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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 22, 1983

No. A-638 Barefoot v. Estelle

Dear Chief,

I have now reviewed (i) the Application for a Stay; (ii) the Response of the State; (iii) the decision of CA5 denying a stay; and (iv) the decision of the DC denying federal habeas relief.

Also I have re-read Byron's helpful summary memo of January 21, and the pool memo on this case when it was here in 1980--a memo that focused on the hypothetical question and answers that are the principal ground relied upon then and now by petitioner.

The 100 per cent degree of certainty expressed by the state's psychiatrist and psychologist seems unprofessional and suspect. Yet, at the federal habeas corpus hearing, the psychiatrist and psychologist who testified for the petitioner, basing their testimony on the same hypothetical, agreed to the extent of 90% with the state's witnesses. None of these experts personally examined the petitioner, though this was an option open to the petitioner with his witnesses. Moreover, at this hearing different experts for the state--also basing their testimony on the hypothetical--agreed generally with the predictive judgment of future dangerousness.

Petitioner's challenge to this testimony is not frivolous. It has been considered and rejected, however, by the Texas Court of Criminal Appeals four times, and by the DC and the CA5 in this habeas proceeding.

In sum, I cannot say that the application for a stay now presents a substantial question meriting further judicial review. Accordingly, I would deny the application.

Sincerely,

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 22, 1983

Re: Barefoot v. Estelle, A-638

Dear Chief,

I have reviewed the application and the response and vote to deny the application for a stay.

Sincerely,

Sandra

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 24, 1983

MEMORANDUM TO THE CONFERENCE

RE: No. 82-6080 Barefoot v. Estelle

The enclosed form of Order was prepared with the help of Al Stevas and Frank Lorson. Al advised me that he will inform the parties that the case will be set for argument in the April session and that the briefing schedule will be tailored accordingly. I suggest that returns might be made to me at your earliest convenience.

I've undertaken to have the Chief Justice and Justice White informed.

W.J.B. Jr.

See Vote on Back

File

MEMORANDUM ON STAY APPLICATION

A-638

CAPITAL CASE
Execution Date: January 25, 1983

BAREFOOT

v.

ESTELLE

Stay Denied by CA5
(Randall, Reavley & Jolly)

Procedural Background: Barefoot was convicted of capital murder and sentenced to death on Nov. 14, 1978. The conviction was affirmed by the Texas Ct. of Crim. Appeals, 596 S.W. 2d 875 (1980). Following a hold for Estelle v. Smith, cert was denied. 453 U.S. 913 (1981), with all Justices voting to deny except Justices Brennan and Marshall, who filed their standard capital case dissent.

Barefoot sought and was denied state habeas relief on Oct. 6, 1981; review was denied by the Tx.Ct.Crim.App the same day. Barefoot did not seek review in this Court. There were apparently two other attempts to obtain state habeas relief. A petition for federal habeas was filed. On October 9, 1981 a stay of execution was granted by the DC. Following a hearing, the DC denied habeas relief on November 12, 1982. The DC and vacated its stay on Dec. 8, 1982 and issued a certificate of probable cause on Dec. 13, 1982. Barefoot had noticed an appeal to CA5 on Nov. 24, 1982. Following briefing and oral argument, CA5, in a

16 page opinion, denied the stay on Jan. 20, 1983, but did not dispose of the appeal.

Facts: The evidence at Barefoot's trial established that during the summer of 1978 he lived in a trailer with four other persons. Barefoot asked one of his roomates, Tiller, for a gun and stated that he intended to kill a policeman who had mistreated him during an arrest. On August 6, 1978, Barefoot told Tiller that he was going to commit a robbery after creating a diversion by setting a building on fire and that he would kil anyone who recognized him. At 4:30 a.m. on August 7th Barefoot, who was wearing a white T-shirt and bluejeans and was armed with a .25 caliber pistol and a home-made bomb, awoke another roomate, Roberson, and asked to be driven to Harker Heights. On the way, Barefoot told Roberson that he was going to blow up a particular night club. The two stopped at a store where Barefoot filled a plastic milk container with gasoline. Roberson dropped Barefoot off near the night club at 5:00 a.m.

At about 5:15 a witness, Edwards, saw the night club in flames and later identified a man standing in the parking lot as Barefoot. Edwards drove to the nearby police station and returned to the night club. Edwards again saw Barefoot at an intersection some distance from the club. Edwards told a police officer, Levin, what he had seen and the officer departed to the location where Barefoot had been seen last.

Another witness, Thrash, as he was walking to work, saw a police patrol car parked at an intersection with its emergency lights on. Officer Levin was standing by the car. Thrash saw a

man wearing a white T-shirt and bluejeans step out of some bushes, walk toward the officer, shoot the officer in the head at point-blank range, and run away. Yet another witness, Richards, heard the shot, looked out the window and saw a man wearing a white T-shirt running away. Richards testified that the man resembled Barefoot.

At 10:30 the same morning, Tiller (roommate) received a call from Barefoot. Barefoot asked if Tiller had listened to the news. Tiller said yes and asked if Barefoot had done "that." Barefoot replied: "yeah, I shot him. I killed the m_______ f_______. I shot him in the head." Tiller called the police. Meanwhile, Barefoot returned home. Roberson testified that Barefoot was still dressed in a white T-shirt and bluejeans, but that the T-shirt now had red blotches on it which appeared to be blood. After being told that the police were looking for him Barefoot said that he had to get out of town because he "wasted a cop."

Barefoot spent the rest of the day and the night of August 7 with one Hernandez. After hearing a newscast, Barefoot told Hernandez that he was the one the police sought but that he had not killed the policeman. Acting on information supplied by Hernandez, the police arrested Barefoot at a bus station in Houston. The police found the .25 caliber pistol, which later proved to be the murder weapon, in Barefoot's pocket at the time of arrest. Barefoot was found guilty of a capital offense: murder of a peace officer who was acting in the lawful discharge of an official duty who the person knew to be a peace officer.

At the punishment stage of the trial, two psychiatrists were called by the State (Holbrook and Grigson). Both doctors were given a "hypothetical" fact situation based on the evidence in the case and were asked if the person described would probably commit future acts of violence that would constitute a continuing threat to society. The detailed nature of the hypothetical is discussed in the pool memo to 80-5320. The opinion of both doctors was that the person would commit such future acts. The State also presented at least 12 witnesses who testified that they knew Barefoot's reputation as a law-abiding citizen and that the reputation was bad. The jury returned positive answers to the three questions required by the Texas Code of Crim. Pro. article 37.071(b): "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Barefoot was sentenced to death.

Direct Appeal: Barefoot raised a number of issues on direct appeal. Barefoot claimed that the trial court erred by: failing to give a circumstantial evidence charge at the guilt-innocence stage; denying a motion for change of venue; overruling challenges for cause of three prospective jurors; refusing additional peremptory challenges; admitting evidence of

extraneous offenses; failing to define "probability;" and overruling objections to psychiatric testimony. Barefoot also challenged Article 37.071 as unconstitutionally vague.

Relevant here are the challenges to the psychiatric testimony. Barefoot claimed that the doctors were not qualified to give an opinion as to his future conduct because they had not examined him. He also argued that psychiatrists in general are not qualified by education or training to predict future behavior. Although acknowledging that the ability to predict future dangerousness is subject to debate, the Ct of Crim Appeals relied on its prior decisions to find that the trial court may admit for whatever value it may have psychiatric testimony concerning future behavior. The ct also found that "the use of hypothetical questions in the examination of expert witnesses is a well established practice," and that the fact that the experts had not examined Barefoot went "to the weight of their testimony, not to its admissibility." Counsel presenting the hypothetical may assume the facts in accordance with his theory of the case. The opponent may secure the expert's opinion on a different set of facts during cross-examination. The ct also rejected Barefoot's claim that the doctors could not express an opinion on the probability of future dangerousness because it amounted to a legal conclusion.

Barefoot's conviction and sentence were affirmed. One judge dissented in part because he felt that the admission of evidence concerning a prior conviction was more prejudicial than it was probative on the issue of motive.

The DC decision Barefoot raised an ineffective assistance of counsel claim based on a claim that one juror was excluded in violation of Witherspoon and that his counsel failed to object, that his attorney did not understand Witherspoon, and that his attorney permitted voir dire to be conducted in a manner that violated Due Process. He also claimed that article 37.071 was unconstitutional because it contains no provisions directing the jury's discretion and, relevant here, that the use of hypothetical questions to psychiatrist during the penalty phase violated Due Process.

The DC found the channeling of discretion claim settled by Jurek v. Texas, and the ineffective assistance of counsel claim frivolous.

On the use of psychiatric testimony claim, the DC found that Jurek v. Texas and Estelle v. Smith implied approval of such use. (The DC's reasoning is essentially the same as the CA's, discussed below). The DC also found that the "majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises." The DC found that Barefoot's claim really concerned the degree of certainty expressed by the psychiatrists at his trial. The differences among experts, the DC found, were quantitative not qualitative and go to the weight, not the admissibility, of the evidence. Petr was not hampered in his cross-examination of the doctors nor precluded from presenting testimony concerning the accuracy of such predictions.

CA5

<u>The CA denial of a stay</u>. The CA addresses three issues in its opinion: (1) the weight to be give the DC's grant of the certificate of probable cause, (2) the merits of Barefoots claim that admission of the psychiatrists' testimony violated due process, and (3) the merits of Barefoots claim concerning new evidence.

The CA notes that the TX Ct. of Crim. Appeals has reviewed the conviction 4 times (direct appeal and 3 collateral attacks), this Court has reviewed it once, and the federal DC once. The CA stated that Barefoot's counsel "was allowed unlimited time to discuss any matter germane to the decision" at oral argument before the CA. The CA found it was its duty to deny the stay if "after all these years of study, no constitutional imperfections of substance can be found." Slip at 3.

The CA noted the disposition of the <u>Brooks</u> case under similar circumstances and the dissent of Justices Brennan, Marshall and Stevens. The CA found its handling of this case entirely distinguishable from <u>Nowakowski</u> v. <u>Maroney</u>, 386 U.S. 542 (1967) (per curiam), and <u>Garrison</u> v. <u>Patterson</u>, 391 U.S. 464 (1968) (per curiam). Neither of those cases dealt with a situation where the party had an opportunity to brief and argue the merits of the underlying issues and they do not suggest that the stay procedure contained in Rule 8, Fed.R.App.P, is abrogated by the granting of a certificate of probable cause. The CA found the case controlled by <u>Carafas</u> v. <u>LaVallee</u>, 391 U.S. 234 (1968), rather than <u>Nowakowski</u> or <u>Garrison</u>. <u>Carafas</u> reversed CA2's denial of leave to proceed <u>IFP</u> and stated "[n]othing in the order

entered by the Court of Appeals ... indicate[d] that the appeal was duly considered on its merits as Nowakowski requires in cases where a certificate of probable cause has been granted." Id., at 242. Carafas goes on to say that "Nowakowski does not necessarily require that the [CA] give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate the basis for the court's summary action." Ibid.

The CA found that, in accordance with Carafas, the parties had been afforded an "unlimited opportunity to make their contentions upon the underlying merits by briefs and oral argument."

On the merits, Barefoot claimed that the opinion testimony of the two psychiatrists is so unreliable that its admission violates due process. Barefoot relied primarily on Green v. Georgia, 442 U.S. 95 (1979) (per curiam) and Gardner v. Florida, 430 U.S. 349 (1977) (joint opinion), for the proposition that the Due Process Clause and the Eighth Amendment limit the types of evidence that may be presented at a sentencing hearing.

Gardner concerned the propriety of the trial judge's use of a presentence report that was not disclosed to defendant or his counsel to determine whether the death penalty should be imposed. The CA found that the opinions of the Court "reflect a concern not for a specific evidentiary rule, but for the nature of the adversary system and the need for the accused and his counsel to be able to respond to this evidence." Slip at 8. Green involved

the exclusion of testimony during the penalty phase concerning an inculpatory statement made by a compatriot of a capital defendant that would tend to support the defendant's claim that he was not present at the time of the murder. The Court held that, under the facts of that case, the exclusion of the testimony violated due process even though the testimony could properly be excluded under the State's hearsay rules. The evidence was "highly relevant to a critical issue in the punishment phase of the trial ... and substantial reasons existed to assume its reliability." 442 U.S., at 97. The CA found Green limited to its facts and that it indicated only that certain egregious evidentiary errors may be redressed by the Due Process Clause.

The CA also thought that this Court, by implication, has approved use of psychiatric testimony. Jurek v. Texas, 428 U.S. 262 (1976), rejected the argument that a requiring a jury to predict future behavior was vague. The Court found it important that the jury have all possible relevant information about the defendant. The CA found psychiatric testimony "would clearly appear to be relevant." Estelle v. Smith, 451 U.S. 454 (1981), also provided support in the CA's view. There the Court noted that Jurek did not disapprove the use of psychiatric testimony on the issue of future dangersouness but recognized that the future dangerousness finding does not require resort to medical experts. Smith held that a defendant could not be compelled to submit to a psychiatric interview. If the CA were to hold that a psychiatrist could not testify on the basis of hypotheticals, it would give the defendant "the right to prevent any and all

psychiatric testimony on the issue of dangerousness," except that in his favor. Such a holding would be inconsistent with Jurek's statement that juries should have all relevant information. The Court's statements in Smith that the State need not resort to medical testimony indicates that the testimony of lay persons would be admissible. A holding that doctors' testimony on the issue was inherently unreliable would mean that the testimony of lay persons would be even more unreliable.

The CA next addressed Barefoot's claim that the state court was without jurisdiction to set an execution date while the habeas appeal was pending. The CA found no merit in the argument; it is a state law issue that cannot be addressed on federal habeas. Barefoot also argued that if the state court had no jurisdiction then he was denied Equal Protection because Texas courts are closed to him. The CA rejected this argument finding federal abstention in habeas cases "a rule of judicial efficienc which merely prevents the petitioner from litigating the same habeas issue in two forums at the same time." The rule was inapplicable because setting an execution date is not a habeas suit.

The CA next addressed Barefoot's claim concerning newly disclovered evidence. The witness Richards who testified that she had had seen a man in a white T-shirt who resembled Barefoot running from the murder scene now states that the man she saw could not have been Barefoot because the hair, height and build of the two men differed. She now states that she told everyone who interrogated here about the dissimilarities, but that the

D.A. frightened her into giving false testimony by telling here that Barefoot intended to kill everyone in her office. The CA found it "difficult" to accept Richards new statement. No rational prosecutor would have called her as a witness. The CA also noted an inconsistency in the testimony Richards gave at trial. She heard two shots and it was undisputed that only one was fired.

The CA also found that Richards' testimony "cannot and could not affect the determination of Barefoot's guilt." Slip at 14. The CA reviewed the trial evidence and found that even if the prosecutor deliberately frightened her to get her testimony "a reversal of the conviction would not be justified ... the omitted evidence could not create a reasonable doubt of Barefoot's guilt, and the alleged prosecutorial conduct could not have an effect on the trial." United States v. Agurs, 427 U.S. 97 (1976).

The CA stated that "finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for say should be DENIED."

Application for stay The application is expected to arrive about 12:30 today.

State's response The State notes that Barefoot is not automatically entitled to a stay under Brooks and agrees that "if he can demonstrate a reasonable judicial doubt about the outcome of any of the issues he would present during his full appeal" he is entitled to a stay. There is no doubt about the outcome in this case.

The State first argues that the CA correctly determined that the claim concerning the jurisdiction of the state court to set an execution date and the abstention claim. The State relies on the findings of the DC and the opinion of the CA on the claims concerning psychiatric testimony.

On the newly discovered evidence claim, the State notes that Barefoot raised it for the first time before the CA and agrees with the CA's disposition of the issue.

On Jan. 20, 1983, the State was informed by the Clerk's office of the USDC WD TX that Barefoot intends to file a new federal habeas petn today. The DC has set the matter for an evidentiary hearing on January 24, 1983 (Monday). The State argues that any factual dispute concerning the newly discovered evidence can be determined at that time if Barefoot re-raises the issue. If that DC entertains a reasonable doubt as to the matter, that judge will be in the best position to determine whether a stay should be granted.

Discussion Brooks settled the question whether a certificate of probable cause requires that a stay be granted. The CA has given the parties an adequate opportunity to address the merits and has extensively stated its reasons for denying the stay.

That leaves the issue of the psychiatric testimony that is the focus of the application for stay which has now arrived and has been distributed. My vote is to deny the application.

BRW

drk 01/24/83

To: Mr. Justice Powell

From: Rives

Re: No. A-638, Barefoot v. Estelle

The issue raised in Justice Brennan's memorandum seems legitimate. If the Court can settle on procedures, embodied in the form of clear rules, that ensure fair review of death sentences, then the pressure on both the lower courts and this Court to make difficult choices in a minimum of time might be alleviated.

The concern that must underlie the memorandum is not that the petitioner has not had considerable process below but that he has *not had the opportunity to pursue the federal habeas* proceedings--a DC hearing and appellate review--that are available to other habeas petitioners. Whether the petr has such a right is a difficult question. As a practical matter, it is difficult to overlook the number of pool memos that find numerous sentencing errors in cases on direct appeal from state court. More often than not, these cases are not cert worthy because they involve application of settled law to the particular facts of the case and the memo recommends that the errors be left to federal habeas. Ideally, there should be no need to resort to federal habeas, but it seems that states often have had difficulty in applying the procedural protections required by Gregg and its progeny. This

difficulty may arise either from unfamiliarity with the procedures or the fact that the state courts, when confronted with the nature of the crime, have found it hard to adhere to the procedural safeguards that this Court has said are essential to the constitutionality of the death penalty.

If this is an accurate assumption, then there is some pressure to ensure that the capital defendants have their federal claims reviewed by federal judges. It might be possible to say as a matter of federal supervisory power that a petr seeking federal habeas review will be entitled to one trip through the federal habeas system. This would encourage a petr to bring all his meritorious claims in his first petn. It perhaps would defuse the pressure on both the CAs and this Court of having to deal with difficult issues in a short space of time. Habeas petns from the CAs in capital cases could be dealt with under the Court's normal certiorari procedures, which would allow the Court to make considered judgments. If a petr does not prevail on federal habeas, then these capital cases could be treated no differently than any other case. A stay will be granted only when there is a possibility of granting cert on the issue presented.

Barefoot v. Estelle

No. A-638

On Application for Stay

January 24, 1983

Memorandum of JUSTICE BRENNAN.

We have before us an application for a stay of an execution scheduled to take place on Tuesday, January 25, 1983. Petitioner applies for a stay of execution pending filing in and disposition by this Court of a petition for certiorari to the United States Court of Appeals for the Fifth Circuit, presenting the question of "the appropriate standard for granting or denying a stay of execution when a death-sentenced federal habeas corpus petitioner presents a constitutional issue of first impression to a federal court of appeals." Application for Stay, at 2.

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), and I would grant the application and vacate petitioner's sentence of death for that reason alone. Independently of that view, however, I believe that a petition for certiorari presenting the question proposed by petitioner should be granted. The question of the proper standard for granting stays in death penalty cases involves fundamental issues

of orderly judicial process which this Court has never addressed and about which the lower federal courts have differed. It merits the kind of consideration that full briefing and oral argument would provide. Therefore, I would also grant the stay pending receipt and disposition of a petition for certiorari, or, in the alternative, I would treat the application before us as a petition for certiorari on this issue, see Brooks v. Estelle, ___ U.S. ___ (1982) (per curiam), and grant it.[1]

I

For the second time in as many months, this Court is faced with an application for a stay of execution in a case pending on appeal before the United States Court of Appeals for the Fifth Circuit. See Brooks v. Estelle, ___ U.S. ___ (1982). Both this case and Brooks involve a decision by the Court of Appeals to deny an application for a stay addressed to it, despite the fact that in both cases the District Court had issued a certificate of probable cause to appeal, see 28 U.S.C. §2253, and an appeal had in fact been docketed.

In its opinion denying a stay in this case, the Court of Appeals states the following legal standards:

> "This court may interfere with the action of the State of Texas only upon a showing that the Constitution of the United States has been violated. Upon the question of whether to stay execution until the appeal has been processed, we consider the likelihood of success of that appeal. Ruiz v. Estelle, 666 F.2d 555 (CA5 1981). There should be a substantial

[1]Since the Court of Appeals' decision denying a stay is obviously a final resolution of the case, this Court has jurisdiction to review it on writ of certiorari.

> case on the merits of any serious legal question involved in the appeal to warrant staying the decision below. Ruiz v. Estelle, 666 F.2d 854, 857 (CA5 1982)." Barefoot v. Estelle, No. 82-1680 (CA5 Jan. 20, 1983), at 3.

At the close of its opinion, the court concludes:

> "This Court has had the benefit of the full trial court record except for a few exhibits unimportant to our considerations. We have read the arguments and materials filed by the parties. The petitioner is represented here, as he has been throughout the habeas corpus proceedings in state and federal courts, by a competent attorney experienced in this area of the law. We have heard full arguments in open court. Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for stay should be DENIED." Id., at 16.

The Court of Appeals denied petitioner's stay application less than a week after the application was filed, and less than three days after scheduling the application for oral argument. Necessarily, briefing on the merits of the appeal underlying the stay application was limited. Petitioner--who has never delayed in presenting his claims to federal and state forums--had less than two weeks in all to prepare and present his application to the Court of Appeals.[2]

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[2]Petitioner Thomas Barefoot was convicted of murdering a policeman. After the Texas Court of Criminal Appeals affirmed his conviction, Barefoot v. State, 596 S.W.2d 875 (1980), and this Court denied certiorari, 453 U.S. 913 (1981), petitioner was sentenced to be executed on October 16, 1981. After exhausting his state collateral remedies, petitioner applied for federal habeas corpus, and his execution was stayed on October 9, 1981. The United States District Court held an evidentiary hearing on petitioner's habeas claim and finally denied it thirteen months later in November 1982. The District Court issued petitioner a certificate of probable cause to appeal the denial of his habeas petition, see 28 U.S.C. §2253, and petitioner promptly noticed

Footnote continued on next page.

II

A brief examination of the question presented by petitioner's appeal below demonstrates that his appeal is far from frivolous, and therefore that the phrases used by the Court of Appeals--"a substantial case on the merits" and "patent substantial merit"--refer to some quality beyond mere non-frivolity. Petitioner claimed that conclusory testimony at the penalty phase of his trial by a psychiatrist[3] who had never examined him, but who merely responded to a long, argumentative hypothetical question put to him by the State, violated petitioner's rights to due process and freedom from cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments.[4] The District Court rejected petitioner's claim

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his appeal.

On the State's motion, the District Court lifted its stay on December 8, 1982, whereupon on December 20 a state court sentenced petitioner to be executed on January 25, 1983. Petitioner immediately sought state habeas corpus relief on the ground that the state court had no jurisdiction to set an execution date. On January 7, 1983, he was informed that the Texas Court of Criminal Appeals had denied him relief, and a second motion for relief was denied on January 11. He then applied to the United States Court of Appeals for a stay of execution pending resolution of his pending appeal in that court. On the afternoon of Monday, January 17, the Court of Appeals scheduled oral argument on the stay for the morning of January 19. The Court of Appeals heard oral argument and issued a 16-page typewritten opinion denying the stay early on the afternoon of January 20. The application to this Court followed.

[3]The psychiatrist whose testimony is at issue in this case, Dr. Grigson, is the same psychiatrist involved in Estelle v. Smith, 451 U.S. 455 (1981).

[4]JUSTICE MARSHALL's dissent describes the merits of petitioner's claims in more detail.

after an evidentiary hearing, and the Court of Appeals addressed it on its merits in its opinion denying a stay. Yet neither the District Court nor the Court of Appeals identified prior controlling precedents from this Court, the Fifth Circuit, or any other Circuit on the issue. Instead, it appears that other District Courts within the Fifth Circuit itself[5], as well as at least one state supreme court[6] have reached contrary determinations. Read closely, the Court of Appeals' determination on the merits in this case rests entirely on its statement that "the Supreme Court has, by implication at least, approved of psychiatric testimony in cases such as these." Id., at 9.[7]

The fact that the Court of Appeals has declined to issue a stay with knowledge that petitioner will be executed before it can give full consideration to his appeal on the issue described

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[5]Petitioner's application cites White v. Estelle, Civ. A. No. H-81-1661 (SD Tex Dec. 30, 1982), and Gholson v. Estelle, Civ. A. No. W-78-CA-68 (WD Tex Oct. 31, 1979), aff'd on other grounds, 675 F.2d 734 (CA5 1982). Application for Stay, at 7.

[6]People v. Murtishaw, ___ Cal. 3d ___, 631 P.2d 446, 175 Cal. Rptr. 738 (1981). Murtishaw relies on evidentiary principles of state law in determining that testimony like that presented in this case is inadmissible as more prejudicial than probative. See 631 P.2d, at 466-471. But similar concerns about the reliability of psychiatric testimony as to dangerousness may be relevant to a constitutional due process inquiry. See Addington v. Texas, 441 U.S. 418, 429 (1979).

[7]The cases on which the Court of Appeals relies fall far short of expressly approving the conclusory responses to hypothetical questions at issue in this case. See Estelle v. Smith, supra; Jurek v. Texas, 428 U.S. 262 (1976). At most, they can be read as holding that psychiatric testimony on the issue of dangerousness is not unacceptable in all cases.

above has disturbing implications for three reasons. First, even if in some cases the requirements of due process may be met by final disposition of the merits of an appeal on a motion for a stay, the procedures used in the Court of Appeals substantially compromise the quality of appellate adjudication compared with the normal process of appellate decisionmaking. Second, the standards applied below represent a significant departure from the approach taken by other federal Courts of Appeals and from prior practice in the Fifth Circuit. And finally, resolution of petitioner's claims in this posture requires this Court to address substantial questions of law without the opportunity provided by our normal decisional procedures.

A

The Court of Appeals cannot be taxed with failing to consider the merits of petitioner's claim. Given the speed with which the case proceeded, the court's opinion shows a commendable effort to address petitioner's claims regarding the psychiatric testimony at his trial.

Nevertheless, it cannot be denied that petitioner was placed at a significant disadvantage by being required to argue the merits of his appeal in the expedited proceeding below. The normal processes for hearing appeals in the federal system provide that the appellant will have 10 days after filing a notice of appeal to order relevant portions of the district court record from the reporter and to file a notice of the issues to be raised on appeal. See Federal Rule of Appellate Procedure 10(b). After the record is filed, the appellant has 40 days to file a

brief, and in most cases another 14 days to file a reply brief after the appellee has responded. Federal Rule of Appellate Procedure 31(a). In this case, however, crucial portions of the District Court record were not available until the very day of oral argument, and petitioner never had an opportunity to address them in writing. He had no opportunity to file a full brief on the merits. The Court of Appeals was informed by letter that the American Psychiatric Association wished to participate in the case as amicus curiae, but the swift disposition of the stay motion precluded such participation.

As the court below noted, this Court has held that, once a district court has granted a federal habeas petitioner a certificate of probable cause to appeal, the court of appeals must address the merits of the appeal. Garrison v. Patterson, 391 U.S. 464, 466 (1968); Nowakowski v. Maroney, 386 U.S. 542 (1967); see also Brooks v. Estelle, supra, at ___ (JUSTICES BRENNAN, MARSHALL & STEVENS, dissenting). Both Garrison and Carafas v. LaVallee, 391 U.S. 234 (1968), make clear that the courts of appeals may, when appropriate, use summary procedures to address the merits of the appeal. "Nowakowsi does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of a certificate of probable cause, is frivolous ...." 391 U.S., at 242; see 391 U.S., at 466. Against that background, this Court's summary disposition of the application for a stay in Brooks v. Estelle, supra, implies at least that a majority of the Court rejects the argument, which

JUSTICE MARSHALL, JUSTICE STEVENS, and I raised in dissent,[8] that considering the merits of an appeal on a stay motion does not comport with the standard of Nowakowski.

The Court's disposition of Brooks, however, does not reject the basic doctrine that courts of appeals must address the merits of an appeal before denying a stay that effectively precludes full consideration of the appeal. Nor does Brooks' taciturn language establish that it is *always* appropriate to resolve the merits of habeas appeals in capital cases on motions for stays of execution. The crucial question is what standard should the courts of appeals apply in deciding when to grant a stay to allow plenary consideration of a pending appeal and when to dispose of the merits in denying the stay.

Given that normal appellate procedures can only improve the quality of a decision on the merits, their advantages should certainly be taken into account in answering the question posed above. It is certainly conceivable that an appellant could receive due process in an appeal without 40 days for briefing after the record is received, but Congress and the Rules drafters have determined that 40 days--or something close to it[9]--strikes

[8] JUSTICE BLACKMUN, while sitting on the Eighth Circuit Court of Appeals, also wrote that "when the district court issue[s] the certificate [of probable cause] the appellate court must indulge in a full review." Blackmun, Allowance of In Forma Pauperis Appeals in §2255 and Habeas Corpus Cases, 43 F.R.D. 343, 351 (1968).

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Precisely what standards govern applications for stays of execution in other circuits is difficult to document: denials of stays in the face of an impending execution date have been, so far at least, exceedingly rare. Nevertheless, it appears that the Eleventh Circuit applies an explicit "non-frivolous issues" test, see Goode v. Wainwright, 670 F.2d 941, 942 (1982); cf. Dobbert v. Strickland, 670 F.2d 938 (1982).[11] The single judge's opinion in Shaw v. Martin, 613 F.2d 487 (CA4 1980)(on application for stay presented to Phillips, J.), indicates that, in the Fourth Circuit, if an applicant is presenting an appeal from a *first* federal habeas decision, a stay will be granted and the appeal will be heard on the merits without any initial showing of

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[10] In Brooks v. Estelle, supra, at least an argument could be made that clear precedent dictated rejecting petitioner's substantive grounds for appeal.

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either likelihood of success or non-frivolousness.

> "I have been mindful that even with respect to issues pending for first instance resolution, it may be appropriate to require a facial showing of substance to justify a stay. But it seems to me that the inquiry into substance properly stops with identification of the nature of the issue, and with consideration as to whether it has been already fairly litigated on the merits under procedures designed for the purpose. In the very nature of proceedings on a motion for a stay of execution, the limited record coupled with the time constaints imposed by imminence of execution preclude any fine-tuned inquiry into the actual merits." 613 F.2d, at 491-492 (citation omitted; emphasis added).

Older precedents in the Third and Ninth Circuits indicate that, at least at one point, both Circuits granted stays automatically if a certificate of probable cause had been issued. United States ex rel. DeVita v. McCorkle, 214 F.2d 823 (CA3 1954); Foquette v. Bernard, 198 F.2d 96 (CA9 1952).

The opinion of the Court of Appeals in this case demonstrates that it is following a substantially different standard from other federal courts of appeals. Furthermore, there is no indication in the court's opinion that it has considered the balance of hardships presented by an application for a stay of execution pending appeal from a first habeas petition. Even accepting arguendo the legitimacy of the State's asserted interest in carrying out its sentences, the equities can only favor granting a stay, especially if the appeal is not frivolous. The very precedents from its own Circuit upon which the Court of Appeals relies state that "the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the

balance of equities weighs heavily in favor of granting a stay." Ruiz v. Estelle, 666 F.2d 854, 856 (CA5 1982)(original emphasis); Ruiz v. Estelle, 650 F.2d 555, 565 (CA5 1981). It is thus apparent that, in addition to employing a standard different from that used in other Circuits, the Court of Appeals is subjecting applications for stays of execution to a higher standard than it uses for other stays pending appeal, even when, as in Ruiz, substantial questions of State-Federal comity are at stake. I question whether that decision comports with constitutional and prudential norms of equity.

C

Finally, it is important to note the deleterious effects of the Court of Appeals' denial of a stay pending a non-frivolous appeal on this Court's role in the appellate structure. An application for a stay of execution, by the time it reaches this Court, may require a decision in a matter of days, if not hours. The parties themselves file extremely short memoranda, and we have no opportunity to receive briefs from interested amici. In the case before us, furthermore, our own precedents provide only oblique guidance, if any guidance at all, on the merits of petitioner's appeal, and apart from the opinion below there is no developed body of decisional law in the courts of appeals. In addition, since the Slaughterhouse Cases, 77 U.S. (10 Wall.) 273, 296-297 (1869), plenary consideration of the standards for granting stays pending appeal has been rare in this Court.

We have thus been forced to decision on both substantive and procedural questions in extreme haste, and without the

substantial aids of high-quality adversary presentation of the issues and well-developed precedents. Cf. O'Brien v. Brown, 409 U.S. 1, 5-6 (1972)(JUSTICE BRENNAN, concurring). And we cannot avoid at least the semblance of a decision on the merits, because it is difficult, if not impossible, that this Court would send a man to his death without actually deciding whether the Court of Appeals used an acceptable standard for evaluating the merits of the appeal or whether its evaluation of the merits was correct. Since it appears that this problem is likely to recur, and since petitioner presents a case where the grounds for appeal are clearly not frivolous, I would grant certiorari to decide--with full briefing, oral argument, and (if they wish) the assistance of amici such as the Attorneys General of other States or the American Bar Association--the proper standards for granting a stay of execution pending appeal. Granting certiorari in this case would give the Court an opportunity to shape the processes by which these issues come to it on something more than an ad hoc basis.

III

In conclusion, petitioner has proposed to file a petition for certiorari raising a question fairly presented by this case. For the reasons set forth above, I believe it would be wise to consider the question of standards for granting stays of execution pending appeal at this time. Accordingly, I would grant a stay pending filing and disposition of the proposed petition for certiorari, or, in the alternative, I would treat the application before us as a petition for certiorari and grant it.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

January 24, 1983

MEMORANDUM TO THE CONFERENCE

RE: 82-6080 THOMAS A. BAREFOOT v. W. J. ESTELLE,
(A-638) DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

At the request of Justice Brennan, I have expedited the briefing schedule so that the above case can be set for argument on Tuesday, April 26, 1983.

Petitioner's brief and the joint appendix are to be filed by March 5, 1983. The respondent's brief is to be filed by April 2, 1983. The reply brief, if any, is to be filed by April 18, 1983.

Respectfully submitted,

Al Stevas

Alexander L. Stevas
Clerk

ORDER LIST

MONDAY, JANUARY 24, 1983

CERTIORARI GRANTED

82-6080 THOMAS A. BAREFOOT v. W.J. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

The application for stay of execution of sentence of death was presented to Justice White and referred to the Court. Treating the application as a petition for writ of certiorari before judgment, certiorari is granted. The parties are directed to brief and argue the question presented by the application, namely, the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner, and also the issues on the appeal before the United States Court of Appeals for the Fifth Circuit. Execution and enforcement of the sentence of death set for Tuesday, January 25, 1983 is stayed pending the sending down of the judgment of this Court.

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Barefoot v. Estelle

No. A-638

On Application for Stay

January 24, 1983

Memorandum of JUSTICE BRENNAN.

We have before us an application for a stay of an execution scheduled to take place on Tuesday, January 25, 1983. Petitioner applies for a stay of execution pending filing in and disposition by this Court of a petition for certiorari to the United States Court of Appeals for the Fifth Circuit, presenting the question of "the appropriate standard for granting or denying a stay of execution when a death-sentenced federal habeas corpus petitioner presents a constitutional issue of first impression to a federal court of appeals." Application for Stay, at 2.

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), and I would grant the application and vacate petitioner's sentence of death for that reason alone. Independently of that view, however, I believe that a petition for certiorari presenting the question proposed by petitioner should be granted. The question of the proper standard for granting stays in death penalty cases involves fundamental issues

of orderly judicial process which this Court has never addressed and about which the lower federal courts have differed. It merits the kind of consideration that full briefing and oral argument would provide. Therefore, I would also grant the stay pending receipt and disposition of a petition for certiorari, or, in the alternative, I would treat the application before us as a petition for certiorari on this issue, see Brooks v. Estelle, ___ U.S. ___ (1982) (per curiam), and grant it.[1]

I

For the second time in as many months, this Court is faced with an application for a stay of execution in a case pending on appeal before the United States Court of Appeals for the Fifth Circuit. See Brooks v. Estelle, ___ U.S. ___ (1982). Both this case and Brooks involve a decision by the Court of Appeals to deny an application for a stay addressed to it, despite the fact that in both cases the District Court had issued a certificate of probable cause to appeal, see 28 U.S.C. §2253, and an appeal had in fact been docketed.

In its opinion denying a stay in this case, the Court of Appeals states the following legal standards:

> "This court may interfere with the action of the State of Texas only upon a showing that the Constitution of the United States has been violated. Upon the question of whether to stay execution until the appeal has been processed, we consider the likelihood of success of that appeal. Ruiz v. Estelle, 666 F.2d 555 (CA5 1981). There should be a substantial

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[1]Since the Court of Appeals' decision denying a stay is obviously a final resolution of the case, this Court has jurisdiction to review it on writ of certiorari.

> case on the merits of any serious legal question involved in the appeal to warrant staying the decision below. Ruiz v. Estelle, 666 F.2d 854, 857 (CA5 1982)." Barefoot v. Estelle, No. 82-1680 (CA5 Jan. 20, 1983), at 3.

At the close of its opinion, the court concludes:

> "This Court has had the benefit of the full trial court record except for a few exhibits unimportant to our considerations. We have read the arguments and materials filed by the parties. The petitioner is represented here, as he has been throughout the habeas corpus proceedings in state and federal courts, by a competent attorney experienced in this area of the law. We have heard full arguments in open court. Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for stay should be DENIED." Id., at 16.

The Court of Appeals denied petitioner's stay application less than a week after the application was filed, and less than three days after scheduling the application for oral argument. Necessarily, briefing on the merits of the appeal underlying the stay application was limited. Petitioner--who has never delayed in presenting his claims to federal and state forums--had less than two weeks in all to prepare and present his application to the Court of Appeals.[2]

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[2]Petitioner Thomas Barefoot was convicted of murdering a policeman. After the Texas Court of Criminal Appeals affirmed his conviction, Barefoot v. State, 596 S.W.2d 875 (1980), and this Court denied certiorari, 453 U.S. 913 (1981), petitioner was sentenced to be executed on October 16, 1981. After exhausting his state collateral remedies, petitioner applied for federal habeas corpus, and his execution was stayed on October 9, 1981. The United States District Court held an evidentiary hearing on petitioner's habeas claim and finally denied it thirteen months later in November 1982. The District Court issued petitioner a certificate of probable cause to appeal the denial of his habeas petition, see 28 U.S.C. §2253, and petitioner promptly noticed

Footnote continued on next page.

II

A brief examination of the question presented by petitioner's appeal below demonstrates that his appeal is far from frivolous, and therefore that the phrases used by the Court of Appeals--"a substantial case on the merits" and "patent substantial merit"--refer to some quality beyond mere non-frivolity. Petitioner claimed that conclusory testimony at the penalty phase of his trial by a psychiatrist[3] who had never examined him, but who merely responded to a long, argumentative hypothetical question put to him by the State, violated petitioner's rights to due process and freedom from cruel and unusual punishment under the Fifth, Eighth, and Fourteenth Amendments.[4] The District Court rejected petitioner's claim

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his appeal.

On the State's motion, the District Court lifted its stay on December 8, 1982, whereupon on December 20 a state court sentenced petitioner to be executed on January 25, 1983. Petitioner immediately sought state habeas corpus relief on the ground that the state court had no jurisdiction to set an execution date. On January 7, 1983, he was informed that the Texas Court of Criminal Appeals had denied him relief, and a second motion for relief was denied on January 11. He then applied to the United States Court of Appeals for a stay of execution pending resolution of his pending appeal in that court. On the afternoon of Monday, January 17, the Court of Appeals scheduled oral argument on the stay for the morning of January 19. The Court of Appeals heard oral argument and issued a 16-page typewritten opinion denying the stay early on the afternoon of January 20. The application to this Court followed.

[3]The psychiatrist whose testimony is at issue in this case, Dr. Grigson, is the same psychiatrist involved in Estelle v. Smith, 451 U.S. 455 (1981).

[4]JUSTICE MARSHALL's dissent describes the merits of petitioner's claims in more detail.

after an evidentiary hearing, and the Court of Appeals addressed it on its merits in its opinion denying a stay. Yet neither the District Court nor the Court of Appeals identified prior controlling precedents from this Court, the Fifth Circuit, or any other Circuit on the issue. Instead, it appears that other District Courts within the Fifth Circuit itself[5], as well as at least one state supreme court[6] have reached contrary determinations. Read closely, the Court of Appeals' determination on the merits in this case rests entirely on its statement that "the Supreme Court has, by implication at least, approved of psychiatric testimony in cases such as these." Id., at 9.[7]

The fact that the Court of Appeals has declined to issue a stay with knowledge that petitioner will be executed before it can give full consideration to his appeal on the issue described

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[5]Petitioner's application cites White v. Estelle, Civ. A. No. H-81-1661 (SD Tex Dec. 30, 1982), and Gholson v. Estelle, Civ. A. No. W-78-CA-68 (WD Tex Oct. 31, 1979), aff'd on other grounds, 675 F.2d 734 (CA5 1982). Application for Stay, at 7.

[6]People v. Murtishaw, ___ Cal. 3d ___, 631 P.2d 446, 175 Cal. Rptr. 738 (1981). Murtishaw relies on evidentiary principles of state law in determining that testimony like that presented in this case is inadmissible as more prejudicial than probative. See 631 P.2d, at 466-471. But similar concerns about the reliability of psychiatric testimony as to dangerousness may be relevant to a constitutional due process inquiry. See Addington v. Texas, 441 U.S. 418, 429 (1979).

[7]The cases on which the Court of Appeals relies fall far short of expressly approving the conclusory responses to hypothetical questions at issue in this case. See Estelle v. Smith, supra; Jurek v. Texas, 428 U.S. 262 (1976). At most, they can be read as holding that psychiatric testimony on the issue of dangerousness is not unacceptable in all cases.

above has disturbing implications for three reasons. First, even if in some cases the requirements of due process may be met by final disposition of the merits of an appeal on a motion for a stay, the procedures used in the Court of Appeals substantially compromise the quality of appellate adjudication compared with the normal process of appellate decisionmaking. Second, the standards applied below represent a significant departure from the approach taken by other federal Courts of Appeals and from prior practice in the Fifth Circuit. And finally, resolution of petitioner's claims in this posture requires this Court to address substantial questions of law without the opportunity provided by our normal decisional procedures.

A

The Court of Appeals cannot be taxed with failing to consider the merits of petitioner's claim. Given the speed with which the case proceeded, the court's opinion shows a commendable effort to address petitioner's claims regarding the psychiatric testimony at his trial.

Nevertheless, it cannot be denied that petitioner was placed at a significant disadvantage by being required to argue the merits of his appeal in the expedited proceeding below. The normal processes for hearing appeals in the federal system provide that the appellant will have 10 days after filing a notice of appeal to order relevant portions of the district court record from the reporter and to file a notice of the issues to be raised on appeal. See Federal Rule of Appellate Procedure 10(b). After the record is filed, the appellant has 40 days to file a

brief, and in most cases another 14 days to file a reply brief after the appellee has responded. Federal Rule of Appellate Procedure 31(a). In this case, however, crucial portions of the District Court record were not available until the very day of oral argument, and petitioner never had an opportunity to address them in writing. He had no opportunity to file a full brief on the merits. The Court of Appeals was informed by letter that the American Psychiatric Association wished to participate in the case as amicus curiae, but the swift disposition of the stay motion precluded such participation.

As the court below noted, this Court has held that, once a district court has granted a federal habeas petitioner a certificate of probable cause to appeal, the court of appeals must address the merits of the appeal. Garrison v. Patterson, 391 U.S. 464, 466 (1968); Nowakowski v. Maroney, 386 U.S. 542 (1967); see also Brooks v. Estelle, supra, at ___ (JUSTICES BRENNAN, MARSHALL & STEVENS, dissenting). Both Garrison and Carafas v. LaVallee, 391 U.S. 234 (1968), make clear that the courts of appeals may, when appropriate, use summary procedures to address the merits of the appeal. "Nowakowsi does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of a certificate of probable cause, is frivolous ...." 391 U.S., at 242; see 391 U.S., at 466. Against that background, this Court's summary disposition of the application for a stay in Brooks v. Estelle, supra, implies at least that a majority of the Court rejects the argument, which

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III

In conclusion, petitioner has proposed to file a petition for certiorari raising a question fairly presented by this case. For the reasons set forth above, I believe it would be wise to consider the question of standards for granting stays of execution pending appeal at this time. Accordingly, I would grant a stay pending filing and disposition of the proposed petition for certiorari, or, in the alternative, I would treat the application before us as a petition for certiorari and grant it.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 24, 1983

Re: No. 82-6080 - Barefoot v. Estelle

Dear Bill:

I agree.

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 24, 1983

Re: No. 82-6080, Thomas A. Barefoot v. W.J. Estelle

Dear Bill:

I agree with your proposed order.

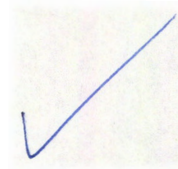
Regards,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR



January 24, 1983

No. 82-6080 Barefoot v. Estelle

Dear Bill,

I have no objection to the form of the order.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 24, 1983

MEMORANDUM TO THE CONFERENCE

RE: No. A-638 Barefoot v. Estelle

The Chief Justice will not be present for the session this morning. May we meet at the end of the session to consider the Barefoot application?

W.J.B.Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 24, 1983

MEMORANDUM TO THE CONFERENCE

RE: No. 82-6080 Barefoot v. Estelle

The enclosed form of Order was prepared with the help of Al Stevas and Frank Lorson. Al advised me that he will inform the parties that the case will be set for argument in the April session and that the briefing schedule will be tailored accordingly. I suggest that returns might be made to me at your earliest convenience.

I've undertaken to have the Chief Justice and Justice White informed.

W.J.B. Jr.

I advised Bill that I approved this order. As more were four votes to grant cert, the order is not inconsistent with my vote to Deny the stay petition. LFP

Bill

The Court certainly has the power to grant cert "before or after the rendition of judgment" by a CA. See 28 U.S.C. §1254(1). I assume that the Justices who voted to grant must have voted to hear all the issues - Accordingly, the order seems OK by me. RK

SUPREME COURT OF THE UNITED STATES

No. A–638

BAREFOOT *v.* ESTELLE

ON APPLICATION FOR STAY

[January 24, 1983]

JUSTICE MARSHALL, dissenting.

The Court today continues the judicial abrogation of the right to federal appellate review in capital cases that it began in *Brooks* v. *Estelle*, — U. S. — (1982). Petitioner persuaded the District Court that there is substantial merit to his claim that the Constitution does not permit the imposition of the death penalty on the basis of predictions by psychiatrists who have never examined him that he will engage in dangerous conduct if allowed to live. Accordingly, the District Court issued a certificate of probable cause to appeal from its order denying petitioner's application for a writ of habeas corpus. Congress has expressly provided that a state prisoner has a right to appeal the denial of a petition for a writ of habeas corpus if he obtains a certificate of probable cause to appeal. Yet both the Fifth Circuit and this Court have refused to stay petitioner's execution pending his appeal, thereby allowing the State of Texas to put petitioner to death before his appeal can be decided.

I dissent. Once a federal judge has decided, as the district judge did here, that a prisoner under a sentence of death has raised constitutional claims of merit, it is a travesty of justice to permit the State to execute the prisoner while his appeal is still pending. Where a man's life is at stake, a constitutional claim that a federal judge has deemed substantial should not be rejected without plenary review following a full opportunity for briefing and argument.

I

A

The right of a state prisoner to petition a federal court for a writ of habeas corpus has been part of our federal system for more than a century.[1] An integral part of the system of collateral review that Congress created is the right to appeal from a district court order denying a writ of habeas corpus. Title 28, Section 2253 of the United States Code expressly provides that an order denying a petition for a writ of habeas corpus "*shall* be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." (Emphasis supplied.)

Congress has imposed one condition on the right to appeal and one condition only: the prisoner must obtain a certificate of probable to appeal from "the justice or judge who rendered the order or a circuit justice or judge." *Ibid.* The issuance of a certificate of probable cause represents a determination that the prisoner's appeal raises a substantial claim. Under the standard prevailing in the Fifth Circuit, a judge will issue a certificate of probable cause only if the prisoner makes a "substantial showing of the denial of [a] federal right." *Stewart* v. *Beto*, 454 F. 2d 268, 270 n. 2 (CA5 1971), cert. denied, 406 U. S. 925 (1972), *quoting Harris* v. *Ellis*, 204 F. 2d 685, 686 (CA5 1953). In this case, although the district judge denied petitioner's application for a writ of habeas corpus, he concluded that petitioner's claims had sufficient substance to warrant consideration by three judges of the Court of Appeals and accordingly issued a certificate of probable cuase to appeal.

Since the issuance of a certificate of probable cause constitutes a ruling that the prisoner's appeal has raised a substantial claim, "the court of appeals must proceed to a disposition of the appeal in accord with its ordinary procedure" when a

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[1] See Act of Feb. 5, 1867, 14 Stat. 385.

certificate of probable cause has been issued. *Nowakowski* v. *Maroney*, 386 U. S. 542, 543 (1967) (per curiam). "[I]f an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits." *Garrison* v. *Patterson*, 391 U. S. 464, 466 (1968) (per curiam). See Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 351 (1968) ("when the district court issue[s] the certificate the appellate court must indulge in a full review").

In a capital case, a court of appeals cannot discharge its obligation to decide a prisoner's appeal on the merits if it allows the State to execute the prisoner while his appeal is still pending. "[I]f there is probable cause to appeal it would be a mockery of federal justice to execute [the prisoner] pending its consideration." *Foquette* v. *Bernard*, 198 F. 2d 96, 97 (CA9 1952) (Denman, J.). *Accord*, *United States ex rel. DeVita* v. *McCorkle*, 214 F. 2d 823 (CA3 1954).

Once a certificate of probable cause has been issued, the most fundamental considerations of equity dictate that the status quo be preserved "to prevent irreparable injury to the [prisoner] resulting from the premature enforcement of a determination which may later be found to have been wrong." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 9 (1942). Where preservation of the status quo is necessary to prevent irreparable harm to the appellant and will cause little or no harm to the appellee, an applicant for a stay, need only show that his appeal raises a substantial legal question.[2] In a capital

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[2] See, *e. g.*, *Ruiz* v. *Estelle*, 650 F. 2d 555, 565 (CA5 1981); *Providence Journal Co.* v. *FBI*, 595 F. 2d 889, 890 (CA1 1979); *Washington Metropolitan Transit Comm'n* v. *Holiday Tours*, 559 F. 2d 841, 843–844 (CADC 1977). As the Court of Appeals for the Fifth Circuit recognized in *Ruiz* v. *Estelle*,

"on motions for stay pending appeal the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is

case, it is indisputable that preservation of the status quo is essential to prevent irreparable harm—the execution of the prisoner. It is likewise indisputable that a stay of execution will cause no harm to the State apart from requiring it to bear the minimal burden of providing a jail cell for the prisoner for the period of time necessary to decide his appeal. Even if the State has an interest in insisting that an execution be carried out at a particular time, that interest pales beside the prisoner's interest in preserving his right to receive plenary appellate review of the constitutionality of his death sentence. A court should therefore grant a stay of execution even if it has "grave doubt . . . as to whether [the prisoner] . . . presents any substantial constitutional question." *Edwards* v. *New York*, 76 S. Ct. 538 (1956) (Harlan, J., in chambers). *A fortiori*, a stay should be granted once a certificate of probable cause to appeal has been issued, for the issuance of the certificate represents a finding that the prisoner has raised a substantial constitutional claim.[3]

B

Both the Court of Appeals and this Court apparently believe that the summary procedure for considering an application for stay constitutes an adequate substitute for plenary review of the merits. I cannot agree. Under Rule 31(a) of

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involved and show that the balance of the equities weighs heavily in favor of granting the stay. If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require—as it does—a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue. The stay procedure of Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a) affords interim relief where relative harm and the uncertainty of final disposition justify it." 650 F. 2d, at 565 (citations omitted).

[3] It has long been the rule that when a defendant is sentenced to death by a federal court, his sentence will automatically be stayed if he takes an appeal. See Fed. R. Crim. Proc. 38(a)(1) ("A sentence of death shall be stayed if an appeal is taken.").

the Federal Rules of Appellate Procedure, a party is given 40 days from the filing of the record to submit his brief on appeal. This time period affords counsel an adequate opportunity to review the record, research the law, and brief the merits. The court of appeals may then take as much time as is necessary for careful consideration of and reflection on arguments made before it.

By contrast, where a court of appeals has effectively disposed of an appeal by denying an application for a stay, the court has not had the benefit of either a full adversarial presentation or adequate time to evaluate the merits of the appeal. "In the very nature of proceedings on a motion for stay of execution, the limited record coupled with the time constraints imposed by imminence of execution preclude any fine-tuned inquiry into the actual merits." *Shaw* v. *Martin*, 613 F. 2d 487, 492 (CA4 1980) (Phillips, J.).

Certainly in this case "the opportunity for adequate exercise of the judicial judgment was wanting." *Rosenberg* v. *United States*, 346 U. S. 273, 311 (Frankfurter, J., dissenting). The application for a stay was filed in the Court of Appeals on Friday, January 14, 1983. On Monday afternoon, January 17, the court scheduled oral argument on the stay application for Wednesday, January 19. On Tuesday, January 18, the State filed its papers in opposition to the stay. On Wednesday morning, a three-judge panel heard oral argument on the stay. One of the members of the panel had been assigned to the case that very morning and had not yet seen any of the papers filed.[4] The next day the court denied the stay. It was only after the court had already issued its ruling that the transcript of the habeas corpus proceeding in the District Court first became available to either the parties or the court.

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[4] The record of the state court trial and sentencing hearing was approximately 1,400 pages long.

II

This case illustrates the dangers that arise whenever a court of appeals precludes full consideration of the merits of a prisoner's appeal by denying a stay of execution despite the issuance of a certificate of probable cause. For the reasons elaborated below, I am convinced that the Court of Appeals erred in rejecting the conclusion of the District Court, which had given plenary consideration to petitioner's claims, that there is substance to petitioner's challenge to the constitutionality of his death sentence. Petitioner's applications to the Court of Appeals and to this Court present the substantial question whether a State may rely on a psychiatrist's prediction of future dangerousness as a basis for imposing the death penalty.

The Court of Appeals' conclusion that petitioner had failed to present a colorable claim rested on the incorrect assumption that this Court's prior decisions have approved the use of psychiatric predictions of dangerousness. Slip op., at 9–10. Whether a defendant may constitutionally be sentenced to death on the basis of such predictions was not decided in either *Jurek* v. *Texas*, 428 U. S. 262 (1976), or *Estelle* v. *Smith*, 451 U. S. 454 (1981). In *Jurek* the Court upheld the Texas death penalty statute but did not specifically address what types of evidence may be introduced.[5] Nor did the

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[5] Indeed, in *Jurek* the Court quoted a passage from a state decision which indicated that the jury was to consider a defendant's background in making its own determination of future dangerousness. There was no suggestion that the jury would be presented with the testimony of psychiatrists directly addressing the ultimate issue of future dangerousness:

"'In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emo-

Court decide the issue in *Smith*, which held only that psychiatric testimony based on an interview with the defendant should have been excluded because it had been obtained in violation of his Fifth and Sixth Amendment rights. The few passing references in the Court's opinion in *Smith* to the fact that the Texas scheme contemplates the use of psychiatric testimony plainly did not constitute a determination that such testimony is consistent with constitutional requirements. See 451 U. S., at 472–473.[6]

There is a substantial question whether psychiatric predictions of dangerousness are so inherently unreliable that the State may never rely on such testimony to impose the death sentence. See *People* v. *Murtishaw*, 175 Cal. Rptr. 738, ——, 631 P. 2d 446, 469 (1981) (holding psychiatric predictions of dangerousness inadmissible in capital cases). See also *White* v. *Estelle*, —— F.Supp. ——, Civil Action No. H-81-1661 (SD Tex. Dec. 30, 1982) (expressing "serious reservations" about permissibility of considering psychiatric predictions of future dangerousness). Within the psychiatric profession itself there appears to be substantial agreement that long-term psychiatric predictions of future dangerousness are inherently unreliable. In 1974 an American Psychiatric Association Task Force report concluded that

tional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.' 522 S. W. 2d, at 939–940." 428 U. S., at 272–273.

[6] The Court specifically noted that "the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does *not* require resort to medical experts." 451 U. S., at 473 (emphasis added). The clear implication is that the decision in *Jurek* upholding the Texas capital scheme did not decide what type of evidence may be considered by the jury. In *Estelle* the Court also acknowledged the view of the psychiatric community "that clinical predictions as to whether a person would or would not commit commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts." 451 U. S., at 472.

predictions of future dangerousness "are fundamentally of very low reliability."[7] According to the Task Force, "the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence is unproved. . . . Psychiatric expertise in the prediction of 'dangerousness' is not established and clinicians should avoid conclusory judgments in this regard."[8]

The passage of eight years since the Task Force Report was written has reinforced these conclusions. A draft report recently issued by another American Psychiatric Association Task Force concluded that "[c]onsiderable evidence has been accumulated by now to demonstrate that long-term prediction by psychiatrists of future violence is an extremely inaccurate process."[9] A recent study noted that "the professional literature almost uniformly affirms low predictive accuracy with regard to the dangerousness of mental patients."[10] The Association has recently represented to this Court its position that psychiatric predictions of future dangerousness are so ~~inherently~~ unreliable that they should be prohibited in capital cases. Brief for American Psychiatric Association as *Amicus Curiae* 11–17, *Estelle* v. *Smith, supra.*[11] The Association has concluded that a prediction of

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[7] American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, *Clinical Aspects of the Violent Individual* 23 (1974).

[8] *Id.*, at 30, 33.

[9] American Psychiatric Association Task Force on the Role of Psychiatry in the Sentencing Process 28.

[10] Schwitzgebel, "Prediction of Dangerousness and Its Implications for Treatment," in Curran, McGarry, & Petty, Modern Legal Medicine, Psychiatry, and Forensic Medicine 784 (1980).

[11] Petitioner's counsel has represented to this Court that the American Psychiatric Association is prepared to file a *amicus curiae* brief in support of petitioner's petition for certiorari. The Association had also informed the Court of Appeals of its intention to file an *amicus curiae* brief in that

future dangerousness by a psychiatrist "involves no more 'expertise'—and certainly no more 'psychiatric expertise'—than does that of the average nonexpert." *Id.*, at 14 (footnote omitted). Clearly no psychiatrist can be "one hundred percent and absolute[ly]" certain, as one of the psychiatrists testifying for the State claimed to be, that an individual will commit criminal acts of violence. Tr. 2131.

Psychiatric predictions of future dangerousness raise particular problems in the context of the Texas death penalty scheme. Under the Texas scheme, the critical determination made by the sentencing jury is whether the defendant is likely to commit criminal acts in the future.[12] In *Jurek* v. *Texas, supra,* this Court upheld the Texas statute only on the assumption that the question of the defendant's future dangerousness encompasses a consideration of "whatever mitigating circumstances [the defendant] may be able to show." 428 U. S., at 272.[13] In this case, the precise ques-

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court.

[12] Under the Texas statute the jury at the sentencing stage is instructed to answer the following questions:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Art. 37.071 (b) (Supp. 1975–1976).

If the jury answers "yes" to all applicable questions, the death sentence must be imposed. In almost all cases the answer to question (1) is a foregone conclusion once the sentencing phase of the trial is reached. Question (3) is frequently inapplicable. Consequently, in many cases the sentence the defendant receives will depend entirely upon the jury's answer to question (2).

[13] The Court assumed that the jury would undertake an "objective consideration of the *particularized* circumstances of the individual offense *and*

tion presented to the State's experts—whether the defendant was likely to commit future criminal acts of violence—was one of the ultimate questions to be decided by the sentencing jury. When a jury is permitted to consider psychiatric testimony directly addressing this ultimate issue, the risk arises that it will give undue weight to the testimony of psychiatrists and forego an independent determination of its own. There is in addition the possibility that the introduction of psychiatric predictions will limit the jury's focus to the narrow issue of future dangerousness and curtail the full consideration of any relevant mitigating circumstances that is constitutionally required.[14]

(emphasis supplied)

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the individual offender." 428 U. S., at 274. It is constitutionally essential that the jury do so in deciding whether to impose the death sentence. See, *e. g.*, *Eddings* v. *Oklahoma*, —— U. S. ——, —— (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 606 (1978) (plurality opinion); *Roberts* v. *Louisiana*, 431 U. S. 633, 637 (1977) (*per curiam*); *Woodson* v. *North Carolina*, 428 U. S. 280, 303–304 (1976) (plurality opinion of Stewart, POWELL, and STEVENS, JJ.).

[14] In non-capital cases, indeed even in civil cases, courts have often deemed it improper for experts to state their conclusions on "the ultimate issue to be decided by the jury upon all the evidence in obedience to the judge's instructions as to . . . questions of law." *United States* v. *Spaulding*, 23 U. S. 498, 506 (1935). The danger created by such testimony is that "the jury may forego independent analysis of the facts and bow too readily to the opinion of an expert or otherwise influential witness." McCormick, *Evidence* § 12, at 26 (1954).

Here this risk was compounded by the manner in which the question of the defendant's future behavior was presented to the State's experts. The witnesses did not base their opinions upon an examination of the defendant, but upon a lengthy description of a "hypothetical" individual. The description was, of course, drawn from the material facts as viewed by the prosecution. The use of such hypothetical questions may undermine the jury's independent determination of the facts because it places before the jury a partisan summation of the facts material to the sentencing determination. For this reason, the practice has been severely criticized, see McCormick, *supra*, at ¶ 16, at 33–34, and has been termed by one judge "the most horrific and grotesque wen on the fair face of justice." Judge

A guiding principle in this Court's evolving capital punishment jurisprudence is that the "qualitative difference" between the death penalty and other forms of punishment demands "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976). Without carefully considering the reliability of psychiatric predictions of future behavior, the Court of Appeals was in no position to reject the novel and complex claims raised by petitioner.

III

The State of Texas has scheduled petitioner's execution for Tuesday, January 25. In order to accomodate this schedule, the Court of Appeals moved with extraordinary speed to dispose of petitioner's claims. In a civilized society, this precipitous end to a prisoner's life is no cause for celebration. "It is . . . important that before we allow human lives to be snuffed out we be sure—emphatically sure—that we act within the law." *Rosenberg* v. *United States*, 346 U. S., at 321 (Douglas, J., dissenting). The procedure followed by the Court of Appeals, and today condoned by this Court, did not provide the necessary certainty. The execution of petitioner while his appeal is pending will ensure that such certainty is never achieved.

Learned Hand, New York Bar Association Lectures on Legal Topics, 1921–1922.

Reviewed 4/25. Thoughtful & interesting memo with some meritorious suggestions.
We should establish standards or rules, as Mike suggests. Whether we do it in this case or by changes in Rules of this Court is a question I'd like to consider. The latter would give us a more thoughtful opportunity.

mfs 04/25/83

BENCH MEMORANDUM

No. 82-6080

Barefoot v. Estelle

Michael F. Sturley April 25, 1983

Question Presented

1. What standards should a lower court apply in deciding whether to grant a stay of execution in a capital case pending disposition of a federal habeas petition?

2. May the prosecution use psychiatric testimony in response to a "hypothetical" question at the penalty phase of a capital case when (a) the question summarizes the evidence against the defendant in explicit detail, (b) the witness has never examined the defendant, and (c) the answer is dispositive of one of the jury's ultimate findings?

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I. Background

A. Statutory Background

Under 28 U.S.C. §2254, a state prisoner may seek habeas relief in federal court "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Section 2253 provides that the final order in a habeas proceeding is "subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." This right of *appeal is subject to an important caveat*:

> An *appeal may not be taken* to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process *issued by a State court, unless* the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

no appeal w/o certificate of probable cause

28 U.S.C. §2253. Rule 22(b) of the Federal Rules of Appellate Procedure elaborates on this requirement.

Section 2251 permits any "justice or judge ... before whom a habeas corpus proceeding is pending" to stay all proceedings against the petr until the case is resolved. Rule 8 of the Federal Rules of Appellate Procedure details the procedures for obtaining a stay of a DC order, but it does not specify the substantive standards for such a stay. Some CAs have announced substantive standards, but this Court has never done so.

To obtain the death penalty under Texas law, "[t]he state must prove ... beyond a reasonable doubt," Tex. Code Crim. P. §37.071(c), that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." §37.071(b)(2).

Texas

B. Facts

Petr was convicted of killing a police officer and sentenced to death. The evidence of guilt seems overwhelming. When petr was arrested, for example, the gun that fired the fatal bullet was in his back pocket.

Yes

At the sentencing phase of petr's trial, the State presented the "expert testimony" of two psychiatrists who regularly appear in support of capital sentences--John Holbrook and James Grigson. Neither had ever examined petr, but both testified that petr was likely to be dangerous in the future on the basis of a long "hypothetical" question. This "hypothetical" was a detailed recitation of the prosecution's evidence in the case. For example, the prosecutor asked each psychiatrist to "assume" that a "hypothetical" person used the alias Darren Callier (an alias that petr used), but that he later revealed to another "hypothetical" person that his real name was Thomas Barefoot. The "hypothetical" also assumed certain states of mind. For example, the prosecutor asked each psychiatrist to assume "that Darren Callier ... never did anything whatsoever to show remorse for what happened to the police officer."

Holbrook testified that the "hypothetical" Thomas Barefoot was a "criminal sociopath" and that he knew of no treatment that could change the behavior of such a person. Grigson testified that the "hypothetical" Thomas Barefoot "would be a fairly classical, typical, sociopathic personality disorder." He "most certainly would" commit criminal acts in the future. The proba-

bility was "100% and absolute," "whether he was in the penitentiary or whether he was free."

Petr's conviction and sentence were affirmed on appeal by the Texas Court of Criminal Appeals. 596 S.W.2d 875 (1980). An execution date was set.

C. Prior Action in This Court

You stayed the execution as Circuit Justice for the Fifth Circuit pending the filing and disposition of a cert petn. The petn was timely filed and initially held for the disposition of Estelle v. Smith, 451 U.S. 454 (1980).

After Smith was decided, the CHIEF JUSTICE (as author of the Smith majority) circulated a "hold memo." He summarized the facts of the case and petr's contentions, then concluded:

> These claims are not insubstantial, but are better addressed on habeas corpus review.
> I will vote to DENY.

Greg Morgan, who had written the pool memo, annotated the hold memo for you:

> Deny. The new practice in Texas--avoiding 5th Am questions by basing psychiatric testimony on "hypothetical" questions--will be challenged on habeas.

Yes

You underlined "habeas" and wrote "Yes" in the margin. Cert was denied on June 29, 1981.

D. Decisions Below

Three months later petr filed his petn for state habeas. It took the Texas Court of Criminal Appeals only eight days to deny the writ. Two days later, petr sought federal habeas.

On November 12, 1982, the DC (WD Tex; Bunton) denied the writ. Petr filed his notice of appeal. The DC granted his petition for leave to proceed *in forma pauperis* and issued a certificate of probable cause. On December 8, however, while the appeal was still pending, the DC vacated its earlier stay of execution.

On December 20 the State sought to cut off appellate review by scheduling petr's execution for January 25, 1983. Petr sought a stay from the Texas Court of Criminal Appeals as soon as he learned that the execution had been scheduled. On January 7, the state court denied this stay. Petr then sought a stay from CA5. CA5 denied this stay summarily, without deciding the merits of petr's appeal.

II. Discussion

This case presents two important issues. Resolution of the first issue will have an important impact on the orderly administration of capital cases in federal courts. (1) It offers this Court the opportunity to avoid the unseemly "last minute" rushes that have plagued it from time to time, and threaten to plague it even more in the future. (2) Resolution of the second issue will be of particular importance in Texas, where the State is required to prove future dangerousness in order to justify the death penalty.

A. Standards for a Stay

(1) General Observations. It is clear that federal habeas has frequently been abused, both in capital cases and noncapital cases. Although these abuses have been well-documented, and several sensible reform proposals have been published,[1] Congress has retained federal habeas in essentially the same form. Congress clearly intends to retain the remedy, apparently believing that prisoners should have some access to federal courts to protect their federal rights.

Furthermore, this Court relies on federal habeas to relieve some of the pressure in difficult cases on direct appeal from state judgments.[2] I do not know how many times this year I have recommended denying cert in a case on direct appeal on the ground that any error could be corrected on federal habeas. This case, however, is a perfect example. Petr has a strong claim, but it involves a complicated factual record and technical medical evidence. The Court was entirely justified two years ago when it hoped that the lower federal courts would be able to sort out this mess without bothering us.

The reliance placed on federal habeas, both by Congress and this Court, requires that it be a meaningful remedy. It

Yes

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[1]Judge Friendly's proposals come readily to mind.

[2]In terms of sheer workload, the availability of successive habeas petns probably more than compensates for this factor. But the Court generally has little difficulty denying cert in these easy cases. When one focuses on hard cases--the cases involving real thought and effort--it is convenient to be able to leave most of them to lower federal courts on habeas.

would be ludicrous for Congress to grant prisoners this powerful right, but allow States to make the right meaningless by executing the prisoners before their cases can be heard. It would be even worse for this Court to deny cert in difficult cases on the ground that a remedy exists under federal habeas, but then allow the State to moot habeas proceedings while the case is still pending.

This does not mean, of course, that a prisoner is automatically entitled to a stay of execution whenever a habeas petn is pending. The availability of successive habeas petns would make this rule unworkable. The State has an interest in the orderly administration of justice, and that interest should be protected. The standards for a stay should accommodate both society's interest in preserving a state prisoner's federal habeas remedy and society's interest in the orderly administration of justice.

Yes

In the next two sections, I present my suggestion for the appropriate standards. I recommend that these be announced under the Court's supervisory powers over the lower federal courts rather than as a matter of constitutional or statutory law.

Mike's idea

(2) Standards on Initial Habeas. On an *initial* habeas, a stay *should be granted as a matter of* course while the petn or an appeal is pending. A prisoner has a right to have his federal claims reviewed in federal court, and this rule is the most effi-

cient way to protect this right. In most states, it is the rule that is already followed.

There should be "one exception" to this rule: If the prisoner has substantially delayed the filing of his petn, he should be required to justify the delay. If there is some justification for the delay, a stay should be granted. If not, a stay should only be available under the higher standards imposed on subsequent habeas petns. See part II.A.3, infra. Thus a prisoner who waits five years after exhausting state remedies should not receive a stay as a matter of course. He will be subjected to a higher standard.

I had initially considered an additional exception, but Rives convinced me that it would not be a good idea. I had thought that there would be no need for a stay if a CA denied leave to appeal in forma pauperis, or denied a certificate of probable cause. My reasoning was that both of these events had the effect of dismissing the appeal. Thus the CA had finally resolved the appeal, and the case was no longer pending. As Rives pointed out, however, the prisoners in these cases can still seek cert in this Court. Thus they would seek stays pending the disposition of their cert petns. As a result, this Court would be forced to determine whether their cases might be certworthy on a stay application rather than on the petn itself. Decisions would be made in a hurry, at the last minute, in an unseemly rush. I now agree that our interest in the orderly administration of justice is better served by disposing of these cases in the normal course of business rather than at the last minute.

Since the Court invariably denies cert when a CA denies leave to appeal in forma pauperis or a certificate of probable cause, the rule will not significantly delay executions. It will make the process easier for the Court, and it will appear fairer to the public.

(3) Standards on Subsequent Habeas. When a prisoner has already completed one round of federal habeas, and seeks to raise a new claim,[3] the burden should be on him to show why he did not raise his claim sooner. Tactical advantage would not be a sufficient justification. A change in the law might justify the delay, or newly discovered evidence that could not, with reasonable diligence, have been discovered earlier, could be a sufficient justification.

If a prisoner can meet this burden, the court should treat the case as an inital habeas proceeding. But if the prisoner is unable to satisfy his burden, he should be subject to a higher standard. He should be required to show a likelihood of success on the merits.[4] Thus if he has what may be a valid claim--and the burden would be on him to show that he might have

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[3]If he seeks to raise the same claim, his petn can be dismissed summarily. If there has been a relevant change in the law, of course, he would effectively have a new claim.

[4]Likelihood of success on the merits is a common element of tests to determine if equitable relief should be granted. A balancing of the equities is an element that often accompanies it. When the prisoner's life is in the balance, the equities clearly tip in his favor if he has a likelihood of success on the merits.

a valid claim--he would not be executed before that claim could be heard.

Eleventh hour applications can be viewed as a special case of this rule. When a prisoner files an application for a stay shortly before he is scheduled to be executed, the burden should be on him to show--in addition to everything else--why he waited until the eleventh hour. If he has a valid excuse, the court may grant a temporary stay if necessary to have time to apply the above standards. But if there is no reason to justify waiting so long, the prisoner bears the risk that he will be unable to meet his burden to show likelihood of success on the merits in the limited time available.

Yes

(4) Advantages. If these standards are adopted, they should give lower courts (both CAs and DCs) guidance in dealing with capital cases. I recognize that these standards go well beyond what is necessary for the case before us, but I assume that is why the Court granted cert. In any event, I believe that this *broad "rule-making" is required* here to avoid the problems we have seen as recently as Evans v. Alabama and Alabama v. Evans.

Yes - some Rule making here is necessary

These standards should also take this Court out of the business of reviewing claims on their merits at the last minute. The Court will still have to consider applications for stays, but they will be in cases where a prisoner has already had one federal habeas proceeding and was unable to justify his failure to raise his present claim at that time. The Court need not consid-

er the merits. It need only decide whether the case is cert-worthy. The Court may still have to consider applications to vacate stays if States are impatient to execute people. But such applications should be much rarer when DCs and CAs no longer grant stays as a matter of course. They should only come in cases where lower courts have affirmatively found either (i) a justification for not bringing the claim sooner, or (ii) a likelihood of success on the merits of the prisoner's claim. I assume that very few stays will need to be vacated under such circumstances.

Finally, these standards should encourage an orderly, expeditious process in the federal courts. Prisoners have a strong incentive to bring all their federal claims early. There is a strong disincentive for piecemeal claims. Courts would generally be spared the unseemly task of making last-minute rulings on the merits. And this Court would be spared the necessity of reviewing the merits of every claim.

I am not sure of this.

(5) Application of the Standards. Applying the standards that I have suggested, it is clear that CA5 should have granted a stay in this case. This was petr's first federal habeas proceeding, and he did not delay in bringing it. He filed his petn in DC two days after state habeas was denied. His petn for state habeas was filed almost immediately after this Court denied cert on his direct appeal.

no delay
This is imp.

To the extent this was an "eleventh hour" application for a stay, it is the State's fault. Petr sought a stay as soon as an execution was scheduled.

Even if the standards were less generous than I suggest, CA5 should have granted a stay here. If, for example, the Court accepts the "additional exception" that Rives convinced me to reject, see part II.A.2, supra, that exception would not apply. The DC had granted petr a certificate of probable cause. In fact, even under the standard that CA5 purported to apply or under the standard I would find appropriate for subsequent habeas actions, a stay should have issued. Petr may not have a winning claim on the merits, but he at least has a "substantial likelihood" of success.

B. The "Hypothetical" Question

Since CA5 has not ruled on the merits of petr's claim, the Court may wish to reverse (on the stay question) and remand for consideration of the merits. I assume, however, that the decision to order the parties to brief the merits was deliberate, and that the Court intends to rule on the merits.

In the final analysis, the resolution of the merits becomes a judgment call. In my view, use of the "hypothetical" question was clearly unfair. The issue is whether it was unfair enough to be a constitutional violation. I think that it was. The medical evidence is overwhelming that psychiatrists are unable to predict long-term future dangerousness any more effectively than a lay person. And to the extent that a psychiatrist

can predict long-term future dangerousness, he cannot do so without examining the defendant.[5] The State has presented an "expert" to the jury and, in essence, asked that expert to answer one of the ultimate jury questions on the basis of his expertise. Since his expertise does not qualify him to answer that question, the jury has been awed into accepting evidence on a false basis. That, in my view, is a violation of due process.[6]

The State makes two specious arguments on the basis of the Court's prior cases. First, the State argues that Jurek v. Texas, 428 U.S. 262 (1976), justifies the "hypothetical" testimony here. That argument is wrong. Jurek held that Texas may require a finding of future dangerousness before imposing the death penalty. The opinion you joined noted that the jury should "have before it all possible relevant information about the individual defendant whose fate it must determine." 428 U.S., at 276 (opinion of Stewart, POWELL, and STEVENS, JJ.) (emphasis added). There is no reason for the jury to have irrelevant information--particularly when it is highly prejudicial.

Second, the State argues that Estelle v. Smith, 451 U.S.

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[5]This subject is well discussed in Joel Klein's brief for amicus American Psychiatric Association. In view of the deference we pay to ACOG in the abortion cases, I think the same deference is due to APA in this case.

yes

[6]In some States, admission of "hypothetical" psychiatric testimony could well be harmless error in the appropriate circumstances. Since Texas law requires the State to prove future dangerousness beyond a reasonable doubt, however, I do not see how the testimony here could possibly have been harmless. Cf. Zant v. Stephens, No. 81-89.

Did State in this case try to obtain petr's consent

Jury should be told of refusal

454 (1981), creates a dilemna for it. Smith prevents the State from forcing a defendant to submit to a psychiatric examination. If this case prevents the State from using "hypothetical" evidence, it will be unable to use any psychiatric evidence at all. This argument is irrelevant. To the extent that Smith prevents the State from using bad evidence (and Smith does nor foreclose the possibility entirely), that is no justification for using even worse evidence. And even if the two cases together had the effect of excluding all psychiatric testimony on this issue, that would not be a problem. The medical evidence indicates that such testimony is worthless anyway. Why not exclude it? The State may still use lay actuarial evidence. In view of the analogies mentioned in Jurek, 428 U.S., at 275, and nn. 9-11 (bail, prison sentences, parole), this seems to have been what you had in mind at that time.

no, though it is not worth much the opinion of psychiatrist

As a final note, you may wish to consider the relationship between this case and your opinion in Michael Jones v. United States, No. 81-5195. Mark informs me that you plan to include a footnote about the difficulty in predicting future dangerousness on the basis of psychiatric testimony. In considering Jones, however, you should remember that the cases are very different. Here the consequences of the testimony are capital punishment--an irrevocable penalty different in kind from incarceration. Our scrutiny should therefore be much more careful. Furthermore, in the commitment context, a psychiatrist need only be concerned with predicting short-term dangerousness.* His task is thus more likely to be within his competence. If his predic-

Yes

Yes

Yes

tion is wrong, it is still possible to reexamine the patient and make a new prediction. Finally, this case involves "hypothetical" testimony. Even if there is some value to psychiatric testimony on the issue of long-term dangerousness, there is no value to "hypothetical" psychiatric testimony.

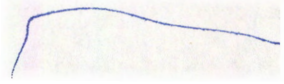
III. Conclusion

The decision below should be reversed. Using its supervisory powers, the Court should announce standards for lower courts to apply in deciding applications for stays of execution in capital cases. In essence, these *standards should protect* a pr*isoner's right to one federal habeas proceed*ing *except in* cases of unjustified delay in filing the petition. For subsequent habeas proceedings, the prisoner should be subject to a higher standard, such as likelihood of success on the merits, unless he can justify his failure to bring his claim earlier.

On the merits of petr's claim, the Court should vacate the death sentence and remand for resentencing. The use of "hypothetical" psychiatric testimony violated petr's right to due process.

Mike

82-6080 BAREFOOT v. ESTELLE Argued 4/26/83



Greenberg (Petr)

Argues as "friend of court" (but really as a 100% opponent of all capital punishment.)

States he will argue appropriate standards, & leave to Mr Gray this case.

Emphasizes this was a ~~first~~ §2254 application, & there was a certificate of probable cause.

note | A second petition is not entitled to same consideration. "may be treated summarily."

Standard: should be considered fully - 4 to 6 mos.

Gray (for Petr)

Issue goes to heart of Texas procedure: whether Δ constitutes a continuing threat to society

Use of psychiatric testimony - from any psychiatrist - is unconst.

Becker (Asst AG - Texas)

Cert. of probable cause was issued because DC thought the issue was not frivolous - tho DC said issue was not substantial enough to justify staying the execution.

SOC noted it is illogical to have a dif. standard for cert. of prob. cause + staying of execution. Becker answered that each is authorized by a different Rule of Crim. Procedure. (but neither Rule states a standard)

HAB emphasized the Cert. of Probable Cause: "if it had not been issue, we would have a different case."

Was this State's fault or Barefoots ? (Barefoot was litigating in state system for 3 yrs before he filed fed H/C)

BRW said one of issues here is that CA5 merely denied Stay of Execution and did not "aff'm" - at least it did it say so. Should have made a substantial decision

82-6080 Barefoot

April 28
Pre-Cf

1. Psychiatric hypotheticals.
Not per se invalid

Jurek

Discretion of TC on proper instructions (jury assesses weight) & in view of (i) whether the "expert" is regular State employee (i.e. establish independence & competency, (ii) whether Δ has refused to submit to examination by a qualified psychiatrist, etc.

Here, testimony - 100% certainty is highly suspect. But several other psychiatrist agreed with Dr. Grigson.

2. Cert. of Probable Cause.
CA5 here expressly considered its duty in light of DC's Cert. of Probable Cause.

~~Petr's~~ Petr's Brief (p 24) agreed Brooks was properly decided → In Brooks v Estelle the Court denied a Stay (as did CA5) where there was ~~a~~ a Certificate. / Dissent (WJB, TM, & PS) had argued that a CA must address merits)

3. CA did address merits (see App 19, 26)

4. Normally, ~~and~~ on first §2254 petition, ~~&~~ & where Certificate has been issued by DC, a CA should review on merits - but this is not required.

5. Dr Grigson's "100% certain" ~~test~~ testimony should not have been permitted

Affm 6-3

No. 82-6080, Barefoot v. Estelle Conf. 4/29/83

The Chief Justice Affirm

Psychiatric ev. has never been held inadmissible.

When a certificate of probable cause is issued, there should be an automatic stay of execution.

Examination of the individual before a medical op. is given is impossible in "will contest cases". Examination not necessary. (Good point)

Justice Brennan Vacate death penalty

CA5's procedures are not adequate in capital cases.

Long term psychiatric predictions are indefensible.* This is not inconsistent with Jurek. It would leave Q to lay judg of jury.

*Esp. where no examination of Δ

Justice White Affirm on judg. of CA5

Altho CA5 concluded with "denying stay", the effect of its full op. was to affirm on merits.

We cannot say summary procedure is improper.

2

Justice Marshall Vacate death sentence.
Will revise & expand opinion, previously circulated.

Justice Blackmun Vacate & Remand
Noted his opinion on "certificate of probable cause" while on CA8.
When certificate is issued, stay should be automatic.
Agree with ABA brief.
Petr. claim here was not frivolous, & CA5 should have reviewed on merits.
Dr Grigson's test. is wholly unreliable.

Justice Powell Affirm
See my notes
Agree largely with BRW.
What we say is important.
DC should have instructed jury to ignore Grigson's testimony.
But there was other psychiatric testimony, & there can be no doubt as to the justness of result in this case.

Justice Rehnquist Aff'm
This is here on cert. before judgment — but we are free to affirm on merits.
Agree with CJ, BRW, LFP

Justice Stevens Aff'm
Would not foreclose a summary disposition by a CA but there should be a decision on merits. Altho in effect CA5 decided merits; ~~its~~ its bottom line was to deny stay.
But as of now, CA5 was free to decide case, & can't say its ~~un~~ decision is constitutionally infirm.

Justice O'Connor Aff'm
~~O~~ As to procedure, the ABA's ~~proposal~~ proposal that stay should be automatic in capital case where cert. of probable cause is issued, should be approved. (9 agreed)

Barefoot v. Texas

tlg

D.C. Superior Court Judge **Gladys Kessler** ventured into the increasingly contentious legal-psychiatric thicket recently, ruling that government psychiatrists cannot offer predictions about a defendant's future dangerousness in a civil commitment proceeding.

Kessler, head of the court's family division, ruled that "no psychiatric witness can reasonably offer an 'expert' opinion on this issue."

The U.S. Supreme Court is expected to set a standard soon for psychiatric testimony in the case of a Texas man sentenced to death for the murder of a policeman. Defense attorneys are challenging the testimony of two psychiatrists who offered opinions on the man's dangerousness based on his prior criminal record.

In a brief filed in that case, the American Psychiatric Association said last week that the "large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases."

Post of 5/1/83

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAY 26 1983

Recirculated: ____________

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER *v.* W. J. ESTELLE, JR, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

We have two questions before us in this case: whether the District Court erred on the merits in rejecting the petition for habeas corpus filed by petitioner, and whether the Court of Appeals for the Fifth Circuit correctly denied a stay of execution of the death penalty pending appeal of the District Court's judgment.

I

On November 14, 1978, petitioner was convicted of the capital murder of a police officer in Bell County, Texas. A separate sentencing hearing before the same jury was then held to determine whether the death penalty should be imposed. Under Tex. Code Crim. Proc. Ann. § 37.071,[1] two

[1] Tex. Code Crim. Proc. Ann. § 37.071 provides:

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for

special questions were to be submitted to the jury: whether the conduct causing death was "committed deliberately and with reasonable expectation that the death of the deceased or another would result"; and whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The state introduced into evidence petitioner's prior convictions and his reputation for lawlessness. The state also called two psychiatrists, John Holbrook and James Grigson, who, in response to hypothetical questions, testified that petitioner would probably commit further acts of violence and represent a continuing threat to society. The jury answered both of the questions put to them in the affirmative, a result which required the imposition of the death penalty.

On appeal to the Texas Court of Criminal Appeals, petitioner urged, among other submissions, that the use of psychiatrists at the punishment hearing to make predictions about petitioner's future conduct was unconstitutional because psychiatrists, individually and as a class, are not competent to predict future dangerousness. Hence, their predictions are so likely to produce erroneous sentences that their use violated the Eighth and Fourteenth Amendments. It was also urged that, in any event, the permitting of an-

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or against sentence of death.

"(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

"(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

"(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

The question specified in (b)(3) was not submitted to the jury.

swers to hypothetical questions by psychiatrists who had not personally examined petitioner was constitutional error. The court rejected all of these contentions and affirmed the conviction and sentence on March 12, 1980, 596 S.W. 2d 875; rehearing was denied on April 30, 1980.

Petitioner's execution was scheduled for September 17, 1980. On July 29, this Court granted a stay of execution pending the filing and disposition of a petition for certiorari, which was filed and then denied on June 29, 1981. 453 U. S. 913. Petitioner's execution was again scheduled by the state courts, this time for October 13, 1981. An application for habeas corpus to the Texas Court of Criminal Appeals was denied on October 7, 1981. —— S.W. 2d ——, whereafter a petition for habeas corpus was filed in the United States District Court for the Western District of Texas. Among other issues, petitioner raised the same claims with respect to the use of psychiatric testimony that he had presented to the state courts. That court stayed petitioner's execution pending action on the petition. An evidentiary hearing was held on July 28, 1982, at which petitioner was represented by competent counsel. On November 9, 1982, the District Court filed its findings and conclusions, rejecting each of the several grounds asserted by petitioner. The writ was accordingly denied; also, the stay of petitioner's death sentence was vacated. The District Court, however, granted petitioner's motion to proceed *in forma pauperis* and issued a certificate of probable cause pursuant to 28 U. S. C. § 2253, which provides that an appeal may not be taken to the Court of Appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a state court "unless the Justice or Judge who rendered the order or a Circuit Justice or Judge issues a certificate of probable cause." Notice of appeal was filed on November 24, 1982.

At this point, the Texas courts set January 25, 1983, as the new execution date. A petition for habeas corpus and motion for stay of execution were then denied by the Texas

Court of Criminal Appeals on December 21, 1982, and another motion for stay of execution was denied by the same court on January 11, 1983.

On January 14, petitioner moved the Court of Appeals for the Fifth Circuit to stay his execution pending consideration of his appeal from the denial of his petition for habeas corpus. On January 17, the parties were notified to present briefs and oral argument to the court on January 19. The case was heard on January 19, and on January 20 the Court of Appeals issued an opinion and judgment denying the stay. The court's opinion recited that the court had studied the briefs and record filed and had heard oral argument at which petitioner's attorney was allowed unlimited time to discuss any matter germane to the case. The Court of Appeals was of the view that by giving the parties unlimited opportunity to brief and argue the merits as they saw fit, the requirements set forth in this Court's cases, such as *Garrison* v. *Patterson*, 391 U. S. 464 (1968), *Nowakowski* v. *Maroney*, 386 U. S. 542 (1967), and *Carafas* v. *LaValle*, 391 U. S. 234 (1968), were satisfied. As the court understood those cases, when a certificate of probable cause is issued by the District Court, the Court of Appeals must give the parties an opportunity to address the merits. In its view, the parties had been given "an unlimited opportunity to make their contentions upon the underlying merits by briefs and oral argument." The Court of Appeals then proceeded to address the merits of the psychiatric testimony issue, together with new claims not presented to the District Court, that the state court had no jurisdiction to resentence petitioner and that newly-discovered evidence warranted a new trial. Each of the grounds was discussed by the court and rejected. The court concluded that since the petition had no substantial merit, a stay should be denied.

Petr then filed an application for stay of execution with the Circuit Justice for the Fifth Circuit, who referred the matter to the Court. On January 24, 1983, the Court stayed peti-

tioner's execution and, treating the application for stay as a petition for writ of certiorari before judgment, certiorari was granted. The parties were directed to brief and argue "the question presented by the application, namely, the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner, and also the issues on appeal before the United States Court of Appeals for the Fifth Circuit." —— U. S. ——. The case was briefed and orally argued here and we now affirm the judgment of the District Court.

II

With respect to the procedures followed by the Court of Appeals in refusing to stay petitioner's death sentence, it must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error. "It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." *Lambert* v. *Barrett*, 159 U. S. 660, 662 (1895). Furthermore, unlike a

Yes

term of years, a death sentence cannot begin to be carried out by the state while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit. They need not, and should not, however, fail to give non-frivolous claims of constitutional error the careful attention that they deserve.

For these reasons, we granted certiorari before judgment to determine whether the Court of Appeals erred in refusing to stay petitioner's death sentence.

A

Petitioner urges that the Court of Appeals improperly denied a stay of execution while failing to act finally on his appeal. He suggests the possibility of remanding the case to the Court of Appeals without reaching the merits of the District Court's judgment. The heart of petitioner's submission is that the Court of Appeals, unless its believes the case to be entirely frivolous, was obligated to decide the appeal on its merits in the usual course and must, in a death case, stay the execution pending such disposition. The State responds that the Court of Appeals reached and decided the merits of the issues presented in the course of denying the stay and that petitioner had ample opportunity to address the merits.

We have previously held that "[i]f an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits." *Garrison* v. *Patterson*, 391 U. S. 464, 466 (1968) (per curiam); *Nowakowski* v. *Maroney*, 386 U. S. 542 (1967); *Carafas* v. *Lavalle*, 391 U. S. 243 (1968). These decisions indicate that if a court of appeals is unable to resolve the merits of an appeal before the scheduled date of execution, the petitioner is entitled to a stay of execution to permit due consideration of the merits. But we have also held that the requirement of a decision on the merits "does

not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases." *Carafas* v. *Lavalle*, *supra*, at 242; *Garrison* v. *Patterson*, *supra*, at 446. In *Garrison*, after examining our prior holdings, we concluded that

> "Nothing in [these cases] prevents the courts of appeals from considering the questions of probable cause and the merits together, and nothing said there or here necessarily requires full briefing in every instance in which a certificate is granted. We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed by rule or otherwise, that his opportunity will be limited. "391 U. S. at 446–447.

We emphasized, *id.*, that there must be ample evidence that in disposing of the appeal, the merits have been addressed, but that nothing in the cases or the applicable rules prevents a Court of Appeals from adopting summary procedures in such cases.

On the surface, it is not clear whether the Fifth Circuit's recent practice of requiring a showing of some prospect of success on the merits before issuing a stay of execution, *O'Bryan* v. *Estelle*, 691 F. 2d 706, 708 (1982); *Brooks* v. *Estelle*, —— F. 2d —— (1982), comports with these requirements. Approving the execution of a defendant before his appeal is decided on the merits would clearly be improper under *Garrison*, *Nowakowski*, and *Carafas*. However, a practice of deciding the merits of an appeal, when possible, together with the application for a stay, is not inconsistent with our cases.

yes ← what CA5 did in this case

It appears clear that the Court of Appeals in this case pursued the latter course. The Court of Appeals was fully aware of our precedents and ruled that their requirements

were fully satisfied. After quoting from *Garrison*, the Court of Appeals said:

> "Our actions here fall under this language. Petitioner's motion is directed solely to the merits. The parties have been also offered an unlimited opportunity to make their contentions upon the underlying merits and oral argument. This opinion demonstrates the reasons for our decision."

CA5 in this case

In a section of its opinion entitled "Merits of Appeal: Psychiatric Testimony on Dangerousness," the Court of Appeals then proceeded to address that issue and reject petitioner's contentions.

The course pursued by the Court of Appeals in this case was within the bounds of our prior decisions. In connection with acting on the stay, the parties were directed to file briefs and to present oral argument. In light of the Fifth Circuit's announced practice, *O'Bryan* v. *Estelle*, 691 F. 2d 706, 708 (1982); *Brooks* v. *Estelle*, —— F. 2d —— (1982), it was clear that whether a stay would be granted depended on the probability of success on the merits. The parties addressed the merits and were given unlimited time to present argument. We do not agree that petitioner and his attorneys were prejudiced in their preparation of the appeal. The primary issue presented had been briefed and argued throughout the proceedings in the state courts and rebriefed and reargued in the district court's habeas corpus proceeding. From the time the district court ruled on the petition on November 9, 1982, petitioner had 71 days in which to prepare the briefs and arguments which were presented to the Fifth Circuit on January 19, 1983.

Although the Court of Appeals did not formally affirm the judgment of the district court, there is no question that the Court of Appeals ruled on the merits of the appeal, as its concluding statements demonstrate:

> "This Court has had the benefit of the full trial record except for a few exhibits unimportant to our consideration. We have read the arguments and materials filed by the parties. The petitioner is represented here, as he has been throughout the habeas corpus proceedings and in state and federal courts, by a competent attorney experienced in this area of the law. We have heard full arguments in open court. Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for stay should be DENIED."

It would have been advisable, once the court had addressed the merits and arrived at these conclusions, to verify the obvious by expressly affirming the judgment of the District Court, as well as to deny the stay. The court's failure to do so, however, does not conflict with *Garrison* and related cases. Indeed, in *Garrison* itself, the Court noted that "in an effort to determine whether the merits had been addressed . . . this Court solicited further submissions from the parties in the case." 391 U. S., at 466. If a formal decision on the merits were required, this inquiry would have been pointless. Moreover, the Court of Appeals cannot be faulted for not formally affirming the judgment of the District Court since this Court, over the dissent of three Justices arguing as petitioner does here, refused to stay an execution in a case where the Court of Appeals followed very similar procedures. *Brooks* v. *Estelle*, —— U. S. —— (1982).[2]

Although the Court of Appeals moved swiftly to decide the stay, this does not mean that its treatment of the merits was cursory or inadequate. On the contrary, the court's resolution of the primary issue on appeal, the admission of psychi-

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[2] In that case, we treated the application for stay as a petition for certiorari or in the alternative as a petition for certiorari challenging the merits of the Court of Appeals' decision. We denied the petition on either assumption. —— U. S. ——.

| ya

atric testimony on dangerousness, reflects careful consideration. For these reasons, to remand to the Court of Appeals for verification that the judgment of the District Court is affirmed would be an unwarranted exaltation of form over substance.

B

That the Court of Appeals' handling of this case was tolerable under our precedents is not to suggest that its course should be accepted as the norm or as the preferred procedure. It is a matter of public record that an increasing number of death-sentenced petitioners are entering the appellate stages of the federal habeas process. The fair and efficient consideration of these appeals requires proper procedures for the handling of applications for stays of executions and demands procedures that allow a decision on the merits of an appeal accompanying the denial of a stay. The development of these procedures is primarily a function of the courts of appeals and the rulemaking processes of the federal courts, but the following general guidelines can be set forth.

First. Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal in order to prevent frivolous appeals from delaying the States' ability to impose sentences, including death sentences. The primary means of separating meritorious from frivolous appeals should be the decision to grant or withhold a certificate of probable cause. It is generally agreed that "probable cause requires something more than the absence of frivoloity, and that the standard is a higher one than the 'good faith' requirement of Sec. 1915." Blackmun, "Allowance of In Forma Pauperis Appeals in Sec. 2255 and Habeas Corpus Cases," 43 F.R.D. 343, 352 (CA 8 1967). We agree with the weight of opinion in the courts of appeals that a certificate of probable cause requires petitioner to make a "substantial showing of the denial of [a] federal right." *Stewart* v. *Beto*, 454 F. 2d 268, 270 n. 2 (CA 5 1971), cert denied, 406 U. S. 925 (1972).

consistent with

General Guidelines

Yes

See also *Ramsey* v. *Hand*, 309 F. 2d 947, 948 (CA 10 1962); *Goode* v. *Wainwright*, 670 F. 2d 941 (CA 11 1982).[3] In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause, but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.

Second. When a certificate of probable cause is issued by the district court, as it was in this case, or later by the court of appeals, petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal. Accordingly, a circuit court, where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution pending disposition of an appeal when a condemned prisoner obtains a certificate of probable cause on his initial habeas appeal.

Third. As our earlier cases have indicated, a court of appeals may adopt expedited procedures in resolving the merits of habeas appeals, notwithstanding the issuance of a certificate of probable cause. If a circuit chooses to follow this course, it would be advisable to promulgate a local rule stating the manner in which such cases will be handled and informing counsel that the merits of an appeal may be decided upon the motion for a stay. Even without special procedures, it is entirely appropriate that an appeal which is "frivolous and entirely without merit" be dismissed after the hearing on a motion for a stay. Local Rule 20, Court of Appeals

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[3] The following quotation cogently sums up this standard:

"In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *United States ex rel. Jones* v. *Richmond*, 245 F. 2d 234 (CA2), cert. denied, 355 U. S. 846 (1957).

Yes

for the Fifth Circuit. We caution that the issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous, and that a court of appeals should be confident that petitioner's claim is squarely foreclosed by a holding of this Court or is lacking any factual basis in the record of the case before dismissing it as frivolous.

If an appeal is not frivolous, a court of appeals may still choose to expedite briefing and hearing the merits of all or of selected cases in which a stay of a death sentence has been requested, provided that counsel has adequate opportunity to address the merits and knows that he is expected to do so. If appropriate notice is provided, argument on the merits may be heard at the same time the motion for a stay is considered, and the court may thereafter render a single opinion deciding both the merits and the motion, unless exigencies of time preclude a considered decision on the merits, in which case the motion for a stay must be granted. In choosing the procedures to be used, the courts should consider whether the delay that is avoided by summary procedures warrants departing from the normal, untruncated processes of appellate review. In instances where expedition of the briefing and argument schedule is not ordered, a court of appeals may nevertheless choose to advance capital cases on the docket so that the decision of these appeals is not delayed by the weight of other business.

Yes

Fourth. Second and successive federal habeas corpus petitions present a different issue. "To the extent that these involve the danger that a condemned inmate might attempt to use repeated petitions and appeals as a mere delaying tactic, the State has a quite legitimate interest in preventing such abuses of the writ." Brief of *Amicus Curiae* NAACP Legal Defense and Educational Fund, Inc. 41. Rule 9 of the Rules Governing § 2254 Cases states that "a second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief . . . [or if] the failure

Yes

of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Even where it cannot be concluded that a petition should be dismissed under Rule 9, it would be proper for the district court to expedite consideration of the petition. The granting of a stay should reflect the presence of substantial grounds upon which relief might be granted.

Fifth. Stays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the Court of Appeals which has denied a writ of *habeas corpus*. It is well-established that "there must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed." *White* v. *Florida*, —— U. S. —— (POWELL, J., Circuit Justice). Application for stays of death sentences are expected to contain the information and materials necesary to make an assessment of the merits of the issue and so to determine whether plenary review and a stay are warranted. A stay of execution should first be sought from the Court of Appeals, and this Court generally places considerable weight on the decision reached by the circuit courts in these circumstances.

III

Petitioner's *merits* submission is that his death sentence must be set aside because the Constitution of the United States barred the testimony of the two psychiatrists who testified against him at the punishment hearing. There are several aspects to this claim. First, it is urged that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community. Second, it is said that in any

event, psychiatrists should not be permitted to testify about future dangerousness in response to hypothetical questions and without having examined the defendant personally. Third, it is argued that in the particular circumstances of this case, the testimony of the psychiatrists was so unreliable that the sentence should be set aside. As indicated below, we reject each of these arguments.

A

The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel. In the first place, it is contrary to our cases. If the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, *Jurek* v. *Texas*, 428 U. S. 262 (1976), and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify. In *Jurek*, seven Justices rejected the claim that it was impossible to predict future behavior and that dangerousness was therefore an invalid consideration in imposing the death penalty. JUSTICE STEVENS responded directly to the argument, 428 U. S., at 274–276:

> "It is, of course, not easy to preduct future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process

of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all posible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced."

Although there was only lay testimony with respect to dangerousness in *Jurek*, there was no suggestion by the Court that the testimony of doctors would be inadmissable. To the contrary, the Court said that the jury should be presented with all of the relevant information. Furthermore, in *Estelle* v. *Smith*, 451 U. S. 454, 473 (1981), in the face of a submission very similar to that presented in this case with respect to psychiatric testimony, we approvingly repeated the above quotation from *Jurek* and went on to say that we were in "no sense disapproving the use of psychiatric testimony bearing on future dangerousness". See also *California* v. *Ramos*, —— U. S. ——, —— (1983); *Gregg* v. *Georgia*, 428 U. S. 153, 203–204 (1976) (plurality opinion) (desirable to allow open and far-ranging argument that places as much information as possible before the jury).

Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissable would immediately call into question those other contexts in which predictions of future behavior are constantly made. For example, In *O'Connor* v. *Donalson*, 422 U. S. 563, 576 (1975), we held that a non-dangerous civil committee could not be held in confinement against his will. Later, speaking about the requirements for civil commitments, we said:

"There may be factual issues in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington* v. *Texas*, 441 U. S. 418, 429 (1979).

In the second place, the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but as generally so unreliable that it should be ignored. If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of the state's psychiatrists along with opposing views of the defendant's doctors.

Third, petitioner's view mirrors the position expressed in the amicus brief of the American Psychiatric Association (APA). As indicated above, however, the same view was presented and rejected in *Estelle* v. *Smith*. We are no more convinced now that the view of the APA should be converted into a constitutional rule barring an entire category of expert testimony. We are not persuaded that such testimony is almost entirely unreliable and that the fact finder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.

The *amicus* does not suggest that there are not other views held by members of the association or of the profession generally. Indeed, as this case and others indicate, there are those doctors who are quite willing to testify at the sentencing hearing, who think, and will say, that they know

what they are talking about, and who expressly disagree with the Association's point of view. Furthermore, their qualifications as experts are regularly accepted by the courts. If they are so obviously wrong and should be discredited, there should be no insuperable problem in doing so by calling members of the association who are of that view and who confidently assert that opinion in their *amicus* brief. Neither petitioner nor the association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials. We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.

We are unaware of and have been cited to no case, federal or state, that has adopted the categorical views of the association.[4] Certainly it was presented and rejected at every

[4] Petitioner relies on *People* v. *Murtishaw*, —— Cal. 3d ——, 175 Cal. Rptr. 738, 631 P. 2d 446. There the California Supreme Court held that in light of the general unreliability of such testimony, admitting medical testimony concerning future dangerousness was error in the context of a sentencing proceeding under the California capital punishment statutes. The court observed that "the testimony of [the psychiatrist was] not relevant to any of the listed factors" which the jury was to consider in deciding whether to impose the death penalty." 631 P. 2d, at 469. The court distinguished cases, however, where "the trier of fact is required by statute to determine whether a person is 'dangerous'", in which event "expert testimony, unreliable though it may be, is often the only evidence available to assist the trier of fact." *Ibid.* Furthermore, the court acknowledged "that despite the recognized general unreliability of predictions concerning future violence, it may be possible for a party in a particular case to show that a reliable prediction is possible. . . . A reliable prediction might also be conceivable if the defendant had exhibited a long-continued pattern of criminal violence such that any knowledgeable psychiatrist would anticipate future violence." *Id.* Finally, we note that the court did not in any

stage of the present proceeding. After listening to the two schools of thought testify not only generally but about the petitioner and his criminal record, the District Court found:

> "The majority of psychiatric experts agree that where there is pattern of repetitive assault and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises. The accuracy of this conclusion is reaffirmed by the expert medical testimony in the case at the evidentiary hearing. . . . It would appear that petitioner's complaint is not the diagnosis and prediction made by Drs. Holbrook and Grigson at the punishment phase of his trial, but that Dr. Grigson expressed extreme certainty in his diagnosis and prediction. . . . In any event, the differences among the experts were quantitative, not qualitative. The differences in opinion go to the weight of the evidence and not the admissibility of such testimony. . . . Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal." J.A. 13 (footnote omitted).

DC's op.

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way indicate that its holding was based on constitutional grounds.

Petitioner also relies on *White* v. *Estelle*, 554 F. Supp. 851 (S.D. Tex. 1982). The court in that case did no more than express "serious reservations" about the use of psychiatric predictions based on hypotheticals in instances where the doctor has had no previous contact with the defendant. *Id.*, at 858. The actual holding of the case, which is totally irrelevant to the issues here, was that the testimony of a doctor who *had* interviewed the defendant should have been excluded, because, prior to the interview, the defendant had not been given *Miranda* warnings or an opportunity to consult with his attorney, as required by *Estelle* v. *Smith*, 451 U. S. 454 (1981).

We agree with the trial judge, as well as with the Court of Appeals' judges who dealt with the merits of the issue and agreed with the trial court in this respect.

B

Whatever the decision may be about the use of psychiatric testimony, in general, on the issue of future dangerousness, petitioner urges that such testimony must be based on personal examination of the defendant and may not be given in response to hypothetical questions. We disagree. Expert testimony, whether in the form of an opinion based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the fact finder do its assigned job. As the Court said long ago, *Spring Co.* v. *Edgar*, 99 U. S. 645, 657 (1878):

> Men who have made questions of skill or science the object of their particular study, says Phillips, are competent to give their opinions in evidence. Such opinions ought, in general, to be deduced from facts that are not disputed, or from facts given in evidence; but the author proceeds to say that they need not be founded upon their own personal knowledge of such facts, but may be founded upon the statement of facts proved in the case. Medical men, for example, may give their opinions not only to the state of a patient they may have visited, or as to cause of the death of a person whose body they have examined or as to the nature of the instruments which caused the wounds they have examined, but also in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial. Judicial tribunals have in many instances held that medical works are not admissible, but they everywhere hold that men skilled in science, art, or particular trades may give their opinions as witnesses in matters pertaining to their professional calling."

See also *Dexter* v. *Hall*, 15 Wall. 9, 26–27 (1872); *Forsythe* v. *Doolittle*, 120 U. S. 73, 78 (1877); *Bram* v. *United States*, 168 U. S. 532, 568–569 (1897).

Today, in the federal system, the Federal Rules of Evidence, §§702–706, provide for the testimony of experts. The advisory committee notes touch on the particular objections to hypothetical questions, but none of these caveats lend any support to petitioner's constitutional arguments. Furthermore, the Texas Court of Criminal Appeals could find no fault with the mode of examining the two psychiatrists under Texas law:

> "The trial court did not err by permitting the doctors to testify on the basis of the hypothetical question. The use of hypothetical questions is a well-established practice. 2 C. McCormick and R. Ray, Texas Evidence, § 1402 (2d ed. 1956). That the experts had not examined appellant went to the weight of their testimony, not to its admissability." 596 S.W. 2d 875, 887.

Like the Court of Criminal Appeals, the District Court, and the Court of Appeals, we reject petitioner's constitutional arguments against the use of hypothetical questions. Although cases such as this involve the death penalty, we perceive no constitutional barrier to applying the ordinary rules of evidence governing the use of expert testimony.

C

As we understand petitioner, he contends that even if the use of hypothetical questions in predicting future dangerousness is acceptable as a general rule, the use made of them in his case violated his right to due process of law. For example, petitioner insists that the doctors should not have been permitted to give an opinion on the ultimate issue before the jury, particularly when the hypothetical questions were phrased in terms of petitioner's own conduct;[5] that the hypo-

---

[5] There is support for this view in our cases. *United States* v.

thetical questions referred to unproven facts; and that the answers to the questions were so positive as to be assertions of fact and not opinion. These claims of misuse of the hypothetical questions, as well as others, were rejected by the Texas courts, and neither the District Court nor the Court of Appeals found any constitutional infirmity in the application of the Texas Rules of Evidence in this particular case. We agree.

IV

In sum, we affirm the judgment of the District Court. There is no doubt that the psychiatric testimony was very prejudicial to petitioner, but that does not make that evidence inadmissable, any more than may be true of other particularly telling evidence against any defendant in a criminal case. At bottom, to agree with petitioner's basic position would seriously undermine and in effect overrule *Jurek* v. *Texas*. Petitioner conceded as much at oral argument. Tr. of Oral Arg. 23–25. We are not inclined at this time, however to overturn the decision in that case.

The judgment of the District Court is

Affirmed.

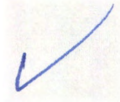
Spaulding, 293 U. S. 498, 506 (1935), but it does not appear that from what the Court there said that the rule was rooted in the Constitution. In any event, we note that the Advisory Committee notes to Rule 704 of the Federal Rules of Evidence state as follows:

"The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called 'ultimate issue' rule is abolished by the instant rule."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 27, 1983



Re: No. 82-6080 - Barefoot v. Estelle

Dear Byron:

In due course, I shall try my hand at a dissent in this case.

Sincerely,

Harry

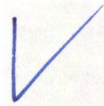
Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 27, 1983

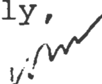


Re: No. 82-6080 Barefoot v. Estelle

Dear Byron:

Please join me.

Sincerely,



Justice White

cc: The Conference

mfs 05/30/83

See letter to BRW

To: JUSTICE POWELL

From: Michael

Re: Barefoot v. Estelle, No. 82-6080

JUSTICE WHITE's draft in this case is essentially strong, but it does have some problems. It appears that your vote will be necessary for a majority, so you are in a good position to make suggestions.

(1) Part II.A, pp. 6-10, strikes me as an unnecessary and unconvincing attempt to justify what the Court did in Brooks v. Estelle by endorsing what CA5 did here. It is unnecessary, for the Court can justify its own actions in Brooks without endorsing CA5's. The procedural question, for example, was not presented to the Court in Brooks. Moreover, it is well established that this Court's denial of cert does not indicate a view on the merits. And it is unconvincing because the draft as a whole makes clear that a CA must rule on the merits. Although there can be little question what CA5's view on the merits would have been, it is also clear that CA5 was unwilling to make its ruling on the merits.

(2) Part II.B, pp. 10-13, is generally helpful, but I think you should focus on the fifth general guideline, p. 13. JUSTICE WHITE states, in accordance with settled law, that a stay of execution pending disposition of a cert petn is not automatic in a death case--even when petr is on his first trip through federal habeas. I have no problem with this as a statement of existing

The Ct is not to be locked in. We usually will grant the "stay" - as I believe I have consistently done. But no need to impose an inflexible rule.

legal principle, but the Court may wish to reconsider the rule here. The effect of JUSTICE WHITE's guideline is to force this Court to determine whether capital cases might be cert-worthy on a stay application rather than on the petn itself. Decisions must be made in a hurry, at the last minute, in an unseemly rush. It seems that our interest in the orderly administration of justice is better served by disposing of these cases in the normal course of business rather than at the last minute. If the Court later grants cert, a stay is unquestionably appropriate. But even if the Court later denies cert, an automatic stay on the first trip through federal habeas will not delay the State's processes unduly. What little delay the stay produces will be balanced by making the process easier for the Court, and making it appear fairer to the public. (The balance would be different, of course, for a subsequent habeas petn unless there was a good reason for not bringing the claim on the first habeas petn.)

There is a problem with the beginning of Part III.A, pp. 14-15. JUSTICE WHITE shades petr's argument, and overstates the importance of Jurek v. Texas, 428 U.S. 262 (1976). The danger of which petr complains is not that psychiatrists are unable to make predictions as well as lay people. The danger is that their predictions are no better than lay witnesses', but that jurors will nevertheless attach undue (even dispositive) weight to those predictions simply because they come from psychiatrists. Psychiatrists are being allowed to testify as experts on matters that are not properly within their expertise. JUSTICE WHITE makes a good argument that there is no constitutional violation here, p.

no

Yes

?

Yes

3

Mark - I've re-read Jurek. I would not use some of BRW's language; but I don't think he "overstates" the substance of Jurek. BRW quoted the most relevant part. See also Estelle v. Smith.

I do not approve of Dr. Grigson's "extreme" certainty. The State could have had more helpful counsel. The State must have known there would be X-exam + in final argument that further ridiculing an expert who is no absolute & personally. The DC dealt very well with this problem & way the system works. See BRW p18

16, and this argument is applicable to the contention that petr actually makes. He should stick with that argument.

(4) Leave to BRW

There is also a problem with Part III.C, pp. 20-21. JUSTICE WHITE simply summarizes petr's argument, points out that the lower courts rejected it, and declares "We agree." If the argument is so frivolous that it can be dismissed without discussion, it should be relegated to a footnote. I do not think the argument is so frivolous, and suggest some explanation of why it is meritless. The draft now suggests that petr's position is wrong simply because it has been rejected by the courts below.

(5)

Finally, there is a problem with the entire tone of Part III. I can accept the argument that there was no constitutional error in admitting the psychiatric testimony, but I continue to believe that the evidence was highly prejudicial and had little probative value. I gather from our discussions that you agree. JUSTICE WHITE, however, seems to be endorsing the Texas procedure. He appears to applaud the Texas prosecutors for giving the jury more "relevant" information to consider. See, e.g., p. 15. On pp. 16-17, he seems to suggest that the psychiatric testimony is helpful. I think the Court can hold that the procedure was not unconstitutional without endorsing the Texas practice.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Ask Mike

May 31, 1983

Re: 82-6080 - Barefoot v. Estelle

Dear Byron:

Except for Part II-A, I agree in substance with what you have written. It seems to me, however, that II-A is both inconsistent with the remainder of the opinion and unnecessary. Parts II-B and III demonstrate that the Court of Appeals erred in this case in two ways: it should have granted a stay of execution until it decided the merits of the appeal, and it overstated the case when it said that there was no semblance of merit in the prisoner's claims. Yet Part II-A hints that the failure to enter a final judgment is nothing but a procedural technicality. ?

This does not suggest any disagreement with your ultimate disposition of the case. As you state, the fact that the Court of Appeals erred in failing to act on the merits of the case before the petitioner was executed does not automatically require a remand. All it requires is that some court decide the merits before the stay we entered is lifted. Since we decide the merits in Part III, the procedural error committed by the Court of Appeals will be demonstrably irrelevant as of the issuance of our mandate. I don't know whether the proper terminology is harmless procedural error or mootness, but our disposition obviously makes remand unnecessary.

I wonder if it would not remove the internal tension in the opinion to move the substance of your conclusion in Part II-A to the end of the opinion. In that manner, the opinion would begin with a statement of what the correct procedure is, continue to an analysis of the merits, and conclude with an explanation of what the correct disposition of this case is. With the possible exception of a few relatively minor points, I believe I could join

something along those lines. If you leave the discussion in its present form, I will write separately because I feel very strongly that a Court of Appeals should never let a case become moot by reason of the execution of one of the litigants when it has an obligation to decide the merits of the appeal before the execution takes place.

It did decide them.

One final point: <u>Brooks</u> v. <u>Estelle</u> may be distinguished on the ground that there was not even arguable merit in the petitioner's claim. Even though I agree with you that we must reject the claim here, surely we cannot say that the merits contentions in this case are wholly frivolous.

Respectfully,

Justice White

Copies to the Conference

June 6, 1983

82-6080 Barefoot v. Estelle

Dear Byron:

Please join me.

Sincerely,

Justice White

lfp/ss

cc: The Conference

June 6, 1983

82-6080 Barefoot v. Estelle

Dear Byron:

I am writing a join note separately, as I agree essentially with your opinion.

I do not agree with John's view that Part II-A is "inconsistent with the remainder of the opinion". Part II-A, as John suggests (letter of May 31) perhaps is "unnecessary" as this Court's action in Brooks can be justified on its own. I would not object if you decided - in order to obtain John's vote - to move the substance of the concluding portions of Part II-A to the end of the opinion. As you suggest, it was unfortunate and poor practice not to use the appropriate words ruling on the merits. It is clear, however, that in substance this is exactly what CA5 did.

Your proposed general guidelines are constructive. I do have a suggestion as to the "fifth". I agree that stays of execution should not be "automatic" even when a petition for cert is being filed in the first federal habeas corpus case. Almost invariably, I have granted a stay in such a situation. On the first habeas review, I think our normal practice has been to take a close look at the petition. It may be well to say this in substance, making clear as you have that this is not automatic.

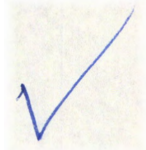
Sincerely,

Justice White

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR



June 7, 1983

No. 82-6080 Barefoot v. Estelle

Dear Byron,

Please join me in your opinion.

I understand John's concerns and if you decide to make changes to accommodate his views, that is perfectly acceptable as far as I am concerned.

Sincerely,

Sandra

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 7, 1983

Re: 82-6080 - Barefoot v. Estelle

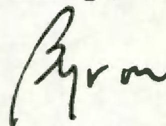
Dear John,

In tardy response to your letter about the circulating draft, I would much prefer, if there are four other votes in support, to leave the proposed opinion as it is. You suggest that Part II-A is inconsistent with the rest of the opinion and unnecessary. I doubt that it is either.

Barefoot submits that the Court of Appeals erroneously failed to reach the merits of his appeal and that we should remand to permit the Court of Appeals to cure its error. In response, the draft asserts that the Court of Appeals in fact reached and decided the merits; and in Part III the draft agrees with the Court of Appeals' and the District Court's view of the merits. If anything is unnecessary to decision in this case, which is here on certiorari before judgment, it is Part II-B. If four others insisted, I would be quite happy to eliminate that part.

Hence, in Navy terms, I shall stand by for boarding.

Sincerely,



Justice Stevens

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 7, 1983

Re: 82-6080 - Barefoot v. Estelle

Dear Byron:

Thanks for your note. While you are standing by, I shall be doing the work of a yeoman. What I write will suggest that it is better practice to affirm a judgment than to allow the appeal to become moot by executing one of the litigants.

Respectfully,

John

Justice White

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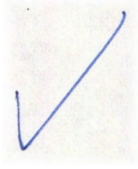
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 24, 1983



No. 82-6080

Barefoot v. Estelle

Dear Thurgood,

Please join me in your dissent.

Sincerely,

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 30, 1983

RE: Case No. 82-6080 - Barefoot v. Estelle

Dear Byron:

This will confirm my "join".

Regards,

WEB

Justice White

Copies to the Conference

82-6080 Barefoot v. Estelle (Mike)

BRW for the Court
  1st draft 5/26/83
  2nd draft 6/13/83
  3rd draft 6/17/83
  4th draft 6/23/83
  5th draft 6/30/83
    Joined by CJ, LFP, WHR, SOC

JPS concurring in the judgment

TM dissent
  1st draft 6/23/83
    Joined by WJB

HAB dissent
  Typed draft 6/29/83
  1st printed draft 6/29/83
    TM joins all but Part V