ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-6080

TITLE THOMAS A. BAREFOOT, Petitioner v. W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

PLACE Washington, D. C.

DATE April 26, 1983

PAGES 1 - 60

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS A. BAREFOOT, :

Petitioner :

v. : No. 82-6080

W. J. ESTELLE, JR., DIRECTOR, :

TEXAS DEPARTMENT OF CORRECTIONS :

- -x

Washington, D.C.

Tuesday, April 26, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 o'clock a.m.

APPEARANCES:

JACK GREENBERG, ESQ., New York, New York; on behalf of NAACP Legal Defense and Educational Fund, Inc., as amicus curiae.

WILLIAM E. GRAY, JR., ESQ., Houston, Texas; on behalf of Petitioner.

DOUGLAS M. BECKER, ESQ., Assistant Attorney General of Texas, Austin, Texas; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Barefoot against Estelle.

Mr. Greenberg, you may proceed whenever you are ready.

ORAL ARGUMENT OF JACK GREENBERG, ESQ.,
ON BEHALF OF NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.,
AS AMICUS CURIAE

MR. GREENBERG: Mr. Chief Justice, and may it please the Court, I shall argue first as a friend of the Court on the issue of standards for granting stays of execution on denials of petitions for writ of habeas corpus in capital case, and Mr. Gray shall argue for the Petitioner on the merits of the case with regard to the admissibility of the psychiatric testimony.

I would first like to commence with a brief review of the chronology of the case, because it bears upon an important issue with regard to the stay, and that is whether counsel acted diligently or dilatorily.

The Petitioner in this case, Thomas Barefoot, was convicted in November, 1978, of homicide, and he litigated his case in the state courts on direct review, and then to this Court, and then on state post-conviction relief for approximately three years,

and on October 6th, 1981, he completed his proceedings in the state system, and less -- approximately a week later, on October 14th, he filed his case in the United States District Court.

That case was resolved a year later in the District Court on November, 1982, and on December 3rd, the District Court granted a certificate of probable cause and permission to proceed in forma pauperis, and on December 4th it vacated a stay which it had theretofore granted.

Shortly thereafter, on December --

QUESTION: Mr. Greenberg, do those two actions strike you as being at all inconsistent?

MR. GREENBERG: Yes. On December 20th, the District Court set the date of execution for January 25th, 1983.

Texas has a doctrine which does not permit litigation in its state courts as long as proceedings are pending in the federal courts, and some newly discovered evidence appeared, as well as an additional state court matter, which had not been exhausted, and so Mr. Gray went back into the state courts on December 20th on state habeas corpus which was denied on December 21st.

However, he was not notified of this denial

until January 7th. A week thereafter, he filed his petition in the United States Court of Appeals for the Fifth Circuit, on January 14th.

He received a telephone call on January 17th telling him to appear for a hearing on the application for stay on January 19th. He appeared in court on January 19th. The panel which had Judge Brown on it informed him that Judge Brown was ill and Judge Randall was substituting for Judge Brown, and it was stated in open court that Judge Randall had showed up at the last moment, didn't know anything at all about the case.

The record on the -- of the state court proceedings had not yet been filed in federal court. The record of the federal habeas court proceedings was just then filed. There was a letter from counsel which was turned over to the court saying that the American Psychiatric Association desired to file a friend of the court brief on the important issue of the admissibility and the significance of the psychiatrict testimony in this case, which was based upon a respons to a hypothetical question.

The hearing on the stay was concluded. Twenty-four hours later, a 16-page opinion was issued denying the stay and setting forth as a standard for granting a denial of stay whether or not Petitioner had

established a substantial likelihood of success on the merits.

In essence, this --

QUESTION: I have a little difficulty, Mr. Greenberg, tracking the matter of the substitution of the judge. How is that relevant to any issue here?

MR. GREENBERG: Such preparation as the judge might have been able to make even on that short notice was not possible for Judge Randall, who just showed up at the last moment, certainly through not fault of her own.

QUESTION: Well, you must be aware that, for example, one Justice of this Court for many years came on the bench without knowing anything but the name of the case, and did so deliberately. You suggest that disqualifies a judge from participating?

MR. GREENBERG: No, I certainly was not suggesting it was a disqualification, but certainly it was an indication of not adequate opportunity for study and reflection on a matter that was complex and difficult.

QUESTION: But a matter that had been through the state court systems up to that time.

MR. GREENBERG: The matter had been through the state court system, but Petitioner had a

Congressionally mandated statutory right to federal habeas corpus review of his constitutional claims in the federal courts and had not yet had that.

Now, our brief and others argue that a stay should be granted on appeal from appeal from denial of a first application, I must stress, a first application for writ of habeas corpus whenever petitioner presents issue that are not frivolous or has a certificate of probable cause.

But there are additional reasons which we would like to submit on this argument based on policy why Petitioner's first application should receive the ordinary consideration afforded non-death sentence prisoners who assert they have been denied constitutional rights without having their cases mooted by execution. Those --

QUESTION: Mr. Greenberg, I know you stress first application, but there just isn't anything in the rules or the statute that refer to the first application, and I --

MR. GREENBERG: But there is something that refers to second application, and that is --

QUESTION: -- distinguish.

MR. GREENBERG: There is something that refers to second application, and that is the Rule 9(b) of the

rules governing federal habeas corpus. If the Petitioner is abusing the writ --

QUESTION: But nothing as far as the rules concerning the stay are concerned that would limit it to a first application.

MR. GREENBERG: Well, but he is not going to have -- he is not going to have his hearing unless he gets a stay, because he will be executed before his case has been heard on the merits, so the two are intimately involved one with another.

QUESTION: Well, but I think we have to be conscious of the fact that there are successive petitions typically filed, and we will have to address this for successive petitions.

MR. GREENBERG: I do not for a moment suggest that a successive petition requires the same consideration that an initial petition requires, although some successive petitions have succeeded in the Courts of Appeals, and indeed in this Court, so they are not all to be viewed as automatically --

QUESTION: Well, then, how would you distinguish them, as opposed to just saying you don't see why one would have to be treated the same as the other for stay purposes?

MR. GREENBERG: I think a successive petition

deserves much more cursory treatment. An initial petition merits serious consideration. These initial petitions have succeeded at the rate of almost 70 to 80 percent in the courts of appeals. These are not frivolous petitions.

I would like to just identify three policy considerations that support the statutory argument made in the various briefs. The first is the interest of the defendant to have his constitutional claims fairly considered in the same manner as the claims of an ordinary embezzler or petty theif.

The second is the interest of the states in maintaining an effective system of criminal justice, and the third is the interest of this Court in not only doing justice to capital defendants but the total run of business of the federal courts.

As to the defendants in the capital cases, they are mostly represented by volunteer counsel, public defenders, a few civil rights organizations, such as the one for which I work, which has three or four lawyers working on such cases. The cases are complex. The capacity of lawyers to present them fairly and completely is now -- we have now gone totally beyond that, and if the courts obtain the assistance they need, at a minimum, there should be the time for the ordinary

briefing and presentation of ordinary cases.

As far as the interests of the states are concerned, there is one thing to be said for states. They are interested in the administration of -- fair administration of the criminal justice systems, capital punishment as a deterrent, as an appropriate attributive device. I happen not to agree with that. We are required to accept. The pipeline is filled. Executions are occurring. Anyone who picks up the papers will know that people who commit homicides are being executed. If there is a deterrent effect arising from executions, that deterrent effect will take place.

So far as the interest of the federal judiciary is concerned, this Court and other courts have heavy dockets of many different kinds of cases. The counsel in those cases and the parties in those cases cannot have their cases fairly heard if they must operate on a crash schedule, as Mr. Gray had to operate in this case, compiling a complex record in three days, the record of the trial and the record of the habeas corpus proceeding not being presented until one before the hearing and the other after the hearing, a difficult issue requiring medical judgments, which was covered in a brief by the American Psychiatric Association, which finally was filed in this Court.

To compress on a crash, rush basis the consideration of the stay into the consideration of the merits, which is what, of course, happens, because otherwise the case is mooted out by the execution of the defendant before he has a hearing on the merits, does not help the federal courts, does not help criminal justice, and certainly is to the detriment of the defendant.

We urge upon this Court a standard which is that in cases of a first application for a petition of writ of habeas corpus, that application be considered in the ordinary course of events, which may take four to six months, instead of the crash basis, which takes four to six weeks, and that the interests of -- all the various interests involved will be well served and no interest involved will be disserved by such a procedure.

CHIEF JUSTICE BURGER: Very well.

Mr. Gray.

ORAL ARGUMENT OF WILLIAM E. GRAY, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. GRAY: Mr. Chief Justice, and may it please the Court, the state in this case put on at the guilt stage of the trial -- Texas has a bifurcated procedure in capital cases -- put on all of the evidence

that was later incorporated in the hypothetical questions to two psychiatrists. They put on evidence of prior convictions. At the punishment hearing, they put on evidence -- well, they put that on at the punishment hearing, prior convictions for two firearm cases and three drug-related cases.

They put on testimony at the guilt stage of the trial about -- at least they introduced the testimony of some charges in New Mexico involving rape and kidnapping of a child under 13. At the punishment stage, they put on evidence of the defendant's bad reputation. This testimony came in from police officers who had handled the Petitioner on these drug-related cases, on the firearm cases, and on no cases relating to violent crimes.

The prosecutor then incorporated all of the evidence that had already been heard by the jury in the hypothetical questions to two psychiatrists, Dr. Grigson, who has represented the state in probably 75 to 100 cases, and Dr. Holbrook, who is now deceased. Both of these psychiatrists --

QUESTION: Is now deceased, did you say?

MR. GRAY: Yes, Your Honor. He committed suicide.

The critical nature of this type of testimony

goes to the very heart of the Texas procedure, because the issue of whether a defendant lives or dies is based upon one fact issue, and that is whether in the opinion of the jury he will constitute a future danger to society.

Dr. Grigson testified in answer to this hypothetical question that it was 100 percent and absolute, in his -- he didn't even say in his opinion. He just said 100 percent and absolute that this defendant would constitute a continuing danger to society. Dr. Holbrook was almost as emphatic.

That removes any discretion that the jury that heard this case may have had in determining whether Mr. Barefoot lived or died.

QUESTION: Well, the jury could disbelieve the testimony, could they not?

MR. GRAY: They -- well, not under the -- there is nothing a defendant can present under the Texas procedure in mitigation of punishment unless it bears directly on future dangerousness, and even then, when he introduces such evidence, there are no provisions whatsoever in the Texas law that the jury be instructed to consider that mitigating evidence or to balance the mitigating evidence against the aggravating facts of the case.

QUESTION: Well, Mr. Gray, couldn't you cross examine the psychiatrist and on the basis of your cross examination urge to the jury that his opinion out not to be credited by them?

MR. GRAY: Well --

QUESTION: Could you or could you not?

MR. GRAY: You could not do it and protect a defendant's constitutional rights. There is no way it can be done, because the reliable and ethical psychiatric pratitioners will not give such testimony and will not --

QUESTION: I said cross examine. I didn't say call a witness of your own.

MR. GRAY: All right. The lawyers in this case tried to cross examine Dr. Grigson. He said he didn't recognize any of these authorities from the American Psychiatric Association or any other practitioners.

QUESTION: Can't you argue that fact to the jury as a reason for not crediting his testimony?

MR. GRAY: You can argue it, but --

QUESTION: Well, you said you couldn't argue it. I thought you said you couldn't.

MR. GRAY: Well, no, you can't -- you can't present any mitigating evidence, and if you bring on --

you can't get any other psychiatrist to testify, because they don't believe that any predictions of future dangerousness can be made. They feel, and the American Psychiatric --

QUESTION: Well, couldn't you put someone on the stand to say so? That it is improper in their view to present that kind of testimony?

MR. GRAY: Well, then you are not balancing one psychiatric opinion against another. You are just attacking the credentials of the --

QUESTION: But you could do that, could you not?

MR. GRAY: You can do that, surely.

QUESTION: Yes.

MR. GRAY: If the lawyers are prepared to do so. But most of the lawyers are court-appointed in these capital cases in Texas, and they have no funds, and it is difficult to get a psychiatrist to testify.

QUESTION: Well, the state of Texas not pay for expert witnesses for a defendant in a capital case?

MR. GRAY: They will pay up to $500, and you can't get a psychiatrist to come in off the stree for $500. There is really no adequate way that you can remove the prejudice from this testimony by cross examination or by putting on the testimony of another

psychiatrist. It is just like if the state put on polygraph testimony. You can't remove the prejudice from that testimony, that inadmissible testimony, by putting on another operator, or by cross examining that person.

This falls in that same category. Based on the brief filed by the American Psychiatric Association, and based upon the studies they have done, psychiatrists are wrong more than they are right in their predictions of future dangerousness. This zeros all of the life or death issues in a capital case down to that one issue, and down to testimony from practitioners like Grigson and Holbrook who are absolutely certain that a defendant -- every defendant they see will be a future danger to society if he is charged with the offense of capital murder.

QUESTION: Are you arguing, Mr. Gray, that the state should not be permitted to introduce any psychiatric testimony even from acknowledged national experts?

MR. GRAY: Well, I don't think we have to go that far in this case. We are objecting -- We say -- certainly that is the thrust of our argument, that it should not be admissible. This Court has held in Jurek that a lay jury is qualified to make that

determination. In this case, the lay jury had the exact testimony and evidence that the psychiatrists had in their hypothetical question.

The psychiatric opinion merely reinforced that evidence, and gave a gloss of expertise to it, where no expertise was required. It was a decision that the jury was competent to make based on the evidence already before them.

It will not -- The state does not have to rely on psychiatric testimony to prove the issue of future dangerousness. Five other states have a similar statute. None of those utilize psychiatric testimony.

QUESTION: But you are saying it is unconstitutional to use it?

MR. GRAY: I am saying, given what this Court has held, that a more strict determination is required in capital cases, I submit that it is inadmissible. It should be. It adds nothing except, as I say, a gloss of expertise to lay testimony. The American Psychiatric --

QUESTION: Mr. Gray, you don't emphasize the fact that this first man didn't testify as an expert. He testified as a fact.

MR. GRAY: He did. It wasn't --

QUESTION: Both of them did.

MR. GRAY: He did not give his opinion. They

used the names of all the witnesses. They needed to use the names of Mr. Barefoot and his alias. There was no question in the minds of the jury that either of these were referring to the case on trial, and that their absolute opinion was directly related to the persons on trial.

QUESTION: There was not -- They didn't examine Barefoot?

MR. GRAY: They did not examine him. They merely answered the hypothetical question, and that question by the prosecutor included numerous conclusions that he had drawn from the testimony of the witnesses that he put on.

QUESTION: Are you representing to us, Mr. Gray, that in Texas for $500 you could not get a psychiatrist to come in and challenge the testimony of this particular psychiatrist?

MR. GRAY: I don't know of any. I've been searching. I've represented a number of these people, and it is extremely difficult to get them for anything around that figure. And certainly not to conduct an examination. And even if we could get them, it would be fruitless under the way the Texas statute is drawn and under the way the Texas procedure works, because any psychiatrist you get who is a competent, ethical

practitioner, will not be so absolute in his testimony. He can't be, because the studies have shown that they are not qualified, they are no more qualified than the lay person to make predictions of future dangerousness.

So, all you can do with those psychiatrists is attack the qualifications of Mr. -- Dr. Grigson and Dr. Holbrook and similar practitioners who --

QUESTION: Where does Dr. Grigson practice?

MR. GRAY: He practices -- I think he has an office in Dallas, but he practices all over the state, wherever the prosecution needs his type of testimony.

QUESTION: Has the medical association ever zeroed in on him?

MR. GRAY: I am not sure about that. But he, as this Court knows, has testified in an inordinate number of capital cases, always for the state, and his opinions are always the same, whether he has examined the people or not.

QUESTION: Well, I suppose you can bring that out on cross examination and let the jury know that.

MR. GRAY: Sure, you could do that.

QUESTION: And you do that, suppose.

MR. GRAY: Absolutely, but that's just like admitting an involuntary confession and telling the jury not to consider it. It is something that can't be

removed, because these doctors are so absolute, and a reliable practitioner is not.

They can't compete with those people, because they try to stay within the guidelines of their profession. The prejudice cannot be removed, and the whole question comes down to the jury relying on what these doctors tell them, how they should answer the question, a question that this Court has held can be answered by a lay jury.

And it is all based on lay testimony. It is all based on the same evidence that the jury heard in these hypothetical situations. Dr. Grigson has testified in a number of cases since this time, and since Smith was decided by this Court.

QUESTION: Would it be you view, Mr. Gray, that if a defendant at this stage of the trial brought in a psychiatrist who testified that he had examined the man, that he had looked over his entire record, and that in his opinion, professional opinion, he would not be dangerous, would you say that testimony was admissible?

MR. GRAY: Well, I would say it would not be admissible unless a state was granted a collateral right to have him examined by a psychiatrist of their own selection. The state is certainly not going to put on --

QUESTION: Then you are right back to the

adverary system, aren't you?

MR. GRAY: Well, given what the American Psychiatric Association says in their brief in this case, and based upon the studies that they have made, this testimony even to non-dangerousness would be unreliable and should not be admissible, but I am saying if --

QUESTION: But as has been suggested to you by questions from the bench, that lack of reliability can be laid before the fact-finders, the jurors, both by cross examination and by other experts.

MR. GRAY: It can be. It does not work in these cases.

QUESTION: Well, do you conclude from that or do you suggest we conclude from that that therefore it is an unconstitutional practice because it isn't successful?

MR. GRAY: I'm not saying that, Your Honor. I'm saying -- well, actually, in Eddings, this Court examined some psychiatric testimony where the psychiatrist had examined Eddings for about an hour, and drew some determinist conclusions from that examination, and I believe you, Judge Burger, Chief Justice, said that that was fantastic testimony, or something like that, and you --

QUESTION: That is not this case.

MR. GRAY: I understand, but this is even more fantastic testimony. There was no examination. There was nothing. And it cannot be counted by cross examination. The lawyers in this case tried. Grigson doesn't recognize any medical authority. You cannot cross examine him on the basis of these prior studies or the holdings of the American Psychiatric Association. In fact, he says they're a bunch of crackpots or something.

QUESTION: You are not suggesting that all psychiatrists agree with the American Psychiatric Association, are you?

MR. GRAY: Well, I don't know. I think 27,000 out of the 35,000 belong to the American Psychiatric Association, and that association is appearing in this case, trying to point out to this Court, as we are, that it is futile to rely upon cross examination of the adversary procedure to counter this type of testimony in a capital case. There is too much at stake. And the jurors invariably believe something that is presented to them as medical testimony by -- even though it is not medical testimony, as it was not in this. These were not hypothetical questions.

These were fact questions, and even if the

Court doesn't go far enough to exclude this type of testimony in every case, I think under the facts of this case it should hold that the procedure used in this particular case was unconstitutional because it was not hypothetical.

QUESTION: If you held the introduction of this kind of testimony to be unconstitutional, it would be on the ground, I suppose, that it is just too unreliable, as the association says. Is that right?

MR. GRAY: Absolutely. Yes, sir.

QUESTION: Well, isn't that an assertion then that the whole notion of predicting future dangerousness is unconstitutional?

MR. GRAY: I think it is, Your Honor, but --

QUESTION: Well, then, that just means overturning part of Jurek.

MR. GRAY: Absolutely, because I don't think this Court --

QUESTION: So you are -- Don't we have to, to agree with you, don't we have to reverse part of Jurek, because we seem to -- the Court seems to have accepted there the notion of this prediction, and if it is so uncertain that even a psychiatrist can't testify to it, you would think its use as a basis for imposing the death penalty would be completely unconstitutional in

itself, but that isn't what Jurek held.

MR. GRAY: I think this Court didn't really examine this specific problem in Jurek. In Jurek --

QUESTION: Well, not the specific one, but we must not have thought that -- or the Court must not have thought that it was a -- that the prediction was so uncertain that it would be unconstitutional.

MR. GRAY: Well, at that time, it was represented to this Court that the state would permit the introduction of mitigating evidence, and that the jury would consider facts in mitigation. That has not been what has happened under the Texas law since Jurek was decided. There are no --

QUESTION: Well, that may be. That's a different point. That's a different -- it seems to me that's a different point --

MR. GRAY: Well --

QUESTION: -- but you are suggesting to us that no psychiatric testimony may be used because the business of prediction is unconstitutionally uncertain.

MR. GRAY: I'm --

QUESTION: Isn't that right? That is your submission.

MR. GRAY: Well, sort of, but --

QUESTION: Sort of? I don't know how else --

what else it is.

MR. GRAY: What I am saying is, and the American Psychiatric Association agrees with this, the psychiatrists are wrong two out of three times.

QUESTION: They may be. That may be.

MR. GRAY: And lay persons are wrong two out of three times.

QUESTION: But their submission is that it is too uncertain for them to testify about it, that the testimony is utterly meaningless.

MR. GRAY: Absolutely.

QUESTION: Well, and hence the whole business of prediction, predicting future dangerousness is just out of bounds.

MR. GRAY: It is, because --

QUESTION: Well, then, if that is the case, it seems to me you would have to tear up part of Jurek.

QUESTION: And some federal statutes which now, after a conviction or a determination of not guilty by reason of insanity, and when the defendant is placed in a mental institution, he stays there until he can demonstrate that his release will not be dangerous. Are you saying that then they must be committed there permanently if you don't admit any testimony on the subject?

MR. GRAY: I am not saying that, Your Honor, and that's not what the American Psychiatric Association is saying. They say that they can do that in those cases where there is not so much at stake, but where it is a life or death situation, they are not qualified to do it. They are wrong two out of three times, and then if they give that percentage of predictions to a jury, who can make the same determination, the jury would be wrong two out of three times also, so that would multiply the odds of being wrong even more than two out of three times.

QUESTION: Is that two out of three based on the examination of cases where the testimony of the psychiatrist was that the person would not be dangerous, and then he went out a committed other crimes, including murder?

MR. GRAY: Yes, there have been a number of studies, and they all bear out that general -- general overprediction by psychiatrists, and when you add that overprediction to testimony that the jurors are competent according to this Court to determine and make a -- reach a decision on, it --

QUESTION: Well, are you narrowing your point just to capital cases?

MR. GRAY: Yes, Your Honor, absolutely, and I

think that's the thrust of the American Psychiatric Association's brief also.

QUESTION: In other words, a psychiatrist is to be permitted to testify after a person has been found not guilty by reason of insanity in a murder case, and goes to St. Elizabeth Hospital, and you would say it is all right for the psychiatrist then to testify 60 or 90 days later that his release will not endanger the community?

MR. GRAY: Yes, and that's because in those cases they are only making short-range predictions of dangerousness. In a capital murder case, we are talking about long-range predictions.

QUESTION: Well, it isn't -- if you are going to release them, it isn't very short range. If it is just going to be testimony that he is no longer dangerous, if he ever was, that is pretty --

MR. GRAY: But the fallacy --

QUESTION: And also, just remember that one of the standards for a civil commitment is whether a person is dangerous to himself or others.

MR. GRAY: Right, but Grigson and his compadres in Texas have refined this testimony to the point that they testify 100 percent absolute that a defendant will be a danger in the penitentiary also, so

that --

QUESTION: Well, if you were making a submission based on Dr. Grigson, that might be one thing, but you are making a general submission here. It wouldn't have made any difference if the testimony in this case had been presented by the president of the American Psychiatric Society. You would be making exactly the same submission.

MR. GRAY: Absolutely, as far as Mr. Barefoot is concerned, but as far the Texas procedure generally, and the use of psychiatric testimony, Texas is the only state that utilizes this in capital cases.

CHIEF JUSTICE BURGER: Very well.

Mr. Becker?

ORAL ARGUMENT OF DOUGLAS M. BECKER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BECKER: Mr. Chief Justice, and may it please the Court, by way of background upon the stay issue, I wish to state at the outset, as the Court has said in another context, death is indeed different. The Court has said that the imposition or the carrying out of the death penalty. The imposition of it is different also, in the rather obvious following manner which I think bears emphasis.

No one is sentenced to be on death row, and I

think we can all agree that the more than 1,100 persons now on death row represents a national tragedy, but it is a national tragedy that is exacerbated by the fact that they sit there apparently interminably while their cases are litigated year after year in the appellate courts.

I think that we can all agree that the effects of this delay are terrible. They erode the public faith in the judiciary, promote the view that the law cannot be carried out, destroy whatever deterrent effect the death penalty would otherwise have, makes proof of claims harder if retrials are necessary, often make retrials impossible, and I think that we also agree that the delays are very unfair to those who are unconstitutionally confined upon death row, who after interminable years on death row finally reach an adjudication that their conviction was unconstitutional in the first place, and now rehabilitation must begin of those individuals after the debilitating effects of being on death row for years.

The Attorney General of Texas two or three years ago began filing motions to expedite --

QUESTION: I don't think I follow you, Mr. Becker. If they got out of death row, they shouldn't have been there in the first place.

MR. BECKER: That's right, Your Honor. They should never have been convicted. I am saying if they achieve --

QUESTION: So the state of Texas was wrong.

MR. BECKER: If the state of Texas was wrong, yes, sir.

QUESTION: If. Your assumption is that it was wrong.

MR. BECKER: Yes, sir.

QUESTION: All right.

MR. BECKER: Yes, that's correct. And I'm saying that those persons ought to have been in the general population within the prison, and enjoying the rehabilitative effects that the general population enjoys, and should not be incarcerated on death row, and the sooner that a constitutional adjudication like that can be reached, the sooner that those rehabilitative effects can be practiced upon the prisoner.

QUESTION: Somewhere in your argument I trust you will tell me why the District Court issued a certificate of probable cause.

MR. BECKER: Well, Your Honor, it is because he believed that at least one of the claims was not frivolous. I think we know which one it was, and I think we can tell from the language why he thought that

was, and at the same time I can respond to Mr. Justice Rehnquist's earlier question about the inconsistency.

The certificate of probable cause was undoubtedly granted as to the hypothetical psychiatric testimony issue, and I think the language that the District Court used showed what he meant. He said, upon careful reflection, or upon reflection, this ground --

QUESTION: Well, do you know right off where that is in the -- is that in one of the briefs we have?

MR. BECKER: The language? It is in the joint appendix, Your Honor, the joint appendix, which contains the District Court's opinion, and he said that upon careful reflection, the ground is without merit, or completely without merit, and what he meant was the ground to him was not frivolous --

QUESTION: Did you file a joint appendix, or who -- somebody?

QUESTION: Several of us don't seem to have a joint appendix.

MR. BECKER: I've got one. I'm sorry. I didn' file it.

QUESTION: Go ahead. Go ahead.

MR. BECKER: All right. He said that you couldn't look at the issue and upon its face conclude that it was frivolous, but upon examination and careful

thought, that it was entirely without merit, and I think that there is only an inconsistency between the fact that -- among the two facts that he granted a certificate of probable cause, and actually, he did not deny a stay of execution. He granted the state's motion to remove the stay of execution that he had previously entered, the same procedural effect.

And he thought that even though it was not frivolous upon its face, that upon reflection, it was not a substantial issue. Therefore, he did not stay the execution, and the Court of Appeals looked at the matter the same way.

QUESTION: So he thought -- the District Judge thought the standard for granting or vacating a stay was different from the standard for issuing a certificate of probable cause?

MR. BECKER: Patently he did, just as the District Court in the Brooks case thought the same thing, and just as the Fifth Circuit judges have thought the same thing and indeed said the same thing.

QUESTION: Does that mean that he should not have issued a certificate of probable cause?

MR. BECKER: No, sir. We have contended that the hypothetical question issue is not frivolous, but as we argued in the Fifth Circuit, it borders upon the

frivolous. That is, we have been unwilling to say it is a frivolous issue completely. It is one that bears some thought, some minimal reflection.

But upon making that reflection, every judge that has considered it, which at this point includes 32 by my count, has conclued that the issue is without merit, and is totally without merit. Therefore, even though it may not be frivolous, it is without substance, and there are a large number of issues in these cases that will fall within that category.

QUESTION: Well, it just seems so illogical to have a different standard for when you issue a certificate of probable cause than you do for the issuance of a stay so that issue can be resolved. I just don't see how you would argue for a different standard.

MR. BECKER: Well, because we are under different statutes, Your Honor. The certificate of probable cause, as you know, is governed by Rule 22, and Section 2253, and the granting of the stay is governed by Rule 8 of the appellate rules or Section 2251, Part 28, depending on whose argument you buy in the briefs.

QUESTION: Well, neither one of them articulate the standard.

MR. BECKER: Well, that's correct, but I think

there are different -- there are different things involved. The certificate of probable cause is related to what he needs in order to appeal, but the granting of the stay is in effect the granting of an injunction against a state process, a state procedure that has been supported by lengthy judicial proceedings, and I think that the granting of an injunction under those circumstances, whether it is under Rule 8 or Section 2251, involves important comity interests. It involves calling a halt to the state court proceedings, and I think that in order to do that, the Petitioner has a higher burden properly to fulfill than the mere burden that he has to gain a certificate of probable cause to appeal within the federal system something that involves no state interest at all.

So, although it may be inconsistent, I think that there are good reasons for it. I also think that --

QUESTION: Well, there certainly is a great Pyhrric victory, isn't it, to get a certificate of probable cause only to be executed?

MR. BECKER: Well, Your Honor, I think you have to look and see what happened after he got his certificate of probable cause. We know from this Court's authorities, Garrison and the other cases, that what he has to have is a fair opportunity to present his

claims, and he has to have notice of what those procedures are, and in this case he had the opportunity to present a brief, any brief that he wanted, any number of briefs that he wanted up through the day of oral argument. He had unlimited oral argument itself, and he had a written opinion.

Now, much has been made of the time periods the Petitioner had to prepare his briefs in his oral argument. In fact, these are -- the important issue, the hypothetical testimony issue is one that he had briefed five separate times in prior judicial proceedings, both state and federal, which had been going on since his original appeal. He raised it in his original appeal, and his certiorari --

QUESTION: General Becker, don't misunderstand me. I am sympathetic, and have said so in published opinions, to this intolerable delay, but I think one hurdle you have is the fact that some federal judge has issued a certificate of probable cause, and I think what you are saying really is that he shouldn't have issued it, and if he had not issued it, you would have an entirely different case.

MR. BECKER: The Fifth Circuit never went so far as to call the issue frivolous. They came next to calling it frivolous, and I am submitting to you that

what I believe the District Judge meant was that the issue is not frivolous. That is what I have to decide.

QUESTION: They did summarily deal with the merits, and their ultimate conclusion was that there was no semblance of merit to any of the issues.

MR. BECKER: That's correct. They did not use the word "frivolous" probably because they didn't want to get into the inconsistency of saying that the District Court was wrong in saying that the matter was not frivolous, which they didn't do.

QUESTION: But they did address the merits

MR. BECKER: They did address the merits, and I am not sure about your use of the word "summary," Your Honor. They allowed the briefs, any briefs, and the matters that were briefed --

QUESTION: It wasn't the normal -- it wasn't the normal time period.

MR. BECKER: It was the normal for a stay proceeding, which are common and routine in the Fifth Circuit.

QUESTION: How much time was it?

MR. BECKER: All right, sir.

QUESTION: For briefing?

MR. BECKER: He had from the time he first briefed his -- the hypothetical question issue, he had a

number of years to prepare that.

QUESTION: I am talking about what you are talking about. You said when the court was considering it.

MR. BECKER: Well, Your Honor --

QUESTION: The court wasn't considering it 100 years ago.

MR. BECKER: All right. He was sentenced to death on -- he was sentenced --

QUESTION: Why can't you give me a date?

MR. BECKER: Yes, sir. December the 20th, 1982, the trial court sentenced him to die on January the 25th, 1982. He had 36 days between the date he was sentenced to die, when he knew that he would die, to pursue whatever relief that he needed to pursue, 36 days, and he ultimately --

QUESTION: Wait a minute. Excuse me. May I interrupt? You said the death sentence was -- I thought the death sentence was on November 21st, 1978.

MR. BECKER: Well, that was the original one.

QUESTION: Yes.

MR. BECKER: He was resentenced after the District Court in this case --

QUESTION: Yes, but he -- and he was in the state system for about three years before he even

started the federal proceeding.

MR. BECKER: Yes, sir. That's correct. But he was resentenced to die on December the 20th, after the --

QUESTION: But that is not the death sentence, that is just a scheduling of the execution, wasn't it?

MR. BECKER: Yes, I'm sorry.

QUESTION: Not the death sentence.

MR. BECKER: That's correct.

QUESTION: Quite a difference.

MR. BECKER: Yes, sir, it is. His execution was scheduled on December the 29th, 1982, 36 days hence, and so at that point he knew he was going to be in the process of getting a stay of execution from the state or the federal courts. He ultimately presented three issues in the fifth circuit to support the granting of a stay. The hypothetical question issue, which had been briefed many times previously, a jurisdictional issue of the Court of Criminal Appeals that the Fifth Circuit did hold frivolous, purely a matter of state law, and thirdly, the issue of the allegedly perjurious witness, Mary Richards.

Now, she surfaced on, apparently, December the 27th, 1982, when she contacted the Petitioner's attorneys and they took her deposition in Austin, Texas,

when the state was not present, having had no notice, and so even after December the 27th, they had 18 to 20 days in which to prepare a brief raising that issue, which they did. Indeed, the surfacing of Mary Richards is one of the reasons that we have argued that the speeding up of this process achieves justice. The record in this case shows she wouldn't have come forward if an execution date had not been set.

I think that the procedure --

QUESTION: Do you think the Court of Appeals would have been justified in terms of the procedures that it followed in concluding -- in concluding -- well, it concluded -- I will start that way -- it concluded the motion for stay should be denied. That was its last few words, wasn't it?

MR. BECKER: Yes, sir.

QUESTION: Do you think it could as well have concluded that the judgment of the District Court should be affirmed?

MR. BECKER: No, sir. I don't think --

QUESTION: What makes you think, then, that it really considered the merits of the appeal?

MR. BECKER: Because they said they did. Because they said --

QUESTION: Well, then, why didn't they -- why

didn't they -- why didn't they affirm the judgment of the District Court?

MR. BECKER: Well --

QUESTION: This implies there was something left to be done.

MR. BECKER: Well, I suppose besides the possibility that some other court might stay the execution and things might be left, the inquiry they were making was not whether he was right or wrong in any of the assertions he was making on the merits. The inquiry they were making under Rule 8 as they followed it was whether or not they entertained a reasonable --

QUESTION: Well, that is -- and you are defending that.

MR. BECKER: Yes, sir, I am defending what --

QUESTION: Well, I think certainly part of the issue here is whether or not the Court of Appeals could possibly deny the stay without also ruling on the appeal.

MR. BECKER: Well, they gave him an easier burden. They said to the Petitioner, you don't have to show us that you are going to win any of these issues. All you have to show us is that you --

QUESTION: Well, tell me, what would have been wrong, what would have been legally wrong if the Court

of Appeals had concluded on the merits of the appeal that the judgment is affirmed?

MR. BECKER: Well --

QUESTION: Tell me what would have been wrong.

MR. BECKER: The only thing I know that would be wrong is, they hadn't been doing that in prior cases, and under Garrison and this Court's authorities I don't know if the Petitioner was on notice that he was going to be actually affirmed on all his positions.

QUESTION: Well, I take it you think he was on notice -- you claim he was on notice that he was going to have to address the merits.

MR. BECKER: Most certainly, and that he would have to show a substantial issue. Not that he would prevail, but that he had an issue, a substantial issue that could cause --

QUESTION: Well, if he couldn't show he had an issue that had any semblance of merit, why didn't -- why would you suggest it would be wrong for the Court of Appeals just to affirm?

MR. BECKER: If that was their routine policy, I think they could.

QUESTION: But it wasn't, was it?

MR. BECKER: No, sir, it wasn't. What their

routine policy was to do was to decide whether he raised an issue that, as I put it in the brief, raised a reasonable judicial doubt as to its outcome. That is all that he had to do, to raise a question in the minds of two out of those three judges that if he had an appeal, it was possible that he might win, reasonable to think that he might win, and if he couldn't do that, then the Fifth Circuit, by denying the state of execution, would in effect be saying, what is the use of going ahead with the full appeal and more briefing and our usual burdens upon whether judgment is going to be affirmed or reversed when the result is preordained by the finding that we have already made that he can't even present an issue that has substantial merit or semblance.

QUESTION: Do you suggest that what the Court of Appeals did is consistent with Garrison?

MR. BECKER: I am suggesting it is consistent with Garrison, yes.

QUESTION: Well, Garrison suggests -- said you could use summary procedures, and you could collapse -- you could collapse the question of stay and the merits, but it never suggested that you could avoid ruling on the merits with finality, and there was no ruling on the merits with finality here.

MR. BECKER: Well, Your Honor --

QUESTION: What would happen to the appeal? Whatever happened with Barefoot's appeal?

MR. BECKER: Well, Your Honor, it would be mooted by his execution if Barefoot --

QUESTION: And then -- and then it would just be dismissed as moot, I take it.

MR. BECKER: Correct, which is exactly what happened in the appeal of Charlie Brooks. That's right. And if the Fifth Circuit had adopted those procedures, I have agreed that I think that they could have done so under Garrison if there had been notice to the parties and so on, but what they did here was, they did something that was even easier for the Petitioner. They said, you don't have to convince us you are going to win. All you have to convince us of is that there is a reasonable doubt or, as the Fifth Circuit has also said, that we don't have adequate time at this point to determine whether or not you raise a substantial issue.

And the Fifth Circuit said in O'Bryan that if they didn't have adequate time again they would grant the stay. I have said in my brief that I don't quarrel with that approach either. I think perhaps I have conceded too much. The problem of the --

QUESTION: May I ask you a question at this

point about the timing of the thing? Because we are all interested in expeditious procedures in these cases. The case was in the state court system for about three years. It was in the Federal District Court for several months, maybe close to a year. And then you get to the Court of Appeals, and suddenly there is a great emergency. Why, if there is this much time allowed for the Texas appellate courts to review it carefully, why should there suddenly be this change in emphasis on accelerated procedures here?

MR. BECKER: Well, Your Honor, I think it is appropriate for the focus in these proceedings to be upon the trial, the direct appeal, and the first certiorari petition. Those are the --

QUESTION: But couldn't they be done more rapidly than three years?

MR. BECKER: Well, I wish that they had been, and in this case, the trial itself, the conviction occurred three and a half months after the crime.

QUESTION: Right.

MR. BECKER: Then it was on appeal in the Court of Criminal Appeals for 17 months before a result was obtained --

QUESTION: That compares with what period of time in the federal appellate system?

MR. BECKER: Yes, sir. Well, then there was a certiorari petition which sat in this Court for 14 months before being ruled upon, and then he was in -- he filed the state habeas corpus writ that was very speedily resolved, denied by the Court of Criminal Appeals about four months after this Court had denied certiorari. Then he was in Federal District Court, where it took 13 months following an evidentiary hearing. It wouldn't have taken so long. There were three evidentiary hearings set at our request, upon our motion to expedite proceedings in the District Court, but the judge heard extensive evidence in that federal evidentiary hearing. He had to write extensive findings of fact, conclusions of law, which took him from August to November, basically, to write, and which I don't think was an unreasonable delay, and I think it's appropriate at this point -- at that point in the proceedings to say that if the Petitioner, after all of this review, which at that point had involved nine separate proceedings, 51 judges, state and federal, not one of whom had ever found any constitutional problem with what happened at his trial.

QUESTION: How many judges did you say?

MR. BECKER: Fifty-one, Your Honor. That include some overlap, but there still would be at least

40.

QUESTION: I would assume you counted the Court of Appeals each time, the same judges.

MR. BECKER: No -- well -- No, sir, there was -- between his first appeal and his second and third state habeas corpus appeals, there was a large turnover on the Court of Criminal Appeals. There is some overlap, but it was before 51 judges, and there is not one who has yet to find a constitutional problem with this trial.

QUESTION: Apart from the cert petition, which of course would be nine of the judges here --

MR. BECKER: Yes, sir.

QUESTION: -- there was only one federal judge at that point, wasn't there?

MR. BECKER: Well, and at this point there had been a federal district judge, of course.

QUESTION: That's right.

MR. BECKER: Before that, twice, now, incidentally, he also denied an additional habeas corpus writ on March 28th by Mr. Barefoot based upon different grounds.

QUESTION: That is later. That is later.

MR. BECKER: Um-hm. And then the three -- and then the three judges of the Fifth Circuit are included

within that number.

QUESTION: But is it your submission, just so I get it, that once the case reached the Federal Court of Appeals for the first time, then everything should accelerated at a radically different rate than ordinary litigation?

MR. BECKER: Well, ordinary litigation is subject to motions to stay pending appeal. It is routine. We have to get them ourselves when we lose habeas corpus cases in the state of Texas, and there's an order to release a petitioner. We have to go to the Fifth Circuit and ask for a motion to stay that in order to keep him incarcerated during the appeal. It is not extraordinary. It is routine.

Now, it may appear extraordinary when it is applied to a capital case, but again, the burden that is placed on the petitioner is the same as any litigant.

QUESTION: Well, I understand. I am really trying to get your position as a general matter, not just this case. Is it your view that when a capital case first reaches the Federal Court of Appeals on the first review of a denial of an application for habeas corpus, there should be an expedited procedure in that court in every capital case?

MR. BECKER: Well, yes.

QUESTION: And if so, how much -- what should it be, ten-day briefing, or what is the regular procedure they ought to follow?

MR. BECKER: Well, Your Honor, the Fifth Circuit has to allow the briefing that the time constraints will allow in terms of the execution and then if there hasn't been adequate time for them to get briefs that they thought were satisfactory, or to decide the issues presented by the briefs, then I said they should stop the execution, they should stay it. They should refuse to stay the execution only where they are satisfied with the presentation by the parties and where they are satisfied in good conscience that they have had adequate time to determine that there is not substantial issue. Otherwise, they are free to stay the execution. We are asking for a limited rule. We are not saying Petitioner has the burden of proof to do this, and if he doesn't have time to do it, then he loses.

QUESTION: No, but you are asking -- I just want to be sure I understand you. You are asking that as soon as the first federal habeas corpus application is denied, you then will run into -- proceed, I shouldn't say run, you will go promptly into the state court and get an execution date set --

MR. BECKER: Um-hm.

QUESTION: -- which will then accelerate the proceedings in the Court of Appeals.

MR. BECKER: And then we will be fighting for a stay of exeuction or opposing a stay of execution. That's right. We have attempted to expedite the proceedings also in the District Courts, and have been very successful, and did so in this very case, expedite them at every point, to reach a result in these cases, whether the state wins or whether the state loses. We want to reach a result. We want the people off death row, whether they weren't supposed to be there in the first place or whether there is no constitutional problem with their conviction, and that they should be executed, and when we are in the context of a motion for stay in the Fifth Circuit, we don't think it is inappropriate to ask the Court of Appeals to refuse to grant the stay of execution unless the Petitioner can show a substantial issue. That is all that we have asked for in this case.

QUESTION: And it would be your view that if he did show a substantial issue and they weren't quite prepared to decide it, they should then have a second argument. You are in effect asking for two arguments on the merits, I mean, in a case that is close enough that it requires some thought.

MR. BECKER: Well, if they didn't have time to decide the question, which is what they said in the O'Bryan case, then they grant the stay of execution, and what would happen is, then they went ahead with the normal briefing schedule. Now, once they had stayed the execution, there wasn't anything else that could be done, because the state of Texas couldn't set a new execution ordinarily.

QUESTION: It seems to me it is a -- maybe this shouldn't be a consideration, but the procedure you advocate will be more burdensome for the Federal Courts of Appeals, because they will have to take the first look at it on an expedited basis, and if they think there is a serious question, then they set it down for a second briefing and argument.

MR. BECKER: Well, Your Honor --

QUESTION: That's the routine you ask for.

MR. BECKER: -- Rule 8 is probably burdensome to the -- more burdensome to the Court of Appeals than life would be without it, because in those cases, too, they have to do the same thing. They have to decide, do we stop everything on appeal, and if we don't, sometimes that makes things easier for them. An appeal can be mooted out by refusing to stay the judgment of the District Court, and subject it to dismissal later on, as

certainly happened, and has happened to me.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 12:59 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Becker, you may continue.

ORAL ARGUMENT OF DOUGLAS M. BECKER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BECKER: Your Honors, I have attempted to reduce my argument upon the stay question to a syllogism. First, that it is perfectly understandable why the standards for granting a certificate of probable cause and a stay pending appeal are different. A certificate of probable cause to the appeal involves an internal matter of federal jurisdiction with no particular concern for the state.

The granting of a stay pending an appeal involves in effect an injunction against the state court proceedings and, we argue, justifies the higher standard that has been required in these cases.

The standard for a certificate of probable cause is an absence of frivolity of at least one issue, and of the stay, that there be a substantial question.

The opinion of the District Court in this case illustrates the District Court's painstaking attempt to distinguish between those issues that were frivolous, some of which were labeled as frivolous in his opinion, and others, like the psychiatric issue, at Page 12 of

the joint appendix, where the District Court stated that upon careful reflection, this ground is without merit, and I think the District Court felt that if he had to give the kind of careful reflection to an issue that he had to give in this opinion, that it was not frivolous, but at the same time that he could in good faith conclude that it was not substantial, and therefore grant the state's motion to reinstitute the execution.

Secondly, the Fifth Circuit could have simply expedited the appeal and done essentially the same things that it did do and affirm the judgment of the District Court. Instead, it did something that was more favorable to the Petitioner. Clearly, the Fifth Circuit addressed the merits of all the issues that Petitioner raised in this case. They did so in applying the stay standard to determine whether any of those were substantial, a more favorable standard for Petitioner to prevail upon than he would have had in an expedited appeal.

So, although I think they could have expedited the appeal and actually affirmed the judgment, I also think if they could have done that, plainly they could have done something that was more favorable to Petitioner, which is to consider his issues within the context of a stay.

The procedures are not precisely a way to expedite all capital cases, as was suggested. It is a manner, and there have been indeed many cases where we did not oppose stays of execution that were granted by District Courts, even though we were plainly entitled to do that in the Court of Appeals under Rule 8.

Instead, what it is is a means of deciding where an injunction is necessary in a capital case as in any other kind of case, to preserve the appellant's right to appeal, to make a preliminary evaluation of the issues that are presented, to determine whether any of them are substantial, and to determine whether further delays are appropriate even though there are no substantial issues. And what the Court of Appeals did in this case is to decide that where there was no substantial issue after a careful examination of the merits, no further delay was appropriate.

I don't think that that is an unreasonable burden on the Courts of Appeals. It is one that they exercise all the time. I don't think the Fifth Circuits thinks it is an unreasonable burden. The Fifth Circuit, it must be remembered, the Court of Appeals had the absolute right simply to grant the stay of execution pending appeal. They would have had to write nothing upon that point, and the state would have been out of

court. Instead, what they did was to take on that burden and to decide the question of whether any of the issues were substantial.

With respect to the issue of the hypothetical psychiatric testimony, I think that what the plaintiff does ask the Court in effect to do is to overrule Jurek, something that is obviously not before the Court, and that is the import of his argument, because in Jurek if the Court approved the future dangerousness issue as an appropriate one to decide the question of life or death, the Court also in the same breath said that all relevant evidence should be presented.

I think that Petitioner's argument that there is no room for mitigating circumstances within this context is plainly without merit. The very criteria that Drs. Holbrook and Grigson enumerated as important to their diagnosis emphased the kinds of things that Petitioner says he had no opportunity to present, things like family ties, and employment record, attendance at church, a stable circle of friends, and all the other things in his brief that he says could not have affected the opinion of the psychiatrists are the very things that are directly related to the loyalty to institutions that the doctors talked about during their testimony.

He could have impeached their testimony upon

that basis and asked them if it would have been changed if any of those things existed. He could have clearly put on evidence, mitigating evidence of those facts at the punishment phase in order to argue that to the jury, and he did not. It can only be assumed that those things did not exist.

I also will emphasize that under Texas law, the defendant can, and he does, call psychiatric witnesses in his own behalf, and although the assertion has been made --

QUESTION: Texas law is alone in its provisions, isn't it? There is no other state law like this one.

MR. BECKER: Well, Your Honor, not exactly, no. There are several states that include future dangerousness as an important factor. In Virginia --

QUESTION: How many?

MR. BECKER: Five that I know of. Of the 33 --

QUESTION: Five out of 50?

MR. BECKER: Well, out of the 33 that have the death penalty, or all 50, yes, sir. Virginia's scheme is --

QUESTION: Who are you using now that Dr. Holbrook is gone?

MR. BECKER: Well, Your Honor, I am not sure I

understand the question. There are a wide variety of psychiatrists who testify in Texas as a matter of --

QUESTION: Are you using just Dr. Grigson in all these cases?

MR. BECKER: Well, now, it is up to the individual district attorneys as to who they want to use. Both Dr. Grigson and Dr. Holbrook testified at trial that they had testified for defendants before. That is in the record. Dr. Grigson has testified against me in a habeas corpus proceeding. And so I don't think the situation is as black and white as Petitioner and some of the amici would lead you to believe.

QUESTION: Well, he has been here in every case we have had from Texas.

MR. BECKER: Yes, sir. He has -- There is no denying that he has testified in a wide range of cases. There is also no denying that that would be a substantial basis for his impeachment by the defendant, and in fact that was used as a basis for his impeachment.

During jury argument, I think it is worth noting -- I think reading the jury argument in this case at the punishment phase is well worth the Court's time, because it places this issue within the proper context.

You will see defense counsel arguing to the jury without objection that psychiatrists cannot predict human behavior with certainty, citing literature, the studies, the APA task force report. They can't predict future dangerousness. They had never examined defendants. That their elements of the diagnosis didn't prove it. That all sociopaths do not necessarily commit acts of future violence. That the facts in the hypothetical question were not true and therefore should not be believed by the jury, and a number of other matters.

They also emphasized that there was nothing in the hypothetical question about --

QUESTION: Of course, he had no other alternative. The evidence was admitted. That was the only thing that he had to say.

MR. BECKER: Well, Your Honor, but he could --

QUESTION: You can't criticize him for having done this.

MR. BECKER: Well, he could have presented evidence of his own to further substantiate his claim. In fact, I don't know of anything that is any of the briefs of the Petitioner or of the amici that could not have been presented at trial, either in the way of evidence or in the way of jury argument. The jury was charged by the court that expert witnesses are the same

as any other witnesses in the sense that their testimony is to be weighed by the jury, and the jury is to give whatever credibility that they wish to those witnesses.

And the district attorney in this case, in his own summation, told the jury to weigh the testimony of the expert witnesses, and that they may want to put a certain amount of credence here, or a certain amount there, and furthermore, he told the jury that if any way the facts and the hypothetical question were inaccurate, that they should not -- that they should discount the answer to the hypothetical question also.

I think that there was ample ground for the defense to present mitigation within the context of the hypothetical question, and that as long as that opportunity existed, they should not be heard to complain now.

QUESTION: Mr. Becker, if we agreed with you, we would affirm the judgment of the District Court, wouldn't we?

MR. BECKER: Yes, sir.

QUESTION: I am not sure. Did counsel answer the question?

QUESTION: Yes.

QUESTION: Fine.

Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:09 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

Thomas A. Barefoot, Petitioner, V. W. J. Estelle, Jr., Director, Texas Department of Corrections No. 82-6080

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)