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The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the Ake in Barefoot’s Achilles Heel

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THE SUPREME COURT, THE MENTALLY DISABLED CRIMINAL DEFENDANT, PSYCHIATRIC TESTIMONY IN DEATH PENALTY CASES, AND THE POWER OF SYMBOLISM: DULLING THE AKE IN BAREFOOT'S ACHILLES HEEL*

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INTRODUCTION

For centuries, the symbol of the insanity defense1 and the symbol of capital punishment2 have been linked—symbolically3

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1. Any discussion of the insanity defense—casual, epigrammatic or scholarly—must begin with the acknowledgment that the defense operates in at least three parallel force fields: in the field of criminal law (i.e., resolution of the issues of responsibility and blameworthiness, see generally Goldstein, The Insanity Defense 12-13 (1967); Model Penal Code § 1.02(1) (Tent. Draft No. 2, 1954); Perlin, Overview of Rights in the Criminal Process, in 3 Legal Rights of Mentally Disabled Persons 1879, 1891-92 (Prac. L. Inst. ed. 1979); Holloway v. United States, 148 F.2d 665, 666 (D.C. Cir. 1945) cert. denied, 334 U.S. 852 (1948) ("Our collective conscience does not allow punishment where it cannot impose blame"); Note, Due Process Concerns With Delayed Psychiatric Evaluations and the Insanity Defense: Time is of the Essence, 64 B.U.L. Rev. 861, 865-66 (1985)), in the field of criminal procedure (i.e., resolution of the issues of quantum of and allocation of burden of proof, see generally id. at 866-69, and cases cited in nn. 31-37), and in the field of symbolism. "Symbol" is defined here in its Jungian sense: "the best possible expression for a complex fact not yet clearly apprehended by consciousness." C. Jung, On Psychic Energy, in 8 Collected Works of C.G. Jung, The Structure and Dynamics of the Psyche 75 (Hull trans. 2d ed. 1972) [hereinafter cited as Collected Works]. Jung's discussions of symbolism are particularly apt for insanity defense analyses; see, e.g., Synchronicity: an Acausal Connecting Principle, Collected Works at 417, 485-95 (historical, multicultural examples of symbolism); 5 Collected Works: Symbols of Transformation, Part 2 at 231 (psychological truth of symbols); The Symbolic Life, in 18 Collected Works: The Symbolic Life 273-74 (man's need for a "symbolic life"). On the specific importance of symbolism in insanity defense jurisprudence, see, e.g., Bazelon, The Dilemma of Criminal Responsibility, 72 N.Y. L.J. 263 (1982-83) [hereinafter cited as Responsibility Dilemma].

2. There can be no question as to the symbolic significance of capital punishment as a political, sociological or penological issue, either historically or contemporaneously. See, e.g., infra notes 28-31, 336, 339.

3. The redundancy is purposeful. For a lengthy empirical study, concluding that support of the death penalty is a symbolic attitude reflecting a "symbolic perspective" of citizens' basic values, see Tyler & Webb, Support for the Death Penalty: Instrumental
and empirically—in a dance of death. It was taken as common wisdom that the insanity defense developed as a procedural

Response to Crime, or Symbolic Attitude? 17 Law & Soc'y Rev. 21, 26, 40, 43 (1982). A recent study has concluded that "jurors who are permitted to try capital cases are more likely to convict insane defendants than jurors representing the whole spectrum of capital punishment attitudes would be." Ellsworth, Bukaty, Cowan & Thompson, The Death Qualified Jury and the Defense of Insanity, 8 Law & Hum. Behav. 81, 92 (1984). Surveying the literature, Ellsworth and her colleagues found that a "crime control ideology has underlain objections to the insanity defense at least since M'Naghten's case," id. at 83, and that "pro-death jurors have been much more likely than anti-death jurors to regard the insanity defense as a ruse and as an impediment to the conviction of criminals." Id. at 90.

Judge Bazelon has eloquently characterized the insanity defense as "a convenient symbolic target in [the] war of words [over the crisis in crime]." Responsibility Dilemma, supra note 1, at 277.

4. See, e.g., Note, Insanity of the Condemned, 88 Yale L.J. 533 (1979) [hereinafter cited as Note, Insanity].

One of the earliest pleas in the legal literature for abolition of the death penalty in this country focused on the improper execution of the insane:

Another fatal objection to capital punishment is this: . . . There have been . . . several instances in which the alleged criminal, whose life has been taken in this manner, has afterwards been proven insane, and therefore not responsible for his acts. The latest case of the latter kind to which my attention has been called is that of John Henry Barker, a half-breed negro, who, on Tuesday, July 6, at Sing Sing Prison, N.Y., was executed by electricity for the alleged crime of murdering his wife at White Plains, on August 30, 1895. I learned from the New York World of Wednesday, the seventh of the same month, that immediately after the execution of this man, an autopsy by the attending physicians, Drs. Goodwin and Sheehan, revealed the fact that the victim of this judicial murder was the possessor of a diseased brain; and although not a violent lunatic, he was nevertheless not in his right mind, and therefore not responsible for his conduct. Thus it appears that the great State of New York has deliberately taken the life of a poor negro, who, in the opinion of competent physicians, ought to have been made a subject of medical care and treatment, rather than an object of the vengeance of the law. The conclusion necessarily following from these disgraceful facts is that, in the punishment of crime, no political community has the right to take from the convict that which it cannot restore to him after his innocence of the crime of which he shall have been convicted may have been clearly established, or after he may have been shown to have been an irresponsible person. So that whatever may be said either in favor or in defense of capital punishment, I consider this objection to it to be a decisive one, which ought to justify and to require its immediate abolition wherever it is now practiced.

shield primarily, if not solely, to thwart the use of the death penalty. While this was not the sole rationale for pleading the defense, the connection appeared inextricable: if capital punishment were to be abolished, as seemed likely less than fifteen years ago, the use of the defense would fade into obscurity.

Recent developments, of course, have put this prediction to rest. The death penalty has been revived, executions have renewed apace, the Supreme Court appears "willing to let the states get on with the business of executions," the trial of John Hinckley rekindled the never-truly-moribund debate on the fu-
ture of the insanity defense, and—in response to the Hinckley verdict—state legislatures and Congress rushed to restrictively amend insanity defense laws to abate the perceived public "outrage" at the "abuses" of the defense.

One additional dimension is added when it is further noted that these twin vectoral forces—resuscitation of the death penalty and attempted evisceration of the insanity defense—have been plotted out in recent years in the context of a criminal justice system where the vast majority of all criminal defendants are indigent, and thus dependent on some sort of public defender system for the provision of counsel. Each year, fewer criminal defendants are represented by for-fee private counsel; conversely, more are represented by fixed-salary, full-time, publicly-funded counsel.

17. A vector is a quantity with both magnitude and direction, See Wilson, Gibbs' Vector Analysis 1 (11th ed. 1952).
18. See generally Nat'l Legal Aid & Defender Ass'n, The Other Face of Justice (1973).
19. See id. at 70-76.
21. General wisdom to the contrary, the insanity defense appears to be raised more on behalf of indigent defendants than in the context of a Hinckley type case. See, e.g., Nissman et al., Beating the Insanity Defense: Denying the License to Kill 2 (1980).
Each of these developments has raised multiple and complex questions for the criminal justice system, especially in cases of indigent mentally disordered offenders22 charged with serious crimes for which the death penalty might be sought. What is the appropriate role of psychiatric testimony in an “ordinary” criminal case? In a death case? What limits—if any—should there be on expert testimony in a death case? What qualified counsel must be provided in order to meet constitutional minima? Should insanity defense standards and burdens be different in a death case than in an “ordinary” case? If an indigent criminal defendant pleads “not guilty by reason of insanity,” does she/he have a right to a psychiatric witness at state expense? Are there other circumstances under which indigent criminal defendants have such a right?

In a series of seemingly-unrelated recent cases—Barefoot v. Estelle,23 Ake v. Oklahoma24 and Strickland v. Washington,25 the Supreme Court has offered some tentative answers to these questions. At first, the Court’s holdings appear inconsistent, almost to the point of irreconcilability. However, closer examination may reveal some overarching principles to provide the glue of doctrinal cohesion. This article will look at these cases in this context in an effort to identify the doctrine and articulate its constitutional and practical underpinnings.

I. THE SCOPE (AND LIMITS) OF EXPERT TESTIMONY AND THE ROLE (AND PERCEIVED ROLE) OF THE EXPERT WITNESS

It is common wisdom that the insanity defense developed as it did as a recognition that the state could not put to death a person not responsible for his acts.26 Even as eminent an author-

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22. This category includes those perceived as mentally disabled as well as those self-perceived.
26. See, for a full analysis, Note, Insanity, supra note 4, at 535-37, and sources cited at nn. 11-22, including, inter alia, 4 Blackstone, Commentaries 395-96; Coke, Third Institute 4 (London 1644); 1 Hale, The History of the Pleas of the Crown 2 (London 1716). See generally Solesbee v. Balkcom, 339 U.S. 9, 17-19 (1950) (Frankfurter, J., dissenting), and Hazard & Louisell, Death, the State and the Insane: Stay of Execution, 9
ity as Dr. Karl Menninger has argued consistently that the insanity defense has survived solely as a vestigial organ to the body of capital punishment: "Were capital punishment to be removed, with it would go automatically the absurd insanity defense and the perennial nonsense about sufficient responsibility, sufficient mentality and sufficient mental health to properly profit from the vastly expensive hanging or electrocution ritual." 27 The leading text on the insanity defense suggests that "insanity has become something to be asserted only when a death sentence or very long imprisonment is in the offing." 28 Logically then, when it appeared that capital punishment was nearing abolition, 29 it similarly appeared that "[m]uch of the urgency has gone out of the whole issue of the insanity defense since the scope of capital punishment has been greatly curtailed." 30

This overview, however, appears somewhat wide of the mark in at least three critical areas. First, historically, the insanity defense has not proven to be an impenetrable bulwark to prevent execution of the insane. 31 Second, while the insanity defense


27. Mathevs, Mental Disability and the Criminal Law 23 n.4 (1970) (private communication from Dr. Menninger (Dec. 9, 1969)); see generally Menninger, The Crime of Punishment (1969). Of course, this observation could not possibly predict the sequence of events to unfold in the United States Supreme Court over the past decade and a half. As Dean Meltsner has recently noted somewhat wryly: "In my lifetime I have seen the Constitution rewritten. In one of my specialties, the death penalty, I have seen the law go from unquestioning acceptance to virtual abolition to virtual unquestioning acceptance. And I am still a boy." Meltsner, Wither Legal Education, 30 N.Y.L.Sch. L. Rev. 579 (1985).


For a comprehensive history of the law applying to the execution of the insane, see Ford v. Wainwright, 752 F.2d 526, 530-32 (11th Cir. 1985) (Clark, C.J., dissenting).
may have first developed as a tactical plea to prevent executions, its use in non-capital cases was well documented as early as the nineteenth century; today its use clearly permeates all levels of the criminal law from capital cases to misdemeanors. Third, capital punishment simply has not disappeared. If anything, as a social institution it is probably a stronger force in American society than it has been in thirty years. In short, the insanity plea has never been a death-case-only plea, and as reports of the death penalty's demise appear greatly exaggerated, it is likely that that reason, at least, can no longer be used as a predictor of the demise of the insanity defense.

Given these developments, it appears reasonable that questions of the reliability of mental health expert testimony and the permissible scope of such testimony should again occupy center-stage at the criminal justice/mental health cutting edge, especially in the Supreme Court's universe of post-Gregg death penalty jurisprudence, where a defendant's potential future dangerousness has been specifically validated as a consideration in imposing the death penalty. If this prediction is "essential" to a life-or-death decision, it can be expected that questions as

32. See, e.g., Smith, Trial By Medicine 26 (1981), and cases and sources cited at 185 n.68; The Case of William Spiers: Arson: Plea of Insanity, 15 J. Insanity 200 (1858). The Spiers case is also discussed in Fire at the New York State Lunatic Asylum, 14 J. Insanity 116 (1857), and Rebuilding of The Asylum at Utica, 15 J. Insanity 402 (1858).


34. See generally Bedau, supra note 29, at 3-95.

35. Other countervailing social and legal factors, however, may limit the use of the plea. See, e.g., Singer, The Aftermath of An Insanity Acquittal: The Supreme Court's Recent Decision in Jones v. United States, ANNALS supra note 16, at 114 (Jones v. United States, 463 U.S. 354 (1983), will likely result in a significant drop in the number of insanity pleas); Hinckley's Trial, supra note 15 at 861 (impact of Hinckley acquittal on subsequent federal legislation geared to curtail the use of the defense); Slovenko, The Insanity Defense in the Wake of the Hinckley Trial, 14 Rutgers L.J. 373, 395 (1983) ("following the uproar over the Hinckley verdict, jurors will be less likely to return NGRI [not guilty by reason of insanity] verdicts and psychiatrists will be less willing to take part in the judicial process").


39. Id. at 275.
to possible limitations on the legitimacy of expertise in this area would be carefully scrutinized.

In considering responses to these questions, it is clear that the literature on the limits of the reliability of psychiatric predictive testimony is voluminous and relatively unchallenged. The American Psychiatric Association has stated flatly that the "unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." Surveys of empirical data are consistent: "the ability of psychiatrists to reliably predict future violence is unproved," "the professional literature demonstrate[s] no reliable criteria for psychiatric predictions of long-term future criminal behavior"; the best clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several year period.

40. For a sampling of the extensive literature see Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693 (1974); Stone, Mental Health and Law: A System in Transition 27-36 (1975); Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa. L. Rev. 439 (1974); Monahan, Predicting Violent Behavior (1981); Cocozza & Steadman, The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence, 29 Rutgers L. Rev. 1084 (1976). Interestingly, a recent critical article which analyzes research methodologies employed in these and other "classic" studies of the area, and determines that the "current depictions of the research on dangerousness predictions exaggerate their inaccuracy," concludes: "[R]ead in their best light, the data suggest that [no] method of prediction provides information that will permit an accurate designation of a 'high risk' group whose members have more than a forty or fifty percent chance of committing serious assaultive behavior." Slobogin, Dangerousness and Expertise, 133 U. Pa. L. Rev. 97, 126 (1984).


44. APA Barefoot Brief, supra note 42, at 13 (citing Stone, supra note 40, at 29).

45. Monahan, supra note 40, at 49; see also, e.g., Pfohl, Predicting Dangerousness: A Social Deconstruction of Psychiatric Reality, in Mental Health and Criminal Justice 201, 220 (Teplin ed. 1984):
Given this inability to accurately predict dangerousness, it is, as Professor Slobogin notes,46 “ironic” that the Supreme Court now appears to enthusiastically endorse continued reliance on this sort of testimony in death penalty litigation47 and elsewhere,48 in spite of the growing awareness that mental health

An analysis of the methodological procedures of this clinical science suggests that its claim to predictive expertise is empirically unwarranted. Past research on predictive outcomes suggests that at its best, it falsely overestimates violence in approximately two out of three cases. My own research on how clinical readings of future violence are conducted suggests reasons for this inaccuracy. Diagnostic judgments are seen as contingent on a complex process of social interaction whereby clinicians construct theories about the future lives of patients based on present readings of past records. These clinical readings are subsequently expanded, modified, and justified as clinicians selectively guide the structure of psychiatric interviews and negotiate with each other over such matters as deferential status and the practical and political consequences of making a particular diagnosis. In the long run, however, all that clinicians do concretely is cloaked in the objective-sounding language of their final diagnostic report. In this text a multiplicity of social factors are reduced to an argot of individualized pathology. This is the most important political consequence of the diagnostic process. Past, present, and future behaviors are wrenched from their social context and made over into simple, believable stories of personalized disease and biographical maladjustment.

cf. Jeffrey, Criminal Law and the Medical Model, in ATTACKS ON THE INSANITY DEFENSE 176, 200 (Jeffrey ed. 1985), suggesting that methodology of predicting dangerousness be abandoned, and “more scientific procedures, including biological and neurological [procedures]” be substituted, recommending use, inter alia, of “the CAT scan, PETT scan, NMR scan . . . [and] hair analysis.”

46. Slobogin, supra note 40, at 98.
47. See, e.g., Jurek v. Texas, 428 U.S. 262 (1976); Estelle v. Smith, 451 U.S. 454, 473 (1981) (in the course of opinion holding that defendant’s privilege against compelled self-incrimination was violated where psychiatrist who had examined defendant on competence issue testified at death penalty hearing without having warned defendant that statements could be so used against him, the Supreme Court noted it was “in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness”); California v. Ramos, 463 U.S. 992, 1001 n.16 (1983).

Each review proceeding, periodic or otherwise, should be a comprehensive evaluation of all evidence pertaining to the committee’s mental illness and potential dangerousness by reason thereof. Although the purpose of each review hearing is the assessment of the committee’s current condition and the consequent need for restrictions upon his liberty as a matter of community or individual protection, all prior evidence, both factual and expert, pertaining to those issues remains relevant . . . . The reviewing judge must evaluate the current evidence submitted to him in light of all evidence adduced in earlier proceedings. The committee does not enter each review proceeding with a clean slate,
professionals lack expert capacity in this area. This tension has led inevitably to considerable debate over the scope of admissibility of such expert testimony. Should the status quo be continued? Should the scope of the expert's testimony be limited to statements of mental condition? Should an expert only be per-

although certainly the passage of time might diminish the relevancy of certain expert diagnostic evidence to the point where it may be insignificant. The accuracy of the reviewing judge's evaluation of the committee's probable dangerousness will be greatly enhanced by ensuring that he has the maximum amount of relevant information concerning the committee at his disposal.


50. As the Supreme Court noted:

If the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, . . . it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify.


51. Congress has recently amended the Federal Rules of Evidence to limit expert testimony in insanity cases. Under the new rule, "no expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." Fed. R. Evid. 704(b)(1984). The legislative history of this amendment is crystal-clear: "The purpose of this amendment is to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact." Continuing Appropriations, 1985-Comprehensive Crime Control Act of 1984, P.L. No. 98-473, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 3412-13. The committee report quoted from the American Psychiatric Association's Statement on the Insanity Defense:

When . . . "ultimate issue" questions are formulated by the law and put to the expert witness who must then say "yea" or "nay," then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact inseparable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will.

Id. at 3413.

This limitation is in accord with recent recommendations suggesting that such testimony "cannot be considered dispositive." Defense Under Siege, supra note 16, at 425; see also, e.g. Hammond, Predictions of Dangerousness in Texas: Psychotherapists' Con-
mitted to testify if he explains fully—via a "publicly demonstra-
ble test"—how he arrived at his diagnosis and conclusion, or if
he states his diagnosis "as an organic whole arrived at upon . . .
the application of . . . contemporary scientific investigatory de-
vices"? Does requiring the expert to state an opinion on the
ultimate issue of responsibility "place" him in the role of moral
decision maker?

This issue came to a head in the Supreme Court two terms
ago in Barefoot v. Estelle. While the decision's "trickle-down"
impact on this point has not yet been particularly profound,
its jurisprudential approach to the issues in question is important,
as a reflection of its overwhelming ambivalence towards psychi-
atric expert testimony, as an example of its irritation at the use
of multiple habeas corpus petitions as a tool to thwart the impos-
sition of the death penalty, and as an example—ultimately—of

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2. Ship of Fools, supra note 51, at 460 (citing SZASZ, LAW, LIBERTY AND PSYCHIATRY 130 (1963), and GLUECK, LAW AND PSYCHIATRY 42-43 (1962)).
5. In the nearly two years since Barefoot's decision, it has been cited by lower courts on questions of validity of psychiatric predictions less than a handful of times, see, e.g., United States v. Toriero, 735 F.2d 725, 734 (2d Cir. 1984); State v. Flath, 281 S.C. 1, 313 S.E.2d 619, (S.C. Sup. Ct. 1984), and on the court's use (or non use) of social science empirical studies as to legislative facts only once, Dunagin v. City of Oxford, Miss., 718 F.2d 738, 748 n.8 (5th Cir. 1983); see also State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984), discussed infra text accompanying note 189.
6. On the Supreme Court's view of this point, see Jones v. United States, 463 U.S. 354, 365 n.13 (1983): "We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community." For an analysis of how the current court "improperly manipulates constitutional fact through the use of a variety of devices, including a selective negativism and disregard of facts, alternated with the suspension of disbelief," see Shaman, Constitutional Fact: The Perception of Reality by the Supreme Court, 35 U. Fla. L. Rev. 236, 252 (1983); see also Sales & Hafemeister, Empiricism and Legal Policy on the Insanity Defense, Mental Health and Criminal Justice 253 (Teplin ed. 1984) ("Clearly, the misuse and nonuse of relevant social scientific information by legislators is a critical issue that begs for systematic study"); Saks & Baron, The Use, Nonuse, Misuse of Applied Social Research in the Courts (1980).
7. See infra text accompanying notes 463-506.
8. "With each Supreme Court decision denying a challenge to a particular state's
its attitude towards the possibility of potential error in capital sentencing.\(^{58}\)

Thomas Barefoot was convicted in 1978 of murdering a Texas police officer.\(^{59}\) Under the penalty phase procedures employed by Texas,\(^{60}\) the sentencing jury was asked two specific questions:

(1) was the conduct which caused death “committed deliberately and with the reasonable expectation that death . . . would result,”\(^{61}\) and (2) was there a “probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”\(^{62}\)


58. Barefoot v. Estelle, 463 U.S. 880 (1983) has been sharply criticized for demonstrating “a new willingness to tolerate significant potential error in capital sentencing,” The Supreme Court: 1982 Term, HARV. L. REV. 70, 121 (1983), for relying on an “almost mechanistic invocation of an idealized adversary process,” id. at n.28, and for “disregard[ing] . . . the entire framework of evidentiary law,” id. at 121. Along with two other death penalty cases decided in the same term—Zant v. Stephens, 462 U.S. 862 (1983), and Barclay v. Florida, 463 U.S. 939 (1983)—Barefoot was characterized as “acquiesc[ing] in a sentencing procedure that reflects neither the highest standards of reliability in decision-making nor the exercise of discretion according to clear and consistent criteria.” Id. at 127.


60. TEX. CODE CRIM. PROC. ANN. § 37.071 (Vernon 1981).


At the penalty phase, the state called two psychiatrists—Dr. Holbrook and the now infamous Dr. Grigsone—who, in response to hypothetical questions, testified that defendant “would probably commit further acts of violence and represent a continuing threat to society.”

The jury subsequently answered both special questions in the affirmative, “a result which required the imposition of the death penalty.”

On his state court appeal, defendant argued (1) that the use of psychiatrists at the death penalty hearing to make predictions about his likely future conduct was unconstitutional because psychiatrists—individually and as a class—were not competent to predict future dangerousness, and (2) that permitting answers to hypotheticals by psychiatrists who did not personally examine a defendant was constitutional error. Both arguments were rejected, and the conviction was affirmed.

Defendant subsequently filed a federal habeas corpus petition, raising, inter

63. Dr. Grigson has testified regarding defendant’s dangerousness in more than 70 capital sentencing hearings, all but one of which has resulted in imposition of the death sentence. Ewing, ‘Dr. Death’ and the Case for an Ethical Ban on Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 AM. J. L. & MED. 407, 410 (1983) [hereinafter cited as Ewing, ‘Dr. Death’]; see generally, ROBTSCHER, THE POWER OF PSYCHIATRY 198-207 (1980). Dr. Grigson is profiled in They Call Him Dr. Death, Time, June 1, 1981, at 64; Taylor, Dallas Doctor of Doom, Nat’l L. J., Nov. 24, 1980, at 1, and Bloom, Killers and Shrinks, Texas Monthly, July, 1978, at 64.


For a detailed analysis of a pre-Barefoot Texas death penalty trial concluding that the state’s trial courts have used expert mental health testimony in a “woefully inadequate manner” at the penalty phase, see Dix, Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness, 57 TEX. L. REV. 1343, 1399 (1977) (characterizing the state criminal appeals court’s “failure . . . to scrutinize [such testimony] more diligently” as “discouraging,” id. at 1316).

64. Barefoot, 463 U.S. at 884.
65. See TEX. CODE CRIM. PROC. ANN. § 37.071(c) (Vernon 1981).
67. Id. at 885.
69. This petition followed an earlier grant of a stay of execution by the Supreme Court, pending filing and disposition of defendant’s petition for certiorari from the state court’s final decision. The petition was filed and then denied. See Barefoot v. Texas, 453 U.S. 913 (1981).
alia, the same claims as had been rejected by the state courts. Following an evidentiary hearing, defendant's writ was denied. After a lengthy and complex series of procedural maneuvers, apparently designed to assure a stay of defendant's death sentence while the constitutional question was being considered, the fifth circuit similarly rejected defendant's arguments. The Supreme Court again stayed the execution and granted certiorari on both the psychiatric issue and the question of the "appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced habeas corpus petitioner."

The Supreme Court affirmed, holding initially that a habeas corpus petitioner must make a "substantial showing of the denial of a federal right," and that, while a circuit court, "where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution" pending appellate disposition, "when a condemned prisoner obtains a certificate of probable cause on his initial appeal," a court of appeals "may adopt expedited procedures in resolving the merits of habeas appeals."

The Court then proceeded to defendant's "merits submission," and characterized his tripartite claim in this way:

71. Id. at 886.
72. Id. at 887.
73. See Barefoot v. Estelle, 697 F.2d 593, 596-98 (5th Cir. 1983).
76. Id. at 893-94 (quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971), cert. denied, 406 U.S. 925 (1972)).
77. Id. at 894.
78. Id. (emphasis added). The Court also held that a "successor" petition "may be dismissed if the judge finds that it fails to allege new or different grounds for relief . . . [or if] the failure of the petitioner to assert these grounds in a prior petition constituted abuse of the writ," id. at 895 (quoting Rule 9(b) of the Rules Governing § 2254 Cases, and that stays of execution "are not automatic pending the filing and consideration of a petition for a writ of certiorari"), for a stay to be granted there "must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal that irreparable harm would result if the decision is not stayed," id. (quoting White v. Florida, 463 U.S. 1229 (Powell, J., chambers opinion), cert. denied, 459 U.S. 1055 (1982)).
First, it is urged that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community. Second, it is said that in any event, psychiatrists should not be permitted to testify about future dangerousness in response to hypothetical questions and without having examined the defendant personally. Third, it is argued that in the particular circumstances in this case the testimony of the psychiatrists was so unreliable that the sentence should be set aside.  

The Court, per Justice White, rejected defendant's first point by paraphrasing his suggestion as "somewhat like asking us to disinvent the wheel." It characterized the argument as "contrary to our cases," relying on Jurek v. Texas to support the proposition that medical testimony on dangerousness should be admissible. The Court asserted "it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify." Beyond this, defendant's argument would "immediately call into question those other contexts in which predictions of future behavior are constantly made."  

Further, the Court noted that the rules of evidence generally allow relevant testimony to be admitted into evidence with the appropriate weight to be allocated by the fact-finder "who would have the benefit of cross-examination and contrary evidence by the opposing party." Psychiatric testimony on predictions of dangerousness may be countered as erroneous in a particular case, or may be characterized as generally unreliable, but the jury should hear the views of doctors on both sides of these
issues.88

The Court also rejected the views presented in the amicus brief filed by the American Psychiatric Association: (1) such testimony was invalid because of its "fundamentally low reliability"89 (thus undermining the integrity of the fact-finding process), and (2) long-term prediction of future dangerousness is an "essentially lay determination that should be based not on diagnosis and opinions of medical experts, but on the basis of predictive statistical or actuarial information that is fundamentally nonmedical in nature."90

First, the Court relied on its recent decision in Estelle v. Smith91 in which it stated that, while a defendant had fifth and sixth amendment rights to meaningfully exercise the privilege against self-incrimination and to the assistance of counsel prior to submitting to a psychiatric interview which the state could use as the basis of testimony at the penalty phase of a capital case,92 this decision in "no sense disapprove[d] the use of psychiatric testimony bearing on future dangerousness."93 In addi-

88. Id. at 898-99 (emphasis added). The Court noted that there was no evidence offered by the defendant to contradict the state doctors' testimony, id. n.5, but also pointed out that, despite defendant's indigence, there was no contention that the court refused to provide an expert for the defendant (as then mandated by Texas state law). Id., citing Tex. Code Crim. Proc. Ann., Art. 26.05(d) (Vernon Supp. 1982). Cf. Ake v. Oklahoma, 105 S. Ct. 1087 (1985), discussed infra text accompanying notes 182-290.

89. APA Barefoot brief, supra note 42, at 14.

90. Id. See Barefoot v. Estelle, 463 U.S. 880, 899 (1983). In an interesting footnote, id. at n.6, the Court denied the persuasiveness of several cases cited by the dissent—including, inter alia, United States v. Kilgus, 517 F. 2d 508, 510 (9th Cir. 1978), United States v. Brown, 557 F. 2d 541, 558-59 (6th Cir. 1977), and United States v. Hearst, 412 F. Supp. 893, 895 (N.D. Cal. 1976), aff'd on other grounds, 563 F.2d 1331 (9th Cir. 1977), Barefoot v. Estelle, 463 U.S. 880, 931 n.9 (Blackmun, J. dissenting)—as rejecting certain other sorts of "scientific proof" (e.g., hair identification; psycholinguistics) as admissible because those cases were decisions based on federal evidence law and not on the constitution. Id. at 899 n.6 (emphasis added).


92. Id. at 468-73.


Two other similarities between Smith and Barefoot are noteworthy: The American
tion, the Court reasoned, there are psychiatrists willing to testify as to such future dangerousness;94 "if they are so obviously wrong and should be discredited, there should be no insuperable problem in doing so by calling members of the [American Psychiatric] Association who are of that view and who confidently assert their opinion in the amicus brief."95

On this point, the Court stressed that it was "unconvinced . . . at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinions about future dangerousness, particularly when [defendant] has the opportunity to present his own side of the case."96 It rejected what it characterized as the premise of Justice Blackmun's dissent—"that a jury will not be able to separate the wheat from the chaff"—stating that "we do not share in this low evaluation of the adversary process."97

On the second question concerning the propriety of the use of hypotheticals in such circumstances, the Court simply held that "expert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the fact finder do its assigned job."98 The Court further endorsed the position taken by the

Psychiatric Association filed an amicus brief in Smith arguing that "the use of psychiatric testimony in a capital case on the issue of whether a defendant is likely to commit serious crimes in the future is constitutionally invalid because it undermines the reliability of the factfinding process," Estelle v. Smith, No. 79-1127, Brief of Amicus APA, at 11 (1981); and, the sole expert witness at the sentencing hearing in Smith was Dr. Grigson. Dix, Expert Prediction, supra note 49, at 2 n.5.

94. Barefoot, 463 U.S. at 899 (emphasis added).
95. Id. at 900-01.
97. Barefoot, 463 U.S. at 899 n.7. In the same footnote the majority cites Dr. Monahan's studies that experts are inaccurate in predictions of future violence two out of three times, Monahan, The Clinical Prediction of Violent Behavior 47-49 (1981), but notes that Dr. Monahan also felt that "there may be circumstances in which prediction is both empirically possible and ethically appropriate." Id. at v.
98. 463 U.S. at 903. In support of this proposition the Court cited four nineteenth century cases: Spring Co. v. Edgar, 99 U.S. 645 (1879); Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73 (1872); Forsythe v. Doolittle, 120 U.S. 73 (1877); and Braun v. United States, 168 U.S. 532 (1897).

The Court noted that the commentary to the Federal Rules of Evidence "touch[es] on the particular objections to hypothetical questions," but lends no support to defendant's argument. 463 U.S. at 904. The Advisory Committee Note to Fed. R. Evid. 705 (not mentioned in the decision) states that "the hypothetical question has been the target of a great deal of criticism as encouraging partisan bias," Fed. R. Evid. 705.3 advisory com-
Texas Court of Criminal Appeals in *Barefoot*: "that the experts had not examined [defendant] went to the weight of their testimony, not to its admissibility."

Finally, on the application of those rules to the instant case, defendant had argued that the psychiatrists should not have been permitted to give opinion evidence on the ultimate issue before the jury where the hypothetical was phrased in terms of defendant's conduct, in a context where the hypothetical facts and the psychiatrists' answers were so positive as to be assertions of facts, not opinions. The Court rejected all these arguments, noting that the defendant could have propounded his own hypothetical based on his version of the facts, and that, the more certain an expert is about prediction, the easier it should be to impeach him.

In a sharply-worded dissent, Justice Blackmun (speaking

mittee note, an observation probably a bit more pointed than a mere "touch[ing] on."


While the hypothetical question first came to prominence in *M'Naghten*, its use predates that case by nearly a century. See, e.g., Earl Fenners' Trial, 19 How. St. Trials 943 (1760); Lord Melville's Trial, 29 How. St. Trials 1065 (1806); its first recorded use in an American jurisdiction was apparently in *State v. Powell*, 7 N.J.L. 249 (1824); see generally, *Wigmore on Evidence* 792-95 (3d. ed. 1940). The matter is discussed fully in *Quen, The Hypothetical and the Ultimate Questions: Their Historical Relationship, Part II, 10 Newsletter Am. Acad. Psych. & L.* 17 (1985).

At least one eminent psychiatrist has noted that, when evaluated according to contemporary criteria for antisocial personality disorder ("sociopathy"), by its own terms, the hypothetical employed in *Barefoot* "failed to provide a determination of whether any of the three requirements for the diagnosis had been met." Applebaum, *Death, the Expert Witness, and the Dangers of Going Barefoot*, 34 Hosp. & Commun. Psych. 1003, 1004 (1983). See also, Green, *Capital Punishment, Psychiatric Experts, and Predictions of Dangerousness*, 13 Capital L. Rev. 535, 550-51 (1983-84) (Hypothetical failed to comply with criterion of Diagnostic and Statistical Manual III; *Barefoot*’s endorsement of such hypothetical "will undoubtedly prejudice the defendant").

100. *Barefoot*, 463 U.S. at 904-05.

101. *Id.* at 905 n.10.

102. *Id.* n.11.

The more certain a state expert is about his prediction, the easier it is for the defendant to impeach him. For example, in response to Dr. Grigson's assertion that he was "100% sure" that an individual with the characteristics of the one in the hypothetical would commit acts of violence in the future, Dr. Fason testified at the habeas hearing that if a doctor claimed to be 100% sure of something without examining the patient, "we would kick him off the staff of the hospital for his arrogance."

H. Tr. 48. Similar testimony could have been presented at *Barefoot*’s trial, but was not. *Id.*
DULLING THE AKE

for himself and for Justices Marshall and Brennan) rejected the
majority's views on the psychiatric issue:

The Court holds that psychiatric testimony about a de-
fendant's future dangerousness is admissible, despite the
fact that such testimony is wrong two times out of three.
The Court reaches this result—even in a capital
case—because, it is said, the testimony is subject to
cross-examination and impeachment. In the present state
of psychiatric knowledge, this is too much for me. One
may accept this in a routine lawsuit for money damages,
but when a person's life is at stake—no matter how hei-
nous his offense—a requirement of greater reliability
should prevail. In a capital case, the specious testimony
of a psychiatrist, colored in the eyes of an impressionable
jury by the inevitable untouchability of a medical spe-
cialist's words, equates with death itself.

After reviewing the psychiatric testimony, Justice Black-
mun cited extensively from the APA amicus brief in support of
several propositions: (1) "Neither the Court nor the State of
Texas has cited a single reputable scientific source contradicting
the unanimous conclusion of professionals in this field that psy-
chiatric predictions of long-term future violence are wrong more
often than they are right", (2) "psychiatrists simply have no
expertise in predicting long-term future dangerousness," a
"layman with access to relevant statistics can do at least as well
and possibly better", (3) "the scientific literature makes crys-

103. Id. at 916 (Blackmun, J., dissenting). Justice Stevens concurred with the judg-
ment of the court, id. at 906; Justices Marshall and Brennan dissented on the issue of
the appropriate procedures to follow in capital cases. Id. at 906 (Marshall, J., and Bren-
nan, J., dissenting).
104. Id. at 916.
105. Id. at 917-19. Both Drs. Holbrook and Grigson testified to a "reasonable psychi-
atric certainty" that the defendant was a "criminal sociopath" (Holbrook), suffering
from a "classical, typical, sociopathic personality disorder" (Grigson). Grigson testified
that, on sociopathy scale of one to ten, defendant was "above ten," and that there was a
"one hundred percent and absolute" chance defendant would commit future acts of
criminal violence that would constitute a continuing threat to society." Id. (quoting trial
transcript).
107. Id. at 918 (see also sources cited at n.3).
108. Id. (see also sources cited at n.4).
tal-clear that [Drs. Holbrook and Grigson] had no expertise whatever,” and (4) “it is impossible to square admission of this purportedly scientific but actually baseless testimony with the Constitution’s paramount concern for reliability in capital sentencing.”

Given this backdrop, Justice Blackmun concluded that such “unreliable scientific evidence is widely acknowledged to be prejudicial,” as “‘an aura of scientific infallibility’ may shroud the evidence and thus lead the jury to accept it without critical scrutiny.” The court’s interest in “encouraging the introduction of a wide scope of evidence” is an interest in “accurate information”—there is no interest “in providing deceptive and inaccurate testimony to the jury.” While the Court trusts the adversary process to “sort out the reliable from the unreliable,” Justice Blackmun openly speculated as to how “juries are to separate valid from invalid expert opinions when the ‘experts’ themselves are so obviously unable to do so.” In his view, opinion evidence should not be admissible “if the court believes that the state of the pertinent art of scientific knowledge does not permit a reasonable opinion to be asserted.” “When the court knows full well that psychiatrists’ predictions of dangerousness are specious, there can be no excuse for imposing on the defendant, on pain of his life, the heavy burden of convincing a

109. Id. (see also sources cited at n.5). “A death sentence cannot rest on the highly dubious predictions secretly based on a factual foundation of hearsay and pure conjecture.” Id. at 919 n.5.

110. Id. at 919 (see also sources cited at n.6).

111. Id.


113. Id. at 920, relying on Zant v. Stephens, 103 S. Ct. 2733, 2748 (1983).


115. Ramos at 1001.

116. Id. at 921, quoting id. at 899.

117. Id.

118. Id., quoting McCormick, Evidence 31 (1972). Cross-examination is not “an antidote for this distortion of the truthfinding process . . . [because it] is unlikely to reveal the fatuousness of psychiatric predictions [which] rest . . . on psychiatric categories and intuitive clinical judgment [that are] not susceptible to cross-examination and rebuttal.” Id. at 932, citing Dix, Expert Prediction supra note 49, at 44.
jury of laymen of the fraud.”

*Barefoot* appears to be indefensible on evidentiary grounds, on constitutional grounds and on common sense grounds. It flies in the face of virtually all of the relevant scientific literature. It is inconsistent with the development of evidence law doctrine, and it makes a mockery of earlier Supreme Court decisions cautioning that *extra* reliability is needed in capital cases. In the words of Dr. Paul Appelbaum, it is an example of “tortuous reasoning in the extreme,” reflecting “factual inconsistency in the service of a transcendent ideological goal.”

First, as Justice Blackmun stressed, the testimony did not meet the stringent criteria demanded by the lead case of *Frye*

119. *Id.* at 924.
121. *Dr. Appelbaum Replies*, 142 AM. J. PSYCH. 387, 388 (1985). Appelbaum had set out his view on the current Court in an earlier article:

> Not only does the Court's agenda transcend psychiatry, but the Court is willing to mold its image of psychiatry in whatever way is useful in fulfilling its goals. Among these goals, clearly, is a desire to limit judicial involvement in institutional affairs, reserving the time and energies of the courts, and their capacity for objective evaluation, for more traditional adjudicatory roles.


In a subsequent response to a letter to the editor, Dr. Appelbaum amplified on these remarks.

As I noted in the paper, and this may be the most difficult message for psychiatrists to hear, the Court's agenda is not identical to psychiatry's agenda. In pursuit of broader aims—especially efforts to restrain the activist tendencies of the lower federal judiciary, but with other factors also playing an important role—the Court will move closer to and further from our positions, as it suits the Court's needs.

An example of this can be seen in a case that postdates my paper, *Barefoot v. Estelle*, in which the Court was asked to restrict the use of psychiatric predictions of dangerousness at death penalty hearings. Focusing solely on the Court's previous expressions of doubt about the accuracy of psychiatric determinations, reviewed in my paper, one might have expected a firm rejection of inherently inaccurate psychiatric prognostications in a setting in which predictive accuracy is literally a life-and-death matter. Viewing the case as another in a long line of liberal challenges to death penalty proceedings, the Court supported the continuing use of psychiatrists to predict future dangerousness, thus sending the message down the line that it would look with disfavor on further efforts to impede application of the death penalty. As noted in the dissent in *Barefoot*, the Court's reasoning was tortuous in the extreme. Yet its behavior becomes explicable when the Court's real agenda is exposed.

*Id.* (emphasis added).

123. Much of the material in this section is adapted from *Defense Under Siege*,
v. United States,\textsuperscript{124} the "seminal case on scientific evidence."\textsuperscript{125} Even where a witness has "peculiar knowledge or experience not common to the world,"\textsuperscript{126} such an expert "cannot indulge in mere speculation or surmise."\textsuperscript{127} In areas where there is far greater reliability than in predictivity of dangerousness,\textsuperscript{128} where there is greater accord as to witness' peculiar skills in forming opinions and far greater acceptance of techniques within the scientific community as to a test's accuracy, such testimony is almost invariably excluded.\textsuperscript{129}

The first—and leading—case to focus the test for admissibility of scientific evidence on the concept of "general acceptance in the particular field in which it belongs" was \textit{Frye}.\textsuperscript{130} In considering the reliability of expert testimony used to interpret the results of the forerunner of the modern polygraph, the \textit{Frye} court stated:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.\textsuperscript{131}

\textit{supra} note 16, at 420-25.

\textsuperscript{124}. 293 F. 1013 (D.C. Cir. 1923).


New Jersey's case law on this point reflects the majority rule of most American jurisdictions. See generally, 7 Wigmore, Evidence (1978), §§ 1917-1929 at 1-43.

\textsuperscript{127}. Rempfer, at 144-45, 72 A.2d at 208.

\textsuperscript{128}. E.g., lie detectors, voice prints, truth sera.


The test of the need for expert testimony is whether the matter is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to the fact in issue . . . . What we look for from the witness is the minimal technical training and knowledge essential to the expression of a meaningful and reliable opinion. . . .

\textit{Id.} (citations omitted).

\textsuperscript{130}. \textit{Frye} v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

\textsuperscript{131}. \textit{Id.} For a survey of earlier "scientific" methodologies used to determine truth and allocate blame in the criminal process in other civilizations, see \textit{Reik, The Unknown
The Frye test has been applied in an ever-increasing range of expert testimony challenges. Although it remains the "majority rule," it has been called into question by other courts suggesting that scientific evidence should be treated "in the same way that other evidence is treated, weighing its probative value against countervailing dangers and considerations." However, even with the use of such a formula, the testimony in Barefoot would still fail to pass muster.


133. Symposium, supra note 132, at 198.

134. Id. at 194.

135. Compare, for these purposes, the seven factors identified by Judge Weinstein and Professor Berger as relevant to a court's consideration in assessing the probative value of scientific evidence with the eleven factors identified by Professor McCormick for the same purpose:

Weinstein and Berger

(1) the technique's general acceptance in the field, (2) the expert's qualifications and stature, (3) the use which has been made of the new technique, (4) the potential rate of error, (5) the existence of specialized literature, (6) the novelty of the new invention, and (7) the extent to which the technique relies on the subjective interpretation of the expert.


McCormick

(1) the potential error rate using the technique, (2) the existence and maintenance of standards governing its use, (3) presence of safeguards in the characteristics of the technique, (4) the analogy to other scientific techniques whose results are admissible, (5) the extent to which the technique has been accepted by scientists in the field involved, (6) the nature and breadth of the inference adduced, (7) the clarity and simplicity with which the technique can be described and its results explained, (8) the extent to which the basic data are verifiable by the court and jury, (9) the availability of other experts to test and evaluate the technique, (10) the probative significance of the evidence in the circumstances of the case, and (11) the care with which the technique was employed in the case.

These issues were recently examined in State v. Cavallo, a New Jersey Supreme Court case involving a challenge to psychiatric expert testimony. The defense offered a psychiatrist to testify as to his familiarity with the characteristics exhibited by rapists, and his expert opinion that such characteristics were completely absent in the defendant. In affirming the trial judge's refusal to allow this testimony, the state supreme court specifically rejected defendant's contention that "considerations of reliability should determine the weight accorded to scientific testimony, not its admissibility." The court stated:

The danger through introduction of unreliable expert evidence is clear. While juries would not always accord excessive weight to unreliable expert testimony, there is substantial danger that they would do so, precisely because this evidence is labeled "scientific" and "expert." Moreover, the court predicted a "'battle of the experts' on the validity of the expert evidence," if the proffered testimony were allowed, stating: "In so subjective a field as psychiatry, the experts are bound to differ." The Cavallo opinion offered an in-depth examination of the "foundation requirements for the admissibility of new scientific techniques" such as the psychiatric expert testimony there at issue. In the course of this examination, the court alluded to the "general acceptance" standard articulated in Frye, and then proceeded to consider methods of proving the general acceptance and, thereby, reliability of scientific evidence. Three such

trial court usually must rely on expert testimony"; and (2) "this approach relies on adversary trial procedures to expose deficiencies." Id. at 194-95.


137. Id. at 512, 443 A.2d at 1021-22.
138. Id. at 518, 443 A.2d at 1025.
139. Id.
140. Id. at 519, 443 A.2d at 1025 (emphasis added) (citation omitted).
141. Id. at 520, 443 A.2d at 1026.
methods were cited as having gained recognition from the courts: (1) expert testimony, (2) scientific and legal writings, and (3) judicial opinions. The court then noted defendant’s failure to satisfy any one of these methods:

Here, defendants have offered no expert testimony as to the general acceptance, by psychiatrists or any other medical community, upon which [the proffered expert] based his analysis. Reference to scientific writings . . . is not shown in the present case. . . . Defendants have . . . failed to persuade us that the proper evidence has been accepted as reliable by other jurisdictions, or for other purposes in the New Jersey legal system.

Based on this, the Cavallo court concluded: “Defendants therefore have not met their burden under Rule 56 of showing that [the proffered expert’s] testimony is based on reasonable scientific premises.”

When viewed against this judicial background, the reliability of psychiatric expertise in predicting long-term future dangerousness that was relied on in Barefoot is immediately suspect.

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142. *Id.* at 521, 443 A.2d at 1026, citing Gianelli, *supra* note 112, at 1215.
143. *Id.* at 521-22, 526, 442 A.2d at 1026-27, 1029 (footnote omitted).
144. N.J. EVID. R. 56(2) closely parallels FED. R. EVID. 702 and 703. See generally, N.J. RULES OF EVIDENCE (Anno. 1985), comments 5-9, at 382-97.
145. 88 N.J. at 526, 443 A.2d at 1029.
146. Several state courts have also rejected the use of psychiatric testimony as a reliable predictor of future behavior. See, e.g., People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 174 Cal. Rptr. 738 (1981) (use of psychopharmacologist’s testimony concerning defendant’s future conduct in prison constitutes error requiring reversal of verdict at penalty trial in a murder case); Matter of Kevin M., 113 Misc. 2d 896, 450 N.Y.S.2d 261 (Fam. Ct. 1982) (in deciding whether a juvenile should be placed in a more restrictive setting, court relied on juvenile’s actions rather than predictions of dangerousness); Matter of Tanise B., 119 Misc. 2d 30, 462 N.Y.S.2d 537 (Fam. Ct. 1983) (in a suit regarding termination of parental rights, mother is entitled to presence of counsel at court-ordered psychiatric examination because of the unreliability and subjectivity of psychiatric testimony); Moss v. State of Texas, 559 S.W.2d 936, 951 (Tex. Ct. Civ. Appeals 1976) (in a civil commitment case, court stated that no expert “is sufficiently qualified by training or experience in the prediction of human behavior that his bare opinion of ‘potential danger’ is sufficient to justify the court in depriving a person of his liberty”).
147. It does not appear that *Frye* has ever been analyzed with regard to the specific question of psychiatric predictivity of dangerousness, although it has been considered in cases involving, e.g., the existence of a specific type of mental disorder, see State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982) (“rape trauma syndrome”), or the requisite mental state necessary to find a specific intent in a murder prosecution, see Hughes v. Mathews, 576 F.2d 1250, 1258 (7th Cir. 1978). *Marks* merely cites *Frye* in a “see also”
Barefoot stands alone, it would seem, in recent case law in its "unquestioned assumption of expert infallibility." Only reference while Hughes indulges in no systematic analysis of the issues in question. Cf. United States v. Alexander, 471 F.2d 923, 955 (D.C. Cir. 1973) (Bazelon, J., concurring in part in a separate opinion) ("it may be that the validity of [certain psychological] tests is so doubtful that they should be excluded from evidence as a matter of law") id. n.85, citing Frye; People v. Spigno, 156 Cal. App. 2d 279, 319 P.2d 458, 463-65 (D. Ct. App. 1957) (construing Frye to reject testimony of psychologist on defendant's "lustful intent"). Cavallo, of course, recognized the distinction between "a prediction about the likelihood of having committed certain criminal acts [and] amenability to cure for sickness." State v. Cavallo 88 N.J. 508, 525, 443 A.2d 1020, 1028 (1978) (emphasis added).

For a recent survey of criticisms of the increased use of scientific evidence, finding a "shockingly high level of error in forensic analysis," see Imwinkelried, The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology, 28 VILL. L. REV. 554, 560 (1982-83). Although Imwinkelried ultimately concludes that the "clear weight of the available hard data calls into question the assumption underlying Frye, namely, that scientific testimony overwhelms the typical lay juror," id. at 570, he notes that the question "implicates fundamental libertarian and democratic values," id. at 571:

In a criminal case, when a defendant's liberty is at stake, how tolerant can we be of evidence prone to error? In a democratic society, to what extent shall we place our faith in lay jurors who have no expertise in the technical field to which the testimony in the case relates?

Dr. Bernard Diamond, a "nationally known specialist" in forensic psychiatry, People v. Burnick, 14 Cal. 3d 306, 328 n.19, 535 P.2d 352, 366 n.19, 121 Cal. Rptr. 488, 502 n.19 (1975), would, on the other hand, apply Frye "to all psychiatric predictions of dangerousness, not just those made during the penalty phase of a capital trial," Note, People v. Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases, 70 CAL. L. REV. 1069, 1087 (1982), counseling that all expert predictions of dangerousness "should at least be viewed with extreme skepticism," id. at 1090.

For a recent exhaustive opinion construing FED. R. EVID. 702, rejecting the Frye test, and relegating "acceptance of a scientific technique within the scientific community" to the role of "one factor" to be considered in a determination of whether or not to admit novel evidence, see United States v. Downing, 735 F.2d 1224, 1237 (3d Cir. 1985).


For a thoughtful analysis of Barefoot expressing concern over the "danger that we are approaching a situation in which we have an official court-determined science, a concept grossly antithetical to the normal processes of science," see Levine, The Adversary Process and Social Science in the Courts: Barefoot v. Estelle, 12 J. PSYCH. & L. 147, 170 (1984).

In cautioning care "in distinguishing the scientific from the interpretive frame of reference when considering the values of expert testimony," id. at 172, Professor Levine focuses on the work of Professors Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 VA. L. REV. 427 (1980) which he sees as perhaps "reflecting the reality that the court's purpose is not entirely that of making a probabilistic determination of past facts, but also includes creating an historical myth, a social consensus of what we say the past was in order to justify actions in the future. The argument when viewed from this perspective is not
two years before, the Supreme Court had noted in *Smith*:

Indeed, some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are "fundamentally of very low reliability" and that psychiatrists possess no special qualifications for making such forecasts.¹⁴⁹

Yet the *Barefoot* court subsequently chose to ignore the vast array of professional literature disclaiming the reliability of subjective psychiatric predictions,¹⁵⁰ via its reliance on an "almost mechanistic invocation of the adversary process" and on a procedure that "reflects neither the highest standards of reliability in decision-making nor the exercise of discretion according to clear and consistent criteria."¹⁵¹

Other problems with *Barefoot* are apparent. At least one pre-*Barefoot* article has argued, presciently and articulately, that, under the Principles of Medical Ethics Applicable to Psychiatry, it is clearly *unethical* for a psychiatrist to testify as to a defendant’s dangerousness on the basis of either a hypothetical or an examination without warning the defendant of the purpose of the exam.¹⁵² Under those principles, "it is unethical for a psychiatrist to offer a professional opinion unless he/she has conducted an examination. . . ."¹⁵³ While the majority in *Barefoot* notes that, notwithstanding the views of the APA, "there are

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¹⁴⁹ On this point, the Court cited: REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE ON CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 23-20, 33 (1974); STONE, supra note 40, at 27-36; and the APA Barefoot Brief, supra note 42, at 11-17.

¹⁵⁰ See WEINSTEIN, supra note 135, at 702-19 (para. 702(03)): “Opinions which are based in large measure on a subjective analysis may have less probative value because it may be difficult to evaluate the skill of the expert in extrapolating a judgment from the scientific data,” relying on United States v. Williams, 538 F.2d 1194, 1199 n.9 (2d Cir. 1978), cert. denied, 439 U.S. 1117 (1979).

¹⁵¹ The Supreme Court, 1982 Term, 97 HARV. L. REV. 70, 121 n.28, 127 (1983).

¹⁵² Ewing, 'Dr. Death' supra note 63, at 415. See also, Podgers, The Psychiatrist's Role in Death Sentence Debated, 66 A.B.A.J. 1509 (1980).

¹⁵³ AMERICAN PSYCHIATRIC ASSOCIATION, THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 7(3)(1981 rev. ed.)
those doctors who are quite willing to testify at the sentencing hearing [on future dangerousness in response to a hypothetical], it fails to note that such behavior is considered unethical when it is done without benefit of an examination.

Finally, the question of the scope of admissibility of evidence where an expert did not personally examine the subject is not as clear-cut as the Supreme Court would have us believe. While the rule of law is usually stated that it is not generally essential for an expert who testifies at a trial actually to examine the subject matter of a lawsuit, most of the reported cases involve civil litigation. In one criminal case on point involving the admissibility of hypnotically-induced testimony, a state court held that the expert offered by the proponent must be the one who conducted the hypnotic session "in order to aid the court in evaluating the procedures followed." In light of the Court's longstanding insistence that "the need for procedural safeguards is particularly great where life is at stake," it is somewhat bizarre that, in Barefoot, the Court countenances testimony generally appropriate in cases involving subject matter such as defective hobby horses.

At least one recent case has, so to speak, turned Barefoot on its head.

155. For a blistering attack on Barefoot, see Geimer, Death at Any Cost: A Critique of the Supreme Court's Recent Retreat From Its Death Penalty Standards, 12 FLA. ST. U.L. REV. 737, 760-66 (1985) [hereinafter cited as Geimer]. Professor Geimer characterizes Barefoot as a "gross retreat" from the Court's commitment to reliability in death sentencing, id. at 760, and a "bad faith abandonment" of established death penalty standards, id. at 764, reflecting "little desire on the part of the majority to be bothered with facts at all," id. at 763.
157. See, e.g., Savoia v. Woolworth, 88 N.J. Super. 153, 211 A.2d 214 (App. Div. 1965) (expert could testify as to dangers inherent in a mechanical hobby horse even though he had only seen photos of the horse); Buckelew, 87 N.J. at 530, 435 A.2d at 1159 (although witness had never examined patient in cut bladder/malpractice case, he had heard her testify and could conclude her complaint was "commensurate" with the type of injury usually caused by the operation in question).
At least one inter-disciplinary analysis of Barefoot has concluded, "if the enormous problems raised by the use of hypothetically derived testimony in capital cases are to be addressed, therefore, it will have to be by the psychiatric profession, not by the federal courts." Showalter & Bonnie, Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting, 12 BULL. AM. ACAD. PSYCH. & L. 159, 176 (1984).
its heels. In *State v. Davis*, the New Jersey Supreme Court allowed a defendant at the penalty phase of a capital case to introduce expert statistical testimony relating to empirical studies generally relevant to the defendant's potential for rehabilitation where the defendant raises his character as a mitigating factor. The court found such evidence—specifically "statistical evidence of the rehabilitative potential of similarly situated defendants"—could "assist the jury" in its penalty phase deliberations.

In ruling that such evidence came within the state's statutory framework the court found that "character" embraced "those individual qualities that distinguish a particular person," including "his capacity to reform," and that empirical studies "may under appropriate circumstances be sufficiently related to a defendant's rehabilitative potential to satisfy the statutory threshold for relevancy." Specifically, "this kind of information, when presented by experts, . . . can assist lay persons in the deliberative process to reach sound determinations concerning an individual's character."

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162. *See generally, N.J. STAT. ANN. § 2C:11-3 (WEST 1982).*
163. *See N.J. STAT. ANN. § 2C:11-3c(5)(h) (West 1982) (mitigating factors include "any other factor which is relevant to the defendant's character or record or to the circumstances of the offense").

164. Defense counsel sought to proffer the expert testimony of Dr. Marvin E. Wolfgang, a sociologist, "eminent criminologist," and "expert in statistics," whose research has focused on "the psychological and sociological determinants of violent crime." *96 N.J. 611, 615, 477 A.2d 308, 310* (1984). While Dr. Wolfgang never interviewed the defendant, he relied on a "statistical profile" of the defendant's demographic "features" which led him to conclude that, based on empirical studies, if the defendant were to serve a mandatory minimum thirty year sentence (without parole eligibility), he "would never again commit another serious crime of any kind." *Id.*

165. *Id. at 617, 477 A.2d at 311.*
166. *Id.*

167. The court cautioned that the admissibility of such evidence was "subject to appropriate standards concerning its competency (such as its scientific reliability and the qualifications of the expert witness)." *Id.*


169. *Davis* at 617-18, 477 A.2d at 311-12.
170. *Id.*
171. *Id.*
172. *Id.*
In buttressing this point, the court relied on Justice Blackmun's dissent in Barefoot: "It has been observed that a layperson with access to relevant statistics can assess a defendant's rehabilitative potential at least as well, and possibly better than, those with psychiatric training in this area."\(^{173}\) The use of such statistics is appropriate, given the "singular nature of the penalty phase of a capital proceeding and the ineluctable conclusion that doubts must be resolved in favor of admission when evidence of a mitigating factor is offered by the defendant."\(^{174}\)

The court found that a lowered threshold of mitigating evidence at the sentencing phase was "consistent with [the] recognition"\(^{175}\) that "the imposition of death is . . . profoundly different from all other penalties,"\(^{176}\) and that "greater flexibility and latitude"\(^{177}\) may be accorded a fact finder in the use of such testimony. Any shortcomings in such testimony, "when measured by strict rules of evidential relevance and competence,"\(^{178}\) should be "properly relegated to the adversarial process [to perform] the task of 'separating the wheat from the chaff.'"\(^{179}\)


\(^{174}\) Davis, 96 N.J. at 620, 477 A.2d at 312.

\(^{175}\) Id. at 622, 477 A.2d at 313.

\(^{176}\) Id., quoting Lockett, 438 U.S. at 605.

\(^{177}\) Id., 477 A.2d at 314.

\(^{178}\) Id. at 623, 477 A.2d at 313.

\(^{179}\) Id., (quoting Barefoot v. Estelle, 486 U.S. 880 (1983)). The court noted, however, that it was not crafting a \textit{per se} rule of admissibility:

However, relaxed standards for admissibility are not to be equated with automatic admissibility. Judicial tolerance is not judicial license. For example, in this case the court may, upon a persuasive showing, consider the report, or any of its component parts, incomplete and therefore unhelpful. Arguably, the report could, upon countervailing proofs presented by the prosecutor through cross-examination or rebuttal evidence, be considered untrustworthy because of its failure to consider the educational background, employment history, familial status, criminal record, or some other important demographic factor relating to the potential for rehabilitation. It might also be considered flawed because of its use of, or its undifferentiated emphasis upon, statistical data based upon race, gender, or other suspect characteristic. The court must retain discretion to exclude the evidence, in whole or in part, if its probative value is substantially outweighed by
Davis appears to be the only case to have so construed Barefoot. By articulating its reliance on state statute, by the New Jersey Court could selectively rely on Justice Blackmun’s dissent on psychiatric predictive expertise (to support the admissibility of non-medical, statistical evidence) and on the majority’s opinion on the jury’s ability to make careful determinations as to expert testimony. By doing so, it breathes new meaning into the “death is different” language of pre-Barefoot cases, and perhaps, suggests to state courts in jurisdictions with similar character-mitigation evidence statutes a creative way to deal with some of the problems posed by Barefoot.

II. AN INDIGENT’S RIGHT TO EXPERT ASSISTANCE

The average man on the street no doubt believes that the present state of the criminal justice system affords indigent criminal defendants the same privileges and protections as their wealthy counterparts. The truth, however, is that where a defendant must rely on the state to pay for his constitutional rights, he sometimes walks a precarious route to “justice,” fraught with artificial barriers and confused by unsettled case law. Nowhere is this problem more capricious than in the provision of expert services to indigents at government expense.

While the case law has variously held that indigent defendants were entitled to such services on a variety of constitutional

181. The “irony” of the Davis result is noted in Geimer, supra note 155, at 764 n.124.
182. Cf. United States v. Torniero, 725 F.2d 725, 734-35 (2d Cir. 1984) (quoting “wheat from the chaff” rationale in case unsuccessfully seeking to raise “compulsive gambling disorder” as relevant to insanity defense plea): The insanity defense has never been free from controversy, criticism, and revision. No rule designed to embody societal values will ever be sacrosanct. As our understanding of the intricacies of the fathomless human mind continues to evolve, legal rules must respond to changed conceptions of the nature of moral culpability, and to advances in the science of mental illness. The fundamental question will always be an inquiry into how best to embody society’s sense of what conduct is appropriate for punishment by criminal sanctions.
Id. at 724-35.
theories, prior to this term there had been no unequivocal Supreme Court holding that a defendant had such a right. In fact, a 1953 case, United States ex rel Smith v. Baldi, which had rejected the argument that there was such a right, appeared to raise a near-insurmountable obstacle to the proposition that the Constitution requires appointment of an expert witness at state expense.

Yet, at least seven overlapping but distinct rationales for providing necessary defense services to indigents have been articulated: "(1) establishment of the defendant's innocence; (2) equality of access to justice as between the poor and the rich; (3) equality of access to justice as between the indigent defendant and the prosecutor; (4) access to that which is fundamental for a 'fair trial'; (5) access to that which assures an 'adequate defense'; (6) access to that which 'assists counsel,' and, (7) access to that which assures an 'effective defense.' Beyond this, the Baldi doctrine had been progressively eroded by three decades of development of constitutional doctrine which applied the equal protection clause and the due process clause to claims by indigent defendants in contexts which presuppose a criminal justice system in which "partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."

184. See, e.g., Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980) (due process and equal protection require appointment of medical expert); People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966) (right to compulsory process of witnesses requires appointment of handwriting expert); State v. Sahlie, 90 S.D. 682, 245 N.W.2d 476 (1976) (right to counsel includes right to appointment of fingerprint experts where defendant's request is reasonable, timely, and financially necessary). For an analysis suggesting equal protection prong of Williams was "superfluous," see Note, Constitutional Law—Equal Protection—Refusal to Provide Expert Witnesses for Indigent Defendant Denies Equal Protection—Williams v. Martin, 59 WASH.U.L.Q. 317, 328 (1981) ("court need not have reached equal protection question . . . [but instead] could have followed other courts by relying on the established due process ground"). Id. at 328.

185. 344 U.S. 561 (1953).

186. Decker, supra note 183, at 576; see, e.g., Nelson v. State, 35 Wis. 2d 797, 151 N.W.2d 694 (1967) (citing Baldi).


These doctrinal developments have been paralleled variously by scholarly analyses, professional standard-setting, and legislative testimony urging that a constitutional right to expert assistance for indigent defendants be provided in appropriate cases. Baldi appeared to be more and more of an anachronism, especially in the context of the need of an expert to proffer an insanity defense.

The use of partisan experts in insanity defense trials has
been a “well established” practice for 300 years. Expert witnesses were critical to the final outcome in such seminal insanity cases as Hadfield’s Case, Regina v. Oxford, and M’Naghten’s Case. Isaac Ray, an authority in the field, noted the “utmost importance” of expert testimony at an insanity trial, finding it essential that such testimony be “founded on extraordinary knowledge and skill relative to the particular disease, insanity.”

Such testimony serves at least three purposes:

1. First, it supplies the court with facts concerning the offender’s illness;
2. second, it presents informed opinion concerning the nature of that illness; and third, it furnishes a basis for deciding whether the illness made the patient legally insane at the time of the crime under that juris-

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197. Medical experts have been called to testify in trials in England since the fourteenth century. M. Guttmacher, The Mind of the Murderer 109 (1960); citing Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901) (“in 1345, [the] court summoned surgeons to state whether or not a wound was a fresh one” in an appeal of a mayhem conviction). After surveying the earlier reported cases (beginning with Alsop v. Bowtrell, Cro. Jac. 541 (1619)), Guttmacher concludes that, “by the last quarter of the seventeenth century the practice of employing partisan experts had become well established,” id. at 112, noting that in the manslaughter trial of the Earl of Pembroke in the House of Lords, 6 Howell St. Tr. 847 (1678), “physicians were called by both sides to testify as to the cause of death,” id. at 112-13.

See also Simon, The Defense of Insanity, 11 J. Psychiatry & L. 183, 193 (1983) (“By the middle of the seventeenth century . . . the experts were called as witnesses by the parties involved in the dispute”). For an historical overview, see Brief of Amicus for the New Jersey Department of the Public Advocate at 8-10, Ake v. Oklahoma, 105 S. Ct. 1087 (1985) [hereinafter cited as Ake NJDPA Brief].

198. 27 Howell’s St. Tr. 1281, 1320, 1334-36 (K.B. 1800).

199. 9 Car. & P. 525, 541 (N.P. 1840).


201. I. Ray, A Treatise on the Medical Jurisprudence of Insanity (1838), § 27 at 48 (Overholser ed. 1862).

Although largely meaningless to a lay person, the data generated in a psychiatric evaluation enables the psychiatrist to formulate an opinion on the question of a defendant's mental state at the time of the crime. The psychiatrist thus transforms clinical data into evidence that is accessible to the fact-finder. Similarly, the psychiatrist's interpretative skills are brought to bear on any "direct" evidence that may be available in a particular case, such as contemporaneous writings of the defendant or lay witnesses' observations of unusual behavior. Even nonclinical data of this type must be subject to the careful interpretation of a diagnostician.

Assuming a defendant has a valid insanity defense, it is hard to imagine how, absent the assistance of a psychiatrist both before and during trial, he will be able to persuade the jury of its merits. Because of the essentially retrospective nature of the sanity inquiry, it does the defendant little good to show only that he was seriously mentally ill at some point other than the time of the crime

Psychiatric testimony is also necessary to provide the jury with an explanation for conduct that might otherwise appear incomprehensible. Lay jurors may be able to recognize that a defendant's actions are aberrant or bizarre. Only on the basis of clinical diagnosis, however, can they seriously entertain the possibility that the defendant is not responsible for these actions. Psychiatric testimony is necessary to explain effects of a defendant's mental disorder on his cognition or control—relevant factors under the sanity tests of most jurisdictions. Psychiatric testimony is also necessary to give the jury a logical and coherent account of how a particular mental illness can affect the criminal behavior with which the defendant is charged. This account is a crucial link in the defense.

See also, Ake Petitioner Brief, supra note 193, at 30-31:

Like an attorney, an expert psychiatrist or psychologist can provide indispensable assistance both before and during trial. Indeed, as with an attorney, pre-trial assistance may often be the more crucial. An expert is necessary not only to conduct an examination of the defendant, but to make the initial determination of what tests and examinations need to be conducted. Elements of a patient's medical or personal history that may seem insignificant to a lawyer may have great meaning to a psychiatrist or psychologist; without an expert's help, a lawyer may not even know what questions to ask. See Goldstein & Fine, The Indigent Accused, the Psychiatrist, and the Insanity Defense, 110 U. Pa. L. Rev. 1061, 1066 (1962). For similar reasons, the expert can enable the defense attorney better to anticipate the testimony of the prosecution experts, so as to prepare for cross-examination and rebuttal. F. Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases 467 (1970).

And at trial, an expert can convey and explain his findings to the judge and jury in a manner that lay witnesses just cannot match. "All juries will be impressed by lucid explanations of the forces, drives and compulsions which affect the controls of an abnormal personality which has become separated from reality." Blocket v. United States, 228 F.2d 853, 864 (D.C. Cir. 1961) (Burger, J.,
As a result, a defendant’s access to independent medical evidence has become “inextricably intertwined with his very ability to obtain a fundamentally fair trial.”

The “table stakes,” are, of course, even higher because of the nature of psychiatric expertise itself. Such expertise demands rigorous “adversarial testing” in part, because of subtleties and nuances of psychiatric diagnosis “which render certainties virtually meaningless,” and, in part, because the Supreme Court has endorsed the validity of such expert testimony on future dangerousness questions in capital cases, relying on the adversary system to expose any deficiencies in such testimony. Unfortunately counsel historically has been “grossly inadequate in the ability to elicit and evaluate such testimony effectively.

“A defense attorney, in a criminal trial involving the insanity defense, who is realistically expected to fulfill his proper role of adducing probative evidence in support of his client’s

\[\text{concurring). But lucid explanations of such forces, drives and compulsions cannot be presented by lay witnesses who do not themselves have an educated understanding of such phenomena. In short, the defendant whose defense is insanity simply “cannot expect to succeed unless he can present an expert witness.” Goldstein & Fine, supra, at 1063. As Justice Brennan once wrote, an attorney appointed to defend such a case without access to expert assistance can often do little but “throw his hands up in despair.” Brennan, Law and Psychiatry Must Join in Defending Mentally Ill Criminals, 49 A.B.A.J. 239, 242 (1963).}\]

204. Ake NJDPA Brief, supra note 197, at 18.

[M]any lawyers possess scant knowledge about psychiatric decision-making, diagnosis, and evaluation tools. This shortcoming can seriously impede their cross-examination of expert witnesses. Once psychiatric testimony is elicited few lawyers have the special skills to evaluate such testimony.

Id. See generally Perlin, Representing Individuals in the Commitment and Guardianship Process, in 1 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 497 (Friedman ed. 1979); Van Ness & Perlin, Mental Health Advocacy: The New Jersey Experience, in MENTAL HEALTH ADVOCACY: AN EMERGING FORCE IN CONSUMERS’ RIGHTS 62 (Kopolow & Bloom eds. 1977); Golten, Role of Defense Counsel in the Criminal Commitment Process, 10 Am. Crim. L. Rev. 385 (1972). Historical surveys are cited in Perlin & Sadoff, supra, at 161 n.6, 164 nn.28-32.
claim and in challenging the State's evidence, must acquire the requisite psychiatric expertise to accomplish that task."\textsuperscript{209} And, while probative and rigorous cross-examination of an opposing psychiatrist may partially fulfill this role,\textsuperscript{210} "calling to the stand a psychiatrist who disagrees with the opposing psychiatrist is an even better way of forcing judges and juries to use their common sense."\textsuperscript{211} For advocacy to be "effective,"\textsuperscript{212} independent psychiatric expertise in aid of the presentation of an insanity defense would appear to be a "necessit[y], not [a] luxur[y];"\textsuperscript{213} the absence of an expert witness truly "goes to the very trustworthiness of the criminal justice process."\textsuperscript{214}

While this summary reflects near total scientific and legal accord,\textsuperscript{215} it could in no way be seen as a persuasive argument in support of the proposition that the Supreme Court would eventually endorse it.\textsuperscript{216} This appears to be so especially in light of the Court's basic silence on the point since \textit{Baldi}\textsuperscript{217} was decided over three decades ago. Thus, when the Court granted certiorari in \textit{Ake v. Oklahoma}\textsuperscript{218} to a "5000 Docket" case\textsuperscript{219} raising this

\begin{itemize}
\item \textsuperscript{211} Ennise \& Litwack, \textit{Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom}, 62 \textit{CALIF. L. REV.} 693, 746 (1974).
\item \textsuperscript{212} \textit{McMann v. Richardson}, 397 U.S. 759, 771 \& n.14 (1970).
\item \textsuperscript{213} \textit{See Gideon v. Wainwright}, 372 U.S. 335 (1963).
\item \textsuperscript{214} \textit{United States v. Theriault}, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring), cert. denied, 411 U.S. 984 (1973).
\item \textsuperscript{215} \textit{See, e.g., Powell v. Alabama}, 287 U.S. 45, 73 (1932) (consensus reflects "fundamental nature" of rights); \textit{see also, e.g., Enmund v. Florida}, 458 U.S. 782, 789-97 (1982).
\item \textsuperscript{216} \textit{Jones v. United States}, 463 U.S. 354 (1983).
\item \textsuperscript{217} The issue was, in fact, briefed over twenty years ago in \textit{Bush v. Texas}, 372 U.S. 586 (1963), but the Court deferred a constitutional evaluation at that time. For a discussion of \textit{Bush} in this context, \textit{see Note, Right to Aid}, \textit{supra} note 191, at 1056, 1075.
\item \textsuperscript{218} \textit{Ake v. Oklahoma}, 105 S. Ct. 1091 (1984).
\item \textsuperscript{219} \textit{In forma pauperis} proceedings in the Supreme Court are governed by 28 U.S.C. 1915 (1983) and U.S. Sup. Ct. R. 46. Docketing of such cases begins each term with the number "5001," hence, these are known as the "5000 docket" cases. For an explanation, \textit{see Stern \& Gressman, Supreme Court Practice § 1.13} (5th ed. 1978).
\end{itemize}
precise issue so soon after its decisions in *Barefoot* and *Jones v. United States*, it was not clear at all that *Baldi* would subsequently be put to rest.

Glenn Burton Ake was charged in the Oklahoma state courts with two counts of murder and two of shooting with intent to kill. Because of his behavior at his arraignment, the trial judge sua sponte ordered a psychiatric examination to advise him “whether the Defendant may need an extended period of mental observation.” The report characterized defendant as “at times . . . frankly delusional. . . . He claims to be the ‘sword of vengeance’ of the Lord and that he will sit at the left hand of God in heaven.” As a result of this examination, the examining psychiatrist diagnosed defendant as a “probable paranoid schizophrenic” and recommended a prolonged psychiatric evaluation to determine defendant’s competency to stand trial.

220. Three questions were actually presented in *Ake*:

1. When an indigent defendant’s sanity at the time of the offense is seriously in issue, can a State constitutionally refuse to provide any opportunity whatsoever for him to obtain the psychiatric assistance and examination necessary to prepare and establish his insanity defense?
2. When a State seeks in a capital case to prove the aggravating circumstance of future dangerousness through psychiatric testimony, can it constitutionally refuse to provide an indigent defendant with psychiatric assistance to rebut that testimony and to develop and present mitigating evidence?
3. Can a State constitutionally put a defendant on trial, without making an inquiry into his competency, when he is involuntarily receiving psychoactive medication that renders him unable to participate in his defense and prejudices his appearance before the jury?

*Ake Petitioner’s Brief, supra* note 193, at i.

In light of its eventual disposition of the case, *see infra* text accompanying note 251, the Court declined to address the third question. *Ake*, 105 S. Ct. at 1092 n.2.


222. *Ake*, 105 S. Ct. at 1091.

223. The arraigning judge characterized his behavior as “bizarre.” *Ake Petitioner’s Brief, supra* note 193, at 2, quoting J.A. 2.


225. *Id.* at 1090-91.

226. *Id.* at 1091. While defendant’s trial was underway, an Oklahoma statute became effective authorizing the trial court to “initiate a competency determination on its own motion . . . if the court has a doubt as to the competency of the [defendant].” *Okla. Stat. tit. 22, § 1175.2* (1980). Under the Constitution, a person who cannot understand and participate intelligently in the proceedings against him may not be put to trial. *See* *Drope v. Missouri*, 320 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).
Defendant was subsequently transferred to a state hospital for a competency evaluation, as a result of which the hospital's chief forensic psychiatrist found him not competent to stand trial. After a hearing, the court found defendant incompetent, and ordered him committed to the state hospital. Within six weeks, the state hospital psychiatrist told the court that defendant had regained his competency, noting that he was being maintained on 200 milligram doses of Thorazine three times daily. Criminal proceedings were immediately resumed.

Defendant's attorney then notified the court that the defendant would raise an insanity defense, and asked the court to arrange either to have a psychiatrist examine defendant with respect to his mental condition at the time of the offense, or to provide funds to allow the defendant to arrange for one in light of defendant's indigency. The judge rejected this request in light of what he characterized as an "almost cripplingly restrictive" state law and on the authority of Baldi, holding that

227. Ake, 105 S. Ct. at 1091.
228. Id.
229. At the competency hearing, a psychiatrist who had consulted with the state hospital's chief forensic psychiatrist, see Ake Petitioner's Brief, supra note 193, at 2-3, testified:

[Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia—chronic, with exacerbation, that is with current upset, and that in addition to the psychiatric diagnosis, that he is dangerous.

Because of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within—I believe—the State Psychiatric Hospital system. Id. at 3. The psychiatrist was never asked a question about defendant's mental condition of the time of the offense. Id. at 3-4.
230. Ake, 105 S. Ct. at 1091.
231. Id. Thorazine is the first of the major psychotropic drugs to be developed and has been in wide use as a treatment for mental illness since the 1950's, see Winick, Psychotropic Medication and Competence to Stand Trial, 1977 AM. BAR FOUND. RES. J. 769, 779-80. It is a powerful sedative, see, e.g., Chesney v. Adams, 377 F.Supp. 998, 889 (D. Conn. 1974); DETRE & JARECKI, MODERN PSYCHIATRIC TREATMENT 536 (1971), whose properties have been noted in the past by the Supreme Court, see, e.g., Mills v. Rogers, 457 U.S. 291, 293 n.1 (1982); Jones v. United States, 453 U.S. 354, 358 n.16, 360-61 (1983); see also Vitek v. Jones, 445 U.S. 480 (1980), Transcript of Oral Argument, April 24, 1978, at 29.
232. Ake, 105 S. Ct. at 1091.
234. Ake, 105 S. Ct. at 1091.
there was "no constitutional duty to provide private psychiatric examination to indigent defendants." 235

At the trial, defendant’s sole defense was insanity. 236 Defendant called to the stand each of the psychiatrists who had examined defendant while he was at the state hospital, but none was able to testify as to his mental state at the time of the offense because none had so examined him as to insanity. 237 There was thus, "no expert testimony for either side on Ake’s sanity at the time of the offense." 238 The jury rejected defendant’s insanity defense 239 and found him guilty on all counts. 240

235. Id.
236. Ake, 105 S. Ct. at 1091.
237. Id. The testimony of Dr. Enos is typical:
   Q. Then your examinations, or your conclusions are not whether he knew right from wrong?
   A. No.
   Q. And, certainly wouldn’t relate to the months of October—
   A. Not at all.
   Q. —or November 1979, as to whether he knew right from wrong?
   A. That’s correct.
   . . .
   Q. Is there any place in any report you have ever seen, or anything you have had the benefit to review, that has said “this defendant was legally insane in October or November of 1979?”
   A. No, Sir.
   Q. Do you have any opinion as to whether—
   A. No, sir.

Ake Petitioner’s Brief; supra note 193, at 7, quoting J.A. 46.

238. Ake, 105 S. Ct. at 1091 (emphasis in original).
239. Defendant did not testify. As his trial counsel explained:

[D]ue to the uncooperative nature of the defendant, and the lack of communication . . . defense counsel at this time is unable to put the defendant on the witness stand, or to determine whether or not he in fact wants to execute [sic] his Constitutional right to testify in his behalf . . . We cannot get a yes or no if he wants to take the stand, so we rest.

Ake Petitioner’s Brief, supra note 193, at 9, quoting J.A. 54–55.

Earlier in the trial, in an in-chambers statement, defense counsel had characterized defendant as “goofier than hell”:

Mr. Brewer: We waive presence of our—he ain’t going to talk to us anyway. He doesn’t know what is going on. He is goofier than hell. We don’t need him, and he can’t assist us. We have already told the court that he doesn’t possess the ability to aid and assist in a jury trial. Has he ever talked to you, Mr. Strubhar?

Mr. Strubhar: No.

Mr. Brewer: He has never talked to me. Never said hello.

Id. at 10, quoting J.A. 27. Brewer and Strubhar were defendant’s two trial counsel.

240. Ake, 105 S. Ct. at 1092.
At the sentencing proceeding, no new evidence was presented. In summation, the prosecution relied on previously-adduced psychiatric testimony to establish that defendant was mentally ill and dangerous, and that there was a "high probability that [Ake] would again commit criminal acts of violence." Defendant had no expert witness to rebut this testimony or introduce mitigating evidence on the question of punishment. The jury sentenced defendant to death on the murder charges and to 500 years imprisonment on each of the two lesser offenses.

On appeal, the Oklahoma Court of Appeals rejected defendant's constitutional argument that he was entitled to a court-appointed psychiatrist "as incident to his constitutional rights to effective assistance of counsel and availability of compulsory process for obtaining witnesses." Notwithstanding "the unique nature of capital cases," the appellate court affirmed, holding that Oklahoma had no responsibility to provide such services to indigents charged with capital offenses. Although the court noted that defendant "remained mute throughout his trial... refus[ing] to converse with his attorneys, ... star[ing] straight ahead during both stages of the proceedings," it speculated that it was possible that "the defense of insanity interposed by the appellant fostered such behavior on his part." The Su-
The Supreme Court then granted certiorari.\textsuperscript{249}

The Court reversed,\textsuperscript{250} holding that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist’s assistance on this issue, if the defendant cannot otherwise afford one."\textsuperscript{251}

After disposing of a jurisdictional issue,\textsuperscript{252} the Court observed that it had long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.\textsuperscript{253} This principle, grounded in the due process clause’s guarantee of "fundamental fairness,"\textsuperscript{254} derives from the belief “that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial pro-

\hspace{1cm} \textit{fense Under Siege, supra} note 16, at 404.

The overwhelming weight of scientific evidence is in accord: Schizophrenic patients with post-psychotic depression have been described as “wooden” in appearance, motorily “inactive or retarded,” lacking initiative to perform routine tasks, experiencing overwhelming fatigue and neurasthenic symptoms, “hypersomnic” and “emotionally withdrawn.” Nearly all reports comment on the patient’s disinclination to speak. All of these symptoms, however, can be manifestations of antipsychotic drug-induced akinesia.


\textsuperscript{249} Ake, 104 S. Ct. 1091 (1984).

\textsuperscript{250} Mr. Justice Marshall delivered the majority opinion in which six other justices joined; Chief Justice Burger filed an opinion concurring in the judgment, and Justice Rehnquist dissented.

\textsuperscript{251} Ake, 105 S. Ct. at 1092.

\textsuperscript{252} Oklahoma had successfully argued below that, because defendant had not repeated his request in his motion for a new trial, that claim was waived. See \textit{Ake}, 663 P.2d at 6, citing Hawkins v. State, 569 P.2d 490 (Okla. Ct. Crim. App. 1977). It then argued to the Supreme Court that the holding below relied on an “independent and adequate state ground” and should thus not be reviewed. \textit{Ake}, 105 S. Ct. at 1092. This argument was rejected because the federal constitutional error made below was a “fundamental” one, \textit{id.}; in such circumstances, “the state law prong of the court’s holding is not independent of federal law, and our jurisdiction is not precluded,” \textit{id.} at 1093, citing Heb v. Pitcairn, 324 U.S. 117, 126 (1945).

\textsuperscript{253} \textit{Id.} at 1093.

\textsuperscript{254} \textit{Id.}
ceeding in which his liberty is at stake."^255

"Meaningful access to justice" is the theme of the relevant cases, the Court found,^255 noting that "mere access to the courthouse door does not by itself assure a proper functioning of the adversary process."^257 A criminal trial is "fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."^258

In determining whether access to a psychiatrist is one of the "basic tools of an adequate defense,"^259 the Court set out three relevant factors:

The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. . .^260

It quickly disposed of the first prong, characterizing the private interest in accuracy of a criminal proceeding as "almost uniquely compelling."^261 It just as summarily rejected the argument that a reversal would "result in a staggering burden to the state,"^262 noting that at least forty states and the federal government already made such services available.^263 It also found it "difficult to identify any interest of the state, other than in its

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255. Id. The Court reviewed its line of decisions from Griffin through Gideon citing also Strickland, McMann and Evitts v. Lucey, 105 S. Ct. 830 (1985), for the proposition that any assistance of counsel be effective. Id., See Part III, infra.
256. Ake, 105 S. Ct. at 1094.
257. Id.
258. Id. While such a defendant does not have a right to all the assistance that a wealthier defendant might be able to purchase, he is nonetheless entitled to "an adequate opportunity to present [his] claims fairly within the adversary system." Ross v. Moffitt, 417 U.S. 600, 612 (1974).
261. Id.
262. Id.
economy, that weighs against recognition of this right."

Finally it considered the "pivotal role" psychiatry has come to play in criminal proceedings, reflecting the "reality . . . that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."

Adopting sub silentio the arguments of petitioner and amici, the Court set out what it perceived as the role of the psychiatrist in such cases:

[P]sychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the medical condition of the defendant at the time of the offense.

264. Id. at 1095. "Unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." Id.
265. Id.
266. Id.
267. Ake, 105 S. Ct. 1095-96 (citation omitted).
Because psychiatry is not an exact science, however, and because of frequent psychiatric disagreement on the classification and diagnosis of mental illness and the likelihood of future dangerousness, it is often necessary for juries to resolve the differences in opinion. On such a determination, "the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' " This finding led the Court "inexorably" to conclude that:

[Without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."

268. Id. at 1096. Although the Court characterized juries as "the primary fact finders" on the issue of insanity, id., this may not be so, in the light of the findings that over 80% of all insanity defense cases result in stipulations as to insanity. See, e.g., Steadman, Insanity Acquittals in New York State, 1965-1978, 137 AM. J. PSYCHIATRY 321, 322 (1980); Insanity Defense in Federal Courts: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 97th Cong. 2nd Sess. 261 (1982) (testimony of N.J. Public Advocate Joseph H. Rodriguez). See e.g., Sadoff, The Effect of the Hinckley Trial on the Insanity Defense, DIRECTIONS IN PSYCHIATRY, Lesson 29, at 3 (1983) (substantial psychiatric agreement as to insanity in "by far the majority of cases").

One recent study has revealed near-unanimity in insanity determinations among court appointed, non-adversarial psychiatric examiners. See Fukunaga, Pasewark, Hawkins & Gudeman, Insanity Plea: Interexaminer Agreement and Concordance of Psychiatric Opinion and Court Verdict, 5 L. & HUM. BEHAV. 325, 326 (1981) (92% agreement, characterized as an "explicitly high" "magnitude of congruence").


The Court stressed that psychiatrists "enable the [members of the] jury to make its most accurate determination of the truth on the issue before them," and, "for this reason, the States and wealthy individuals, rely on psychiatrists as examiners, consultants and witnesses." Ake, 105 S. Ct. at 1096. It concluded on this point: "In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice." Id.

270. Id. As a recent student note has aptly pointed out, "[p]sychiatric opinions are neither value-neutral nor unbiased. Instead, a psychiatrist may become an advocate for a party in subtle ways, a fact which makes it almost impossible to defend effectively
As the risk of error from denial of such assistance is highest when the defendant’s mental condition is seriously in question,” it would thus qualify for such assistance when he is able to make an “ex parte threshold showing . . . that his sanity is likely to be a significant factor in his defense.” The Court thus held that when a defendant is able to demonstrate that his sanity was such a “significant factor,” the state must “assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the defense.”

On the question of the defendant’s right to a psychiatrist to rebut the State’s evidence of his future dangerousness, the Court reasoned that a similar conclusion was compelled. Noting that Barefoot had approved the practice of allowing jurors to hear against allegations by mental health experts without an expert of one’s own.” Note, People v. Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases, 70 CALIF. L. REV. 1069, 1080 (1982), citing inter alia, 1 J. Ziskin, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY, 38 (3d ed. 1981); Diamond, The Psychiatrist as an Advocate, J. PSYCHIATRY & L. 5 (1973); Morse, Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law, 51 S. CAL. L. REV. 527, 625 (1978); Pollack, Psychiatric Consultation for the Courts, in MEDICAL AND PSYCHIATRIC TESTIMONY IN CRIMINAL CASES 177, 187-88 (1968).

Judge Bazelon has similarly noted that “psychiatry is not a value-free discipline,” referring to the “institutional pressure and personal biases that cause psychiatrists to serve interests other than the therapeutic needs of their patients.” Responsibility Dilemma, supra note 1, at 274. “Since insanity trials fail to elicit the institutional biases that tend to particular interests, the indigent defendant, as a result of his inability to secure an independent expert, is fundamentally prejudiced in his attempt to raise this affirmative defense provided by law.” Id. See also, e.g., Whatley, Indigents and the Insanity Defense, 3 LAW & PSYCHOLOGY REV. 115, 121 (1977).

271. Ake, 105 S. Ct. at 1097.
272. Id.
273. Id. The court emphasized that this did not give the defendant access to “choose a psychiatrist of his personal liking,” id.; its concern was simply that an indigent defendant “have access to a competent psychiatrist”; id. Cf. In re Gannon, 123 N.J. Super. 104, 301 A.2d 493 (Somerset Co. Ct. 1977) (indigent in civil commitment case has no right “to shop around for a psychiatrist who agrees with him”).
274. Ake, 105 S. Ct. at 1097.
such psychiatric testimony,275 "at least where the defendant has had access to an expert of his own,"276 the Court found that this holding relied, "in part, on the assumption that the factfinder would have before it both the prosecutor's psychiatrists and the opposing views of the defendant's doctors and would therefore be competent to 'uncover, recognize, and take due account of . . . shortcomings' in predictions on this point."277 Where the consequence of error is so great, the relevance so evident and the burden on the State so slim, due process thus requires "access to a psychiatric examination" for assistance in the preparation of the sentencing phase.278

The Court disposed of the argument that Baldi controlled, noting first that the defendant there had been examined by neutral psychiatrists,279 and, more importantly, that Baldi predated the "extraordinarily enhanced role of psychiatry in criminal law today,"280 and the Court's recognition of certain "elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to attain a fair hearing, [and which] has signaled our increased commitment to assuring meaningful access to the judicial process."281

278. Id. The links between Barefoot and Ake were presciently noted in Slobogin, Dangerousness and Expertise, 133 U. Pa. L. Rev. 97, 160 (1984) (Barefoot majority's focus on "opposing views of defendant's doctors," 463 U.S. at 899, suggests that "when there are none the adversary system may not function adequately"); id. at 161 (questioning whether indigent defendant will be able to obtain "meaningful consultation"). Slobogin argues persuasively that Barefoot "arrives at the wrong conclusion," Id. at 163:

Given the low probative value of expert clinical predictions of dangerousness and the heightened possibility of undue reliance by the factfinder on such testimony when it is unopposed, the due process clause should bar its admission unless the defendant chooses to rely upon clinical prediction testimony. Despite the Court's inference to the contrary, the mere opportunity to obtain expert assistance or to make reference to current research about the general unreliability of dangerousness predictions should not weaken the due process claim, since neither of these devices significantly improves the adversary system's ability to pinpoint erroneous testimony.

Id. He concludes that "the fact finder should be presented with only the most reliable information in the least prejudicial way." Id. at 165.

280. Id.
281. Id.
On the facts of the case before it, the Court found it "clear that [defendant's] mental state at the time of the offense was a substantial factor in his defense," and that his future dangerousness was also "a significant factor at the sentencing phase." The denial of his requests for psychiatric assistance thus violated the Due Process Clause, and the case was reversed and remanded for a new trial.

Chief Justice Burger concurred, suggesting that "nothing in the Court's opinion reaches non-capital cases." Justice Rehnquist dissented, criticizing the Court's constitutional rule as "far too broad," indicating that he would limit the rule to capital cases and "make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant." There has been little case law and virtually no commentary on Ake in the period since the Court's decision, although both the breadth of the Court's decision and the selection of Justice Marshall as its author have been noted. And of course, Ake is

282. Id.
283. Id. at 1099.
284. Id.
285. Id. (Burger, CJ., concurring).
286. Id. (Rehnquist, J., dissenting). Justice Rehnquist would require a "considerably greater showing" of need than demonstrated by defendant here, see id. at 1101, suggesting that defendant's behavior could well have been feigned, id. but see sources cited supra note 248. He concluded:

Finally, even if I were to agree with the court that some right to a state-appointed psychiatrist should be recognized here, I would not grant the broad right to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, at 1097. A psychiatrist is not an attorney, whose job it is to advocate. His opinion is sought on a question that the State of Oklahoma treats as a question of fact. Since any "unfairness" in these cases would arise from the fact that the only competent witnesses on the question are being hired by the State, all the defendant should be entitled to is one competent opinion—whatever the witness' conclusion—from a psychiatrist who acts independently of the prosecutor's office. Although the independent psychiatrist should be available to answer defense counsel's questions prior to trial, and to testify if called, I see no reason why the defendant should be entitled to an opposing view, or to a "defense" advocate.

For the foregoing reasons, I would affirm the judgment of the Court of Criminal Appeals of Oklahoma.

287. Id. at 1101-02 (emphasis in original).
288. See, e.g., Greenhouse, Supreme Court: Of Meaty Tea Leaves and Other Bafflesments, N.Y. Times, Mar. 12, 1985, at A26 (writing the Ake opinion characterized as "the meatiest assignment that Justice Marshall has received in years"); Lauter, The Justices'
consistent with pre-existing practices in more than 80% of all American jurisdictions.\footnote{289} We still must wait, however, to see how broadly the Court expects\textit{Ake} to be read in parallel situations.\footnote{280}

\section*{III. The Right to Counsel and The Meaning of "Adequacy"}

To a great extent, the development of constitutional criminal procedure over the past half century has tracked the expanding jurisprudence of the constitutional right to counsel at a criminal trial.\footnote{281} The Supreme Court's simple but eloquent evocation in the "Scottsboro Boys" case\footnote{282}—that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel"\footnote{283}—established "[unmistakable] conclusions about the fundamental nature of the right to counsel"\footnote{284} as "one of the safeguards of the sixth amendment deemed necessary to insure fundamental human rights of life and liberty."\footnote{285} These "conclusions" were rearticulated in the "monumental"\footnote{286} decision of\textit{Gideon v. Wainwright},\footnote{287} holding that the right of an indigent defendant in a criminal trial to the assistance of counsel was one of the "fund-
mental safeguards of liberty . . . protected against state invasion by the Due Process Clause of the Fourteenth Amendment."

Following Gideon, the Supreme Court—on various due process and equal protection theories—has expanded the indigent’s right to counsel both horizontally (through other stages of the criminal process) and vertically (beyond mere placement of “a warm body with a legal pedigree next to an indigent defendant”). A constitutional right to counsel has thus been found to attach to misdemeanor prosecutions where a defendant is subject to actual imprisonment, to appeals “as to right,” and at “critical stages” in the criminal prosecution. It has also been found to apply to parole or probation revocation hearings, where needed to ensure the effectiveness of the hearing rights guaranteed by due process. To make the trial (and appeal) process meaningful, the Supreme Court expanded its earlier holding of Griffin v. Illinois—that, if a state chose to grant defendants a right to appeal, due process and equal protection compelled it to provide a trial transcript for an indigent defendant who otherwise could not perfect his appeal—in a series of cases involving the use of transcripts for collateral attack on convictions.

298. Id. at 341. The Court in Gideon overruled its prior decision in Betts v. Brady, 316 U.S. 455, 472 (1942) (which held that refusal to appoint counsel for an indigent felony defendant did not violate the Due Process Clause of the Fourteenth Amendment), characterizing Betts as “an anachronism when handed down.” Gideon, 372 U.S. at 345 (quoting amicus curiae brief filed by 22 states on appellant’s behalf).


300. Gideon’s Realities, supra note 296, at 819.


303. The test for assistance here is whether “substantial rights of a criminal accused may be affected.” Memph v. Rhay, 389 U.S. 128, 134 (1967). Under this rubric, the right has been found to attach at preliminary hearings, Coleman v. Alabama, 399 U.S. 1, 7-10 (1970); at certain pretrial identification procedures, see, e.g., United States v. Wade, 388 U.S. 218, 236-38 (1967) (post-indictment lineups); when the defendant is subjected to governmental attempts to elicit inculpatory statements, see, e.g., Miranda v. Arizona, 384 U.S. 436 (1966); and at pretrial psychiatric interviews, Estelle v. Smith, 451 U.S. 454 (1981).


306. Id. at 18. Griffin, of course, is the source of Justice Black’s famous dictum: “There can be no legal justice where the kind of trial a man gets depends on the amount of money he has.” Id. at 19.

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for habeas corpus proceedings, and for trial preparation. Notwithstanding the lofty aspirations reflected in these decisions, the reality turned out to be somewhat less sanguine. Writing thirteen years after the Gideon decision, Chief Judge David Bazelon observed with customary pith:

The harsh truth is, however, that although we generals of the judiciary have designed inspiring insignia for the standard, the battle for equal justice is being lost in the trenches of the criminal courts where the promise of Gideon and Argersinger [v. Hamlin] goes unfulfilled. The casualties of these defeats are easy to identify. The prime casualties are defendants accused of street crimes, virtually all of whom are poor, uneducated, and unemployed. They are the persons being represented all too often by "walking violations of the Sixth Amendment."  

Judge Bazelon surveyed the options available to the indigent defendant who relies on appointed counsel, and found them all wanting. The first group of counsel—"the regulars"—consisted mostly of a "cache of mediocre lawyers," often incompetent, indifferent or driven by greed, they are concerned only with copping a plea and their fee. Judge Bazelon reasoned that they were "drawn into the ranks of the 'cop-out bar' by either the economic necessity of inadequate fee structures or the need to curry favor with plea-hungry judges who have the life-and-death power to appoint counsel and fix their compensation."

The second group—the more affluent "uptown lawyers" who handled the bulk of appointed cases in the "bad old days"

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310. Gideon's Realities, supra note 296, at 811-12, (quoting, in part, Bazelon, The Defective Assistance of Counsel, 42 U. CINN. L. REV. 1, 2 (1973)).
312. Id. (citing, inter alia, Downie, Justice Denied 174-77 (1971)).
313. Id. (citation omitted).
314. Id.
315. Id. "The lawyers gained a visceral understanding of the plight of those charged with crime; the system gained forceful advocates for reform; clinical practice gained
before *Gideon*—subsequently diminished in importance. While these lawyers had brought certain intangible benefits to the criminal trial process, representation was still often ineffective because of this group's general unfamiliarity with the criminal system, "particularly with those informal norms of police, prosecutors, and courts that cannot be learned from books."³¹⁶

The third group—public defenders—"unquestionably has brought about a major improvement in the quality of defense services,"³¹⁷ but this improvement "gives no justification for complacency."³¹⁸ "The high quality representation" which Judge Bazelon found in the District of Columbia's Public Defender system was "an exception, not the rule" in national practice.³²⁰

In sum, in spite of the ambitious expectations of *Gideon*, the reality of representation fell far short of the mark.

This recognition was followed by a flood of decisions which attempted to give life to the notion that a criminal defendant had a right to the "effective" assistance of counsel.³²¹ After years

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³¹⁶. *Id.* at 814. For examples of Judge Bazelon's applications of these principles to the cases, see his dissents in *Watson v. United States*, 439 F.2d 442, 460-61 (D.C. Cir. 1970) (Bazelon, J., dissenting), and *Jackson v. United States*, 336 F.2d 579, 585 (D.C. Cir. 1964) (Bazelon, J., dissenting). As he noted, "No defendant wishes his trial to be the vehicle for some patent lawyer to master criminal practice." *Gideon's Realities*, supra note 296, at 814.


³¹⁹. *Id.* at 815. A then contemporaneous survey revealed that, too often, Public Defenders were supported by inadequately staffed offices, were faced with unmanageable caseloads, unsurmountable time restraints, nonexistent training programs or resources, and the need to "go to trial unprepared and appear at sentencing . . . uninformed." *Id.* at 815-16 (referring to *Benner & Neary, The Other Face of Justice* (1973)), summarized in Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667 (1975); see also *Casper, American Criminal Justice: The Defendant's Perspective* (1972).

³²⁰. *Gideon's Realities*, supra note 296, at 815.

³²¹. *Powell* had first held that aid of counsel had to be "effective" aid, *Powell v. Alabama*, 287 U.S. 45, 71 (1932), and the Court repeated the use of the adjective in *Glasser v. United States*, 315 U.S. 60, 70 (1942) (federal defendant had right to "effective appointment" of counsel). In *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), the
of allowing the perpetuation of virtually impossible-to-fail tests such as the “farce or mockery of justice” standards, the Supreme Court has subsequently found that a criminal defendant is “entitled to a reasonably competent attorney . . . whose advice is ‘within the range of competence demanded of attorneys in criminal cases.’” as part of the constitutional guarantee of “adequate legal assistance,” “a fair trial and a competent attorney.” This is because “the very premise of our adversary system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.” Unless the accused receives the effective assistance of counsel, “a serious risk of error infects the trial itself.” As the Court underscored last term in United States v. Cronic, “if the process loses its character as a confrontation between adversaries, the constitutional guarantee is

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Court found that “the right to counsel is the right to the effective assistance of counsel.” (emphasis added). Note that Judge Bazelon hypothesized that, perhaps, “we should replace the phrase ‘ineffective assistance’ with a new term, such as ‘failure of the criminal process,’ which properly implicates the system rather than the attorney.” Gideon’s Realities, supra note 296, at 823.

322. The “farce or mockery” test, generally traced to Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945), cert. denied, 325 U.S. 889 (1945), found ineffectiveness of counsel “only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense,” Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965), quoted in Ellis v. Oklahoma, 430 F.2d 1352, 1356 (10th Cir. 1970), cert. denied, 401 U.S. 1010 (1971); Johnson v. United States, 422 F.2d 555, 557 (7th Cir. 1970) and Borchert v. United States, 405 F.2d 735, 738 (9th Cir. 1968), cert. denied. 394 U.S. 972 (1969), or where counsel exhibited such “gross incompetence . . . [that] blotted out the essence of a substantial defense,” Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967). Cases are collected at Strazella, Ineffective Assistance of Counsel Claims: New Uses, New Problems, 19 ARIZ. L. REV. 443, 446 (1977); see also Smithburn & Springman, Effective Assistance of Counsel: In Quest of a Uniform Standard, 17 WAKE FOREST L. REV. 497, 504-06 (1980). These tests have been characterized as requiring “such a minimal level of performance that [they] themselves mock the Sixth Amendment.” Gideon’s Realities, supra note 296, at 819.


327. Cronic, 104 S. Ct. at 2046 (quoting in part, Cuyler v. Sullivan, 446 U.S. 335, 343 (1980)).

Cronic was a white-collar crime case involving an elaborate "check-kiting" scheme. \(^{330}\) While defendant's sentence was a serious one—twenty-five years in federal prison\(^{331}\)—it was clearly not of the same magnitude as a death sentence, the ultimate penalty. As the Supreme Court has noted consistently since its 1976 decisions holding that the death penalty was not unconstitutional \(^{per se}\), \(^{332}\) "the need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases," as a result of the "nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence." \(^{333}\) Or, as the Court continues to note, "death is different" \(^{334}\)—"unique in its severity and irrevocability." \(^{335}\)

The significance of this "different-ness" is heightened in any consideration of the quality of representation afforded to the defendant facing the death penalty, in light of the uncontested evidence that there is an absolute statistical significance between economic status and capital punishment. \(^{336}\) Would this

\(^{329}\) Id. at 2045-46. The Court quoted Circuit Judge Wyzanski on this point: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." Id. at 2046 (quoting United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975), cert. denied, 423 U.S. 876 (1975)).


\(^{331}\) Cronic, 104 S. Ct. at 2042.


in any way be a factor if the Court were to consider an ineffectiveness-of-counsel argument made in the context of a death penalty case? Would the Court specifically follow the lead of each of the federal circuits by (1) explicitly rejecting the "farce and mockery" test, and (2) by defining (a) what constituted "reasonably competent" representation, and (b) what role substandard performance should play in determining cases seeking reversal on that ground? Against this background, the Court granted certiorari in Strickland v. Washington, a case argued in tandem with Cronic, so as "to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel."

In Strickland, respondent David Washington was charged with three capital murder charges in Florida state court. When his court-appointed counsel learned that the defendant had confessed to two of the homicides, he "experienced a sense of hopelessness about the case," and "cut his [investigation] efforts off." Defendant pled guilty to all charges. At his plea hearing, he told the court that he was "under extreme stress caused by his inability to support his family," and that he "accepted responsibility for his crimes." Against counsel's advice, defendant waived a jury trial on the question of punishment, and elected to be sentenced by the trial judge without a jury's recommendation.

Streib, supra note 11, at 447-74, (especially at 477: "all eleven executions resulted from criminal homicides of socially 'more valuable' victims").

337. The Second Circuit was the final circuit to abandon the test in Trappnell v. United States, 725 F.2d 149 (2d Cir. 1983). For a survey of all circuits see Genego, The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation, 2 AM. CRIM. L. REV. 181, 190 n. 74 (1984) [hereinafter cited as Performance Standards].

338. Id. at 190.
340. "In tandem" arguments are explained at STERN & GROSSMAN, SUPREME COURT PRACTICE § 14.10 at 752 (5th ed. 1978).
341. Strickland 104 S. Ct. at 2063.
342. Id. at 2056. The crimes are characterized in the Court's opinion as "brutal."
343. Id.
344. Id. at 2057.
345. Id.
346. Id.
347. Id.
In preparation for the sentencing hearing, defendant’s lawyer spoke to defendant about his background, and talked to defendant’s wife and mother on the telephone (although he never met with either). He did not seek out character witnesses, nor did he request a psychiatric examination of defendant. His decision not to present or attempt to seek out evidence “concerning respondent’s character and emotional state . . . reflected his sense of hopelessness about overcoming the evidentiary effect of respondent’s confession to the gruesome crimes.”

At the sentencing hearing, counsel argued “that respondent’s remorse and acceptance of responsibility justified sparing him from the death penalty,” stressing that the defendant had no significant history of criminal activity and that defendant “committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances.” He cast defendant as “fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances.”

The trial judge found numerous aggravating circumstances and “insufficient mitigating circumstances” to outweigh them, and sentenced defendant to death. The Florida Supreme Court upheld the convictions and sentences on direct

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348. Id.
349. Id.
350. Id.
351. Id. Under the Florida death penalty law, “mitigating circumstances” include the following:

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(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

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(e) The defendant acted under extreme duress . . .

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

FLA. STAT. ANN. § 921.141(4) (West 1985).

For a general history of the role of mental disorder as a mitigating factor in death penalty cases, see Mental Disorder, supra note 332, at 790-806, and sources cited in notes 402-62.

352. 104 S. Ct. at 2057.
353. See factors listed in FLA. STAT. ANN. § 921.141(3) (West 1985).
354. 104 S. Ct. at 2058.
355. Id.
Defendant then sought collateral relief in state court, arguing in part that he received inadequate representation at sentencing in six different ways. He charged that counsel failed (1) to request a psychiatric evaluation, (2) to investigate and present character witnesses, (3) to move for a continuance to adequately prepare for sentencing, (4) to seek a pre-sentence investigation report, (5) to present meaningful arguments to the sentencing judge, and (6) to investigate the medical examiner’s reports (or cross-examine the state’s medical experts) as to the manner of death of the victims. In supporting this claim, counsel submitted fourteen affidavits from friends, neighbors and relatives, stating that they would have testified on defendant’s behalf, had they been so requested, as well as psychiatric and psychological reports finding that, while defendant was not under “extreme mental or emotional disturbance,” he was “chronically frustrated and depressed because of his economic dilemma” at the time of his crimes. The trial court denied relief, finding that defendant’s attorney had acted competently. Further, even had trial counsel done everything urged by defendant (through his new lawyers) in his post-conviction petition, “there [was] not even the remotest chance that the outcome would have been any different.” He characterized the aggravating circumstances as “overwhelming.” This judgment was similarly affirmed by the Florida Supreme Court.

Defendant subsequently sought federal habeas corpus review, raising primarily the same arguments. After conducting an evidentiary hearing, the district court denied relief, holding that, while trial counsel had made “errors in judgment” in failing to investigate nonstatutory mitigating evidence, there was no

357. Counsel had indicated that he specifically declined to request the preparation of such a report “because he judged that [it] might prove more detrimental than helpful.” 104 S. Ct. at 2057.
358. Id. at 2058.
359. Id.
360. Id. at 2059.
361. Id. (emphasis in original).
363. 104 S. Ct. at 2060.
showing of resulting prejudice.\textsuperscript{364} On appeal, the Eleventh Circuit\textsuperscript{365} reversed and remanded for additional fact-finding under new standards set out in its opinion.\textsuperscript{366} In determining whether defense counsel fulfilled his "duty to investigate," the circuit court found that—absent "outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest" (in which cases no special showing of prejudice must be made)\textsuperscript{367}—the defendant must show that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense."\textsuperscript{366} The Supreme Court subsequently granted certiorari to determine if this were the proper formulation of the standard,\textsuperscript{366} and reversed.\textsuperscript{370}

The Court reviewed its prior decisions in the area, and concluded that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."\textsuperscript{371} After not-

\textsuperscript{364} Id.

\textsuperscript{365} First, the appeal was heard by a panel of the Fifth Circuit, which affirmed in part, vacated in part and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims it had developed in its opinion. \textit{Id.} (citing \textit{Washington v. Strickland}, 673 F.2d 879, 906-07 (5th Cir. 1982)). Unit B of the Fifth Circuit then granted the state's petition for \textit{en banc} rehearing. \textit{Washington v. Strickland}, 679 F.2d 23 (5th Cir. 1982) (Unit B). Unit B ultimately became the Eleventh Circuit. \textit{See} Appellate Court Reorganization Act of 1980, \textit{Pub. L. No. 96-452, \S 9(1), 94 Stat. 1994, 1995 (1980).}

\textsuperscript{366} \textit{Washington v. Strickland}, 693 F.2d 1243, 1263-64 (11th Cir. 1982). Under these standards, criminal defendants had the right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." \textit{Id.} at 1250. Such assistance must include a "reasonable amount of pretrial investigation," \textit{id.} at 1251, reflecting "'informed, professional deliberation' rather than 'inexcusable ignorance or senseless disregard of their clients' rights'" \textit{id.} (quoting, in part, United States v. Bosch, 584 F.2d 1113, 1122 (1st Cir. 1978)). While the "amount of pretrial investigation that is reasonable defies precise measurement," it depends on a variety of factors: "the number of issues in the case, the relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel." \textit{Id.}

\textsuperscript{367} \textit{Id.} at 1258-59.

\textsuperscript{368} \textit{Id.} at 1262.

\textsuperscript{369} 104 S. Ct. at 2062-63.

\textsuperscript{370} \textit{Id.} at 2071.

\textsuperscript{371} \textit{Id.} at 2064. Defendant's counsel before the Supreme Court stressed five reasons why Washington's trial counsel's failure to "conduct any independent investigation for mitigating information . . . severely impaired the . . . presentation of his case at a capital sentencing hearing." \textit{Respondent's Brief} at 93, \textit{Strickland v. Washington}, 104 S. Ct. 2052 (1984) [hereinafter cited as \textit{Respondent's Brief}]
ing that the role of counsel at a capital sentencing proceeding was comparable to counsel's role at trial (as opposed to counsel's role at "an ordinary sentencing") 372 the Court established a two-

First, the stakes were life and death.

Second, the district court explicitly found that defendant's trial counsel ceased any preparation or investigation of respondent's case out of a sense of hopelessness and despair after respondent confessed to three murders. Counsel never attempted to undertake the role of an active and zealous advocate for his client's life. The integrity and fairness of the adversary proceedings were wholly undermined by the essential withdrawal of defense counsel from the sentencing process.

Third, counsel was unable to provide a "guiding hand" at sentencing because he lacked the indispensable factual prerequisites for the exercise of informed judgment. The district court found as a fact that [defendant's trial counsel] did not seek any witnesses in mitigating (Pet. App. 264-65), nor did he conduct "an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings." (Pet. App. 282). Without this factual information, counsel could do little more than rely on respondent's statements at the guilty plea proceedings (J.A. 322-23); he certainly could not meaningfully advise the respondent on what mitigating information could and should be presented to the sentencer. [Defendant's trial counsel's] "total abdication of duty should never be viewed as permissible trial strategy." Pickens v. Lockhart, 714 F.2d 1455, 1467 (1983).

Fourth, counsel's inadequate preparation resulted in the impoverishment of the record, depriving the sentencer of the knowledge about the character and background of the defendant that is indispensable to an "individualized determination" of whether life or death is the proper punishment. Zant v. Stephens, 103 S. Ct. at 2743-44; Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1902); Woodson v. North Carolina, 428 U.S. at 304.

Fifth, the subtle influences that are involved in reaching a life or death decision under Florida law make it particularly difficult to assess the impact of counsel's errors upon a record thus impoverished. Under Florida's capital sentencing scheme, "even if the statutory threshold has been crossed and the defendant is in the narrow class of persons who are subject to the death penalty, the sentencing authority is not required to impose the death penalty." Barclay v. Florida, 463 U.S. 939, 954 (1983); State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Indeed, the Florida courts have developed a series of precedents "in which, even though statutory mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of non-statutory mitigating circumstances tips the scales in favor of life imprisonment." Barclay v. Florida, 463 U.S. at 954-55. Numerous Florida cases emphasize the critical, often determinative, significance of non-statutory mitigating information that Florida sentencers have repeatedly employed in their capital sentencing calculus.

In sum, respondent has shown that he did not receive representation within the range of competence demanded of attorneys in criminal cases. Consequently, counsel's ineffectiveness impaired the presentation of the defense at his capital sentencing hearing.

Id. at 93-99 (footnotes omitted).

372. Strickland, 104 S. Ct. at 2064. That role was articulated as "ensur[ing] that the adversarial testing process works to produce a just result under the standards governing
part test to determine whether a defendant's claim that counsel's assistance was "so defective as to require reversal" should prevail:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

373. Id.
374. Id. Respondent's Supreme Court counsel had urged, on the other hand, that the inquiry be phrased in light of "the basic functions counsel serves," Respondent's Brief, supra note 371, at 20:

[Counsel] is a "guiding hand" to the accused through the legal process and a critical leg of the adversary process, a counterweight to the prosecutor. An attorney must, therefore, discharge certain basic responsibilities. He must: (1) function as an active advocate, providing "[u]ndivided allegiance and faithful, devoted service to a client." VonMoltke v. Gillies, 332 U.S. 708, 725 (1945); (2) act as an informed advisor by providing the lawyer's skilled perspective on the case; and (3) conduct an adequate factual and legal investigation in order to be able to fulfill his advisory role in a proper manner.

The responsibility must be adequately discharged at sentencing as well as at trial. Particularly in the area of capital sentencing, effective counsel serves to ensure an individualized determination of life or death based on the character and background of the offender and the circumstances of the offense. Zant v. Stephens, 462 U.S. 862 (1983).

Id. at 20-21.

Counsel also had urged the court to reject the "outcome determinative test":

To prevail on a Sixth Amendment claim of ineffective assistance, a defendant must establish an adverse impact on the presentation of the case or other impairment to the defense from counsel's errors, not that the outcome would have been different with adequate counsel. The outcome determinative test is wholly inappropriate: It forces the federal courts to retry issues of guilt and penalty and to speculate on how the record might have been different and how those differences might have altered the perceptions of the original trier of fact. Instead of principled decisions focusing on an attorney's performance, the outcome-determinative test would generate a series of subjective judgments as to whether a person was properly convicted or sentenced. These would provide no
The proper standard for attorney performance is that of "reasonably effective assistance."\textsuperscript{375} This is an "objective" standard,\textsuperscript{376} measured by "simple reasonableness under prevailing professional norms."\textsuperscript{377} Judicial scrutiny of counsel's performance under such circumstances "must be highly deferential,"\textsuperscript{378} and:

[B]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. That is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."\textsuperscript{379}

Warning that "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges,"\textsuperscript{380} the Court instructed that an "actual ineffectiveness claim" must be assessed "on the facts of the particular case,

\begin{itemize}
  \item \textsuperscript{375} \textit{Strickland}, 104 S. Ct. at 2064.
  \item \textsuperscript{376} \textit{Id.} at 2065.
  \item \textsuperscript{377} \textit{Id.} Under this test the court found that counsel owed his/her client "certain basic duties."
  \item Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See \textit{Cuyler v. Sullivan}, 446 U.S. 335, 346 (1980). From counsel's function as assistant to the defendant derives the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See \textit{Powell v. Alabama}, 287 U.S. 45, 68-69 (1932).
  \item \textsuperscript{378} \textit{Strickland}, 104 S. Ct. at 2065.
  \item \textsuperscript{379} \textit{Id.} at 2065-66 (citation omitted).
  \item \textsuperscript{380} \textit{Id.} at 2066. The Court offered no authority to support this assertion.
\end{itemize}
A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine, whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Applying this standard to the case in question—where the issue was whether counsel fulfilled his duty to investigate—the Court found that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” In any effectiveness case,” the Court continued, “a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.”

Even a “professionally unreasonable” error will not result in the reversal of a conviction, however, “if the error had no effect on the judgment[,] . . . any deficiencies in the counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.” To show prejudice, “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” The Court

381. Id.
382. Id.
383. Id.
384. Id.
385. Id. at 2067.
386. Id.
387. Id. at 2068.
defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Given this test, when a defendant challenges a death sentence, the question is "whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

Applying these principles to the case before the Court was "not difficult." It found that respondent's trial counsel's conduct "cannot be found unreasonable," and that, even assuming unreasonableness, "respondent suffered insufficient prejudice to warrant setting aside his death sentence." The Court characterized trial counsel as having made a "strategic choice," with nothing in the record showing that his "sense of hopelessness distorted his professional judgment." "Counsel's strategy choice was well within the range of professionally reasonable judgment, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable." In short, "[f]ailure to make the required showing of

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388. Id. The court rejected respondent's suggestion that the proper test would be whether the errors "impaired the presentation of the defense," citing Respondent's Brief, supra note 371, at 58, on the theory that that standard provided "no workable principle" in that "it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding." Id.


389. Strickland, 104 S. Ct. at 2069.

390. Id. at 2070.

391. Id.

392. Id.

393. Id.

394. Id. at 2071.

395. Id. With respect to the question of prejudice, "the lack of merit of respondent's claim is even more stark":

The evidence that respondent says his trial counsel should have offered at
either deficient performance or sufficient prejudice defeats the ineffectiveness claim.” 396 More generally,” the Court concluded, “respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel’s assistance”; 397 thus, “the sentencing proceeding was not fundamentally unfair.” 398

Justice Brennan filed a separate opinion, concurring in part and dissenting in part. 399 While he joined in the majority’s opinion because it provided “helpful guidance” 400 to lower courts, he cautioned that the standards “can and should be applied with concern for the special considerations that must attend review of counsel’s performance in a capital sentencing proceeding.” 401

the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and the District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his “rap sheet” would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent’s claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Id. 396. Id. 397. Id.

398. Washington’s petition for rehearing was denied, see 104 S. Ct. 3562 (1984), and he was put to death on July 13, 1984; See also Supreme Court Turns Down Plea for Stay of Murderer’s Execution, N.Y. Times, July 13, 1984, at A-14, col. 5.

399. Strickland, 104 S. Ct. at 2071 (Brennan, J., concurring and dissenting). Justice Brennan dissented from the Court’s judgment and adhered to his view that the death sentence is in all circumstances unconstitutional under the eighth and fourteenth amendments. Id. at 2061-72 (citing Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting)).

400. Strickland, 104 S. Ct. at 2071, 2072 (Brennan, J., concurring and dissenting). 401. Id. at 2073. Justice Brennan emphasized that “discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action,” id. (quoting Zant v. Stephens, 462 U.S. 862, 874 (1983)). Thus, the Court has “consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding,” Strickland, 104 S. Ct. at 2073. Because of the basic differences between the death penalty and all other punishments, the Court has recognized that there is “a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” Id. at 2074 (quoting Barefoot v. Estelle, 463 U.S. 880, 914 (1983) (Marshall, J., dissenting)). Barefoot is discussed infra text accompanying notes 26-160.
Justice Marshall dissented, characterizing the majority's efforts as "unhelpful," and criticizing the adoption of a performance standard "that is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the sixth amendment is interpreted." By the vagueness of its holding, he charged, the Court has "not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs." Even beyond the "debilitating ambiguity" of the Court's standard (which will likely "stunt the development of constitutional doctrine in this area") and the majority's "regrettable" discussion of the presumption of reasonableness to be afforded to counsel's decision under the test, Justice Marshall took sharp issue with the majority's characterization of the capital sentencing proceeding as indistinguishable from an ordinary trial.

"The Constitution requires a stricter adherence to procedural safeguards in a capital case than in other cases," he emphasized, since defense counsel's performance "is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality." Marshall further asserted:

Because it is "essential" in the sentencing phase of a capital case that "the [fact-finder] have . . . all possible relevant information about the individual defendant whose fate it must determine," Strickland, 104 S. Ct. at 2071, 2074 (Brennan, J., dissenting) (quoting Jurek v. Texas, 428 U.S. 262, 276 (1976)) (opinion of Justices Stewart, Powell, and Stevens), the "sentencer in capital cases must be permitted to consider any relevant mitigating factor," Strickland, 104 S. Ct. at 2074 (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)). Thus Justice Brennan concluded, "[C]ounsel's general duty to investigate . . . takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care." Strickland, 104 S. Ct. at 2074.

403. Id.
404. Id.
405. Id.
406. Id.
407. Id. at 2076.
408. Id. at 2077.
409. Id. at 2079.
410. Id.
411. Id.
Reliability in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." The job of amassing that information and presenting it in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts, combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings.

412. *Id.* (citation omitted). These views led Justice Marshall to dissent from the Court's disposition of the case:

It is undisputed that respondent's trial counsel made virtually no investigation of the possibility of obtaining testimony from respondent's relatives, friends, or former employers pertaining to respondent's character or background. Had counsel done so, he would have found several persons willing and able to testify that, in their experience, respondent was a responsible, nonviolent man, devoted to his family, and active in the affairs of his church. See App. 338-365. Respondent contends that his lawyer could have and should have used that testimony to "humanize" respondent, to counteract the impression conveyed by the trial that he was little more than a cold-blooded killer. Had this evidence been admitted, respondent argues, his chances of obtaining a life sentence would have been significantly better.

Measured against the standards outlined above, respondent's contentions are substantial. Experienced members of the death-penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections. See Goodpaster, *The Trial for Life; Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. Rev. 299, 300-02, 334-35 (1983). The State makes a colorable—though in my view not compelling—argument that defense counsel in this case might have made a reasonable "strategic" decision not to present such evidence at the sentencing hearing on the assumption that an unadorned acknowledgement of respondent's responsibility for his crimes would be more likely to appeal to the trial judge, who was reputed to respect persons who accepted responsibility for their actions. But however justifiable such a choice might have been after counsel had fairly assessed the potential strength of the mitigating evidence available to him, counsel's failure to make any significant effort to find out what evidence might be garnered from respondent's relatives and acquaintances surely cannot be described as "reasonable." Counsel's failure to investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the courts of the trial gave him a feeling of hopelessness regarding the possibility of saving respondent's life, see App. 383-384, 400-401.

If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done
Because of the special circumstances of a death case, Justice Marshall would establish different standards for assessing attorney performance:

In my view, a person on death row, whose counsel’s performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a “reasonable probability” that he would have been given a life sentence if his lawyer had been competent . . . . If the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate.\footnote{13}

The first comprehensive analysis of Strickland characterized the Court’s approach as “unfortunate and misguided,” and as having “failed to meet its obligation to help ensure that criminal defendants receive competent representation.”\footnote{14} According to the critic,\footnote{15} the majority crafted its opinion “to ensure that the review test will produce the same results as the old ‘farce and mockery-due process’ test.”\footnote{16} The application of the Supreme Court’s new test to the facts of Strickland underscores this return to the status quo ante.\footnote{17}

The problems with the Court’s holding are reflected in its treatment of trial counsel’s failure to obtain a psychiatric evaluation in preparation for his client’s capital sentencing hearing. Although a state-ordered psychiatric evaluation had found that there was “no indication of major medical illness at the time of the crime,”\footnote{18} and although defendant had told the trial judge at

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\footnote{13}{Id. at 2080-81 (Marshall, J., dissenting) (citations omitted).}
\footnote{14}{Id.}
\footnote{15}{Performance Standards, supra note 337, at 182.}
\footnote{16}{Genego, the author of the article, was Chairperson of the Competency Committee of the ABA Section of Criminal Justice.}
\footnote{17}{Performance Standards, supra note 337, at 196.}
\footnote{18}{See generally id. at 196-98; 209-11. See also Note, The Ineffective Assistance of Counsel Quandry: The Debate Continues, 18 Akron L. Rev. 325, 334 (1984) (Strickland’s seemingly “objective” reasonably-effective-assistance test is “poisoned with obtrusive subjectivity”).}

so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel’s failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding. I respectfully dissent.

\textit{Id.} at 2080-81 (Marshall, J., dissenting) (citations omitted).
his plea entry that he was suffering from "extreme stress,"\textsuperscript{419} trial counsel—who subsequently stated that he received no indications from defendant of any psychological problems\textsuperscript{420}—"did not undertake any efforts to explore [defendant's] mental state in order to use psychological distress as a basis for mitigation at the death penalty hearing."\textsuperscript{421}

A psychiatric evaluation "might have established the existence of a mental disturbance that could have supported a finding of a mitigating factor"\textsuperscript{422} or at least "substantiated [defendant's] claim that he was acting under "extreme mental stress."\textsuperscript{423} Yet, the Court characterized trial counsel's decision to forego such an examination as a "reasonable" decision,\textsuperscript{424} and a plausible strategic choice.\textsuperscript{425} How, though, could trial counsel have come to this "plausible" choice without at least requesting such

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  \item \textsuperscript{419} Id. at 2057.
  \item \textsuperscript{420} Id.
  \item \textsuperscript{421} Performance Standards, supra note 337, at 196. At defendant's federal habeas corpus hearing, affidavits of a psychiatrist and psychologist were introduced to provide "information relevant to the issue of mental or emotional stress." Respondent's Brief, supra note 371, at 12 (quoting Court of Appeals' Record at 58). The affiants concluded that, "while Mr. Washington was legally sane at the time of the crimes, his violent actions were attributable to the uncontrollable eruption of long-suppressed feelings of self-hatred and anger generated by exposure to extensive child abuse, incest and a broken and violent family situation, combined with the severe frustration and depression concerning his financial problems." Id. at 13. A second psychiatric affidavit was submitted to the District Court, following the defendant's habeas corpus hearing; this report found that, at the time of the crimes, defendant "was under the influence of extreme mental or emotional disturbance, and that he was unable to conform his conduct to the requirements of the law." Respondent's Brief, supra note 371, at 12 n.13 (citing J.A. 495-503).
  \item \textsuperscript{422} Performance Standards, supra note 337, at 196.
  \item \textsuperscript{423} Id. at 196-97.
  \item \textsuperscript{424} Strickland, 104 S. Ct. at 2071.
  \item \textsuperscript{425} Id. at 2070. Of course, trial counsel had conceded that, after defendant confessed, he did not feel that "there was anything which [he] . . . could do which was going to save [defendant] from his fate," Respondent's Brief, supra note 371, at 3 (quoting J.A. 400), and that his despair over the confession resulted in a "cessation and end" to his preparation, id. (quoting J.A. 426). As trial counsel himself testified at defendant's habeas hearing:
    \begin{quote}
      I really could find very little to address myself to in terms of a relevant, cogent presentation of mitigating circumstances as outlined by the statute itself and certainly insofar as aggravating circumstances are concerned, I . . . did not feel exactly like I . . . had sufficient ammunition to persuade anybody that the State was not going to succeed in showing at least that they outweighed the mitigating circumstances.
    \end{quote}
    Id. at 8 (quoting J.A. 404).
an examination? "Washington had everything to gain and nothing to lose from a defense-initiated psychiatric examination, and the defense attorney could not have known the value of a report before one was made." To merely suggest—without supporting authority or explanation—that counsel could have "surmise[d]" from his own conversations with defendant "that psychological evidence would be of little help" begs the question. The importance of psychiatric evidence at the sentencing phase to evaluate mental disorder as a potential mitigating factor cannot be questioned in that "clear evidence indicates that, since the medieval period, Anglo-American law has accepted special treatment, and often has permitted mitigation, when a criminal is afflicted with a mental abnormality."

In short, the absence of workable standards in Strickland—as underscored by the Court's refusal to characterize trial counsel's performance as ineffective—"is a clear signal of counsel's unprofessional assistance."
that [the Supreme] Court is not at all disturbed with inadequate performance by criminal defense lawyers.\(^4\)\(^3\)\(^3\) It appears that "the Supreme Court has sent a message that the problem of competency, at least in criminal cases,\(^4\)\(^3\)\(^4\) should be taken off the agenda."\(^4\)\(^3\)\(^6\)

Although there has not been extensive post-\textit{Strickland} litigation on the specific question of mental disorder,\(^4\)\(^3\)\(^6\) at least one court has expressed a willingness to attempt to articulate performance standards in this area. In \textit{United States ex rel. Rivera v. Franzen}\(^4\)\(^3\)\(^7\) a federal district court found that a \textit{Strickland}-like performance rendered counsel's assistance ineffective,\(^4\)\(^3\)\(^8\) and remanded for supplemental briefs on the question of actual
Rivera was a habeas application stemming from petitioner's prior state court murder conviction, based on his allegation that trial counsel was ineffective in failing to investigate and proffer a potential insanity defense. The district court found that, although petitioner (1) had been institutionalized on four separate occasions for mental illness, (2) had made several suicide attempts, (3) was taking Thorazine at the time of the trial, and although counsel spoke to petitioner on eight separate occasions prior to trial, trial counsel never inquired as to whether petitioner had a history of psychiatric problems, and never contacted petitioner's family to discuss the case. After reviewing the Strickland test, the court set out two questions: (1) "did [trial counsel's] conversations with Rivera amount to 'reasonable investigation' into a potential insanity defense?" and if (1) is answered in the negative, (2) "was [counsel's decision not to further investigate this potential defense] a reasonable decision in light of all the circumstances, including [counsel's] conversation with Rivera?"

While the court found counsel conducted "some form" of

439. Id. at 204. Subsequently, the court denied Rivera's petition for failure to show prejudice under Strickland because he "failed to undermine confidence in his conviction by showing a reasonable probability that he would have been found not guilty by reason of insanity had his counsel investigated such a defense." United States ex rel. Rivera v. Franzen, No. 80-C-5139, slip op. at 4 (N.D. Ill., May 24, 1985).

440. Id. at 199.

441. Id. For pre-Strickland cases considering counsel's obligation to "discuss" or "explore" the insanity defense, see, Perlin & Sadoff, supra note 317; see also, supra notes 404-07.

442. Thorazine, a brand name of chlorpromazine, was the first major psychotropic drug to be developed, and has been used to treat mental illness for over 30 years. See, e.g., Kinross-Wright, The Current Status on the Phenothiazines, 200 J. A.M.A. 461 (1967); Winick, Psychotropic Drugs and Competence to Stand Trial, 1777 AM. BAR FOUND. RES. J. 769, 780. It is considered as "unavoidable unsafe," Stone v. Smith, Kline & French Laboratories, 731 F.2d 1575, 1578 (11th Cir. 1984); and as a "major tranquilizer," United States v. Wilson, 471 F.2d 1072, 1074 (D.C. Cir. 1972), cert. denied 410 U.S. 957 (1973).


444. Id. In fact, as petitioner had informed the probation officer entrusted with the pretrial report that he had "no mental problems," counsel read this portion of that report into the record of sentencing.

445. Id. at 200 (quoting Strickland, 104 S. Ct. at 2066).

446. Id. at 202.
investigation, his level did not constitute "reasonable investigation" of the defenses of diminished capacity and insanity. To be "reasonable," such an investigation would have to include (1) an examination of relevant psychiatric hospital records, (2) an inquiry into the circumstances of the suicide attempts, (3) some review of the nature and effects of Thorazine usage and, perhaps, (4) a psychiatric examination. The court found that counsel impermissibly delegated important strategic choices to his client; by this delegation, counsel "defaulted on his duty to make an independent investigation and a reasonable decision to abandon or pursue further the potential defenses of insanity and diminished capacity."

Even if it could be argued, the court reasoned, that counsel made a "deliberate decision" to abandon the defenses, that decision "would have been unreasonable because of [counsel's] almost total lack of information." Counsel's failure to make appropriate inquiries resulted in his "reject[ing] the defense without pursuing the basic inquiries necessary to evaluate its merits intelligently." Counsel's reliance on defendant to bring to his attention facts in support of an insanity defense was "unreasonable precisely because Rivera could not be expected to know that his psychiatric history afforded him one of the only two potential defenses available." Counsel's failure rendered his assistance ineffective since "the client cannot take on the role of defense attorney and counsel cannot attempt to adopt

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447. Id.
448. Id. (citing United States ex rel. Lee v. Rowe, 446 F. Supp. 1039, 1048 (N.D. Ill. 1978)).
449. Id. See generally, Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).
450. Rivera, 594 F.Supp. at 203. Defendant had raised to counsel only the possibility of a self-defense claim. Id. at 200.
451. Id. at 203. See, e.g., Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982), cert. denied, 464 U.S. 843 (1983); Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983) (defendant's instruction to counsel to "walk me or fry me" did not excuse counsel's failure to investigate possible intoxication defense). The presentation of the insanity defense has been appropriately characterized as "probably . . . the most demanding task of the defense lawyer." Kwall, The Use of Expert Services by Privately Retained Criminal Defense Attorneys, 13 Loy. U. Chi. L.J. 1, 17 (1981).
453. Id. (quoting Martin, 711 F.2d at 1280).
454. Id.
the role of psychiatrist." Because it was impossible to tell from the state of the record whether petitioner suffered prejudice within the terms of the Strickland test, the parties were thus ordered to file supplemental briefs on that point.

Rivera thus appears to represent a common sense approach to the problem of counsel’s failure to explore a potential insanity defense after Strickland, and reflects at least the preliminary resolution of one federal district court’s concerns with the issue of competent representation. Importantly, the Rivera court suggested to the parties that they might include in their supplemental briefs “affidavits of experts as to the effects of Thorazine when used with alcohol or as to the petitioner’s mental state on the evening of the homicide.” In short, the court implicitly rejected Strickland’s notion that counsel can sua sponte decide “psychological evidence would be of little help” without careful consideration of what that evidence might reveal, and, in so doing, it perhaps set down the first building block in the creation of meaningful and objective post-Strickland “perform-

455. Id.
456. Id. at 205.
457. It is interesting to note that trial counsel in both Strickland and Rivera were “experienced.” See Strickland, 104 S. Ct. at 2056, Rivera, 594 F. Supp. at 199 (counsel’s practice consisted almost “exclusively” of criminal defense work); see also Blake v. Kemp, 758 F.2d 523, 531-32 (11th Cir. 1985) cert. denied, 106 S. Ct. 374 (1985) (failure of state to provide examining psychiatrist with defendant’s confession and incriminating letter deprived defendant of effective assistance of counsel; actions made “the outcome of the trial presumptively unreliable”); see generally Gideon’s Realities, supra note 296.
459. Id. at 205. The parties were also directed to file the records of petitioner’s hospital stay.
460. See Strickland, 104 S. Ct. at 2071.
461. On at least one subsequent occasion, the court has declined an opportunity to consider the issues raised by Strickland in a fact-context arguably more striking than Rivera. See Alford v. Wainwright, 105 S. Ct. 355 (1984) (Marshall, J., dissenting from denial of certiorari), where defense counsel accepted his client’s refusal to rely on the insanity defense with “no independent investigation of his client’s mental or criminal history,” in spite of fact that the record “demonstrate[d] unequivocally” that defendant had history of mental illness, and had been found not guilty by reason of insanity on murder charges six years prior to the indictment in the instant case. Id. at 356. Because the defendant was ultimately found competent to stand trial, the Eleventh Circuit found that trial counsel was “ethically bound to follow his client’s wishes” to not pursue the insanity defense. Alford v. Wainwright, 725 F.2d 1282, 1289 (11th Cir. 1984), aff’d, 564 F. Supp. 459 (N.D. Fla. 1985). In his angry dissent from certiorari denial, Justice Marshall — writing for himself and Justice Brennan — concluded:
ANCE STANDARDS.\[462]\n
**CONCLUSION**

At first examination, *Barefoot, Ake* and *Strickland*, appear irreconcilable. In *Strickland*, the Supreme Court established a nearly-standardless, seemingly-impossible-to-fail test for adequacy of counsel in the fact context of a death penalty case in which trial counsel's failure to explore defendant's mental state as a potential mitigating factor was characterized as a reasonable "strategic choice."\[463]\n
In *Barefoot*, the Court approved the use of psychiatric opinion evidence to predict dangerous behavior to such an extent that the defendant would probably commit future "criminal acts of violence that would constitute a continuing threat to society,"\[464]\n
even where the testifying witness never personally examined the defendant. In *Ake*, it found a constitutional right for indigent defendants to access to an independent psychiatric evaluation where such a defendant has preliminarily shown that "his sanity at the time of the offense is likely to be a significant factor at trial."\[465]\n
Underlying all of these decisions is nothing less than a sea of ambiguity and ambivalence.

Although the Court has not yet rejected its language of nearly a decade ago that "death is different,"\[466]\n
its rulings in these cases reflect an overwhelming ambivalence\[467] towards this doctrine. In *Ake*, it is rigidly adhered to;\[468]\n
in *Strickland*, it is paid little more than lip service;\[469]\n
and in *Barefoot*, it is turned

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The lower court has countenanced a view of counsel's constitutional duty that is blind to the ability of the individual defendant to understand his situation and usefully assist in his defense. The result is to deny to the persons who are most in need of it the educated counsel of an attorney.


467. For the classic definition of "ambivalence," see *Alexander, Fundamentals of Psychoanalysis* 107-08 (1948).
468. 105 S. Ct. at 1094.
469. 104 S. Ct. at 2064. At least one recent comment specifically criticized *Strickland* for the court's "failure to formulate tests that sufficiently reflect the unique character of
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on its head.\footnote{1985} While the Court apparently remains concerned as to the quality of representation offered to criminal defendants,\footnote{470} it shows a level of deference to counsel's "reasonable professional judgment"\footnote{471} in \textit{Strickland} that it had heretofore reserved for decision-making by mental health professionals.\footnote{472} While its \textit{Barefoot} decision might be read as containing the seeds of the \textit{Ake} holding—being partially premised on the assumption that a defendant would have access to his own expert\footnote{473}—it must also be read in light of the well-documented inadequacy of most counsel to adequately cross-examine psychiatric expert witnesses.\footnote{474} While \textit{Ake} finds that "meaningful access to justice"\footnote{475} is the bellwether of fair trial (specifically contemplating an indigent defendant's right of "access to the raw materials integral to the building of an effective defense"),\footnote{476} \textit{Strickland} relegates counsel's failure to seek similar outside expert assistance to the level of a reasonable "strategic choice."\footnote{477} \textit{Barefoot} rejects the notion that psychiatric testimony about future dangerousness is inherently untrustworthy;\footnote{478} \textit{Ake} explicitly fears "the [extremely high] risk of an inaccurate resolution of sanity issues"\footnote{479} because of the scientific inexactitude of psychiatry and incidence and degree of professional disagreement on the diagnosis and classification of capital cases." \textit{Note}, \textit{The Ineffective Assistance of Counsel Quandry: The Debate Continues}, 18 AKRON L. REV. 325, 333 (1984); \textit{see generally}, Goodpaster, \textit{supra} note 412, at 300-05. But cf. \textit{State v. Nash}, 143 Ariz. 392, 397, 694 P.2d 222, 228 (1985) (adopting \textit{Strickland} because its "objective standard provides better guidance to lawyers and judges" than would a "more subjective" test).

\footnote{470} 463 U.S. at 888. \textit{See also}, e.g., Geimer, \textit{supra} note 155, at 739 ("it is the Court itself which has helped return the law of death to the same roulette wheel proposition it was at the time of \textit{Furman}, and even that game is rigged").

\footnote{471} \textit{Evitts v. Lucey}, 105 S. Ct. 830 (1985) (right to effective assistance of counsel on first appeal of right).

\footnote{472} 103 S. Ct. at 2066.
\footnote{474} \textit{Ake}, 105 S. Ct. at 1097.
\footnote{476} \textit{Ake}, 105 S. Ct. at 1094.
\footnote{477} \textit{Id.} at 1093.
\footnote{478} \textit{Strickland}, 104 S. Ct. at 2052.
\footnote{479} \textit{Barefoot}, 463 U.S. at 894.
\footnote{480} \textit{Ake}, 105 S. Ct. at 1096.
tion of mental illness.481

Can these circular conflicts be sorted out? While psychiatric testimony was at (or near) the heart of the issue in each of the three cases, the insanity defense was an issue only in Ake. To a lay observer, Glenn Barton Ake might have been the only defendant to conform to common notions of “craziness.”482 Although appropriate psychiatric testimony might have served as the basis of a nonstatutory mitigating factor in Strickland and as the basis of a rebuttal to the Holbrook-Grigson testimony in Barefoot, it does not appear that the pleading of the insanity defense was ever seen as a serious option in either case.

Although the “universe of death penalty issues is shrinking rapidly,”483 the fear of executing the “truly insane” is still a powerful one.484 The combination of Hinckley-verdict-inspired legislative restrictions485 and the Court’s decision in Jones v. United States486 will no doubt limit the already-miniscule universe of successful insanity pleas.487 And, it is not unreasonable to infer that—for whatever motivations—the Court is engaging in a self-measured “fundamental fairness” analysis of death pen-

482. See, e.g., Ake, 105 S. Ct. at 1091, and supra note 239. On the question of the Court’s perception of how close a defendant so conforms, see, e.g., Perlin, Psychiatric Testimony in a Criminal Setting, 3 BULL. AM. ACAD. PSYCH. & L. 143, 148 (1975), quoting Laswell, Forward, in ARENS, THE INSANITY DEFENSE xi (1974). For a clinical discussion of the “genuinely insane,” see Rachlin, Halpern & Portnow, The Volitional Rule, Personality Disorders and the Insanity Defense, 14 PSYCH. ANNALS 143, 148 (1984). For an analysis of abnormal behavior perceived as “crazy”—“an intuitive or commonsense meaning of abnormal that reflects social evaluations and values”—see Morse, supra note 270, at 549. See also, id. at 564-89, 640-45 & 654 (“If any class of crazy persons is to be treated differently, every attempt should be made to ensure that only a tiny fraction of crazy persons who seem clearly and totally crazy should be singled out”) (emphasis added). Cf., e.g., Ellsworth, Nukaty, Cowan & Thompson, The Death Qualified Jury and the Defense of Insanity, 8 L. & HUM. BEHAV. 81, 91 (1984) (“death-qualified” jurors in controlled simulated study estimated that only 31% of defendants who plead insanity “really are” insane).
483. Proportionality Review, supra note 57.
484. As the Supreme Court of Mississippi put it somewhat floridly over thirty years ago, “Amid the darker midst of mental collapse, there is no light against which the shadow of death may be cast.” Musselwhite v. State, 215 Miss. 363, 60 So. 2d 807, 809 (1952). But cf. Alvord v. Wainwright, 105 S. Ct. 355 (1984), discussed supra at note 461.
485. See generally, Hinckley’s Trial, supra note 15.
ality cases to avoid specific, individual executions that "shock the conscience," especially in cases involving the powerful symbol of the insanity defense.

The Court remains overwhelmingly ambivalent about the issues at hand—adequacy of counsel, scope of admissibility of expert testimony, meaningful access to independent expert assistance, and the interplay between mental incapacity (whether or not it rises to the level of satisfying the elements of the insanity defense)—and the death penalty. As noted above, Paul Appelbaum has suggested that the Court's "tortuous" reasoning is outcome-determinative; it serves to further a specific "transcendent ideological goal." Subsequently, Appelbaum specifically applied this analysis to Barefoot, finding the Court's behavior there "explicable," in specific furtherance of its decision to "look with disfavor on further efforts to impede application of the death penalty." While Appelbaum is most likely right—if the "fundamental fairness"/"shocks the conscience" test suggested above is accepted, the Court's apparently-contrary decision in Ake appears at least not inconsistent—there is probably a deeper and murkier explanation available as well.

The Supreme Court remains fascinated with all aspects of mental disability law, especially in the context of cases involving the mentally disabled in the criminal law process. Like the moth drawn to the flame, it continues to grant certiorari in a whole range of disability cases, in contexts including special

489. See supra note 1.
490. The court is, of course, no stranger to ambivalence in death penalty cases. For a comprehensive and penetrating analysis of the Court's approach to "a dark reminder of our recent legal past," see Miller & Bowman, "Slow Dance on the Killing Ground": The Willie Francis Case Revisited, 32 DePaul L. Rev. 1, 4 (1985) (analyzing the Court's behavior in Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947), with special attention to Justice Frankfurter's public and private positions).
491. See supra text accompanying notes 121-22.
492. Appelbaum, supra note 120, at 831.
493. Dr. Applebaum Replies, supra note 120, at 388.
494. Id.
497. See, e.g., City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985); Scanlon v. Atascadero State Hospital, 105 S. Ct. 3142 (1985); Heckler v. American Hos-
education, and employment rights. While this may well be a partial reflection of the Chief Justice's well-documented preoccupation with psychiatry in the courts (and a residue of his lengthy battles with Judge Bazelon when both sat on the District of Columbia Court of Appeals), this cannot be the entire answer. More likely, when dealing with the mentally ill, the members of the Court—like the rest of us—are beset by ambiguous and ambivalent feelings in need of self-rationalization: unconscious feelings of awe, of fear, of revulsion, of wonder.

When these feelings are weighed in the symbolic context of the putatively mentally ill criminal defendant—caught in “the...
pandemonium between the mad and the bad"—the conflicts in the Court's recent holdings appear, if not entirely irreconcilable, at least comprehensible. Perhaps if at least some members of the Court were to acknowledge the depth of these feelings and their desire to reconcile them, then some doctrinal consistency might be within the realm of possibility. Short of this, it is likely that the Court will remain a prisoner of external symbols and internal impulses, and its future holdings will continue to defy any sort of meaningful harmonization.


The leading (and most comprehensive) article on this population is German & Singer, Punishing the Not Guilty: Hospitalization of Persons Acquitted By Reason of Insanity, 29 Rutg. L. Rev. 1011 (1976) (not guilty by reasons of insanity patients "doubly cursed" and "doubly neglected"). The authors conclude that "no group of patients has been more deprived of treatment, discriminated against, or mistreated than persons acquitted of crime on grounds of insanity." Id. at 1074.

506. The temptation to characterize these impulses as "irresistible" is irresistible. The Author wishes to thank Karen Binder, Thomas Damrauer, Isabel Johnston and Peter Margulies for their support and assistance.