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"THEIR FUTURES, SO FULL OF DREAD": HOW *BAREFOOT'S* CONTAMINATION OF THE DEATH PENALTY TRIAL PROCESS CONTINUES

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ABSTRACT

Forty years ago, in its most roundly-criticized criminal procedure decision in modern history, the Supreme Court of the United States, in Barefoot v. Estelle (463 U.S. 880 (1983))—a decision premised on testimony by the responses to a hypothetical of a witness who had never directly evaluated the defendant—ruled that such testimony as to future dangerousness (testimony that had concluded there was a "100% chance" the defendant would commit more crimes if released into society) was permissible. Over a stinging dissent by Justice Blackmun, the Supreme Court ruled in Barefoot that it was not constitutional error for psychiatrists to testify that the defendant—whom they had never interviewed, nor evaluated—"would probably commit further acts of violence and represent a continuing threat to society." The problems caused by Barefoot plague the legal system today, especially since we have learned more about the meaning of "dangerousness" in this context, the accuracy of predictivity, the use of assessment instruments, the heuristics used by jurors in coming to conclusions about dangerousness, and more.

In the years since Barefoot, the Supreme Court has returned to related questions of evidence admissibility on multiple occasions, most notably (for the purposes of our inquiries) in Daubert v. Merrill Dow Pharmaceuticals Inc. (509 U.S. 579 (1993)) and Kumho Tire Co. v. Carmichael (526 U.S. 137 (1999)). These cases and their progeny, however, have had "negligible impact" on post-Barefoot litigation.

We know that the Fifth Circuit has been abysmal in enforcing decisions that grant criminal defendants in death penalty cases even minimal rights in cases involving adequacy of counsel and imposition of the death penalty on defendants who were either intellectually disabled or seriously mentally ill. We wrote this paper to assess how that Circuit has construed Barefoot for the past forty years.

The cases we discuss fall mainly into these groupings:

- *Cases that rely on the shibboleth that the adversary process can be counted on to, in Justice White's unfortunate phrase, "separate the wheat from the chaff."*
- *Cases that reject Daubert's potential impact on the holding of Barefoot, in some instances finding specifically that Daubert has no application to capital cases.*
- *Cases that reject adequacy-of-counsel arguments based on Strickland v. Washington, and*
- *Cases that involve the so-called "battle of the experts."*

We argue that, in spite of the Fifth Circuit's decisions on this question, Daubert and Kumho have implicitly overruled Barefoot in this context, and that lower courts should acknowledge this. We then construe these findings through the lens of therapeutic jurisprudence (TJ), focusing on the Court's failure to take seriously defendants' Strickland-based arguments and its obeisance to the adversarial process cliche, concluding that continued adherence to Barefoot mocks TJ principles.

INTRODUCTION

Forty years ago, in its most widely-criticized criminal procedure decision in modern history,[1] the United States Supreme Court, in *Barefoot v. Estelle*—a decision premised on testimony of responses to a hypothetical from a witness who had never directly evaluated the defendant—ruled that such testimony as to future dangerousness was permissible. The testimony, given by expert witness, Dr. James Grigson, concluded, in essence, that there was a "100%" chance the defendant would commit more crimes if released into

[1] See, e.g., Paul Appelbaum, *Death, The Expert Witness, and the Dangers of Going Barefoot*, 34 HOSP. & COMMUN. PSYCHIATRY 1003 (1983); Paul S. Appelbaum, *Hypotheticals, Psychiatric Testimony, and the Death Sentence*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 169, 170–71, 176 (1984); *Murray Levine, The Adversary Process and Social Science in the Courts:* Barefoot v. Estelle, 12 J. PSYCHIATRY & L. 147, 170 (1984); C. Robert Showalter & Richard J. Bonnie, *Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 159, 164-166 (1984); William S. 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); Brock Mehler, The *Supreme Court and State Psychiatric Examinations of Capital Defendants: Stuck Inside of* Jurek *with the* Barefoot *Blues Again*, 59 UMKC L. REV. 107, 114-115, 121 (1990); D.M. Risinger, Mark P. Denbeaux & Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise,"* 137 U. PA. L. REV. 731, 780 n. 215 (1989) (stating, "[w]e have yet to find a single word of praise for, or in defense of, Barefoot in the literature of either science or law."). For more recent articles critical of *Barefoot*, *see* James Acker, *Snake Oil with a Bite: The Lethal Veneer of Science and Texas's Death Penalty*, 81 ALB. L. REV. 751, 763-69 (2017); Mayara Reyes, *Danger! The Defendant is "Disturbed." Risks of Using Psychiatric Assessments to Predict Future Dangerousness*, 17 CONN. PUB. INT. L.J. 141, 162-163 (2017); Jaymes Fairfax-Columbo & David DeMatteo, *Reducing the Dangers of Future Dangerousness Testimony: Applying the Federal Rules of Evidence to Capital Sentencing*, 25 WM. & MARY BILL RTS. J. 1047, 1056-61 (2017).

society.[2] Dr. Grigson[3] subsequently lost his accreditation by the American Psychiatric Association, but nevertheless testified in at least fifty-seven cases after he was expelled.[4]

Over a stinging dissent by Justice Blackmun,[5] the Supreme Court ruled in *Barefoot* that it was not constitutional error for psychiatrists to testify that a defendant—whom they had never interviewed, nor evaluated—"would probably commit further acts of violence and represent a continuing threat to society."[6] In response, Justice Blackmun stressed:

> (1) no "single, reputable source" was cited by the majority for the proposition that psychiatric predictions of long-term violence "are wrong more often than they are right"; (2) laymen can do "at least as well and possibly better" than psychiatrists in predicting violence";
> (3) it is "crystal-clear" from the literature that the state's witnesses "had no expertise whatever," and
> (4) such "baseless" testimony cannot be reconciled with the Constitution's "paramount concern for reliability in capital sentencing.[7]

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[2] Barefoot v. Estelle, 463 U.S. 880, 905 n.11 (1983); *see also* Nethery v. State, 692 S.W. 2d 686, 709 (Tex. Crim. App. 1985) (providing another instance of Dr. Grigson testifying that "he was 100% accurate in his predictions of future violence."). For additional reading on how "junk science" has contaminated the legal process, see Michael L. Perlin*, "Deceived Me into Thinking/I Had Something to Protect": A Therapeutic Jurisprudence Analysis of When Multiple Experts are Necessary in Cases in which Fact-finders Rely on Heuristic Reasoning and "Ordinary Common Sense,"* 13 LAW J. SOC. JUST. 88 (2020) [hereinafter, *Deceived Me into Thinking/I Had Something to Protect*].

[3] *See generally*, Flores v. Johnson, 210 F.3d 456, 467 n. 17 (5th Cir. 2000) (Garza, J., specially concurring) (citing Ron Rosenbaum, *Travels with Dr. Death,* VANITY FAIR, May 1990, at 206); *see also* Michael L. Perlin, *"Your Corrupt Ways Had Finally Made You Blind": Prosecutorial Misconduct and the Use of "Ethnic Adjustments" in Death Penalty Cases of Defendants with Intellectual Disabilities*, 65 AM. U. L. REV., 1437, 1448 n. 56 (2016) (citing testimony from Dr. Paul Appelbaum and Dr. Henry Steadman that concluded Dr. Grigson's testimony in such cases was "unethical.") [hereinafter *Your Corrupt Ways Had Finally Made You Blind*]. Dr. Appelbaum and Dr. Steadman are two of the most eminent experts in the world on these issues. For more information, *see generally Paul S. Appelbaum, MD*, COLUM. UNIV. DEP'T OF PSYCH., https://www.columbiapsychiatry.org/profile/paul-s-appelbaum-md (last visited Mar. 19, 2024); Holly Davis, *PRA Founder and President, Dr. Henry J. Steadman, Retires After an Illustrious Career*, POL'Y. RSCH. ASSOC. (Dec. 18, 2017), https://www.prainc.com/steadman-retirement/. For additional discussion on Dr. Grigson's harmful testimony, see David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L. J. 1005, 1077 n. 268 (1989) (characterizing Dr. Grigson's testimony as standing on the "fringe of accepted medical practice."); Mike Tolson, *Effect of "Dr. Death" and his Testimony Lingers*, HOUSTON CHRON. (June 17, 2004), https://www.chron.com/news/houston-texas/article/Effect-of-Dr-Death-and-his-testimony-lingers-1960299.php.

[4] *Your Corrupt Ways Had Finally Made You Blind*, *supra* note 3, at 1447 n. 53; Gardner v. Johnson, 247 F.3d 551, 556 n. 6 (5th Cir. 2001) (discussing the circumstances of Dr. Grigson's expulsion). *See also* Kathy Tran, *James Paul Grigson, Jr.*, TEX. STATE HIST. ASS'N (June 24, 2022), https://www.tshaonline.org/handbook/entries/grigson-james-paul-jr.

[5] *See* Thomas Regnier, Barefoot *in Quicksand: The Future of "Future Dangerousness" Predictions in Death Penalty Sentencing in the World of* Daubert *and* Kumho*,* 37 AKRON L. REV. 469, 490 (2004) (noting in Justice Blackmun's "positively livid dissent," he "fumes: [i]n the present state of psychiatric knowledge, this is too much for me.").

[6] *Barefoot,* 463 U.S. at 884. *See generally infra* text accompanying notes 53-73.

[7] *Id.* at 921-23.

As one of the co-authors (Perlin) has noted in a paper with two others, "[t]he problems seen in *Barefoot* continue to plague the legal system today."[8] This conclusion follows decades of developments in which we have learned more about the meaning of "dangerousness" in this context, the accuracy of predictivity, the use of assessment instruments, the heuristics used by jurors in coming to conclusions about dangerousness,[9] and more.[10]

In the years since *Barefoot,* the Supreme Court has returned to related questions of evidence admissibility on multiple occasions, most notably (for the purposes of our inquiries) in *Daubert v. Merrill Dow Pharmaceuticals Inc.*[11] and *Kumho Tire Co. v. Carmichael*.[12] Both cases were based on the

[8] Alison J. Lynch, Michael L. Perlin & Heather Ellis Cucolo, *"My Bewildering Brain Toils in Vain": Traumatic Brain Injury, The Criminal Trial Process, and the Case of Lisa Montgomery*, 74 RUTGERS L. REV. 215, 238 (2021); *see also*, Fairfax-Columbo & DeMatteo, supra note 1 at 1047. For more information about the application of Barefoot in state courts, *see*: Streetman v. State, 698 S.W.2d 132, 137 (Tex. Crim. App. 1985); *Nethery*, 692 S.W.2d at 708-709 (including testimony from Dr. Grigson); Holloway v. State, 691 S.W.2d 608, 616-17 (Tex. Crim. App. 1984) (including testimony from Dr. Grigson); Smith v. State, 683 S.W.2d 393, 409 (Tex. Crim. App. 1984); Lagrone v. State, 942 S.W.2d 602 (Tex. App. 1997), cert. denied, 522 U.S. 917 (1997). *See also* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 17-2.2, at 17-14 (3d ed. 2016) (Spring 2023 update) (citing, *inter alia*, State v. Gates, 503 A.2d 163, 166 (Conn. 1986); State v. Plath, 313 S.E.2d 619, 627 (S.C. 1984); Edmonds v. Commonwealth, 329 S.E.2d 807, 813 (Va. 1985); Woomer v. Aiken, 856 F.2d 677 (4th Cir. 1988); Moody v. Johnson, 139 F.3d 477 (5th Cir. 1998). State v. Davis, 477 A.2d 308, 310-12 (N.J. 1984) (which sanctioned the admissibility of statistical evidence by a defendant at the penalty phase of a capital case relating to empirical studies connected to the defendant's rehabilitation potential in a case where the defendant raised his character as a mitigating factor under N.J. STAT. ANN. § 2C:113c(5)). The Supreme Court of New Jersey relied on Justice Blackmun's dissent in *Barefoot* (discussed *infra*, text accompanying notes 67-73) to buttress its position. *Davis*, 477 A.2d at 311. For extensive discussion in this context, *see* Michael L. Perlin, *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*, 3 N.Y.L. SCH. HUMAN RTS. ANN. 91, 119-21 (1985) [hereinafter *Power of Symbolism: Dulling the Ake in Barefoot's Achilles Heel*]

[9] Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 392-93 (2003).

[10] Beyond the scope of this article is an inquiry into the extent to which artificial intelligence and machine learning algorithms—that increasingly allow computerized predictions concerning risks of dangerousness—may be more accurate and less discriminatory than traditional forms of testimony offered in such cases. *See e.g*., John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, 88 U. CHI. L. REV. 1285, 1297-1298 (2021).

[11] Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (allowing jurors to hear evidence and weigh facts from experts whose testimony included novel scientific theories, even if those theories had not gained "general acceptance" in the scientific community, as long as the testimony was "relevant" and "reliable.").

[12] Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999) (applying *Daubert* to non-scientific expert testimony). *See also* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 145-47 (1997) (holding the trial judge's mandate to review testimony for scientific validity was not an abuse of discretion).

Federal Rules of Evidence.[13] These cases and their progeny, however, have had a "negligible impact" on post-*Barefoot* litigation.[14] Thus, Professor John Edens and his colleagues have concluded that, "[a]lthough … *Daubert* [and] *Kumho …* may have a constraining effect on the use of clinical predictions of violence risk in capital cases, *at present these predictions continue relatively unabated,*"[15] and "there is little, if any evidence, that there has been any 'real life' impact of *Daubert* on *Barefoot* in this context."[16] As Professor Elizabeth DeCoux has sadly said in an article looking at *Barefoot* in the context of *Daubert*, "*Barefoot* appears to conclude that the only expert testimony that is to be kept from the jury is expert testimony based on a methodology that is *always* wrong. If testimony is in the category of being wrong only most of the time, the judge must admit it so the jury can evaluate it."[17]

Similarly, *Kumho* has had little impact,[18] although, a state court has made its position clear, saying that it was "impossible… to reconcile *Kumho* with

[13] *See generally Daubert*, 509 U.S. 579 (1993); *Kumho Tire Co.,* 526 U.S. 137 (1999). *See also* Paul C. Giannelli, Daubert*: Interpreting the Federal Rules of Evidence*, 15 CARDOZO L. REV. 1999, 2001-03 (1994) (discussing the United States Supreme Court's interpretation of the Federal Rules of Evidence in light of *Daubert*). A 2000 Amendment to Rule 702 codified *Daubert* as part of the Federal Rules of Evidence. *See* FED. R. EVID. 702 (2000). *But see* Brett Tarver & Rebecca E. Younker, *Proposed Amendments to Federal Rule of Evidence 702 Provide Clarification for Courts and Litigants* (Spring 2023), TROUTMAN PEPPER (last visited Apr. 1, 2024) (noting under the amended rule, lawyers must prove "it is more likely than not" that the expert testimony should be admitted under earlier set standards, which include whether the testimony is "based on sufficient facts or data" and "will help the trier of fact to understand the evidence or to determine a fact in issue."); Jacqueline Thomsen, *Updated Evidence Rule Warns Judges Against Junk Science*, BLOOMBERG LAW (Dec. 1, 2023), https://news.bloomberglaw.com/us-law-week/updated-evidence-rule-warns-judges-against-junk-science (observing the Rules Committee Note "sends a clear . . . message: [j]udges should not let expert analysis that doesn't reach a certain standard through to juries."). Rule 702 has since been amended, effective December 1, 2023, clarifying that "1) the standard for admissible expert testimony is a preponderance of the evidence standard for all four elements of the rule, and (2) the expert's opinion must demonstrate a reliable application of principles or methodology to the facts of the case." *See* Tarver & Younker.

[14] PERLIN & CUCOLO, *supra* note 8, § 17-2.2 at 17-15. *See e.g.*, Gonzales v. Stephens, No. SA-10CA-165, 2014 WL 496876, at *16 (W.D. Tex. Jan. 15, 2014) (noting the petitioner's argument that *Daubert* and *Kumho* have implicitly overruled *Barefoot* "has been rejected repeatedly, both expressly and implicitly, by the Fifth Circuit.").

[15] John Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?"*, 29 LAW & HUM. BEHAV. 55, 57 (2005) (emphasis added).

[16] PERLIN & CUCOLO, *supra* note 8, § 17-2.2, at 17-16. In general, *Daubert* has had minimal impact on the criminal justice system, and absolutely zero impact on death penalty litigation. See *infra* note 164.

[17] Elizabeth L. DeCoux, *The Admission of Unreliable Expert Testimony Offered by the Prosecution: What's Wrong with* Daubert *and How to Make It Right*, 2007 UTAH L. REV. 131, 159-60 (2007) (emphasis added). *Compare with* United States v. Scheffer, 523 U.S. 303, 334 (1998) (Stevens, J., dissenting) (citing *Barefoot*, Justice Stevens notes "[t]here is no legal requirement that expert testimony must satisfy a particular degree of reliability to be admissible. Expert testimony about a defendant's 'future dangerousness' to determine his eligibility for the death penalty, even if 'wrong most of the time,' is routinely admitted." (emphasis added)).

[18] *See e.g*., *Gonzales*, 2014 WL 496876, at *16. ("Petitioner's contention that *Daubert* and *Kumho Tire* implicitly overruled *Barefoot*'s holding regarding the admissibility of expert opinion testimony regarding future dangerousness in a capital murder trial has been rejected by the Fifth Circuit consistently and does not warrant federal habeas corpus relief.").

the Court's earlier decision in *Barefoot."*[19] At least one post-*Kumho* case minimizes its significance, summarily dismissing defendants' arguments in this manner: "[Defendant] primarily cites law review articles along with *a few cases interpreting the Federal Rules of Evidence,"* listing *Daubert* and *Kumho.*[20]

Post-*Barefoot* developments must also be considered in the context of *Strickland v. Washington,*[21] which established a "pallid, nearly-impossible-to-violate" standard[22] in determinations of adequacy of counsel.[23] Although numerous defendants in post-*Barefoot* cases have argued that counsel was ineffective either for not cross-examining vigorously on the question of dangerousness assessments, or for failing to properly rebut future dangerousness

[19] Logerquist v. McVey, 1 P.3d 113, 126 (Ariz. 2000); *compare with* State ex rel. Romley v. Fields, 35 P.3d 82, 89 (Ariz. Ct. App. 2001) (involving the use of risk assessment tools in determining whether someone should be classified as a sex offender. "Unlike DNA and other types of 'scientific' evidence, these risk assessment tools do not have an aura of scientific infallibility."). *See also* D.H. Kaye, *Choice and Boundary Problems in* Logerquist, Hummert, *and* Kumho Tire, 33 ARIZ. ST. L. J. 41, 58 (2001) (". . . *Barefoot* plainly leaves open the possibility that *Daubert* or *Kumho Tire* would require exclusion of the expert testimony."). In *Cloud v. Pfizer, Inc*., which involved psychiatric testimony, the plaintiff argued *Barefoot* "establishes . . . a different and relaxed standard applied to behavioral scientists." Cloud v. Pfizer, Inc., 198 F.Supp.2d 1118, 1135 (D. Ariz. 2001). The Court rejected this argument, noting "the Court's gatekeeping function remains the same." *Id*. (citing *Kumho*., 526 U.S. at 141). It is axiomatic that states may grant more rights to criminal defendants based on state constitutional law than they might be entitled to under federal constitutional law. For additional case law and scholarship on the matter, *see*: Davenport v. Garcia, 834 S.W.2d 4, 40 (Tex. 1992) (Hecht., J., concurring) ("It cannot be denied that there are rights protected by state constitutions that extend beyond those guaranteed by the United States Constitution"); Erwin Chermerinsky, *State Constitutions as the Future for Civil Rights*, 48 N.M. L. REV. 259, 264 (2018); (Justice) William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (noting state constitutions were "font[s] of individual liberty" that often provide greater protection than the Supreme Court's interpretation of federal law); Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier*, 20 LOY. L.A. L. REV. 1249 (1987) (discussing great state constitutional protections in the context of rights for persons institutionalized because of mental disabilities).

[20] West v. Allen, 868 F.Supp.2d 1224, 1309 (N.D. Ala. 2011) (emphasis added).

[21] Strickland v. Washington, 466 U.S. 668, 684 (1984) (considering "the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the ineffective assistance of counsel.").

[22] *See* Michael L. Perlin, *''The Executioner's Face is Always Well-Hidden'': The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 205-06 (1996) [hereinafter *The Executioner's Face is Always Well-Hidden*]; MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 123-38 (2013); Michael L. Perlin & Alison J. Lynch, *''My Brain is so Wired'': Neuroimaging's Role in Competency Cases Involving Persons with Mental Disabilities*, 27 B.U. PUB. INT. L.J. 73, 92-93 (2018).

[23] *Strickland* required simply that counsel's efforts be "reasonable" under the circumstances. *Strickland*, 466 U.S. at 669. "[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.'" *Strickland,* 466 U.S. at 689.

evidence,[24] courts have routinely found that this was either a strategic decision by counsel and/or did not constitute prejudice to the defense.[25] In at least one Fifth Circuit case and multiple district court cases, the *fear* that the state would call Dr. Grigson (or a psychiatrist who would have testified in the same mode as Dr. Grigson) on rebuttal was enough to animate defense counsel's decision to not seek a mental status examination of the defendant in the first place.[26]

We also know that the Fifth Circuit has been abysmal in enforcing decisions that grant criminal defendants in death penalty cases even minimal rights. Two of the co-authors (MLP & TRH) and a third have thus concluded, in a trilogy of earlier articles, that:

> in S*trickland* cases, "the Fifth Circuit regularly and consistently mocked the idea of adequate and effective counsel"[27];
>
> in cases seeking to enforce *Atkins v. Virginia*, purportedly banning capital punishment in cases of defendants with intellectual disabilities,[28] the Circuit's decisions were "an embarrassment to our system of criminal law and procedure,"[29] and "infinitely depressing,"[30] and
>
> in cases seeking to enforce *Panetti v. Quarterman,* also purportedly banning capital punishment in cases involving defendants who were seriously mentally ill,[31] its decisions were "even more astonishing" than were its post-*Strickland* and

[24] See *infra* cases accompanying note 119.

[25] See *infra* text accompanying note 194, and note 194. *See generally* Michael L. Perlin, Talia Roitberg Harmon & Sarah Chatt, *"A World of Steel-Eyed Death": An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. MICH. J. L. REFORM 261, 304 (2019) (discussing the minimalistic way the Fifth Circuit has interpreted *Strickland* in the context of cases involving death penalty defendants with serious mental disabilities alleging ineffective assistance of counsel).

[26] *See* Lewis v. Cockrell, No. 3-93-329-G, 2002 WL 1398554 at *2 (N.D. Tex. June 26, 2002); *see also*, Threadgill v. Quarterman, No. CIV.A. 3:05-CV-2217-, 2009 WL 2448499 at *21 (N.D. Tex. Aug. 10, 2009) (defense counsel chose not cross-examine the State's expert out of fear that the witness would have testified in a Grigson-esque way); Brewer v. Dir., TDCJ-CID, No. 2:15-CV-50-Z-BR, 2021 WL 6845600 at *54 (N.D. Tex. Sept. 30, 2021) ("[T]he defense made the decision not to have Brewer evaluated by a mental health expert because it could open the door to Brewer being interviewed and evaluated by a prosecution mental health expert.").

[27] Perlin, Harmon & Chatt, *supra* note 25, at 308. *See also* Anna VanCleave, *The Illusion of Heightened Standards in Capital Cases*, 2023 U. ILL. L. REV. 1289, 1291-92 (discussing how capital cases are often *not* as procedurally rigorous as expected, or hoped for).

[28] Atkins v. Virginia, 536 U.S. 304, 320-21 (2002).

[29] Perlin, Harmon & Chatt, *supra* note 25, at 309.

[30] Michael L. Perlin, Talia Roitberg Harmon & Sarah Wetzel, *"Man Is Opposed to Fair Play": An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously* Atkins v. Virginia, 11 WAKE FOREST J. L. & POL'Y 451, 497 (2021).

[31] Panetti v. Quarterman, 551 U.S. 930, 958-60 (2007).

> post-*Atkins* decisions.[32] In the latter analysis we found that there "has not been *a single case* decided by the Fifth Circuit in the fourteen years since *Panetti* in which that Circuit found that a defendant was not competent to be executed."[33]

We approached this project with that background in mind. In this article we examine how the Fifth Circuit has construed *Barefoot*, especially in light of (1) what we have learned about predictions of future dangerousness, (2) how contemporaneous, valid and reliable evidence has taught us that, in these contexts, "predictions of future dangerousness are no better than random guesses,"[34] (3) the impact of *Daubert* and *Kumho* on *Barefoot* decision making, and (4) how these issues have been construed in cases involving effectiveness of counsel per the Supreme Court's decision in *Strickland v. Washington*.

The Fifth Circuit cases we discuss fall mainly into these groupings:[35]

> Cases that rely on the shibboleth that the adversary process can be counted on to, in Justice White's unfortunate phrase, "separate the wheat from the chaff."
>
> Cases that reject *Daubert's* potential impact on the holding of *Barefoot,* in some instances finding specifically that *Daubert* has no application to capital cases.
>
> Cases that reject *Strickland*-based arguments, and
> Cases the purportedly involve the so-called "battle of the experts."

We argue that, in spite of the Fifth Circuit's decisions on this question, *Daubert* and *Kumho* have implicitly overruled *Barefoot,* and that lower

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[32] Michael L. Perlin & Talia Roitberg Harmon, *"Insanity is Smashing up Against My Soul": The Fifth Circuit and Competency to be Executed Cases after* Panetti v. Quarterman, 60 U. LOUISVILLE L. REV. 555, 561 (2022) [hereinafter *Insanity is Smashing Up Against My Soul*].

[33] *Id.* For additional commentary on federal and state court decisions on *Panetti* enforcement issues discussed *supra*, *see* Michael L. Perlin, Talia Roitberg Harmon & Haleigh Kubiniec, *"The World of Illusion is at My Door": Why* Panetti v. Quarterman *is a Legal Mirage*, 59 CRIM. L. BULL. 273 (2023); Michael L. Perlin, Talia Roitberg Harmon & Maren Geiger, *"The Timeless Explosion of Fantasy's Dream": How State Courts Have Ignored the Supreme Court's Decision in* Panetti v. Quarterman, 49 AM. J. L. & MED. 205 (2023).

[34] Mary Marshall, Note, *Miller v. Alabama and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1656 (2019).

[35] In cases decided at the district court level (in which *Barefoot* issues were not considered on appeal), courts also considered *Barefoot* in the context of the significance of race in future dangerousness determinations [Barefoot was Caucasian], and in the context of the use of the psychopathy "checklist." See *infra* text accompanying note 209.

courts should acknowledge this.[36] We then construe these findings through the lens of therapeutic jurisprudence ("TJ"), focusing on the Court's failure to take seriously defendants' *Strickland*-based arguments and its obeisance to the adversarial process cliche, concluding that continued adherence to *Barefoot* mocks TJ principles.

The title of this article draws, in part, on Bob Dylan's complex song, *Jokerman,*[37] a song whose lyrics one of the authors (MLP) has drawn upon for article titles three times previously.[38] The song, in part, tells us that evil "is inside us all,"[39] and reflects a "renewed skepticism" about "closed and fixed points of view."[40] The quoted lyrics come from this couplet:

> Fools rush in where angels fear to tread
> Both of their futures, so full of dread, you don't show one[41]—
> Shedding off one more layer of skin
> Keeping one step ahead of the persecutor within.[42]

In the cases we discuss in this article, the prosecutor—using the legally and morally corrupt testimony of witnesses such as Dr. James Grigson—becomes the *persecutor.* The defendants unlikely were *angels*; it is not clear if the attorneys in some of the cases we discuss[43] were or were not *fools*. But there is no question in our mind that the defendants' futures were—as a result of the sanctioning of this testimony by trial and appellate

[36] The authors understand that a lower court cannot "overrule" a Supreme Court case, of course. But such a court can articulate the position that its enforcement of *Barefoot* is conceptually, *ethically,* legally and, from a social policy perspective, incorrect—and urge the Supreme Court to reconsider its holding—*especially* in the context of *Daubert* and its progeny; *see* Erica Beecher-Monas, *Heuristics, Biases, and the Importance of Gatekeeping*, 2003 MICH. ST. L. REV. 987, 1001 (2003): "[t]he question of whether initial screening by the judge for scientific validity is necessary for rationality is one on which even the Supreme Court is divided. The Supreme Court in *Barefoot v. Estelle* thought the adversary system could be relied upon to present enough information to jurors so that they could sort reliable from unreliable expert testimony. The *Daubert* Court thought expert testimony needed to be screened for relevance first. Which Court was correct?").

[37] *See* BOB DYLAN, JOKERMAN (Columbia Records 1983).

[38] *See* Michael L. Perlin & Heather Ellis Cucolo, *"Take the Motherless Children off the Street": Fetal Alcohol Syndrome and the Criminal Justice System,* 77 U. MIAMI L. REV. 561, 568 (2023) [hereinafter *Take the Motherless Children off the Street*]; Michael L. Perlin & Naomi M. Weinstein, *"Friend to the Martyr, a Friend to the Woman of Shame": Thinking About the Law, Shame and Humiliation*, 24 S. CAL. REV. L. & SOC. JUST. 1, 6 (2014); Heather Ellis Cucolo & Michael L. Perlin, *"Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J. L. & SOC. CHANGE 125, 134 (2015).

[39] *See e.g.*, MICHAEL GRAY, THE BOB DYLAN ENCYCLOPEDIA 364 (2008).

[40] *See* MICHAEL GRAY, SONG & DANCE MAN III: THE ART OF BOB DYLAN 516 (2000) (quoting AIDAN DAY, JOKERMAN: READING THE LYRICS OF BOB DYLAN (1984).

[41] *Jokerman*, BOB DYLAN, https://www.bobdylan.com/songs/jokerman/. (last visited Apr. 16, 2024).

[42] *Id.*

[43] Especially, for example, those attorneys in the cases raising *Strickland* issues. See *infra* text accompanying notes 115-20.

courts—"full of dread."[44] Certainly, to return to the full lyrics again, the state of affairs that we seek to deconstruct here is, to a great measure, the result of the willful blindness[45] of many of the "false-hearted judges" to whom Dylan refers elsewhere in the song.[46]

There is no question that the criminal trial process in cases involving defendants with serious mental disabilities charged with serious offenses is, to return again to the song's lyrics, "a shadowy world."[47] As a result of the decision in *Barefoot,* many of the defendants in the cases we discuss wind up, symbolically, in a "fiery furnace."[48] We hope the references to this song will help contextualize for readers the developments in this area of the law.

I. BAREFOOT V. ESTELLE

A. The Case, Commentary and Critique[49]

After Thomas Barefoot was convicted of murdering a Texas police officer, two psychiatrists[50] testified in response to hypothetical questions at the pen-

[44] See *infra* note 210. Nine of the defendants in cases decided by the Fifth Circuit have been executed, as were seven of the defendants in the grouping of district court cases that we have examined.

[45] *See* Glob.-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 767 (explaining that under the criminal law doctrine of willful blindness, a defendant must subjectively believe that there is a high probability that a fact exists, and must take deliberate actions to avoid learning of that fact). Under this doctrine, individuals "deliberately shield[ ] . . . themselves from clear evidence of critical facts that are strongly suggested by the circumstances." *Glob.-Tech Appliances, Inc.*, 563 U.S. at 766.

[46] On the role of judicial corruption in Dylan's lyrics in general, *see* Michael L. Perlin, *Tangled up in Law: The Jurisprudence of Bob Dylan,* 38 FORDHAM URB. L.J. 1395, 1417 (2012).

[47] *Jokerman*, *supra* note 41.

[48] *Id.*

[49] *See generally*, PERLIN & CUCOLO, *supra* note 8, §§ 17-2.1 to 17-2.2, at 17-3 to 17-16.1.

[50] As noted above, one of those psychiatrists—Dr. James Grigson, known as "Dr. Death"—was ultimately expelled by both the American Psychiatric Association and the Texas Psychiatric Association. The expulsion followed his use of competency examination results against a defendant during the punishment phase of his trial, and his claim of "100-percent accuracy" in predicting how dangerous a defendant he had never examined would be in future years. *See* text accompanying *supra* note 4; Mike Tolson, *supra* note 3. Dr. Grigson's aura was so powerful that there have been multiple instances of defense counsel making the tactical decision to *not* call a witness of his own, so as to prevent the state from calling Dr. Grigson on rebuttal. *See e.g.*, *Lewis v. Cockrell,* 2002 WL 1398554 at *2 (The decision not to seek a psychological evaluation was a deliberate decision made by Byck [defense counsel]. Essentially Byck was fearful that any examination of Lewis while confined in the Dallas County Jail would be quickly known to the district attorney's office which would result in the prosecution calling Dr. James Grigson as an expert witness in the punishment phase. Based upon his own prior experience in defending capital murder cases in which Dr. Grigson testified, Byck was well aware of the persuasive power of Dr. Grigson's testimony. He took a calculated risk that if he did not pursue psychological testing for Lewis, the State would not call Grigson).

alty phase of the trial. They testified that the defendant "would probably commit further acts of violence and represent a continuing threat to society."[51] The jury subsequently accepted this testimony and imposed the death penalty.[52]

Barefoot's conviction was affirmed by the state courts,[53] and his application in federal district court for a writ of habeas corpus was denied.[54] After the Fifth Circuit affirmed the district court's denial,[55] the Supreme Court agreed to hear the case. The Court summarized defendant's claims in this manner:

> 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.[56]

The Court first rejected the argument that psychiatrists could not reliably predict future dangerousness in this context. The Court noted that it made "little sense" to exclude *only* psychiatrists from the "entire universe of persons who might have an opinion on this issue,"[57] and that the defendant's argument would also "call into question those other contexts in which predictions of future behavior are constantly made."[58] In the course of this argument, the Court rejected the views presented by the American Psychiatric

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[51] *Barefoot*, 463 U.S. at 884. For details on this aspect of *Barefoot*, *see* Ana M. Otero, *The Death of Fairness: Texas's Future Dangerousness Revisited,* 4 U. DENV. CRIM. L. REV. 1, 30 (2014). For discussion on the other state psychiatrist in this case in a different context, *see* CHLOE DEAMBROGIO, JUDGING INSANITY, PUNISHING DIFFERENCE 116-17 (2024). Deambrogio discusses Dr. James Holbrook's homophobic testimony in Leath v. State, 346 S.W.2d 346 (Tex. Crim. App. 1961), even quoting the trial transcript: "[homosexual psychopaths] have no close relationship with anyone. They live in a jungle *just like a lion or a tiger or any other wild animal*." (emphasis added by Deambrogio).

[52] *Barefoot*, 463 U.S. at 884. Dr. Grigson's testimony here mirrored his testimony in other Texas death penalty cases. *See e.g.*, DEAMBROGIO, *supra* note 51, at 150 (discussing Dr. Grigson's testimony in the death penalty case of Burks v. State, 583 S.W.2d 389 (Tex. Crim. App. 1979), in which Grigson testified, "[a]s long as he lives, he's going to be a danger to society whether it be inside a prison wall or whether it's outside, wherever it is, as long as he lives.") In response to the question, "Can't [he] be rehabilitated?", Grigson responded, "There's absolutely nothing that can be done." DEAMBROGIO, *supra* note 51, at 151 (quoting Grigson testimony, vol. 2, 779:17-25).

[53] Barefoot v. State, 596 S.W.2d 875 (Tex. Crim. App. 1980).

[54] *See Barefoot,* 463 U.S. at 885.

[55] Barefoot v. Estelle, 697 F.2d 593 (5th Cir. 1983).

[56] *Barefoot,* 463 U.S. at 896.

[57] *Id.* at 897.

[58] *Id.* at 898.

Association as *amicus* that: (1) such testimony was invalid due to "fundamentally low reliability,"[59] and (2) long-term predictions of future dangerousness were essentially lay determinations that should be based on "predictive statistical or actuarial information that is fundamentally nonmedical in nature."[60]

On the question of testifying in such a case in response to a hypothetical, the Court simply held that expert testimony "is commonly admitted as evidence where it might help the fact finder do its assigned job,"[61] and that the fact that the witnesses had not examined the defendant "went to the weight of their testimony, not to its admissibility."[62]

This position was squarely rejected in Justice Blackmun's dissent (for himself, Justice Brennan and Justice Marshall):

> The Court holds that psychiatric testimony about a defendant'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 heinous 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 untouchability of a medical specialist's words, equates with death itself.[63]

As noted previously,[64] Justice Blackmun made four main points: that there was not a single valid source supporting the majority's position on the validity of psychiatric predictions of dangerousness, that lay persons did at least as well as psychiatrists in such prediction-making, that the state's witnesses had no authentic expertise, and that the testimony before the court ignored

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[59] *See Barefoot*, 463 U.S. at 899 (1983); *see* Brief Amicus Curiae for the American Psychiatric Ass'n at 4, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080).

[60] *See Barefoot*, 463 U.S. at 900-01 (1983); *see* Brief Amicus Curiae for the American Psychiatric Ass'n at 5, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080). The specific predictivity problems raised in cases involving defendants such as Barefoot—diagnosed as a "criminal sociopath" and suffering from a "classical, typical, sociopathic personality disorder," *Barefoot,* 463 U.S. at 917–19,—were discussed comprehensively prior to the argument and decision in the *Barefoot* case. *See generally* George E. Dix, *Clinical Evaluation of the "Dangerousness" of "Normal" Criminal Defendants,* 66 VA. L. REV. 523, 532–50 (1980); *see generally* George E. Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics,* 5 AM. J. CRIM. L. 151, 175-92 (1977); *see also id.* at 172 ("Dr. Grigson operates 'at the brink of quackery.'").

[61] *Barefoot*, 463 U.S. at 903.

[62] *Barefoot*, 463 U.S. at 904.

[63] *Barefoot*, 463 U.S. at 916.

[64] *See supra* text accompanying notes 5-10.

the Constitution's "paramount concern for reliability in capital sentencing."[65]

Because such purportedly scientific testimony—though "unreliable [and] prejudicial"[66]—was imbued with an "aura of scientific infallibility,"[67] it could easily lead "the jury to accept it without critical scrutiny."[68] Justice Blackmun charged: "When the court knows full well that psychiatrists' predictions of such testimony are specious, there can be no excuse for imposing on the defendant, on pain of his life, the heavy burden of convincing a jury

[65] *See Barefoot*, 463 U.S. at 923, 923 n.6 ("Although I believe that the misleading nature of any psychiatric prediction of future violence violates due process when introduced in a capital sentencing hearing, admitting the predictions in this case—which were made without even examining the defendant—was particularly indefensible.") Justice Blackmun continued in this way: "The Court does not see fit to mention this principle [the paramount need for reliability] today, yet it is as firmly established as any in our Eighth Amendment jurisprudence. The Court does not see fit to mention this principle today, yet it is as firmly established as any in our Eighth Amendment jurisprudence . . . See *Eddings v. Oklahoma,* 455 U.S. 104, 110–112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982) (plurality opinion) (capital punishment must be "imposed fairly, and with reasonable consistency, or not at all"); *id.,* at 118–119, 102 S.Ct., at 877–879 (O'CONNOR, J., concurring); *Beck v. Alabama,* 447 U.S. 625, 637–38, and n. 13, 100 S.Ct. 2382, 2389–2390, and n. 13, 65 L.Ed.2d 392 (1980); *Green v. Georgia,* 442 U.S. 95, 97, 99 S.Ct. 2150, 2151, 2152, 60 L.Ed.2d 738 (1979); *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); *Gardner v. Florida,* 430 U.S. 349, 359, 97 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977) (plurality opinion); *id.,* at 363–364, 97 S.Ct., at 1207–1208 (White, J., concurring). *Barefoot*, 463 U.S. at 924-25 (Blackmun, J., dissenting)."

[66] *Barefoot*, 463 U.S. at 926.

[67] *Barefoot*, 463 U.S. at 926 (citing Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980)).

[68] *Id*.

of laymen of the fraud.."[69] The commentary on *Barefoot* has been, and continues to be,[70] uniformly negative.[71] Commentators have unanimously criticized how the Court dealt with psychiatric testimony as "amazingly naïve,"[72] underscoring that it flies in the face of carefully crafted guidelines suggesting

[69] *Id.* at 935-36.

[70] *See, e.g.*, Gabriella Argueta-Cevallos, *A Prosecutor with a Smoking Gun: Examining the Weaponization of Race, Psychopathy, and ASPD Labels in Capital Cases*, 53 COLUM. HUM. RTS. L. REV. 624, 628-29 (2022) ("*Barefoot* . . . demonstrate[s] how expert testimony on psychological labels may be used to facilitate substantial harm against groups who are already vulnerable to exploitation.").

[71] *See, e.g.*, *Power of Symbolism: Dulling the* Ake *in* Barefoot*'s Achilles Heel*, *supra* note 8; Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss?"*, 29 ARIZ. L. REV. 1 (1987); Charles P. Ewing, *"Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings*, 8 AM. J. L. & MED. 407 (1982) (proposing an ethical ban on predictions of dangerousness by psychiatrists and psychologists in the capital sentencing context). Predictions such as those by Dr. Grigson and his colleagues in many of the cases we discuss here were based solely on what are characterized as static factors (the crime for which the defendant has been convicted and his past record). *See* Stephen C. P. Wong, et al., *The Utility of Dynamic and Static Factors in Risk Assessment, Prediction, and Treatment*, *in* HANDBOOK OF VIOLENCE RISK ASSESSMENT AND TREATMENT: NEW APPROACHES FOR MENTAL HEALTH PROFESSIONALS 83, 84-86 (Joel T. Andrade ed., 2009). Dynamic factors (the potential for growth and change), *see id*., are ignored. Our thanks to Dr. Ken Weiss for his helpful suggestions on this issue. For more discussion on the advantages of dynamic risk assessment models as opposed to static prediction models, see Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCH., PUB. POL'Y. AND L. 505, 560-61 (1998); Jackson Polansky & Henry F. Fradella, *Does "Precrime" Mesh with the Ideals of U.S. Justice?: Implication for the Future of Predictive Policing*, 15 CARDOZO PUB. L., POL'Y & ETHICS J. 253, 292 n. 176 (2017) (noting that "although the behavioral science of risk assessment has improved significantly with actuarial-derived instruments that take into account both static and dynamic factors, the prediction of dangerousness remains an inexact science."); Karen Franklin, *"The Best Predictor of Future Behavior is . . . Past Behavior" Does the Popular Maxim Hold Water?*, PSYCH. TODAY (Jan. 3, 2013), https://www.psychologytoday.com/intl/blog/witness/201301/the-best-predictor-future-behavior-is-past-behavior (discussing how past behavior is an indicator for future conduct only under certain circumstances); Randy Borum et. al., *Assessing and Managing Violence Risk in Clinical Practice*, 2 J. PRAC. PSYCH. & BEHAV. HEALTH 205, 206 (July 1996) (arguing that risk of violence "dynamic, contextual, and continuous" rather than "static, dispositional, and dichotomous.").

[72] *See, e.g.*, George E. Dix, *Participation by Mental Health Professionals in Capital Murder Sentencing,* 1 INT'L J.L. & PSYCHIATRY 283, 289 (1978) (characterizing such testimony as "amazingly naive" five years before the Court's decision in *Barefoot*).

limitations on expert testimony in such areas.[73] The sorts of heuristic devices[74] that the Court employed in *Barefoot* led the Court to "misinterpret some significant empirical data, to disparage other data, and to ignore yet other data.[75]In an earlier article, one of the authors (Perlin) suggested that:

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.[76]

This assessment remains true.[77] Although Justice White tried to reassure us that, as a result of vigorous cross-examination, "the jury will . . . be able to separate the wheat from the chaff,"[78] there is scant evidence that there is

[73] *See*, e.g., Richard J. Bonnie, *Foreword, Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 VA. L. REV. 167, 177-78 (1980); C. Robert Showalter & Richard J. Bonnie, *Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 159, 166-67 (1984); George E. Dix, *supra* note 60, at 575 ("a mental health professional should be banned from expressing any predictive opinion more specific than that the subject poses a greater risk than the average person of engaging in future assaultive or otherwise criminal conduct") (footnote omitted) (emphasis added); Regnier, *supra* note 5 at 470 ("We must rethink the *Daubert*/*Kumho* test for admissibility of expert testimony so as to preserve the insights of the *Frye v. United States* test and ensure that reliability becomes the keynote in both scientific and technical testimony."). *See also* Daniel A. Krauss & Dae Ho Lee, *Deliberating on Dangerousness and Death: Jurors' Ability to Differentiate Between Expert Actuarial and Clinical Predictions of Dangerousness*, 26 INT'L J. L. & PSYCHIATRY 113 (2003).

[74] *See Take the Motherless Children off the Street*, *supra* note 38, at 578 n.91 ("Heuristics" is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks, the use of which frequently leads to distorted and systematically erroneous decisions and causes decision-makers to "ignore or misuse items of rationally useful information."); Michael L. Perlin & Naomi Weinstein, *Said I, 'But You Have No Choice': Why a Lawyer Must Ethically Honor a Client's Decision about Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 73, 86-87 (2016).

[75] Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 668 (1993). *See also* Paul S. Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 AM. J. L. & MED. 335, 341 (1987), as discussed in Michael L. Perlin, *"In These Times of Compassion When Conformity's in Fashion": How Therapeutic Jurisprudence Can Root out Bias, Limit Polarization and Support Vulnerable Persons in the Legal Process*, 10 TEXAS A&M L. REV. 219, 237 (2023) (the opinion in *Barefoot* "persuasively demonstrates that the Court's use of heuristic devices leads it to misinterpret some significant empirical data, to disparage other data, and to ignore yet other data."). [hereinafter *Conformity and Compassion*].

[76] *Power of Symbolism: Dulling the Ake in Barefoot's Achilles Heel*, *supra* note 8, at 111 (footnote omitted).

[77] If anything, it is probably too tempered.

[78] *See Barefoot*, 463 U.S. at 899 n.7 (1983). One commentator has characterized this as a "cavalier attitude toward indiscriminate acceptance of scientifically unreliable testimony." Cathleen C. Herasimchuk, *A Practical Guide to the Admissibility of Novel Expert Evidence in Criminal Trials Under Federal Rule 702,* 22 SAINT MARY'S L. J. 181, 201 (1990).

any basis in fact for this blithe reassurance.[79] Certainly, the record is clear that courts continue to regularly ignore relevant, valid, and reliable social science data in this specific context.[80]

We also cannot lose sight of the fact that the "unreliability of expert testimony regarding future dangerousness is more obvious now than when *Barefoot* was decided."[81] This flows from multiple sources: Courts are now aware—they must be aware—of the American Psychiatric Association's conclusion that the psychiatric profession has rejected the idea that future dangerousness can be accurately predicted,[82] and studies that initially appeared to sanction such predictivity were flawed by "fundamental errors."[83] In short,

[79] As previously noted, we know that both historical and contemporaneous studies of juries, prosecutors, and psychologists all indicate that "predictions of future dangerousness are no better than random guesses." *See* Mary Marshall, *supra* note 34, at 1656. For more information on how predictions of future dangerousness continue to "dominate" death penalty decision making, despite being "intellectually indefensible" in light of the theories justifying capital punishment, *see* Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 69 L. & CONTEMP. PROBS. 301, 301-02 (2006); Jeremy Dang, *Future Dangerousness: A Faulty Cog in the Machinery of Death*, 49 AM. J. CRIM. L. 199, 204 (2022) (citing Sherri Lynn Johnson, *Buck v. Davis From the Left*, 15 OHIO ST. J. CRIM. L. 247, 261 (2017). Again, note, State prosecutors used Dr. Grigson—successfully—dozens of times after he was expelled by the American Psychiatric Association and the Texas Psychiatric Association. For examples of such cases, *see e.g.* Fuller v. Johnson, 114 F.3d 491 (5th Cir. 1997); *Moody*, 139 F.3d 477 (5th Cir. 1998); Jackson v. State, 160 S.W.3d 568 (Tex. Crim. App.) (in this non-death penalty case, Dr. Grigson was called by the *defendant* (to testify as to the seriousness of his mental illness)). *See also* Michael L. Perlin, *"Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1528 (2016) (noting that none of the prosecutors who used Dr. Grigson following his expulsion ever received sanctions) [hereinafter *Merchants and Thieves, Hungry for Power*].

[80] *See, e.g.*, PERLIN, *supra* note 22, at 21-26, discussing *Barefoot*. It should be noted that the court has been frequently criticized for ignoring such data in other substantive areas as well. *See, e.g.*, Rebecca S. Dressler et al., *Breast Implants Revisited: Beyond Science on Trial*, 1997 WIS. L. REV. 705 (1997) (calling for improvement in the evaluation of scientific evidence in the courtroom as related to breast implants); Beck Roan, *Ignoring Individualism: How a Disregard for Neuroscience and Supreme Court Precedent Makes for Bad Policy in Idaho's Mandatory Juvenile Transfer Law*, 52 IDAHO L. REV. 719 (2016) (criticizing disregard of scientific evidence relating to neurobiological development); Eleanor Kittilstad, *Reduced Culpability Without Reduced Punishment: A Case for Why Lead Poisoning Should Be Considered a Mitigating Factor in Criminal Sentencing*, 108 J. CRIM. L. & CRIMINOLOGY 569 (2018) (discussing the legal considerations of the impact of lead poisoning on criminal behavior).

[81] DeCoux, *supra* note 17, at 160.

[82] *See, e.g.*, Jordan Dickson, D*aubert Won't Do: Why Expert Testimony Regarding Future Dangerousness Requires a New Rule of Evidence*, 107 GEO. L.J. 481 (2019).

[83] DeCoux, *supra* note 17, at 156-57 (discussing findings reported in Mark D. Cunningham et al., *Revisiting Future Dangerousness Revisited: Response to DeLisi and Munoz*, 15 CRIM. JUST. POL'Y REV. 365-76 (2004)). For an empirical consideration of the actual future dangerousness of such individuals, *see also* Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence,* 32 LAW & HUM. BEHAV. 46, 61 (2008) (analyzing prison disciplinary records of inmates convicted of capital offenses who prosecutors alleged posed a future danger and finding that only ten percent of those inmates had been cited for serious assault). This latter article has been cited favorably in litigation from another circuit: *see* United States v. Smith, No. 3:16-CR-00086-SLG-1, 2019 WL 11863697 at *1 n.12 (D. Alaska Oct. 22, 2019); United States v. McCluskey, No. CR 10-2734 JCH, 2013 WL 12330210, *8 (D.N.M. June 11, 2013).

although courts continue to admit expert testimony regarding future dangerousness, "no modern studies supporting its reliability can be found."[84]

B. Impact of Daubert and its Progeny

A relevant question to which astonishingly little attention has been given is this: What has been the impact of the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[85] *and in Kumho Tire Co. v. Carmichael*[86] on the relevance and reliability of the *Barefoot* test? And if the impact has been negligible, why is that?[87]

Daubert established that expert testimony is admissible so long as it follows the rules of the scientific method.[88] It instructs the trier of fact to consider whether: (1) the theory or technique is scientific knowledge that can be, and has been, tested; (2) the theory or technique has been subjected to peer review or publication; (3) the theory or technique has a known or potential rate of error; and (4) the theory or technique is generally accepted within the relevant scientific community.[89] If a trial court considers these factors, "the court should focus solely on the principles and methodology, not on the conclusions that they generate."[90] In short, *Daubert* places the reliability assessment on trial judges.[91] And this doctrine was expanded to non-scientific evidence in the *Kumho* case.[92] As one of the authors (Perlin) noted in an article with others, "*Daubert* and *Kumho Tire* do a remarkably clear job of commanding judges to properly scrutinize fields before admitting opinions from

[84] DeCoux, *supra* note 17, at 160.

[85] *Daubert*, 509 U.S. 579 (1993)

[86] *Kumho Tire Co.,* 526 U.S. 137 (1999).

[87] *See* Paul C. Giannelli, *The Supreme Court's "Criminal"* Daubert *Cases,* 33 SETON HALL L. REV. 1071 (2003) (discussing the intersection between *Daubert* and the Supreme Court's criminal procedure jurisprudence).

[88] *See generally*, Harold J. Bursztajn, Milo Fox Pulde, Darlyn Pirakitikulr & Michael L. Perlin, Kumho *for Clinicians in the Courtroom: Inconsistency in the Trial Courts*, 24 MED. MALPRACTICE L. & STRATEGY, Nov. 2006, at 1.

[89] *Daubert,* 509 U.S. at 593-94; *see* Heather Ellis Cucolo & Michael L. Perlin, *"Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J. L. & SOC. CHANGE 125, 140 (2015) (discussing the *Daubert* factors in greater depth) [hereinafter *Far from the Turbulent Space*]

[90] *Daubert*, 509 U.S. at 595.

[91] *Far from the Turbulent Space*, *supra* note 89, at 140.

[92] *See Kumho,* 526 U.S. at 146-47 (finding *Daubert* rationale applies to matters involving "technical" or "other specialized" knowledge, such as a question of tire engineering). *Kumho* is cited in multiple district court cases in our cohort, but none rely on it as controlling authority. *See e.g.*, *Gonzales*, 2014 WL 496876 at *16 ("Insofar as petitioner argues . . . in his fifth and sixth claims herein that the Supreme Court's opinions in *Daubert* and *Kumho Tire* overruled *Barefoot sub silentio,* that contention has been rejected repeatedly"). However, at the circuit level, Judge Garza relies on *Kumho* in his special occurrence as to why *Barefoot* should no longer control. *See Flores*, 210 F.3d at 464; *infra* text accompanying notes 100-02.

those fields' practitioners."[93]

The inconsistencies between *Daubert* and *Barefoot* should be apparent,[94] yet, despite their observation in subsequent cases,[95] the inconsistencies have basically been ignored.[96] The Fifth Circuit has been clear about this: "[e]xpert future dangerousness testimony is permissible under *Barefoot*,[97] and any "contention that the Supreme Court may overrule *Barefoot* in light of *Daubert* is completely speculative."[98] On this point, we must consider the observations of Professors Erica Beecher-Monas and Edgar Garcia-Ril:

The point is not that *Daubert* overrules *Barefoot*. It does not. Rather, the point is that the conceptual underpinnings of *Daubert* are anathema to the

[93] Bursztajn et al, *supra* note 88, at 4-5. Having said this, it is essential to acknowledge that *Daubert* has not been a panacea for criminal defendants at all. *See e.g.*, D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?,* 64 ALB. L. REV. 99, 105-08 (2000). In sixty-seven cases of challenged government expertise, the prosecution prevailed in sixty-one of these. *Id.* at 105. Out of fifty-four complaints by criminal defendants that their expert testimony was improperly excluded, the defendant lost in forty-four of these. *Id*. at 106. Even more strikingly, in a survey of 134 judicial decisions across all levels of the court system in Wisconsin on *Daubert* issues, prosecutors have amassed an undefeated 134-0 record*. See* Michael D. Cicchini, *The Daubert Double Standard,* 2021 MICH. ST. L. REV. 705, 707 (2021). As Professor Susan Rozelle has memorably said, "[t]he game of scientific evidence looks fixed." Susan D. Rozelle, Daubert*, Schmaubert: Criminal Defendants and the Short End of the Science Stick*, 43 TULSA L. REV. 597, 598 (2007). On the teleological ways that courts construe cases such as *Daubert* in criminal cases, *see* Michael L. Perlin, *I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 82 (2017) [hereinafter, *I've Got My Mind Made Up*]. A recent editorial in *Science* reports gloomily on *Daubert*'s impact on the criminal process in general. *See* Jennifer Mnookin, *Science, Justice and Evidence*, SCIENCE, Nov. 17, 2023, at 741 ("Unfortunately, there has been far less real change in criminal cases. Many kinds of forensic evidence, from fingerprints to bloodstain pattern analysis to firearms identification, continue to enter court with remarkably little scientific scrutiny or proof of accuracy and validity.").

[94] *See e.g*., Michael H. Gottesman, *From* Barefoot *to* Daubert *to* Joiner*: Triple Play or Double Error?,* 40 ARIZ. L. REV. 753, 756 (1998) ("*Daubert* cannot be squared with *Barefoot.*"); Rozelle, *supra* note 93, at 603 (stating that expert evidence predicting future dangerousness "simply cannot qualify" post-*Daubert*).

[95] *See, e.g*., *State ex rel. Romley*, 35 P.3d at 88-89.

[96] *See, e.g*., Logerkvist v. McVey, 1 P.3d 113, 127 (Ariz. 2000) ("*Daubert* does not mention *Barefoot."). But see Davis*, 477 A.2d at 310-12 (sanctioning the admissibility of statistical evidence relating to a defendant's rehabilitation potential as a mitigating factor at the penalty phase of a capital case, relying on Justice Blackmun's Barefoot dissent to buttress its position). The relationship between *Davis* and *Barefoot* is discussed in James W. Marquart, Sheldon Ekland-Olson & Jonathan R. Sorenson, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449, 465-66 (1989); *see also* Regnier, *supra* note 5, at 506-07 (asserting in a discussion of *Barefoot* and *Daubert* that "[a]s applied in Texas, the future dangerousness element of the penalty phase in capital murder cases is a façade that shields the process's lack of due process.").

[97] Gonzales v. Stephens, 606 F. App'x 767, 774 (2015) (citing Williams v. Stephens, 761 F.3d 561, 571 (5th Cir. 2014); *see, e.g*., Roberts v. Thaler, 681 F.3d 597, 608-09 (5th Cir. 2012); *Holiday v. Stephens*, 587 F. App'x 767, 783 (5th Cir. 2014).

[98] *Williams,* 761 F.3d at 571; *see also* Buntion v. Lumpkin, 982 F.3d 945, 950 (5th Cir. 2020) (denying the applicant's motion for a certificate of appealability in a case where the applicant criticized Barefoot as being based on "first generation evidence that has since been proven false" and "wobbly, moth-eaten foundations."). Strategies for the defense bar in this context are suggested in Michael D. Cicchini, *Daubert Strategies for the Criminal Defense Bar,* 2021 U. ILL. L. REV. ONLINE 97 (2021).

result in *Barefoot*. Yet, the rule announced in *Barefoot* continues to be used without any attempt at subjecting it to a *Daubert* analysis.[99]

There is much to learn from Judge Garza's special concurrence in the Fifth Circuit case, *Flores v. Johnson.*[100] In that case, Judge Garza noted pointedly, "[o]n the basis of any evidence thus far presented to a court, it appears that the use of psychiatric evidence to predict a murderer's 'future dangerousness' fails all five *Daubert* factors."[101] On this point, Judge Garza concluded, "[o]verall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals who routinely testify to, and profit from, predictions of dangerousness."[102]

A federal death penalty case from Massachusetts made this point strongly, albeit in dictum. While noting that "the literature that this court has reviewed is consistent with Judge Garza's conclusion" [in his *Flores* concurrence], that court concluded that its "experience in the case causes it to wonder whether it is impossible for lay jurors, as well as for trained experts, to predict future dangerousness with the level of reliability necessary to ensure that the death penalty is not being "wantonly and . . . freakishly imposed." *Furman v. Georgia,* 408 U.S. 238, 310, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring)."[103] The Court further concluded:

However, the evolution of the law, and of scientific research, presents the question of whether it can now be said that future dangerousness can generally be predicted with sufficient reliability to assure that the death penalty is not being imposed arbitrarily and capriciously. Therefore, if this issue is, in

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[99] Erica Beecher-Monas & Edgar Garcia-Rill, *The Law and the Brain: Judging Scientific Evidence of Intent,* 1 J. APP. PRAC. & PROCESS 243, 274 (1999). Elsewhere, Professor Beecher-Monas has argued for the "constitutionalization of *Daubert*, at least with respect to death penalty proceedings" and concluded that "judicial gatekeeping standards for scientific evidence, as outlined by the *Daubert* trio of cases, are an essential component of due process and that the trustworthiness of expert scientific testimony—in a system that aspires to rationality—is a minimum prerequisite." Beecher-Monas, *supra* note 9, at 360, 362. The third case in the "trio" to which Professor Beecher-Monas refers is *General Electric Co. v. Joiner*, which reiterated the trial judge's mandate to review testimony for scientific validity and "fit," and allowed a district court to reject expert testimony relying on studies too dissimilar to the facts before it. *See Joiner*, 522 U.S. at 144-45 (1997). *Joiner* is not discussed in a single case interpreting *Barefoot*. *But see* Gottesman*, supra* note 94 (discussing *Barefoot, Daubert,* and *Joiner* in a scholarly article).

[100] *See Flores*, 210 F.3d at 458-70.

[101] *Id.* at 464.

[102] *Id.* at 465. Interestingly, in a state case, while affirming a death penalty sentence, the Court of Criminal Appeals of Texas nevertheless quoted this language from Judge Garza's opinion, noting that "some have criticized the courts for failing to apply the standards set out in *Daubert* . . . to psychiatric testimony offered to prove future dangerousness in capital sentencing." Coble v. State, 330 S.W.3d 253, 275 n. 54 (Tex. Crim. App. 2010).

[103] United States v. Sampson, 335 F.Supp.2d 166, 219, 222 (D. Mass. 2004) (quoting Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)).

an appropriate case, fully-developed factually and well-briefed, it may be appropriate for the Supreme Court to consider again its ruling in *Jurek.*[104]

Again, *Daubert* has had no "real life" impact on *Barefoot*, at least in the Fifth Circuit.[105] This is all the more troubling, given the enormity and the potential finality of the capital sentencing process;[106] it is a conundrum made even more puzzling by courts' (including the Fifth Circuit) willingness to apply *Daubert* to *other* questions of criminal law and procedure,[107] and their specific refusal to apply it to capital sentencing cases.[108] Oddly, there is only one reference to the relationship between *Barefoot* and *Daubert* in any Supreme Court decision, and that is in a dissent by Justice Stevens in a non-

[104] *Id.* at 222-23. In *Jurek*, the Supreme Court specifically had upheld the constitutionality of a state statutory scheme which required, *inter alia*, that the jury determine, beyond a reasonable doubt, whether there was a "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Jurek v. Texas, 428 U.S. 262, 269, 274-76 (1976). *But see* George E. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343, 1411 (1977) ("The term 'a probability' provides jurors no guidance in deciding how likely it must be that defendant will commit certain behavior."). For non-death penalty state cases that have excluded such testimony, but those cases have cited neither *Barefoot* nor *Daubert* see e.g., In re Coffel, 117 S.W.3d 116 (Mo. Ct. App. 2003); Collier v. State, 857 So.2d 943 (Fla. Dist. Ct. App. 2003). On this point, see Christopher Slobogin, Dangerousness and Expertise Redux, 56 Emory L. J. 275 (2006).

[105] *See* PERLIN & CUCOLO, supra note 8, § 17-2.2, at 17-16; Gobert v. Lumpkin, No. 1:15-CV-42, 2022 WL 980645, *30 (W.D. Tex. Mar. 30, 2022) ("The Fifth Circuit has repeatedly held that *Daubert* does not control the admission of expert mental health testimony regarding future dangerousness offered at the punishment phase of a capital murder trial." (citing, *inter alia*, *Williams*, 761 F.3d at 571; *Roberts*, 681 F.3d at 609; *Fields*, 483 F.3d at 341-43)). The Fifth Circuit has countenanced the use of "*Daubert* hearings" in other criminal cases. *See e.g.*, Lucio v. Lumpkin, 987 F.3d 451, 458-59 (5th Cir. 2021) (addressing the admissibility of a social worker's proffered testimony on why petitioner "would have given police officer[s] information in [her] statement that was not correct" in a capital case where future dangerousness not an issue on appeal); United States v. Tucker, 345 F.3d 320, 327 (5th Cir. 2003) (finding in a mail fraud case that "*Daubert* considerations apply to all species of expert testimony, whether based on 'scientific, technical, or other specialized knowledge.'").

[106] *See*, Erica Beecher-Monas & Edgar Garcia-Hill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 CARDOZO L. REV., 1845, 1859-60 (2003) (describing the "heightened concern in the context of capital sentencing hearings, where the jury hearing the evidence might very well impose the death penalty.").

[107] *See e.g.*, United States v. Hall, 93 F.3d 1337, 1339, 1346 (7th Cir. 1996) (remanding where the trial court used the incorrect standard in excluding expert testimony on a defendant's susceptibility to giving a false confession); Moore v. Ashland Chemical Inc., 151 F.3d 269, 277-78 (5th Cir. 1998) (finding that clinical medical testimony on causation must pass the *Daubert* test); Hanson v. State, 72 P.3d 40 (Okla. Crim. App. 2003) (finding the trial court erred by excluding defense expert's testimony about risk assessment and probability proffered to rebut continuing threat testimony, without holding a *Daubert* hearing); United States v. Iron Cloud, 171 F.3d 587, 590 (8th Cir. 1999) (citing to *Daubert*, and taking judicial notice of the undependability of the portable breath test machine in a non-capital vehicular homicide case); State v. Olenowski, 289 A. 3d 456, 459 (N.J. 2023) (applying *Daubert* to drunk driving prosecutions); *see also* other Fifth Circuit cases cited *supra* note 105.

[108] *See e.g.*, *Williams,* 761 F.3d at 571; *Fields,* 483 F.3d at 341-46; *Holiday*, 587 Fed. App'x at 783. For examples at the district court level, *see* United States v. Cramer, No. 1:16-CR-26, 2018 WL 624896, at *2 (E.D. Tex. Jan. 30, 2018); *Gobert*, 2022 WL 980645, at *30. The defendant in *Cramer* was also unsuccessful in his efforts to strike future dangerousness as an aggravator in death sentence determinations. *See Cramer,* 2018 WL 624896, at *1.

death penalty case holding that a per se rule against admission of polygraph evidence in court martial proceedings did not violate the Fifth or Sixth Amendment rights of accused to present a defense.[109] This case has no connection whatsoever to the issues discussed in this article.

In short, the continued reliance on *Barefoot* in death penalty cases in the wake of *Daubert* is conceptually incoherent.[110]

C. Impact of Strickland

As noted previously, the Fifth Circuit has done a "bizarre and terrifying[ly] poor job of enforcing even the minimal standard articulated by the Supreme Court in *Strickland v. Washington.*"[111] And this "mock[ery]"[112] has been repeated time after time in cases involving *Barefoot* claims.[113]

As we will discuss subsequently, courts have regularly rejected *Barefoot*-related claims– based, by way of example, on trial counsel's failure "to independently investigate and prepare for testimony [introduced by the State] concerning future dangerousness"–on the theory that the defendant could not rely on *Strickland*, as it "is well-established that evidence of future dangerousness is constitutionally admissible."[114] In other cases, the Fifth Circuit has rejected *Strickland* claims on the grounds that trial counsel made a reasonable decision under the rubric of "trial strategy" whether to rebut or not rebut evidence[115]; and, because *Barefoot* ruled such evidence is admissible, there could be no prejudice under *Strickland.*[116]

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[109] *See Scheffer*, 523 U.S. at 344-35 (providing the *only* example Supreme Court opinion in which *Barefoot* and *Daubert* are both cited).

[110] Consider in this context this astonishing paragraph in *Buntion*: In fact, "[t]he Supreme Court has *never* intimated that the factual correctness of the jury's prediction on the issue of future *dangerousness* . . . bears upon the constitutionality" of a death sentence. The Court contemplated in cases like *Barefoot* that dangerousness evidence might be wrong "most of the time." Yet it still did not create a remedy for defendants whose death sentences turned on that evidence. *Buntion*, 982 F.3d at 950-51 (citation omitted).

[111] Perlin, Harmon & Chatt, *supra* note 25, at 308. The co-authors have further explained:

> In virtually all cases, *Strickland* errors—often egregious errors—were ignored, and in over a third of the cases in which they *were* acknowledged, defense counsel had confessed error. Regularly, this Court affirmed convictions (in multiple cases leading to sanctioned executions) in cases where counsel introduced no mitigating evidence, failed to retain mental health experts, and failed to read mental health records. In the aggregate, the Fifth Circuit regularly and consistently mocked the idea of adequate and effective counsel. *Id*. (footnotes omitted).

[112] *Id.* at 263.

[113] *See infra* text accompanying notes 185-93.

[114] Devoe v. Davis, 717 F. App'x. 419, 427 (5th Cir. 2018) (citing *Barefoot*, 463 U.S. at 896-903).

[115] *See e.g*., Simpson v. Quarterman, No. 1:04-CV-485, 2007 WL 1008193, at *28 (5th Cir. Mar. 29, 2007); *Brewer*, 2021 WL 6845600 at *46; *see also id*. at *55-56 (describing the state court's conclusion that Brewer's counsel "adopted a reasonable trial strategy of not having Brewer evaluated by a defense mental health expert . . . because doing so might open the door to Brewer being evaluated by a prosecution expert" as "unassailable.").

[116] *See infra* text accompanying notes 185-93.

In short, there has been virtually no reformative progress in this area since the *Barefoot* decision some forty years ago. In the next section, we explain how we reached our findings, and then discuss some of the Fifth Circuit cases that are relevant to our inquiry.

II. OUR FINDINGS

A. Methodology

The following is an explanation of the methodology employed in this article. Utilizing the Nexis Uni and Westlaw databases, we determined that there were 294 case opinions in the Fifth Circuit that cited *Barefoot v. Estelle*.[117] We found seventeen case opinions (involving sixteen defendants) that contained a discussion of *Barefoot* relevant to our questions.[118] We then qualitatively analyzed them to determine themes for how the Fifth Circuit has interpreted *Barefoot*.

We excluded the remaining 279 case opinions from this analysis as they fell into the following categories:

> Case opinions where the defendant was not convicted of capital murder and thus not sentenced to death,[119]
>
> Case opinions where the defendant was convicted of capital murder and sentenced to death or crime was otherwise unclear, but had only cited *Barefoot* for its holdings on other procedural issues, such as certificates of probable cause (CPC), certificate of appealability (COA),[120] stays of execution, or the scope of

[117] The full list of cases is on file with the authors.

[118] *See Fields*, 483 F.3d at 341-45; Cook v. Cockrell, 34 F. App'x 151, at *1-3 (5th Cir. 2002); *Flores*, 210 F.3d at 462-70; Little v. Johnson, 162 F.3d 855, 859-63 (5th Cir. 1998); *Buntion*, 982 F.3d at 950-51; *Gonzales*, 606 F. App'x at 774-75; *Holiday*, 587 F. App'x at 782-83; Johnson v. Cockrell, 306 F.3d 249, 254-55 (5th Cir. 2002); Harper v. Lumpkin, 64 F.4th 684, 698-700 (5th Cir. 2023); Harper v. Lumpkin, 19 F.4th 771, 785-86 (5th Cir. 2021) (same defendant); Coble v. Davis, 728 F. App'x 297, 299-301 (5th Cir. 2018); *Devoe*, 717 F. App'x at 427; *Williams*, 761 F.3d at 571; Rivas v. Thaler, 432 F. App'x 395, 404 (5th Cir. 2011); Guy v. Cockrell, No. 01-10425, 2002 WL 32785533, at *4 (5th Cir. July 23, 2002); Tigner v. Cockrell, 264 F.3d 521, 526-27 (5th Cir. 2001); Curry v. Johnson, 228 F.3d 408, at *4 (5th Cir. 2000).

[119] *See, e.g.*, Hallmark v. Johnson, 118 F.3d 1073, 1076 (5th Cir. 1997); Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1126-27 (5th Cir. 1991); United States v. Castro, 30 F.4th 240, 243 (5th Cir. 2022); United States v. Megwa, No. 20-10877, 2021 WL 3855498, at *3 (5th Cir. June 1, 2021); Murphy v. Johnson, 110 F.3d 10, 11 (5th Cir. 1997).

[120] The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") of 1996 changed the certificate of probable cause ("CPC") to the certificate of appealability ("COA"). *See* John Bennett, *The Certificate of Appealability: The Case for Equal Protection for the Federal Habeas Petitioner,* VOICE FOR THE DEF. (June 2002), at 23, 23-26.

federal habeas corpus petitions,[121]

Case opinions that cited *Barefoot* solely on issues involving mitigating or aggravating[122] evidence that were irrelevant to expert psychiatric testimony and questions of future dangerousness,[123] and

Case opinions that cited *Barefoot* simply to support the position that *Jurek v. Texas*[124] still controlled the contours of death penalty law.[125]

B. Findings

A review of the sixteen "*Barefoot* cases" in the Fifth Circuit reveals these results[126]:

As noted earlier, there is one strong "anti-*Barefoot*" concurring opinion,[127] and several other cases that–in spite of affirming convictions–vividly point out the infirmities in *Barefoot.*[128]

In only one case (*Guy v. Cockrell*),[129] was a defendant remotely "successful,"

[121] *See e.g.,* Baldwin v. Maggio, 715 F.2d 152, 153-156 (5th Cir. 1983) (stay of execution); Green v. Johnson, 116 F.3d 1115, 1120 (5th Cir. 1997) (CPC); Drinkard v. Johnson, 97 F.3d 751, 756-70 (5th Cir. 1996) (CPC); Washington v. Johnson, 90 F.3d 945, 949 (5th Cir. 1996) (CPC; stay of execution); Fierro v. Johnson, 197 F.3d 147, 154 n.12 (5th Cir. 1999) (federal habeas corpus petition); Hicks v. Johnson, 186 F.3d 634, 636 (5th Cir. 1999) (COA); Rayford v. Stephens, 662 F. App'x 315, 330 n.39 (5th Cir. 2015) (COA); Autry v. Estelle, 719 F.2d 1251, 1252 (5th Cir. 1983) (federal habeas corpus petition). For other cases construing habeas requirements, *see* Balentine v. Thaler, 629 F.3d 470, 476 n.5 (5th Cir. 2010); Rocha v. Thaler, 628 F.3d 218, 223 n.5 (5th Cir. 2010). The full list of cases is on file with the authors.

[122] At least two cases relied on *Barefoot* for its holding on aggravating circumstances: Thompson v. Lynaugh, 821 F.2d 1054, 1059 (5th Cir. 1987); Prystash v. Davis, 854 F.3d 830, 839-40 (5th Cir. 2017).

[123] *See, e.g.*, *Roberts*, 681 F.3d at 606-09 (involving a *Barefoot* claim after the trial court refused to allow expert testimony regarding the impact of alcohol and crack cocaine on the defendant's actions); Fierro v. Lynaugh, 879 F.2d 1276, 1279-80 (5th Cir. 1989) (involving a due process claim after the trial court allowed *lay witnesses* to testify as to future dangerousness). The full list of cases is on file with the authors.

[124] *See Jurek*, 428 U.S. 262 (holding that the imposition of the death penalty is not *per se* cruel and unusual punishment in violation of the Eight and Fourteenth Amendments). *Jurek* continues to be the subject of legal scholarship. *See, e.g.*, Justin D. Levinson et al., *Deadly 'Toxins': A National Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 GA. L. REV. 225, 237-40 (2021).

[125] *See* Tennard v. Dretke, 442 F.3d 240, 250 (5th Cir. 2006); Graham v. Collins, 950 F.2d 1009, 1028 (5th Cir. 1992); Penry v. Lynaugh, 832 F.2d 915, 927 (5th Cir. 1987) (Garwood, J., concurring).

[126] Some cases are categorized more than once. In only one case arising in Fifth Circuit district courts citing *Barefoot* was the defendant successful at the *habeas* level, the court there finding that the failure to inform the defendant at time of pretrial psychiatric examination that examination could bear on question of future dangerousness in a capital murder sentencing phase, as well as failure to inform defendant of his *Miranda* rights, violated defendant's Fifth Amendment right against compulsory self-incrimination. *See* Vanderbilt v. Lynaugh, 683 F. Supp. 1118, 1122-26 (E.D. Tex. 1988) (distinguishing *Barefoot*).

[127] *See Flores,* 210 F.3d at 462-70; *supra* text accompanying notes 100-02.

[128] *See Harper*, 64 F.4th at 692-93; *Buntion*, 982 F.3d at 950-51; *see also Cook*, 34 F. App'x 151 at *1 n.6 (discussing the "sharp criticism" of *Barefoot* in *Flores* and *Gardner*). For further discussion of *Harper* and *Buntion* in this context, see *infra* note 158 and *infra* note 188 and accompanying text.

[129] Guy v. Cockrell, No. 01-10425, 2002 WL 32785533 (5th Cir. July 23, 2002).

having his sentence reduced from death to life without parole.[130] It should be underscored, however, that that decision did not touch on the *Barefoot*-related aspects of the case at all, but dealt, instead, with an ineffective assistance of counsel claim.[131]

In three cases, *Daubert* arguments were rejected based on what we call the "adversarial process rationale."[132]

In three cases, there was support for the position that Barefoot was no longer good law after *Daubert* (and the holding of *Barefoot* was criticized on both law and policy grounds), but the convictions and sentences were affirmed based on the law of precedent.[133]

In nine cases,[134] it was felt that *Daubert should* overrule *Barefoot*, but again, the convictions and sentences were affirmed based on the law of precedent.[135]

In seven cases, *Strickland* arguments were rejected because of the holding in *Barefoot.*[136] One of these cases specifically found there was no *Strickland* violation where the defendant argued that counsel's failure to request a psychiatric examination pursuant to *Ake v. Oklahoma*[137] rose to the level of ineffectiveness of counsel.[138]

In three cases, the court determined that *Daubert* did not apply to capital cases.[139] In one case—involving a "battle of the experts"—it was determined that the state expert was more credible than the defense expert.[140]

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[130] *Editorial: Justice for Joe Lee Guy*, MY PLAINVIEW (June 30, 2004), https://www.myplainview.com/news/article/Editorial-Justice-for-Joe-Lee-Guy-8961393.php.

[131] *See* Guy v. Dretke, No. 5:00-CV-191-C, 2004 WL 1462196, at *2 (N.D. Tex. June 29, 2004) (finding a *Strickland* violation where the defense mitigation investigator had a relationship with the murder victim's mother and the conflict of interest was not revealed).

[132] *See Holiday*, 587 F. App'x at 783; *Flores*, 210 F.3d at 463; *Little*, 162 F.3d at 863.

[133] *See Buntion*, 982 F.3d 945; *Cook*, 34 F. App'x 151 at *1 nn.1-2; *Flores*, 210 F.3d at 462-70. *See also* Coble v. Stephens, No. W-12-CV-039, 2015 WL 5737707, at *18 (W.D. Tex. Sept. 20, 2015), *aff'd on other grounds sub. nom. Coble*, 728 F. App'x 297 (finding "nothing to establish that *Barefoot* does not remain viable in light of *Daubert").*

[134] This includes some of the cases also in the other categories.

[135] *See Williams*, 761 F.3d 571; *Holiday*, 587 F. App'x at 782-83; *Tigner*, 264 F.3d at 526-27; *Rivas*, 432 F. App'x at 404; *Flores*, 210 F.3d at 462-70; *Gonzales*, 606 F. App'x at 774-75; *Coble*, 728 F. App'x 297; *Johnson*, 306 F.3d at 254-55; *Fields*, 483 F.3d at 341-45.

[136] *See Curry*, 228 F.3d at *4; *Williams*, 761 F.3d at 571; *Devoe*, 717 F. App'x at 427; *Harper*, 64 F.4th at 698-99; *Cook*, 34 F. App'x 151 at *1-3; *Johnson*, 306 F.3d at 253-55; *Little*, 162 F.3d 855.

[137] Ake v. Oklahoma, 470 U.S. 68 (1985).

[138] *See Little*, 162 F.3d at 861; *see also* Rogers v. Director, TCDJ-ID, 864 F. Supp. 584, 594-95 (E.D. Tex. 1994) (rejecting defendant's *Ake* argument in a *Strickland* context).

[139] *See Williams,* 761 F.3d at 571; *Fields,* 483 F.3d at 341-46; *Holiday*, 587 F. App'x at 783.

[140] *See Coble*, 728 F. App'x at 299-300. Note that in our earlier inquiries into Fifth Circuit decision-making in death penalty cases involving defendants with serious mental disabilities, this issue was raised far more frequently. *See Insanity is Smashing Up Against My Soul*, *supra* note 32, at 580-92; Perlin, Harmon & Wetzel, *supra* note 30, at 485-88*; see also* Perlin, Harmon & Kubiniec, *supra* note 33, at 285-92 (addressing battles of the experts in cases interpreting *Panetti v. Quarterman* from other federal circuits); *supra* text accompanying notes 31-33.

An examination of *Barefoot*-related decisions from district courts in the Fifth Circuit[141] reveals that most decisions fell into the same categories mentioned above.[142] These district court cases that discussed issues not addressed by the Fifth Circuit will be considered *infra*. We now turn to the Fifth Circuit findings in more detail.

i. The "Adversary Process"

One of *Barefoot's* many weak lynchpins is its reliance on the adversary process as a means of separating, in the words of the decision itself, "the wheat from the chaff."[143] As other commentators have noted, this assumption–that the adversary system "works"–is exceedingly problematic.[144] The adversarial process is based on the myth that adversarial debate between

[141] We employed a similar methodology for "distilling" all district court decisions that had cited *Barefoot* so as to determine which ones needed to be considered. Briefly, of the 1,478 case opinions that cited *Barefoot v. Estelle*, we found twenty-eight case opinions for twenty-eight defendants with relevant *Barefoot* claims. The remaining 1,450 case opinions were excluded from this analysis because they involved defendants that were not convicted of capital murder, and not sentenced to death (*e.g.*, Keel v. Mississippi Dep't of Corr., No. 3:21CV226-GHD-JMV, 2022 WL 1695780 (N.D. Miss. May 26, 2022); Chidi v. Lumpkin, No. CV H-20-0698, 2021 WL 1060260, at *2 (S.D. Tex. Mar. 19, 2021); Amero v. Dir., No. 2:20-CV-21-Z-BR, 2021 WL 6753639 at *20 (N.D. Tex. Oct. 29, 2021); Brown v. Dir., No. 3:19-CV-2301-L-BN, 2022 WL 18231891 at *78 (N.D. Tex. Aug. 10, 2022); Resendez v. Lumpkin, No. 7:22-CV-45, 2023 WL 2412919 at *4 (S.D. Tex. Feb. 2, 2023)), or the case opinions only cited *Barefoot* for its holdings on other procedural issues, such as certificates of probable cause ("CPC"), certificate of appealability ("COA"), stays of execution, or federal habeas corpus petitions (*e.g.,* Brooks v. Dir., TDCJ-CID, No. 1:19-CV-607, 2023 WL 2330425 at *1 (E.D. Tex. Mar. 1, 2023) (COA); Lackey v. Scott, 885 F. Supp. 958, 962 (W.D. Tex. 1995) (stay of execution); Perez-Patino v. Davis, No. 7:16-CV-634, 2018 WL 791452, at *5 (S.D. Tex. Feb. 8, 2018) (federal habeas corpus petition)).

[142] *See, e.g.*, Solomon v. Livingston, No. 1:02CV455, 2005 WL 997316 (E.D. Tex. Mar. 28, 2005); Williams v. Thaler, No. 1:09cv271, 2013 WL 1249773 (E.D. Tex. Mar. 26, 2013); Guy v. Johnson, No. 5:00-CV-191-C, 2001 WL 34157813 (N.D. Tex. Feb. 27, 2001); Perry v. Quarterman, No. 07-1032, 2008 WL 11466068 (S.D. Tex. Feb. 22, 2008).

[143] *Barefoot,* 463 U.S. at 899 n.7.

[144] *See* State v. Harvey, 692 S.W.2d 290, 293 (Mo. 1985) ("Faith in the capacity of a trial to produce a reliable determination of guilt or innocence, or a just punishment, derives in large measure from confidence in the adversarial process"); Jeffrey D. Collins, *Alaska Rule 26: A Quixotic Venture into the World of Mandatory Disclosure*, 11 ALASKA L. REV. 337, 340 (1994) ("The prevailing belief is that through this adversarial process the truth will ultimately emerge"). For an exhaustive categorization of the system's flaws, *see* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World,* 1 J. INST. FOR STUDY LEGAL ETHICS 49 (1996) (focusing specifically on the "limited remedial power of adversarialism"). *See also* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002) (concluding that the adversarial process is stubborn, headstrong, arrogant, egotistical, irritating, argumentative, quarrelsome, hostile, and focused on winning instead of dispute resolution).

equal autonomous parties will produce the "truth."[145] Significantly, in their analysis of how *Daubert* and *Kumho* have moved courts to "heavier judicial evaluation and control, in the name of 'reliability,'"[146] Professors Denbeaux and Risinger catalog the literature that critiques this position.[147]

There is little empirical literature that supports Justice White's aspirational observation. Scholars have noted that, without "at least some exposure to scientific discourse and a basic understanding of the underlying principles of scientific methodology," neither judges nor lawyers are "[able] to discern the 'wheat from the chaff'"[148]; and certainly, there is no reason to expect that jurors could do so any better.[149] As Professor Christopher Slobogin has noted:

> There is good reason to believe, however, that Justice Blackmun and Judge Garza[150] are correct and Justice White is wrong about the effect of prediction testimony in an adversarial proceeding, at least when it is clinical in nature.[151] Yet, several of the Fifth Circuit cases blithely[152] uphold convictions based precisely on this unfounded endorsement of the adversarial process as a means of achieving just verdicts,[153] basing its rationale on, by way of example, the theory

[145] Chrisje Brants, *Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands*, 80 U. CIN. L. REV. 1069, 1088 (2012). *See generally* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding,* 61 DUKE L.J. 1 (2011). These arguments are not new, by any means. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 80-102 (first Princeton paperback ed. 1973) (1949) (critiquing the notion that the adversarial process leads to the discovery of truth).

[146] Mark P. Denbeaux & D. Michael Risinger, Kumho Tire *and Expert Reliability: How the Question You Ask Gives the Answer You Get,* 34 SETON HALL L. REV. 15, 24 (2003).

[147] *See id.* at 22 n.28.

[148] Anne M. Corbin & Steven B. Dow, *Breaking the Cycle: Scientific Discourse in Legal Education*, 26 TEMP. J. SCI. TECH. & ENV'T. L. 191, 207, 212 (2007). *Daubert* offers a different view of the adversary system: In contrast with the *Barefoot* Court's apparent boundless faith in the jury and the adversary system, the *Daubert* Court gave only lip service to its faith in the jury and the adversary system, and the threshold it erects assumes that common sense or community values could not resolve the question of the consequences of in utero exposure to Bendectin. Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based Upon Clinical Judgment and Scientific Research,* 4 PSYCH. PUB. POL'Y & L. 1226, 1245 (1998).

[149] *See Deceived Me into Thinking/I Had Something to Protect*, *supra* note 2, at 117 n.149. On why cross-examination cannot be relied on "singularly" in such situations, *see* Jordan Dickson, *Daubert Won't Do: Why Expert Testimony Regarding Future Dangerousness Requires a New Rule of Evidence,* 107 GEO. L.J. 481, 490 (2019). On how decisions such as *Barefoot*—which rely on cross-examination as the palliative—improperly "valorize the adversary process" *see* Jerry H. Elmer, *Scientific and Expert Testimony after Daubert*, 42 R.I. BAR J. 13, 13 (1993). For a comprehensive empirical analysis that "call[s] into question the Supreme Court's confidence in *Barefoot" see* Shari Seidman Diamond et al., *Juror Reactions to Attorneys at Trial,* 87 J. CRIM. L. & CRIMINOLOGY 17, 41 (1996).

[150] Judge Garza wrote the concurrence in *Flores*, (210 F.3d at 456) discussed *supra* at text accompanying notes 100-02.

[151] Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 312 (2006).

[152] The word is used intentionally. *See Barefoot,* 463 U.S. at 929-30 (Blackmun, J., dissenting) ("There is every reason to believe that inexperienced jurors will be still less capable of 'separat[ing] the wheat from the chaff,' despite the Court's *blithe* assumption to the contrary" (emphasis added)).

[153] *See, e.g.*, *Holiday*, 587 F. App'x at 783; *Flores*, 210 F.3d at 456; *Little*, 162 F.3d 855.

> that "the adversarial system reduces any prejudicial unreliability in future dangerousness expert testimony because it can expose the flaws in such testimony."[154]

If there is any meaningful rationale for this mythic vision of the adversarial system as a "chaff remover," it is that effective counsel will ensure that the jury is able to "see" the truth. But this is a classic example of "a fact not in evidence." The absence of effective counsel undermines faith in the proper functioning of the adversarial process.[155] As one commentator has noted, "[t]he public's faith in the criminal justice system rests on the belief that the victor in an adversarial process has earned the victory because a capable opponent soundly tested credible evidence of guilt, not because one side pulled its punches."[156]

It is crystal-clear that the *Strickland* case has failed as a vehicle for enforcing adequacy of counsel standards in the Fifth Circuit. especially in death penalty cases involving defendants with mental disabilities.[157] As we discuss below, these failures are especially profound in *Barefoot*-related cases.

ii. Interaction with Daubert

a) Daubert and the Adversary Process

Several Fifth Circuit cases have rejected *Daubert* challenges precisely because of the faith in the adversary process just discussed. In *United States v.*

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[154] *Fields*, 483 F.3d at 345. On *Fields* in this context, see Reyes*, supra* note 1, at 164 ("Like *Barefoot*, the *Fields* court failed to uphold its gate-keeping function. Instead, it relied on the mistaken assumption that the adversarial system would be enough to reduce any prejudicial unreliability in future dangerousness expert testimony."). An analysis of *Fields* concludes that Coons' methodology has "has gone by the wayside." *See* Michael J. Vitacco, *Insanity Acquittees in the Community: Legal Foundations and Clinical Conundrums*, 43 FORDHAM URB. L.J. 847, 857 n.44 (2016). A district court case quoted *Flores* on this point: "[E]ven assuming that this evidence was unreliable, the adversary system would redress this problem by creating a credibility evaluation by the jury." *Solomon*, 2005 WL 997316 at *6, *aff'd,* 213 F. App'x 294 (5th Cir. 2007) (quoting *Flores*, 210 F.3d at 463) (*Barefoot* not mentioned on appeal). *See also* Jennifer Bard*, Diagnosis Dangerous: Why State Licensing Boards Should Step in to Prevent Mental Health Practitioners from Speculating Beyond the Scope of Professional Standards*, 2015 UTAH L. REV. 929 (discussing how state licensing boards should prohibit the use of such testimony); Jane Campbell Moriarty & Daniel D. Langleben, *Who Speaks for Neuroscience? Neuroimaging Evidence and Courtroom Expertise*, 68 CASE W. RSRV. L. REV. 783, 802 n.95 (2018) (supporting Professor Jennifer Bard's assertion that state licensing boards should ensure that "experts do not testify beyond the scope of medical support or evidence" and that "licensing boards could have a strong normative effect on the scope of expert's testimony."). *But see Your Corrupt Ways Had Finally Made You Blind*, *supra* note 3, at 1445 n. 41 (Professor Bard's "excellent recommendation . . . does not go far enough").

[155] *See* Laferriere v. State, 697 A.2d 1301, 1303 (Me. 1997).

[156] Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 474 (2004). One can speculate as to whether a decision to not seek a mental status examination for a defendant because of fear that the state might call Dr. Grigson in rebuttal is an example of counsel "pulling punches." *See* cases cited *supra* note 26.

[157] *See* Perlin, Harmon & Chatt, *supra* note 25.

Fields,[158] the Court concluded that "the adversarial system reduces any prejudicial unreliability in future dangerousness expert testimony because it can expose the flaws in such testimony."[159] In *Buntion v. Lumpkin,* the Court concluded, "[w]e are not persuaded that future dangerousness testimony [is] almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings."[160] And, in *Holiday v. Stephens,*[161] the Court concluded that the defendant's arguments against allowing an expert to testify to future dangerousness "is somewhat like asking us to disinvent the wheel."[162]

b) Daubert's Professed Inapplicability to Death Penalty Cases

As we have noted, the Fifth Circuit has basically rejected the idea that the Supreme Court's *Daubert* decision has any impact on death penalty litigation.[163] This holding—repeated frequently in Texas federal district court cases[164]--flows from *United States v, Fields,* a *federal* death penalty case that found the federal statute governing such cases "by its terms does not fully implement the Federal Rules of Evidence at the punishment phase," and "since *Daubert*'s holding was based on the Federal Rules of Evidence, it is not directly applicable."[165] Later cases simply say "*Daubert* does not apply to the standards governing the admissibility of expert evidence at a capital

[158] 483 F.3d 313, 341-46 (5th Cir. 2007). See *infra* text accompanying note 165 for a fuller discussion of *Fields*.

[159] United States v. Fields, 483 F.3d 313, 345 (5th Cir. 2007).

[160] *Buntion*, 982 F. 3d at 950 (quoting *Barefoot*, 463 U.S. at 899).

[161] *Holiday*, 587 F. App'x. 767.

[162] *Id.* at 782-83 (quoting Barefoot, 463 U.S. at 896). Interestingly, at the trial level in this case, the state's expert—who, like Grigson, never examined the defendant, *id.* at 782—testified that "his method of assessing future-dangerousness was considered valid," *id*. at 783, a statement that was demonstrably false, *see* Holiday v. Stephens No. H-11-1696, 2013 WL 3480384, at *29 (S.D. Tex. July 10, 2013). The "disinvent the wheel" metaphor—which first appeared in the *Barefoot* case, *see* 463 U.S. at 896—was also used in *Perry v. Quarterman*, No. 07-1032, 2008 WL 11466068, at *34 (S.D. Tex. Feb. 22, 2008), certificate of appealability denied, 314 F. App'x 663 (5th Cir. 2009).

[163] For examples of opinions where the Fifth Circuit has rejected the idea that the *Daubert* decision has any impact on death penalty litigation, *see, e.g.*, *Williams,* 761 F.3d at 571; *Fields,* 483 F.3d at 341–46; *Holiday*, 587 F. App'x at 783.

[164] *See, e.g.*, Rivas v. Thaler, No. 3:06-CV-344-B, 2010 WL 1223130, at *9 *(N.D. Tex. Jan. 22, 2010); Sigala v. Quarterman, No. 5:05cv177,* 2008 WL 8911640, at *8 (E.D. Tex. Mar. 28, 2008); Ramey v. Davis, 314 F. Supp. 3d 785, 830 (S.D. Tex. 2018), *aff'd sub nom.* Ramey v. Lumpkin, 7 F.4th 271 (5th Cir, 2021); Broadnax v. Davis, No. 3:15-CV-1758-N, 2019 WL 3302840, at *20 (N.D. Tex. July 23, 2019), *aff'd sub nom.* Broadnax v. Lumpkin, 987 F.3d 400 (5th Cir. 2021); *Cramer*, 2018 WL 624896 at *2; *Gobert*, 2022 WL 980645, at *30; *Gonzales*, 2014 WL 496876, at *16, *certificate of appealability denied,* 606 F. App'x 767 (5th Cir. 2015).

[165] *Fields,* 483 F.3d at 342. Interestingly, the *Fields* court continued in this manner: "[Defendant's] statutory argument is unavailing and is better couched as a constitutional claim based in the Eighth and Fifth Amendments. Unfortunately for Fields, that constitutional argument is foreclosed and it is beyond our power to revisit it." *Fields,* 483 F.3d at 343. None of the cases that relied on *Fields* on this point made reference to this part of the opinion. The *Fields* court also noted that it was "somewhat sympathetic" to defendant's argument, but it concluded that it "ultimately cannot read a provision into the [Federal Death Penalty Act] that evaluating the probative value of expert testimony for sentencing purposes requires a form of *Daubert* hearing." *Fields,* 483 F.3d at 342-43.

sentencing hearing."[166]

There is only one interesting quasi-exception here**.** In at least one district court case in the Fifth Circuit, a *Daubert* hearing *was* held (and defendant's *Daubert* arguments rejected).[167] On state court remand in that case, counsel asked the court to take judicial notice of those arguments, and stated they would reintroduce those same *Daubert* arguments made at the first hearing. The trial judge responded that she did take judicial notice of the prior *Daubert* hearing and she would maintain the same rulings as she made in the prior hearing.[168] On the defendant's subsequent *habeas* application, the court rejected defendant's *Strickland*-based argument that a new *Daubert* hearing should have been sought and that trial counsel should have made new arguments at that hearing.[169] Neither *Daubert* nor *Barefoot* was mentioned by the Fifth Circuit in its opinion affirming the denial of *habeas* relief.[170]

Nothing in these opinions offers any rationale–beyond the *Fields'* Court's interpretation of the Federal Death Penalty Act in the context of the Federal Rules of Evidence–as to *why Daubert* should *not* apply in this context. Elsewhere, *Daubert* has been found to apply in other criminal cases.[171] For example, the Eighth Circuit has found that *Daubert does* apply to criminal cases "when either the government or the criminal defendant have tried to introduce expert testimony."[172] Similarly, the Second Circuit has found that *Daubert* factors apply to both defense and government experts in federal criminal proceedings.[173]

Yet, the Fifth Circuit has refused to consider such cases, and has rejected

[166] *Williams,* 761 F.3d at 571; *Holiday*, 587 F. App'x at 783; *see also* Roberson v. Dir., TDCJ-CID, No. 2:09cv327, 2014 WL 5343198, at *2 (E.D. Tex. Sept. 30, 2014), *aff'd sub nom.* Roberson v. Stephens, 619 F. App'x 353 (5th Cir. 2015) (citing *Williams* on this point at the trial court level, but citing neither *Barefoot* nor *Daubert* in the Fifth Circuit opinion).

[167] *See* Russeau v. Thaler, No. 6:10cv449, 2012 WL 6706019, at *10-11 (E.D. Tex. Dec. 26, 2012).

[168] *See* Russeau v. State*,* 291 S.W.3d 426, 437-38 (Tex. Crim. App. 2009).

[169] *See Russeau,* 2012 WL 6706019, at *11.

[170] *See* Russeau v. Stephens, 559 F. App'x 342 (5th Cir. 2014).

[171] *See, e.g.*, *infra* notes 173, 176-80.

[172] United States v. Bahena, 223 F.3d 797, 808 (8th Cir. 2000) (applying *Daubert* where the defendant sought to introduce expert testimony concerning voice spectrography); *see United States v. Whitehead,* 176 F.3d 1030 (8th Cir. 1999) (applying *Daubert* where the government sought to introduce expert testimony concerning check-kiting techniques); *United States v. Villiard,* 186 F.3d 893 (8th Cir. 1999) (applying *Daubert* where the defendant sought to introduce expert testimony concerning the fallibility of eye-witness testimony).

[173] United States v. Yousef*,* 327 F.3d 56, 148 (2d Cir. 2003). Law review articles tell us of, literally, hundreds of criminal cases in which *Daubert* has been found to apply. *See, e.g.*, Rozelle, *supra* note 93; Cicchini, *supra* note 93; Risinger, *supra* note 93. And, as noted above, there have been other criminal cases in the Fifth Circuit in which *Daubert* was considered. *See* cases cited *supra* note 105.

Daubert applications[174] in cases where, by way of examples, a prosecution witness "intuitively selected factors he believed were likely to predict future violence rather than relying on factors that have been empirically demonstrated to relate to the risk of future violence among individuals in a particular context."[175] There is no conceivable reason why *Daubert* should apply to a case involving a crime with a lesser penalty but not the death penalty.

It is important to note that multiple states *do* apply *Daubert* in death penalty cases,[176] and in cases related to matters such as the admissibility of diffuse tensor imaging (DTI) and functional MRI (fMRI) neuroimaging evidence,[177] drunk driving,[178] or police investigatory techniques.[179] In one case, where a conviction was affirmed in spite of the trial court's failure to conduct an admissibility hearing on crime scene reconstruction testimony, nothing in the court's opinion goes to the question of the relevance of *Daubert* in death penalty cases.[180]

c) Daubert and the Law of Precedent[181]

Multiple cases merely find that, as B*arefoot* remains controlling precedent, *Daubert* is, basically, irrelevant to the defendant's case. Some characterize the argument that the Supreme Court *may* overrule *Barefoot* because of *Daubert* as "completely speculative."[182] Elsewhere, this defense argument was rejected because it "would constitute a new rule in violation of

[174] In one district court case, the court ignored the defense argument that "asking jurors to prognosticate future dangerousness forces them to abandon the beyond a reasonable doubt standard," Guevara v. Thaler, No. 08-1604, 2011 WL 4455261, at *26 (S.D. Tex. Sept. 23, 2011), simply citing *Barefoot* for the proposition that "the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty," *id.* at *27, rejecting the argument with no analysis.

[175] *Holiday*, 587 F. App'x at 782. The state witness in this case—following in the footsteps of Grigson—did not interview the defendant. *See id.*

[176] *See, e.g.*, State v. Morrison, 871 So.2d 1086, 1087 (La. 2004) ("[T]he present record does not provide this Court with an adequate basis for determining whether the trial judge properly exercised his gate-keeping function under *Daubert* . . . despite evidence presented by defendant that voice identification analysis has been subjected to peer review and publication, has a known error rate, and has a degree of acceptance in the relevant scientific community.")

[177] *See* State v. Grate, 172 N.E.3d 8, 26 (Ohio 2020).

[178] *See Olenowski*, 304 A.3d at 620-22.

[179] *See* Flowers v. State, 158 So.32 1009, 1031 (Miss. 2014) ("The *Daubert* factors apply to expert testimony relating to police investigatory techniques.").

[180] *See* Mitchell v. State, 136 P.3d 671, 699-401 (Okla. Crim. App. 2006).

[181] *See* Powell-El v. Hooks, No. 3:16-cv-109, 2018 WL 3328526, at *2 (S.D. Ohio July 6, 2018) (explaining that the law of precedent requires that "decisions from higher courts should control like cases in the lower courts unless or until the higher courts overrule the precedent.").

[182] *E.g.*, *Williams*, 761 F.3d at 571 (quoted in *Gonzales*, 606 F. App'x at 774-75); *see also Rivas*, 432 F. App'x at 404 (finding a *Daubert* claim regarding expert testimony on future dangerousness "squarely foreclosed by Supreme Court and circuit precedent"); *Ramey*, 314 F. Supp. 3d at 830, *aff'd sub. nom. Ramey*, 7 F.4th 271 (*Barefoot* not mentioned in Fifth Circuit opinion); *Broadnax*, 2019 WL 3302840 at *20, *aff'd sub. nom. Broadnax*, 987 F.3d 400.

Teague's[183] non-retroactivity principle."[184]

d) Failure to Find *Strickland* Violations

Most of the cases that reject *Strickland* arguments are premised on the rationale that as long as *Barefoot* remains "good law," a failure to–by way of example–object to the state's expert testimony that the defendant "constituted a future threat to society" could not be a *Strickland* violation. This is because *Barefoot,* which countenanced that testimony, remained good law.[185] Others examined the record and found no prejudice under *Strickland*.[186] In *Williams v. Stephens,* for example, the Court rejected defendant's argument that his lawyer fell short of the *Strickland* standard because he failed to challenge the *Barefoot* holding as "incompatible" with *Daubert.*[187] In some cases, the Fifth Circuit candidly conceded the weakness of the *Barefoot* holding, but nonetheless felt compelled to reject the defendant's arguments.[188]

In at least one case, defense counsel noted (perhaps, admitted) that he did not introduce any rebuttal expert testimony on the dangerousness issue, because he did not want to "accentuate" Dr. Grigson's testimony.[189] The Court found that this was a reasonable strategic decision and that *Strickland* was

[183] *See* Teague v. Lane*,* 489 U.S. 288 (1989) (holding that new rules of constitutional criminal law generally will not be announced or applied on collateral review).

[184] *Tigner*, 264 F.3d at 527. Dr. Grigson testified for the state in this case. *See id.* at 526. *See also Gobert*, 2022 WL 980645, at *24, *certificate of appealability denied*, No. 22-70002, 2023 WL 4864781 (5th Cir. July 31, 2023) (citing *Teague* in this context on the trial court level, but not citing *Barefoot* in the Fifth Circuit opinion).

[185] *See, e.g.*, *Curry*, 228 F.3d at *4; *Williams*, 761 F.3d at 571 (rejecting "the notion that trial counsel is deficient for not challenging the continued validity of *Barefoot* (citing *Johnson*, 306 F.3d at 255 (5th Cir. 2002)); Mines v. Cockrell, No. 3:00-CV-2044-H, 2003 WL 21394632, at *16-*17 (N.D. Tex. May 21, 2003) (noting that failure to object to Grigson's testimony because of his "notorious reputation" was not *Strickland* error).

[186] *See, e.g.*, *Harper*, 64 F.4th at 699, *cert. denied*, 144 S. Ct. 429 (2023).

[187] *Williams*, 761 F.3d at 571. *See also*, Harper v. Lumpkin, 19 F.4th 771 (5th Cir. 2011), *withdrawn and superseded on denial of reh'g en banc*, 64 F.4th 684 (5th Cir. 2023).

[188] *See Harper*, 19 F.4th at 785, *withdrawn and superseded on denial of reh'g en banc*, *Harper*, 64 F.4th 684 (5th Cir. 2023) (conceding that expert testimony on the likelihood of future dangerousness is "rather shaky" in general); *Buntion*, 982 F.3d at 950, discussed in this context *supra* note 98. *See also*, Holberg v. Davis, No. 2:15-CV-285-Z, 2021 WL 3603347, at *134 (N.D. Tex. Aug. 13, 2021) (finding, contrarily, that "the record now before the court establishes the *antithesis* of deficient performance by Holberg's trial counsel" (emphasis added)); Holberg v. Lumpkin, No. 21-70010, 2023 WL 2474213, at *1 (5th Cir. Mar. 13, 2013) (granting a limited certificate of appealability (COA), on the grounds that "reasonable jurists could debate the district court's resolution of her ineffective assistance of counsel." (*Barefoot* cited only on COA issue)).

[189] *See, e.g.*, *Cook*, 34 F.App'x 151 at *3.

not violated.[190]

Finally, in one case, the defendant's *Strickland* argument—based on an *Ake v. Oklahoma*[191] violation in which counsel failed to seek an independent psychiatric evaluation—failed on the rationale that such decision was a "reasonable trial strategy."[192] This opinion failed to point out a glaring irony: that *Barefoot* (decided two years before *Ake*) relied, in part, on the assumption that the factfinder would have before it both the views of 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.[193]

e) Cases Involving "Battles of the Experts"

In our earlier investigations of the Fifth Circuit's jurisprudence in cases

[190] *See id.* at *3 (5th Cir. 2002) (noting further that if the defense did call a rebuttal witness, that would have undermined counsel's argument that Grigson had never spoken to the defendant, as the rebuttal witness had). *See also*, *Little*, 162 F.3d at 861 ("[C]ounsel's decision not to request a psychiatric exam . . . and offer rebuttal psychiatric testimony during sentencing constituted a reasonable trial strategy"); *Curry*, 228 F.3d at *4 (finding the decision to not retain an expert to counter state's arguments on future dangerousness was "a strategic decision and is virtually unchallengeable"); *Devoe*, 717 F.App'x. at 427 ("Devoe's trial counsel's failure to object to the admission of [state testimony on defendant's likely future dangerousness] could not be objectively unreasonable, nor could jurors of reason disagree on this point"). Of interest here is that the witness in question was a senior criminal investigator for the Texas Special Prosecution Unit, not a psychiatrist. *Id*. at 422. Elsewhere, in a district court case, defendant's *Strickland* claim was rejected where the court found that his counsel had presented "contrary evidence through [his own expert] and "vigorously cross-examined the state's expert," thus failing to show that "counsel's representation fell below an objective standard of reasonableness." *Roberson***,** 2014 WL 5343198, at *23. Of special interest in Roberson is this. The prosecution followed a death on what is called generally "shaken baby syndrome." *See* Ex parte Roberson, No. WR-63,081-03, 2023 WL 151908, *1 (Tex. Crim. App. Jan. 11, 2023), *cert. denied sub nom.* Roberson v. Texas, 144 S. Ct. 129 (2023) (denying habeas relief on the grounds that "new scientific evidence" contradicts such testimony). Recently, in a lengthy and scholarly opinion, the New Jersey intermediate appellate court found that such testimony was not scientifically reliable. *See* State v. Nieves, 302 A.3d 595, 621 (N.J. 2023).

[191] *Ake*, 470 U.S. 68. On the relationship between *Barefoot* and *Ake*, *see generally Power of Symbolism: Dulling the* Ake *in* Barefoot*'s Achilles Heel*, *supra* note 8.

[192] *Little*, 162 F.3d at 861. For the relationship between *Barefoot* and *Ake* as discussed in cases from other circuits, *see e.g.*, Buttrum v. Black, 721 F. Supp. 1268, 1310-13 (N.D. Ga. 1989) (habeas corpus petition granted after finding the trial court violated [defendant's] due process right under *Ake*. "Under *Ake* the defendant is entitled to 'a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.") (citing *Ake*, 470 U.S. at 84)); Fitzgerald v. Trammell, No. 03-CV-531-GFK-TLW, 2013 WL 5537387 at *60 (N.D. Okla. Oct. 7, 2013) (leaving another court to substantiate whether Fitzgerald "was denied the basic tools to present a defense . . . by the denial of expert assistance guaranteed by Ake v. Oklahoma . . .").

[193] *See* Messer v. Kemp, 831 F.2d 946, 972 (11th Cir. 1987) (Kravitch, C.J., dissenting) (citing *Barefoot*, 463 U.S. at 899 (1983)). *See also* Lee Richard Goebes, *The Equality Principle Revisited: The Relationship of* Daubert v. Merrell Dow Pharmaceuticals *to* Ake v. Oklahoma, 15 CAP. DEF. J. 1, 16 (2002) (discussing this aspect of *Ake*). On the disconnect between *Barefoot* and *Ake*, *see Power of Symbolism: Dulling the* Ake *in* Barefoot*'s Achilles Heel*, *supra* note 8, at 165 (noting *Barefoot* rejects the notion that psychiatric testimony about future dangerousness is inherently untrustworthy; *Ake* explicitly fears "the [extremely high] risk of an inaccurate resolution of sanity issues" because of the scientific inexactitude of psychiatry and incidence and degree of professional disagreement on the diagnosis and classification of mental illness).

involving capital punishment of persons with intellectual disabilities,[194] and, in general, competency to be executed,[195] we discussed extensively those cases that turned on how the court reconciled conflicting expert testimony.[196] In virtually all cases–even though their expertise was, objectively, often far less than that of the defense experts–state experts were inevitably seen as more credible.[197] By way of example, in cases involving defendants with intellectual disabilities, prosecution experts endorsed the use of "ethnic adjustments" in death penalty cases—artificially adding points to the IQ scores of minority death penalty defendants—to make them eligible for capital punishment.[198]

What is most interesting here are the cases from our discussion about how *Strickland* has been construed when there was no "battle of the experts" issue. In those cases, defense counsel chose *not* to challenge the admissibility of Dr. Grigson's testimony for fear that that ploy would further highlight Grigson's testimony and might lead the state to call an *additional* witness to testify in the same manner on rebuttal.[199]

Only one of the sixteen-case cohort dealt squarely with this issue, and it is a particularly troubling example of the non-impact that *Daubert* has had on more recent post-*Barefoot* cases in the context of differing expert opinions. In *Coble v. Davis*,[200] the methodology employed by the state's expert was to look "at the person's history of violence, attitude about violence, the offense conduct, the personality and general behavior of the person, the quality of their conscience, whether they show remorse, and where the person will be located within the prison system."[201] The witness conceded that, in addition to never having been published in an academic journal, "he had not read any of the scholarly articles and treatises provided by the State on the prediction of future dangerousness."[202] Nonetheless, the trial court found Dr. Coons to

[194] *See, e.g.*, Perlin, Harmon & Wetzel, *supra* note 30 at 451.

[195] *See Insanity is Smashing up Against My Soul, supra* note 32 at 561.

[196] *See, e.g.*, *Insanity is Smashing up Against My Soul, supra* note 32 at 580-85 (competency to be executed); Perlin, Harmon & Wetzel, *supra* note 30 at 483-84 (intellectual disabilities).

[197] *See, e.g.*, *Insanity is Smashing up Against My Soul, supra* note 32 at 580-84.

[198] *See, e.g.*, Perlin, Harmon & Wetzel, *supra* note 30 at 485-88. On the pernicious use of "ethnic adjustments" in this context in general, see *Your Corrupt Ways Had Finally Made You Blind*, *supra* note 3; Robert M. Sanger, *IQ, Intelligence Tests, "Ethnic Adjustments" and* Atkins, 65 AM. U. L. REV. 87 (2015); David L. Shapiro et al., *Ethnic Adjustment Abuses in Forensic Assessment of Intellectual Abilities*, PRACTICE INNOVATIONS (Oct. 17, 2019), at 2.

[199] *See Cook*, 34 F.App'x 151 at *3 (5th Cir. 2002), discussed in this context *supra* notes 189-90.

[200] *Coble*, 728 F. App'x. 297.

[201] *Id.* at 299.

[202] *Id.*

be "qualified as an expert."[203]

In response, the defense witness[204] testified that the state witness's methodology for predicting violence in prison is "notoriously unreliable and entirely speculative," and that the "major psychological associations considered [that witness's] subjective risk-assessment method unreliable and inconsistent with the standard of practice."[205] The trial court ruled that the defendant "failed to show actual prejudice," and allowed the state witness's testimony to be admitted.[206] The Fifth Circuit affirmed, simply concluding that the defendant had pointed to no case in which the admission of unreliable evidence rose to an Eighth Amendment violation.[207]

Again, other issues were the focal point of some district court decisions.

[203] *Id.* at 300. Here, the 5th Circuit *conceded* that the state's expert testimony was "insufficiently reliable," but nonetheless rejected the defendant's argument because, citing *Barefoot*, they were "required to follow binding precedent from that court on federal constitutional issues." *Coble*, 728 F.App'x at 300-01. Two of the co-authors (MLP & TRH) have written in other contexts about the propensity of some courts—employing the confirmation heuristic, that is, preference for information that confirms beliefs and hypotheses. For further reading, see Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175-76 (1998); *See e.g.,* Perlin, Harmon & Kubiniec, *supra* note 33, at 288-92, 293-94 (discussing cases involving Dr. William Logan and Ferguson v. Secretary, Florida Dept. of Corrections, 716 F.3d 1315 (11th Cir. 2013).

[204] The defense expert witness in *Coble* was Mark Cunningham. *Coble*, 728 F'Appx at 300. *See* MARK D. CUNNINGHAM, https://www.markdcunningham.com/ (last visited June 12, 2024) (Mark is the recipient of the 2019 American Correctional Association Peter P. Lejins Research Award, the *Texas Psychological Association Award for Outstanding Contribution to Science,* and the shared recipient of the 2019 Association of American Publishers PROSE (Professional and Scholarly Excellence) Award, psychology category).

[205] *Coble,* 728 F. App'x. at 300.

[206] *Id.* at 300-301. Cunningham testified "that there was a 94.8 percent error rate in the accuracy of predictions of future dangerousness and only a 1.4 percent error rate in the accuracy of predictions of improbability of future dangerousness." *Coble*, 728 F. App'x at 300. In *Solomon*, 2005 WL 997316 at *6, the court noted archly, "[e]xperts often disagree as to their opinions, hence the phrase, 'battle of the experts.'" *See also*, *Roberson*, 2014 WL 5343198, at *20 ("Roberson may not agree with the correctness of the State's experts' testimony and the applicability of the Hare Psychopathy tests, but such arguments go to the weight of the evidence as opposed to the admissibility of the evidence."). On the psychopathy test checklist (the *Hare* test), see *infra* note 209.

[207] *Coble,* 728 F. App'x. at 301-02. *Cf.* Eugenia LaFontaine, Note, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional,* 44 B.C. L. REV. 207, 211 (2002) (arguing that by allowing "juries to hear psychiatric predictions of future dangerousness, [states] continue to violate the Eighth Amendment by encouraging the use of unreliable and inaccurate testimony which misguides juries and leads to arbitrary and capricious results."). In subsequent litigation in the *Coble* case at the state level, it was found that Coons' testimony was unreliable but that the error was harmless. *See Coble*, 728 F.App'x, 297, 301; *Brewer*, 2021 WL 6845600 at *57 (noting "the TCCA held the trial court error in admitting Dr. Coons' testimony at Coble's retrial was harmless.").

These included the role of race in assessments of future dangerousness,[208] and the relevance of the use of psychopathy/psychopathology "checklists" in assessing future dangerousness.[209] While these are significant issues, the Fifth Circuit never discussed them in appeals on the cases in question.

In short, the Fifth Circuit post-*Barefoot* opinions are devoid of thoughtful analysis. They merely repeat catchphrases that do not reflect nuance of any sort, they ignore *all* the evidence of the past four decades (much of which was available at the time of the *Barefoot* case), and they pay little attention to intervening Supreme Court decisions that demand recognition (as they have been recognized in multiple other jurisdictions in these contexts).[210]

We now turn to the school of thought known as *therapeutic jurisprudence* to contextualize what we have written about here, in the hopes that that approach will shed a brighter light on what we have been discussing.

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[208] *See* Perry v. Quarterman, No. CV 07-1032, 2008 WL 11466068 (S.D. Tex. Feb. 22, 2008). In *Perry*, defense counsel's closing argument focused, in part, on the state's use of Dr. Walter Quijano as an expert witness, because his "methodology" had "made the Attorney General 'confess error in [many] capital murder cases' because he used 'race as a factor in determining future dangerousness.'" *Perry*, 2008 WL 11466068, at *11. Race was not a factor present in *Perry*, and the state Attorney General in other cases had confessed error for using Dr. Quijano as a witness. *Perry*, 2008 WL 11466068, at *11. Interestingly, this witness also testified on behalf of the *defendant* in a case that relied on an alternate holding of *Barefoot*. *See* Prystash v. Stephens, 854 F.3d 830, 834 (5th Cir. 2017). Subsequently the Supreme Court, in a case involving Dr. Quijano's testimony (introduced by the *defense*), found "it would be patently unconstitutional for a State to argue that a defendant is liable to be a future danger because of his race." Buck v. Davis, 580 U.S. 100, 119 (2017). Dr. Quijano's testimony in an earlier aspect of *Buck* led the Texas Youth Commission to terminate its employment contract with him. *See* Brandi Grissom, *TYC Ends Contract with Doctor Who Gave Race Testimony in Court,* TX. TRIBUNE (Oct. 31, 2011), https://www.texastribune.org/2011/10/31/tyc-ends-contract-doctor-who-gave-race-testimony/. On Dr. Quijano's testimony in general, *see* Acker, *supra* note 1. It is not clear whether Dr. Quijano continues to testify. Neither his Linked-In profile nor his WebMD page mentions expert witness work. *See Dr. Walter Y. Quijano, PhD,* WEBMD CARE, https://doctor.webmd.com/doctor/walter-quijano-2b61e762-47c4-416a-a250-aae2f1a976fc-overview (last visited June 20, 2024); *Walter Quijano*, LINKEDIN, https://www.linkedin.com/in/walter-quijano-64233421 (last accessed June 20, 2024).

[209] *See Broadnax*, 2019 WL 3302840 at *20; *Roberson*, 2014 WL 5343198, at **20-21. On how the psychopathology checklist is subject to racial bias, *see* Sean D. O'Brien & Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 HOFSTRA L. REV. 751, 767-78 (2015); Michael L. Perlin & Alison J. Lynch, *"I See What Is Right and Approve, But I Do What Is Wrong": Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging*, 25 LEWIS & CLARK L. REV. 453, 472 (2021) (referencing O'Brien & Wayland's assertion "that 'it is difficult to imagine that implicit racial bias does not come into play when the defendant is labeled "anti-social" or "psychotic."'"). Perlin & Lynch then further discuss the efforts of the creator of the psychopathy checklist to suppress the publication of scholarly papers critical of that checklist). *Id*. at 474.

[210] *See generally* Roper v. Simmons, 543 U.S. 551 (2005). Of the sixteen defendants whose Fifth Circuit cases we discuss here, nine have been executed, two remain on death row, three had their sentences reduced to life in prison due to legal deficiencies in their cases, and one died in prison. Further, of the defendants whose cases involved Barefoot issues at the District Court level, nine have been executed, seven remain on death row, four had their sentences reduced to life in prison due to legal deficiencies in their cases, and one died in prison. See Appendix for sources and further reading on the subsequent histories of these defendants' cases, including the Strickland and Atkins violations involved in some.

III. WHAT IS THERAPEUTIC JURISPRUDENCE?[211]

A. Definition

Therapeutic jurisprudence (TJ) has surfaced as a novel school of thought that recognizes the law has therapeutic or anti-therapeutic consequences. It attempts to look at the "real world" implications of the way the legal system controls or manages behavior, most importantly, the way it regulates the lives and behavior of those who are marginalized.[212] It seeks to "ferret out biases, and to deal with the vulnerabilities of so much of [this marginalized] population" [and] is a means of potentially avoiding the polarization that is often the hallmark of traditional litigation."[213]

TJ's goal is to determine whether legal rules, procedures, and lawyer roles can or should be modified to increase their therapeutic potential *while not subordinating due process principles*.[214] While there is an innate tension in this inquiry, David Wexler has clearly identified how it must be resolved: the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[215] To be clear, "an inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil

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[211] This section is largely adapted from Michael L. Perlin, *"I Hope the Final Judgment's Fair": Alternative Jurisprudences, Legal Decision-Making, and Justice, in* THE CAMBRIDGE HANDBOOK OF PSYCHOLOGY OF LEGAL DECISION-MAKING (Monica Miller et al, eds.) (2024). This section further distills the work that one of the co-authors (MLP) has done on this topic for the past three decades, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623, 624-25 (1993). *See also Conformity and Compassion, supra* note 75; Michael L. Perlin, Heather Ellis Cucolo & Deborah A. Dorfman, "*I Saw Guns and Sharp Swords in the Hands of Young Children": Why Mental Health Courts for Juveniles with Autism Spectrum Disorder and Fetal Alcohol Spectrum/Disorder Are Needed*, 19 NW. J. L. & SOC. POL'Y 228, 251 (2024); *I've Got My Mind Made Up, supra* note 93, at 91 n.55*;* and Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304, 347 (2016).

[212] *See* Michael L. Perlin, et al.,*"The Distant Ships of Liberty": Why Criminology Needs to Take Seriously International Human Rights Laws that Apply to Persons with Disabilities*, 31 S. CAL. REV. L. & SOC. JUST. 374, 394 (2022) (discussing how TJ forces "us to look at the 'real world' implications of the failure of criminology to confront international human rights as it applies to persons institutionalized because of mental disability.").

[213] Julie Goldenson, Stanley L. Brodsky & Michael L. Perlin, *Trauma-Informed Forensic Mental Health Assessment: Practical, Legal, Ethical and Alignment with Therapeutic Jurisprudence Perspectives*, 28 AM. PYSCH. ASS'N PSYCHOL., PUB. POL'Y & L. 226, 227 (2022). *See generally*, *Conformity and Compassion, supra* note 75 at 220-221.

[214] *See e.g*., Michael L. Perlin, *"And My Best Friend, My Doctor, Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005); David B. Wexler, *Therapeutic Jurisprudence: Restructuring Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 762 (1993).

[215] David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

rights and civil liberties."[216]

TJ uses the law to "empower individuals, enhance rights, and promote well-being."[217] Further, it is "a sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasizes psychological wellness over adversarial triumphalism."[218] TJ–which is intrinsically "collaborative and interdisciplinary"[219]—supports an ethic of care.[220] Its structural foundations are commitments to dignity and to compassion.[221]

Importantly, for the purposes of this article, the use of TJ would make it more likely that defendants would be satisfied with the outcome of court proceedings, and, in cases involving therapeutic intervention, this outcome satisfaction would lead to greater compliance and success.[222] For one example, it would give richer textures to sentencing procedures, and would more likely bring about the sort of reconciliation that can only be positive for mental health purposes.[223] The "*perception* of receiving a fair hearing is therapeutic because it contributes to the individual's sense of dignity and conveys that he or she is being taken seriously." [224] Significantly, David Wexler, one of the co-creators of TJ, has underscored:

> Developments in areas of psychology—such as the elements of procedural justice, such as the reinforcement of desistance from crime, such as the techniques of relapse prevention planning, such as the principles of health psychology used to promote compliance with medical (or judicial) orders—can be brought into

[216] Michael L. Perlin, Deborah A. Dorfman & Naomi M. Weinstein, *"On Desolation Row": The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us,* 24 TEX. J. ON C.L. & C.R. 59, 103-04 (2018).

[217] Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 278 (2014).

[218] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J. L. & MED. 328, 329-30 (2001).

[219] *See* Nigel Stobbs, et al., *Therapeutic Jurisprudence—A Strong Community and Maturing Discipline, in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE 15, 18 (Nigel Stobbs, Lorana Bartels & Michel Vols eds., 2019). *See also Conformity and Compassion, supra* note 75, at 224.

[220] Perlin, Dorfman & Weinstein, *supra* note 216 at 104 (citing Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006)).

[221] *See Conformity and Compassion*, *supra* note 75, at 221.

[222] *See e.g*., Bernard P. Perlmutter, *George's Story: Voice and Transformation through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic,* 17 ST. THOMAS L. REV. 561, 595 (2005).

[223] *See generally* Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles, in Adversarial Proceedings*, 40 CRIM. L. BULL. 483, 491 (2004).

[224] Michael L. Perlin, Keri K. Gould & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption*, 1 AM. PSYCH. ASS'N. PSYCH. PUB. POL'Y & L. 80, 114 (1995).

> the legal realm and used as the new wine of TJ.[225]

It is also critical to consider two of TJ's foundational principles: compassion and dignity.[226] By way of example, writing about dignity in the important context of civil commitment,[227] Professors Jonathan Simon and Stephen Rosenbaum embrace TJ as a modality of analysis.[228] As dignity is at the "core" of TJ,[229] this means that people "possess an intrinsic worth that should be recognized and respected, and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth."[230]

Further, justice with compassion is one of the main premises of TJ.[231] A judge who demonstrates compassion best "represent[s] the goals of therapeutic jurisprudence."[232] Professors Anthony Hopkins and Lorana Bartels make this explicit:

> The argument we make here is that TJ is founded upon the psychology of compassion, understood as a sensitivity to and concern for the suffering of others and a commitment to alleviating and preventing it. The "other" in the context of TJ is any person upon whom the law acts or any actor within the legal process.[233]

Hand in glove with these principles is the prescription that "the right to counsel is . . . the core of therapeutic jurisprudence."[234] As one of the co-

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[225] David B. Wexler, *Guiding Court Conversation Along Pathways Conductive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence,* 1 INT'L J. THERAPEUTIC. JURIS. 367, 369 (2016).

[226] *See Conformity and Compassion*, *supra* note 75, at 226.

[227] On TJ and the civil commitment process in general, *see* PERLIN & CUCOLO, *supra* note 18, § 2-6.1, at 2-76.2 to 2-90.

[228] Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in an Age of Mass Incarceration*, 70 U. MIAMI L. REV. 1, 12-13 (2015). *See generally* Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1156 (1997).

[229] Michael L. Perlin, "*Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence*, 27 N.Z. U. L. REV. 1135, 1137 (2017).

[230] See Michael L. Perlin & Heather Ellis Cucolo, *"Something's Happening Here/But You Don't Know What It Is": How Jurors (Mis)Construe Autism in the Criminal Trial Process*, 82 U. PITT. L. REV. 585, 617-618 (2021) (quoting Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009)).

[231] *See* Lorie Gerkey, *Legal Beagles, a Silent Minority: Therapeutic Effects of Facility Dogs in the Courtroom*, 1 INT'L J. THERAPEUTIC JURIS. 405, 415 (2016).

[232] LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. AM. 373, 407 (2000).

[233] Anthony Hopkins & Lorana Bartels, *Paying Attention to the Person: Compassion, Equality and Therapeutic Jurisprudence, in Methodology and Practice and Practice of Therapeutic Jurisprudence*, *in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE, *supra* note 219 at 107. *See also*, in the context of TJ, Nigel Stobbs, *Compassion, the Vulnerable and COVID-19*, 45 Alt. L.J. 81, 81 (2020) ("Compassion is a virtue, value or disposition to act which can be held by individuals or groups .... Compassion is generally defined as having two elements. First is empathy--the capacity to sense that another is suffering, and to know what it might feel like to be subjected to that kind of suffering .... The second element of compassion is a felt need to try and alleviate that sensed suffering of others.").

[234] Juan Ramirez Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 119 (2004).

authors wrote over 25 years ago, "any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to insure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective."[235] As one of the co-authors has noted elsewhere, "[t]he failure to assign adequate counsel bespeaks . . . a failure to consider the implications of therapeutic jurisprudence."[236]

TJ is also the best solution for eliminating sanism[237] and pretextuality[238] in the law. Nearly thirty years ago, one of the co-authors (Perlin) argued that "therapeutic jurisprudence—by forcing us to focus on the therapeutic and anti[-]therapeutic outcomes of court decisions, statutes, rules and roles—illuminates the way that pretextuality and sanism drive the mental disability law system.[239] We believe this applies equally to the criminal justice system.

Finally, we believe that TJ is the best tool for combatting heuristics[240] and what we have referred to elsewhere as "false 'ordinary common sense'"

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[235] *The Executioner's Face is Always Well-Hidden*, *supra* note 22, at 235.

[236] Michael L. Perlin, *'Yonder Stands Your Orphan with His Gun": The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes,* 46 TEX. TECH. L. REV. 301, 337 (2013).

[237] *See e.g*., Michael L. Perlin & Alison J. Lynch*, "Mr. Bad Example": Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root Out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYOMING L. REV. 299, 306 ("Sanism is an 'irrational prejudice of the same quality and character as other irrational prejudices that cause, and are reflected in, prevailing social attitudes such as racism, sexism, homophobia, and ethnic bigotry'") (internal citations omitted). On sanism and the death penalty, *see generally* Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence,* 8 NOTRE DAME J. L., ETHICS & PUB. POL. 239 (1994).

[238] *See e.g*., Michael L. Perlin, *Sanism and the Law*, 15 AM. MED. ASS'N. J. OF ETHICS 878, 880 ("'Pretextuality' refers to the fact that courts regularly accept (either implicitly or explicitly) testimonial dishonesty, countenance liberty deprivations in disingenuous ways that bear little or not relationship to case law or to statutes, and engage in dishonest (and frequently meretricious) decision making . . ."). On how "pretextuality is clear in the death penalty context," *see Merchants and Thieves, Hungry for Power*, *supra* note 79, at 1542.

[239] Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 369, 374 (1994).

[240] *Conformity and Compassion, supra* note 75, at 237; *see also* Beecher-Monas, *supra* note 36, at n. 65; *see, e.g.,* Michael L. Perlin & Heather Ellis Cucolo, *"Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law,* 20 J. GENDER, RACE & JUST. 431, 453 (2017); *see Sanism and the Law, supra* note 238, at 879 (This is a "self-referential and non-reflective" way of constructing the world "('I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is')." *See* Perlin, Harmon & Chatt, *supra* note 25, at 281 (it is a "powerful unconscious animator of legal decision making that reflects 'idiosyncratic, reactive decisionmaking,' and is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities.").

("OCS") in the criminal justice process.[241] Elsewhere, one of the co-authors (Perlin) has said, "[j]udges decide cases teleologically, taking refuge—perhaps unconsciously—in time-worn heuristics that appeal to their own distorted 'ordinary common sense.'"[242]

The cases that reject *Daubert* and continue to endorse *Barefoot*–without even contemplating the possibility that it is time for new thought on that topic–ignore all the precepts of TJ and, sub silentio, fall prey to both the use of heuristic reasoning and the sway of false OCS. By sanctioning the testimony offered by Grigson's successors in interest, they ignore the lynchpins of TJ – dignity and compassion[243] – and ignore the inadequacy of counsel in so many of the cases we have reviewed here.

B. Significance of Courts' Failures to use Therapeutic Justice

As two of the co-authors (Perlin & Harmon) have written about in the past, the Fifth Circuit's failure to employ therapeutic jurisprudence principles in cases involving interpretations of *Strickland v. Washington*,[244] *Atkins v. Virginia,*[245] and *Panetti v. Quarterman,*[246] has been woeful.

About *Strickland,* we said this: "[i]t is fatuous to even consider whether the therapeutic principles to which the creators of TJ have aspired are part of either the trials of the defendants in this cohort of cases or the actions by counsel."[247] About *Atkins,* we said that the Fifth Circuit's decisions "all basely, and disgracefully, violate the most minimal standards of therapeutic jurisprudence, and ignore any notion of 'dignity.'"[248] And about *Panetti*, we said, "the Fifth Circuit has not, even remotely, factored in the teachings of therapeutic jurisprudence in its post-*Panetti* decisions.[249] We characterized the Fifth Circuit's caselaw as "bizarre and frightening,"[250] and this characterization holds true for the cohort of cases we discuss in this paper.

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[241] *See* Michael L. Perlin, *''What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top, You're on the Bottom": Are the Americans with Disabilities Act (and* Olmstead v. L.C.*) Anything More than "Idiot Wind?*," 35 U. MICH. J.L. REFORM 235, 236 (2001) ("[W]e use prereflective 'ordinary common sense' and other cognitive-simplifying devices such as heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.").

[242] *I've Got My Mind Made Up*, *supra* note 93*,* at 153.

[243] *Conformity and Compassion, supra* note 75, at 226-28.

[244] *Strickland,* 466 U.S. 668.

[245] *Atkins*, 536 U.S. 304, 305.

[246] *Panetti*, 551 U.S. 930, 936.

[247] Perlin, Harmon & Chatt, *supra* note 25, at 307, 308 (the "Fifth Circuit cases are squarely part of the system's incoherence and illegitimacy").

[248] Perlin, Harmon & Wetzel, *supra* note 30, at 496.

[249] *Insanity is Smashing Up Against My Soul*, *supra* note 32, at 603.

[250] Perlin, Harmon & Chatt, *supra* note 25, at 308.

Consider the bedrocks of therapeutic jurisprudence: commitments to dignity and compassion,[251] and the presence of effective counsel.[252] All are pathetically missing from the cohort of cases we discuss in this paper. First, other than in Judge Garza's concurrence and those opinions that refer to it favorably,[253] there is not a shred of compassion in this entire group of cases. Second, decisions sanctioning executions based on what can only be characterized as utterly bogus testimony[254] laugh at the notion of "dignity."[255]

Finally, as we found in our *Strickland*-focused analysis*, "*[t]he caselaw is totally bereft of those TJ-required fair process norms such as a meaningful right to counsel that 'operate as substantive and procedural restraints on state power to ensure that the individual suspect is treated with dignity and respect.'"[256] It is beyond ironic that the Fifth Circuit, in virtually every case, rejects *Strickland*-based inadequacy of counsel claims in light of the fact that *Barefoot* premised its holding, in significant part, on the aspiration that the adversary process would be the solution to any problems. As the cases we discuss here clearly demonstrate, that has not been the case at all.

It is ironic that ineffective counsel claims are almost automatically rejected, given the reality that the main rationale of *Barefoot* was a reliance on the adversarial process, theoretically premised on the previously-noted aspiration that adversarial debate between equal autonomous parties will produce the "truth."[257] This premise has always been a fantasy. In multiple cases of the sample we studied, the actions of defense lawyers reflected almost a fear of the adversarial process. Cases were decided as they were because counsel simply did not challenge Dr. Grigson and others who testified in the same

[251] *Conformity and Compassion, supra* note 75, at 226-27.

[252] *See* Ramirez & Ronner, *supra* note 234.

[253] *See e.g.*, *Solomon*, 2005 WL 997316, *6 (discussing Judge Garza's concurrence in *Flores; Barefoot* not mentioned on appeal); *Guy*, 343 F.3d 348, *on remand sub. nom*.; *Dretke*, 2004 WL 1462196 (discussing Judge Garza's concurrence in *Flores;* Guy's conviction subsequently vacated due to *Strickland* violation; *Barefoot* not mentioned in remand opinion). In *Wooten*, 598 F.3d 215 (the court rejected defendant's reliance on the *Garza* concurrence*: "*Because the Supreme Court has not explicitly overruled *Barefoot,* however, to hold that expert testimony on the issue of future dangerousness is inadmissible would require this Court to create a new rule of constitutional law, which it is prohibited from doing in the course of collaterally reviewing a criminal conviction" (*Barefoot* not mentioned in appellate opinion)).

[254] In writing about the death penalty in the context of therapeutic jurisprudence, one of one of the co-authors' (MLP) recommendations called for a "serious reevaluation of the roles of expert witnesses in testifying to 'future dangerousness' in death penalty cases." MICHAEL L. PERLIN, *supra* note 22, at 153.

[255] On dignity and therapeutic jurisprudence, *see* Michael L. Perlin, *"There Are No Trials Inside the Gates of Eden": Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, *in* COERCIVE CARE: RTS., L. AND POL'Y 193 (2013).

[256] Perlin, Harmon & Chatt, *supra* note 25, at 307 (quoting, in part, Perlin & Weinstein, *supra* note 38, at 12).

[257] Brants, *supra* note 145, at 1088.

manner, regularly pull[ing] their punches."[258]

Writing about the *Panetti* cohort of cases, two of the co-authors (Perlin & Harmon), noted that, if the court had embraced TJ principles, each of the decision-making "pressure points" in that body of law "could have been invigorated with new options and individualized decision-making."[259] Like those cases, these cases are "unfair and offensive to the dignity of criminal justice."[260]

In short, the court's failure to acknowledge the significance of TJ and the need to apply it to the cases in this cohort has robbed the defendants–and the judicial process–of the dignity and the compassion that must be a *sine qua non* of our legal system. By mindlessly repeating shibboleths about chaff and wheat, by rejecting the application of a subsequent U.S. Supreme Court case (without ever elaborating on or articulating its reasons for doing so), by ignoring the rampant violations of the *Strickland* standard, the Fifth Circuit–once again–has acted (and continues to act) shamefully. The vacuity of its talismanic repetition of the platitude that our adversary system would solve all problems that might arise under *Barefoot* is reflected in the analysis of the cases we discuss here.

CONCLUSION

There is no kinder way to couch this. The Fifth Circuit's post-*Barefoot* cases

reject, in a series of *ipse dixit*[261] opinions supported by no cogent analysis, arguments on the vacuity of the adversarial process, arguments seeking the application of *Daubert* to the questions at hand, and arguments illustrating the rampant violations of the *Strickland* test. The developments in the scholarship on future dangerousness of the past four decades has been globally ignored.[262]

Ironically, in *Trevino v. Davis,*[263] the Fifth Circuit pointed out that "counsel

[258] Etienne, *supra* note 156, at 474.

[259] Perlin, Harmon, & Kubiniec, *supra* note 33, at 50.

[260] *Id.* at n.176.

[261] *See* Brannon P. Denning, *Ipse Dixits*, *Bootstraps, and Constitutional Doctrine,* 74 BAYLOR L. REV. 555, 556 (2022).

[262] It will also be important to note how the Fifth Circuit deals with Federal cases in the aftermath of the recent amendments to FED. R. EVID. 702. (amended rule requires that a showing must be made that "it is more likely than not" that the expert testimony should be admitted under earlier set standards, which include whether the testimony is "based on sufficient facts or data" and "will help the trier of fact to understand the evidence or to determine a fact in issue").

[263] Trevino v. Davis, 829 F.3d 328, (5th Cir. 2016); *see Take the Motherless Children off the Street*, *supra* note 38, at 592 (discussing *Trevino*).

. . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[264] It is a pity that it did not listen to its own precedent in the cases under consideration in this article. Here, the Fifth Circuit continues to repeat, in talismanic fashion, that the adversary process would solve all problems that might arise under *Barefoot*. Our analysis of the *Strickland*-related cases rejects this platitude in its entirety.

The Bob Dylan critic Michael Gray notes pointedly how the song *Jokerman*—from which our title is drawn—expresses "the uncomfortable truth that there *can* be no choosing anything as straightforward as one position or another."[265] The cases that we discuss here ignore that "uncomfortable truth"; they simply parrot the conclusion that *Daubert* does not apply to death penalty cases (ignoring the fraudulence of the testimony that has led to death sentences in each case that we discuss), and thus find no reason to consider the opposite position. Again, Dylan wrote in *Jokerman* about the "false-hearted judges dying in the webs that they spin."[266] Here the defendants are entrapped in these webs, and their futures are ensured to be "full of dread."[267] Our hope is that, at some point, this will change.

[264] *Trevino*, 829 F.3d at 339, 343.

[265] MICHAEL GRAY, *supra* note 39, at 364 (emphasis in original).

[266] Bob Dylan, *Jokerman*, THE OFFICIAL BOB DYLAN (1983), https://www.bobdylan.com/songs/jokerman/.

[267] *Id.*

APPENDIX

See text accompanying *supra* note 210.

For the subsequent case histories and present status of the defendants whose Fifth Circuits were discussed, *see*:

Executed Inmates, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html (last updated Feb. 29, 2024) (documenting the executions of Rivas, Coble, Holiday, Cook, Little, Buntion, Tigner, Flores, and Curry).

Inmates on Death Row, TEX DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html (last updated Mar. 14, 2024) (documenting Devoe and Harper's status as death row inmates).

Inmates No Longer on Death Row, TEX DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_offenders_no_longer_on_dr.html (last updated Mar. 14, 2024) (documenting Guy, Williams, and Gonzales' sentence reductions to life in prison, and Johnson's suicide in prison).

Guy v. Dretke, No. 5:00-CV-191-C, 2004 WL 1462196, at *2 (N.D. Tex. 2004) (finding *Strickland* violation in Guy's case).

Death Row Inmate Wins Sympathy, CHI. TRIB. (June 23, 2004), https://www.chicagotribune.com/2004/06/23/death-row-inmate-wins-sympathy/ (describing the deficiency of representation in Guy's case).

Ex Parte Williams, No. WR-71,296-03, 2020 WL 7234532, at *1 (Tex. Crim. App. Dec. 9, 2020) (finding *Atkins* violation in Willliams' case).

Ex Parte Gonzales, No. WR-70,969-03, 2022 WL 2678866, at *1 (Tex. Crim. App. July 11, 2022) (staying Gonzales' execution due to prima facie showing of false testimony by expert witness).

Jolie McCullough, *Execution Halted as Court Questions Whether Ramiro Gonzales Should Have Been Sentenced to Life in Prison*, TEX. TRIB. (July 11,

2022), https://www.texastribune.org/2022/07/11/texas-execution-ramiro-gonzales/ (describing recantation of expert testimony in Gonzales' case).

Allan Turner & Steve McVicker, *Death Row Inmate's Final Message Written in Blood*, CHRON (Oct. 20, 2006), https://www.chron.com/news/houston-texas/article/Death-row-inmate-s-final-message-written-in-blood-1635132.php (describing the details of Johnson's suicide in prison).

For the subsequent case histories and present status of the defendants whose cases involved *Barefoot* issues at the District Court level, *see*:

Executed Inmates, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html (last updated Feb. 29, 2024) (documenting the executions of Rogers, Sigala, Russeau, Wooten, Roberts, Simpson, Threadgill, Perry, and Brewer).

Inmates on Death Row, TEX DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html (last updated Mar. 14, 2024) (documenting Ramey, Prystash, Roberson, Broadnax, Gobert, and Holberg's status as death row inmates).

List of Federal Death Row Prisoners, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners (last visited Mar. 23, 2024) (documenting Cramer's status as a federal death row inmate).

Inmates No Longer on Death Row, TEX DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_offenders_no_longer_on_dr.html (last updated Mar. 14, 2024) (documenting Lewis, Guevara, Mines and Solomon's sentence reductions to life in prison, and Vanderbilt's death in prison).

Lewis v. Dretke, 355 F.3d 364, 369-70 (5th Cir. 2003) (finding *Strickland* violation in Lewis' case).

Ex Parte Guevara, No. WR-63, 926-03, slip op. at 6 (Tex. Crim. App. Sept. 23, 2020) (finding *Atkins* violation in Guevara's case).

Death Sentence Commuted for 2nd Texas Inmate in 2 Weeks Due to Intellectual Disability, CBS NEWS TEX. (Sept. 23, 2020), https://www.cbsnews.com/texas/news/death-sentence-commuted-texas-inmate-gilmar-guevara-intellectual-disability/ (describing Guevara's intellectual disability that led to the finding of an *Atkins* violation).

Mines v. Quarterman, 267 Fed. App'x 356, 362 (5th Cir. 2008) (finding jury instructions improperly precluded jury from considering mitigating evidence regarding Mines' mental illness).

Solomon v. Livingston, No. 1:02CV455, 2005 WL 997316, at *8 (E.D. Tex. Mar. 28, 2005) (citing *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005)) (finding Solomon entitled to relief from his death sentence under the U.S. Supreme Court decision in *Roper v. Simmons* because he was under eighteen years of age at the time of the offense).

Pam Easton, *Death Row Inmate Dies at Galveston Hospital After Collapsing in July*, MY PLAINVIEW (Oct. 17, 2022), https://www.myplainview.com/news/article/Death-row-inmate-dies-at-Galveston-hospital-after-9028354.php (describing the details of Vanderbilt's death in prison).

For additional information on the defendants discussed in the text accompanying *supra* note 210, *see*:

George Rivas Executed in Texas, FORGIVENESS FOUND. (July 12, 2022), https://theforgivenessfoundation.org/2022/07/12/george-rivas-executed-in-texas/.

Billie Wayne Coble: Two Men Arrested at Texas Execution, BBC (Mar. 1, 2019), https://www.bbc.com/news/world-us-canada-47424070.

David Carson, *Execution Report: Raphael Holiday*, TEX. EXECUTION INFO. CTR. (Nov. 19, 2015), https://www.txexecutions.org/reports/531-Raphael-Holiday.htm.

David Carson, *Execution Report: Bobby Cook*, TEX. EXECUTION INFO. CTR. (Mar. 12, 2003), https://www.txexecutions.org/reports/299-Bobby-Cook.htm.

David Carson, *Execution Report: William Little*, TEX. EXECUTION INFO. CTR. (May 9, 2016), https://www.txexecutions.org/reports/177-William-Little.htm.

Jolie McCullough, *Texas Executes Carl Buntion, the State's Oldest Death Row Prisoner, for Houston Police Officer's Murder*, TEX. TRIB. (Apr. 21, 2022), https://www.texastribune.org/2022/04/21/texas-execution-carl-buntion/.

Texas Killer Executed for Double Murder, UPI (Mar. 7, 2002), https://www.upi.com/Top_News/2002/03/07/Texas-killer-executed-for-double-murder/98471015551680/.

Miguel Flores Executed for Angela Tyson Murder, MURDER DATABASE (July 10, 2023), https://murderdb.com/miguel-flores-executed-for-angela-tyson-murder/.

David Carson, *Execution Report: Alva Curry*, TEX. EXECUTION INFO. CTR. (Jan. 29, 2003), https://www.txexecutions.org/reports/293-Alva-Curry.htm.

Jolie McCullough & Ben Hasson, *Faces of Death Row*, TEX. TRIB., https://apps.texastribune.org/death-row/ (last updated Aug. 15, 2023).

Johnson v. Cockrell, 306 F.3d 249 (5th Cir. 2002). (Johnson committed suicide fifteen hours before his execution was scheduled. *See Michael Johnson (murderer, born 1977),* WIKIPEDIA, https://en.wikipedia.org/wiki/Michael_Johnson_(murderer,_born_1977) (last visited June 24, 2024).