Appendix: Brief for the American Psychiatric Association as *Amicus Curiae* Supporting Petitioner, Barefoot v. Estelle

Petitioner Thomas A. Barefoot stands convicted by a Texas state court of the August 7, 1978 murder of a police officer—one of five categories of homicides for which Texas law authorizes the imposition of the death penalty. Under capital sentencing procedures established after this Court's decision in Furman v. Georgia, the "guilt" phase of petitioner's trial was followed by a separate sentencing proceeding in which the jury was directed to answer three statutorily prescribed questions. One of these questions—and the only question of relevance here—directed the jury to determine: whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury's affirmative response to this question resulted in petitioner being sentenced to death.

The principle evidence presented to the jury on the question of petitioner's "future dangerousness" was the expert testimony of two psychiatrists, Dr. John T. Holbrook and Dr. James Grigson, both of whom testified for the prosecution. Petitioner elected not to testify in his own defense. Nor did he present any evidence or testimony, psychiatric or otherwise, in an attempt to rebut the state's claim that he would commit future criminal acts of violence.

Over defense counsel's objection, the prosecution psychiatrists were permitted to offer clinical opinions regarding petitioner, including their opinions on the ultimate issue of future dangerousness, even though they had not performed a psychiatric examination or evaluation of him. Instead, the critical psychiatric testimony was elicited through an extended hypothetical question propounded by the prosecutor. On the basis of the assumed facts stated in the hypothetical, both Dr. Holbrook and Dr. Grigson gave essentially the same testimony.

First, petitioner was diagnosed as a severe criminal sociopath, a label variously defined as describing persons who "lack a conscience," and who "do things which serve their own purposes without regard for any consequences or outcomes to other people." Second, both psychiatrists testified that petitioner would commit criminal acts of violence in the future. Dr. Holbrook stated that he could predict petitioner's future behavior in this regard "within reasonable psychiatric certainty." Dr. Grigson was more confident, claiming predictive accuracy of "one hundred percent and absolute."

The prosecutor's hypothetical question consisted mainly of a cataloguing of petitioner's past antisocial behavior, including a description of his criminal record. In addition, the hypothetical question contained a highly detailed summary of the prosecution's evidence introduced during the guilt phase of the trial, as well as a brief statement concerning petitioner's behavior and demeanor during the period from his commission of the murder to his later apprehension by police.

In relevant part, the prosecutor's hypothetical asked the psychiatrists to assume as true the following facts: First, that petitioner had been convicted of five criminal offenses—all of them nonviolent, as far as the record reveals—and that he had also been arrested and charged on several counts of sexual offenses involving children. Second, that petitioner had led a peripatetic existence and "had a bad reputation for peaceful and law abiding citizenship" in each of eight communities that he had resided in during the previous ten years. Third, that in the two-month period preceding the murder, petitioner was unemployed, spending much of his time using drugs, boasting of his plans to commit numerous crimes, and in various ways deceiving certain acquaintances with whom he was living temporarily. Fourth, that petitioner had murdered the police officer as charged, and that he had done so with "no provocation whatsoever" by shooting the officer in the head "from a distance of no more than six inches." And fifth, that subsequent to the murder, petitioner was observed by one witness, "a homosexual," who stated that petitioner "was not in any way acting unusual or that anything was bothering him or upsetting him . . . "

Testimony of Dr. Holbrook:

Dr. Holbrook was the first to testify on the basis of the hypothetical question. He stated that the person described in the question exhibited "probably six or seven major criterias (sic) for the sociopath in the criminal area within reasonable medical certainty." Symptomatic of petitioner's sociopathic personality, according to Dr. Holbrook, was his consistent "antisocial behavior" from "early life into adulthood," his willingness to take any action which "serves [his] own purposes" without any regard for the "consequences to other people," and his demonstrated failure to establish any "loyalties to the normal institutions such as family, friends, politics, law or religion."

Dr. Holbrook explained that his diagnosis of sociopathy was also supported by petitioner's past clinical violence and "serious threats of violence," as well as an apparent history of "escaping or running away from authority" rather than "accepting a confrontation in the legal way in a court of law."

And finally, Dr. Holbrook testified that petitioner had shown a propensity to "use other people through lying and manipulation . . . " According to Dr. Holbrook, by use of such manipulation the sociopath succeeds in "enhancing [his] own ego image . . . It makes [him] feel good."

After stating his diagnosis of sociopathy, Dr. Holbrook was asked whether he had an "opinion within reasonable psychiatric certainty as to whether or not there is a probability that the Thomas A. Barefoot in that hypothetical will commit criminal acts of violence in the future that would constitute a continuing threat to society?" Without attempting to explain the implied clinical link between his diagnosis of petitioner and his prediction of future dangerousness, Dr. Holbrook answered simply: "In my opinion he will."

Testimony of Dr. Grigson:

On the basis of the prosecutor's hypothetical question, Dr. Grigson diagnosed petitioner as "a fairly classical, typical, sociopathic personality disorder" of the "most severe category." The most "outstanding characteristic" of persons fitting this diagnosis, according to Dr. Grigson, is the complete "lack of a conscience." Dr. Grigson stated that such persons "repeatedly break the rules, they con, manipulate and use people, [and] are only interested in their own self pleasure [and] gratification."

Although Dr. Grigson testified that some sociopathic individuals do not pose a continuing threat to society, he characterized petitioner as "your most severe sociopath." Dr. Grigson stated that persons falling into this special category are "the ones that . . . have complete disregard for another human being's life." Dr. Grigson further testified that "there is not anything in medicine or psychiatry or any other field that will in any way at all modify or change the severe sociopath."

The prosecutor then asked Dr. Grigson to state his opinion on the ultimate issue—"whether or not there is a probability that the defendant . . . will commit criminal acts of violence that would constitute a continuing threat to society?" Again, without explaining the basis for his prediction or its relationship to the diagnosis of sociopathy, Dr. Grigson testified that he was "one hundred percent" sure that petitioner "most certainly would" commit future criminal acts of violence. Dr. Grigson also stated that his diagnosis and prediction would be the same whether petitioner "was in the penitentiary or whether he was free."

INTRODUCTION AND SUMMARY OF ARGUMENT

The questions presented in this case are the logical outgrowth of two prior decisions by this Court. In the first, Jurek v. Texas, the Court dealt with the same Texas capital sentencing procedure involved here. The Court there rejected a constitutional challenge to the "future dangerousness" question, ruling that the statutory standard was not impermissibly vague. Although recognizing the difficulty inherent in predicting future behavior, the Court held that "[t]he task that [the] jury must perform ... is basically no different from the task performed countless times each day throughout the American system of criminal justice." The Jurek Court thus upheld the use of the Texas statutory question, but did not consider the types of evidence that could be presented to the jury for purposes of this determination.

Subsequently in Estelle v. Smith, the Court again dealt with the Texas sentencing scheme—this time in the context of a psychiatric examination to determine the defendant's competency to stand trial. The Court held that the Fifth Amendment's privilege against self-incrimination applied to such psychiatric examinations, at least to the extent that a prosecution psychiatrist later testifies concerning the defendant's future dangerousness. The Court reasoned that although a defendant has no generalized constitutional right to remain silent at a psychiatric examination properly limited to the issues of sanity or competency, full Miranda warnings must be given with respect to testimony concerning future dangerousness because of "the gravity of the decision to be made at the penalty phase ... " The Smith decision thus enables a capital defendant to bar a government psychiatric examination on the issue of future dangerousness.

The [present] case raises the two issues left unresolved in Jurek and Smith. These are, first, whether a psychiatrist, testifying as an expert medical witness, may ever be permitted to render a prediction as to a capital defendant's long-term future dangerousness. The second issue is whether such testimony may be elicited on the basis of hypothetical questions, even if there exists no general prohibition against the use of expert psychiatric testimony on the issue of long-term future dangerousness. *Amicus* believes that both of these questions should be answered in the negative.

I. Psychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness of a defendant in a capital case, at least in those circumstances where the psychiatrist purports to be testifying as a medical expert possessing predictive expertise in this area. Although psychiatric assessments may permit short-term predictions of violent or assaultive

behavior, medical knowledge has simply not advanced to the point where long-term predictions—the type of testimony at issue in this case—may be made with even reasonable accuracy. 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.

The forecast of future violent conduct on the part of a defendant in a capital case is, at bottom, a lay determination, not an expert psychiatric determination. To the extent such predictions have any validity, they can only be made on the basis of essentially actuarial data to which psychiatrists, qua psychiatrists, can bring no special interpretative skills. On the other hand, the use of psychiatric testimony on this issue causes serious prejudice to the defendant. By dressing up the actuarial data with an "expert" opinion, the psychiatrist's testimony is likely to receive undue weight. In addition, it permits the jury to avoid the difficult actuarial questions by seeking refuge in a medical diagnosis that provides a false aura of certainty. For these reasons, psychiatric testimony on future dangerousness impermissibly distorts the fact-finding process in capital cases.

II. Even if psychiatrists under some circumstances are allowed to render an expert medical opinion on the question of future dangerousness, *amicus* submits that they should never be permitted to do so unless they have conducted a psychiatric examination of the defendant. It is evident from the testimony in this case that the key clinical determination relied upon by both psychiatrists was their diagnosis of "sociopathy" or "antisocial personality disorder." However, such a diagnosis simply cannot be made on the basis of a hypothetical question. Absent an in-depth psychiatric examination and evaluation, the psychiatrist cannot exclude alternative diagnoses; nor can he assure that the necessary criteria for making the diagnosis in question are met. As a result, he is unable to render a medical opinion with a reasonable degree of certainty.

These deficiencies strip the psychiatric testimony of all value in the present context. Even assuming that the diagnosis of antisocial personality disorder is probative of future dangerousness—an assumption which we do not accept—it is nonetheless clear that the limited facts given in the hypothetical fail to disprove other illnesses that plainly do not indicate a general propensity to commit criminal acts. Moreover, these other illnesses may be more amenable to treatment—a factor that may further reduce the likelihood of future aggressive behavior by the defendant.

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