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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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Moana earned her Bachelor’s degree in Criminology and Criminal Justice at Niagara University. Her commitment to scholarly inquiry continued through her Master’s degree in Criminal Justice Administration, where she dedicated herself fully to the present research. After graduating from Niagara University in August 2023, Moana commenced her legal education at Willamette University College of Law in September 2023. This experience has shaped her aspiration to contribute significantly to the legal field, combining academic rigor with practical application in pursuit of justice and societal impact. She expects to earn her Juris Doctor in 2026.

Portions of this article were presented by co-authors Perlin, Harmon & Geiger on November 15, 2023, to the American Society of Criminology’s annual conference, Philadelphia, PA (presentation was co-sponsored by the Indigent Defense Research Association and the International Society for Therapeutic Jurisprudence). The authors wish to thank Dr. Kenneth Weiss and Dr. David Shapiro for their very helpful comments.

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

Over a stinging dissent by Justice Blackmun, 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.” 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.”

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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].


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.


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.”

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, 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. and Kumho Tire Co. v. Carmichael. Both cases were based on the

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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.”).

Federal Rules of Evidence. These cases and their progeny, however, have had a “negligible impact” on post-Barefoot litigation. 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,” and “there is little, if any evidence, that there has been any ‘real life’ impact of Daubert on Barefoot in this context.” 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.”

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

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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), TRAUTMAN 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 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, supra note 16.

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.”).


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 “[i]there 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. 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.

Post-Barefoot developments must also be considered in the context of
Strickland v. Washington, which established a “palid, nearly-impossible-to-viate” standard in determinations of adequacy of counsel. Although
numerous defendants in post-Barefoot cases have argued that counsel was
ineffective either for not cross-examining vigorously on the question of dan-
gerousness 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 Chemerinsky, 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).


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.”).


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, courts have routinely found that this was either a strategic decision by counsel and/or did not constitute prejudice to the defense. 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.

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 Strickland 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, the Circuit’s decisions were “an embarrassment to our system of criminal law and procedure,” 28 and “infinitely depressing,” 29 and

in cases seeking to enforce Panetti v. Quarterman, also purportedly banning capital punishment in cases involving defendants who were seriously mentally ill, 30 its decisions were “even more astonishing” than were its post-Strickland and

24 See infra cases accompanying note 119.
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).
29 Perlin, Harmon & Chatt, supra note 25, at 309.
post-Atkins decisions.\textsuperscript{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.”\textsuperscript{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,”\textsuperscript{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:\textsuperscript{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

\textsuperscript{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].

\textsuperscript{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).


\textsuperscript{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.\footnote{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?”}. 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, \textit{Jokerman},\footnote{See BOB DYLAN, JOKERMAN (Columbia Records 1983).} a song whose lyrics one of the authors (MLP) has drawn upon for article titles three times previously.\footnote{See Michael L. Perlin & Heath 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 \textit{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).} The song, in part, tells us that evil “is inside us all,”\footnote{See e.g., MICHAEL GRAY, THE BOB DYLAN ENCYCLOPEDIA 364 (2008).} and reflects a “renewed skepticism” about “closed and fixed points of view.”\footnote{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)).} The quoted lyrics come from this couplet:

\begin{quote}
Fools rush in where angels fear to tread
Both of their futures, so full of dread, you don’t show one—
Shedding off one more layer of skin
Keeping one step ahead of the persecutor within.
\end{quote}

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 \textit{persecutor}. The defendants unlikely were angels; it is not clear if the attorneys in some of the cases we discuss\footnote{\textit{Jokerman}, BOB DYLAN, https://www.bobdylan.com/songs/jokerman/. (last visited Apr. 16, 2024).} 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
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 blindness45 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 Critique49

After Thomas Barefoot was convicted of murdering a Texas police officer, two psychiatrists50 testified in response to hypothetical questions at the pen-

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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.


47 Jokerman, supra note 41.

48 Id.

49 See generally, PERLIN & CUOCOLO, 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 com-
mit further acts of violence and represent a continuing threat to society.” 51
The jury subsequently accepted this testimony and imposed the death pen-
alty. 52

Barefoot’s conviction was affirmed by the state courts, 53 and his applica-
tion 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 partic-
ular circumstances in this case the testimony of the psychiatrists was so unrelia-
ble 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 per-
sons 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 pre-
dictions of future behavior are constantly made.” 58 In the course of this argu-
ment, the Court rejected the views presented by the American Psychiatric

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

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,” 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.”

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,” and that the fact that the witnesses had not examined the defendant “went to the weight of their testimony, not to its admissibility.”

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.

As noted previously, 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 psychosocial factors.

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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.”

Because such purportedly scientific testimony—though “unreliable [and] prejudicial”—was imbued with an “aura of scientific infallibility,” it could easily lead “the jury to accept it without critical scrutiny.” 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

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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, 857, 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.


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

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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.").


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. The sorts of heuristic
devices 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.” In an earlier article, one of the authors (Perlin) suggested that:

Barefoot appears to be indefensible on evidentiary grounds, on constitu-
tional 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.

This assessment remains true. 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,” 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
any basis in fact for this blithe reassurance.\textsuperscript{79} Certainly, the record is clear that courts continue to regularly ignore relevant, valid, and reliable social science data in this specific context.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{82} and studies that initially appeared to sanction such predictivity were flawed by “fundamental errors.”\textsuperscript{83} In short,
although courts continue to admit expert testimony regarding future dangerousness, “no modern studies supporting its reliability can be found.”

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.\(^8^5\) and in Kumho Tire Co. v. Carmichael\(^8^6\) on the relevance and reliability of the Barefoot test? And if the impact has been negligible, why is that?\(^8^7\)

*Daubert* established that expert testimony is admissible so long as it follows the rules of the scientific method.\(^8^8\) 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.\(^8^9\) If a trial court considers these factors, “the court should focus solely on the principles and methodology, not on the conclusions that they generate.”\(^9^0\) In short, *Daubert* places the reliability assessment on trial judges.\(^9^1\) And this doctrine was expanded to non-scientific evidence in the *Kumho* case.\(^9^2\) 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

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\(^8^4\) DeCoux, supra note 17, at 160.
\(^8^5\) Daubert, 509 U.S. 579 (1993).
\(^8^7\) 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).
\(^8^9\) Daubert, 509 U.S. at 593-94; see Heather Ellis Cuocolo & 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]
\(^9^0\) Daubert, 509 U.S. at 595.
\(^9^1\) Far from the Turbulent Space, supra note 89, at 140.
\(^9^2\) 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 4968767 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.  

The inconsistencies between Daubert and Barefoot should be apparent, yet, despite their observation in subsequent cases, the inconsistencies have basically been ignored. The Fifth Circuit has been clear about this: “[e]xpert future dangerousness testimony is permissible under Barefoot,” and any “contention that the Supreme Court may overrule Barefoot in light of Daubert is completely speculative.” 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

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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).

an appropriate case, fully-developed factually and well-briefed, it may be appropriate for the Supreme Court to consider again its ruling in Jurek.\footnote{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 Infirmitities 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).}

Again, Daubert has had no “real life” impact on Barefoot, at least in the Fifth Circuit.\footnote{See PERLIN & CUCULO, 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.’”).}

This is all the more troubling, given the enormity and the potential finality of the capital sentencing process;\footnote{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.”).} 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,\footnote{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.} and their specific refusal to apply it to capital sentencing cases.\footnote{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.} 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-
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. This case has no con-
nection 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.

**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*.” And this “mock[ery]” has been re-
peated time after time in cases involving *Barefoot* claims.

As we will discuss subsequently, courts have regularly rejected *Barefoot-
related claims—based, by way of example, on trial counsel’s failure “to inde-
pendently 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 danger-
ousness is constitutionally admissible.” 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 ev-
idence; and, because *Barefoot* ruled such evidence is admissible, there
could be no prejudice under *Strickland*.

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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.


115 See e.g., Simpson v. Quarteman, 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*.\(^1\) We found seventeen case opinions (involving sixteen defendants) that contained a discussion of *Barefoot* relevant to our questions.\(^2\) 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.\(^3\)

- 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),\(^4\) stays of execution, or the scope of

\(^{1}\) The full list of cases is on file with the authors.

\(^{2}\) 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).

\(^{3}\) 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).

federal habeas corpus petitions.\textsuperscript{121}

Case opinions that cited \textit{Barefoot} solely on issues involving mitigating or aggravating\textsuperscript{122} evidence that were irrelevant to expert psychiatric testimony and questions of future dangerousness,\textsuperscript{123} and

Case opinions that cited \textit{Barefoot} simply to support the position that \textit{Jurek v. Texas}\textsuperscript{124} still controlled the contours of death penalty law.\textsuperscript{125}

\section*{B. Findings}

A review of the sixteen “\textit{Barefoot} cases” in the Fifth Circuit reveals these results\textsuperscript{126}.

As noted earlier, there is one strong “anti-\textit{Barefoot}” concurring opinion,\textsuperscript{127} and several other cases that—in spite of affirming convictions—vividly point out the infirmities in \textit{Barefoot}.\textsuperscript{128}

In only one case (\textit{Guy v. Cockrell}),\textsuperscript{129} was a defendant remotely “successful,”

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\textsuperscript{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 \textit{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.
\textsuperscript{122} At least two cases relied on \textit{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). See, e.g., \textit{Roberts}, 681 F.3d at 606-09 (involving a \textit{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 \textit{lay witnesses} to testify as to future dangerousness). The full list of cases is on file with the authors.
\textsuperscript{123} See \textit{Jurek}, 428 U.S. 262 (holding that the imposition of the death penalty is not \textit{per se} cruel and unusual punishment in violation of the Eight and Fourteenth Amendments). \textit{Jurek} continues to be the subject of legal scholarship. See, e.g., Justin D. Levinson et al., \textit{Deadly 'Toxins': A National Empirical Study of Racial Bias and Future Dangerousness Determinations}, 56 GA. L. REV. 225, 237-40 (2021).
\textsuperscript{124} See \textit{Tennard v. Dretke}, 442 F.3d 240, 250 (5th Cir. 2006); Graham v. Collins, 950 F.2d 1009, 1026 (5th Cir. 1992); Penry v. Lynaugh, 832 F.2d 915, 927 (5th Cir. 1987) (Garwood, J., concurring).
\textsuperscript{125} Some cases are categorized more than once. In only one case arising in Fifth Circuit district courts citing \textit{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 \textit{Miranda} rights, violated defendant’s Fifth Amendment right against compulsory self-incrimination. See \textit{Vanderbilt v. Lynaugh}, 683 F. Supp. 1118, 1122-26 (E.D. Tex. 1988) (distinguishing \textit{Barefoot}).
\textsuperscript{126} See \textit{Flores}, 210 F.3d at 462-70; supra text accompanying notes 100-02.
\textsuperscript{127} See \textit{Harper}, 64 F.4th at 692-93; \textit{Buntion}, 982 F.3d at 950-51; see also \textit{Cook}, 34 F. App’x 151 at *1 n.6 (discussing the “sharp criticism” of \textit{Barefoot} in \textit{Flores} and \textit{Gardner}). For further discussion of \textit{Harper} and \textit{Buntion} in this context, see infra note 158 and infra note 188 and accompanying text.
\textsuperscript{128} 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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\(^{131}\) 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.


\(^{138}\) See *Little*, 162 F.3d at 861; see also Rogers v. Director, TCJD-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 reveals that most decisions fell into the same categories mentioned above. 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.” As other commentators have noted, this assumption—that the adversary system “works”—is exceedingly problematic. The adversarial process is based on the myth that adversarial debate between

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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)).


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.”\footnote{145} Significantly, in their analysis of how Daubert and Kumho have moved courts to “heavier judicial evaluation and control, in the name of ‘reliability,’”\footnote{146} Professors Denbeaux and Risinger catalog the literature that critiques this position.\footnote{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’”\footnote{148}, and certainly, there is no reason to expect that jurors could do so any better.\footnote{149} As Professor Christopher Slobogin has noted:

There is good reason to believe, however, that Justice Blackmun and Judge Garza\footnote{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.\footnote{151} Yet, several of the Fifth Circuit cases blithely\footnote{152} uphold convictions based precisely on this unfounded endorsement of the adversarial process as a means of achieving just verdicts,\footnote{153} basing its rationale on, by way of example, the theory


\footnote{147} See id. at 22 n.28.

\footnote{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. POLY & L. 1226, 1245 (1998).

\footnote{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).

\footnote{150} Judge Garza wrote the concurrence in Flores, (210 F.3d at 456) discussed supra at text accompanying notes 100-02.

\footnote{151} Christopher Slobogin, Dangerousness and Expertise Redux, 56 EMORY L.J. 275, 312 (2006).

\footnote{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)).

\footnote{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.”

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. 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.”

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. 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 “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). 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); Jan Campbell Moriarty & Daniel D. Langleben, Who Speaks for Neuroscience? Neuroimaging Evidence and Courtroom Expertise, 68 CASE W. RES. 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”).


157 See Perlin, Harmon & Chatt, supra note 25.
Fields, 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.”\textsuperscript{159} In\textit{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.”\textsuperscript{160} And, in\textit{Holiday v. Stephens},\textsuperscript{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.”\textsuperscript{162}

\textbf{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\textit{Daubert} decision has any impact on death penalty litigation.\textsuperscript{163} This holding—repeated frequently in Texas federal district court cases\textsuperscript{164}—flows from\textit{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\textit{Daubert}'s holding was based on the Federal Rules of Evidence, it is not directly applicable.”\textsuperscript{165} Later cases simply say “\textit{Daubert} does not apply to the standards governing the admissibility of expert evidence at a capital

\textsuperscript{158} 483 F.3d 313, 341-46 (5th Cir. 2007). See infra text accompanying note 165 for a fuller discussion of Fields.
\textsuperscript{159} United States v. Fields, 483 F.3d 313, 345 (5th Cir. 2007).
\textsuperscript{160} Buntion, 982 F. 3d at 950 (quoting Barefoot, 463 U.S. at 899).
\textsuperscript{161} Holiday, 587 F. App’x. 767.
\textsuperscript{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\textit{Barefoot} case, see 463 U.S. at 896—was also used in\textit{Perry v. Quartersman}, 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).
\textsuperscript{163} For examples of opinions where the Fifth Circuit has rejected the idea that the\textit{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.
\textsuperscript{165} Fields, 483 F.3d at 342. Interestingly, the\textit{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.”\textit{Fields}, 483 F.3d at 343. None of the cases that relied on\textit{Fields} on this point made reference to this part of the opinion. The\textit{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\textit{Daubert} hearing.”\textit{Fields}, 483 F.3d at 342-43.
sentencing hearing.”

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). 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. 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. Neither Daubert nor Barefoot was mentioned by the Fifth Circuit in its opinion affirming the denial of habeas relief.

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. 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.” Similarly, the Second Circuit has found that Daubert factors apply to both defense and government experts in federal criminal proceedings.

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

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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).


170 See Rousseau 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 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.”

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, and in cases related to matters such as the admissibility of diffuse tensor imaging (DTI) and functional MRI (fMRI) neuroimaging evidence, drunk driving, or police investigatory techniques. 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.

c) Daubert and the Law of Precedent

Multiple cases merely find that, as Barefoot 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.” 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.”)


178 See Olenski, 304 A.3d at 620-22.

179 See Flowers v. State, 158 So.3d 1009, 1031 (Miss. 2014) (“The Daubert factors apply to expert testimony relating to police investigatory techniques.”).


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 non-retroactivity principle.”

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. Others examined the record and found no prejudice under Strickland. 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. In some cases, the Fifth Circuit candidly conceded the weakness of the Barefoot holding, but nonetheless felt compelled to reject the defendant’s arguments.

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. The Court found that this was a reasonable strategic decision and that Strickland was

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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. 2021), withdrawn and superseded on denial of rehe'g en banc, 64 F.4th 684 (5th Cir. 2023).

188 See Harper, 19 F.4th at 785, withdrawn and superseded on denial of rehe'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. 3, 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. Oklahoma191 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) (Kravitich, 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,\textsuperscript{194} and, in general, competency to be executed,\textsuperscript{195} we discussed extensively those cases that turned on how the court reconciled conflicting expert testimony.\textsuperscript{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.\textsuperscript{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.\textsuperscript{198}

What is most interesting here are the cases from our discussion about how \textit{Strickland} has been construed when there was no “battle of the experts” issue. In those cases, defense counsel chose \textit{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 \textit{additional} witness to testify in the same manner on rebuttal.\textsuperscript{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 \textit{Daubert} has had on more recent post-\textit{Barefoot} cases in the context of differing expert opinions. In \textit{Coble v. Davis},\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{202} Nonetheless, the trial court found Dr. Coons to

\begin{itemize}
\item \textsuperscript{194} See, e.g., Perlin, Harmon & Wetzel, supra note 3 at 451.
\item \textsuperscript{195} See \textit{Insanity is Smashing up Against My Soul}, supra note 32 at 561.
\item \textsuperscript{196} See, e.g., \textit{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).
\item \textsuperscript{197} See, e.g., \textit{Insanity is Smashing up Against My Soul}, supra note 32 at 580-84.
\item \textsuperscript{199} See \textit{Cook}, 34 F.App’x 151 at *3 (5th Cir. 2002), discussed in this context supra notes 189-90.
\item \textsuperscript{200} \textit{Coble}, 728 F. App’x. 297.
\item \textsuperscript{201} \textit{Id.} at 297.
\item \textsuperscript{202} \textit{Id.}
be “qualified as an expert.”

In response, the defense witness 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.” The trial court ruled that the defendant “failed to show actual prejudice,” and allowed the state witness’s testimony to be admitted. 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.

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

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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 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.

206 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, and the relevance of the use of psychopathy/psychopathology “checklists” in assessing future dangerousness. 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).

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 LinkedIn 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 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. 213 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


TJ uses the law to “empower individuals, enhance rights, and promote well-being.” 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.” TJ—which is intrinsically “collaborative and interdiscipli


dary”—supports an ethic of care. Its structural foundations are commitments to dignity and to compassion.

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. 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. 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.” 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
It is also critical to consider two of TJ’s foundational principles: compassion and dignity. By way of example, writing about dignity in the important context of civil commitment, Professors Jonathan Simon and Stephen Rosenbaum embrace TJ as a modality of analysis. As dignity is at the “core” of TJ, 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.”

Further, justice with compassion is one of the main premises of TJ. A judge who demonstrates compassion best “represent[s] the goals of therapeutic jurisprudence.” 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.

Hand in glove with these principles is the prescription that “the right to counsel is . . . the core of therapeutic jurisprudence.” As one of the co-

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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.


233 Anthony Hopkins & Lorana Bartels, Paying Attention to the Person: Compassion, Equality and Therapeutic Jurisprudence, in 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.”).

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.”

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.”

TJ is also the best solution for eliminating sanism and pretextuality 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. We believe this applies equally to the criminal justice system.

Finally, we believe that TJ is the best tool for combatting heuristics 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.
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.
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 Cuocolo, “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. 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.’”

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—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, Atkins v. Virginia, and Panetti v. Quarterman, 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.” 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.’” And about Panetti, we said, “the Fifth Circuit has not, even remotely, factored in the teachings of therapeutic jurisprudence in its post-Panetti decisions.” We characterized the Fifth Circuit’s caselaw as “bizarre and frightening,” and this characterization holds true for the cohort of cases we discuss in this paper.

242 I’ve Got My Mind Made Up, supra note 93, at 153.
243 Strickland, 466 U.S. 668.
244 Atkins, 536 U.S. 304, 305.
245 Panetti, 551 U.S. 930, 936.
246 Perlin et al.: “Their Futures, So Full of Dread”: How Barefoot’s Contamination of the Criminal Justice Process is Worsening, supra note 25, at 307, 308 (the “Fifth Circuit cases are squarely part of the system’s incoherence and illegitimacy”).
247 Perlin, Harmon & Wetzel, supra note 30, at 496.
248 Perlin, Harmon & Chatt, supra note 25, at 603.
249 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 testimony254 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.
257 Brants, supra note 145, at 1088.
manner, regularly pull[ing] their punches.”

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.” Like those cases, these cases are “unfair and offensive to the dignity of criminal justice.”

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 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.

Ironically, in Trevino v. Davis, 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.
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.”\textsuperscript{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 \textit{Barefoot}. Our analysis of the \textit{Strickland}-related cases rejects this platitude in its entirety.

The Bob Dylan critic Michael Gray notes pointedly how the song \textit{Jokerman}—from which our title is drawn—expresses “the uncomfortable truth that there \textit{can} be no choosing anything as straightforward as one position or another.”\textsuperscript{265} The cases that we discuss here ignore that “uncomfortable truth”; they simply parrot the conclusion that \textit{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 \textit{Jokerman} about the “false-hearted judges dying in the webs that they spin.”\textsuperscript{266} Here the defendants are entrapped in these webs, and their futures are ensured to be “full of dread.”\textsuperscript{267} Our hope is that, at some point, this will change.

\textsuperscript{264} \textit{Trevino}, 829 F.3d at 339, 343. \\
\textsuperscript{265} \textsc{Michael Gray}, supra note 39, at 364 (emphasis in original). \\
\textsuperscript{267} \textit{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:


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

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


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).


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/.


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/.


