Cases
on
Mental Health
Law
in
Texas

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Texas Psychological Association

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INTRODUCTION

This is a casebook of judicial decisions that have interpreted the work done by mental health professionals, primarily from Texas, but also from other jurisdictions that have application to practice in our state. The book is targeted to students and practitioners. Students enrolled in a training program in mental health by reading these cases will find a better understanding of the issues courts find important in our practices. Practitioners can obtain guidance on decisions in critical treatment points with patients and their families by reading how other professionals have proceeded with similar situations and how the courts interpret their actions. These cases were selected to provide not only information about how the courts direct practice but also for their reasoning in the decision which can help students and practitioners to appreciate the elements that courts consider in guiding public policy in their decisions.

There is an introductory section to each case which provides a précis of the case, followed by the complete text of the case or an abbreviated form of the case. In those cases where material was excised, the editors eliminated material not germane to issues of professional practice. The book can be used as a supplement to courses in mental health law or ethics courses. Practitioners who have legal issues raised in their practice can review the cases in the table of contents which contains a one line description of each case; then review the précis. If the case seems to address the questions, then read the entire case. Such background can provide for more informed decisions about practice.

These cases provide the history that binds us as a profession. We selected cases in most areas of professional practice based on our experience that these areas create the most questions about how to proceed in professional practice, cases that are fundamental to professional mental health practice in Texas. The topic areas are: consent to treatment, privacy, duty to protect, reporting neglect and abuse, couples issues in treatment., children's rights to privacy in treatment, involuntary civil commitment, intellectual disability in criminal cases, dangerousness, and expert testimony. We believe that understanding the legal rationale, that is, knowing how the courts think about these issues, will assist the clinician in doing a better job in practice than otherwise.

Each of the Editors is on a faculty of a University where we train professionals in psychology and law, dealing with issues of professional practice. We hope that this book will make our jobs and the jobs of other faculty in professional programs easier. I am pleased to have worked with Ollie J. Seay, Ph.D., past president of the Texas Psychological Association, and with Carl N. Edwards, J.D., Ph.D., who, although new to Texas, has taken with a great deal of zeal his entry into our state, our ways of thinking, and our culture. Both my co-editors have contributed enormous time and energy into the casebook project, as well as the Seventh Edition of the *Texas Law and the Practice of Psychology* Sourcebook. Thank you both.

I am grateful to the Chairman in the Department of Psychiatry and Behavioral Science at Baylor College of Medicine, Stuart C. Yudofsky, M.D., and Britta Ostermeyer, M.D, the Mental Health Service Chief at Ben Taub Hospital, Harris County Hospital District, without whose blessing I would not have had the resources to produce this book.

We are also pleased that the Texas Psychological Association is once again the publisher of this book under the direction of David White, the Executive Director.

August, 2010

Ray Hays, Ph.D., J.D.

Houston

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PRIVACY, CONFIDENTIALITY, AND PRIVILEGE

PRIVACY, CONFIDENTIALITY, AND PRIVILEGE

Jaffe v. Redmond **established a protection for mental health records in federal court cases. Redmond was a police officer who used deadly force in the course of her job, resulting in the death of Ricky Allen. Officer Redmond had several meetings with a social worker for therapy after this shooting and death. The Special Administrator of Allen's estate brought a suit for unlawful use of excessive force by Redmond. The court held that there is a privilege for psychotherapy notes under Federal Rule 501, essentially meaning that psychotherapy notes under these circumstances cannot be admitted as evidence in court. Since this case applied the Federal Rules of Evidence, it has no applicability in Texas State Courts where most mental health records are not privileged. It is, however, included in this set of cases as context and background.**

Carrie **JAFFE**, special administrator for Ricky Allen, Sr., deceased

v.

Mary Lou **REDMOND**

518 U.S. 41 (1996)

OPINION

Justice Stevens delivered the opinion of the Court.

Petitioner is the administrator of the estate of Ricky Allen. Respondents are Mary Lu Redmond, a former police officer, and the Village of Hoffman Estates, Illinois, her employer during the time that she served on the police force. [1] Petitioner commenced this action against respondents after Redmond shot and killed Allen while on patrol duty.

On June 27, 1991, Redmond was the first officer to respond to a "fight in progress" call at an apartment complex. As she arrived at the scene, two of Allen's sisters ran toward her squad car, waving their arms and shouting that there had been a stabbing in one of the apartments. Redmond testified at trial that she relayed this information to her dispatcher and requested an ambulance. She then exited her car and walked toward the apartment building. Before Redmond reached the building, several men ran out, one waving a pipe. When the men ignored her order to get on the ground, Redmond drew her service revolver. Two other men then burst out of the building, one, Ricky Allen, chasing the other. According to Redmond, Allen was brandishing a butcher knife and disregarded her repeated commands to drop the weapon. Redmond shot Allen when she believed he was about to stab the man he was chasing. Allen died at the scene. Redmond testified that before other officers arrived to provide support, "people came pouring out of the buildings," App. 134, and a threatening confrontation between her and the crowd ensued.

Petitioner filed suit in Federal District Court alleging that Redmond had violated Allen's constitutional rights by using excessive force during the encounter at the apartment complex. The complaint sought damages under Rev. Stat. §1979, 42 U.S.C. § 1983 and the Illinois wrongful death statute, Ill. Comp. Stat., ch. 740, §180/1 *et seq.* (1994). At trial, petitioner presented testimony from members of Allen's family that conflicted with Redmond's version of the incident in several important respects. They testified, for example, that Redmond drew her gun before exiting her squad car and that Allen was unarmed when he emerged from the apartment building.

During pretrial discovery petitioner learned that after the shooting Redmond had participated in about 50 counseling sessions with Karen Beyer, a clinical social worker licensed by the State of Illinois and employed at that time by the Village of Hoffman Estates. Petitioner sought access to Beyer's notes concerning the sessions for use in cross examining Redmond. Respondents vigorously resisted the discovery. They asserted that the contents of the conversations between Beyer and Redmond were protected against involuntary disclosure by a psychotherapist patient privilege. The district judge rejected this argument. Neither Beyer nor Redmond, however, complied with his order to disclose the contents of Beyer's notes. At depositions and on the witness stand both either refused to answer certain questions or professed an inability to recall details of their conversations.

In his instructions at the end of the trial, the judge advised the jury that the refusal to turn over Beyer's notes had no "legal justification" and that the jury could therefore presume that the contents of the notes would have been unfavorable to respondents. [2] The jury awarded petitioner $45,000 on the federal claim and $500,000 on her state law claim.

The Court of Appeals for the Seventh Circuit reversed and remanded for a new trial. Addressing the issue for the first time, the court concluded that "reason and experience," the touchstones for acceptance of a privilege under Rule 501 of the Federal Rules of Evidence, compelled recognition of a psychotherapist patient privilege. [3] 51 F. 3d 1346, 1355 (1995). "Reason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment." *Id.,* at 1355-1356. As to experience, the court observed that all 50 States have adopted some form of the psychotherapist patient privilege. *Id.,* at 1356. The court attached particular significance to the fact that Illinois law expressly extends such a privilege to social workers like Karen Beyer. [4] *Id.,* at 1357. The court also noted that, with one exception, the federal decisions rejecting the privilege were more than five years old and that the "need and demand for counseling services has skyrocketed during the past several years." *Id.,* at 1355-1356.

The Court of Appeals qualified its recognition of the privilege by stating that it would not apply if "in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests." *Id.,* at 1357. Balancing those conflicting interests, the court observed, on the one hand, that the evidentiary need for the contents of the confidential conversations was diminished in this case because there were numerous eyewitnesses to the shooting, and, on the other hand, that Officer Redmond's privacy interests were substantial. [5[*Id.,* at 1358. Based on this assessment, the court concluded that the trial court had erred by refusing to afford protection to the confidential communications between Redmond and Beyer.

The United States courts of appeals do not uniformly agree that the federal courts should recognize a psychotherapist privilege under Rule 501. Compare *In re Doe,* 964 F. 2d 1325 (CA2 1992) (recognizing privilege); *In re Zuniga,* 714 F. 2d 632 (CA6), cert. denied, 464 U.S. 983 (1983) (same), with *United States* v. *Burtrum,* 17 F. 3d 1299 (CA10), cert. denied, 513 U. S. ___ (1994) (declining to recognize privilege); *In re Grand Jury Proceedings,* 867 F. 2d 562 (CA9), cert. denied *sub nom. Doe* v. *United States,* 493 U.S. 906 (1989) (same); *United States* v. *Corona,* 849 F. 2d 562 (CA11 1988), cert. denied, 489 U.S. 1084 (1989) (same); *United States* v. *Meagher,* 531 F. 2d 752 (CA5), cert. denied, 429 U.S. 853 (1976) (same). Because of the conflict among the courts of appeals and the importance of the question, we granted certiorari. 516 U. S. ___ (1995). We affirm.

Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience." The authors of the Rule borrowed this phrase from our opinion in *Wolfle* v. *United States,* 291 U.S. 7, 12 (1934), [6] which in turn referred to the oft repeated observation that "the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk* v. *United States,* 290 U.S. 371, 383 (1933). See also *Hawkins* v. *United States,* 358 U.S. 74, 79 (1958) (changes in privileges may be "dictated by `reason and experience' "). The Senate Report accompanying the 1975 adoption of the Rules indicates that Rule

501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case by case basis." S. Rep. No. 93" 1277, p. 13 (1974). [7] The Rule thus did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to "continue the evolutionary development of testimonial privileges." *Trammel* v. *United States*, 445 U.S. 40, 47 (1980); see also *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 189 (1990).

The common law principles underlying the recognition of testimonial privileges can be stated simply. " `For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.' " *United States* v. *Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 J. Wigmore, Evidence §2192, p. 64 (3d ed. 1940)). [8] See also *United States* v. *Nixon*, 418 U.S. 683, 709 (1974). Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a " `public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.' " *Trammel*, 445 U. S., at 50, quoting *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

Guided by these principles, the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence . . . ." 445 U. S., at 51. Both "reason and experience" persuade us that it does.

Like the spousal and attorney client privileges, the psychotherapist patient privilege is "rooted in the imperative need for confidence and trust." *Trammel*, 445 U. S., at 51. Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. [9] As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment." Advisory Committee's Notes to Proposed Rules, 56 F. R. D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)).

By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests.

Our cases make clear that an asserted privilege must also "serv[e] public ends." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). Thus, the purpose of the attorney client privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Ibid.* And the spousal privilege, as modified in *Trammel*, is justified because it "furthers the important public interest in marital harmony," 445 U. S., at 53. See also *United States* v. *Nixon*, 418 U. S., at 705; *Wolfle* v. *United States*, 291 U. S., at 14. The psychotherapist privilege serves the public interest by facilitating the provision of appropriate

treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance. [10]

In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access--for example, admissions against interest by a party--is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth seeking function than if it had been spoken and privileged.

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. [11] We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. See *Trammel,* 445 U. S., at 48-50; *United States* v. *Gillock,* 445 U.S. 360, 368, n. 8 (1980). Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. [12] Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

It is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision. Although common law rulings may once have been the primary source of new developments in federal privilege law, that is no longer the case. In *Funk* v. *United States,* 290 U.S. 371 (1933), we recognized that it is appropriate to treat a consistent body of policy determinations by state legislatures as reflecting both "reason" and "experience." *Id.,* at 376-381. That rule is properly respectful of the States and at the same time reflects the fact that once a state legislature has enacted a privilege there is no longer an opportunity for common law creation of the protection. The history of the psychotherapist privilege illustrates the latter point. In 1972 the members of the Judicial Conference Advisory Committee noted that the common law "had indicated a disposition to recognize a psychotherapist patient privilege when legislatures began moving into the field." Proposed Rules, 56 F. R. D., at 242 (citation omitted). The present unanimous acceptance of the privilege shows that the state lawmakers moved quickly. That the privilege may have developed faster legislatively than it would have in the courts demonstrates only that the States rapidly recognized the wisdom of the rule as the field of psychotherapy developed. [13]

The uniform judgment of the States is reinforced by the fact that a psychotherapist privilege was among the nine specific privileges recommended by the Advisory Committee in its proposed privilege rules. In *United States* v. *Gillock,* 445 U.S. 360, 367-368 (1980), our holding that Rule 501 did not include a state legislative privilege relied, in part, on the fact that no such privilege was included in the Advisory Committee's draft. The reasoning in *Gillock* thus supports the opposite conclusion in this case. In rejecting the proposed draft that had specifically identified each privilege rule and substituting the present more open ended Rule 501, the Senate Judiciary Committee explicitly stated that its action "should not be understood as disapproving any recognition of a psychiatrist patient . . . privileg[e] contained in the [proposed] rules." S. Rep. No. 93-1277, at 13.

Because we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist patient privilege will serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth," *Trammel,* 445 U. S., at 50, we hold that

confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. [14]

All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. [15] Today, social workers provide a significant amount of mental health treatment. See, *e.g.*, U. S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994 pp. 85-87, 107-114; Brief for National Association of Social Workers et al. as *Amici Curiae* 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, *id.*, at 6-7 (citing authorities), but whose counseling sessions serve the same public goals. [16] Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers. [17] We therefore agree with the Court of Appeals that "[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." 51 F. 3d, at 1358, n. 19.

We part company with the Court of Appeals on a separate point. We reject the balancing component of the privilege implemented by that court and a small number of States. [18] Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 449 U. S., at 393.

These considerations are all that is necessary for decision of this case. A rule that authorizes the recognition of new privileges on a case by case basis makes it appropriate to define the details of new privileges in a like manner. Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would "govern all conceivable future questions in this area." *Id.*, at 386. [19]

The conversations between Officer Redmond and Karen Beyer and the notes taken during their counseling sessions are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Notes

[1] Redmond left the police department after the events at issue in this lawsuit.

[2] App. to Pet. for Cert. 67.

[3] Rule 501 provides as follows: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with State law."

[4] *See* Illinois Mental Health and Developmental Disabilities Confidentiality Act, Ill. Comp. Stat., ch. 740, §§110/1-110/17 (1994).

[5] "Her ability, through counseling, to work out the pain and anguish undoubtedly caused by Allen's death in all probability depended to a great deal upon her trust and confidence in her counselor Karen Beyer. Officer Redmond, and all those placed in her most unfortunate circumstances, are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of duty. An individual who is troubled as the result of her participation in a violent and tragic event, such as this, displays a most commendable respect for human life and is a person well suited `to protect and to serve.' " 51 F. 3d, at 1358.

[6] "[T]he rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience. *Funk* v. *United States*, 290 U.S. 371." *Wolfle* v. *United States*, 291 U. S., at 12-13.

[7] In 1972 the Chief Justice transmitted to Congress proposed Rules of Evidence for United States Courts and Magistrates. 56 F. R. D. 183 (hereinafter Proposed Rules). The rules had been formulated by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court. *Trammel* v. *United States*, 445 U.S. 40, 47 (1980). The proposed rules defined nine specific testimonial privileges, including a psychotherapist patient privilege, and indicated that these were to be the exclusive privileges absent constitutional mandate, Act of Congress, or revision of the Rules. Proposed Rules 501-513, 56 F. R. D., at 230-261. Congress rejected this recommendation in favor of Rule 501's general mandate. *Trammel*, 445 U. S., at 47.

[8] The familiar expression "every man's evidence" was a well known phrase as early as the mid 18th century. Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the maxim during the May 25, 1742, debate in the House of Lords concerning a bill to grant immunity to witnesses who would give evidence against Sir Robert Walpole, first Earl of Orford. 12 T. Hansard, Parliamentary History of England 643, 675, 693, 697 (1812). The bill was defeated soundly. *Id.*, at 711.

[9] *See* studies and authorities cited in the Brief for American Psychiatric Association et al. as *Amici Curiae* 14-17, and the Brief for American Psychological Association as *Amicus Curiae* 12-17.

[10] This case amply demonstrates the importance of allowing individuals to receive confidential counseling. Police officers engaged in the dangerous and difficult tasks associated with protecting the safety of our communities not only confront the risk of physical harm but also face stressful circumstances that may give rise to anxiety, depression, fear, or anger. The entire community may suffer if police officers are not able to receive effective counseling and treatment after traumatic incidents, either because trained officers leave the profession prematurely or because those in need of treatment remain on the job.

[11] Ala. Code §34-26-2 (1975); Alaska Rule Evid. 504; Ariz. Rev. Stat. §32-2085 (1992); Ark. Rule Evid. 503; Cal. Evid. Code Ann. §§1010, 1012, 1014 (1995); Colo. Rev. Stat. §13-90-107(g)(1) (1987); Conn. Gen. Stat. §52-146c (1995); Del. Uniform Rule Evid. 503; D. C. Code Ann. §14-307 (1995); Fla. Stat. §90.503 (Supp. 1992); Ga. Code Ann. §24-9-21 (1995); Haw. Rules Evid. 504, 504.1; Idaho Rule Evid. 503; Ill. Comp. Stat., ch. 225 §15/5 (1994); Ind. Code §25-33-1-17 (1993); Iowa Code §622.10 (1987); Kan. Stat. Ann. §74-5323 (1985); Ky. Rule Evid. 507; La. Code Evid. Ann., Art. 510 (West 1995); Me. Rule Evid. 503; Md. Cts. & Jud. Proc. §9-109 (1995); Mass. Gen. Laws §233:20B (1995); Mich. Comp. Laws Ann. §333.18237 (Supp. 1996); Minn. Stat. Ann. §595.02 (1988 and Supp. 1996); Miss. Rule Evid. 503; Mo. Rev. Stat. §491.060 (1994); Mont. Code Ann. §26-1-807 (1995); Neb. Rev. Stat. §27-504 (1995); Nev. Rev. Stat. Ann. §49.209 (Supp. 1995); N. H. Rule Evid. 503; N. J. Stat. Ann. §45:14B 28 (West 1995); N. M. Rule Evid. 11-504; N. Y. Civ. Prac. Law §4507 (McKinney 1992); N. C. Gen. Stat. §8-53.3 (Supp. 1995); N. D. Rule Evid. §503; Ohio Rev. Code Ann. §2317.02 (1995); Okla. Stat., Tit. 12 §2503 (1991); Ore. Rules Evid. 504, 504.1; 42 Pa. Cons. Stat. §5944 (1982); R. I. Gen. Laws §§5-37.3-3, 5-37.3-4 (1995); S. C. Code Ann. §19-11-95 (Supp. 1995); S. D. Codified Laws §§19-13-6 to 19-13-11 (1995); Tenn. Code Ann. §24-1-207 (1980); Tex. Rules Civ. Evid. 509, 510; Utah Rule Evid. 506; Vt. Rule Evid. 503; Va. Code Ann. §8.01-400.2 (1992); Wash. Rev. Code §18.83.110 (1994); W. Va. Code §27-3-1 (1992); Wis. Stat. §905.04 (1993-1994); Wyo. Stat. §33-27-123 (Supp. 1995).

[12] At the outset of their relationship, the ethical therapist must disclose to the patient "the relevant limits on confidentiality." See American Psychological Association, Ethical Principles of Psychologists and Code of Conduct, Standard 5.01 (Dec. 1992). See also National Federation of Societies for Clinical Social Work, Code of Ethics V(a) (May 1988); American Counseling Association, Code of Ethics and Standards of Practice A.3.a (effective July 1995).

[14] Petitioner acknowledges that all 50 state legislatures favor a psychotherapist privilege. She nevertheless discounts the relevance of the state privilege statutes by pointing to divergence among the States concerning the types of therapy relationships protected and the exceptions recognized. A small number of state statutes, for example, grant the privilege only to psychiatrists and psychologists, while most apply the protection more broadly. Compare Haw. Rules Evid. 504, 504.1 and N. D. Rule Evid. 503 (privilege extends to physicians and psychotherapists), with Ariz. Rev. Stat. Ann. §32-3283 (1992) (privilege covers "behavioral health professional[s]"); Tex. Rule Civ. Evid. 510(a)(1) (privilege extends to persons "licensed or certified by the State of Texas in the diagnosis, evaluation or treatment of any mental or emotional disorder" or "involved in the treatment or examination of drug abusers"); Utah Rule Evid. 506 (privilege protects confidential communications made to marriage and family therapists, professional counselors, and psychiatric mental health nurse specialists). The range of exceptions recognized by the States is similarly varied. Compare Ark. Code Ann. §17-46-107 (1987) (narrow exceptions); Haw. Rules Evid. 504, 504.1 (same), with Cal. Evid. Code Ann. §§1016-1027 (West 1995) (broad exceptions); R. I. Gen. Laws §5-37.3-4 (1956) (same). These variations in the scope of the protection are too limited to undermine the force of the States' unanimous judgment that some form of psychotherapist privilege is appropriate.

[14] Like other testimonial privileges, the patient may of course waive the protection.

[15] f petitioner had filed her complaint in an Illinois state court, respondents' claim of privilege would surely have been upheld, at least with respect to the state wrongful death action. An Illinois statute provides that conversations between a therapist and her patients are privileged from compelled disclosure in any civil or criminal proceeding. Ill. Comp. Stat., ch. 740, §110/10 (1994). The term "therapist" is broadly defined to encompass a number of licensed professionals including social workers. Ch. 740, §110/2. Karen Beyer, having satisfied the strict standards for licensure, qualifies as a clinical social worker in Illinois. 51 F. 3d 1346, 1358, n. 19 (CA7 1995).

Indeed, if only a state law claim had been asserted in federal court, the second sentence in Rule 501 would have extended the privilege to that proceeding. We note that there is disagreement concerning the proper rule in cases such as this in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law. See C. Wright & K. Graham, 23 Federal Practice and Procedure §5434 (1980). Because the parties do not raise this question and our resolution of the case does not depend on it, we express no opinion on the matter.

[16] The Judicial Conference Advisory Committee's proposed psychotherapist privilege defined psychotherapists as psychologists and medical doctors who provide mental health services. Proposed Rules, 56 F.R.D., at 240. This limitation in the 1972 recommendation does not counsel against recognition of a privilege for social workers practicing psychotherapy. In the quarter century since the Committee adopted its recommendations, much has changed in the domains of social work and psychotherapy. See generally Brief for National Association of Social Workers et al. as *Amici Curiae* 5-13 (and authorities cited). While only 12 States regulated social workers in 1972, all 50 do today. See American Association of State Social Work Boards, Social Work Laws and Board Regulations: A State Comparison Study 29, 31 (1996). Over the same period, the relative portion of therapeutic services provided by social workers has increased substantially. See U. S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994, pp. 85-87, 107-114.

[17] *See* Ariz. Rev. Stat. Ann. §32-3283 (1992); Ark. Code Ann. §17-46-107 (1995); Cal. Evid. Code §§1010, 1012, 1014 (West 1995); Colo. Rev. Stat. §13-90-107 (1987); Conn. Gen. Stat. §52-146q (1991); Del. Code Ann., Tit. 24 §3913 (1987); D. C. Code §14-307 (1995); Fla. Stat. §90.503 (1991); Ga. Code Ann. §24-9-21 (1995); Idaho Code §54-3213 (1994); Ill. Comp. Stat., ch. 225, §20/16 (1994); Ind. Code §25-23.6-6-1 (1993); Iowa Code §622.10 (1987); Kan. Stat. Ann. §65-6315 (Supp. 1990); Ky. Rule Evid. 507; La. Code Evid. Ann., Art. 510 (West 1995); Me. Rev. Stat. Ann., Tit. 32, §7005 (1988); Md. Cts. & Jud. Proc. Code Ann. §9-121 (1995); Mass. Gen. Laws §112:135A (1994); Mich. Comp. Stat. Ann. 339.1610 (1992); Minn. Stat. §595.02(g) (1994); Miss. Code Ann. §73-53-29 (1972); Mo. Ann. Stat. §337.636 (Supp. 1996); Mont. Code Ann. §37-22-401 (1995); Neb. Rev. Stat. Ann. §71-1,335 (1995); Nev. Rev. Stat. Ann. §§49.215, 49.225, 49.235 (Supp. 1995); N. H. Rev. Stat. Ann. §330-A:19 (1995); N. J. Stat. Ann. §45:15BB-13 (1995); N. M. Stat. Ann. §61-31-24 (Supp. 1995); N. Y. Civ. Prac. Law §4508 (1992); N. C. Gen. Stat. §8-53.7 (1986); Ohio Rev. Code Ann. §2317.02 (1995); Okla. Stat., Tit. 59, §1261.6 (1991); Ore. Rev. Stat. §40.250 (1991); R. I. Gen. Laws §§5-37.3-3, 5-37.3-4 (1995); S. C. Code Ann. §19-11-95 (Supp. 1995); S. D. Codified Laws §36-26-30 (1994); Tenn. Code Ann. §63-23-107 (1990); Tex. Rule Civ. Evid. 510; Utah Rule Evid. 506; Vt. Rule Evid. 503; Va. Code Ann. §8.01-400.2 (1992); Wash. Rev. Code §18.19.180 (1994); W. Va. Code §30-30-12 (1993); Wis. Stat. §905.04 (1993-1994); Wyo. Stat. §33-38-109 (Supp. 1995).

[18] *See, e.g.,* Me. Rev. Stat. Ann., Tit. 32, §7005 (1964); N. H. Rev. Stat. Ann. §330 A:19 (1995); N. C. Gen. Stat. §8-53.7 (1986); Va. Code Ann. §8.01-400.2 (1992).

[19] Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

Justice Scalia, with whom The Chief Justice joins, dissenting.

In the past, this Court has well understood that the particular value the courts are distinctively charged with preserving--justice--is severely harmed by contravention of "the fundamental principle that `the public . . . has a right to every man's evidence.' " *Trammel* v. *United States,* 445 U.S. 40, 50 (1980) (citation omitted). Testimonial privileges, it has said, "*are not lightly created nor expansively construed,* for they are in derogation of the search for truth." *United States* v. *Nixon,* 418 U.S. 683, 710 (1974) (emphasis added). Adherence to that principle has caused us, in the Rule 501 cases we have considered to date, to reject new privileges, see *University of Pennsylvania* v. *EEOC,* 493 U.S. 182 (1990) (privilege against disclosure of academic peer review materials); *United States* v. *Gillock,* 445 U.S. 360 (1980) (privilege against disclosure of "legislative acts" by member of state legislature), and even to construe narrowly the scope of existing privileges, see, *e.g., United States* v. *Zolin,* 491 U.S. 554, 568-570 (1989) (permitting *in camera* review of documents alleged to come within crime fraud exception to attorney client privilege); *Trammel, supra* (holding that voluntary testimony by spouse is not covered by husband wife privilege). The Court today ignores this traditional judicial preference for the truth, and ends up creating a privilege that is new, vast, and ill defined. I respectfully dissent.

The case before us involves confidential communications made by a police officer to a state licensed clinical social worker in the course of psychotherapeutic counseling. Before proceeding to a legal analysis of the case, I must observe that the Court makes its task deceptively simple by the manner in which it proceeds. It begins by characterizing the issue as "whether it is appropriate for federal courts to recognize a `psychotherapist privilege,' " *ante,* at 1, and devotes almost all of its opinion to that question. Having answered that question (to its satisfaction) in the affirmative, it then devotes *less than a page of text* to answering in the affirmative the small remaining question whether "the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy," *ante,* at 13.

Of course the prototypical evidentiary privilege analogous to the one asserted here--the lawyer client privilege--is not identified by the broad area of advice giving practiced by the person to whom the privileged communication is given, but rather by the *professional status* of that person. Hence, it seems a long step from a lawyer client privilege to a tax advisor client or accountant client privilege. But if one recharacterizes it as a "legal advisor" privilege, the extension seems like the most natural thing in the world. That is the illusion the Court has produced here: It first frames an overly general question ("Should there be a psychotherapist privilege?") that can be answered in the negative only by excluding from protection office consultations with professional psychiatrists (*i.e.,* doctors) and clinical psychologists. And then, having answered that in the affirmative, it comes to the *only* question that the facts of this case present ("Should there be a social worker client privilege with regard to psychotherapeutic counseling?") with the answer seemingly a foregone conclusion. At that point, to conclude against the privilege one must subscribe to the difficult proposition, "Yes, there is a psychotherapist privilege, but not if the psychotherapist is a social worker."

Relegating the question actually posed by this case to an afterthought makes the impossible possible in a number of wonderful ways. For example, it enables the Court to treat the Proposed Federal Rules of Evidence developed in 1972 by the Judicial Conference Advisory Committee as strong support for its holding, whereas they in fact counsel clearly and directly against it. The Committee did indeed recommend a "psychotherapist privilege" of sorts; but more precisely, and more relevantly, it recommended a privilege for psychotherapy conducted by "a person authorized to practice medicine" or

"a person licensed or certified as a psychologist," Proposed Rule of Evidence 504, 56 F. R. D. 183, 240 (1972), which is to say that *it recommended against the privilege at issue here*. That condemnation is obscured, and even converted into an endorsement, by pushing a "psychotherapist privilege" into the center ring. The Proposed Rule figures prominently in the Court's explanation of why that privilege deserves recognition, *ante,* at 12-13, and is ignored in the single page devoted to the sideshow which happens to be the issue presented for decision, *ante,* at 13-14.

This is the most egregious and readily explainable example of how the Court's misdirection of its analysis makes the difficult seem easy; others will become apparent when I give the social worker question the fuller consideration it deserves. My initial point, however, is that the Court's very methodology--giving serious consideration only to the more general, and much easier, question--is in violation of our duty to proceed cautiously when erecting barriers between us and the truth.

To say that the Court devotes the bulk of its opinion to the much easier question of psychotherapist patient privilege is not to say that its answer to that question is convincing. At bottom, the Court's decision to recognize such a privilege is based on its view that "successful [psychotherapeutic] treatment" serves "important private interests" (namely those of patients undergoing psychotherapy) as well as the "public good" of "[t]he mental health of our citizenry." *Ante,* at 7-9. I have no quarrel with these premises. Effective psychotherapy undoubtedly is beneficial to individuals with mental problems, and surely serves some larger social interest in maintaining a mentally stable society. But merely mentioning these values does not answer the critical question: are they of such importance, and is the contribution of psychotherapy to them so distinctive, and is the application of normal evidentiary rules so destructive to psychotherapy, as to justify making our federal courts occasional instruments of injustice? On that central question I find the Court's analysis insufficiently convincing to satisfy the high standard we have set for rules that "are in derogation of the search for truth." *Nixon,* 418 U. S., at 710.

When is it, one must wonder, that *the psychotherapist* came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios,* parents, siblings, best friends and bartenders--none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother child privilege.

How likely is it that a person will be deterred from seeking psychological counseling, or from being completely truthful in the course of such counseling, because of fear of later disclosure in litigation? And even more pertinent to today's decision, to what extent will the evidentiary privilege reduce that deterrent? The Court does not try to answer the first of these questions; and it *cannot possibly have any notion* of what the answer is to the second, since that depends entirely upon the scope of the privilege, which the Court amazingly finds it "neither necessary nor feasible to delineate," *ante,* at 16. If, for example, the psychotherapist can give the patient no more assurance than "A court will not be able to make me disclose what you tell me, unless you tell me about a harmful act," I doubt whether there would be much benefit from the privilege at all. That is not a fanciful example, at least with respect to extension of the psychotherapist privilege to social workers. See Del. Code Ann., Tit. 24, §3913(2) (1987); Idaho Code §54-3213(2) (1994).

Even where it is certain that absence of the psychotherapist privilege will inhibit disclosure of the information, it is not clear to me that that is an unacceptable state of affairs. Let us assume the very worst in the circumstances of the present case: that to be truthful about what was troubling her, the police officer who sought counseling would have to confess that she shot without reason, and wounded an innocent man. If (again to assume the worst) such an act constituted the crime of negligent wounding under Illinois law, the officer would of course have the absolute right not to admit that she shot without reason in criminal court. But I see no reason why she should be enabled *both* not to admit it in criminal

court (as a good citizen should), *and* to get the benefits of psychotherapy by admitting it to a therapist who cannot tell anyone else. And even less reason why she should be enabled to *deny* her guilt in the criminal trial--or in a civil trial for negligence--while yet obtaining the benefits of psychotherapy by confessing guilt to a social worker who cannot testify. It seems to me entirely fair to say that if she wishes the benefits of telling the truth she must also accept the adverse consequences. To be sure, in most cases the statements to the psychotherapist will be only marginally relevant, and one of the purposes of the privilege (though not one relied upon by the Court) may be simply to spare patients needless intrusion upon their privacy, and to spare psychotherapists needless expenditure of their time in deposition and trial. But surely this can be achieved by means short of excluding even evidence that is of the most direct and conclusive effect.

The Court confidently asserts that not much truth finding capacity would be destroyed by the privilege anyway, since "[w]ithout a privilege, much of the desirable evidence to which litigants such as petitioner seek access . . . is unlikely to come into being." *Ante,* at 10. If that is so, how come psychotherapy got to be a thriving practice before the "psychotherapist privilege" was invented? Were the patients paying money to lie to their analysts all those years? Of course the evidence generating effect of the privilege (if any) depends entirely upon its scope, which the Court steadfastly declines to consider. And even if one assumes that scope to be the broadest possible, is it really true that most, or even many, of those who seek psychological counseling have the worry of litigation in the back of their minds? I doubt that, and the Court provides no evidence to support it.

The Court suggests one last policy justification: since psychotherapist privilege statutes exist in all the States, the failure to recognize a privilege in federal courts "would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." *Ante,* at 11. This is a novel argument indeed. A sort of inverse pre-emption: the truth seeking functions of *federal* courts must be adjusted so as not to conflict with the policies *of the States*. This reasoning cannot be squared with *Gillock,* which declined to recognize an evidentiary privilege for Tennessee legislators in federal prosecutions, even though the Tennessee Constitution guaranteed it in state criminal proceedings. *Gillock,* 445 U. S., at 368. Moreover, since, as I shall discuss, state policies regarding the psychotherapist privilege vary considerably from State to State, *no* uniform federal policy can possibly honor most of them. If furtherance of state policies is the name of the game, rules of privilege in federal courts should vary from State to State, *à la Erie*.

The Court's failure to put forward a convincing justification of its own could perhaps be excused if it were relying upon the unanimous conclusion of state courts in the reasoned development of their common law. It cannot do that, since *no* State has such a privilege apart from legislation. [1] What it relies upon, instead, is-the fact that all 50 States and the District of Columbia have [1] *enacted into law* [2] *some form* of psychotherapist privilege." *Ante,* at 10 (emphasis added). Let us consider both the verb and its object: The fact [1] that all 50 States have *enacted* this privilege argues not *for,* but *against,* our adopting the privilege judicially. At best it suggests that the matter has been found not to lend itself to judicial treatment--perhaps because the pros and cons of adopting the privilege, or of giving it one or another shape, are not that clear; or perhaps because the rapidly evolving uses of psychotherapy demand a flexibility that only legislation can provide. At worst it suggests that the privilege commends itself only to decisionmaking bodies in which reason is tempered, so to speak, by political pressure from organized interest groups (such as psychologists and social workers), and decisionmaking bodies that are not overwhelmingly concerned (as courts of law are and should be) with justice.

And the phrase [2] "some form of psychotherapist privilege" covers a multitude of difficulties. The Court concedes that there is "divergence among the States concerning the types of therapy relationships protected and the exceptions recognized." *Ante,* at 12, n. 13. To rest a newly announced federal common law psychotherapist privilege, assertable from this day forward in all federal courts, upon "the States' *unanimous judgment* that some form of psychotherapist privilege is appropriate," *ibid.* (emphasis added), is rather like announcing a new, immediately applicable, federal common law of torts, based upon the

States' "unanimous judgment" that *some* form of tort law is appropriate. In the one case as in the other, the state laws vary to such a degree that the parties and lower federal judges confronted by the new "common law" have barely a clue as to what its content might be.

Turning from the general question that was not involved in this case to the specific one that is: The Court's conclusion that a social worker psychotherapeutic privilege deserves recognition is even less persuasive. In approaching this question, the fact that five of the state legislatures that have seen fit to enact "some form" of psychotherapist privilege have elected not to extend *any form* of privilege to social workers, see *ante*, at 15, n. 17, ought to give one pause. So should the fact that the Judicial Conference Advisory Committee was similarly discriminating in its conferral of the proposed Rule 504 privilege, see *supra*. The Court, however, has "no hesitation in concluding . . . that the federal privilege should also extend" to social workers, *ante*, at 13--and goes on to prove that by polishing off the reasoned analysis with a topic sentence and two sentences of discussion, as follows (omitting citations and non-germane footnote):

"The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals." *Ante*, at 13-14.

So much for the rule that privileges are to be narrowly construed.

Of course this brief analysis--like the earlier, more extensive, discussion of the general psychotherapist privilege--contains no explanation of why the psychotherapy provided by social workers is a public good of such transcendent importance as to be purchased at the price of occasional injustice. Moreover, it considers only the respects in which social workers providing therapeutic services are *similar* to licensed psychiatrists and psychologists; not a word about the respects in which they are different. A licensed psychiatrist or psychologist is an expert in psychotherapy--and that may suffice (though I think it not so clear that this Court should make the judgment) to justify the use of extraordinary means to encourage counseling with him, as opposed to counseling with one's rabbi, minister, family or friends. One must presume that a social worker does *not* bring this greatly heightened degree of skill to bear, which is alone a reason for not encouraging that consultation as generously. Does a social worker bring to bear at least a significantly heightened degree of skill--more than a minister or rabbi, for example? I have no idea, and neither does the Court. The social worker in the present case, Karen Beyer, was a "licensed clinical social worker" in Illinois, App. 18, a job title whose training requirements consist of "master's degree in social work from an approved program," and "3,000 hours of satisfactory, supervised clinical professional experience." Ill. Comp. Stat., ch. 225, §20/9 (1994). It is not clear that the degree in social work requires *any* training in psychotherapy. The "clinical professional experience" apparently will impart some such training, but only of the vaguest sort, judging from the Illinois Code's definition of "[c]linical social work practice," viz., "the providing of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders in individuals, families and groups based on knowledge and theory of psychosocial development, behavior, psychopathology, unconscious motivation, interpersonal relationships, and environmental stress." Ch. 225, §20/3(5). But the rule the Court announces today--like the Illinois evidentiary privilege which that rule purports to respect, Ch. 225, §20/16. [2] --is not limited to "licensed clinical social workers," but includes all "licensed social workers." "Licensed social workers" may also provide "mental health services" as described in §20/3(5), so long as it is done under supervision of a licensed clinical social worker. And the training requirement for a "licensed social worker" consists of either (a) "a degree from a graduate program of social work" approved by the State, or (b) "a degree in social work from an undergraduate program" approved by the State, plus "3 years of supervised professional experience." Ch. 225, §20/9A. With due respect, it does not seem to me that any of this training is comparable in its rigor (or indeed in the precision of its subject) to the training of the other experts (lawyers) to whom this Court has accorded a privilege, or even of the experts (psychiatrists and

psychologists) to whom the Advisory Committee and this Court proposed extension of a privilege in 1972. Of course these are only *Illinois'* requirements for "social workers." Those of other States, for all we know, may be even less demanding. Indeed, I am not even sure there is a nationally accepted definition of "social worker," as there is of psychiatrist and psychologist. It seems to me quite irresponsible to extend the so called "psychotherapist privilege" to all licensed social workers, nationwide, without exploring these issues.

Another critical distinction between psychiatrists and psychologists, on the one hand, and social workers, on the other, is that the former professionals, in their consultations with patients, *do nothing but psychotherapy*. Social workers, on the other hand, interview people for a multitude of reasons. The Illinois definition of "[l]icensed social worker," for example, is as follows:

"Licensed social worker" means a person who holds a license authorizing the practice of social work, which includes social services to individuals, groups or communities in any one or more of the fields of social casework, social group work, community organization for social welfare, social work research, social welfare administration or social work education." Ch. 225, §20/3(9).

Thus, in applying the "social worker" variant of the "psychotherapist" privilege, it will be necessary to determine whether the information provided to the social worker was provided to him *in his capacity as a psychotherapist*, or in his capacity as an administrator of social welfare, a community organizer, etc. Worse still, if the privilege is to have its desired effect (and is not to mislead the client), it will presumably be necessary for the social caseworker to advise, as the conversation with his welfare client proceeds, which portions are privileged and which are not.

Having concluded its three sentences of reasoned analysis, the Court then invokes, as it did when considering the psychotherapist privilege, the "experience" of the States--once again an experience I consider irrelevant (if not counter indicative) because it consists entirely of legislation rather than common law decision. It says that "the vast majority of States explicitly extend a testimonial privilege to licensed social workers." *Ante,* at 15. There are two elements of this impressive statistic, however, that the Court does not reveal.

First--and utterly conclusive of the irrelevance of this supposed consensus to the question before us--the majority of the States that accord a privilege to social workers do *not* do so as a subpart of a "psychotherapist" privilege. The privilege applies to *all* confidences imparted to social workers, and not just those provided in the course of psychotherapy. [3] In Oklahoma, for example, the social worker privilege statute prohibits a licensed social worker from disclosing, or being compelled to disclose, "*any information* acquired from persons consulting the licensed social worker in his or her professional capacity" (with certain exceptions to be discussed *infra*). Okla. Stat., Tit. 59, §1261.6 (1991) (emphasis added). The social worker's "professional capacity" is expansive, for the "practice of social work" in Oklahoma is defined as:

"[T]he professional activity of helping individuals, groups, or communities enhance or restore their capacity for physical, social and economic functioning and the professional application of social work values, principles and techniques in areas such as clinical social work, social service administration, social planning, social work consultation and social work research to one or more of the following ends: Helping people obtain tangible services; counseling with individuals families and groups; helping communities or groups provide or improve social and health services; and participating in relevant social action. The practice of social work requires knowledge of human development and behavior; of social economic and cultural institutions and forces; and of the interaction of all of these factors. Social work practice includes the teaching of relevant subject matter and of conducting research into problems of human behavior and conflict." Tit. 59, §1250.1(2) (1991).

Thus, in Oklahoma, as in most other States having a social worker privilege, it is not a subpart or even a derivative of the psychotherapist privilege, but rather a piece of special legislation similar to that achieved

by many other groups, from accountants, see, *e.g.*, Miss. Code Ann. §73-33-16(2) (1995) (certified public accountant "shall not be required by any court of this state to disclose, and shall not voluntarily disclose" client information), to private detectives, see, *e.g.*, Mich. Comp. Laws §338.840 (1979) ("Any communications . . . furnished by a professional man or client to a [licensed private detective], or any information secured in connection with an assignment for a client, shall be deemed privileged with the same authority and dignity as are other privileged communications recognized by the courts of this state"). [4] These social worker statutes give no support, therefore, to the theory (importance of psychotherapy) upon which the Court rests its disposition.

Second, the Court does not reveal the enormous degree of disagreement among the States as to the scope of the privilege. It concedes that the laws of four States are subject to such gaping exceptions that they are " `little better than no privilege at all,' " *ante,* at 16 and n. 18, so that they should more appropriately be categorized with the five States whose laws contradict the action taken today. I would add another State to those whose privilege is illusory. See Wash. Rev. Code §18.19.180 (1994) (disclosure of information required "[i]n response to a subpoena from a court of law"). In adopting *any* sort of a social worker privilege, then, the Court can at most claim that it is following the legislative "experience" of 40 States, and contradicting the "experience" of 10.

But turning to those States that do have an appreciable privilege of some sort, the diversity is vast. In Illinois and Wisconsin, the social worker privilege does not apply when the confidential information pertains to homicide, see Ill. Comp. Stat., ch. 740, §110/10(a)(9) (1994); Wis. Stat. §905.04(4)(d) (1993-1994), and in the District of Columbia when it pertains to any crime "inflicting injuries" upon persons, see D. C. Code §14-307(a)(1) (1995). In Missouri, the privilege is suspended as to information that pertains to a criminal act, see Mo. Rev. Stat. §337.636(2) (1994), and in Texas when the information is sought in any criminal prosecution, compare Tex. Rule Civ. Evid. 510(d) with Tex. Rule Crim. Evid. 501 *et seq*. In Kansas and Oklahoma, the privilege yields when the information pertains to "violations of any law," see Kan. Stat. Ann. §65-6315(a)(2) (Supp. 1990); Okla. Stat., Tit. 59, §1261.6(2) (1991); in Indiana, when it reveals a "serious harmful act," see Ind. Code Ann. §25-23.6-6-1(2) (1995); and in Delaware and Idaho, when it pertains to any "harmful act," see Del. Code Ann., Tit. 24, §3913(2) (1987); Idaho Code §54-3213(2) (1994). In Oregon, a state employed social worker like Karen Beyer loses the privilege where her supervisor determines that her testimony "is necessary in the performance of the duty of the social worker as a public employee." See Ore. Rev. Stat. §40.250(5) (1991). In South Carolina, a social worker is forced to disclose confidences "when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding." See S. C. Code Ann. §19-11-95(D)(1) (Supp. 1995). The majority of social worker privilege States declare the privilege inapplicable to information relating to child abuse. [5] And the States that do not fall into any of the above categories provide exceptions for commitment proceedings, for proceedings in which the patient relies on his mental or emotional condition as an element of his claim or defense, or for communications made in the course of a court ordered examination of the mental or emotional condition of the patient. [6]

Thus, although the Court is technically correct that "the vast majority of States explicitly extend a testimonial privilege to licensed social workers," *ante,* at 15, that uniformity exists only at the most superficial level. No State has adopted the privilege without restriction; the nature of the restrictions varies enormously from jurisdiction to jurisdiction; and 10 States, I reiterate, effectively reject the privilege entirely. It is fair to say that there is scant national consensus even as to the propriety of a social worker psychotherapist privilege, and none whatever as to its appropriate scope. In other words, the state laws to which the Court appeals for support demonstrate most convincingly that adoption of a social worker psychotherapist privilege is a job for Congress.

* * *

The question before us today is not whether there should be an evidentiary privilege for social workers providing therapeutic services. Perhaps there should. But the question before us is whether (1) the need for that privilege is so clear, and (2) the desirable contours of that privilege are so evident, that it is appropriate for this Court to craft it in common law fashion, under Rule 501. Even if we were writing on a clean slate, I think the answer to that question would be clear. But given our extensive precedent to the effect that new privileges "in derogation of the search for truth" "are not lightly created," *United States* v. *Nixon*, 418 U. S., at 710, the answer the Court gives today is inexplicable.

In its consideration of this case, the Court was the beneficiary of no fewer than 14 *amicus* briefs supporting respondents, most of which came from such organizations as the American Psychiatric Association, the American Psychoanalytic Association, the American Association of State Social Work Boards, the Employee Assistance Professionals Association, Inc., the American Counseling Association, and the National Association of Social Workers. Not a single *amicus* brief was filed in support of petitioner. That is no surprise. There is no self interested organization out there devoted to pursuit of the truth in the federal courts. The expectation is, however, that *this Court* will have that interest prominently--indeed, primarily--in mind. Today we have failed that expectation, and that responsibility. It is no small matter to say that, in some cases, our federal courts will be the tools of injustice rather than unearth the truth where it is available to be found. The common law has identified a few instances where that is tolerable. Perhaps Congress may conclude that it is also tolerable for the purpose of encouraging psychotherapy by social workers. But that conclusion assuredly does not burst upon the mind with such clarity that a judgment in favor of suppressing the truth ought to be pronounced by this honorable Court.

I respectfully dissent.

Notes of the Dissent

[1] The Court observes: "In 1972 the members of the Judicial Conference Advisory Committee noted that the common law `had indicated a disposition to recognize a psychotherapist patient privilege when legislatures began moving into the field.' Proposed Rules, 56 F. R. D., at 242 (citation omitted)." *Ante*, at 12. The sole support the Committee invoked was a student Note entitled Confidential Communications to a Psychotherapist: A New Testimonial Privilege, 47 Nw. U. L. Rev. 384 (1952). That source, in turn, cites (and discusses) a single case recognizing a common law psychotherapist privilege: the unpublished opinion of a judge of the Circuit Court of Cook County, Illinois, *Binder* v. *Ruvell*, No. 52 C 2535 (June 24, 1952)--which, in turn, cites no other cases.

I doubt whether the Court's failure to provide more substantial support for its assertion stems from want of trying. Respondents and all of their *amici* pointed us to only four other state court decisions supposedly adopting a common law psychotherapist privilege. See Brief for the American Psychiatric Association et al. as *Amici Curiae* 8, n. 5; Brief for the American Psychoanalytic Association et al. as *Amici Curiae* 15-16; Brief for the American Psychological Association as *Amicus Curiae* 8. It is not surprising that the Court thinks it not worth the trouble to cite them: **(1)** In *In re "B"*, 482 Pa. 471, 394 A. 2d 419 (1978), the opinions of four of the seven Justices *explicitly rejected* a nonstatutory privilege; and the two Justices who did recognize one recognized, not a common law privilege, but rather (*mirabile dictu*) a privilege "constitutionally based," "emanat[ing] from the penumbras of the various guarantees of the Bill of Rights, . . . as well as from the guarantees of the Constitution of this Commonwealth." *Id.*, at 484, 394 A. 2d, at 425. **(2)** *Allred* v. *State*, 554 P. 2d 411 (Alaska 1976), held that no privilege was available in the case before the court, so what it says about the existence of a common law privilege is the purest dictum. **(3)** *Falcon* v. *Alaska Pub. Offices Comm'n*, 570 P. 2d 469 (1977), a later Alaska Supreme Court case, proves the last statement. It *rejected the* claim by a physician that he did not have to disclose the names of his patients, even though some of the physician's practice consisted of psychotherapy; it made no mention of *Allred*'s dictum that there was a common law psychiatrist patient privilege (though if that existed it would seem relevant), and cited *Allred* only for the proposition that there was no *statutory* privilege, *id.*, at 473, n. 12. And finally, **(4)** *State* v. *Evans*, 104 Ariz. 434, 454 P. 2d 976 (1969), created a limited privilege, applicable to court ordered examinations to determine competency to stand trial, *which tracked a privilege that had been legislatively created after the defendant's examination*.

In light of this dearth of case support--from all the courts of 50 States, down to the county court level--it seems to me the Court's assertion should be revised to read: "The common law had indicated *scant* disposition to recognize a psychotherapist patient privilege when (*or even after*) legislatures began moving into the field."

[2] Section 20/16 is the provision of the Illinois Statutes cited by the Court to show that Illinois has "explicitly extend[ed] a testimonial privilege to licensed social workers." *Ante*, at 15, and n. 17. The Court elsewhere observes that respondent's communications to Beyer would have been privileged in state court under another provision of the Illinois Statutes, the Mental Health and Developmental Disabilities Confidentiality Act, Ill. Comp. Stat., ch. 740, §110/10 (1994). *Ante*, at 14, n. 15. But the privilege conferred by §110/10 extends to an even more ill defined class: not only to *licensed* social workers, but to *all* social workers, to nurses, and indeed to "any other person not prohibited by law from providing [mental health or developmental disabilities] services or from holding himself out as a therapist if the recipient reasonably believes that such person is permitted to do so." Ch. 740, §110/2.

[3] *See* Ariz. Rev. Stat. Ann. §32-3283 (1992); Ark. Code Ann. §17-46-107 (1995); Del. Code Ann., Tit. 24, §3913 (1987); Idaho Code §54-3213 (1994); Ind. Code §25-23.6-6-1 (1993); Iowa Code §154C.5 and §622.10 (1987); Kan. Stat. Ann. §65-6315 (Supp. 1990); Me. Rev. Stat. Ann., Tit. 32, §7005 (1988); Mass. Gen. Laws §112:135A (1994); Mich. Comp. Laws Ann. §339.1610 (1992); Miss. Code Ann. §73-53-29 (1995); Mo. Rev. Stat. §337.636 (1994); Mont. Code Ann. §37-22-401 (1995); Neb. Rev. Stat. §71-1,335 (Supp. 1994); N. J. Stat. Ann. §45:15BB 13 (1995); N. M. Stat. Ann. §61-31-24 (1993); N. Y. Civ. Prac. §4508 (McKinney 1992); N. C. Gen. Stat. §8-53.7 (1986); Ohio Rev. Code Ann. §2317.02(G)(1) (1995); Okla. Stat., Tit. 59 §1261.6 (1991); Ore. Rev. Stat. §40.250 (1991); S. D. Codified Laws §36-26-30 (1994); Tenn. Code Ann. §63-23-107 (1990); Wash. Rev. Code §18.19.180 (1994); W. Va. Code§30-30-12 (1993); Wyo. Stat. §33-38-109 (Supp. 1995).

[4] These ever multiplying evidentiary privilege statutes, which the Court today emulates, recall us to the original meaning of the word "privilege." It is a composite derived from the Latin words "privus" and "lex": private law.

[5] *See, e.g.*, Ariz. Rev. Stat. Ann. §32-3283 (1992); Ark. Code Ann. §17-46-107(3) (1995); Cal. Evid. Code Ann. §1027 (West 1995); Colo. Rev. Stat. §19-3-304 (Supp. 1995); Del. Rule Evid. 503(d)(4); Ga. Code Ann. §19-7-5(c)(1)(G) (1991); Idaho Code §54-3213(3) (1994); La. Code Evid. Ann., Art. 510(B)(2)(k) (West 1995); Md. Cts. & Jud. Proc. Code Ann. §9-121(e)(4) (1995); Mass. Gen. Laws, §119:51A (1994); Mich. Comp. Laws Ann. §722.623 (1992 Supp. Pamph.); Minn. Stat. §595.02.2(a) (1988); Miss. Code Ann. §73-53-29(e) (1995); Mont. Code Ann. §37-22-401(3) (1995); Neb. Rev. Stat. §28-711 (1995); N. M. Stat. Ann. §61-31-24(C) (Supp. 1995); N. Y. Civ. Prac. §4508(a)(3) (McKinney 1992); Ohio Rev. Code Ann. §2317.02(G)(1)(a) (1995); Ore. Rev. Stat. §40.250(4) (1991); R. I. Gen. Laws §5-37.3-4(b)(4) (1995); S. D. Codified Laws §36-26-30(3) (1994); Tenn. Code Ann. §63-23-107(b) (1990); Vt. Rule Evid. 503(d)(5); W. Va. Code §30-30-12(a)(4) (1993); Wyo. Stat. §14-3-205 (1994).

[6] *See, e.g.*, Fla. Stat. §90.503(4) (Supp. 1992) (all three exceptions); Ky. Rule Evid. 507(c) (all three); Nev. Rev. Stat. §49.245 (1993) (all three); Utah Rule Evid. 506(d) (all three); Conn. Gen. Stat. §52-146q(c)(1) (1995) (commitment proceedings and proceedings in which patient's mental condition at issue); Iowa Code §622.10 (1987) (proceedings in which patient's mental condition at issue).

An unlicensed supervisee of Pennsylvania clinical psychologist Polly Rost gave psychological treatment to a female minor, S.P., for recurring headaches allegedly caused by a fall at the York Jewish Community Center (YJCC). S.P.'s mother filed suit against YJCC and gave permission for Rost to provide treatment records to the mother's attorney. Rost later received a subpoena from YJCC's attorney for the same records. Rost complied with the subpoena without seeking permission from S.P.'s mother. The Pennsylvania Board of Psychology found that Psychologist Rost had violated the rules of the Board by not obtaining the consent of her client before releasing the information, and the Pennsylvania Supreme Court upheld that finding.

Polly **ROST**

v.

State **BOARD** of Psychology,

659 A.2d 626 (Pa. 1995)

OPINION

Polly Rost, a clinical psychologist licensed to practice in the Commonwealth of Pennsylvania, appeals from an order of the State Board of Psychology which reprimanded her for having violated Sections 8(a)(9) and (11) of the Professional Psychologists Practice Act (Act). [1] We affirm.

The facts in this case are not in dispute, having been stipulated to by the parties. This case originated in February of 1987 when an unlicensed supervisee of Rost began giving psychological treatment to S.P., a female juvenile. S.P. was treated in Rost's practice for recurring headaches that allegedly were caused when S.P. fell and struck her head at the York Jewish Community Center (YJCC). In March of 1988, S.P.'s mother filed suit against the YJCC on S.P.'s behalf, alleging that YJCC's negligence had caused her daughter physical and emotional harm.

In December of 1989, YJCC's attorney mailed Rost a subpoena requesting the treatment records for S.P. Rost subsequently provided YJCC with these treatment records. Although S.P.'s mother had previously signed a release allowing Rost to turn over the records to S.P.'s own attorney, Rost had not obtained permission to release the records to YJCC. Furthermore, Rost did not attempt to contact S.P.'s mother, or S.P.'s attorney, to obtain permission to release the records or to advise them of her intention to release the records prior to doing so. Rost did not attempt to gain permission because she believed that she was already authorized to release records to YJCC based upon the release which had previously been given to S.P.'s attorney.

On January 25, 1993, the Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs (BPOA) issued an order to show cause in which it charged Rost [with having violated three sections of the Act: (1) Section 8(a)(9) of the Act [2] through her violation of Ethical Principle 5 of the Board Regulations [3] governing the confidentiality of client information; (2) Section 8(a)(13) of the Act [4] by failing to perform a statutory obligation imposed upon licensed psychologists; [5] and (3) Section 8(a)(11) of the Act [6] by engaging in unprofessional conduct.

On June 17, 1993, a hearing was held before Frank C. Kahoe, a hearing examiner appointed by the Board. Subsequently, on August 30, 1993, the hearing examiner issued a proposed adjudication and order in which he concluded that Rost was not subject to disciplinary action under Section 8(a) of the Act, because S.P. had waived the client-psychologist privilege by asserting a claim for emotional damages in her lawsuit against YJCC. In response, the BPOA filed a brief on exceptions. The Board disagreed with the hearing examiner's recommendation, and by an amended order dated April 18, 1994, [7] officially reprimanded Rost for having violated Section 8(a)(9) and (11) of the Act. [8] Rost's appeal to this Court followed. [9]

On appeal, Rost presents the following questions for our review: (1) whether Rost violated Sections 8(a)(9) and (11) of the Act by releasing confidential medical records when she did so in response to a valid subpoena and where her client had previously authorized the release of the same records to the client's attorney; (2) whether the Board improperly found that Rost violated Sections 8(a)(9) and (11) of the Act since Ethical Principle 5 of the Board Regulations, upon which the Board's findings were based, is void for vagueness; and (3) whether Rost was exempted by Ethical Principle 5 of the Board Regulations from her duty to not release the records and thereby did not violate Sections 8(a)(9) and (11) of the Act.

Rost's first argument is that she did not violate Sections 8(a)(9) and (11) of the Act because she released the records pursuant to a subpoena and S.P. waived her right to confidentiality by initiating a lawsuit in which her psychological condition was at issue. In support of this position, Rost points out that the trial court in S.P.'s lawsuit against YJCC ultimately ruled that S.P. had waived her privilege of confidentiality. (Respondent's Exhibit C, Reproduced Record (R.R.) 5d.) She further claims that S.P.'s attorney had a duty to disclose the records to YJCC during discovery. Accordingly, Rost argues that she did not violate Ethical Principle 5 of the Board Regulations, since S.P. no longer had an expectation of privacy in regard to the records.

However, we must agree with the Board that Rost's argument is misplaced. We are not faced with the question of whether YJCC should have been barred from introducing S.P.'s records at trial based on the psychologist-client privilege. That is a determination properly made by a judge and not by a psychologist lacking formal legal training. See Moore v. Bray, 10 Pa. 519 (1849); Commonwealth v. Hess, 270 Pa. Super. 501, 506, 411 A.2d 830, 833, appeal dismissed as improvidently granted, 499 Pa. 206, 452 A.2d 1011 (1979) (no claimant of a testimonial privilege can be the final arbiter of his own claim). At the time Rost released S.P.'s records to YJCC, she did not seek the consent of her client, professional legal advice or the imprimatur of a judge. Rather, she unilaterally decided to release S.P.'s records.

Rost is also mistaken when she attempts to equate the psychologist-client privilege with the rule of confidentiality found in the Code of Ethics for psychologists. Although the two are similar, the privilege is limited in scope to the question of admissibility of evidence in a civil or criminal trial. In interpreting the psychologist-client privilege, we are guided by the same rules that apply to the attorney-client privilege. Kalenevitch v. Finger, 407 Pa. Super. 431, 595 A.2d 1224 (1991). The privilege may be waived by the client as was ultimately found to have occurred in this case. [10] Waiver of the privilege may occur where the client places the confidential information at issue in the case. Premack v. J.C.J. Ogar, Inc., 148 F.R.D. 140 (E.D. Pa. 1993). It may also be waived where there is no longer an expectation of privacy regarding the information because the client has made it known to third persons. See Commonwealth v. Goldblum, 498 Pa. 455, 447 A.2d 234 (1982) (attorney-client privilege no longer exists where communications were publicly disclosed by direction of client.)

Nevertheless, the Code of Ethics for psychologists imposes a duty of confidentiality which extends beyond the testimonial privilege found in Section 5944 of the Judicial Code; [11] this duty is absolute and cannot be waived except after full disclosure and written authorization by the client. Unlike the privilege, it continues even when the information has been previously disclosed to third parties or is material to litigation initiated by the client. In the present case, Rost did not even attempt to obtain the consent of her client before releasing confidential information. Although S.P. was eventually found to have waived the psychologist-client privilege, this does not absolve Rost from her ethical duty of confidentiality. Rost had a duty to either obtain written permission to release the records from S.P. or challenge the propriety of the subpoena before a judge. Rost did neither. Instead, she unilaterally gave S.P.'s records to YJCC without consulting with S.P. or her attorney. Since the language of Ethical Principle 5 of the Board Regulations unambiguously prohibits this type of conduct, we must concur with the Board's conclusion that Rost violated Section 8(a)(9) of the Act. Additionally, we agree with the Board that Rost's breach of her duty of confidentiality constitutes unprofessional conduct in violation of Section 8(a)(11) of the Act.

Rost's second argument is that the Board improperly found that she violated Section 8(a)(9) and (11) of the Act by releasing the medical records since Ethical Principle 5 of the Board Regulations is void for vagueness. Rost argues that the language of Section 5944 of the Judicial Code and Ethical Principle 5 of the Board Regulations is vague because it does not sufficiently inform a psychologist who is issued a subpoena as to how to comply with his or her ethical obligations without violating a court order. Therefore, Rost claims Ethical Principle 5 of the Board Regulations is invalid. Rost concludes that the Board could not properly find that she violated a Board regulation or engaged in unprofessional conduct based on a violation of an invalid regulation.

We strongly disagree with Rost's argument. Ethical Principle 5 provides for the confidentiality of all client information obtained in a psychologist's practice except where the client has given his written permission to release the information or where there is a risk of imminent danger to another individual or society. [12] Its language is not vague; rather, it is plain and unambiguous. Rost may in fact have been confused by the conflicting obligations imposed by the rules of her profession and a court issued subpoena. However, any confusion which she might have had cannot be attributed to the clear prohibition against revealing confidential information contained in Ethical Principle 5 of the Board Regulations.

Whenever a professional in possession of confidential information is served with a subpoena, a conflict naturally arises between one's duty to the courts and one's duty of confidentiality towards one's client. In this respect, Rost is no different from the numerous other psychologists, doctors, lawyers, and clergymen who receive subpoenas in this Commonwealth each year. The value of a psychologist's, or other professional's, duty of confidentiality would be illusory if it could be overridden anytime a conflicting duty arose which was thought to be more important. Although Rost may have been placed in an unfavorable position, she is not excused from following the ethical guidelines of her profession which plainly forbid her from disclosing a client's records without her consent.

Rost argues that it is unreasonable to expect a psychologist, lacking formal legal training, to know the proper procedure to follow after receiving a subpoena. Rost apparently believes that she was in an untenable position in which she would have had to either violate the rules of professional conduct or disregard a subpoena. However, this argument is flawed. Rost could have challenged the subpoena in court or obtained permission from her client before releasing the information. If Rost was uncertain about her legal rights and responsibilities, she should have at least obtained advice from an attorney instead of unilaterally releasing her client's records. As a licensed psychologist, she had an obligation to be aware of the ethical duties which govern her profession. Having received the benefits of being licensed by the state, Rost cannot now argue that she is a "layman" who lacks the knowledge and training necessary to understand and comply with the Board's regulations. [13]

Rost's third argument is that her actions in releasing the medical records fall under the exception to Ethical Principle 5 of the Board Regulations which permits disclosure "when there is clear and imminent danger to an individual or to society." [14] 49 Pa. Code § 41.61. Rost argues that S.P.'s suit against YJCC was fraudulent and thereby created an "imminent danger" to YJCC and the Court of Common Pleas of York County. Only by releasing this information, Rost claims, was she able to prevent the danger "caused by fraudulent pleadings to the Commonwealth's Courts." (Petitioner's Brief, at 18.)

We may summarily dismiss this argument. The exception relied upon by Rost is very limited and does not encompass her situation. It only applies where a client poses a serious threat of killing or physically injuring a third person or group of persons. 49 Pa. Code § 41.61. While we condemn the filing of fraudulent pleadings, [15] it does not rise to the same level as serious physical harm. In this case, Rost does not allege that S.P. posed a threat of physical harm to others of any kind. Therefore, we agree with the Board that Rost's actions do not fall within any exception to Ethical Principle 5 of the Board Regulations.

Accordingly, we affirm the order of the Board which reprimanded Rost for having violated Sections 8(a)(9) and (11) of the Act.

JOSEPH T. DOYLE, Judge

ORDER

NOW, May 22, 1995, the order of the State Board of Psychology in the above-captioned matter is hereby affirmed.

Footnotes

[1] Act of March 23, 1972, P.L. 136, as amended, 63 P.S. § 1208(a)(9) and (11).

[2] Section 8(a)(9) authorizes the board to suspend, revoke, limit or restrict a license or reprimand a licensee for "violating a lawful regulation promulgated by the board, including, but not limited to, ethical regulations, ..." 63 P.S. § 1208(a)(9).

[3] 49 Pa. Code § 41.61. Ethical Principle 5(a) reads in pertinent part:

Psychologists may not, without the written consent of their clients or the client's authorized legal representative, or the client's guardian by order as a result of incompetency proceedings, be examined in a civil or criminal action as to information acquired in the course of their professional service on behalf of the client. Information may be revealed with the consent of the clients affected only after full disclosure to them and after their authorization. . . .

[4] 63 P.S. § 1208(a)(13).

[5] Section 5944 of the Judicial Code, 42 Pa. C.S. § 5944, states:

No psychiatrist or person who has been licensed . . . to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

[6] P.S. § 1208(a)(11).

[7] An original order had been entered on March 29, 1994, which incorrectly stated that Rost had been found to have violated Section 8(a)(13) of the Act.

[8] Although authorized to suspend or revoke Rost's license under Section 8(a) of the Act, as well as impose a one thousand dollar fine for each count under Section 11 of the Act, 63 P.S. § 1211, the Board chose to impose only a reprimand, the least burdensome penalty available.

[9] Our review of the Board's decision is limited to a determination of whether constitutional rights have been violated, whether an error of law has been committed, and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; see Makris v. Bureau of Professional and Occupational Affairs, 143 Pa. Commw. 456, 599 A.2d 279 (1991).

[10] Section 5944 of the Judicial Code, 42 Pa. C.S. § 5944, governing the psychologist-client privilege, does not expressly mention "waiver." However, it does state that the confidential communications between psychologists and their clients will be treated in the same way as under the attorney-client privilege. Furthermore, Section 5916 of the Judicial Code, 42 Pa. C.S. § 5916, governing the attorney-client privilege in civil matters, and Section 5928, 42 Pa. C.S. § 5928 of the Judicial Code, governing the privilege in criminal matters, both state that the privilege may be "waived." Therefore, the waiver principle is applicable to the psychologist-client privilege.

[11] In addition to looking at the clear and unambiguous language of Ethical Principle 5 of the Board Regulations, we find Rule 1.6 of the Pennsylvania Rules of Professional Conduct to be helpful in determining the scope of the Board Regulations. The Comment to Rule 1.6 reads in pertinent part:

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege . . . in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. . . .

We believe this language applies equally well to a comparison of the psychologist-client privilege and a psychologist's duty of confidentiality embodied in Ethical Principle 5 of the Board Regulations.

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[13] Rost also argues that the attorneys for S.P. and YJCC failed to fully comply with the rules of discovery and that she would not have released the information as she did if they had acted properly. However, we do not need to decide whether Rost's allegations are correct since the attorneys' behavior is not relevant to our assessment of Rost's conduct. Even if the attorneys acted unprofessionally, this would not excuse Rost's own unprofessional conduct.

[14] See supra note 12.

[15] We point out that there is nothing in the record before us which would support Rost's contention that S.P.'s pleadings were in fact fraudulent. Therefore, even if Rost's argument had merit on its face, we would have to dismiss it since it is not factually supported in the record. See Churilla v. Barner, 269 Pa. Super. 100, 105 n.6, 409 A.2d 83,

86 n.6 (1979) ("allegations of a pleading do not constitute part of a trial record unless made part of it by offer and admission or court direction").

New Jersey psychologist Maureen B. Smith treated Diane Runyon for a period of five years. Dr. Smith testified as part of a divorce hearing at the request of the husband of Ms. Runyon, and that testimony critical of the mental health of her client Mrs. Runyon. Diane Runyon filed a complaint for monetary damages against Dr. Smith and her employer, Psychological Associates, alleging that Dr. Smith violated the psychologist-patient privilege and the rules and regulations governing psychologists by providing fact and opinion testimony at the hearing that was based on information learned from counseling sessions with her client. Further, Diane Runyon alleged that Dr. Smith submitted a written report and certification that contained false and inaccurate information.

The State Supreme Court held that if a psychologist fails to raise the patient's privilege and discloses confidential information without a court determination that disclosure is required, the psychologist has breached the duty owed to the patient and the patient has a cause of action against the psychologist for the unauthorized disclosure of information obtained in the course of treatment.

Diane **RUNYON**

v.

Maureen B. **SMITH**, Ph.D**.,**

749 A.2d 852 (N.J. 2000)

Syllabus

This appeal concerns the psychologist-patient privilege.

On January 30, 1995, Diane Runyon sought and obtained a temporary restraining order (TRO) prohibiting her husband, Guy Runyon, from returning to the marital home. Mr. Runyon sought an immediate hearing on January 31, 1995, to contest the issuance of the TRO because he believed Diane Runyon posed a danger to their children. The record is silent as to whether Diane obtained notice of this hearing; she did not appear.

Mr. Runyon called Dr. Maureen Smith, a licensed clinical psychologist, as his first witness. Dr. Smith, who had treated Diane over a five-year period, expressed concern for the welfare and safety of the children. She testified that Diane did not have a history of a good relationship with the children; that Diane had been somewhat of an absentee mother in the past two years; that Diane had been physically and verbally abusive with her oldest son; and that Diane had an obsessive compulsive personality and was involved with a cult-like group. Dr. Smith testified that Mr. Runyon had an excellent relationship with his children and was the primary parent.

A close friend of Diane's also testified, stating that it would be in the best interest of the children to be with their father. Guy Runyon also testified. He confirmed the fact that Diane had used physical violence on their eldest son.

The Family Part judge, finding Dr. Smith's testimony very persuasive, modified the TRO by granting temporary custody of the children to Mr. Runyon.

Subsequent to the January hearing, Dr. Smith submitted to the court a written report dated June 19, 1995, wherein she was critical of Diane Runyon, concluding that it would be a mistake to expose the children to "the ideology of a woman with obvious thought disorders...." This report was relied on to severely restrict Diane's access to her children. Mr. Runyon was awarded custody of the children.

On January 21, 1997, Diane Runyon filed a complaint for monetary damages against Dr. Smith and her employer, Psychological Associates, alleging that Dr. Smith violated the psychologist-patient privilege and the rules and regulations governing psychologists by providing fact and opinion testimony at the January hearing that was based on information learned from counseling sessions with Diane. Further, Diane alleged that Dr. Smith submitted a written report and certification that contained false and inaccurate information.

After filing an answer to the complaint, Dr. Smith and Psychological Associates moved for summary judgment, arguing that the doctor's testimony at the January hearing was necessary to protect the best interests of the children. Diane Runyon filed a cross-motion, arguing that even if Dr. Smith was entitled to breach the privilege, the doctor did not have immunity to make false and inaccurate statements. The court granted partial summary judgment on the issue of piercing the privilege. The court reserved decision on the immunity issue.

In August 1997, Dr. Smith and Psychological Associates filed a second motion for summary judgment, arguing that false and inaccurate testimony by a witness in a judicial proceeding is immunized from liability. The court agreed and dismissed Diane Runyon's remaining claims with prejudice.

Diane Runyon appealed. The Appellate Division reversed the entry of summary judgment in favor of Dr. Smith and remanded for further proceedings. The Appellate Division reasoned that the three-pronged test must be satisfied in order to pierce the psychologist-patient privilege: 1) there must be a legitimate need for the evidence; 2) the evidence must be relevant and material to the issue to be decided; and 3) the information sought cannot be secured from any less intrusive means. The Appellate panel concluded that there was no attempt by the judge to apply this test and that the third prong of the test was not satisfied. More importantly, the panel concluded that there was no reasonable explanation for the submission of the January19th report. The Appellate Division found that Dr. Smith's testimony at the January hearing and her subsequent report violated the psychologist-patient privilege.

According to the Appellate Division, if a psychologist fails to raise the privilege of the patient and makes disclosure of confidential information without a determination by the court that disclosure is required, the psychologist has breached the duty owed to the patient and the patient has a cause of action against the psychologist for the unauthorized disclosure of confidential information received in the course of treatment.

The Supreme Court granted certification.

HELD: Judgment of the Appellate Division is affirmed substantially for the reasons expressed in the opinion of the Appellate Division. If a psychologist fails to raise the patient's privilege and discloses confidential information without a court determination that disclosure is required, the psychologist has breached the duty owed to the patient and the patient has a cause of action against the psychologist for the unauthorized disclosure of information obtained in the course of treatment.

1. On this inadequate record, the Court is unable in hindsight to assess whether the testimony of Mr. Runyon and Diane's friend provided an adequate basis for the temporary custody award. Nevertheless, Dr. Smith's testimony and her report violated the psychologist-patient privilege.

2. Nothing in this record demonstrates that the children were exposed to such a degree of danger that would trigger the statutory duty to warn.

3. The fact that Diane Runyon may not prevail on her claim for damages does not affect her right to pursue that claim.

JUSTICE O'HERN, dissenting, in which the CHIEF JUSTICE joins**,** notes that, even assuming that Diane Runyon could establish by competent expert testimony that Dr. Smith's conduct fell below the acceptable standard of care, there are no recoverable damages. The trial court has already determined that not only would Dr. Smith's evidence have been admissible in the custody action, the outcome of the custody dispute would have been the same whether or not the evidence was introduced; thus, no viable claim for emotional distress damages has been presented. This is a matter better suited to be addressed in the arena of professional responsibility.

Opinion

Per Curiam

We affirm the judgment of the Appellate Division substantially for the reasons set forth in its comprehensive opinion. Runyon v. Smith, 322 N.J. Super. 236, 730 A.2d 881 (1999). We add these observations to clarify the basis for our disposition and to address the concerns of our dissenting colleagues.

We recognize the dissent's concern about instances in which the psychologist-patient privilege must yield because of "the potential of harm to others." Runyon v. Smith, 163 N.J. 439, 749 A.2d 852, 2000 N.J. LEXIS 524, (O'Hern, J., dissenting). In Kinsella v. Kinsella, 150 N.J. 276, 316, 696 A.2d 556 (1997), adverting to that very concern, we observed that "because of the unique nature of custody determinations, the scope of the patient-psychiatrist privilege that may be claimed by parents in relation to custody issues poses more difficult problems that those posed by the scope of the privilege in other situations." We specifically acknowledged in Kinsella that courts in custody disputes "must strike a balance between the need to protect children who are in danger of abuse and neglect from unfit custodians and the compelling policy of facilitating the treatment of parents' psychological or emotional problems." Id. at 327.

We are not prepared on this inadequate record to agree unqualifiedly with the Appellate Division's conclusion that, even absent Dr. Smith's testimony, "there was sufficient evidence from plaintiff's friend and from Mr. Runyon to justify awarding temporary custody of the children to Mr. Runyon." 322 N.J. Super. at 245. We simply cannot assess in hindsight whether the testimony of Mr. Runyon and that of plaintiff's friend provided an adequate basis for the Family Part's temporary custody award. Nevertheless, all parties acknowledge that the Family Part did not conduct the in camera review contemplated by Kinsella, 150 N.J. at 328, and apparently did not make the appropriate determination on the record that evidence of fitness from other sources was inadequate. We also acknowledge that the hearing in question took place more than two years before Kinsella was decided. However, we cannot turn back the clock and determine now whether adherence to the Kinsella standards and procedures would have permitted the privilege to be pierced. Indisputably, those standards and procedures were not observed. We therefore conclude, as did the Appellate Division, Runyon, 322 N.J. Super. at 246, that "Dr. Smith's testimony at the January hearing and her subsequent report violated the psychologist-patient privilege."

We acknowledge that in certain circumstances a psychologist may have a duty to warn and protect third parties or the patient from imminent, serious physical violence. As part of that duty, the psychologist would be required to disclose confidential information obtained from a patient. See N.J.S.A. 2A:62A-16. Nothing in this record demonstrates that the children were exposed to danger of a degree that approached the level of danger that triggers the statutory duty to warn. Moreover, Dr. Smith's testimony occurred about six months after her last session with plaintiff. That six-month interval is itself inconsistent with the statutory standard of "imminent serious physical violence." N.J.S.A. 2A:62A-16b(1).

We also are in accord with the Appellate Division's conclusion that a psychologist who fails to assert her patient's privilege and discloses as a witness confidential information concerning that patient without a court determination that disclosure is required may be liable for damages to the patient. See Stempler v. Speidell, 100 N.J. 368, 375-77, 495 A.2d 857 (1985) (discussing liability of physicians in general for unauthorized disclosure of confidential information). The dissent argues persuasively, however, that

plaintiff incurred no recoverable damages as a result of Dr. Smith's disclosures, asserting that the result of the custody dispute would have been the same even if her testimony had been excluded. Runyon v. Smith, 2000 N.J. LEXIS 524, (O'Hern, J., dissenting). That plaintiff may not prevail on her claim for damages does not affect her right to pursue it. Because the issue is not before us, however, we express no view on the merits of plaintiff's claim.

Affirmed.

JUSTICES STEIN, COLEMAN, LONG, VERNIERO, and LAVECCHIA join in this opinion.

DISSENTBY: O'HERN

I agree with the substantive analysis of the Appellate Division's restatement of the manner in which a psychologist should exercise responsibility in preserving a patient's confidences. Those principles were set forth in our decision in Kinsella v. Kinsella, 150 N.J. 276, 696 A.2d 556 (1997). Resolution of the Kinsella issues is but the beginning of the analysis, not the end.

Psychologists labor under conflicting sets of duties. They have a duty to respect the confidences of a patient, but exceptions do exist. Psychologists cannot always ignore the potential for harm to others.

The seminal case regarding the duty of a psychiatrist [or psychologist] to protect against the conduct of a patient is Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In Tarasoff the plaintiffs alleged the defendant therapists had a duty to warn their daughter of the danger posed to her by one of the therapists' patients. The Tarasoff plaintiffs were parents of Tatiana Tarasoff, a young woman killed by a psychiatric patient. Two months prior to the killing, the patient informed his therapist that he intended to kill a young woman. Although the patient did not specifically name Tatiana as his intended victim, plaintiffs alleged, and the trial court agreed, that the defendant therapists could have readily identified the endangered person as Tatiana.

Applying Restatement (Second) of Torts § 315 (1965) to the facts before it, the Tarasoff court held the patient-therapist relationship was sufficient to support the imposition of an affirmative duty on the defendant for the benefit of third persons. Tarasoff, 17 Cal. 3d at 435, 131 Cal. Rptr. 14, 551 P.2d 334. The Tarasoff court ruled that when a psychotherapist determines, or, pursuant to the standards of the profession, should determine, that a patient presents a serious danger of violence to another the therapist incurs an obligation to use reasonable care to protect the intended victim against such danger. Tarasoff, 17 Cal. 3d at 435, 131 Cal. Rptr. 14, 551 P.2d 334. According to the Tarasoff court, discharge of the duty may require the therapist to take whatever steps are necessary under the circumstances, including possibly warning the intended victim or notifying law enforcement officials.

[Petersen v. State, 100 Wn.2d 421, 671 P.2d 230, 236 (Wash. 1983) (emphasis added).]

This psychologist may have erred in not asserting her patient's privilege. She may have believed that she was under a duty to do so, being in the presence of a court that expressed no concern for the propriety of her conduct. One thing is clear, there is no evidence that she intended to do anything but that which was best for the involved children.

We generally try to avoid "unnecessary court events." State v. Shaw, 131 N.J. 1, 13, 618 A.2d 294 (1993). We should do that here. Although Kinsella had not been decided when the psychologist testified in the custody case, the trial court was fully aware of the principles of Kinsella when it dismissed the patient's subsequent complaint for malpractice. The trial court was also fully aware of the principles that govern a professional malpractice action against a psychologist.

The plaintiff in a malpractice action based on tort must establish four elements to make out a prima facie case. . . . When the plaintiff is a patient and the defendant is the patient's therapist, Schultz tells us that the four key elements necessary to prove malpractice are: "(1) that a therapist-patient relationship was established; (2) that the therapist's conduct fell below the acceptable standard of care; (3) that this conduct was the proximate cause of the injury to the patient; and (4) that an actual injury was sustained by the

patient." In the particular case of a patient suing a therapist for breach of confidentiality, the most difficult hurdles to overcome, showing malpractice has taken place, are "whether the standard of care to which the psychotherapist is obliged to conform encompasses confidentiality, whether the duty is breached by disclosure and whether recoverable damages are incurred."

[Ellen W. Grabois, The Liability of Psychotherapists for Breach of Confidentiality, 12 J.L. & Health 39, 68-69 (1998).]

Even assuming that plaintiff can establish by competent expert testimony that Dr. Smith's conduct fell below the acceptable standard of care, [1] "recoverable damages" were incurred. Grabois, supra, 12 J.L. & Health at 69.

In the analogous context of attorney malpractice in a custody dispute, the client bringing a legal malpractice action has a heavy burden. The plaintiff must effectively prove two cases; the one giving rise to the malpractice action, and the one for legal malpractice. For example, in a malpractice action stemming from a child custody dispute, the jury must determine the custody issue, using the appropriate legal principles in order to make a determination of the legal malpractice action. The case-within-a-case approach speaks to the elements of causation and damages, for only after making a determination of the case below can a jury find that the attorney's negligence was the proximate cause of the client's loss. If a jury finds the attorney was in fact negligent, but the underlying claim would have, absent this breach of duty, been resolved in the same manner, it cannot be said that the attorney's negligence caused damage.

[Andrew S. Grossman, Avoiding Legal Malpractice In Family Law Cases: The Dangers of Not Engaging in Formal Discovery, 33 Fam. L.Q. 361, 367 (1999).]

The trial court has already determined that not only would the psychologist's evidence have been admissible in the custody action, the outcome of the custody dispute would have been the same whether or not the evidence was introduced.

No viable claim for emotional distress damages has been presented.

Damages for [negligent infliction of] emotional distress must be "so severe that no reasonable man could be expected to endure it." Buckley v. Trenton Savings Fund. Soc., 111 N.J. 355, 366-67, 544 A.2d 857 (1988) (citation omitted). Determination of whether emotional distress can be found in a particular case is a question of law for a court to decide, leaving the jury to decide if it had been proved in act. Id. at 367. Here, plaintiff's upset, embarrassment and anxiety are no more severe than was Buckley's loss of sleep, aggravation, headaches, nervous tension and embarrassment which the Supreme Court held was not severe. As in Buckley, because there is no severe emotional distress, further examination into the intent of the tortfeasor is not warranted.

[Rocci v. MacDonald-Cartier, 323 N.J. Super. 18, 25, 731 A.2d 1205 (App. Div. 1999).]

In short, the Court has perceived the tip of the iceberg. The Court would do well to look under the surface of the water to perceive the formidable reasons why this case should be concluded. A futile rerun of the custody trial will only serve to reopen old wounds. It is time to end the discord. Lawsuits are not the solution to every problem. Ethics disciplinary boards are better suited to resolving this problem.

For most licensed and trained psychotherapists, this confidential relationship will be spelled out in professional ethical codes and state statutes. Therapists, therefore, must be alert to situations in which they are called upon to reveal information about their patients. Therapists are protected by privilege statutes, but exceptions do exist. Psychotherapists must educate themselves with respect to these statutes, especially since we live in a time in which third party payors and others will seek to know more about the patient's prognosis and the usefulness of the psychotherapy. Patients, too, must be alert and inquisitive, and ask that their therapists inform them of any requests for confidential information.

[Grabois, supra, 12 J.L. & Health at 84.]

Because the issue remaining in this case is one of professional responsibility, not one of "recoverable damages," I would reinstate the judgment of the Law Division dismissing the plaintiff's complaint for malpractice.

The Chief Justice joins in this opinion.

[1] Even if the Tarasoff principles did not authorize disclosure, "statements made during joint counseling are not privileged in litigation between the joint patients." Redding v. Virginia Mason Medical Center, 75 Wn. App. 424, 878 P.2d 483, 485 (Wash. Ct. App. 1994). Dr. Smith counseled the parties jointly.

Abrams v. Jones **deals with privacy from a parent of a child's mental health records. Rosemary Jones Droxler took her eleven-year-old daughter, Karissa Jones, to psychologist Laurence Abrams because the child "…was agitated and showed signs of sleeplessness and worry." Droxler and her former husband Donald Jones divorced some four years before and were joint managing conservators of Karissa. Initially, Karissa was reluctant to talk to Abrams and therapy began only after Abrams assured Karissa that he would communicate only general themes of what occurred in therapy with her parents. Karissa's father Donald Jones found out that Karissa was seeing Abrams three months after the initiation of therapy, and requested Abrams' records of his care of Karissa. Abrams met Jones and his attorney and gave general information about treatment of Karissa but refused to provide his notes of treatment. Jones filed suit claiming that he had an unconditional right to access of to his child's psychological records under Section 153.073 of the Family Code. When the case came to trial, Dr. Abrams' defense, as permitted by Chapter 611 of the Texas Health and Safety code, was that to reveal confidential information would harm Karissa by undermining her trust.**

The issues are whether a mental health professional may withhold information from a parent after a child has requested that those communications be held private? The court had to decide whether the Family Code provision or the Health and Safety Code provision for access to mental health records controls when a parent requests information from their child's confidential mental health record.

The Court held that a mental health "professional" may deny access to any portion of a record if the professional determines that access would be harmful the patient's physical, mental, or emotional health."

The parent who requests such confidential information is not presumed to be necessarily acting "on behalf of the child" and "…the Legislature has chosen to closely guard a patient's communication with a mental-health professional." When these two issues are taken together the need for protection of information is greater than the parent's right to have access to the information.

The implication for practice is that a parent who is refused access to a child's mental health record has the option of finding another professional who may examine and photocopy the record and then share them with the parent. There is also judicial recourse in that the parent who is denied access to the information may file suit in District Court to obtain access to the record. The burden of proof that the denial of the record was proper is on the professional who denied access. The implication for practice is that parents may eventually obtain copies of their child's mental health records.

Laurence **ABRAMS**

v.

Donald Paul **JONES**,

35 S.W.3d 620 (Tex. 2000)

OPINION

This case presents issues of statutory construction. We are called upon to determine if either section 153.072 of the Family Code or section 611.0045 of the Health and Safety Code allows a parent to demand access to detailed notes of his or her child's conversations with a mental health professional when that parent is not acting on behalf of the child or when the mental health professional believes that releasing the information would be harmful to the child's physical, mental, or emotional health. The Legislature has balanced a child's need for effective treatment and a parent's rights and has imposed some limits on a parent's right of access to confidential mental health records. Accordingly, we reverse the judgment of the court of appeals and render judgment that Jones take nothing.

I

The child whose records are at issue is Karissa Jones. Her parents, Donald and Rosemary Jones, divorced when she was about seven years old. Both parents remarried sometime before the present controversy erupted, and Rosemary Jones is now Rosemary Droxler. In the original decree, Karissa's parents were appointed joint managing conservators of her and her younger sister. Two years after the divorce, her father initiated further court proceedings to become the sole managing conservator of his daughters. Litigation ensued for two more years. Karissa's parents ultimately agreed to a modification of the original order, but both parents were retained as joint managing conservators. The modified decree gave Jones certain rights of access to his children's psychological records.

Several months after the modification proceedings were concluded, Rosemary Droxler sought the professional services of a psychologist, Dr. Laurence Abrams, for Karissa. The uncontroverted evidence is that Karissa, who by this time was eleven years old, was agitated and showed signs of sleeplessness and worry. At the time the trial court heard this case, Abrams had seen Karissa six times for about fifty minutes on each occasion.

At the beginning of Abrams's first consultation with Karissa, she was reluctant to talk to him. When Abrams explored that reluctance with her, she told him that she was concerned that he would relate what she had to say to her parents. Abrams responded that he would have to provide a report to her parents, but that he could give them a general description of what was discussed without all the specifics. Abrams and Karissa reached an understanding about what he would and would not tell her parents, and he was thereafter able to establish a rapport with her.

Shortly after Karissa began seeing Abrams, her father (Jones) and his legal counsel met with Abrams and requested that he release all of her records. Abrams gave Jones and his counsel a verbal summary of information, sharing with them the basic subject matter of his consultations with Karissa. Abrams related that Karissa had told him that Jones's new wife (who formerly was Karissa's nanny) had said to Karissa that when she turned twelve, she would have to choose where she lived. Karissa told Abrams that she was afraid there would be more conflict in court between her parents because of this choice. Abrams described Karissa as in a "panic" when he first saw her over what she believed to be her impending decision and an ensuing battle between her parents. Abrams also told Jones that Karissa had said that she leaned toward choosing to live with her father and that she was at times unhappy living with her mother because her mother was away from home more than Karissa liked.

After Abrams had related this information about his sessions with Karissa, Jones told Abrams that no conversations of the nature Abrams had described had occurred between Jones and Karissa or between Karissa and her stepmother. At some point in the dialogue among Abrams, Jones, and Jones's attorney,

Abrams either agreed with Jones's counsel or said in response to a question from counsel that Karissa's mother had taken Karissa to see Abrams "to get a leg up on" Jones in court.

A few days after the meeting among Jones, his counsel, and Abrams, Jones's counsel again pressed for Abrams's records in two letters to Abrams. Abrams responded verbally and in writing that releasing the detailed notes about his conversations with Karissa would not be in her best interest. Abrams offered to give his notes to any other psychologist that Jones might choose to replace Abrams as Karissa's counselor, and Abrams explained that Karissa's new psychologist could then determine whether it was in Karissa's best interest to give Abrams's notes to Jones. Jones did not seek another counselor for Karissa, and Abrams did not release his notes to Jones. Abrams continued to treat Karissa until this suit was filed by Jones to compel Abrams to release his notes. The record is silent as to whether Abrams was to continue treatment after this suit was resolved.

Droxler, Karissa's mother, entered an appearance in the suit against Abrams, and she agreed with Abrams that neither parent should have access to his notes of conversations with Karissa. A hearing was held before the trial court. Abrams testified that a sense of protection and closeness is an integral part of psychotherapy and that without some expectation of confidentiality, Karissa would not have opened up to him. He said that Karissa had several discussions with him about the confidentiality of their sessions. Abrams testified that in his opinion the release to either parent of his detailed notes of what Karissa had said was not in her best interest.

Jones took the position in the trial court that as a parent, he was unconditionally entitled to see all of Abrams's records regarding his daughter. He further represented to the trial court that based on his conversations with Karissa, he was of the opinion that she did not object to the release of her records. Abrams testified, however, that Karissa had asked him not to reveal the details of their conversations, and that during the week before the hearing, her mother delivered a note which Karissa had written to Abrams again asking that he maintain the confidentiality of their discussions.

Abrams's detailed notes about what Karissa had told him during his professional consultations with her were provided to the trial court. The court, however, stated on the record at the conclusion of the hearing that it had not reviewed them and did not intend to. There is no indication that it ever did so.

The trial court held that Jones was entitled to Abrams's notes. Abrams appealed, and Karissa's mother (Droxler) filed briefing in the court of appeals in support of Abrams's position. The court of appeals affirmed the trial court's judgment with one justice dissenting. *Abrams v. Jones*, 983 S.W.2d 377 (Tex. App.-Houston [14th Dist.] 1999). We granted Abrams's petition for review, which was supported by Karissa's mother.

There are three questions of statutory construction that we must decide. They are (1) whether section 153.073 of the Family Code gives a divorced parent greater rights of access to mental health records than parents in general have under chapter 611 of the Texas Health and Safety Code, (2) whether section 611.0045(b) of the Health and Safety Code allows a professional to deny a parent access to portions of mental health records if the professional concludes that their release would harm the child, and (3) whether a parent is always deemed to be acting on behalf of his or her child when requesting mental health records.

II

As indicated above, the first question that we must resolve is whether section 153.073 of the Family Code or chapter 611 of the Health and Safety Code governs this matter. TEX. FAM. CODE § 153.073; TEX. HEALTH & SAFETY CODE §§ 611.001 to 611.008. We conclude that chapter 611 provides the framework within which this case must be decided.

Section 153.073 of the Family Code addresses parental rights upon dissolution of the parents' marriage to one another. It provides that unless a court orders otherwise, a parent who is appointed a conservator

"has at all times the right . . . as specified by court order . . . of access to medical, dental, psychological, and educational records of the child." TEX. FAM. CODE 153.073(a)(2). Jones contends that this section of the Family Code mandates that a parent who is appointed a conservator has access at all times to all psychological records of the child. We disagree.

We interpret section 153.073 to ensure that a court may grant a parent who is divorced and who has been named a conservator the same rights of access to his or her child's psychological records as a parent who is not divorced. We do not interpret section 153.073 to override the provisions of chapter 611 of the Health and Safety Code that specifically address parents' rights to the mental health records of their children. The legislative history of section 153.073 indicates that it was enacted to equalize the rights of nonmanaging-conservator parents in comparison to managing-conservator parents. *See* HOUSE COMM. ON JUDICIAL AFFAIRS, BILL ANALYSIS, Tex. H.B. 1630, 73d Leg., R.S. (1993) (explaining that this provision was needed to remedy (1) previous limitations on nonmanaging conservators during periods of possession, when the child might need health care, and (2) the fact that managing conservators were not required to consult with the other parent about important decisions affecting the child's health, education, or welfare). The Legislature did not intend in section 153.073 to give greater rights to divorced parents than to parents who are not divorced. We turn to chapter 611 of the Health and Safety Code.

III

The Legislature has determined that a patient's right of access to his or her own mental health records is not absolute. Section 611.0045 of the Health and Safety Code says that a "professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health." TEX. HEALTH & SAFETY CODE § 611.0045(b).

There are, however, checks and balances on a professional's decision not to disclose portions of a mental health record to a patient. A patient may select another professional for treatment of the same or related condition, and the professional denying access must allow the newly retained professional to examine and copy the records that have not been released to the patient. *Id.* § 611.0045(e). The newly retained professional may then decide whether to release the records to the patient.

There are provisions in chapter 611 of the Health and Safety Code that deal specifically with the mental health records of a minor. Section 611.0045(f) provides that the "content of a confidential record shall be made available to a [parent] who is acting on the patient's behalf." *Id.* § 611.0045(f). n1 Jones contends that a parent necessarily acts on behalf of his or her child when seeking access to a child's mental health records under section 611.0045(f). The court of appeals agreed. It held that "by requesting that Abrams turn over Karissa's mental health records, Jones was necessarily 'acting on behalf' of Karissa as contemplated by section 611.0045(f) of the Code." *Abrams v. Jones*, 983 S.W.2d 377, 381 (Tex. App.-Houston [14th Dist.] 1999).

In construing a statute, we must attempt to give effect to every word and phrase if it is reasonable to do so. *See City of Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998); *see also* TEX. GOV'T CODE § 311.021(2) (stating that in enacting a statute, it is presumed that the entire statute is intended to be effective). If the Legislature had intended for a parent to have access to all aspects of a child's mental health records by simply proving that he or she is indeed the child's parent, the Legislature would not have needed to add the phrase "who is acting on the patient's behalf" in section 611.0045(f).

We agree with the dissent in the court of appeals that, unfortunately, parents cannot always be deemed to be acting on the child's behalf. *See Abrams*, 983 S.W.2d at 382 (Edelman, J., dissenting). An obvious example is when a parent has sexually molested a child and later demands access to the child's mental health treatment records. A court would not presume that the parent is acting on the child's behalf in such circumstances. Similarly, parents embroiled in a divorce or other suit affecting the parent/child relationship may have motives of their own for seeking the mental health records of the child and may not be acting "on the patient's [child's] behalf." TEX. HEALTH & SAFETY CODE § 611.0045(f). We

therefore conclude that a mental health professional is not required to provide access to a child's confidential records if a parent who requests them is not acting "on behalf of" the child.

IV

When a parent *is* acting on behalf of his or her child, the question that then arises is whether, under section 611.0045(b), a professional may nevertheless deny access to a portion of a child's records if their release would be harmful to the patient's physical, mental, or emotional health. TEX. HEALTH & SAFETY CODE § 611.0045(b). Jones contends that subsection (b) only applies when "the patient" seeks his or her own records and not when a parent seeks a child's records. We disagree.

Section 611.0045(f) contemplates that when a parent seeks a child's mental health records "on the patient's behalf," the parent steps into the shoes of the patient. *Id.* § 611.0045(f). Subsection (f) affords third parties, including a parent, no greater rights than those of the patient. This is evident when section 611.0045(f) is considered in its entirety. It applies not only to parents, but to "a person who has the written consent of the patient." *Id*. §§ 611.004(a)(4), 611.0045(f). It would be unreasonable to construe subsection (f) to allow a patient to obtain through a third person a record that a mental health professional has determined under subsection (b) would be harmful if released to the patient. Because subsection (b) may limit a patient's rights to his or her own records, subsection (b) can also limit a parent's or third party's right to a patient's records when the third party or parent stands in the patient's stead.

In construing a statute or code provision, a court may consider, among other matters, the (1) object sought to be attained by the statute, (2) circumstances under which the statute was enacted, (3) legislative history, (4) consequences of a particular construction, and (5) laws on similar subjects. *See* TEX. GOV'T CODE § 311.023. This Court has recently recognized that, through Chapter 611, "the Legislature has chosen to closely guard a patient's communications with a mental-health professional." *Thapar v. Zezulka*, 994 S.W.2d 635, 638 (Tex. 1999). One purpose of confidentiality is to ensure that individuals receive therapy when they need it. *See R.K. v. Ramirez*, 887 S.W.2d 836, 840 (Tex. 1994) (describing the purposes of the physician-patient privilege under the Texas Rules of Evidence). Although a parent's responsibilities with respect to his or her child necessitate access to information about the child, if the absence of confidentiality prevents communications between a therapist and the patient because the patient fears that such communications may be revealed to their detriment, neither the purposes of confidentiality nor the needs of the parent are served.

If a professional does deny a parent access to part of a child's records, the parent has recourse under section 611.0045(e). TEX. HEALTH & SAFETY CODE § 611.0045(e). First, the professional denying access must allow examination and copying of the record by another professional selected by the parent acting on behalf of the patient to treat the patient for the same or a related condition. *Id*. Second, a parent denied access to a child's records has judicial recourse. *See id*. § 611.005(a). We therefore conclude that the court of appeals erred in construing sections 611.0045(b) and (f) of the Health and Safety Code as giving a parent totally unfettered access to a child's mental health records irrespective of the child's circumstances or the parent's motivation.

We turn to the facts of this case and the interplay between section 611.045 and section 611.005 of the Health and Safety Code, which provides a remedy to a parent if a child's mental health records have been improperly withheld.

V

As already indicated above, a person who is aggrieved by a professional's improper "failure to disclose confidential communications or records" may petition a district court for appropriate relief. TEX. HEALTH & SAFETY CODE § 611.005(a). A professional who denies access has "the burden of proving that the denial was proper." *Id*. § 611.005(b). Accordingly, Abrams bore the burden of proving in these proceedings that he properly denied access to his notes about his conversations with Karissa.

The trial court ruled against Abrams. Abrams did not request and the trial court did not make any findings of fact or conclusions of law. But because the reporter's record is part of the record on appeal, the legal sufficiency of the trial court's implied finding in support of the judgment, which was that Abrams failed to meet his burden of proof, may be challenged in the same manner as jury findings. *See Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989). We must examine the entire record to determine whether Abrams established as a matter of law that his denial of access was proper either because Abrams established that (1) Jones was not acting on Karissa's behalf, or (2) access to the notes would be harmful to Karissa's mental or emotional health.

Jones never indicated that he was seeking the notes on behalf of Karissa, as distinguished from his own behalf. At the hearing, Jones testified that his motivation for obtaining Abrams's notes was in part the indication that Karissa's mother had hired Abrams "to get a leg up on me in court." Although this is some evidence that Jones was not acting on behalf of Karissa but was acting in his own interest, it is not conclusive. Jones's testimony that he was "partially" motivated by what he perceived to be his former wife's custody tactics indicated that there were additional reasons for seeking Karissa's records. Abrams did not prove conclusively that Jones was not acting on behalf of Karissa.

But even if Jones were acting on behalf of Karissa, Abrams testified that in his professional opinion it would be harmful to her to release his notes detailing their conversations. When Abrams first saw Karissa, she would not talk to him. He was unable to establish a rapport with her until they discussed confidentiality. Abrams asked her "what it would take to get her to talk," and he explained at the hearing that "it came down to, she needed protection . . . . She needed protection against anyone knowing what she said. She simply couldn't talk if there was a chance either parent would know what she said." Abrams made the decision during the first session with Karissa not to give his notes to either of her parents. He testified, "I had to in order to be able to treat the girl." He told Karissa at that session that he would not disclose his notes to her parents unless required to do so by a court. Karissa thereafter opened up to Abrams. Abrams explained at the hearing that an integral part of psychotherapy is that the patient have a sense of protection and security and that she drop defensive mechanisms. Abrams continued to treat Karissa after he had denied her father access to the notes, and she responded positively to treatment after Abrams assured her that the details of her conversations would be confidential. Treatment continued until this suit was filed. None of this testimony was contradicted or even challenged. *See Allright, Inc. v. Strawder*, 679 S.W.2d 81, 82 (Tex. App.-Houston [14 Dist.] 1984, writ ref'd n.r.e.) (observing that "uncontroverted testimony, even from a witness categorized as an expert, may be taken as true as a matter of law if it is clear, direct and positive, and is free from contradictions, inconsistencies, inaccuracies and circumstances tending to cast suspicion thereon"). This testimony, in the absence of contrary evidence, is sufficient to establish as a matter of law that release of Karissa's records would have been harmful to her.

Jones's testimony that in his opinion, Karissa did not object to the release of Abrams's notes does not raise a fact question of whether their release would be harmful to her. Karissa was a layperson--an eleven-year-old layperson. She was not qualified to make a determination of whether release of her records would be harmful to her physical, mental, or emotional health. *See* TEX. HEALTH & SAFETY CODE § 611.0045(b). The uncontradicted evidence established as a matter of law that Abrams's denial of access to his detailed notes was proper.

The trial court erred in holding that Jones was entitled to the detailed notes about his daughter's conversations with her mental health professional under the facts of this case. Accordingly, we reverse the judgment of the court of appeals and render judgment that Jones take nothing.

Priscilla R. Owen, Justice

Footnotes

[1] The relevant portions of section 611.0045 are as follows:

§ 611.0045. Right to Mental Health Record

(a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.

(b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.

. . .

(f) The content of a confidential record shall be made available to a person listed by Section 611.004(a)(4) or (5) who is acting on the patient's behalf.

TEX. HEALTH & SAFETY CODE §§ 611.0045(a), (b), (f).

Section 611.004(a)(4) provides in turn:

§ 611.004. Authorized Disclosure of Confidential Information Other than in Judicial or Administrative Proceeding

(a) A professional may disclose confidential information only:

. . . .

(4) to a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs.

Id. § 611.004(a)(4).

Dissent by Nathan L. Hecht

I believe that the court of appeals majority correctly construed the statutory scheme and properly applied the law to the facts to reach the result it reached.

Accordingly, I respectfully dissent from the Court's decision in this case.

James A. Baker, Justice

JUSTICE HECHT, dissenting.

In this Term's decisions construing the Parental Notification Act, [1] the Court has exhibited a disturbing lack of regard for the rights of parents to raise and care for their children. [2] This case continues in that vein, holding that under chapter 611 of the Texas Health and Safety Code, mental health care professionals -- who, as defined by statute, [3] include everyone from physicians to pretenders -- have broad discretion to deny parents access to their children's mental health records, broader discretion than even a district judge has to order disclosure. As eager as the Court has been to find justification for allowing a child to have an abortion without telling her parents, contrary to a trial court's view of the evidence, it will come as no surprise that the Court has no difficulty keeping parents ignorant of their children's mental health records, contrary to the trial court's conclusion. As in the parental notification cases, the Court casts responsibility for its decision in this case on the Legislature. But this steady erosion of parental authority is judicial, not legislative; it results from the Court's view of statutory language through a prism of presumed diminution in parental authority. I respectfully dissent.

It should go without saying that parents generally need to know information contained in their children's health records in order to make decisions for their well-being. To remove any doubt that this is true, even after divorce, for any parent with custodial responsibility for a child, section 153.073(a)(2) of the Texas Family Code states that "unless limited by court order, a parent appointed as a conservator of a child has at all times the right . . . of access to medical, dental, psychological, and educational records of the child . . . ." A parent's right to this information is not an insignificant matter and should not be restricted absent compelling reasons.

Section 611.0045 of the Texas Health and Safety Code, the pertinent parts of which are quoted in the margin, [4] permits a mental health care "professional", broadly defined as stated above, to deny a patient access to his own mental health records if disclosure would harm the patient's physical, mental, or

emotional health. For the same reason, access may be denied to a patient's representative, including a parent if the patient is a child. [5] In a suit to obtain the records, the professional has the burden of proving that denial of access is proper. [6] Nothing in the statute suggests that this burden should be anything but substantial. Certainly, a patient should not be denied access to his own mental health records absent solid, credible evidence that disclosure will cause him real, demonstrable harm. A general concern that disclosure to the patient would not be in his best interest should not be enough to deny him access. The statute sets no different harm standard for denying a parent access to a child's records. Denial of access cannot be based on some general concern that the child may be displeased or discomfited, even severely, about the disclosure. Rather, denial must be grounded on evidence of actual impairment to the child's health.

As the parental notification cases recently demonstrate, the meaning the Court gives a statutory standard is best demonstrated not by the words used to describe it but by its application in specific circumstances. This case illustrates how little evidence the Court believes is necessary not simply to raise the issue of whether a parent should be denied a child's mental health records but to *conclusively establish* -- so that no court can rule otherwise -- that a parent is not entitled to the records. The Court's decision to deny access to the records in this case rests entirely on the testimony of Abrams, a licensed clinical psychologist, who stated at a hearing in the district court: that Jones's former wife brought their eleven-year-old daughter, Karissa, to him in February 1996 because Karissa was agitated and showed signs of worry and sleeplessness; that Karissa refused to open up to him until he promised her that he would not reveal the details of their conversations to her parents, even though she understood that a judge might later order disclosure; that Karissa then told him she was troubled that if when she turned twelve in October she had to express a preference for living with one parent or the other, as her stepmother (her former nanny) had suggested she might, n7 it would provoke more hostility between her parents; that after meeting with Karissa six times in five months, she seemed much better; that Karissa had reiterated her desire for confidentiality in their last meeting four months earlier in June 1996, and in a note her mother had brought to him a few days before the October 15 hearing; and that he had told Karissa's father, Jones, that his former wife had hired him to "get a leg up on" Jones in their continuing court proceedings. On the specific issue of whether disclosing Karissa's records to Jones would harm Karissa's health, Abrams's testimony in its entirety is as follows:

> Q Is it your opinion at this time that the release of those records would be physically or emotionally harmful to Karissa?
>
> A Yes, sir.
>
> Q And what is that opinion?
>
> A That *would have harmed* her, as a matter of fact. It would be the very essence, it would make her get better, to give her protection.
>
> Q As we sit here on October 15th of 1996, *is it still your opinion* that it would be harmful to her mental or emotional health if these records are released?
>
> A Yes, sir.
>
> Q And can you tell the Judge *why* you believe that?
>
> A *I've had no communications from her to be otherwise.* I asked her the last time I saw her, in June about it, she reaffirmed her need for it. I received a note from her last week asking for it again.
>
> (Emphasis added.)

The Court holds that this testimony, which did not persuade the district judge, *conclusively established* that Karissa's health would be harmed by disclosing her records to her father. The Court not only denies the trial court any meaningful role in determining credibility and weighing evidence, it reaches a conclusion, as a matter of law, on evidence that is inconclusive. Assuming that Abrams's testimony established that *Karissa's health would have been harmed in February 1996* if he could not have

promised her a measure of confidentiality because she would not have opened up to him and he could not have counseled her, the only evidence that disclosure of the records *would harm Karissa's health in October 1996*, when Abrams was no longer seeing her, was that she continued to request confidentiality. Jones disputed whether Karissa still wanted Abrams's records kept from him, testifying that based on his conversations with his daughter, his opinion was that she wanted him to have the records. The Court concludes that Jones's testimony is no evidence that disclosure would not harm Karissa because an eleven-year-old is not qualified to say what would be harmful to her health. But if that is true, as I agree it is, then Abrams's testimony that Karissa continued to request confidentiality must likewise be disregarded. Karissa is no more qualified to say that disclosure of her records to her father would harm her health than that it would not. If Abrams's opinion cannot be based on Karissa's wishes, then it has no basis at all. Asked why he believed that disclosure would harm Karissa's health, Abrams answered, "I've had no communications from her to be otherwise."

Surely the Court does not think that a need for confidentiality at one point in time precludes disclosure of information forever. Nothing in the evidence before us suggests that Abrams would ever see Karissa again. Her twelfth birthday was three days after the hearing, and her anxieties about any choices she would have to make at that point were soon to be resolved one way or the other. No reason that Abrams gave for denying Jones access to his daughter's records remained valid. Had the trial judge found from this evidence that there might yet be some lingering need for nondisclosure, I could understand this Court's deference to that finding. But I do not understand how this Court can conclude that *no reasonable trial judge* could find from this evidence that Karissa's health would not be harmed by allowing her father access to her records.

It is no answer to say, as the Court seems to, that section 611.0045 allows a parent to take a child to other professionals until one is found who will release the records. True, Jones could simply have taken his daughter to one professional or another until he found one willing to turn over her records, and the statute gives Abrams no way to object. But the statute is not a full-employment guarantee for mental health care professionals, and no parent should be forced to shop a child as a patient merely to obtain the child's records. More importantly, I see no justification for applying section 611.0045 to permit one professional to trump another, regardless of their relative qualifications, and yet let any professional trump a district judge.

The Court's determination to restrict parental access to mental health records despite and not because of the statute is further demonstrated by its conclusion that section 611.0045 authorizes nondisclosure not only when the child's health may be harmed but when a parent is not "acting on the patient's behalf" as provided in subsection (f) of the statute. These words cannot, in my view, be sensibly read to create a separate standard for access to records. One might think that a parent could easily meet such a standard by stating that his or her request for a child's records was motivated out of love and concern for the child, but the Court concludes that evidence that parents are hostile to one another is enough by itself to support an inference that they are selfishly motivated and therefore not acting on their child's behalf. The evidence the Court points to in this case is especially problematic. Abrams told Jones -- Jones did not merely have his suspicions -- that he believed he had been hired by Karissa's mother to counsel Karissa in order to give the mother "a leg up" in her ongoing disputes with Jones over custody of Karissa and her sister. The Court is troubled by Jones's frank admission in the October hearing that Abrams's statement to him was part of his motivation for obtaining Karissa's records, even though it could not have been important to Jones when he first went to meet with Abrams the preceding February -- which was before Abrams had expressed the view that he himself was being used by Karissa's mother. It is difficult to imagine any reasonable, candid parent who would not acknowledge a similar motivation under the circumstances; indeed, one might have been less inclined to believe Jones if he had denied any such motivation. To rest denial of access to a child's medical records merely on inferences drawn from disputes between the parents conflicts with their rights under section 153.073(a)(2) of the Texas Family Code.

By construing section 611.0045 as establishing an acting-on-behalf-of standard for gaining access to a child's mental health records, the Court requires inquiry into, and inevitable disputes over, a parent's subjective motivations, instead of focusing on the more objective harm-to-the-patient's-health standard. I do not read section 611.0045 to require such an inquiry, which will almost always exacerbate difficulties between divorced parents.

While Abrams appears to have been professional in his dealings with the parties, and the district court did not suggest the contrary, the court was not bound by Abrams's views. Today's decision, coming as it does four years after the events at issue, cannot be of much importance to these parties. Karissa will soon be sixteen. Its importance lies in the difficulties it will cause future parties and in its further deterioration of parents' rights to raise their children.

Footnotes for Dissent

[1] TEX. FAM. CODE §§ 33.001-.011.

[2] *In re Doe 1(I)*, 19 S.W.3d 249, 2000 Tex. LEXIS 21 (Tex. 2000); *In re Doe 2*, 19 S.W.3d 278, 2000 Tex. LEXIS 25 (Tex. 2000); *In re Doe 3*, 19 S.W.3d 300, 2000 Tex. LEXIS 26 (Tex. 2000); *In re Doe 4(I)*, 19 S.W.3d 322, 2000 Tex. LEXIS 27 (Tex. 2000); *In re Doe 4(II)*, 19 S.W.3d 337, 2000 Tex. LEXIS 34 (Tex. 2000); *In re Doe 1(II)*, 19 S.W.3d 346, 2000 Tex. LEXIS 67 (Tex. 2000).

[3] TEX. HEALTH & SAFETY CODE § 611.001(2) ("'Professional' means: (A) a person authorized to practice medicine in any state or nation; (B) a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder; or (C) a person the patient reasonably believes is authorized, licensed, or certified as provided by this subsection.").

[4] Section 611.0045. Right to Mental Health Record

(a) Except as otherwise provided by this section, a patient is entitled to have access to the content of a confidential record made about the patient.

(b) The professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health.

(c) If the professional denies access to any portion of a record, the professional shall give the patient a signed and dated written statement that having access to the record would be harmful to the patient's physical, mental, or emotional health and shall include a copy of the written statement in the patient's records. The statement must specify the portion of the record to which access is denied, the reason for denial, and the duration of the denial.

(d) The professional who denies access to a portion of a record under this section shall redetermine the necessity for the denial at each time a request for the denied portion is made. If the professional again denies access, the professional shall notify the patient of the denial and document the denial as prescribed by Subsection (c).

(e) If a professional denies access to a portion of a confidential record, the professional shall allow examination and copying of the record by another professional if the patient selects the professional to treat the patient for the same or a related condition as the professional denying access.

(f) The content of a confidential record shall be made available to a person listed by Section 611.004(a)(4) or (5) who is acting on the patient's behalf.

* * *

(h) If a summary or narrative of a confidential record is requested by the patient or other person requesting release under this section, the professional shall prepare the summary or narrative.

[5] The persons referred to in section 611.0045(f) who can act on behalf of a patient are "a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent to manage the patient's personal affairs", *id.* § 611.004(a)(4), or "the patient's personal representative if the patient is deceased", *id.* § 611.004(a)(5).

[6] *Id.* § 611.005(b) ("In a suit contesting the denial of access under Section 611.0045, the burden of proving that the denial was proper is on the professional who denied the access.").

[7[*Cf.* TEX. FAM. CODE § 153.134(a)(6) ("If a written agreement of the parents is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors: . . . (6) if the child is 12 years of age or older, the child's preference, if any, regarding the appointment of joint managing conservators . . . ."); *id.* § 153.008 ("If the child is 10 years of age or older, the child may, by writing filed with the court, choose the managing conservator, subject to the approval of the court."); *id.* § 153.009(b) ("When the issue of managing conservatorship is contested, on the application of a party, the court shall interview a child 10 years of age or older and may interview a child under 10 years of age.").

INFORMED CONSENT

INFORMED CONSENT

After Ernest Benjamin Smith was indicted in Texas for murder, the State announced its intention to seek the death penalty. At an ensuing psychiatric examination, ordered by the trial court to determine respondent's competency to stand trial, conducted in the jail where Smith was being held, the examining doctor determined that respondent was competent. No notice of this examination was provided to Smith's attorneys. Thereafter, respondent was tried by a jury and convicted. A separate sentencing proceeding was then held, before the same jury, as required by Texas law. At such a proceeding, the jury must resolve three critical issues to determine whether or not the death sentence will be imposed. One of these issues involves the future dangerousness of the defendant, *i.e.*, whether there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. At the sentencing hearing, the doctor who had conducted the pretrial psychiatric examination was allowed to testify for the State over defense counsels' objection that his name did not appear on the list of witnesses the State planned to use at either the guilt or penalty stages of the proceedings. His testimony was based on the pretrial examination, and stated in substance that respondent would be a danger to society. The jury then resolved the issue of future dangerousness, as well as the other two issues, against respondent, and thus, under Texas law, the death penalty was mandatory. The Texas Court of Criminal Appeals affirmed the conviction and death sentence. After unsuccessfully seeking a writ of habeas corpus in the state courts, respondent petitioned Federal District Court for relief. The Federal District Court vacated the death sentence, holding that admission of the doctor's testimony at the penalty phase was a Constitutional error. The United States Court of Appeals affirmed.

The Supreme Court held that the admission of the doctor's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination, because he was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a capital sentencing proceeding.

ESTELLE

v.

SMITH,

451 U.S. 454 (1981)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the prosecution's use of psychiatric testimony at the sentencing phase of respondent's capital murder trial to establish his future dangerousness violated his constitutional rights. 445 U.S. 926 (1980).

I

A

On December 28, 1973, respondent Ernest Benjamin Smith was indicted for murder arising from his participation in the armed robbery of a grocery store during which a clerk was fatally shot, not by Smith, but by his accomplice. In accordance with Art. 1257(b)(2) of the Tex. Penal Code Ann. (Vernon 1974)

concerning the punishment for murder with malice aforethought, the State of Texas announced its intention to seek the death penalty. Thereafter, a judge of the 195th Judicial District Court of Dallas County, Texas, informally ordered the State's attorney to arrange a psychiatric examination of Smith by Dr. James P. Grigson to determine Smith's competency to stand trial. [1] s*ee* n 5, *infra*.

Dr. Grigson, who interviewed Smith in jail for approximately 90 minutes, concluded that he was competent to stand trial. In a letter to the trial judge, Dr. Grigson reported his findings:

"[I]t is my opinion that Ernest Benjamin Smith, Jr., is aware of the difference between right and wrong and is able to aid an attorney in his defense."

App. A-6. This letter was filed with the court's papers in the case. Smith was then tried by a jury and convicted of murder.

In Texas, capital cases require bifurcated proceedings -- a guilt phase and a penalty phase. [2] If the defendant is found guilty, a separate proceeding before the same jury is held to fix the punishment. At the penalty phase, if the jury affirmatively answers three questions on which the State has the burden of proof beyond a reasonable doubt, the judge must impose the death sentence. *See* Tex. Code Crim. Proc.Ann., Arts. 37.071(c) and (e) (Vernon Supp. 1980). One of the three critical issues to be resolved by the jury is

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

Art. 37.071(b)(2). [3] In other words, the jury must assess the defendant's future dangerousness.

At the commencement of Smith's sentencing hearing, the State rested "[s]ubject to the right to reopen." App. A-11. Defense counsel called three lay witnesses: Smith's stepmother, his aunt, and the man who owned the gun Smith carried during the robbery. Smith's relatives testified as to his good reputation and character. [4] The owner of the pistol testified as to Smith's knowledge that it would not fire because of a mechanical defect. The State then called Dr. Grigson as a witness.

Defense counsel were aware from the trial court's file of the case that Dr. Grigson had submitted a psychiatric report in the form of a letter advising the court that Smith was competent to stand trial. [5] This report termed Smith "a severe sociopath," but it contained no more specific reference to his future dangerousness. *Id.* at A-6. Before trial, defense counsel had obtained an order requiring the State to disclose the witnesses it planned to use both at the guilt stage and, if known, at the penalty stage. Subsequently, the trial court had granted a defense motion to bar the testimony during the State's case in chief of any witness whose name did not appear on that list. Dr. Grigson's name was not on the witness list, and defense counsel objected when he was called to the stand at the penalty phase.

In a hearing outside the presence of the jury, Dr. Grigson stated: (a) that he had not obtained permission from Smith's attorneys to examine him; (b) that he had discussed his conclusions and diagnosis with the State's attorney; and (c) that the prosecutor had requested him to testify, and had told him, approximately five days before the sentencing hearing began, that his testimony probably would be needed within the week. *Id.* at A-1A-16. The trial judge denied a defense motion to exclude Dr. Grigson's testimony on the ground that his name was not on the State's list of witnesses. Although no continuance was requested, the court then recessed for one hour following an acknowledgment by defense counsel that an hour was "all right." *Id.* at A-17.

After detailing his professional qualifications by way of foundation, Dr. Grigson testified before the jury on direct examination: (a) that Smith "is a very severe sociopath"; (b) that "he will continue his previous behavior"; (c) that his sociopathic condition will "only get worse"; (d) that he has no "regard for another human being's property or for their life, regardless of who it may be"; (e) that "[t]here is no treatment, no medicine . . . that in any way at all modifies or changes this behavior"; (f) that he "is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so"; and (g) that he "has no remorse or sorrow for what he has done." *Id.* at A-17 - A-26. Dr. Grigson, whose testimony

was based on information derived from his 90-minute "mental status examination" of Smith (*i.e.*, the examination ordered to determine Smith's competency to stand trial), was the State's only witness at the sentencing hearing.

The jury answered the three requisite questions in the affirmative, and, thus, under Texas law, the death penalty for Smith was mandatory. The Texas Court of Criminal Appeals affirmed Smith's conviction and death sentence, *Smith v. State,* 540 S.W.2d 693 (1976), and we denied certiorari, 430 U.S. 922 (1977).

B

After unsuccessfully seeking a writ of habeas corpus in the Texas state courts, Smith petitioned for such relief in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 2254. The District Court vacated Smith's death sentence because it found constitutional error in the admission of Dr. Grigson's testimony at the penalty phase. 445 F.Supp. 647 (1977). The court based its holding on the failure to advise Smith of his right to remain silent at the pretrial psychiatric examination and the failure to notify defense counsel in advance of the penalty phase that Dr. Grigson would testify. The court concluded that the death penalty had been imposed on Smith in violation of his Fifth and Fourteenth Amendment rights to due process and freedom from compelled self-incrimination, his Sixth Amendment right to the effective assistance of counsel, and his Eighth Amendment right to present complete evidence of mitigating circumstances. *Id.* at 664.

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The United States Court of Appeals for the Fifth Circuit affirmed. 602 F.2d 694 (1979). The court held that Smith's death sentence could not stand, because the State's "surprise" use of Dr. Grigson as a witness, the consequences of which the court described as "devastating," denied Smith due process in that his attorneys were prevented from effectively challenging the psychiatric testimony. *Id.* at 699. The court went on to hold that, under the Fifth and Sixth Amendments,

"Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination."

Id. at 709. Because Smith was not accorded these rights, his death sentence was set aside. While "leav[ing] to state authorities any questions that arise about the appropriate way to proceed when the state cannot legally execute a defendant whom it has sentenced to death," the court indicated that "the same testimony from Dr. Grigson, based on the same examination of Smith" could not be used against Smith at any future resentencing proceeding. *Id.* at 703, n. 13, 709, n. 20.

II

A

Of the several constitutional issues addressed by the District Court and the Court of Appeals, we turn first to whether the admission of Dr. Grigson's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination because respondent was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding. Our initial inquiry must be whether the Fifth Amendment privilege is applicable in the circumstances of this case.

(1)

The State argues that respondent was not entitled to the protection of the Fifth Amendment because Dr. Grigson's testimony was used only to determine punishment after conviction, not to establish guilt. In the State's view, "incrimination is complete once guilt has been adjudicated," and therefore the Fifth

Amendment privilege has no relevance to the penalty phase of a capital murder trial. Brief for Petitioner 33-34. We disagree.

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is

"the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

Culombe v. Connecticut, 367 U. S. 568, 367 U. S. 581-582 (1961) (opinion announcing the judgment) (emphasis added). *See also Murphy v. Waterfront Comm'n*, 378 U. S. 52, 378 U. S. 55 (1964); E. Griswold, The Fifth Amendment Today 7 (1955).

The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387 U. S. 1, 387 U. S. 49 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made "*the deluded instrument of his own conviction,'" Culombe v. Connecticut, supra, at 367 U. S. 581, quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.*

We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. [6] Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. *See Green v. Georgia*, 442 U. S. 95, 442 U. S. 97 (1979); *Presnell v. Georgia*, 439 U. S. 14, 439 U. S. 16 (1978); *Gardner v. Florida*, 430 U. S. 349, 430 U. S. 357-358 (1977) (plurality opinion). Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment. [7] Yet the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to Dr. Grigson similarly infringes Fifth Amendment values.

(2)

The State also urges that the Fifth Amendment privilege is inapposite here because respondent's communications to Dr. Grigson were nontestimonial in nature. The State seeks support from our cases holding that the Fifth Amendment is not violated where the evidence given by a defendant is neither related to some communicative act nor used for the testimonial content of what was said. *See, e.g., United States v. Dionisio*, 410 U. S. 1 (1973) (voice exemplar); *Gilbert v. California*, 388 U. S. 263 (1967) (handwriting exemplar); *United States v. Wade*, 388 U. S. 218 (1967) (lineup); *Schmerber v. California*, 384 U. S. 757 (1966) (blood sample). However, Dr. Grigson's diagnosis, as detailed in his testimony, was not based simply on his observation of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent's account of the crime during their interview, and he placed particular emphasis on what he considered to be respondent's lack of remorse. *See* App. A-27 - A-29, A-33 - 34. [8] Dr. Grigson's prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, in reciting the details of the crime. [9] The Fifth Amendment privilege, therefore, is directly involved here, because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.

The fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment. *See* n 6, *supra*. The state trial judge, *sua sponte*, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader

objective that was plainly adverse to respondent. Consequently, the interview with Dr. Grigson cannot be characterized as a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense. Indeed, if the application of Dr. Grigson's findings had been confined to serving that function, no Fifth Amendment issue would have arisen.

Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. *See, e.g., United States v. Cohen,* 530 F.2d 43 478 (CA5), *cert. denied,* 429 U.S. 855 (1976); *Karstetter v. Cardwell,* 526 F.2d 1144, 1145 (CA9 1975); *United States v. Bohle,* 445 F.2d 54, 66-67 (CA7 1971); *United States v Weiser,* 428 F.2d 932 936 (CA2 1969), *cert. denied* 402 U.S. 949 (1971); *United States v. Albright,* 388 F.2d 719, 724-725 (CA4 1968); *Pope v. United States,* 372 F.2d 710, 720-721 (CA8 1967) (en banc), *vacated and remanded on other grounds,* 392 U. S. 651 (1968). [10]

Respondent, however, introduced no psychiatric evidence, nor had he indicated that he might do so. Instead, the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death. Respondent's future dangerousness was a critical issue at the sentencing hearing, and one on which the State had the burden of proof beyond a reasonable doubt. *See* Tex.Code Crim.Proc.Ann., Arts. 37.071(b) and(c) (Vernon Supp. 1980). To meet its burden, the State used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty. In these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated.

(3)

In *Miranda v. Arizona,* 384 U. S. 436, 384 U. S. 467 (1966), the Court acknowledged that

"the Fifth Amendment privilege is available outside of criminal court proceedings, and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."

Miranda held that

"the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."

Id. at 384 U. S. 444. Thus, absent other fully effective procedures, a person in custody must receive certain warnings before any official interrogation ,including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." *Id.* at 384 U. S. 467-469. The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person, and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intelligent decision as to its exercise." *Ibid.*

The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed, and became essentially like that of an agent of the State recounting unwarned statements made

in a post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system," and was "not in the presence of [a] perso[n] acting solely in his interest." *Id.* at 384 U. S. 469. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.

The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *147 U. S. 562 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." [11]* Malloy v. Hogan,@ 378 U. S. 1, 378 U. S. 8 (1964). We agree with the Court of Appeals that respondent's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase. [12]

A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way.

"Volunteered statements . . . are not barred by the Fifth Amendment," but, under *Miranda v. Arizona, supra,* we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. *Id.* at 384 U. S. 478. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand. [13]

B

When respondent was examined by Dr. Grigson, he already had been indicted, and an attorney had been appointed to represent him. The Court of Appeals concluded that he had a Sixth Amendment right to the assistance of counsel before submitting to the pretrial psychiatric interview. 602 F.2d 708-709. We agree.

The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." The "vital" need for a lawyer's advice and aid during the pretrial phase was recognized by the Court nearly 50 years ago in *Powell v. Alabama,* 287 U. S. 45, 287 U. S. 57, 287 U. S. 71 (1932). Since then, we have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer "at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois,* 406 U. S. 682, 406 U. S. 688-689 (1972) (plurality opinion); *Moore v. Illinois,* 434 U. S. 220, 434 U. S. 226-229 (1977). And in *United States v. Wade,* 388 U.S. at 388 U. S. 226-227, the Court explained:

"It is central to [the Sixth Amendment] principle that, in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

(Footnote omitted.) *See United States v. Henry*, 447 U. S. 264 (1980); *Massiah v. United States*, 377 U. S. 201 (1964). *See also White v. Maryland*, 373 U. S. 59 (1963); *Hamilton v. Alabama*, 368 U. S. 52 (1961).

Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail, [14] and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. *See Coleman v. Alabama*, 399 U. S. 1, 399 U. S. 7-10 (1970) (plurality opinion); *Powell v. Alabama*, *supra*, at 287 U. S. 57. Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, [15] and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.

Because " [a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advice from someone who is trained and skilled in the subject matter." *Maness v. Meyers*, 419 U. S. 449, 419 U. S. 466 (1975). As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter," and is "difficult . . . even for an attorney," because it requires

"a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing."

602 F.2d 708. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel." *Powell v. Alabama*, *supra*, at 287 U. S. 69.

Therefore, in addition to Fifth Amendment considerations, the death penalty was improperly imposed on respondent because the psychiatric examination on which Dr. Grigson testified at the penalty phase proceeded in violation of respondent's Sixth Amendment right to the assistance of counsel. [16]

C

Our holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness, as required by statute. A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty. In addition, a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase. *See* n 10, *supra.*

Moreover, under the Texas capital sentencing procedure, the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts. Indeed, some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are "fundamentally of very low reliability," and that psychiatrists possess no special qualifications for making such forecasts. *See* Report of the American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual 23-30, 33 (1974); A Stone, Mental Health and Law: A System in Transition 27-36 (1975); Brief for American Psychiatric Association as *Amicus Curiae* 11-17.

In *Jurek v. Texas*, 428 U. S. 262 (1976), we held that the Texas capital sentencing statute is not unconstitutional on its face. As to the jury question on future dangerousness, the joint opinion announcing the judgment emphasized that a defendant is free to present whatever mitigating factors he may be able to show, *e.g.*, the range and severity of his past criminal conduct, his age, and the circumstances surrounding the crime for which he is being sentenced. *Id.* at 428 U. S. 272-273. The State, of course, can use the same type of evidence in seeking to establish a defendant's propensity to commit other violent acts.

In responding to the argument that foretelling future behavior is impossible the joint opinion stated:

"[P]rediction 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. And 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."

Id. at 428 U. S. 275-276 (footnotes omitted). While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts.

III

Respondent's Fifth and Sixth Amendment rights were abridged by the State's introduction of Dr. Grigson's testimony at the penalty phase, and, as the Court of Appeals concluded, his death sentence must be vacated. [17] Because respondent's underlying conviction has not been challenged and remains undisturbed, the State is free to conduct further proceedings not inconsistent with this opinion. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Footnotes

[1] This psychiatric evaluation was ordered even though defense counsel had not put into issue Smith's competency to stand trial or his sanity at the time of the offense. The trial judge later explained:

"In all cases where the State has sought the death penalty, I have ordered a mental evaluation of the defendant to determine his competency to stand trial. I have done this for my benefit, because I do not intend to be a participant in a case where the defendant receives the death penalty and his mental competency remains in doubt."

App. A-117. *See* Tex.Code Crim.Proc.Ann., Art. 46.02 (Vernon 1979). No question as to the appropriateness of the trial judge's order for the examination has been raised by Smith.

[2] Article 37.071(a) of the Tex. Code of Crim.Proc.Ann. (Vernon Supp. 1980) provides:

"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 of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

[3] The other two issues are "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," and, "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."Tex.Code Crim.Proc.Ann., Arts. 37.071(b)(1) and (3) (Vernon Supp. 1980).

[4] It appears from the record that Smith's only prior criminal conviction was for the possession of marihuana. *See* App. A-64.

[5] Defense counsel discovered the letter at some time after jury selection began in the case on March 11, 1974. The trial judge later explained that Dr. Grigson was "appointed by oral communication," that "[a] letter of appointment was not prepared," and that "the court records do not reflect [the entry of] a written order." *Id.* at A-118. The judge also stated:

"As best I recall, I informed John Simmons, the attorney for the defendant, that I had appointed Dr. Grigson to examine the defendant and that a written report was to be mailed to me."

Ibid. However, defense counsel assert that the discovery of Dr. Grigson's letter served as their first notice that he had examined Smith. *Id.* at A-113, A-116.

On March 25, 1974, the day the trial began, defense counsel requested the issuance of a subpoena for the Dallas County Sheriff's records of Dr. Grigson's "visitation to . . . Smith." *Id.* at A-8.

[6] Texas law does provide that "[n]o statement made by the defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant *on the issue of guilt* in any criminal proceeding."

Tex.Code Crim.Proc.Ann., Art. 46.023(g) (Vernon 1979) (emphasis added). *See also* 18 U.S.C. § 4244; Fed.Rule Crim.Proc. 12.2(c); *United States v. Alvarez*, 519 F.2d 1036, 1042-1044 (CA3 1975); Note, Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination, 83 Harv.L.Rev. 648, 649, and cases cited at nn. 8-9 (1969).

[7] The State conceded this at oral argument. Tr. of Oral Arg. 47, 49.

[8] Although the Court of Appeals doubted the applicability of the Fifth Amendment if Dr. Grigson's diagnosis had been founded only on respondent's mannerisms, facial expressions, attention span, or speech patterns, 602 F.2d 694, 704 (CA5 1979), the record in this case sheds no light on whether such factors alone would enable a psychiatrist to predict future dangerousness. The American Psychiatric Association suggests, however, that,

"absent a defendant's willingness to cooperate as to the verbal *content* of his communications, . . . a psychiatric examination in these circumstances would be meaningless."

Brief for American Psychiatric Association as *Amicus Curiae* 26 (emphasis in original).

[9] On cross-examination, Dr. Grigson acknowledged that his findings were based on his "discussion" with respondent, App. A-32, and he replied to the question "[w]hat . . . was the most important thing that . . . caused you to think that [respondent] is a severe sociopath" as follows:

"He told me that this man named Moon looked as though he was going to reach for a gun, and he pointed his gun toward Mr. Moon's head, pulled the trigger, and it clicked -- misfired, at which time he hollered at Howie, apparently his other partner there who had a gun, 'Watch out, Howie. He's got a gun.' Or something of that sort. At which point, he told me -- now, I don't know who shot this man, but he told me that Howie shot him, but then he walked around over this man who had been shot -- didn't . . . check to see if he had a gun, nor did he check to see if the man was alive or dead. Didn't call an ambulance, but simply found the gun further up underneath the counter and took the gun and the money. This is a very -- sort of cold-blooded disregard for another human being's life. I think that his telling me this story and not saying, you know, 'Man, I would do anything to have that man back alive. I wish I hadn't just stepped over the body.' Or you know, 'I wish I had checked to see if he was all right,' would indicate a concern, guilt, or remorse. But I didn't get any of this." *Id.* at A-27 - A-28.

[10] On the same theory, the Court of Appeals here carefully left open "the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state." 602 F.2d 705.

[11] While recognizing that attempts to coerce a defendant to submit to psychiatric inquiry on his future dangerousness might include the penalty of prosecutorial comment on his refusal to be examined, the Court of Appeals noted that making such a remark and allowing the jury to draw its own conclusions "might clash with [this Court's] insistence that capital sentencing procedures be unusually reliable." 602 F.2d 707. *See also Griffin v. California*, 380 U. S. 609 (1965).

[12] For the reasons stated by the Court of Appeals, we reject the State's argument that respondent waived his Fifth Amendment claim by failing to make a timely, specific objection to Dr. Grigson's testimony at trial. *See* 602 F.2d 708, n.19. In addition, we note that the State did not present the waiver argument in its petition for certiorari. *See* this Court's Rule 40(1)(d)(2) (1970).

[13] Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination.

[14] Because psychiatric examinations of the type at issue here are conducted after adversary proceedings have been instituted, we are not concerned in this case with the limited right to the appointment and presence of counsel recognized as a Fifth Amendment safeguard in *Miranda v. Arizona*, 384 U. S. 436, 384 U. S. 471-473 (1966). *See*

Edwards v. Arizona, post, p. 451 U. S. 477. Rather, the issue before us is whether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination. *But cf.* n 15, *infra.*

Respondent does not assert, and the Court of Appeals did not find, any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that "an attorney present during the psychiatric interview could contribute little, and might seriously disrupt the examination." 602 F.2d 708. *Cf. Thornton v. Corcoran,* 132 U.S.App.D.C. 232, 242, 248, 407 F.2d 695, 705, 711 (1969) (opinion concurring in part and dissenting in part).

[15] It is not clear that defense counsel were even informed prior to the examination that Dr. Grigson had been appointed by the trial judge to determine respondent's competency to stand trial. *See* n 5, *supra.*

[16] We do not hold that respondent was precluded from waiving this constitutional right. Waivers of the assistance of counsel, however,

"must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends . . . 'upon the particular facts and circumstances surrounding [each] case. . . .'" *Edwards v. Arizona, post* at 451 U. S. 482, quoting *Johnson v. Zerbst,* 304 U. S. 458, 304 U. S. 464 (1938). No such waiver has been shown, or even alleged, here.

[17] Because of our disposition of respondent's Fifth and Sixth Amendment claims, we need not reach the question of whether the failure to give advance notice of Dr. Grigson's appearance as a witness for the State deprived respondent of due process.

JUSTICE BRENNAN.

I join the Court's opinion. I also adhere to my position that the death penalty is in all circumstances unconstitutional.

JUSTICE MARSHALL, concurring in part.

I join in all but 451 U. S. I adhere to my consistent view that the death penalty is, under all circumstances, cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. I therefore am unable to join the suggestion in Part II-C that the penalty may ever be constitutionally imposed.

JUSTICE STEWART, with whom JUSTICE POWELL joins, concurring in the judgment.

The respondent had been indicted for murder and a lawyer had been appointed to represent him before he was examined by Dr. Grigson at the behest of the State. Yet that examination took place without previous notice to the respondent's counsel. The Sixth and Fourteenth Amendments, as applied in such cases as *Massiah v. United States,* 377 U. S. 201, and *Brewer v. Williams,* 430 U. S. 387, made impermissible the introduction of Dr. Grigson's testimony against the respondent at any stage of his trial.

I would for this reason affirm the judgment before us without reaching the other issues discussed by the Court.

JUSTICE REHNQUIST, concurring in the judgment.

I concur in the judgment because, under *Massiah v. United States,* 377 U. S. 201 (1964), respondent's counsel should have been notified prior to Dr. Grigson's examination of respondent. As the Court notes, *ante* at 451 U. S. 469, respondent had been indicted and an attorney had been appointed to represent him. Counsel was entitled to be made aware of Dr. Grigson's activities involving his client, and to advise and prepare his client accordingly. This is by no means to say that respondent had any right to have his counsel present at any examination. In this regard, I join the Court's careful delimiting of the Sixth Amendment issue, *ante* at 451 U. S. 470, n. 14.

Since this is enough to decide the case, I would not go on to consider the Fifth Amendment issues, and cannot subscribe to the Court's resolution of them. I am not convinced that any Fifth Amendment rights

were implicated by Dr. Grigson's examination of respondent. Although the psychiatrist examined respondent prior to trial, he only testified concerning the examination after respondent stood convicted. As the court in *Hollis v. Smith,* 571 F.2d 685, 690-691 (CA2 1978), analyzed the issue:

"The psychiatrist's interrogation of [defendant] on subjects presenting no threat of disclosure of prosecutable crimes, in the belief that the substance of [defendant's] responses or the way in which he gave them might cast light on what manner of man he was, involved no 'compelled testimonial self-incrimination' even though the consequence might be more severe punishment."

Even if there are Fifth Amendment rights involved in this case, respondent never invoked these rights when confronted with Dr. Grigson's questions. The Fifth Amendment privilege against compulsory self-incrimination is not self-executing.

"Although *Miranda*'s requirement of specific warnings creates a limited exception to the rule that the privilege must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed."

Roberts v. United States, 445 U. S. 552, 445 U. S. 560 (1980). The *Miranda* requirements were certainly not designed by this Court with psychiatric examinations in mind. Respondent was simply not in the inherently coercive situation considered in *Miranda.* He had already been indicted, and counsel had been appointed to represent him. No claim is raised that respondent's answers to Dr. Grigson's questions were "involuntary" in the normal sense of the word. Unlike the police officers in *Miranda,* Dr. Grigson was not questioning respondent in order to ascertain his guilt or innocence. Particularly since it is not necessary to decide this case, I would not extend the *Miranda* requirements to cover psychiatric examinations such as the one involved here.

This is a suit in medical malpractice. Patient Milton Barclay sued Dr. Lawrence Campbell alleging that the psychiatrist negligently prescribed neuroleptic drugs without first obtaining informed consent.

Mr. Barclay was referred to Dr. Campbell in 1978 by his employer. Dr. Campbell treated Mr. Barclay for mental illness, prescribing certain neuroleptic drugs. Dr. Campbell did not warn his patient of the risks associated with the neuroleptic drugs, and Mr. Barclay developed tardive dyskinesia as a presumed side effect of the neuroleptic medication. Barclay asserted that his treating physician had a duty to warn him of the risks associated with the medications he prescribed. Dr. Campbell relied in his defense upon the reasonable medical practitioner standard to determine which risks related to medical treatment, and his patient was not a reasonable person who could reasonably be expected to understand the risks and make the medically indicated decision. The physician, Dr. Campbell maintained, may use a subjective standard to determine whether to inform a patient of the risks, and thus there is a therapeutic privilege to withhold information when the physician believes that it will not be appropriately considered by the patient.

The Court, however, relied instead upon the Texas Legislature, which had through the Texas Medical Disclosure Panel, required an objective standard for disclosure of risks. "The right to make medical decisions for one's self has been recognized in numerous decisions as one encompassed by the right of privacy under the United States Constitution…One does not automatically lose that right because of mental illness." There is no therapeutic privilege to withhold information from patients.

Milton **BARCLAY**, Petitioner,

v.

W. Lawrence **CAMPBELL**, M.D., Respondent.

704 S.W.2d 8 (Tex. 1986)

McGee, Justice.

This is a medical malpractice case. Milton Barclay sued Dr. W. Lawrence Campbell, alleging that the doctor negligently prescribed certain drugs for Barclay and negligently failed to disclose to Barclay certain risks associated with the drugs. The trial court granted a partial directed verdict in favor of Dr. Campbell on informed consent and submitted the remaining negligence issues to the jury. The jury did not find Dr. Campbell negligent in his treatment of Barclay and the trial court rendered a take-nothing judgment against Barclay. The court of appeals affirmed the trial court judgment, holding that the trial court did not err in directing a verdict for Dr. Campbell on the issue of informed consent. 683 S.W.2d 498. We disagree. The issue of informed consent should have been submitted to the jury. Therefore, we reverse the judgment of the court of appeals and remand the cause to the trial court.

Barclay was referred to Dr. Campbell in January of 1978 by his employer's company physician. Dr. Campbell treated Barclay for mental illness and during the course of treatment prescribed certain neuroleptic drugs for Barclay. In a small percentage of cases, these drugs produce a condition known as tardive dyskinesia. This condition is marked by involuntary muscle movements. The evidence is undisputed that Dr. Campbell did not warn Barclay of the risks associated with the neuroleptic drugs, and Barclay now suffers from tardive dyskinesia.

This cause is governed by the Medical Liability and Insurance Improvement Act, TEX.REV.CIV.STAT.ANN. art. 4590i (Vernon Supp.1985), enacted in 1977. The Act changed the common-law locality rule concerning the physician's duty of disclosure, based on the "reasonable medical practitioner" standard, declared in *Wilson v. Scott*, 412 S.W.2d 299, 302 (Tex.1967). The Texas Medical Disclosure Panel was established by the Act to determine which risks related to medical care should be disclosed. Section 6.07(a) of the Act creates a rebuttable presumption of negligence when the physician has failed to disclose a risk found on the list. Section 6.07(b) provides that if the panel has made no determination concerning the disclosure of risks attendant to a particular medical procedure in question, the physician is under the "duty otherwise imposed by law." TEX.REV.CIV.STAT.ANN. art. 4590i, § 6.07(a) and (b) (Vernon Supp.1985). In our case, the panel has not made a determination of risk disclosure associated with neuroleptic drug ingestion. Consequently, this cause falls under section 6.07(b) of the Act.

In *Peterson v. Shields*, 652 S.W.2d 929, 931 (Tex.1983), we held that the "duty otherwise imposed by law" meant the duty imposed by section 6.02 of the Act, that is, "to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent." Section 6.02 replaces the common-law locality rule with a "reasonable person" rule. Id. at 931. Thus, the focus shifts from the "reasonable medical practitioner" standard to the "reasonable person" standard which asks what risks are material to making the decision to give or withhold consent to a particular medical procedure.

If no presumption has been established by the Act, the plaintiff must prove by expert testimony that the medical condition complained of is a risk inherent in the medical procedure performed. Id. The expert should also "testify to all other facts concerning the risk which show that knowledge of the risk could influence a reasonable person in making a decision to consent to the procedure." Id.

According to Peterson, the plaintiff must meet two requirements to raise a fact issue. First, the plaintiff must introduce evidence to show the risk is inherent to the medical procedure undertaken. Second, the plaintiff must introduce evidence to show that the risk is material in the sense that it could influence a reasonable person's decision to consent to the procedure. If the plaintiff meets both of these requirements, a fact issue is raised so that the plaintiff is entitled to the submission of two issues.

The first issue asks whether the condition complained of is a risk inherent to the medical procedure performed. If the jury answers this issue affirmatively, the jury considers the second issue. The second issue asks could this inherent risk, if any, influence a reasonable person in making a decision to consent to the procedure.

In our case, there was expert testimony introduced at trial that tardive dyskinesia is an inherent risk associated with neuroleptic drugs. Inherent means that the risk is one which exists in and is inseparable from the drug itself. Tardive dyskinesia arises from the use of the drug and not from any defect in the drug or negligent human intervention. Certain precautions must be taken in prescribing the drug due to the inherent risks associated with the medication.

There was also expert testimony introduced at trial concerning the probabilities of contracting tardive dyskinesia. The testimony was that the risk to Barclay of contracting tardive dyskinesia was small to extremely small. The court of appeals concluded that this testimony constituted no evidence that the risk was material. The issue was whether there was some expert evidence to find that the risk was material enough to influence a reasonable person to give or withhold consent to treatment. We hold that the expert testimony concerning the probabilities of contracting tardive dyskinesia is some evidence that the risk was material enough to influence a reasonable person in his decision to give or withhold consent to the procedure.

There was also other evidence presented which bears on the materiality of the risk. This includes how the condition manifests itself; the permanancy of the condition caused by the risk; the known cures for the condition; the seriousness of the condition; and the overall effect of the condition on the body. Barclay introduced evidence concerning all of these factors which were relevant facts a jury would consider in determining whether the risk was material. We hold that he met the requirements of Peterson and was entitled to have issues submitted to the jury on the issue of informed consent.

Nevertheless, the court of appeals held that the undisputed evidence established that Barclay did not have the reactions of a reasonable person. Relying on section 6.07(a)(2) of the Act, the court of appeals held that it was the legislature's intent to excuse a defendant who is negligent in failing to disclose a risk if it was not medically feasible to make the disclosure. The court of appeals concluded that even if the risk was material and, therefore, should have been disclosed, Dr. Campbell was excused from making the disclosure because it was not medically feasible. The testimony used to support this conclusion was that Barclay did not have the reactions of a reasonable person because he was suffering from schizophrenia. The consensus of the expert testimony was that had Barclay known of the risk of side effects like tardive dyskinesia, it probably would have caused him to refuse the treatment, no matter how minimal the risk and how great the counterveiling risk of refusing the medication.

While we appreciate the dilemma facing a psychiatrist in such a position, we hold that it was not the legislature's intent to take away an individual's right to make such decisions for himself just because his doctor does not believe his patient is reasonable. The court of appeals applied a subjective standard to determine if Barclay was entitled to be informed of the risk. The Act requires the application of an objective standard. The issue is not whether Barclay could have been influenced in making a decision whether to give or withhold consent to the procedure had he known of the risk. Rather, the issue is whether a "reasonable person" could have been influenced in making a decision whether to give or withhold consent to the procedure had he known of the risk. If a "reasonable person" could have been influenced, then Barclay was also entitled to be warned of the risk.

The right to make medical decisions for one's self has been recognized in numerous decisions as one encompassed by the right of privacy under the United States Constitution. See *Carey v. Population Services International*, 431 U.S. 678, 684, 97 S.Ct. 2010, 2015-16, 52 L.Ed.2d 675 (1977); *Roe v. Wade*, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L.Ed.2d 147 (1973). One does not automatically lose that right because of mental illness. A person suffering from a mental illness is guaranteed all the rights, benefits, responsibilities and privileges afforded by the constitutions and laws of the United States and Texas. TEX.REV.CIV.STAT.ANN. art. 5547-80(a) (Vernon Supp.1985). This includes making one's own medical decisions.

Barclay introduced the required expert testimony and, therefore, was entitled to issues on the question of informed consent. Barclay's mental illness does not foreclose his right to be informed of the risk if the jury finds the risk is material in the sense of one which could influence a reasonable person in making a decision to give or withhold consent to the procedure. We reverse the judgment of the court of appeals and remand the cause to the trial court for trial on the issue of informed consent.

REPORTING ABUSE, NEGLECT, AND MISTREATMENT

REPORTING ABUSE, NEGLECT, AND MISTREATMENT

This case answers the question of whether or not someone who reports suspected child abuse to authorities is liable for that reporting. Esther Bird, an employee of the Wetcher Clinic owned by Kenneth Wetcher, M.D., a psychiatrist, examined a child for abuse, concluded that the father, W.C.W., was the abuser and filed an affidavit of that fact with the child's mother who in turn used it to attempt to modify visitation. A police investigation ensued, the father was arrested and charged with abuse, subsequently exonerated and then sued the therapist and clinic.

The father's legal position is that a person who diagnoses abuse owes a duty not to negligently misdiagnose the condition of a child. As a result of this report that proved unfounded, the father claims damages for injury to his reputation, public contempt, ridicule, loss of relationships, loss of self-esteem, lost earnings and expenses of defending himself.

The defendant's legal position is that as a matter of law there is no professional duty running to third parties and since the affidavit was used as part of court proceedings the statements were privileged as a matter of law.

The court held for Bird and Wetcher, finding that as a matter of law there is no duty to a third party liability to not negligently misdiagnose a condition of a patient. Statements in an affidavit filed as part of a court proceeding are privileged and may not be the basis for a suit.

The court did say that all reports made of abuse should be non-accusatory. While there is harm foreseeable to a parent accused of child abuse, a defendant's right to sue a mental health professional must be considered in light of countervailing concerns, including the social utility of eradicating sexual abuse. The administration of justice requires "free and full disclosure from witnesses unhampered by fear of retaliatory lawsuits."

Bird

v.

W.C.W.,

868 S.W.2d 767 (Tex. 1994)

In this case, a psychologist, Esther Bird, examined a child for signs of sexual abuse. After examining the child, the psychologist concluded that the child had been sexually abused and that the natural father, W.C.W., was the abuser. The psychologist then signed an affidavit reporting these conclusions. The affidavit was filed by the child's mother, B.W., in the family court in an effort to modify child custody and visitation orders. All matters, criminal and civil, predicated upon the assertion that the natural father was a child abuser were eventually dropped. The natural father then sued the psychologist and her employer, Kenneth Wetcher, M.D., P.A. & Associates. n1 The question presented is whether the psychologist owed a professional duty of care to the natural father to not negligently misdiagnose the condition of the child. In defense, the psychologist asserts there is no professional duty running to third parties as a matter of law, and regardless, the affidavit asserting the natural father to be the abuser of the child was used as a part of the court litigation process, and consequently, the statement was privileged as a matter of law. The trial court granted summary judgment in favor of Bird and Wetcher. The court of

appeals reversed and remanded for trial on the merits. 840 S.W.2d 50 (Tex. App. 1992). We hold that as a matter of law there is no professional duty running from a psychologist to a third party to not negligently misdiagnose a condition of a patient. We further reaffirm that a statement in an affidavit filed as a part of a court proceeding is privileged. Consequently, we reverse the judgment of the court of appeals and render judgment that the plaintiff take nothing. [1]

I.

In 1983 W.C.W. was appointed managing conservator of his son, Jarrad, following a divorce from B.W. W.C.W. moved to Florida in 1986 and temporarily left Jarrad with his maternal grandmother. Shortly before Jarrad was to leave for Florida, his mother reported to Child Protective Services (CPS) that he had indicated his "daddy" had sexually assaulted him. There was an on-going criminal investigation of sexual abuse allegations when the mother was referred to the Wetcher Clinic, a crisis management service. There, Bird examined Jarrad and interviewed the mother and her common law husband, D.R. Bird suspected that Jarrad had been sexually abused. She later executed an affidavit stating that: "I have concluded that Jarrad has been the victim of sexual abuse by his father . . . ." The mother submitted this affidavit to the family district court and sought to change the existing custody order to gain managing conservatorship of Jarrad and terminate the father's custodial rights. The Houston Police Department also filed criminal charges against the father. After the father retained custody and the criminal charges were dismissed, he sued Bird and Wetcher. We note at the outset that while couched in terms of negligent misdiagnosis, the essence of the father's claim is that it was Bird's *communication* of her diagnosis that caused him emotional harm and related financial damages. [2]

II.

DUTY OF A MENTAL-HEALTH PROFESSIONAL

First we address whether a mental health professional owes a duty to a parent to not negligently misdiagnose a condition of the child. Liability in negligence is premised on a finding of a duty, a breach of that duty which proximately causes injuries, and damages resulting from that breach. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). Whether a legal duty exists under a set of facts is a question of law. *Id.* In determining whether to impose a duty, this Court must consider the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the actor. *Id.*; *Otis Engineering Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983).

We acknowledge that the harm to a parent accused of sexual abuse is foreseeable. However, foreseeability alone is not a sufficient basis for creating a new duty. *Boyles v. Kerr*, 855 S.W.2d 593, 599 (Tex. 1993); *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993). Psychology is an inexact science. There is an inherent risk that someone might be falsely accused of sexually abusing a child; in such cases, injury is almost certain to result. The magnitude of the burden of guarding against the injury is also uncertain. While mental health professionals may be able to conduct tests to determine whether there is indicia of sexual abuse, the quality of information they can acquire is limited. The child is often the main source of the information, and young children can have difficulty communicating abuse of that nature. Thus, while the risk of injury to an accused parent is real, it is only part of the equation. Furthermore, the risk of an erroneous determination of abuse is ameliorated, in part, by the availability of criminal sanctions against a person who knowingly reports false information in a custody proceeding. *See* TEX. FAM. CODE ANN. § 34.031.

A claimant's right to sue a mental health professional must be considered in light of countervailing concerns, including the social utility of eradicating sexual abuse. Evaluating children to determine whether sexual abuse has occurred is essential to that goal. *See Vineyard v. Kraft*, 828 S.W.2d 248, 251 (Tex. App.1992). Young children's difficulty in communicating sexual abuse heightens the need for experienced mental health professionals to evaluate the child. Because they are dealing with such a

sensitive situation, mental health professionals should be allowed to exercise their professional judgment in diagnosing sexual abuse of a child without the judicial imposition of a countervailing duty to third parties.

Two prior cases have found no duty in similar situations. In *Vineyard*, 828 S.W.2d at 251, a father accused of sexually molesting his daughter sued the doctor and the psychotherapist for negligent misdiagnosis and for negligent infliction of emotional harm. The court considered whether a legal duty arises between a parent and a mental health professional who makes an evaluation of a child's condition when child abuse is suspected. *Id.* at 252. The court declined to find a legal duty because there was no physician-patient relationship. *Id.* at 253; *see also*, *Wilson v. Winsett*, 828 S.W.2d 231, 232-33 (Tex. App.1992) (noting that a physician is liable for malpractice or negligence only when there is a physician-patient relationship); *Fought v. Solce*, 821 S.W.2d 218 (Tex. App. 1991) (holding a physician liable for negligence only where there is a physician-patient relationship); *Armstrong v. Morgan*, 545 S.W.2d 45 (Tex. App.--Texarkana 1986, no writ) (finding fact questions existed regarding duty not to injure person being examined). Here, the father had no physician-patient relationship with Bird or with the Wetcher Clinic. *Fought*, 821 S.W.2d at 220.

The court of appeals in *Dominguez v. Kelly*, 786 S.W.2d 749 (Tex. App.1990), reached a similar result. In that case, an employee of the Texas Department of Human Services requested that a minor female be examined by Doctor Kelly. *Id.* 786 S.W.2d at 750. The doctor concluded that there had been sexual abuse. [3] *Id.* The father, Mr. Dominguez, was charged with aggravated sexual abuse. After that charge was dismissed, Mr. Dominguez sued Dr. Kelly for negligence as well as for malicious prosecution. [4] *Id.* 786 S.W.2d at 751. Because there was no physician-patient relationship, the court declined to find a duty. *Id.*[3][4]

However, one court has concluded that a doctor owed a duty to a third party without the requisite patient-doctor relationship. *Gooden v. Tips*, 651 S.W.2d 364 (Tex. App.--Tyler 1983, no writ). The Goodens were involved in automobile accident with Mrs. Goodpastures. They sued Mrs. Goodpastures' doctor, Dr. Tips, for negligence in failing to warn his patient not to drive while under the influence of the drug Quaalude. *Gooden* noted that "under proper facts, a physician can owe a duty to use reasonable care to protect the driving public where a physician's negligence in diagnosis or treatment of his patient contributes to plaintiff's injuries." *Id.* 651 S.W.2d at 369.

The *Gooden* court focused on the foreseeability of the resulting harm in reversing summary judgment in Dr. Tips' favor. The court held that, under the facts alleged, Dr. Tips might have a *duty to warn* his patient not to drive. *Id.* 651 S.W.2d at 369-70 (emphasis supplied). That limited duty does not, however, extend to this case. There is little social utility in failing to warn patients about known side-effects of a drug, but there is great social utility in encouraging mental health professionals to assist in the examination and diagnosis of sexual abuse. Furthermore, in *Gooden* the plaintiff was harmed by the resulting actions of the patient, not by the condition, treatment, or diagnosis of the patient.

We hold that summary judgment was proper in favor of Bird because she owed no professional duty to the father to not negligently misdiagnose the condition of the child.

III.

PRIVILEGE FOR STATEMENT IN AFFIDAVIT

Although we have concluded that there is no professional duty owed to one other than the patient to not negligently misdiagnose a condition, we must still address the defensive issue raised by Bird, whether the communication of her conclusion that the father was the abuser by way of affidavit to the family court was privileged. Bird has not asserted, and the record does not show, that identifying or communicating the identity of the perpetrator of the abuse was part of Jarrad's diagnosis or treatment.

Bird's expertise was required to diagnose whether abuse had occurred and she had a duty to report any suspected abuse. *See* TEX. FAM. CODE ANN. § 34.01 (requiring professionals to report suspected abuse of a child). However, the record does not demonstrate, nor does Bird assert, that identifying the actual perpetrator of the abuse was within the purview of her expertise. Likewise, there is no claim or showing that Bird's professional duty to the patient regarding diagnosis of abuse encompassed communicating her conclusions to third parties outside the physician/patient relationship. *See* TEX. FAM. CODE ANN. § 34.02 (calling for non-accusatory reporting of child abuse). A mental health professional's duty might differ, however, if identifying or communicating the identity of the abuser was part of the patient's treatment such as when part of the treatment is to confront the abuser or to solicit the family's assistance in helping the patient cope with the abuse.

Thus, while Bird owed no duty to the father for her diagnosis of Jarrad, the record does not support the contention that she was functioning within a treatment and diagnosis role when she communicated to the family court, via affidavit, her opinion that it was W.C.W. who abused Jarrad. To the contrary, from the record it appears that she acted no differently than any other lay person in *identifying the alleged perpetrator* in that the statement was based, not upon a scientific experiment, but upon the outcry of the child. Like any other person, she thereby subjected herself to liability for defamation unless a privilege attaches to the form of the communication. Although two privileges potentially relieve Bird of liability for the communication made, she has asserted only a privilege for statements made in the course of judicial proceedings.[5]

Communications made during the course of judicial proceedings are privileged. *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909, 912-13 (Tex. 1942). The privilege also extends to pre-trial proceedings, including affidavits filed with the court. *James v. Brown*, 637 S.W.2d 914, 916-17 (Tex. 1982) (applying the privilege in a defamation action). Bird argues that because the essence of the father's allegations is libel in the context of judicial proceedings, the privilege should apply in this case. We agree.

The privilege afforded against defamation actions is founded on the "theory that the good it accomplishes in protecting the rights of the general public outweighs any wrong or injury which may result to a particular individual." *Reagan*, 166 S.W.2d at 913; *see also Leigh v. Parker*, 740 S.W.2d 101, 103 (Tex. App.--Austin 1987, writ denied) (noting that an action is "'privileged' if it furthers a policy interest of such importance that one is entitled to protection even at the expense of damage to another"). However, *James*, 637 S.W.2d at 918, declined to expand the privilege beyond libel and slander. *See also City of Brady v. Bennie*, 735 S.W.2d 275, 279 (Tex. App.1987) (recognizing a "qualified privilege" in an action for tortious interference in connection with a letter written by an attorney during the course of a prior libel suit).

The court in *James* held that the "doctors' *communications* to the court of their diagnosis of Mrs. James' mental condition, regardless of how negligently made, cannot serve as the basis for a defamation action, ..." *James*, 637 S.W.2d at 917 (emphasis added). Although in *James* the plaintiff was the patient examined and here Jarrad was the patient examined, not his father, and although W.C.W. asserted a negligence rather than a defamation action, the *James* case and this case are virtually indistinguishable on the issue of privileged communications. The communication made by Bird in this case is privileged. This is especially true here, where the father's damages are basically defamation damages. [6] *See Doe v. Blake*, 809 F. Supp. 1020, 1028 (D. Conn. 1992) (extending the privilege beyond defamation actions to avoid the "circumvention [of the policy behind the privilege] by affording an almost equally unrestricted action under a different label").[6][7]

Any injury caused to W.C.W. by denying him the ability to bring a negligence cause of action for his identification as a child abuser based upon an inaccurate diagnosis of child abuse which is communicated in a court proceeding is outweighed by the need to encourage the reporting of child abuse. The public has a strong interest in protecting children, especially protecting them against physical and sexual abuse. By extending the privilege of in court communication to mental health professionals engaged in examining

and diagnosing abuse of children, we further the public's strong interest in helping to eradicate child abuse. [8] Furthermore, the administration of justice requires "full and free disclosure from witnesses unhampered by fear of retaliatory lawsuits." *Id.* 637 S.W.2d at 917; *Leigh*, 740 S.W.2d at 103. We continue to afford a privilege to communications made in the context of a judicial proceeding. Thus, the affidavit Bird submitted to the family court is privileged and defeats the father's negligence claim. [8]

We hold that a mental health professional owes no professional duty of care to a third party to not negligently misdiagnose a condition of a patient. We also hold that a privilege exists for communication of an alleged child abuser's identity in the course of a judicial proceeding whether the accusation was negligently made. Consequently, we reverse the judgment of the court of appeals and render judgment in favor of Bird and Wetcher.

CONCUR BY: BOB GAMMAGE; JOHN CORNYN

CONCUR: JUSTICE GAMMAGE, joined by JUSTICE DOGGETT, concurring.

Though I concur, today's judgment should not be read as conferring a grant of absolute immunity upon mental health professionals. The opinion concludes that "a privilege exists for communication of an alleged child abuser's identity in the course of a judicial proceeding *whether [or not] the accusation was negligently made.*" Every privilege carries with it a responsibility. If we are to grant mental health professionals the privilege of making such accusations, even if they are not called upon to make them, we also should hold them to an appropriate standard of professional responsibility. Adhering to its duty to recognize changes in the common law, Texas courts have from time to time imposed standards on various occupations. *See, e.g., El Chico Corp. v. Poole,* 732 S.W.2d 306, 308 (Tex. 1987); *Otis Engineering Corp. v. Clark,* 668 S.W.2d 307 at 311; *Gooden v. Tips,* 651 S.W.2d 364 at 369.

False accusations of child abuse can be devastating: they destroy reputations, relationships, even lives. Our society faces no problem more serious than child abuse. Though we should give mental health workers in this field some latitude and protection in their efforts to eradicate child abuse, commensurate standards of professional discretion should apply, and failure to adhere to such standards could foreseeably result in their judicial recognition and enforcement.

JUSTICE CORNYN, joined by JUSTICE SPECTOR, concurs with the judgment.

I join the Court's judgment solely for the reason that I agree that Bird's statement, made during the course of judicial proceedings, was privileged.

Footnotes

[1] Wetcher is sued under the theory of *respondeat superior* and no independent claim of professional negligence on the part of Wetcher is asserted. However, Wetcher is independently sued for negligent hiring and supervising of Bird. Because of our holding of no liability on the part of Wetcher's employee, there is no basis for independent liability on the part of Wetcher.

[2] Plaintiff seeks damages for past and future mental anguish, including 1) Injury to his reputation; 2) Public contempt; 3) Ridicule; 4) Loss of relationships; and 5) Loss of self-esteem. He also seeks lost earnings and the expenses he incurred in defending himself before the family and criminal district courts.

[3] The opinion does not state that the doctor communicated who committed the abuse. *Dominguez v. Kelly,* 786 S.W.2d 749, 750 (Tex. App.--El Paso 1990, writ denied). The doctor reported that "certain bruises were made by large hands on the [child's] thighs, 'presumably pulling them apart to sexually abuse her.'" *Id.* 786 S.W.2d at 752.

[4] The opinion notes that there was no evidence of any final determination of the criminal proceedings. *Id.* 786 S.W.2d at 751. However, the aggravated sexual assault charges appear to have been dismissed. Mr. Dominguez pled *nolo contendere* to a third degree felony of injury to a child. *Id.*

[5] In addition to the judicial proceedings privilege, the Family Code also affords immunity to those reporting abuse. The Child Abuse Reporting Act requires "any person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect to report" it. TEX. FAM. CODE ANN. § 34.01

et seq. (Vernon Supp. 1994). Section 34.02 requires the professional to make an oral report to designated authorities within 48 hours, and a written report within 5 days. TEX. FAM. CODE ANN. § 34.02(d). To encourage the reporting of child abuse, the Family Code immunizes persons reporting from civil or criminal liability. TEX. FAM. CODE ANN. § 34.03; *see also* Leota H. Alexander, *Commentary to Chapter 34. Report of Child Abuse*, TEX. TECH. L. REV. 1697, 1707 (1990); TEX. FAM. CODE ANN. § 35.04.

[6] *See supra* note 2.

[7] In *Doe*, it was the doctor's communication that Doe had ARC, the Aids Related Complex, which was objectionable to the plaintiff, not the doctor's conclusion. *Doe*, 809 F. Supp. at 1028. Thus, the court did not allow the patient to sue the doctor for breach of implied contract or for violation of promissory estoppel arising from the doctor's disclosure of his condition. *Id*. 809 F. Supp. at 1026-28.
In a similar vein, it would be ironic if an individual could avoid all the constitutional restrictions on defamation actions merely by disguising such claim in negligence terms. *See e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964); *see also Houston Chronicle Pub. Co. v. Stewart*, 668 S.W.2d 727 (Tex. App.--Houston [1st Dist.] 1984, writ dismissed).

[8] The Family Code immunizes persons reporting suspected child abuse from civil or criminal liability. TEX. FAM. CODE ANN. § 34.03. By providing such immunity, the legislature has established a public policy which encourages the reporting of the abuse of a child.

What should a therapist do when a client tells the therapist about behavior that may constitute criminal acts? While on probation for a sex offense, appellant made unwarned, self-incriminating statements to his therapist during his participation in a court-ordered Sexual Offender Treatment Program. The court found that appellant failed to affirmatively invoke his Fifth Amendment privilege and was not confronted with the "classic penalty situation" which would have excused his failure to invoke his Fifth Amendment privilege and therefore found that appellant's statements were not compelled and were admissible against him in a subsequent criminal proceeding.

115 S.W.3d 1

Phillip Arthur **CHAPMAN**, Appellant,

v.

The **STATE** of Texas.

(Tex. Crim. App. 2003) No 2011/12-02

Sept. 10, 2003.

Defendant was convicted in the Criminal District Court, Dallas County, John Creuzot, J., on his guilty pleas to aggravated sexual assault and indecency with a child. Defendant appealed. The Dallas Court of Appeals, Bridges, J., affirmed. On defendant's petition for discretionary review, the Court of Criminal Appeals, Cochran, J., held that his statement to group therapist that he had molested two other girls and had never been charged was not compelled for Fifth Amendment purposes.

Affirmed.

Attorneys and Law Firms

*2 Edgar A. Mason, Dallas, for Appellant.

Patricia Poppoff Noble, Asst. DA, Dallas, Matthew Paul, State's Atty., Austin, for State.

OPINION

COCHRAN, J., delivered the opinion of the Court.

While on probation for a sex offense, appellant made unwarned, self-incriminating statements to his therapist during his participation in a court-ordered Sexual Offender Treatment Program. He then repeated these statements when questioned, first by his probation officer, and second by a police officer. We must decide whether appellant's statements were compelled in violation of his Fifth Amendment right against self-incrimination.[1] Because *3 we find that appellant: 1) failed to affirmatively invoke his Fifth Amendment privilege; and 2) was not confronted with the "classic penalty situation" which would have excused that failure, we conclude that appellant's statements were not compelled within the meaning of the Fifth Amendment. We therefore affirm the court of appeals which held that appellant's statements were admissible against him in a subsequent criminal proceeding.[2]

I

Appellant was serving 10 years' deferred adjudication probation for two 1995 indecency with a child offenses. Appellant's probation terms required him to attend a Sex Offender Treatment Program (SOTP) and to "participate in and comply with all treatments, guidelines and directions given by the sex offender therapist." Appellant also attended a group therapy program for sex offenders administered by Child Protective Services (CPS). Trevor Parr was appellant's CPS group therapist.

Appellant's treatment contract with the SOTP included a lengthy list of specific requirements[3] and informed him that he must participate in good faith, fully disclosing information relevant to his rehabilitation.[4] During therapy, appellant told Trevor Parr and his therapy group that he had sexually molested two other young girls in 1994, for which he had never been charged. Parr called appellant's probation officer, Andy Nation, the following day and told him about the statements. They discussed who should report the disclosures to the police, because both of them were required to report suspected child abuse or neglect to the relevant authorities.[5] At their next probation meeting, Nation asked appellant about his statements to Parr. Appellant repeated his admissions and later provided the girls' names and contact information.[6] Nation, as required by law, then called Officer Dudley Perry at the Mesquite Police Department to report the offenses.

Officer Perry contacted the girls' parents and obtained statements from the children. Perry then called appellant, who met Perry at the station house. After giving appellant the proper *Miranda* warnings, Perry questioned appellant about the allegations; appellant then confessed. The Dallas County District Attorney's Office charged appellant for the two 1994 acts of indecency with a child.

Appellant filed motions to dismiss the indictment and to suppress the statements. During the motion hearings, appellant gave three reasons for disclosing his prior offenses: 1) he thought that if he did not cooperate with his therapist-and later, his probation officer and the police-Parr would drop him from the treatment program *4 and he would then be in violation of his probation and possibly be sent to jail; 2) he was concerned about his own rehabilitation; and 3) he was concerned about his victims' recovery.

Regarding his first reason for disclosure, appellant testified that Parr had emphasized the importance of complete honesty to a sex offender's recovery and rehabilitation, and strongly encouraged each therapy group member to give a full sexual history as part of the treatment process. His request was reinforced by the possibility of polygraph testing to determine the accuracy and completeness of the self-disclosure as well as possible termination from the program for non-cooperation.

Appellant said that he understood the terms of his probation agreement to mean that if he failed to successfully complete the treatment program, he "could be brought back before the Court, sentenced and be put in jail." He also said that he felt he could not refuse to answer their questions, and he did not think that charges could be filed against him because of his statements. According to appellant, Parr did not tell him that he would turn the information over to authorities until after he (appellant) had already disclosed

the uncharged conduct. Appellant further stated that he "would have had second thoughts" about revealing the incriminating information and would not have revealed it if he had known he could go to prison for it. However, appellant also admitted to the trial judge that he had actually known in advance that Parr would inform the police of his statements:

> Counsel: Mr. Chapman, in these group sessions you were involved in, you were never given any Miranda warnings in those group sessions, were you?
>
> Appellant: No, I wasn't.
>
> Counsel: They never told you if you made these revelations that whatever you said might be used-would be used against you in a court of law, did they?
>
> Appellant: No.
>
> Counsel: Did they ever tell you that they would go down and file criminal cases on you if you-if you revealed that you had sexually offended?
>
> Appellant: They-they told me that-they didn't tell me that they would file charges, but they would tell-were required by law to tell the police department.
>
> The Court: When did they tell you that?
>
> Appellant: It was all through my-my time period that I was going to CPS that this was reiterated over.
>
> The Court: So you knew that before you even said anything to Mr. Parr; is that correct?
>
> Appellant: Yes.
>
> The Court: Okay.

Appellant's second and third reasons for disclosure were interrelated. When asked by his counsel, "Why did you make a clean [breast] of things and tell your therapist about these two prior incidents ... ?" Appellant answered: "Well, I wanted to tell these offenses because I wanted to do this program of recovery, and second, last but not least[,] there be a recourse of rescue for the children that I had harmed." Appellant testified that, despite Parr's urging that sex therapy members give a full sexual history, he did not tell his therapist about the other offenses for several months, not until a friend gave him *Just Before Dawn*, a book intended to help child sexual abuse offenders empathize with their victims and understand the lifelong effects of the offender's conduct on the children. Appellant agreed that reading the book had been a catalyst for his disclosures. *5 When he read the book, he "felt bad for the children" and "wanted to do the right thing." Thus, *he* approached Parr and told him about the prior offenses voluntarily. He made his self-incriminating admissions without any direct questions from his therapist. Appellant further agreed that his therapist did not threaten him in any way or say that if he did not reveal other sexual conduct he would be sent to prison. He also said that he went to the police station voluntarily.

The trial judge denied appellant's motions. Appellant then pleaded guilty to the two offenses and the trial judge sentenced him to 20 years in prison.

In the court of appeals, appellant argued that the trial court erred in refusing to grant his motion to dismiss because the State had violated his right against compelled self-incrimination under the Texas and United States Constitutions. Specifically, appellant argued that the SOTP terms required him to reveal his past sexual history, under pain of polygraph examination, and thus forced him to choose between waiving his Fifth Amendment right against self-incrimination or suffering revocation of his probation for refusing to cooperate. In an unpublished opinion, the court of appeals disagreed, holding, among other things, that the Fifth Amendment right against self-incrimination is not self-executing and that appellant had not shown that he had ever asserted his right against self-incrimination.[7] Before this Court, appellant argues that the court of appeals erred when it found that his statements were not compelled and were therefore admissible.

II

It is a fundamental tenet of Texas and federal constitutional jurisprudence that every person has the right to avoid self-incrimination by exercising the privilege provided him by the Fifth Amendment and the Texas Constitution.[8] He may choose to remain silent rather than to respond to questions when the answers to those questions would tend to incriminate him.[9] The privilege applies not only to an accused's right to refuse to testify in criminal proceedings, but also permits him "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[10]

A criminal defendant does not lose this constitutional protection merely because he has been convicted of a crime.[11] " '[T]he privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.' "[12] A person who has been convicted of a crime, is in prison or *6 on probation still has a right against self-incrimination concerning statements that would incriminate him for some other offense.[13] As the State acknowledged in its brief:

The State could not constitutionally carry out a threat to, and could not legally, revoke probation for refusing to answer questions calling for information that would incriminate the Appellant in separate criminal proceedings. He was not, and could not be, required to jeopardize his conditional liberty by remaining silent, a legitimate exercise of the Fifth Amendment privilege.

Thus, the fact that appellant was on probation for a criminal sexual offense did not itself diminish his Fifth Amendment privilege against self-incrimination.

On the other hand, as the court of appeals correctly stated, this privilege against compelled self-incrimination is not ordinarily self-executing. In all but a few specific situations, a criminal defendant must timely assert his privilege:

'The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.'[14]

Thus, the critical question is whether appellant affirmatively invoked his right against self-incrimination, and if not, whether the facts in this case fall within "the classic penalty situation" exception to this general rule, thereby relieving him of the responsibility to assert his privilege.

Appellant has not argued, or offered any evidence, that he affirmatively invoked his right against self-incrimination before he told his therapist, his probation officer, and Officer Perry of his two other sexual offenses. Therefore, we turn to the second issue, whether the facts of this case made it unnecessary for appellant to assert his right against self-incrimination. For the reasons discussed below, we find that the answer to this question is "No."

In the classic penalty situation, a person is threatened with punishment for relying upon his Fifth Amendment privilege. The Supreme Court has identified the key inquiry in this penalty situation as "whether the accused was deprived of his free choice to admit, to deny, or to refuse to answer."[15] The leading "penalty" case on the use of self-incriminating statements made by probationers is *Minnesota v. Murphy,*[16] in which the Supreme Court held that the defendant's failure to invoke his Fifth Amendment privilege was not excused.[17] As explained in *Murphy:*

*7 [I]f the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.[18]

Like appellant, Marshall Murphy was on probation for a sex offense.[19] Murphy's probation conditions, like appellant's, required him to participate in a sexual offender treatment program, to report to his

probation officer as directed, and to "be truthful with the probation officer 'in all matters.' "[20] Murphy was told that if he did not comply with these conditions, he could be returned to the sentencing court for a probation revocation hearing.[21]

Murphy's therapist informed the probation officer that Murphy had admitted to committing an earlier rape and murder unrelated to his probation offense.[22] When the probation officer met with Murphy, she told him, without first giving him *Miranda* warnings, about the therapist's information.[23] During the course of the probation meeting, Murphy admitted committing the uncharged rape and murder to her as well.[24] The probation officer then informed police of Murphy's self-incriminating statements, and, shortly thereafter, he was arrested, charged, and convicted of first-degree murder.[25]

Murphy appealed, arguing that his motion to suppress the self-incriminating statements should have been granted because he was subjected to a classic penalty situation: he was required, by the terms of his probation, to speak fully and truthfully or remain silent and risk the possibility of having his probation revoked.[26] Although the Supreme Court ultimately rejected Murphy's contention, it explained that "[t]he threat of punishment for reliance on the privilege distinguishes cases of this sort from the ordinary case in which a witness is merely required to appear and give testimony."[27] In the latter case, the witness must invoke his privilege; if he does invoke the privilege, then he cannot be compelled to testify against himself unless granted use-immunity.[28] Similarly, the normal probation conditions, such as a stipulation that the probationer appear and discuss matters that affect his probationary status, does not relieve him of the responsibility to assert his privilege if he fears that his answers may incriminate him.[29]

The critical inquiry is whether a state has gone beyond merely requiring a probationer to appear and speak on matters relevant to his probationary status or "whether [it goes] further and require[s] *8 him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent."[30] In Murphy's case, the Court determined that the state had not crossed this boundary, and therefore Murphy was not excused from his obligation to assert his privilege because:

> 1) Murphy's obligation was no different from the obligation placed on any trial witness, who could also be compelled to appear and who also must either: a) answer truthfully, under penalty of perjury, or b) timely assert his Fifth Amendment privilege;[31]
>
> 2) Murphy's probation terms explicitly prohibited only *false* statements, but were silent regarding the consequences should a probationer choose to exercise his Fifth Amendment privilege and refuse to answer potentially self-incriminating questions;[32]
>
> 3) There was no direct evidence that Murphy confessed because he was threatened with the revocation of his probation;[33] and
>
> 4) Even if Murphy subjectively believed that his probation would be revoked for exercising the privilege, that belief would not be objectively reasonable because "[the Court's] decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for a legitimate exercise of the Fifth Amendment privilege."[34]

For these reasons, the Court could not "conclude that Murphy was deterred from claiming the privilege by a reasonably perceived threat of revocation."[35]

IV.

The Supreme Court's reasoning in *Murphy* is directly applicable to this factually similar case and leads us to conclude that appellant was not subjected to a classic penalty situation.

First, state authorities did not either expressly or impliedly state that appellant's probation would be revoked if he chose to invoke his Fifth Amendment privilege. At most, appellant's probation and treatment contract informed him that the successful completion of his probation might be jeopardized if he failed to comply with the terms of the treatment program. There was no evidence that Parr stated that he would automatically drop appellant from the treatment program (and thus, jeopardize his conditional liberty) if he refused to answer a direct question about uncharged criminal conduct.

Second, and most importantly, Parr never asked appellant directly about his sexual history. Appellant testified that *he* approached Parr with the information. And he did so for laudable reasons. When his counsel asked him why he had told his therapist about the two prior instances of child molestation, appellant answered: *9 "Well, I wanted to tell these offenses because I wanted to do this program of recovery, and second, last but not least [,] there be a recourse of rescue for the children that I had harmed." He explained that he "felt bad for the children" and "wanted to do the right thing." And he also explicitly stated that he went to the police department voluntarily, was given appropriate *Miranda* warnings, waived those rights and voluntarily gave two written confessions about the prior offenses.

Appellant now argues that he thought his disclosures to Mr. Parr would be kept confidential, but there is no evidence that Mr. Parr ever stated or suggested that he would not disclose a group therapy member's confession of crime to that person's probation officer or the police. Quite the contrary-the paragraph of the treatment contract immediately above appellant's signature expressly warned him that "local or state police may be contacted if necessary to maintain victim or community safety." Indeed, appellant said that his therapists repeatedly told him, before he said anything to Mr. Parr, that "they were required by law to tell the police department" about any other sexual offenses. Furthermore, appellant testified that he wanted to do the right thing to help the children whom he had abused, but they could hardly be helped if no one knew their names or knew that appellant, their step-father or step-grandfather, had abused them. There is ample evidence in this record to support the trial court's implicit finding that appellant was compelled to speak by his own conscience, not by any explicit or implicit external threat of punishment.

We disagree with appellant's contention that *Murphy* is distinguishable from his case and further find that appellant's reliance on *State v. Fuller,*[36] and *Lile v. McKune,*[37] is misplaced. Although both cases involve participation in sexual offender treatment programs, we find that the similarities end there.

The treatment program in *Fuller* expressly *required* the probationer to fully disclose his offense history or his probation *would* be revoked and he *would* be sent to prison.[38] The Montana Supreme Court found that, unlike in *Murphy,* the district court "threatened to send [the probationer] to prison if he did not honestly disclose his offense history. It therefore threatened a real and significant punishment if he remained silent."[39] In both *Murphy* and the present case, however, the State did not, either overtly or impliedly, make the demand: "Confess all sex offenses or be punished." Here, as in *Murphy,* the probationer's probation condition proscribed only false statements; "it said nothing about his freedom to decline to answer particular questions."[40]

Similarly, in *Lile,* prison officials "recommended" that Lile, a sex offender inmate, participate in a Sexual Abuse Treatment Program (SATP), but before he could be admitted into the program he had "to disclose his sexual history, including the crime of which he was convicted and any uncharged sexual offenses."[41] When Lile declined to participate in the SATP because the required disclosure of his criminal history would violate his Fifth *10 Amendment privilege against self-incrimination, he was told that his privilege status would be reduced and he would be transferred to a maximum-security unit.[42] He sued under the federal civil rights statute, requesting an injunction to prevent the prison officials from punishing him for refusing to participate in the SATP. The Tenth Circuit found that the threat of *automatic* restriction of privileges and transfer to a maximum security facility constituted impermissible compulsion. That court stated:

> The second consideration that bears on whether the government has sought to compel self-incrimination is the automaticity of the penalty.... We believe that the distinction between an automatic and a conditional consequence is helpful in determining whether government action rises to the level of compulsion.... It remains worth noting that ... the adverse consequences in this case would be imposed on [Lile] automatically once he refused to admit responsibility and disclose his sexual history and thereby refused to participate in the SATP.[43]

In the present case, by contrast, appellant was never put into this automatic "confess all sex offenses or be punished" dilemma. He now argues that if he "had refused [to] answer the sexual history requirement,

he would have been terminated from the Sex Offender Treatment Program thereby violating his probation and jeopardizing his freedom." There is no evidence in the record to support this assertion. There is no evidence that anyone attempted to compel appellant to answer any "sexual history" questions. The SOTP contract that appellant signed contains no requirement that he disclose his entire sexual history or admit to uncharged misconduct as was required in both the *Fuller* and *Lile* programs. There is no evidence that, had he been directly asked and had *11 he refused to answer, invoking his Fifth Amendment right against self-incrimination, appellant would have been terminated from the SOTP. There was no evidence that appellant would suffer *any* automatic penalty if he invoked his Fifth Amendment right not to disclose his prior sexual offenses. Indeed, the State has repeatedly acknowledged that the trial judge could *not* revoke appellant's probation simply because he invoked his right against self-incrimination. Here, unlike the prison policy in *Lile*, appellant's probation status was not automatically contingent upon his disclosure of prior sexual offenses.

In sum, this record does not support any "speak or be punished" penalty situation. Because appellant did not affirmatively invoke his Fifth Amendment right against self-incrimination, we hold that the trial court did not err in denying appellant's motions to dismiss and to suppress his voluntary statements to his therapist, his probation officer, and the police. We therefore affirm the decision of the court of appeals.

Footnotes

1. We granted appellant's Petition for Discretionary Review on the following issue:

Did the Court of Appeals err in holding appellant's compelled and unwarned statements were admissible against him?

2. *Chapman v. State*, No. 05-01-00585-CR, No. 05-01-00611-CR, 2002 WL 1870440 (Tex.App.-Dallas August 15, 2002)(not designated for publication).

3. The State notes that this was not the contract for the Child Protective Services (CPS) program, that is, the program that appellant was actually in when he made self-incriminatory disclosures. The two contracts are, however, similar, and neither the State nor appellant consider their differences significant to the issue before us.

4. Specifically, appellant agreed to: follow the group therapist's treatment recommendations; accept accountability and take responsibility for his sex offenses; complete the treatment plan developed for him by the group therapists; complete all required written assignments in a timely manner; and complete clinical polygraph examinations if required.

5. *See* Tex. Fam.Code § 261.101.

6. Appellant was the step-father of one of the young girls and the step-grandfather of the other.

7. *Chapman*, slip op. at 4.

8. The Fifth Amendment to the United States Constitution states, in pertinent part, that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The parallel provision under the Texas Constitution states: "[i]n all criminal prosecutions the accused ... shall not be compelled to give evidence against himself." Tex. Const. art. I, § 10.

9. *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

10. *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973).

11. *Murphy*, 465 U.S. at 426, 104 S.Ct. 1136; *see also Baxter v. Palmigiano*, 425 U.S. 308, 316, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).

12. *Estelle v. Smith*, 451 U.S. 454, 462, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (citation omitted).

13. *Murphy*, 465 U.S. at 426, 104 S.Ct. 1136.

14. *Murphy*, 465 U.S. at 427-28, 104 S.Ct. 1136 (quoting *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376 (1943)).

15. *Garrity v. New Jersey*, 385 U.S. 493, 496, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (internal quotation omitted). In *Garrity*, the witnesses, police officers who were being investigated for misconduct, were told that they could remain silent, but that if they did so, they "would be subject to removal from office." *Id.* at 494, 87 S.Ct. 616. Severe penalties were attached to the exercise of their Fifth Amendment right, thus any statements they made under these circumstances were the result of compulsion and could not be used against them in any later criminal proceeding. *Id.* at 497-501, 87 S.Ct. 616.

16. 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

17. *Id.* at 440, 104 S.Ct. 1136.

18. *Id.* at 435, 104 S.Ct. 1136.

19. *Id.* at 422, 104 S.Ct. 1136.

20. *Id.*

21. *Id.*

22. *Id.* at 423, 104 S.Ct. 1136.

23. *Id.* at 423-24, 104 S.Ct. 1136.

24. *Id.* at 424, 104 S.Ct. 1136.

25. *Id.* at 424-25, 104 S.Ct. 1136.

26. *Id.* at 422-25, 104 S.Ct. 1136.

27. *Id.* at 435, 104 S.Ct. 1136.

28. *Id.* at 427-29, 104 S.Ct. 1136. Thus a state may "validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be *used* in a criminal proceeding and thus eliminates the threat of incrimination." *Id.* at 435, n. 7, 104 S.Ct. 1136.

29. *Id.* at 436-37, 104 S.Ct. 1136.

30. *Id.* at 436, 104 S.Ct. 1136.

31. *Id.* at 437, 104 S.Ct. 1136.

32. *Id.* Given that " '[at] this point in our history virtually every schoolboy is familiar' " with the rights afforded by the Fifth Amendment, the Court said, it was Murphy's responsibility to seek clarification of the parameters of this particular requirement. *Id.* (internal citation omitted).

33. Murphy was not "expressly informed during the crucial meeting with his probation officer that an assertion of the privilege would result in an imposition of a penalty." *Id.* at 437-38, 104 S.Ct. 1136.

34. The Supreme Court noted that the State was certainly under no illusion to the contrary and stated as much in its brief. *Id.* at 438, 104 S.Ct. 1136.

35. *Id.* at 439, 104 S.Ct. 1136.

36. 276 Mont. 155, 915 P.2d 809 (1996).

37. 224 F.3d 1175 (10th Cir.2000), *rev'd*, 536 U.S. 24, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002).

38. *Fuller*, 915 P.2d at 811, 813.

39. *Id.* at 814.

40. *Murphy*, 465 U.S. at 437, 104 S.Ct. 1136.

41. 224 F.3d at 1178.

42. *Id.* at 1181.

43. *Id.* at 1189. Nonetheless, as appellant acknowledges, a divided Supreme Court, on review of *Lile*, disagreed with the Tenth Circuit, and held that the automatic consequences to the inmate for refusing to participate in the

SATP were not so onerous as to amount to compulsion under the Fifth Amendment. *McKune v. Lile*, 536 U.S. 24, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002). A plurality of the Court held that the adverse consequences Lile faced as a result of his refusal did not "constitute atypical and significant hardships in relation to the ordinary incidents of prison life[,]" and thus there was no unconstitutional compulsion. *Id.* at 37-41, 122 S.Ct. 2017. Justice O'Connor concurred, stating that the particular penalty Lile suffered by invoking his Fifth Amendment right was simply not "so great as to constitute compulsion for the purposes of the Fifth Amendment privilege against self-incrimination." *Id.* at 48-49, 122 S.Ct. 2017 (O'Connor, J., concurring). In sum, neither the Tenth Circuit nor the Supreme Court opinions in *Lile* support appellant's argument. *See also Ainsworth v. Stanley*, 317 F.3d 1, 2-6 (1st Cir.2002) (following *Lile* and holding that requiring sex offender inmates to disclose their histories of sexual misconduct to participate in voluntary sex offender program does not violate their Fifth Amendment right against self-incrimination); *Searcy v. Simmons*, 299 F.3d 1220, 1225-27 (10th Cir.2002) (following *Lile* and holding that the "pressure" imposed upon prison inmate for refusing to give sexual history for the SATP did not rise to a level of unconstitutional compulsion), *cert. denied*, 538 U.S. 999, 123 S.Ct. 1908, 155 L.Ed.2d 825 (U.S.2003); *State v. Pritchett*, 69 P.3d 1278, 1285-87 (Utah 2003) (following *Lile* and holding that statute requiring sex offenders to admit culpability for the offense for which they has been convicted before being considered for probation did not violate Fifth Amendment right against compelled self-incrimination; the grant of probation is a privilege for which the State may require an admission of culpability); *Dzul v. State*, 56 P.3d 875, 884-85 (Nev.2002) (following *Lile* and holding that sex offender's denial of responsibility during pre-sentencing psychosocial interview which may result in denial of probation does not amount to compulsion under Fifth Amendment).

Therapists often ask whether they should report suspected child abuse that may have occurred some time in the past or when the therapist does not have complete information about the abuse. That question was posed to the Texas Attorney General by the Council on Sex Offender Treatment. The answer, as shown in the following letter, was that dated and partial information that leads the therapist to suspect that child abuse has occurred must be reported. "The Council on Sex Offender Treatment may not...permit a registered sex-offender-treatment provider…to decide whether to report a suspicion of child abuse even where the suspicion is based on dated or incomplete information."

Office of the Attorney General
State of Texas

November 26, 1997

Ms. Grace L. Davis, L.M.S.W.-A.C.P Executive Director Council on Sex Offender Treatment 1100 West 49th Street Austin, Texas 78756-3183	**Opinion No. DM-458** Re: Whether Family Code section 261.101(a) permits a registered sex-offender-treatment provider discretion to report information regarding possible child abuse (RQ-944)

Dear Ms. Davis:

Family Code section 261.101(a) requires a person who suspects that a child has been abused or neglected immediately to report the suspicion to the appropriate authorities. You ask whether, in the event a registered sex-offender-treatment provider obtains from a client dated or incomplete information suggesting that the client has abused a child, the treatment provider may use his or her "good judgment" in determining whether to report the information. The plain language of section 261.101(a) compels us to conclude that a treatment provider must report the information immediately if the information causes the treatment provider to believe that a child has been abused.

We understand that in the course of a sex-offender-treatment program, a treatment provider or affiliated-treatment provider (collectively, "treatment provider") may obtain information, through a client's statements or otherwise, that leads the treatment provider to believe the client may have abused a child (other than a child whom the client was convicted of abusing, we assume). You aver that your agency, the Council on Sex Offender Treatment, interprets the Family Code generally to require a treatment provider to report any allegation or statement of child abuse perpetrated by the client and disclosed to the treatment provider, as well as any suspicion the provider has of child abuse perpetrated by the client. You suggest, however, that the council has established an exception with respect to "incomplete or dated" information a treatment provider receives from a client. In that situation, the council apparently encourages a treatment provider to use his or her "good judgment" in deciding whether to report the information to the appropriate authorities. You ask if the council's exception is consistent with Family Code section 261.101. We assume, for purposes of our analysis, that the information, although it is incomplete or dated, causes the treatment provider to suspect that a child has been abused.

Family Code section 261.101(a) mandates immediate reporting of suspected child abuse: "A person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person *shall immediately make a report* as provided by this subchapter." (Emphasis added.) When the legislature originally enacted the substance of this requirement in 1971, it indicated its desire "to protect children . . . by providing for the *mandatory* reporting of suspected cases [of child abuse or neglect]."(1) Thus, the reporting requirement expressly applies *without exception* to any individual whose personal communications normally are privileged.(2) The report should reflect the reporter's belief that a child has been abused(3) and must identify the child if the child's identity is known.(4)

We conclude that the council's interpretation, permitting a treatment provider to decide whether to report suspected child abuse where the suspicion is premised upon incomplete or dated information, is contrary to section 262.101(a).(5) As section 261.101(a) says, a person who suspects that a child has been abused *shall* report the suspicion, and shall do so *immediately*. The term "shall" ordinarily signals a mandate,(6) and the term "immediately" underscores the mandate with a sense of urgency. Conversely, we find no language in section 261.101(a) indicating that reporting suspected child abuse is discretionary(7) or establishing an exception where the suspicion is premised on information that is incomplete or dated. Indeed, a person who knowingly fails to report suspected child abuse in accordance with Family Code chapter 261 commits a class B misdemeanor.(8)

Moreover, chapter 261 appears to contemplate that, in some situations, the reporter will not know all of the details. Section 261.104 implies, for example, that the reporter may not know the child's name or the identity of the child's caregiver. According to the statute, the report must reflect only the reporter's belief that a child has been abused.(9) So long as the reporter acts in good faith, he or she is immune from civil or criminal liability.(10)

In our opinion, Family Code chapter 261 confers discretion in whether to file charges of child abuse upon the investigating authority, the court, and the prosecutor, but confers no discretion upon the person who originally suspects that a child has been abused, *e.g.*, a treatment provider. Once a treatment provider has reported the suspicion to an appropriate authority,(11) the authority will investigate the claim.(12) If, upon completing the investigation, the authority believes the claim of child abuse is substantiated, the authority may recommend to the court, the district attorney, and a law-enforcement agency that a petition should be filed against the alleged perpetrator.(13) The court then may direct a prosecuting authority to file appropriate charges.(14)

S U M M A R Y

Under Family Code section 261.101(a), a person who suspects that a child has been abused or neglected must report that suspicion immediately to the appropriate authorities. The Council on Sex Offender Treatment may not interpret section 261.101(a) to permit a registered sex-offender-treatment provider or affiliated sex-offender-treatment provider to decide whether to report a suspicion where the suspicion is based on dated or incomplete information.

Yours very truly,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

SARAH J. SHIRLEY
Chair, Opinion Committee

Prepared by Kymberly K. Oltrogge
Assistant Attorney General

Footnotes

1. Act of May 24, 1971, 62d Leg., R.S., ch. 902, sec. 1, § 1, 1971 Tex. Gen. Laws 2790, 2790 (emphasis added).

2. Fam. Code § 261.101(c).

3. *Id*. § 261.102.

4. *Id*. § 261.104.

5. A court will not give weight to an agency's construction of an unambiguous statute if the construction is contrary to the statute's plain meaning. Attorney General Opinion JM-1149 (1990) at 2; *see also Calvert v. Kadane*, 427 S.W.2d 605, 607 (Tex. 1968).

6. *See Wright v. Ector Indep. Sch. Dist.*, 867 S.W.2d 863, 868 (Tex. App.--El Paso 1993, no writ) (citing *Inwood North Homeowners' Ass'n v. Meier*, 625 S.W.2d 742, 743 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ)).

7. Your letter to this office suggests that you believe Family Code section 261.101(b) might apply because you seek clarification of section 261.101 as it requires all "professionals" to report suspected child abuse or neglect. Subsection (b) requires a professional to report suspected child abuse within 48 hours after the suspicion arises. By its terms, however, subsection (b) applies only to a professional who has direct contact with children in the normal course of his or her official duties. We do not understand a treatment provider to have direct contact with children in the normal course of his or her official duties; we therefore need not consider whether a treatment provider is a "professional" in the word's broader sense.

8. Fam. Code § 261.109. We note that, under Family Code section 261.107, a person who knowingly or intentionally makes a report that the person knows is false or lacks factual foundation commits a class B misdemeanor. We do not in this opinion determine what a false report is or what a report that lacks a factual foundation is. In addition, whether in a particular situation treatment provider knows information is false or lacks a factual foundation is a fact question that cannot be resolved in the opinion process. *See*, *e.g.*, Attorney General Opinions DM-98 (1992) at 3; H-56 (1973) at 3; M-187 (1968) at 3; O-2911 (1940) at 2. We do not believe, however, that a treatment provider who reports a suspicion of child abuse based on incomplete or

dated information ordinarily may be convicted of making a false report or a report lacking a factual foundation under section 261.107.

9. Fam. Code § 261.102.

10. *Id.* § 261.106(a).

11. *See id.* § 261.103 (listing agencies to which report of child abuse must be made).

12. *See id.* §§ 261.301 - .302.

13. *Id.* § 261.308(a), (b).

14. *Id.* § 261.308(c).

DUTY TO WARN AND PROTECT

DUTY TO WARN AND PROTECT

In 1976, the State of California, in *Tarasoff v. The Regents of the University of California* (551 P.2d 334) held that psychotherapists had a legal duty to warn third parties of violent threats made by a patient against such parties. Subsequently, some twenty-seven states imposed similar *Tarasoff* duties against practitioners in their states, and nine others including the District of Columbia granted permission to warn. Virginia rejected the *Tarasoff* doctrine, and the remaining thirteen states took no explicit action.

***Tarasoff* has a complex, inconsistent, and often troubled history. The doctrine has been criticized for placing psychologists under threats of litigation, and requiring that clinicians inform patients of any applicable duty to violate rules of confidentiality, under circumstances that can both compromise patient trust, and frequently require making decisions that for which there are no empirical guidelines (see, e.g., Paul B. Herbert, "The Duty to Warn: A Reconsideration and Critique," *J Am Acad Psychiatry Law*, 30:417-24, 2002).**

The 1999 Texas case of *Thapar v. Zezulka* (994 S.W.2d 635) provides guidelines as to how Texas has attempted to facilitate a balance of the complex *Tarasoff* issues. Freddy Ray Lilly was treated as an inpatient by a psychiatrist and during treatment admitted that he had threatened his step father, Henry Zezulka; but indicated he would not threaten or harm Henry Zezulka in the future. One month following his inpatient discharge, Lilly killed his stepfather. Henry's Widow (Freddy's Mother) filed suit against the psychiatrist claiming that the psychiatrist had negligently misdiagnosed her son and failed to warn her or her husband of her son's threats and the danger he represented to them. The Texas Supreme Court held that there is no duty to a third party not to negligently misdiagnose a patient and that any warning to third parties, other than the discretionary permission to notify medical personnel or law enforcement personnel of "a probability of imminent physical injury by the patient to the patient or others," is prohibited by statute in Texas.

Renu K. **THAPAR,** M.D., Petitioner,

v.

Lyndall **ZEZULKA**, Respondent.

994 S.W.2d 635 (Tex. 1999)

The primary issue in this case is whether a mental-health professional can be liable in negligence for failing to warn the appropriate third parties when a patient makes specific threats of harm toward a readily identifiable person. In reversing the trial court's summary judgment, the court of appeals recognized such a cause of action. [1] Because the Legislature has established a policy against such a common-law cause of action, we refrain from imposing on mental-health professionals a duty to warn third parties of a patient's threats. Accordingly, we reverse the court of appeals' judgment and render judgment that Zezulka take nothing.

Because this is an appeal from summary judgment, we take as true evidence favorable to Lyndall Zezulka, the nonmovant. [2] Freddy Ray Lilly had a history of mental-health problems and psychiatric treatment. Dr. Renu K. Thapar, a psychiatrist, first treated Lilly in 1985, when Lilly was brought to Southwest Memorial Hospital's emergency room. Thapar diagnosed Lilly as suffering from moderate to severe post-traumatic stress disorder, alcohol abuse, and paranoid and delusional beliefs concerning his

stepfather, Henry Zezulka, and people of certain ethnic backgrounds. Thapar treated Lilly with a combination of psychotherapy and drug therapy over the next three years.

For the majority of their relationship, Thapar treated Lilly on an outpatient basis. But on at least six occasions Lilly was admitted to Southwest Memorial Hospital, or another facility, in response to urgent treatment needs. Often the urgency involved Lilly's problems in maintaining amicable relationships with those with whom he lived. Lilly was also admitted on one occasion after threatening to kill himself. In August 1988, Lilly agreed to be admitted to Southwest Memorial Hospital. Thapar's notes from August 23, 1988, state that Lilly "feels like killing" Henry Zezulka. These records also state, however, that Lilly "has decided not to do it but that is how he feels." After hospitalization and treatment for seven days, Lilly was discharged. Within a month Lilly shot and killed Henry Zezulka. Despite the fact that Lilly's treatment records indicate that he sometimes felt homicidal, Thapar never warned any family member or any law enforcement agency of Lilly's threats against his stepfather. Nor did Thapar inform any family member or any law enforcement agency of Lilly's discharge from Southwest Memorial Hospital.

Lyndall Zezulka, Henry's wife and Lilly's mother, sued Thapar for negligence resulting in her husband's wrongful death. Zezulka alleged that Thapar was negligent in diagnosing and treating Lilly and negligent in failing to warn of Lilly's threats toward Henry Zezulka. It is undisputed that Thapar had no physician-patient relationship with either Lyndall or Henry Zezulka. Based on this fact, Thapar moved for summary judgment on the ground that Zezulka had not stated a claim for medical negligence because Thapar owed no duty to Zezulka in the absence of a doctor-patient relationship. The trial court overruled Thapar's motion. Thapar filed a motion for rehearing of her summary judgment motion based largely on our decision in Bird v. W.C.W, in which we held that no duty runs from a psychologist to a third party to not negligently misdiagnose a patient's condition. [3] In light of Bird, the trial court reconsidered and granted summary judgment for Thapar. Zezulka appealed.

After concluding that Zezulka was not estopped from complaining about the trial court's judgment by her agreement to resolve the duty question through summary judgment, a conclusion with which we agree, the court of appeals reversed the trial court's judgment. [4] The court of appeals held that the no-duty ground asserted in Thapar's motion for summary judgment was not a defense to the cause of action pleaded by Zezulka. [5]

To decide this case we must determine the duties a mental-health professional owes to a nonpatient third party. Zezulka stated her claims against Thapar in negligence. Liability in negligence is premised on duty, a breach of which proximately causes injuries, and damages resulting from that breach. [6] Whether a legal duty exists is a threshold question of law for the court to decide from the facts surrounding the occurrence in question. [7] If there is no duty, there cannot be negligence liability. [8]

In her second amended petition Zezulka lists seventeen particulars by which she alleges Thapar was negligent. But each allegation is based on one of two proposed underlying duties: (1) a duty to not negligently diagnose or treat a patient that runs from a psychiatrist to nonpatient third parties; or (2) a duty to warn third parties of a patient's threats. In her motion for summary judgment Thapar asserted that she owed Zezulka no duty. Thus, we must determine if Thapar owed Zezulka either of these proposed duties.

NEGLIGENT DIAGNOSIS AND TREATMENT

First, we consider Zezulka's allegations that Thapar was negligent in her diagnosis and treatment of Lilly's psychiatric problems. Among other claims, Zezulka alleged that Thapar was negligent in releasing Lilly from the hospital in August 1988, in failing to take steps to have Lilly involuntarily committed, and in failing to monitor Lilly after his release to ensure that he was taking his medication. All of these claims are based on Thapar's medical diagnosis of Lilly's condition, which dictated the treatment Lilly should have received and the corresponding actions Thapar should have taken. [9] The underlying duty question

here is whether the absence of a doctor-patient relationship precludes Zezulka from maintaining medical negligence claims against Thapar based on her diagnosis and treatment of Lilly.

In Bird we held that no duty runs from a psychologist to a third party to not negligently misdiagnose a patient's condition. [10] Since Bird, we have had occasion to consider several permutations of this same duty question. [11] Bird and our post-Bird writings answer definitively the first duty question presented by the facts before us: Thapar owes no duty to Zezulka, a third party nonpatient, for negligent misdiagnosis or negligent treatment of Lilly. [12] Accordingly, Thapar was entitled to summary judgment on all of the claims premised on Zezulka's first duty theory

FAILURE TO WARN

Second, we consider Zezulka's allegations that Thapar was negligent for failing to warn either the Zezulkas or law enforcement personnel of Lilly's threats. We are not faced here with the question of whether a doctor owes a duty to third parties to warn a patient of risks from treatment which may endanger third parties. [13] Instead, we are asked whether a mental-health professional owes a duty to directly warn third parties of a patient's threats.

The California Supreme Court first recognized a mental-health professional's duty to warn third parties of a patient's threats in the seminal case Tarasoff v. Regents of University of California. [14] The court of appeals here cited Tarasoff in recognizing a cause of action for Thapar's failure to warn of her patient's threats. [15] But we have never recognized the only underlying duty upon which such a cause of action could be based--a mental-health professional's duty to warn third parties of a patient's threats. Without considering the effect of differences in the development of California and Texas jurisprudence on the outcome of this issue, we decline to adopt a duty to warn now because the confidentiality statute governing mental- health professionals in Texas makes it unwise to recognize such common-law duty.

The Legislature has chosen to closely guard a patient's communications with a mental-health professional. In 1979, three years after Tarasoff issued, the Legislature enacted a statute governing the disclosure of communications during the course of mental-health treatment. [16] The statute classifies communications between mental-health "professional[s]" and their "patient[s]/client[s]" as confidential and prohibits mental-health professionals from disclosing them to third parties unless an exception applies. [17]

Zezulka complains that Thapar was negligent in not warning members of the Zezulka family about Lilly's threats. But a disclosure by Thapar to one of the Zezulkas would have violated the confidentiality statute because no exception in the statute provides for disclosure to third parties threatened by the patient. [18] We considered a similar situation in Santa Rosa Health Care Corp. v. Garcia, [19] in which we concluded there is no duty to disclose confidential information when disclosure would violate the confidentiality statute. [20] The same reasoning applies here. Under the applicable statute, Thapar was prohibited from warning one of his patient's potential victims and therefore had no duty to warn the Zezulka family of Lilly's threats.

Zezulka also complains that Thapar was negligent in not disclosing Lilly's threats to any law enforcement agency. There is an exception in the confidentiality statute that provides for disclosure to law enforcement personnel in certain circumstances. [21] The statute, however, permits these disclosures but does not require them:

(b) Exceptions to the privilege of confidentiality, in other than court proceedings, allowing disclosure of confidential information by a professional, exist only to the following: ...

(2) to medical or law enforcement personnel where the professional determines that there is a probability of imminent physical injury by the patient/client to himself or to others, or where there is a probability of immediate mental or emotional injury to the patient/client.... [22]

(a) A professional may disclose confidential information only: ...

(2) to medical or law enforcement personnel if the professional determines that there is a probability of imminent physical injury by the patient to the patient or others or there is a probability of immediate mental or emotional injury to the patient ... (emphasis added).

The term "allowing" in section 4(b), quoted above, makes clear that disclosure of confidential information under any of the statute's exceptions is permissive but not mandatory. Imposing a legal duty to warn third parties of patient's threats would conflict with the scheme adopted by the Legislature by making disclosure of such threats mandatory.

We consider legislative enactments that evidence the adoption of a particular public policy significant in determining whether to recognize a new common-law duty. [23] For example, in recognizing the existence of a common-law duty to guard children from sexual abuse, we found persuasive the Legislature's strongly avowed policy to protect children from abuse. [24] The statute expressing this policy, however, makes the reporting of sexual abuse mandatory [25] and makes failure to report child abuse a crime. [26] Further, under the statute, those who report child abuse in good faith are immune from civil and criminal liability. [27] Thus, imposing a common law duty to report was consistent with the legislative scheme governing child abuse.

The same is not true here. The confidentiality statute here does not make disclosure of threats mandatory nor does it penalize mental-health professionals for not disclosing threats. And, perhaps most significantly, the statute does not shield mental-health professionals from civil liability for disclosing threats in good faith. On the contrary, mental-health professionals make disclosures at their peril. [28] Thus, if a common-law duty to warn is imposed, mental-health professionals face a Catch-22. They either disclose a confidential communication that later proves to be an idle threat and incur liability to the patient, or they fail to disclose a confidential communication that later proves to be a truthful threat and incur liability to the victim and the victim's family.

The confidentiality statute here evidences an intent to leave the decision of whether to disclose confidential information in the hands of the mental-health professional. In the past, we have declined to impose a common-law duty to disclose when disclosing confidential information by a physician has been made permissible by statute but not mandatory. [29] We have also declined to impose a common-law duty after determining that such a duty would conflict with the Legislature's policy and enactments concerning the employment-at-will doctrine. [30] Our analysis today is consistent with the approach in those cases.

Because of the Legislature's stated policy, we decline to impose a common law duty on mental-health professionals to warn third parties of their patient's threats. Accordingly, we conclude that Thapar was entitled to summary judgment because she owed no duty to Zezulka, a third-party nonpatient. We reverse the court of appeals' judgment and render judgment that Zezulka take nothing.

Footnotes

FN1. 961 S.W.2d 506.

FN2. *See Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex.1997).

FN3. 868 S.W.2d 767 (Tex.1994).

FN4. *See* 961 S.W.2d at 510-11.

FN5. *See* id. at 511.

FN6. *See Bird*, 868 S.W.2d at 769 (citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex.1990)).

FN7. *See St. John v. Pope*, 901 S.W.2d 420, 424 (Tex.1995); *Bird*, 868 S.W.2d at 769.

FN8. *See Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex.1998); *St. John*, 901 S.W.2d at 424; *Graff v. Beard*, 858 S.W.2d 918, 919 (Tex.1993).

FN9. *See*, e.g., *Van Horn*, 970 S.W.2d at 545.

FN10. *Bird*, 868 S.W.2d at 769-70 (citing *Vineyard v. Kraft*, 828 S.W.2d 248, 251 (Tex.App.--Houston [14th Dist.] 1992, writ denied); *Wilson v. Winsett*, 828 S.W.2d 231, 232-33 (Tex.App.--Amarillo 1992, writ denied); *Fought v. Solce*, 821 S.W.2d 218, 220 (Tex.App.--Houston [1st Dist.] 1991, writ denied); *Dominguez v. Kelly*, 786 S.W.2d 749 (Tex.App.--El Paso 1990, writ denied)).

FN11. *See Van Horn*, 970 S.W.2d at 543; *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 77-79 (Tex.1997); *Krishnan v. Sepulveda*, 916 S.W.2d 478, 482 (Tex.1995); see also *Praesel v. Johnson*, 967 S.W.2d 391, 392 (Tex.1998); *Cathey v. Booth*, 900 S.W.2d 339, 342 (Tex.1995).

FN12. *See Van Horn*, 970 S.W.2d at 545; *Trevino*, 941 S.W.2d at 79; *Krishnan*, 916 S.W.2d at 482; *Bird*, 868 S.W.2d at 770.

FN13. *See Gooden v. Tips*, 651 S.W.2d 364, 365-66 (Tex.App.--Tyler 1983, no writ) (holding doctor owed duty to third party to warn patient not to drive after prescribing the drug Quaalude to patient); see also *Flynn v. Houston Emergicare, Inc.*, 869 S.W.2d 403, 405-06 (Tex.App.-- Houston [1st Dist.] 1994, writ denied) (holding doctor owed no duty to third party to warn patient not to drive after patient was treated for cocaine use because doctor did not create impairment that resulted in injury).

FN14. 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, 345-47 (1976).

FN15. 961 S.W.2d at 511 n. 2. The court of appeals also cited four Texas cases that considered whether to adopt a *Tarasoff* duty but did not. See 916 S.W.2d at 511 n. 2 (citing *Limon v. Gonzaba*, 940 S.W.2d 236, 238-41 (Tex.App.--San Antonio 1997, writ denied); *Kehler v. Eudaly*, 933 S.W.2d 321, 329-32 (Tex.App.--Fort Worth 1996, writ denied); *Kerrville State Hosp. v. Clark*, 900 S.W.2d 425, 435-36 (Tex.App.--Austin 1995), rev'd on other grounds, 923 S.W.2d 582 (Tex.1996); *Williams v. Sun Valley Hosp.*, 723 S.W.2d 783, 785-86 (Tex.App.--El Paso 1987, writ ref'd n.r.e.)).

FN16. *See* Act of May 9, 1979, 66th Leg., R.S., ch. 239, 1979 Tex. Gen. Laws 512 (amended 1991) (current version at Tex. Health & Safety Code § 611.002 (1996)).

FN17. *See* § 2(a), 1979 Tex. Gen. Laws at 513.

FN18. *See* § 4, 1979 Tex. Gen. Laws at 514.

FN19. 964 S.W.2d 940, 941 (Tex.1998) (involving disclosure of HIV test under Tex.Rev.Civ. Stat. art. 4419b-1, § 9.03).

FN20. Id. at 944.

FN21. *See* § 4(b), 1979 Tex. Gen. Laws at 514.

FN22. *See* § 4, 1979 Tex. Gen. Laws at 514 (emphasis added). Current Tex. Health & Safety Code § 611.004(a)(2) adopts the same standard:

FN23. *See Gibbs v. Jackson*, 990 S.W.2d 745, 747 (Tex.1999); *Smith v. Merritt*, 940 S.W.2d 602, 604-05 (Tex.1997) (citing Graff, 858 S.W.2d at 919).

FN24. *See Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 291 (Tex.1996).

FN25. Tex. Fam. Code § 261.101(a) states: “A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.”

FN26. *See* Tex. Fam.Code § 261.109.

FN27. *See* Tex. Fam.Code § 261.106.

FN28. *See* § 5, 1979 Tex. Gen. Laws at 514.

FN29. *See* Praesel, 967 S.W.2d at 396-98.

FN30. See Austin v. Austin v. HealthTrust, Inc.--The Hosp. Co., 967 S.W.2d 400, 403 (Tex.1998); see also Winters v. Houston Chronicle Pub. Co., 795 S.W.2d 723, 724-25 (Tex.1990).

MALPRACTICE

MALPRACTICE

Malpractice is a type of negligence in which a professional, under a duty to act, fails to follow generally accepted professional standards, and that breach of duty then becomes the proximate cause of injury of a party to whom the professional owed that duty. Accepted professional standards are set forth in the ethical codes of professional associations and, in Texas, in the legislative and administrative law upon which the psychologists' jurisprudence examination is based.

Professional standards involve a balancing of competing objectives, as in mandated reporting against requirements for confidentiality. Professionals should become familiar with the legal standards for appropriate balance, and when necessary seek the help of colleagues and professionals. Some issues are, however, well established. Sexual impropriety, for example, is an invitation to sanctions (see, e.g., *Malone v. Sewell*, 168 S.W.3d 243 (2005), overturning a summary judgment granted in favor of a clinician charged with sexual impropriety). Clinicians also have a responsibility to assure that their patients receive an appropriate course of treatment, even if they themselves are not qualified to provide that type of care (see, e.g., *Osheroff v. Chestnut Lodge*, 490 A2d 720 (MD, 1985).

The following two cases deal with recent holdings that clarify and provide reasonable protections to clinicians faced with demanding situations. *Taylor v. Carley*, 158 S.W.3d 1 (2004) reflects the court's reasoning in a case in which a psychologist refers a patient to a psychiatrist, then the patient subsequently files suit against the psychologist for the psychiatrist's care.

158 S.W.3d 1 (2004)

Beverly Lois **TAYLOR** and Jeffrey D. Taylor, individually and as next friends for James Taylor, Joshua Taylor, Jacob Taylor, and Hannah Taylor, minors, and Jeffrey D. Taylor, Jr., Appellants,

v.

John W. **CARLEY**, Appellee.

No. 14-03-00661-CV

(Tex. App. 2004) No. 14-03-00661-CV

September 28, 2004.

Rehearing Overruled March 10, 2005.

3*3 Alton C. Todd, Friendswood, Sheila Lee Haddock, Houston, for appellants.

Norman Snyder, Jr., Wendi Ervin Powers, William J. Sharp, Houston, for appellee.

Panel consists of Chief Justice HEDGES and Justices FROST and GUZMAN.

OPINION

KEM THOMPSON FROST, Justice.

This case presents a dispute between a psychologist and his former patient. We must determine (1) whether the psychologist's alleged negligent diagnosis caused the patient's injury, and (2) whether the psychologist, who had referred the patient to a psychiatrist and who was no longer seeing the patient, had a duty to monitor her progress. Appellants/plaintiffs Beverly Lois Taylor and Jeffrey D. Taylor,

individually and as next friends for James Taylor, Joshua Taylor, Jacob Taylor, and Hannah Taylor, minors, and Jeffrey D. Taylor, Jr., sued appellee/defendant John W. Carley, Ph.D., a psychologist, alleging that Dr. Carley negligently misdiagnosed Beverly Taylor's condition and failed to follow her symptoms after referring her to a psychiatrist. Dr. Carley moved for summary judgment on traditional and no-evidence grounds, and the trial court granted the motion. We conclude (1) there is no evidence that Dr. Carley's alleged negligence in diagnosing Mrs. Taylor proximately caused her injury, and (2) Dr. Carley had no duty to follow or monitor Mrs. Taylor's condition after she stopped seeing him. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mrs. Taylor's first appointment with Dr. Carley occurred in September 1998. Mrs. Taylor consulted with him because she had just returned to full-time work outside the home, was experiencing feelings of anxiety, and having problems in her marriage. In the course of her treatment with Dr. Carley, Mrs. Taylor discussed her oldest son's attention deficit/hyperactivity disorder ("ADHD"). Dr. Carley eventually had Mrs. Taylor take some computerized tests, which, according to Mrs. Taylor, Dr. Carley said were to test for possible ADHD. Toward the end of his sessions with Mrs. Taylor, Dr. Carley diagnosed her as having attention deficit disorder ("ADD"), not hyperactivity, as well as other conditions.[1] Dr. Carley told Mrs. Taylor he wanted a psychiatrist or other medical doctor to evaluate her and determine what her medication needs might be.

Dr. Carley told Mrs. Taylor about Dr. John Steffek, a psychiatrist who rented office space from Dr. Carley and saw patients 4*4 at that location one day a week. Dr. Carley advised Mrs. Taylor that Dr. Steffek generally treated adolescents and children. Mrs. Taylor knew she was free to see any psychiatrist or other medical doctor she chose, but made her independent choice to consult with Dr. Steffek.

Dr. Steffek met with Mrs. Taylor in mid-December 1998. At that time, they talked about multiple issues to clarify or rule out a diagnosis of ADHD. Before meeting Mrs. Taylor, Dr. Steffek had access to Mrs. Taylor's history from Dr. Carley, but Dr. Steffek had not arrived at the conclusion that Mrs. Taylor had ADHD. Based on his interaction with Mrs. Taylor and having her talk about questions on a printed page he gave her, Dr. Steffek concluded Mrs. Taylor exhibited seven of nine phenomena for a diagnosis of ADHD, inattentive type.[2] This was one of Dr. Steffek's three final diagnoses, the other two being generalized anxiety disorder and mixed personality with compulsive, dependent features.

Dr. Steffek told Mrs. Taylor she needed to undergo blood tests, a urinalysis, and an electrocardiogram before he could prescribe medication. Mrs. Taylor completed the blood tests and the urinalysis, but did not have the electrocardiogram. According to Mrs. Taylor, she chose not to have the electrocardiogram because she was busy working and had five children. Dr. Steffek subsequently told Mrs. Taylor she did not need the electrocardiogram because the results of the laboratory work were favorable. Dr. Steffek then gave Mrs. Taylor Dexedrine tablets and told her to try them and also to redo the computer test with Dr. Carley after taking the Dexedrine. Mrs. Taylor reported that her husband was seeing a difference in her behavior, and the results of the re-test also showed improvement after the Dexedrine.

In mid-January 1999, Dr. Steffek first prescribed Adderall for Mrs. Taylor.[3] Dr. Steffek would write the prescriptions one way, but give Mrs. Taylor different directions for taking the medication.[4] Dr. Steffek also instructed Mrs. Taylor to gradually increase the dose, determine how she would feel, and determine whether she had any of the side-effects that typically appear with this medication. If there were no side-effects and functioning was not optimal, Mrs. Taylor was to increase the first dose of the day to attempt to get a more beneficial response. Mrs. Taylor saw Dr. Steffek again in mid-February 1999, and saw him every two months thereafter. According to Mrs. Taylor, sometime around April 1999, she started experiencing headaches and weight loss and reported these symptoms to Dr. Steffek. 5*5 There is some evidence that, at one point, Mrs. Taylor was taking twenty milligrams of Adderall in the morning and twenty in the afternoon, but that was subsequently reduced to fifteen milligrams in the morning and ten in the afternoon.[5] Dr. Steffek never checked Mrs. Taylor's blood pressure while she was under his care.

According to Mrs. Taylor, she saw Dr. Carley two times after she started taking the Adderall, the second occasion being February 23, 1999. Mrs. Taylor did not report any problems with the medications or side effects to Dr. Carley. At the February 23 visit, Mrs. Taylor reported to Dr. Carley that she was "doing well." Mrs. Taylor then started missing appointments with Dr. Carley. Dr. Carley wanted Mrs. Taylor to reschedule the missed appointments, but Mrs. Taylor explained to him she could not do so because she could not be missing two or three days a week going to appointments for two different doctors. By the time Mrs. Taylor started experiencing headaches and weight loss, she had stopped seeing Dr. Carley.

Mrs. Taylor testified that by September 1999, she was taking fifteen milligrams of Adderall in the morning and ten milligrams in the afternoon. On September 24, 1999, Mrs. Taylor was hospitalized with "sudden onset of confusional state, headache, and agitation." Two computered tomography scans performed that day were normal. According to her medical record, Mrs. Taylor's "presentation, especially the presence of hypertension and mild tachycardia, was suspected of amphetamine toxicity."[6] Magnetic resonance imaging ("MRI") was performed the following days. Repeat MRIs showed ischemia (restricted blood flow) of the upper medullary region. Mrs. Taylor had suffered a stroke.

Mrs. Taylor and her husband sued Dr. Carley, Dr. Steffek, three Walgreen entities, and the manufacturer and supplier of Adderral.[7] The Taylors alleged Dr. Carley was negligent in (1) failing to assess and evaluate Mrs. Taylor's status and response to medical treatment and to report such findings to the physician; (2) failing to assess and diagnose Mrs. Taylor's condition accurately; (3) failing to assess the true extent of the symptoms from which Mrs. Taylor was suffering; (4) failing, on Mrs. Taylor's subsequent visits, to perform an assessment of the side-effects of the prescribed Adderall; (5) ignoring Mrs. Taylor's reports of symptoms associated with side-effects from the prescribed Adderall; and (6) deviating from the standard of care for a psychologist treating a patient with complaints like Mrs. Taylor's.

Dr. Carley moved for summary judgment on traditional and no-evidence grounds. He alleged he was entitled to summary judgment as a matter of law because he owed no duty to Mrs. Taylor to:

> (1) assess and evaluate Mrs. Taylor's status and response to medical treatment and to report such findings to the physician;
>
> (2) accurately assess and diagnose Mrs. Taylor's condition "for purposes of 6*6 evaluating her need for medication, contraindications to any medication, such as Adderall, side effects of [sic] symptoms associated with that medication";
>
> (3) assess the true extent of the symptoms Mrs. Taylor was suffering "as it relates to symptoms [Mrs. Taylor] claims to have sustained as a result of taking Adderall"; and
>
> (4) to perform an assessment of the side-effects of the prescribed Adderall on Mrs. Taylor's subsequent visits.

In the trial court, Dr. Carley argued the uncontroverted evidence established he was a psychologist, not a psychiatrist, and as such, he had a duty to evaluate Mrs. Taylor's psychological symptoms "for the purposes of providing counseling, but not for the purposes of determining whether medication is required or whether [Mrs. Taylor] is having adverse symptoms, resulting from use of Adderall." He argued there was no breach of duty because the evidence established Mrs. Taylor never complained to Dr. Carley of "any symptoms, side effects, or adverse consequences, whatsoever, whether related to the Adderall or not." Finally, Dr. Carley argued there was no causation because, although Mrs. Taylor might raise issues about the adequacy of his note-taking, the accuracy of his diagnosis, or the adequacy of his counseling, none of these acts or omissions could have proximately caused Mrs. Taylor's stroke, which she claimed resulted solely from taking the Adderall. Dr. Carley also pointed to Dr. Steffek's testimony that Dr. Steffek had prescribed the Adderall and had not relied on Dr. Carley's notes, treatment, or diagnosis in deciding to prescribe the medication to Mrs. Taylor. In support of the traditional motion for summary judgment, Dr. Carley attached his own deposition testimony and that of Mrs. Taylor and Dr. Steffek.

Dr. Carley also moved for no-evidence summary judgment under Texas Rule of Civil Procedure 166a(i), alleging there was no evidence as to duty, breach of duty, or proximate cause. He specifically asserted:

> Particularly, there is no evidence that Dr. Carley prescribed Adderall to Beverly Taylor; there is no evidence that Dr. Steffeck [sic] based his decision to prescribe Adderall to Beverly Taylor in whole or in part on Dr. Carley's findings or diagnosis of ADHD; there is no evidence that Dr. Carley knew or should have known of the potential adverse consequences of the drug Adderall upon Mrs. Taylor; there is no evidence that Dr. Carley knew or should have known of adverse symptoms or effects suffered by Mrs. Taylor following prescription of the Adderall; there is no evidence that Dr. Carley's acts or omissions, if any, proximately caused the damages she complains of, all of which arose or are derived from her claim that she sustained a stroke as a result of taking Adderall.

The Taylors responded to the summary judgment motions and also objected to Dr. Carley's reliance on the depositions of Dr. Steffek and Dr. Carley because both individuals were interested parties. The Taylors' own summary-judgment evidence consisted of (1) excerpts from the depositions of Dr. Carley, Dr. Steffek, and Mrs. Taylor, (2) an affidavit from Ron Kimball, Ph.D., who had reviewed Dr. Carley's chart notes for Mrs. Taylor, (3) a letter from Mitchell S. Felder, M.D., Mrs. Taylor's psychiatrist expert, and (4) Northeast Medical Center Hospital's discharge summary for Mrs. Taylor. The Taylors attempted to adduce evidence regarding duty solely by pointing to the uncontroverted 7*7 evidence that Mrs. Taylor was Dr. Carley's patient.

The Taylors attempted to raise a genuine fact issue regarding the breach-of-duty element by referring to Dr. Kimball's affidavit. Dr. Kimball criticized the incompleteness of Dr. Carley's notes, and opined that Dr. Carley had violated the standards of care by (1) using an inappropriate technique (biofeedback) to assess ADHD in an adult; (2) using a standard psychological battery not considered reliable in evaluating possible Axis I disorders (anxiety disorder); and (3) never completing a formal process of diagnosis. Regarding breach of duty, Mrs. Taylor also relied on Dr. Carley's deposition testimony that (1) he had made the diagnosis of ADD; (2) ADD had to have been present before age seven; (3) Mrs. Taylor had not previously been diagnosed with ADD; and (4) Mrs. Taylor did not have hyperactivity (required for ADHD).

Finally, the Taylors attempted to raise a genuine fact issue regarding the causation element by referring to the following events: (1) Adderall was prescribed for Mrs. Taylor's misdiagnosed ADD; (2) Mrs. Taylor was self-monitoring whether she was achieving therapeutic levels of Adderall, which can cause the precursor to a stroke by elevating blood pressure; (3) Dr. Steffek and Dr. Carley referred patients to each other; (4) Dr. Steffek was renting office space from Dr. Carley and treated Mrs. Taylor at that location; (5) Dr. Steffek and Dr. Carley would discuss mutual patients, of which Mrs. Taylor was one; and (6) Dr. Carley knew about Mrs. Taylor's Adderall prescription. Mrs. Taylor also alleged, "Plaintiff [Mrs.] Taylor's neurologist upon admittance at Northeast Medical Center Hospital, Dr. Massoud Bina, suspected that her stroke was due to amphetamine toxicity. Further, it is Plaintiff's psychiatrist expert's opinion that the high dosage of Adderall prescribed by Dr. Steffek caused [Mrs.] Taylor's stroke."[8]

Without stating the grounds, the trial court granted Dr. Carley's summary-judgment motion on all claims the Taylors asserted against him. The trial court subsequently severed the claims against Dr. Carley from the Taylors' claims against the remaining defendants, thus making the judgment final as to Dr. Carley.

II. ISSUE PRESENTED AND STANDARD OF REVIEW

In a single issue the Taylors allege the trial court erred in granting summary judgment on unspecified grounds when the summary-judgment evidence established that Dr. Carley owed Mrs. Taylor a duty arising from the psychologist-patient relationship as a matter of law and, at a minimum, raised fact issues regarding (1) whether Dr. Carley breached that alleged duty by misdiagnosing Mrs. Taylor's condition,

and (2) whether Mrs. Taylor suffered damages as a result of medication prescribed by the psychiatrist to whom Dr. Carley referred Mrs. Taylor in foreseeable reliance on the alleged misdiagnosis.

In reviewing a traditional motion for summary judgment, we take as true all evidence favorable to the non-movant, and we make all reasonable inferences in the non-movant's favor. *Dolcefino v. Randolph*, 19 S.W.3d 906, 916 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). If the movant's motion and summary-judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to the non-movant to raise a genuine, material fact issue sufficient to defeat summary judgment. *Id.*

8*8 In reviewing a no-evidence motion for summary judgment, we ascertain whether the non-movant produced any evidence of probative force to raise a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Id.* We take as true all evidence favorable to the non-movant, and we make all reasonable inferences therefrom in the non-movant's favor. *Id.* A no-evidence motion for summary judgment must be granted if the party opposing the motion does not respond with competent summary-judgment evidence that raises a genuine issue of material fact. *Id.* at 917. When the trial court does not specify the grounds for its ruling, we affirm if any of the grounds advanced in the motion has merit. *See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex.1989). Because Dr. Carley moved for summary judgment on both traditional and no-evidence grounds and the trial court did not specify which it granted, we can uphold the summary judgment on either ground. *See Bruce v. K.K.B., Inc.*, 52 S.W.3d 250, 254 (Tex.App.-Corpus Christi 2001, pet. denied); *see also FNFS, Ltd. v. Sec. State Bank & Trust*, 63 S.W.3d 546, 548 (Tex.App.-Austin 2001, pet. denied); *Barraza v. Eureka Co.*, 25 S.W.3d 225, 231 (Tex. App-El Paso 2000, pet. denied).

III. ANALYSIS

A. The Taylors' Assertions and General Negligence Elements

The Taylors contend Dr. Carley was negligent in two ways: (1) misdiagnosing Mrs. Taylor's condition, and (2) failing to monitor the side-effects of the Adderall, which Dr. Steffek prescribed.[9] The elements of a negligence claim are existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. *IHS Cedars Treatment Ctr. of Desoto, Texas, Inc. v. Mason*, No. 01-0926, 47 Tex. Sup.Ct. J. 666, 668, 2004 WL 1396194, at *3 (Tex. June 18, 2004). The threshold inquiry is duty. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex.1995). The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex.1996).

B. Proximate Cause and Dr. Carley's Alleged Misdiagnosis

A reviewing court may assume the existence of a duty and resolve the appeal on the basis of one of the other elements, such as proximate cause. *See Mason*, 47 Tex. S.Ct. J. at 666, 2004 WL 1396194, at * 1 (doing so in context of reviewing summary judgment). The two elements of proximate cause are cause in fact and foreseeability. *Mason*, 47 Tex. S.Ct. J. at 668, 2004 WL 1396194, at *3. These elements cannot be satisfied by mere conjecture, guess, or speculation. *Id.*

"Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred." *Id.* That the harm would not have occurred without an actor's negligence is a necessary, but not sufficient, factor. *See id.* Thus, cause in fact is not established when a defendant's negligence does no more than furnish a condition that 9*9 makes the injuries possible. *Id.* "The evidence must go further, and show that such negligence was the proximate, and not the remote, cause of resulting injuries .... [and] justify the conclusion that such injury was the natural and probable result thereof." *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex.1995) (quotations omitted). Accordingly, even if an injury would not have happened but for the defendant's conduct, the connection between the defendant and the plaintiff's injuries simply may be too attenuated to constitute legal cause. *Id.*

Foreseeability means the actor, as a person of ordinary intelligence, should have anticipated the dangers his negligent act created for others. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex.1992). Foreseeability, however, does not require a person to anticipate the precise manner in which injury will occur once the person creates a dangerous situation through his negligence. *Ambrosio v. Carter's Shooting Ctr., Inc.*, 20 S.W.3d 262, 265 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable. *Id.*

When events intervene between the alleged negligent act and the injury, a question may arise whether such events constitute superseding causes that break the causal connection between the act and the injury. As the San Antonio Court of Appeals has explained:

Texas courts distinguish between a new and independent cause and a concurrent act. A concurrent act cooperates with the original act in bringing about the injury and does not cut off the liability of the original actor. A "new and independent cause," sometimes referred to as a superseding cause, however, is an act or omission of a separate and independent agency that destroys the causal connection between the negligent act or omission of the defendant and the injury complained of, and thereby becomes the immediate cause of such injury.

Benitz v. Gould Group, 27 S.W.3d 109, 116 (Tex.App.-San Antonio 2000, no pet.) (citations omitted).

In determining whether an intervening force rises to the level of a superseding cause, Texas courts consider the following six factors:

(1) the fact the intervening force brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(2) the fact the intervening force's operation or its consequences appear after the event to be extraordinary, rather than normal, in view of the circumstances existing at the time of the force's operation;

(3) the fact the intervening force is operating independently of any situation created by the actor's negligence or is not a normal result of such a situation;

(4) the fact the operation of the intervening force is due to a third person's act or to his failure to act;

(5) the fact the intervening force is due to an act of a third person that is wrongful toward the other and thus subjects the third person to liability to him; and

(6) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

See *Phan Son Van v. Pena*, 990 S.W.2d 751, 754 (Tex.1999). The issue of new and independent cause is a component of the ultimate issue of proximate cause and not an affirmative defense. *Rodriguez v. Moerbe*, 963 S.W.2d 808, 821 n. 12 (Tex.App.-San Antonio 1998, pet. denied).

10*10 In the present case, the Taylors alleged the following causal chain: (1) Dr. Carley misdiagnosed Mrs. Taylor as having ADD/ADHD; (2) Dr. Carley then referred Mrs. Taylor to Dr. Steffek; (3) Dr. Steffek also misdiagnosed Mrs. Taylor as having ADD/ADHD; (4) Dr. Steffek prescribed Adderall for Mrs. Taylor's condition and had Mrs. Taylor self-monitor the effects of the medication; (5) Mrs. Taylor took more than the recommended dose of Adderall; and (6) the Adderall caused Mrs. Taylor to have adverse side effects and eventually suffer a stroke. Thus, according to the Taylors' allegations, at least three events intervened between Dr. Carley's diagnosis and Mrs. Taylor's stroke: (1) Dr. Steffek's independent diagnosis; (2) Dr. Steffek's prescription of the Adderal; and (3) Mrs. Taylor's taking more than the recommended dose of the medication. As alleged, the intervening acts implicated, at a minimum, factors three (independent action of intervening force), four (operation of intervening force as a result of a third person's act), five (wrongfulness of third person's act), and six (degree of culpability of third person) of the six superseding-cause criteria set forth above.

In the no-evidence part of his summary-judgment motion Dr. Carley contended there was no evidence of proximate cause. Dr. Carley specifically alleged, among other things, that there was no evidence (1)

Dr. Carley prescribed Adderall to Mrs. Taylor; (2) Dr. Steffek based his decision to prescribe Adderall to Mrs. Taylor in whole or in part on Dr. Carley's findings or diagnosis of ADHD; (3) Dr. Carley knew or should have known of the potential adverse consequences of the drug Adderall upon Mrs. Taylor; and (4) Dr. Carley knew or should have known of adverse symptoms or effects suffered by Mrs. Taylor following her taking of this medication.[10] Thus, Dr. Carley's no-evidence allegations particularly challenged the Taylors to produce proof of the foreseeability component of proximate cause.

In response, the Taylors presented summary-judgment evidence, which they summarized as follows:

> Adderall is an amphetamine and a Schedule II narcotic which can become addictive. Beverly Taylor was reporting headaches and weight loss to Defendant Steffek. Beverly Taylor was subscribed [sic] Adderall for her misdiagnosed ADD. She was self monitoring whether she was achieving therapeutic levels. Adderall can cause the precursor to a stroke by elevating her blood pressure. Defendant Steffek treated patients, including Beverly Taylor, at Dr. Carley's office on Thursdays. Dr. Steffek was renting space from Dr. Carley. They would refer patients to each other. Dr. Steffek has referred ADHD patients to Dr. Carley before. When Dr. Steffek was in Dr. Carley's office on Thursday's [sic] he would sit down and have a conversation about their mutual patients. Beverly Taylor was a mutual patient.[11] Dr. Carley knew she was being prescribed Adderall.[12] Dr. Carley's breach 11*11 of the standard of care in making the diagnosis of ADD and referring her for medication treatment was a cause of the ultimate damages and injuries sustained by the Plaintiffs herein.[13] Plaintiff Taylor's neurologist upon admittance at Northeast Medical Center Hospital, Dr. Massoud Bina, suspected that her stroke was due to amphetamine toxicity. Further, it is Plaintiff's psychiatrist expert's opinion that the high dosage of Adderall prescribed by Dr. Steffek caused Beverly Taylor's stroke.[14] Adderall would not have been prescribed if her anxiety disorder had not been misdiagnosed by Dr. Carley.[15] (original footnotes deleted; present footnotes added by this court.)

The Taylors have not produced any summary-judgment evidence showing (1) that Dr. Steffek based his decision and treatment on Dr. Carley's diagnosis, or (2) that Dr. Carley knew or should have known of the potential adverse consequences of Adderall on Mrs. Taylor. In light of Dr. Steffek's and Mrs. Taylor's roles in the chain of events and the lack of evidence that Dr. Steffek's allegedly wrongful act was a concurrent act, as opposed to a new and independent cause, Mrs. Taylor's summary-judgment evidence is insufficient to raise a genuine issue of fact on the element of proximate cause.

At oral argument, the Taylors directed this court's attention to *Benitz*, 27 S.W.3d at 116-17 and *Wilson v. Brister*, 982 S.W.2d 42, 44-45 (Tex.App.-Houston [1st Dist.] 1998, pet. denied). In those cases, the appellate courts were reviewing the grant of traditional summary judgment motions in which the defendants shouldered the burden of conclusively proving the presence of a superseding cause. *See Benitz*, 27 S.W.3d at 117; *Wilson*, 982 S.W.2d at 45. They are not persuasive authority for deciding the appropriateness of a no-evidence summary judgment in the present case. *See Phan Son Van*, 990 S.W.2d at 753 n. 2 (stating, if defendant moves for no-evidence summary judgment based on lack of foreseeability, it will be plaintiff's burden to provide summary-judgment evidence of foreseeability).

C. Duty and Dr. Carley's Alleged Failure to Monitor Mrs. Taylor's Reaction to Adderall

Mrs. Taylor contends Dr. Carley had a duty to monitor Mrs. Taylor's progress on the medication Adderall and to report his impressions to Dr. Steffek. According to Mrs. Taylor's deposition testimony, she 12*12 saw Dr. Carley only twice after she began taking the Adderall. She did not tell Dr. Carley about any problems with medications or side effects. At the second visit, she told Dr. Carley she was "doing well." When she started experiencing headaches and weight loss, she was no longer seeing Dr. Carley.

The narrow question in this case, therefore, is whether a psychologist has a duty to monitor or follow the progress of a former patient who is no longer seeing the psychologist but is seeing a physician to whom the psychologist referred the patient. The Taylors cite no authority to support such a duty, and we have found none. We decline to create a new duty not recognized by Texas law. *See T.F.W. Mgmt., Inc. v. Westwood Shores Prop. Owners Ass'n*, 79 S.W.3d 712, 720 (Tex.App.-Houston [14th Dist.] 2002, pet. denied).

IV. CONCLUSION

Having concluded that there is no evidence Dr. Carley's alleged negligence in diagnosing Mrs. Taylor proximately caused Mrs. Taylor's injury and that Dr. Carley had no duty to follow or monitor Mrs. Taylor's condition after she stopped seeking treatment from him, we overrule the Taylors' sole issue on appeal. Accordingly, we affirm the trial court's judgment.

[1] Dr. Carley appears to have used ADD and ADHD interchangeably in his notes, explaining "ADHD is kind of like the vernacular you use which could include ADD or ADHD."

[2] Mrs. Taylor testified that Dr. Steffek did not run any independent tests on her. This testimony is consistent with the interactive nature of Dr. Steffek's approach to diagnosis, which involves the patient talking about each of the phenomena on the printed form rather than having them fill out a checklist.

[3] Adderall is an amphetamine. At the time of Dr. Steffek's deposition in February 2002, the Federal Drug Administration had not approved Adderall for adult use. Dr. Steffek prescribed Adderall instead of Dexedrine for the patient's "ultimate convenience," because it has a "longer therapeutic day."

[4] For example, the January 12, 1999 prescription was for 135 ten-milligrams tablets. The instructions provided with the prescription were to take one-and-a-half tablets three times a day, but Dr. Steffek instructed Mrs. Taylor to begin by taking ten milligrams in the morning and ten milligrams in the afternoon and build the dose up to twenty milligrams in the morning and ten in the afternoon. Dr. Steffek wrote the prescriptions the way he did "for the convenience of the patient and through the exigencies of dealing with the insurance companies who then determine how many pills a person can use during a month."

[5] Mrs. Taylor testified she never took forty milligrams, but stated she was not sure whether she took twenty milligrams at 6:00 a.m. and twenty at 1:00 p.m.

[6] According to the discharge summary for Mrs. Taylor, she "had a history of adult onset ADD and has been treated with 40 mg of dextroamphetamine daily for nearly two years."

[7] Mrs. Taylor's husband and her adult son also filed loss of consortium claims, and Mrs. Taylor and her husband filed loss of consortium claims on behalf of their four minor children.

[8] (footnotes omitted).

[9] Although the Taylors raised both misdiagnosis and failure to monitor in the trial court, their position on appeal is less clear. They state, for example, "[Dr. Carley] owed a duty to Ms. Taylor not to misdiagnose her condition and, *arguably*, his duty extended to monitor her progress on the medication and report his impressions to Dr. Steffek during the course of their joint treatment." (Emphasis added.) Nevertheless, we address both the alleged misdiagnosis and the alleged failure to follow.

[10] In his summary-judgment motion, Dr. Carley did not allege an absence of evidence to show Adderall caused the stroke. Our review is limited to the grounds asserted. *See Gold v. City of College Station*, 40 S.W.3d 637, 642 n. 3 (Tex.App.-Houston [1st Dist.] 2001, pet granted, judgm't vacated w.r.m.).

[11] In support, the Taylors cited only Mrs. Taylor's deposition in which she described her visits with Dr. Steffek. There is nothing in the cited deposition pages to indicate how long Mrs. Taylor was a mutual patient.

[12] In support, the Taylors cited Dr. Carley's deposition in which he testified as follows:

> Q. So, before January 6th, 1999 you did not know she was taking Adderal [sic]?
>
> A. Correct, until she came and had it with her on that day.
>
> Q. Right, right. No one had told you that that was going to be prescribed to your patient.
>
> A. Not at that time.

[13] In support, the Taylors cited the affidavit of Dr. Ron Kimball, Ph.D., in which he opined that Dr. Carley's failure "to follow proper standards in the assessment, diagnosis and development of a treatment plan ... resulted in the misdiagnosis of ADHD, the use of Adderall, and the development of an amphetamine toxicity that was implicating in a disabling CVA." Dr. Kimball provided no facts to support the causal connection between the alleged misdiagnosis and the subsequent events. Affidavits containing conclusory statements unsupported by facts

are not competent summary-judgment evidence. *Skelton v. Comm'n for Lawyer Discipline*, 56 S.W.3d 687, 692 (Tex.App.-Houston [14th Dist.] 2001, no pet.). The Taylors contend by not objecting to Dr. Kimball's affidavit, Dr. Carley has waived any objection on appeal. An objection regarding the conclusive nature of an affidavit, however, is an objection to the substance of the affidavit that can be raised for the first time on appeal. *Id.*

[14] As discussed in note 10, above, in his summary-judgment motion, Dr. Carley did not contend there was an absence of evidence to show Adderall caused the stroke.

[15] The Taylors cited no summary-judgment evidence in support of this contention.

In *Skloss v. Perez*, the court explains its reasoning behind the classification of psychologists and other non-physician providers as health care workers, subject to the litigation formalities and procedures of health care litigation.

BELINDA K. **SKLOSS**, Appellant,
v.
SANDRA J. **PEREZ** AND GUSTAVO PEREZ, SR., INDIVIDUALLY AND AS NEXT FRIENDS OF G.P. AND A.P., MINORS, Appellees.

(Tex. App. 2009) No. 01-08-00484-CV.

Opinion issued January 8, 2009.

Panel consists of Chief Justice RADACK and Justices NUCHIA and HIGLEY.

MEMORANDUM OPINION

LAURA CARTER HIGLEY, Justice

Appellant, Belinda K. Skloss, a Licensed Professional Counselor, appeals from the trial court's order denying her motion to dismiss the suit brought against her by appellees, Sandra J. Perez and Gustavo Perez, Sr., Individually and as Next Friends of G.P. and A.P., minors. In her sole issue, appellant contends that appellees' suit constitutes a health care liability claim and that they failed to serve appellant with an expert report, as required by Texas Civil Practice and Remedies Code section 74.351.[1]

We reverse and remand for entry of judgment dismissing appellees' claims with prejudice and assessing attorney's fees.

Background

Appellant is licensed by the State of Texas as a Licensed Professional Counselor ("LPC"). *See* Tex. Occ. Code Ann. § 503.001-.511 (Vernon 2004 & Supp. 2008). Appellees, Sandra J. Perez and Gustavo Perez, Sr., are the grandparents and conservators of G.P. and A.P.

Beginning in October 2003, appellant provided counseling services to G.P., who was then seven years of age. In March 2004, appellant began providing counseling services to A.P., who was then four years of age. In May 2004, appellant began counseling Mr. and Mrs. Perez. Appellant's counseling services ended in April 2005. According to appellees, appellant saw Mr. and Mrs. Perez over 300 times and saw the children 80 to 90 times each.

According to the record, appellees allege that, during the course of the period from October 2003 to April 2005, appellant required an "exorbitant number of visits," sometimes requiring twice daily visits; threatened to discontinue seeing the children if appellees refused; "threatened to withdraw her support of the family's custody battle" if appellees refused; required Mr. Perez to drive appellant around town for errands and deliveries and then charged his health insurance carrier for therapy sessions; would call four-year-old G.P. on the telephone and bill the insurance company for therapy sessions; and that appellant

"entered into dual relationships" with appellees and improperly terminated their relationship. Appellees allege that they have expended approximately $194,000 in "therapy expenses" over the course of the total 18-month period.

On April 5, 2007, appellees, individually and as next friends of the children, sued appellant, alleging negligence, breach of fiduciary duty, "outrage," "breach of privacy rights," fraud, and breach of contract. Generally, appellees[2] alleged that appellant negligently failed to treat, or improperly treated, appellees, who were suffering from "psychological problems"; that appellees' psychological problems were beyond appellant's competency to treat; that appellant "negligently undertook to treat [appellees]" and "negligently failed to refer [appellees] to another more competent professional person for proper treatment"; and that appellant "negligently maintained or negligently failed to maintain appropriate professional boundaries." In addition, appellees alleged that appellant breached her duty of trust; that her conduct was extreme and outrageous, and caused appellees extreme emotional distress; that she fraudulently represented that she was competent to treat appellees; and that she failed to perform the contract for professional services and charged substantially excessive fees.

It is undisputed that appellees did not serve appellant with an expert report. On January 22, 2008, appellant moved to dismiss appellees' suit on the basis that appellees' claim constituted a health care liability claim and that appellees had failed to file an expert report within 120 days of filing their initial claim, as required by Civil Practice and Remedies Code section 74.351. Appellees responded that their claims did not constitute health care liability claims. On May 20, 2008, after a hearing, the trial court denied appellant's motion to dismiss. This appeal ensued.

Health Care Liability Claim

Appellant contends that the trial court erred by denying her motion to dismiss appellees' claim for failure to timely file an expert report. Appellant contends that she is a "health care provider" and that appellees' claim constitutes a "health care liability claim," as defined under Chapter 74 of the Texas Civil Practice and Remedies Code. Appellant contends that, because it is undisputed that appellees did not serve an expert report on appellant, the suit must be dismissed.

A. Standard of Review

We review a trial court's decision on a motion to dismiss a case for failure to comply with section 74.351 for an abuse of discretion. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001) (applying abuse of discretion standard in review of trial court's decision to dismiss under predecessor statute, section 13(e) of article 4590i); *Torres v. Mem'l Hermann Hosp. Sys.*, 186 S.W.3d 43, 45 (Tex. App.—Houston [1st Dist.] 2005, no pet.). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to guiding rules or principles when it dismisses a claim. *Torres*, 186 S.W.3d at 45. However, if resolution of the issue requires us to construe statutory language, we review under a de novo standard. *Id.*

B. Applicable Law and Guiding Principles

At the time appellant's cause of action accrued, Civil Practice and Remedies Code section 74.351 provided, in relevant part, as follows:

> (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the claim was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. . . .[3]
>
> (b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that: (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the

refiling of the claim.[4]

Stated generally, section 74.351(a) requires a claimant to serve an expert report on a defendant health care provider, or its attorney, within 120 days after the date the claim is filed. If the claimant fails to timely comply, the trial court is required, on the motion of the affected health care provider, to dismiss the suit.

Statutes must be construed as written and the legislative intent determined, when possible, from the express terms. Tex. Gov't Code Ann. § 311.023 (Vernon 2005); *Univ. of Tex. Health Sci. Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 873 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Words and phrases shall be read in context and construed according to rules of grammar and common usage. Tex. Gov't Code Ann. § 311.011(a) (Vernon 2005). Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. *Id.* § 311.011(b). Unless a word is used with reference to a particular trade or subject matter or is a word of art, the word shall be given its ordinary meaning. *Id.* § 312.002.

B. Appellants' Claim

Pursuant to Chapter 74, a "health care liability claim" is

> a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13) (Vernon 2005).

Here, applying Chapter 74, we determine whether appellants' claim is a "health care liability claim" by determining whether their cause of action (1) is against a "health care provider" and (2) "for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety." *See id.*

1. *Health care provider*

The parties dispute whether appellant, as an LPC, is a "health care provider" under Chapter 74. *See id.* § 74.001(a)(12). A "health care provider" is "*any person*, partnership, professional association, corporation, facility, or institution *duly licensed*, certified, registered, or chartered by the State of Texas *to provide health care*, including: a registered nurse, a dentist, a podiatrist, a pharmacist, a chiropractor, an optometrist, or a health care institution." *Id.* § 74.001(a)(12) (emphasis added).

It is undisputed that appellant is a person licensed by the State of Texas as an LPC. *See* Tex. Occ. Code Ann. ch. 503 (Vernon 2004 & Supp. 2008). The list of health care providers in section 74.001(a)(12) does not specifically include an LPC; however, the list is non-exhaustive.[5] *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(12) (Vernon 2005); Tex. Gov't Code Ann. § 311.005(13) (Vernon 2005) ("`Includes' and `including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."); *Christus Health v. Beal*, 240 S.W.3d 282, 286 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (noting that provider list at section 74.001(a)(12) is non-exhaustive).

Section 74.001 also requires that the person be duly licensed "to provide health care." *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(12). "Health care" is "*any act* or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient *during the patient's medical care, treatment, or confinement.*" *Id.* § 74.001(a)(10) (emphasis added). Appellees contend that appellant is not a health care provider because she did not provide "medical care."[6]

> "Medical care" is defined as "practicing medicine." *Id.* § 74.001(a)(19). "Practicing medicine" is the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or

> injury by any system or method, or the attempt to effect cures of those conditions, by a person who: (A) publicly professes to be a physician or surgeon; or (B) directly or indirectly charges money or other compensation for those services.

Tex. Occ. Code Ann. § 151.002(a)(13) (Vernon Supp. 2008) (governing physicians). Occupations Code chapter 503, which governs LPCs, specifically states that "[t]his Chapter does not authorize the practice of medicine as defined under the laws of this State." Tex. Occ. Code Ann. § 503.004 (Vernon 2004). Hence, here, appellant did not provide "medical care" to appellees.

It is undisputed that appellees were not in "confinement" at a health care institution. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(10) (Vernon 2005). The remaining question is whether appellant, as an LPC, was performing an act "for, to, or on behalf of a patient during the patient's . . . *treatment*." *Id.* (emphasis added).

The term "treatment" is not defined in section 74.001. Section 74.001 provides that, "[a]ny legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law." *See id.* § 74.001(b). Appellant does not direct us to any, and we do not find any, case law that specifically defines "treatment" within Chapter 74 or considers whether an LPC provides "treatment" in this context.[7]

As appellant points out, "treatment" is defined in common usage as "the act or manner or an instance of treating someone or something" and as "the techniques or actions customarily applied in a specific situation." Merriam-Webster's Collegiate Dictionary 1333 (11th ed. 2003). More specifically, within the medical context, "treatment" is defined as "the care and management of a patient to combat, ameliorate, or prevent a disease, disorder, or injury." Mosby's Medical Dictionary 1744 (6th ed. 2002). A "patient" is "a recipient of a health care service." *Id.* at 1294. Appellant contends that she was engaging in the "treatment" of appellees because she was engaging in "the techniques and actions customarily applied" by LPCs. Appellant directs us to Texas Occupations Code section 503.003(a), which defines the practice of professional counseling. Appellant contends that, "[b]y definition, professional counseling includes treating mental health."

Section 503.003(a) provides as follows, in pertinent part:

> (a) In this chapter, "practice of professional counseling" means the application of mental health, psychotherapeutic, and human development principles to:
>
> (1) facilitate human development and adjustment throughout life;
>
> (2) prevent, assess, evaluate, *and treat* mental, emotional, or behavioral *disorders* and associated distresses that interfere with mental health;
>
> (3) conduct assessments and evaluations to *establish treatment goals and objectives*; and
>
> (4) plan, implement, and *evaluate treatment plans using counseling treatment* interventions that include:
>
> (A) counseling;
>
> (B) assessment;
>
> (C) consulting; and
>
> (D) referral.
>
> Tex. Occ. Code Ann. § 503.003(a) (Vernon 2004) (emphasis added).

Contained in the record is appellant's affidavit, in which she attested as follows, in relevant part: "I am a licensed professional counselor, licensed by the State of Texas to practice professional counseling. In that capacity, I assessed, evaluated and treated the mental and emotional conditions of Sandra J. Perez, Gustavo Perez, Sr., [G.P. and A.P.]"

Hence, an LPC is licensed by the State of Texas to provide health care, that is, "treatment," and, here, appellant attested that she was providing "treatment" for the mental and emotional conditions of

appellees.

By analogy, the Supreme Court of Texas has considered the scope of the definition of a "health care provider" in section 74.001 in a case involving a physical therapist. *Rehabilitative Care Sys. of Am. v. Davis*, 73 S.W.3d 233, 234 (Tex. 2002). In *Davis*, Davis was attending physical therapy after having surgery on his shoulder. *Rehabilitative Care Sys. of Am. v. Davis*, 43 S.W.3d 649, 652 (Tex. App.—Texarkana 2001, pet. denied). During a session in which Davis was working on a weight machine at the direction of his physical therapist, the therapist left the room. *Id.* at 653. While Davis was unsupervised, he tore his rotator cuff. *Id.* At trial, Davis prevailed on his medical malpractice claim against the rehabilitation center. *Id.* at 652. On appeal, the rehabilitation center contended that the trial court erred in denying its motion for an instructed verdict because Davis failed to produce expert testimony. *Id.* at 656. The intermediate court held that Davis was not required to produce expert testimony regarding the standard of care required of a physical therapist when the claim was that of negligent supervision. *Id.* at 657. The court concluded that the standard of care was within the comprehension of lay persons. *Id.* The Supreme Court of Texas denied the petition for review; however, it wrote to express its disapproval of the lower court's conclusion that expert testimony was not required to establish the appropriate standard of care. *Davis*, 73 S.W.3d at 234. The high court concluded that a malpractice suit against a physical therapist is "no different from any other medical-malpractice suit in that the applicable standard of care must generally be established by expert testimony." *Id.*

Nothing in section 74.001 draws a distinction between mental and physical health care. Here, like *Davis*, the standard of care of a therapist in providing health care to a patient, in the form of "treatment," requires expert testimony.

Moreover, other Texas statutes characterize an LPC as a "health services provider." For example, Texas Civil Practice and Remedies Code section 81.001, defines a "mental health services provider" as "an individual, licensed or unlicensed, who performs or purports to perform mental health services, including a: . . . licensed professional counselor as defined by Section 503.002, Occupations Code." Tex. Civ. Prac. & Rem. Code Ann. § 81.001(2) (Vernon 2005) (defining in context of sexual exploitation by mental health services provider).

We conclude that appellant is a health care provider within section 74.001 of the Civil Practice and Remedies Code.

2. *Healthcare Claim*

We next consider whether appellees' claim is a health care liability claim. Again, a "health care liability claim" is

> a cause of action against a health care provider or physician *for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.* Tex. Civ. Prac. & Rem. Code § 74.001(a)(13) (Vernon 2005) (emphasis added).

To determine whether a cause of action is a "health care liability claim," we consider the underlying nature of the claim. *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543-44 (Tex. 2004). If the act or omission alleged is an inseparable part of the rendition of health care services, then the claim is a health care liability claim. *Id.* at 544. One consideration is whether the specialized knowledge of an expert is required to prove the claim. *Id.* A plaintiff cannot artfully plead around the requirements of Chapter 74. *See id.* at 543. If the cause of action is based on a breach of the standard of care by a healthcare provider, then the claim is a health care liability claim, without regard to how it is labeled. *Torres*, 186 S.W.3d at 47.

In their petition, as amended, appellees sued appellant for negligence, breach of fiduciary duty, outrage, breach of privacy rights, fraud, and breach of contract. Specifically, as to their negligence claim,

appellees alleged that appellant "negligently . . . manipulated the emotions of [appellees] in order to gain control over [appellees] and abused and mishandled the transference phenomenon that arose out of their professional relationship"; that appellant "negligently and carelessly failed *to treat*, or *improperly treated*[,] [appellees], individuals suffering from psychological problems"; that appellant "negligently and carelessly entered into improper and unprofessional dual relationships with [Mr. and Mrs. Perez] during the period of therapy"; that "[d]uring the course of [appellees'] therapy, [appellant] negligently conducted or handled the termination of the professional therapeutic relationship with [appellees], ultimately terminated that relationship improperly, and/or failed to assist in obtaining *other professional treatment in accordance with accepted therapeutic procedure or practice*"; that appellant "negligently undertook *to treat* [appellees], patients or clients who, under these circumstances, had psychological problems which were beyond [appellant's] competency *to treat*"; that appellant "negligently failed to refer [appellees] to another more competent professional person *for proper treatment*"; that appellant "negligently maintained or negligently failed to maintain appropriate professional boundaries in the parties' professional relationship." (Emphasis added.)

As to their remaining claims, stated generally, appellees alleged that appellant breached her duty of trust; that her conduct was extreme and outrageous, and caused appellees extreme emotional distress; that she fraudulently represented that she was competent to treat appellees; and that she failed to perform the contract for professional services and charged excessive fees.

The underlying nature of these claims is that appellant "improperly treated," or "failed to treat," appellees' psychological disorders; that she was not competent "to treat" appellees'; and that she failed to refer appellees to "other professional treatment in accordance with accepted therapeutic procedure or practice." Hence, appellees' claims concern "treatment, lack of treatment, or other claimed departure from accepted standards of . . . health care." *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(13) (Vernon 2005).

In addition, at the heart of the services that an LPC provides is the assessment, evaluation, and treatment of mental health disorders. *See* Tex. Occ. Code Ann. § 503.003(a) (Vernon 2004); *see also* *Diversicare Gen. Partners, Inc. v. Rubio*, 185 S.W.3d 842, 849-50 (Tex. 2005) (considering essence of services at issue). LPCs make judgments about the care and treatment of an individual patient based on the care that a patient requires. *See* *Rubio*, 185 S.W.3d at 850. The essence of appellees' claims are that they were injured by appellant's lapses in professional judgment. *Id.* at 851. Hence, the treatment of appellees' mental health was inseparable from the health care and services provided to them by appellant. *Id.* at 849.

Further, an important factor in determining whether a claim is a health care liability claim is whether expert testimony from a health care provider would be necessary to establish the claim. *Rubio*, 185 S.W.3d at 848. Expert testimony is necessary to establish the standard of care when the act of negligence alleged is of such nature as to not be within the experience of laymen. *See* *Rose*, 156 S.W.3d at 544.

Here, whether appellant acted within the standard of care of an LPC in treating the specific mental health disorders presented by appellees is not within the experience of laypersons; including, whether appellant "mishandled the transference phenomenon that arose out of [her] professional relationship" with appellees. Similarly, whether the emotional injuries of which appellees complain in their suit were proximately caused by appellant's breach of the standard of care, if any, is not within the experience of laypersons. Further, as to appellees' breach of contract claim,[8] the scope and duration of care required to treat appellees' respective conditions and the reasonableness and necessity of the fees for that treatment is not going to be within the experience of laypersons.

We conclude that appellees' claims are health care liability claims because the acts or omissions complained of amount to a claimed departure from accepted standards of health care. *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(13) (Vernon 2005). As such, appellees' suit is subject to the requirements of Chapter 74. Appellants filed suit on April 5, 2007. Pursuant to section 74.351, appellants were required

to file an expert report by August 3, 2007.[9] Appellants do not dispute that they did not file an expert report. When the claimant fails to timely comply, the trial court is required, on the motion of the affected health care provider, to dismiss the suit. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b) (Vernon Supp. 2008). We hold that the trial court erred by denying appellant's motion to dismiss appellees' suit.

Conclusion

We reverse the judgment of the trial court and remand for rendition of judgment dismissing appellees' claims with prejudice and assessing attorney's fees.

[1] The current version of Section 74.351(a) applies to a cause of action that accrued after September 1, 2005, the effective date of the amendments. Act of May 18, 2005, 79th Leg., R.S., ch. 635, §§ 2-3, 2005 Tex. Gen. Laws 1590, 1590. Here, appellants' cause of action accrued prior to September 1, 2005. Accordingly, we apply the former version of section 74.351(a) in this case. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590; *Clark v. TIRR Rehabilitation Ctr.*, 227 S.W.3d 256, 264 (Tex. App.-Houston [1st Dist.] 2007, no pet.).

[2] References to "appellees" includes the children.

[3] *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, §§ 1-3, 2005 Tex. Gen. Laws 1590, 1590.

[4] Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b) (Vernon Supp. 2008). Subsection (b) was not amended in 2005 when subsection (a) was amended. Therefore, we refer to the current version of that subsection.

[5] Cases construing 4590i, the predecessor to Chapter 74, concluded that certain mental health professionals, including licensed counselors, were not health care providers. *See Grace v. Colorito*, 4 S.W.3d 765, 769 (Tex. App.-Austin 1999, pet. denied); *Lenhard v. Butler*, 745 S.W.2d 101, 106 (Tex. App.-Fort Worth 1988, writ denied) (concluding that psychologist was not "health care provider" because the profession was not one of those enumerated in Medical Liability Act section 1.03(a)(3)). Unlike the current statute, which is non-exclusive, the prior statute specifically excluded all but the specified list of medical professionals. *See Christus Health v. Beal*, 240 S.W.3d 282, 286 (Tex. App.-Houston [1st Dist.] 2007, no pet.) (concluding that previous judicial interpretations of former article 4590i § 1.03(a)(3) that determined list was exclusive are obsolete and have no application to amended definition).

[6] Appellees also contend that appellant, as an LPC, cannot be a health care provider because psychologists, which have more formal education and training, are specifically excluded by statute, namely Texas Occupations Code section 151.052. *See* Tex. Occ. Code Ann. 151.052 (Vernon 2004). Chapter 151 provides that a "licensed or certified psychologist" is not a physician. *See id.* We agree that an LPC, like a psychologist, would not be considered a "physician." However, Chapter 74 of the Civil Practice and Remedies Code distinguishes between "health care providers" and "physicians." *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(13) (Vernon 2005). Chapter 151 is not instructive concerning the question before us, which is the scope of who is a "health care provider."

[7] Appellees rely on *Macpete v. Bolomey*, 185 S.W.3d 580 (Tex. App.-Dallas 2006, no pet.), to support their contention that appellant, as an LPC, cannot be a "health care provider" because in *Macpete* the court determined that a psychologist, who has more formal training, was not a "health care provider." A close reading of *Macpete* reveals, however, that the court did not determine whether the psychologist there independently qualified as a health care provider. Rather, applying a different provision of chapter 74, the court determined that the psychologist was a health care provider by virtue of her status as a contractor with "Medical City," who was a health care provider. *See id.* at 584-85 (applying section 74.001(a)(12)(B)(ii)).

[8] Section 74.001 encompasses causes of action that sound in contract. Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13) (Vernon 2005).

[9] *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590.

DANGEROUSNESS

DANGEROUSNESS

Predicting future dangerousness is very difficult; not because some individuals by virtue of their past conduct can be viewed as at increased risk for committing similar dangerous conduct in the future, but because most people have some indeterminate risk of violence that prevents separating those who will and those who will not act violently in the future. The state-of-the art of prediction of future dangerousness is nicely summarized in a portion of the unpublished transcript of *Espada v. Texas* (Tex. Crim. App. 2008) No. AP-75,219:

> In point of error two, appellant argues that the trial court erred, at the punishment stage, in admitting the testimony of Dr. Richard Coons, a psychiatrist, on the subject of appellant's future dangerousness.[3] Appellant argues that Coons's testimony "failed to satisfy any of the criteria for admissibility" under Texas Rule of Evidence 702.[4] More specifically, appellant argues that Coons: (1) "never authored a paper on the subject of future dangerousness"; (2) "had no `hard core data' to support his opinion"; (3) had . . . no research to confirm the error rate of his previous predictions of future dangerousness"; and (4) "[was] [u]nable to cite any established body of scientific work on the prediction of future dangerousness."
>
> Before allowing Coons to testify before the jury, the trial court held a hearing outside the presence of the jury on the question of the admissibility of Coons's testimony under Rule 702. At that hearing, Coons testified that: (1) he was a board-certified psychiatrist with thirty-one years of experience in forensic psychiatry; (2) in the course of his career, he had "evaluated" more than 7,000 persons charged with crimes; (3) taking various factors into account, he could oftentimes formulate an opinion regarding a defendant's future dangerousness; (4) he did not know his rate of error; (5) his opinion regarding a defendant's future dangerousness was ultimately based on his professional training and experience; (6) among the factors he considered were the defendant's personality, the defendant's history of violence, the defendant's attitude toward violence, the nature of the crime in question, the defendant's "behavior patterns" during his lifetime, the defendant's physical abilities, whether the defendant has expressed remorse, whether the defendant has a conscience to help him control his behavior, and the defendant's probable future location (prison); (7) other professionals used the same factors in assessing future dangerousness; (8) his methodology was not based on any specific scientific study; (9) it is impossible to conduct accurate scientific research regarding capital defendants' future dangerousness because such defendants "go to death row"; (10) it is impossible to "get the same level of hard data reliability [about future dangerousness] that you can [get] in [the] hard sciences"; (11) he had attended many professional seminars concerning future dangerousness but had written no papers on that subject; (12) he had read much about, and had consulted many other professionals about, future dangerousness; (13) "psychiatrists are called upon to make judgments about people's [future] dangerousness all the time," e.g., before "commit[ting] somebody [involuntarily to a mental institution], we're asked to determine whether they're likely to be dangerous to themselves or others"; (14) psychiatrists "rely on history to make predictions about the future"; and (15) psychiatrists "can reach conclusions [about future dangerousness], and do [so] all the time, about people who are charged with crimes." Appellant offered no evidence to rebut Coons's testimony but argued that his testimony was inadmissible nevertheless because his "methodology of making predictions of future dangerousness [was] not based upon a scientific foundation" and "he [could] not identify any error rates or things like that."

A second unpublished case, reprinted in its entity below, *Gonzales v. Texas* provides a close look at the thinking behind a decision to uphold the death penalty in a case involving expert testimony on future dangerousness. The dissenting and concurring opinions constitute important reflections of this holding.

RAMIRO F. **GONZALES**, Appellant,
v.
THE STATE OF **TEXAS**.

(Tex. Crim. App. 2009) No. AP-75,540.

Delivered: June 17, 2009.

PRICE, J., announced the judgment of the Court and delivered an opinion in which MEYERS, KEASLER and HOLCOMB, joined, and in which KELLER, P.J., and HERVEY and COCHRAN, JJ., joined except as to point of error one. JOHNSON, J., filed a concurring opinion. COHCRAN, J., filed a concurring opinion in which KELLER, P.J., and HERVEY, J., joined. WOMACK, J., filed a dissenting opinion.

OPINION

PRICE, J.

The appellant was convicted in August 2006 of capital murder.[1] Based on the jury's answers to the special issues set forth in the Texas Code of Criminal Procedure, Article 37.071, sections 2(b) and 2(e), the trial judge sentenced the appellant to death.[2] Direct appeal to this Court is automatic.[3] After reviewing the appellant's ten points of error, we find them to be without merit. Consequently, we affirm the trial court's judgment and sentence of death.

STATEMENT OF FACTS

The appellant was charged with intentionally causing the death of Bridget Townsend by shooting her with a firearm during the course of committing or attempting to commit aggravated sexual assault, kidnapping, or robbery. The evidence at trial established that, while he was in the Bandera County jail waiting to be transported to prison on another matter, the appellant asked to speak with the sheriff, James MacMillian. When MacMillian met with him, the appellant stated that he had information concerning Townsend, a person who had been reported missing almost two years earlier. Initially, MacMillian did not believe him, but when the appellant asserted that he could show MacMillian where Townsend's body was, MacMillian took him more seriously. With the appellant sitting in the passenger seat giving directions and the jail administrator riding in the back, MacMillian drove out of town to the ranch where the appellant and his family lived. After the paved road ended at the ranch headquarters, they continued driving over caliche roads and jeep trails to a remote cedar-covered hillside. They then walked another hundred yards to the location where the appellant indicated that they would find Townsend's remains. As they walked, the appellant described the jewelry Townsend had been wearing, where she had been standing when he shot her, and where he had put her body. They saw a human skull about ten feet from the place the appellant said he had left her. They then observed other bones that had been scattered by wildlife, and they found jewelry that was similar to the jewelry described by the appellant. After MacMillian and the jail administrator tied yellow evidence tape on the trees to mark the location, they drove back to Bandera. MacMillian left markers along the route so that he would be able to retrace it.

The appellant volunteered two different stories during the drive back to the sheriff's office. Initially, he stated that some people in the Mexican Mafia had needed a place to dispose of a body, and so he let them use that location. Then, he stated that he was present while other people committed an offense, but all he did was show them how to get to that location. After they returned to the sheriff's office, the appellant gave additional conflicting stories. A Texas Ranger, Skylor Hearn, testified that the appellant first told him that the appellant had been hired by the Mexican Mafia and Townsend's boyfriend, Joe Leal, to kill Townsend. Next, the appellant indicated that the Mexican Mafia was not involved, but that he and Leal had agreed that he would kill Townsend. Finally, he stated that Leal had not been involved, and that he had killed Townsend on his own. The appellant then admitted that his previous stories had been lies. Hearn testified that the appellant provided details in his final story that were consistent with evidence that

was discovered during the investigation. The appellant gave a statement that was audiotaped and typed. The appellant reviewed, revised, and signed the typed statement. At trial, Hearn read the typed statement out loud. The audiotape was played as well.

In his statement, the appellant related that Leal, Townsend's boyfriend, was his drug supplier. On or about January 14, 2001, he had telephoned Leal's house because he wanted more drugs. Townsend answered the phone and told him that Leal was at work. Then, aware that Townsend was there, he drove to Leal's house in order to steal cocaine. When Townsend answered the door, the appellant walked past her to the bedroom closet where he knew that Leal kept drugs, and he began searching. He found between $150 and $500 in cash on a closet shelf, and he put it in his pocket. He did not respond when Townsend asked him what he was doing. Townsend picked up the telephone and started dialing, telling him that she was calling Leal. The appellant pushed her down, dragged her into the bedroom, and tied her hands and feet with some nylon rope he had found in the closet. He asked her if Leal had any drugs, and she told him no. He then carried her to the front door, where he paused to turn out the lights so no one would see them, and then he carried her to his truck.

The appellant then drove Townsend to the ranch. When they arrived, the appellant stopped long enough to retrieve a high-powered . 243-caliber deer rifle with a scope that he knew was kept in his grandfather's ranch truck. The appellant stated that, at the time he took the rifle, he intended to shoot Townsend because he did not want her to tell anyone that he had "torn up" Leal's house and kidnapped her. Armed with the rifle, he got back into his truck and drove Townsend to the location where her remains were later found. He untied Townsend and walked her toward the brush, but when he started loading the rifle, Townsend began crying and asking for her mother. She told the appellant that she would give him money, drugs, or sex if he would spare her life. In response, the appellant unloaded the rifle and took Townsend back to his truck, where he had sex with her. After she dressed, he reloaded the rifle, walked her back into the brush, and shot her. He listened as her body hit the ground, and then he drove home. When he got back to his grandparents' house, he removed the empty shell casing from the rifle and slung the casing away from the house. He put the rifle back into his grandfather's ranch truck and went inside. There, he interacted with his family as though nothing had happened.

While Hearn was taking the appellant's statement, MacMillian showed investigators the location of Townsend's remains. They found Townsend's skull, most of her long bones and some small bones, her clothing, her jewelry, and her shoes. Her rib cage and vertebrae were never found. Gunshot residue tests on Townsend's shirt revealed the presence of lead. Hearn later seized three high-powered rifles with scopes that he found in the appellant's grandfather's house and ranch truck. He showed them to the appellant, along with a rifle that Hearn had borrowed from the sheriff's department, and asked the appellant if he recognized any of them as the murder weapon.[4] The appellant immediately selected the .243-caliber rifle that Hearn had seized from the ranch truck.

Leal testified about the course of events that led him to report Townsend's disappearance to police. He had spoken to Townsend on the telephone around 6:00 p.m. or 7:00 p.m., and she told him that she had to get up early for work the next morning. When he came home from work a little after midnight, he believed that Townsend was asleep. Her truck was parked outside and things "looked normal." Inside, her purse and keys were on the counter as usual, but the house was cold because the heater had not been turned on. Townsend was not asleep on the couch where Leal had expected her to be, so he went into the bedroom. When he saw that she was not in the bed, he looked around and noticed that the door to the bedroom closet was open. A small box that he kept on a closet shelf was sitting out on the ironing board, open and empty. It had contained between $200 and $300 in cash. Leal testified that Townsend never took money from that box without asking him first. Becoming concerned, Leal began calling friends and family to see if anyone knew where Townsend was. His sister and his friend helped him search the neighborhood. When they could not find her, Leal called the police. He also contacted the appellant because Townsend had told him that the appellant had come by the house earlier that day, and Leal hoped that the appellant might have seen something while he was there. The appellant, however, denied

that he had been there that day. When Leal told the appellant that he might as well tell the truth because Townsend had told him that he had come by, the appellant continued to deny it.

SUFFICIENCY OF THE EVIDENCE

In the appellant's first and second points of error, he claims that the evidence is legally and factually insufficient to support a finding of guilt. However, the appellant does not contend that the evidence taken as a whole is insufficient to sustain his conviction; rather, he complains that his confession is not sufficiently corroborated by independent evidence. Thus, the appellant has blended the standard for whether a confession is sufficiently corroborated with the standards for legal and factual sufficiency. These standards are distinct. In the interest of justice, we will consider each standard.

The appellant argues that his confession was not sufficiently corroborated by independent evidence tending to establish that he murdered Townsend by shooting her with a firearm, and that there was insufficient corroborating evidence tending to establish that he murdered her in the course of committing robbery, kidnapping, or aggravated sexual assault. The corroboration requirement assures that a conviction cannot be obtained solely on the basis of a confession, without some independent evidence that the charged offense was actually committed.[5] When the offense is capital murder charged as a murder in the course of committing another felony, independent evidence that a crime has been committed must corroborate both the murder and the underlying felony.[6] "[T]he *corpus delicti* of murder is established if the evidence shows the death of a human being caused by the criminal act of another."[7] Similarly, the underlying felony need not be conclusively proven by corroborative evidence; all that is required is that there be some evidence that renders the commission of the offense more probable than it would have been without the evidence.[8] "It satisfies the *corpus delicti* rule if some evidence exists outside of the extra-judicial confession which, considered alone or in connection with the confession, shows that the crime actually occurred."[9]

Here, the jury was instructed that the appellant could not be convicted on the basis of his confession alone.[10] The jury heard testimony from MacMillian, Leal, and other witnesses that:

(a) Townsend vanished from her home, suddenly and without a trace, leaving her keys, purse, and truck behind;

(b) Townsend's remains were found in a remote location on the ranch where the appellant lived;

(c) almost two years after Townsend's disappearance, the appellant directed the sheriff on a circuitous route over caliche roads, jeep trails, and scrub land to Townsend's remains;

(d) a rifle matching the one the appellant said he had used to shoot Townsend was found on the ranch, in the place where the appellant said he had obtained it;

(e) lead was detected on Townsend's shirt;

(f) jewelry similar to that described by the appellant was found near Townsend's remains; and

(g) money was taken from Townsend's house at the same time that she disappeared, in an amount and from a location that were consistent with the amount and location described by the appellant.

As such, there was ample independent corroborative evidence rendering it more probable than it would have been otherwise that Townsend's death was caused by the criminal act of another.

Next, the appellant asserts that the independent evidence was not sufficient to corroborate his confession that he committed the underlying offenses of robbery, kidnapping, or aggravated sexual assault. However, the jury could convict the appellant of capital murder if it found the murder was committed during the course of any one of these disjunctively charged underlying offenses.[11] Here, the independent evidence sufficiently corroborated the appellant's confession to at least one of the underlying offenses.

Concerning the underlying offense of kidnapping, Leal's testimony was evidence that Townsend had

planned to be at home, and was home, on the night she disappeared. Townsend's purse, keys, and truck were still at the house in their usual places when she left. These facts tended to show that Townsend did not leave home willingly. That she was moved from the house, and that there were no signs of a struggle or an injury, tended to show that she was alive when she left.[12] A rifle matching the one the appellant said he had used to shoot Townsend was found in his grandfather's ranch truck, where the appellant said he had obtained it, on the ranch where Townsend's remains were found. This evidence further indicates that Townsend was alive when she was taken from her house to the ranch. The appellant directed MacMillian on a circuitous route over caliche roads, jeep trails, and scrub land to the remote location of Townsend's remains. This fact corroborates his statement that he took her to that location.

There was also independent evidence to corroborate the appellant's confession to the robbery. Leal's testimony confirmed that money was taken from the house at the same time that Townsend disappeared. His testimony concerning the amount of money taken and its location on a shelf in his bedroom closet was consistent with the appellant's confession.[13] This evidence rendered the appellant's commission of robbery more probable than it would have been, if it had been based on the appellant's confession alone.

The State admitted in its response to the defense's motion for directed verdict that there was little independent evidence to corroborate the appellant's confession to the offense of aggravated sexual assault. However, the appellant's admissions to murder, kidnapping, and robbery were sufficiently corroborated by independent evidence, and so it is not necessary to address the matter further.

In performing a legal-sufficiency analysis, we review all of the evidence in the light most favorable to the verdict, and ask whether any rational trier of fact could have rendered the jury's findings beyond a reasonable doubt.[14] In a factual-sufficiency review, the evidence is reviewed in a neutral light. Evidence can be factually insufficient if the evidence supporting the verdict is so weak that the verdict seems clearly wrong and manifestly unjust, or if the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust.[15] A reversal for factual insufficiency should not occur when "the greater weight and preponderance of the evidence actually favors conviction."[16] The sufficiency of the evidence is determined by evaluating the probative weight of all the evidence that the trial judge permitted the jury to consider.[17]

In this case, the evidence presented at trial was both legally and factually sufficient. The appellant's confession alone would have been sufficient to prove his guilt of all the elements of capital murder beyond a reasonable doubt.[18] The appellant did not present any contrary evidence. Points of error one and two are overruled.

EXPERT TESTIMONY CONCERNING FUTURE DANGEROUSNESS

In points of error three, four, five, six, and seven, the appellant asserts that the trial court's admission of expert testimony concerning the appellant's future dangerousness violated the requirements of *Nenno*[19] and Rule 702 of the Texas Rules of Evidence, his right to due process as guaranteed by the Fifth Amendment to the United States Constitution,[20] and his right to a fair trial as guaranteed by the Sixth Amendment to the United States Constitution.

In points of error three and four, the appellant makes a global, broad-based assertion that the trial court erred by taking judicial notice of the relevance and reliability of psychiatric and psychological expert testimony on the issue of future dangerousness, rather than performing an independent "gatekeeping" function and making an independent determination as to whether a psychiatric or psychological expert could ever offer an opinion on future dangerousness that would be sufficiently relevant and reliable. However, the trial court did not abuse its discretion by taking judicial notice of the general relevance of such testimony. This Court has repeatedly held that testimony from mental-health experts is relevant to the issue of future dangerousness.[21] Furthermore, contrary to the appellant's assertion, the trial court did not take judicial notice of the reliability of the State's expert's testimony in this particular case; rather, the

court held a hearing before making that determination. Points of error three and four are overruled.

In points of error five, six, and seven, the appellant asserts that the trial court erred in finding that the future-dangerousness testimony of the State's expert in this case, Dr. Edward Gripon, was based on scientifically valid reasoning or methodology. A trial court's ruling on the admissibility of scientific expert testimony is reviewed under an abuse of discretion standard.[22] When "soft" sciences are at issue, the trial court should inquire: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies on or utilizes the principles involved in the field.[23]

Prior to Gripon's testimony at trial, the trial court held a hearing to determine the reliability of his testimony. At the hearing, Gripon testified that he was a medical doctor with a specialty in psychiatry and board certifications in general and forensic psychiatry. He had performed forty to fifty future-dangerousness case evaluations and had testified on the issue of future dangerousness many times. He further testified that determinations of future dangerousness are a legitimate function of forensic psychiatrists. He related that forensic psychiatrists typically rely on interviews, when allowed, and all of the collateral information available, to develop a profile of the person. The best predictor of future dangerousness would be the person's past history. Gripon testified that actuarial methods involved looking at how often things occurred in the death-row population versus the population of others convicted of murder. Gripon acknowledged that there was not one method of performing a future-dangerousness evaluation that was accepted as always right.

Gripon described his method as obtaining "every shred of information" he could get and then fitting it into a "mental health jigsaw puzzle" to see what it looked like. This method was a combination of a clinical assessment and the actuarial method. He would then determine whether he had enough information to feel comfortable in offering an opinion. In this case, he had reviewed the appellant's juvenile records, criminal records, offense reports, jail records, and audio recordings of four telephone calls the appellant had placed from jail. He also interviewed the appellant, but he did not discuss the results of that interview. He testified that he had not attempted to investigate beyond the materials furnished by the State because he felt that those materials were enough to enable him to offer an opinion. The trial court accepted him as an expert.

Based on the record before us, we find the reliability of Gripon's testimony to be sufficiently established under *Nenno* and Rule 702. Thus, we conclude that the trial court did not abuse its discretion in admitting the expert testimony on future dangerousness. Points of error five, six, and seven are overruled.

JURY INSTRUCTIONS CONCERNING MITIGATION

In point of error eight, the appellant complains that the trial court reversibly erred by instructing the jury that mitigating evidence was evidence that reduced his moral blameworthiness. The trial court did not err in giving this instruction, which was required by Article 37.071 of the Texas Code of Criminal Procedure.[24] We have previously rejected a challenge to the constitutionality of this instruction.[25] Point of error eight is overruled.

In point of error nine, the appellant asserts that the jury should have been instructed that mitigating evidence does not require a nexus between the evidence and the commission of the crime. However, the appellant has not identified any alleged mitigating evidence that could not be given effect under the instructions that were given.[26] The mitigation instruction permitted the jury to give full effect to the mitigating evidence.[27] Point of error nine is overruled.

THE 10-12 RULE

In point of error ten, the appellant asserts that the 10-12 rule is unconstitutional, as well as arbitrary and capricious, because it may arbitrarily force the jury to continue deliberating after every juror voted to

answer a special issue in favor of the appellant, and it fails to inform the jurors that a sentence of life will result unless all 12 jurors answer "Yes" to future dangerousness and "No" to mitigation. We have previously rejected these arguments.[28] Point of error ten is overruled.

We affirm the judgment of the trial court.

CONCURRING OPINION

JOHNSON, J., filed a concurring opinion.

I concur in the judgment of the Court because I believe that the Court's disposition of this case is correct. However, I also agree with the arguments set out by Judge Cochran in her concurring opinion and by Judge Womack in his dissenting opinion.

CONCURRING OPINION

COCHRAN, J., filed a concurring opinion in which KELLER, P.J., and HERVEY, J., joined.

I concur in the resolution of appellant's point of error one and otherwise join the Court's opinion. The *corpus delicti* rule deals with the admission of a person's extrajudicial confession to a crime and the need for some independent evidence to corroborate that confession. In the context of the present case, I think that the *corpus delicti* rule requires evidence that corroborates only the fact of a homicide, not the felony that elevates that homicide to capital murder.

The *corpus delicti* rule is not one of constitutional magnitude,[1] nor is it statutorily mandated. It is a common law, judicially created, rule of evidence,[2] the purpose of which is to ensure that a person will not be convicted based solely on his own false confession to a crime that never occurred.[3] Historically, the *corpus delicti* rule has required some corroboration of (1) the occurrence of the specific kind of injury or loss and that (2) the injury or loss was caused by someone's criminal activity.[4] Texas has sometimes added a third requirement: some independent proof that the defendant was connected to the criminal act. Thus, in Texas homicide prosecutions, this Court had historically required independent proof that (1) "the body of the deceased was found and identified"; (2) he died as a result of a criminal act (not by accident, natural causes, or suicide); and (3) the defendant is connected with that criminal act.[5] That third requirement was finally abolished by this Court in 1974.[6] It had never been necessary for the State to offer independent corroboration of each element of the offense or of the specific method by which the offense was alleged to have occurred.[7]

Then, in 1990, a plurality of this Court held that the State was required, in 19.03(a)(2) capital-murder cases, to offer some corroborative evidence of the underlying felony charged in the capital-murder indictment.[8] In *Gribble*, the plurality began with the generally accepted statement about the contours of the *corpus delicti* rule:

This Court has long subscribed to a variant of the common law rule that an extrajudicial confession of the accused is insufficient to support conviction unless corroborated. In Texas, as in most other American jurisdictions, the rule has been construed to require independent evidence of the *corpus delicti*, not merely support for credibility of the confession. Although often inconsistent in our understanding of the term, we have usually held *corpus delicti* to mean harm brought about by the criminal conduct of some person. Thus, the extrajudicial confession of a criminal defendant must be corroborated by other evidence tending to show that a crime was committed. It need not be corroborated as to the person who committed it, since identity of the perpetrator is not a part of the *corpus delicti* and may be established by an extrajudicial confession alone.[9]

Then, having just set out the common law rule that there must be independent evidence of "harm" or "a crime," the plurality announced that the "the essential purpose of the corroboration requirement is to assure that no person be convicted without some independent evidence showing that *the very crime to which he confessed was actually committed*[.]"[10] Thus, *Gribble* held that the State was required to offer some independent evidence of kidnapping, the underlying felony that the State had pled in its capital-

murder indictment.[11] This had not been true under the common law in Texas because the sole purpose of the rule was to ensure that the defendant is not convicted based on a false confession to a crime that never happened. The *corpus delicti* of any homicide-from capital murder to manslaughter or negligent homicide-was a dead body and a criminal act (and sometimes evidence that the defendant was connected to that criminal act). Period. The State was never required to provide independent evidence of the specific manner and means by which the offense was committed or of any other element of the charged homicide. This strange new requirement suddenly jumped into the minds of four members of this Court and has never been further examined. *Gribble* has simply been cited as if it were well-established law with a well-established pedigree.[12] It is neither.

Most American courts that still follow the common law *corpus delicti* rule[13] have concluded that, in the context of a capital-murder or felony-murder trial, the prosecution need not provide any independent evidence of the underlying felony.[14] Proof that a person has died, coupled with proof of a criminal act that caused that death, suffices to ensure that an innocent person will not be unjustly convicted of a capital or felony murder that never occurred.[15] "Death" is the harm or injury that the *corpus delicti* rule addresses in homicide cases.

Because the majority perpetuates the unwarranted extension of the *corpus delicti* rule first made in *Gribble,* without a logical or historical rationale, I can only respectfully concur with the result in point of error one.

WOMACK, J., filed a dissenting opinion.

The Court holds (*ante,* at 13-15) that the trial court did not abuse its discretion in allowing the psychiatrist to offer an expert opinion on the probability that the defendant will commit future acts of dangerousness that will constitute a danger to society.

The fact that there was no evidence introduced (and there seems to be no evidence at all, anywhere) of the reliability of these predictions of future dangerousness should be dispositive. "Now the ordinary rules of evidence require that evidence be reliable in order to be admissible. Reliability in the context of scientific evidence requires scientific validity. It is doubtful that testimony about future dangerousness could withstand *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)] analysis."[1] We apply that analysis to psychiatrists' and psychologists' predictions of future dangerousness.[2]

It must always be remembered that the capital murderer who is not sentenced to death will be sentenced to prison for life without parole. So the relevant question is whether he will commit violent acts in prison.

Our laws permit people with communicable diseases to be quarantined. The laws are based on scientific research that has shown that, without quarantining, the diseases will be spread. Before we accept an opinion that a capital murderer will be dangerous even in prison, there should be some research to show that this behavior can be predicted reliably.

I respectfully dissent.

[1] Tex. Penal Code § 19.03(a)(2).

[2] Art. 37.071, § 2(g). Unless otherwise indicated all references to Articles refer to the Code of Criminal Procedure.

[3] Art. 37.071, § 2(h).

[4] Hearn testified at trial that he had never conducted a gun line-up before, and he added the borrowed rifle to the collection in an effort to duplicate the controls typically used in a suspect line-up.

[5] *Gribble v. State*, 808 S.W.2d 65, 71 (Tex. Crim. App. 1990) (plurality opinion) (observing that "the [corroboration or *corpus delicti*] rule peremptorily reduces the weight of admissible evidence for policy reasons originated by this Court without express legislative sanction," and so the quantum of independent corroborating

evidence need not be great).

[6] *Cardenas v. State*, 30 S.W.3d 384, 390 (Tex. Crim. App. 2000). It has been suggested that we should renounce the rule that in prosecutions brought under Section 19.03(a)(2) of the Penal Code, Tex. Pen. Code § 19.03(a)(2), both murder and underlying felony must be corroborated. Although the rule originated in a plurality opinion, *Gribble v. State*, *supra*, it has since been endorsed by a clear majority of the Court on a number of occasions. *Chambers v. State*, 866 S.W.2d 9, 15 (Tex. Crim. App. 1993); *Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994); *Williams v. State*, 958 S.W.2d 186, 190 (Tex. Crim. App. 1997); *Rocha v. State*, 16 S.W.3d 1, 4-5 (Tex. Crim. App. 2000); *Cardenas v. State*, *supra*. Because we will hold that the evidence in this case *does* corroborate at least one of the underlying felonies, there is no need to address the question whether we should renounce the rule, and hence, disavow those *post-Gribble* majority opinions in our unpublished opinion in this case. The parties here have not briefed the question. Better to save it for a later day when it has been specifically briefed by the parties and it might make a difference to the ultimate resolution of the appeal.

[7] *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

[8] *Salazar v. State*, 86 S.W.3d 640, 645 (Tex. Crim. App. 2002).

[9] *Id.*

[10] The jury was charged:

Even though you should find from the evidence beyond a reasonable doubt that the defendant admitted that he committed the offense, if any, that such admission standing alone is not sufficient to authorize a conviction in the case.

Now, therefore, unless you find and believe that there is other evidence before you, which taken with the alleged statement of the defendant, convinces you beyond a reasonable doubt that the defendant is guilty as charged in the indictment, you will acquit the defendant and say by your verdict "Not Guilty."

[11] *See Cardenas*, 30 S.W.3d at 391; *see also Kitchens v. State*, 823 S.W.2d 256, 259 (Tex. Crim. App. 1991) (quoting *Turner v. United States*, 396 U.S. 398, 420 (1970)).

[12] *See, e.g., Gribble*, 808 S.W.2d at 72.

[13] During the missing-person investigation, law-enforcement officials had deliberately withheld Leal's report about the stolen money as a way to verify the reliability of anyone who might claim to have personal knowledge of Townsend's disappearance.

[14] *Jackson v. Virginia*, 443 U.S. 307 (1979).

[15] *Roberts v. State*, 220 S.W.3d 521, 524 (Tex. Crim. App.), *cert. denied*, 128 S. Ct. 282 (2007) (citing *Watson v. State*, 204 S.W.3d 404, 414-415 (Tex. Crim. App. 2006)).

[16] *Watson*, 204 S.W.3d at 417.

[17] *Gribble*, 808 S.W.2d at 68.

[18] *See Fisher v. State*, 851 S.W.2d 298, 304 (Tex. Crim. App. 1993).

[19] *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998).

[20] In the interest of justice, we assume that the appellant intends to invoke his right to due process as guaranteed by the Fourteenth Amendment. *See, e.g., Washington v. Texas*, 388 U.S. 14, 18 (1967); *Ex parte Madding*, 70 S.W.3d 131, 136 (Tex. Crim. App. 2002).

[21] *See Nenno*, 970 S.W.2d at 561; *see also Russeau v. State*, 171 S.W.3d 871, 884 (Tex. Crim. App. 2005) (citing *Griffith v. State*, 983 S.W.2d 282, 288 (Tex. Crim. App. 1998)).

[22] *Russeau*, 171 S.W.3d at 881.

[23] *Id.* at 883-884.

[24] *See* Art. 37.071, § 2(f)(4).

[25] *See Lucero v. State*, 246 S.W.3d 86, 96 (Tex. Crim. App.), *cert. denied*, 129 S.Ct. 80 (2008).

[26] *See* *Roberts*, 220 S.W.3d at 534.

[27] *See* *Perry v. State*, 158 S.W.3d 438, 448-49 (Tex. Crim. App. 2004); *see also* *Jackson v. State*, 992 S.W.2d 469, 481 (Tex. Crim. App. 1999).

[28] *See, e.g.*, *Druery v. State*, 225 S.W.3d 491, 509 (Tex. Crim. App.), *cert. denied*, 128 S. Ct. 627 (2007); *Russeau*, 171 S.W.3d at 886.

[1] In *Opper v. United States*, 348 U.S. 84 (1954), the Supreme Court rejected the common law *corpus delicti* rule and adopted the "trustworthiness" approach, which it found to be the "better rule." *Id.* at 93. Under that rule, the government must "introduce substantial independent evidence which would tend to establish the trustworthiness of the [defendant's] statement." *Id.* But this "corroborative evidence need not be sufficient, independent of the [defendant's] statements, to establish the *corpus delicti*." *Id. See generally* *United States v. Abu Ali*, 528 F.3d 210, 234-35 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 1312 (2009).

[2] Although the exact origin of the *corpus delicti* rule is unknown, its history traces back to a 17th century English case, *Perry's Case*, 14 How. St. Tr. 1311 (1660), in which Thomas A. Mullen, the purported murder victim, disappeared one night, leaving a "hacked and bloody" hat behind. The defendant was a suspect, and he soon confessed, implicating not only himself but his brother and mother in the murder as well. All three were tried, found guilty, and executed. A few years later, Mr. Mullen reappeared, very much alive. *See* Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. Pa. L.Rev. 638, 638 (1955). "This and similar cases led the British courts to question the sufficiency of confessions to prove that a crime had been committed." *Id.* at 639.

[3] *See* *Salazar v. State*, 86 S.W.3d 640, 644 (Tex. Crim. App. 2002) ("The *corpus delicti* rule guarded against the shocking spectacle and deleterious effect upon the criminal justice system when a murder victim suddenly reappeared, hale and hearty, after his self-confessed murderer had been tried and executed.") (citing Rollin M. Perkins & Ronald N. Boyce, Criminal Law 142-50 (3d ed. 1982)); *see also* *Warszower v. United States*, 312 U.S. 342, 347 (1941) ("The rule requiring corroboration of confessions protects the administration of the criminal law against errors in convictions based upon untrue confessions alone."); *East v. State*, 175 S.W.2d 603, 605 (Tex. Crim. App. 1942) ("The wisdom of this rule lies in the fact that no man should be convicted of a crime, the commission of which he confesses, unless the State shows, by other testimony, that the confessed crime was in fact committed by someone. The contrary would authorize a return of conditions that existed in the days of the inquisition."); *Commonwealth v. Turza*, 16 A.2d 401, 404 (Pa. 1940) (The purpose of the *corpus delicti* rule is to guard against "the hasty and unguarded character which is often attached to confessions and admissions and the consequent danger of a conviction where no crime has in fact been committed.").

[4] *See* *Salazar*, 86 S.W.3d at 644. Although the English common law *corpus delicti* rule originally applied only to murder and bigamy cases, when it traveled to America, it began to be applied to all felonies. *Id.*

[5] *Black v. State*, 128 S.W.2d 406, 409 (Tex. Crim. App. 1939) (upholding defendant's murder conviction and death sentences when there was sufficient independent corroboration that victim died from the criminal act of being shoved off a cliff); *see also Kugadt v. State*, 44 S.W. 989, 996 (Tex. Crim. App. 1898) (murder conviction and death sentence affirmed; "A dead body, or its remains, having been discovered and identified as that of the person charged to have been slain, the basis of the *corpus delicti* being thus fully established, the next step in the process, and the one which is to complete the proof of that indispensable preliminary fact, is to show that the death has been occasioned by the criminal acts or agency of another person.").

[6] *Self v. State*, 513 S.W.2d 832, 837 (Tex. Crim. App. 1974) (the State provided independent corroborative evidence that the murder victim had died and that she had died as the result of a criminal act; defendant's connection to the criminal act could be established solely through his confession; "All cases heretofore holding that the *corpus delicti* in a murder prosecution consists of three elements are hereby overruled to the extent they are in conflict with this opinion.").

[7] *See id.*; *see also* *Salazar*, 86 S.W.3d at 645 & n.19 (rather than requiring independent corroboration of each element and descriptive allegation in the indictment, the *corpus delicti* rule requires that an out-of-court confession be corroborated by some independent evidence tending to show the essential nature of the charged crime).

[8] *Gribble v. State*, 808 S.W.2d 65, 70-71 (Tex. Crim. App. 1990) (plurality op.).

[9] *Id.* at 70 (footnotes and citations omitted).

[10] *Id.* at 71 (emphasis added).

[11] *Id.*

[12] *See, e.g.*, *Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994); *Chambers v. State*, 866 S.W.2d 9, 15-16 (Tex. Crim. App. 1993).

[13] Many state courts, as well as the federal courts, have abolished the *corpus delicti* rule, in favor of the "trustworthiness" standard for the admission of extrajudicial confessions. *See, e.g.*, *State v. Mauchley*, 67 P.3d 477, 482-83 (Utah 2003) (noting that "the federal courts and a growing number of state courts" have rejected the common law *corpus delicti* rule in favor of the "trustworthiness standard" applied to the admission of the defendant's confession).

[14] *See, e.g.*, *People v. Miller*, 236 P.2d 137, 139-40 (Cal. 1951) ("The *corpus delicti* of the crime of murder having been established by independent evidence, . . . extrajudicial statements of the accused . . . may be used to establish the degree of the crime committed").

[15] *See Mauchley*, 67 P.3d at 482 ("We currently adhere to the orthodox *corpus delicti* rule") & 487 (stating that the aggravating circumstances of a capital murder, such as robbery, are not "part of the *corpus delicti*"); *Hall v. State*, 206 S.W.3d 830, 834-35 (Ark. 2005) (defendant did not contend that there was insufficient evidence of the act of murder; "the *corpus delicti* of the crime of murder having been established, the underlying felony of aggravated robbery was clearly shown by the extrajudicial statements of the accused"); *People v. Weaver*, 29 P.3d 103, 132-33 (Cal. 2001) (*corpus delicti* rule did not apply to underlying felony alleged in capital murder prosecution; "When the People have established the*corpus delicti* of murder, a defendant's extrajudicial statements may be admitted to prove an underlying felony for felony-murder purposes even if the felony cannot be proved by evidence other than such statements."); *Commonwealth v. Bardo*, 709 A.2d 871, 874-75 (Pa. 1998) (in capital murder prosecution, *corpus delicti* was satisfied by independent proof of child's death by a criminal act, prosecution did not have to provide independent corroboration of defendant's confession that the killing occurred during the commission of a felony); *State v. Franklin*, 304 S.E.2d 579, 586 (N.C. 1983) (holding that "independent proof of the underlying felony in a felony murder prosecution is not necessary where a confession, otherwise corroborated as to the murder, includes sufficient facts to support the existence of the felony."); *Gentry v. State*, 416 So.2d 650, 652-53 (Miss. 1982) ("It is well established in this state that the *corpus delicti* in a homicide case is made up of two fundamental facts, the first being the death of the deceased and the second the fact of the existence of a criminal agency as to the cause of death. . . . It follows that independent proof of the felony in a felony-murder prosecution is not necessary if the proof of the felony can be gathered from the confession.") (quoting *Rhone v. State*, 254 So.2d 750, 753 (Miss. 1970)); *Jones v. State*, 252 N.E.2d 572, 578 (Ind. 1969) (stating that "murder in the first degree can be committed by a homicide which involves premeditated malice, rape, arson, robbery or burglary, and it is our opinion in this case the *corpus delicti* is established by evidence independent of the confession of a homicide from which inferences may be drawn that it was feloniously done without evidence independent of the confession specifically of premeditation, rape or any of the other enumerated felonies."); *State v. Johnson*, 158 A.2d 11, 19-20 (N.J. 1960) ("In a prosecution for premeditated murder, the State is not required independently to prove those mental elements if the defendant has given a confession that admits them. By the same token, independent proof of the felony in a felony-murder prosecution is not necessary if proof of the felony can be gathered from a corroborated confession. In our view the State satisfied the burden placed upon it by independently proving the fact of death, and by producing corroborative evidence tending to establish that when the defendants confessed that they participated in the holdup and killing they were telling the truth. We therefore find that the confessions were properly received in evidence and were amply corroborated."); *but see Roach v. Commonwealth*, 468 S.E.2d 98, 110 (Va. 1996) (holding that because the *corpus delicti* of both murder and of robbery were shown by independent evidence, the *corpus delicti* of capital murder was sufficiently corroborated); *Maxwell v. State*, 828 So.2d 347, 358 (Ala. Crim. App. 2000) (same).

[1] Erica Beecher-Monas & Edgar Garcia-Rill, "The Law and the Brain," 1 *Journal of Appellate Practice & Process* 243, 274 (1999).

[2] *Russeau v. State*, 171 S.W.3d 871, 883-84 (Tex. Cr. App. 2005).

Finally, below, the 2007 Texas case of *Commitment of Gollihar* is reprinted in its entirety to illustrate a separate behavioral and legal arena of dangerousness; the involuntary civil commitment of sexually dangerous offenders and the role played by behavioral experts in the adjudication of such cases. Once among the most controversial areas of law and human behavior, the unique nature of dangerous sexual predators is now well established along with the constitutionality of the laws governing their involuntary commitment. The issues, on a case-by-case basis, are nevertheless complex, as reflected in the following court deliberations.

224 S.W.3d 843 (2007)

In re **COMMITMENT OF** James **GOLLIHAR**.

(Tex. App. 2007) No. 09-06-243 CV.

Submitted February 8, 2007.

Decided May 17, 2007.

845*845 Bob Mabry, Kelly Gatewood, State Counsels for Offenders, Huntsville, for appellant.

Kerrie Hergenrader, Joey Robertson, Special Prosecutions Unit-Civil Division, Huntsville, for appellee.

Before McKEITHEN, C.J., KREGER and HORTON, JJ.

OPINION

HOLLIS HORTON, Justice.

The Civil Commitment of Sexually Violent Predators Act ("Act")[1] (1) provides for the involuntary civil commitment of an offender to outpatient treatment and supervision if the offender is found to be a sexually violent predator. *See* Tex. Health & Safety Code Ann. § 841.081 (Vernon Supp.2006).[2] (2) A jury determined that 846*846 James Gollihar was a sexually violent predator under Texas law by finding that he suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See id.* § 841.003 (Vernon 2003). Gollihar challenges the legal and factual sufficiency of the evidence establishing that he is likely to engage in a future predatory act of sexual violence. He also challenges the reliability of the testimony of Dr. Sheri Gaines, the State's expert witness. We affirm the trial court's judgment and order of civil commitment.

Issue One: Legal and Factual Sufficiency

In issue one, Gollihar challenges the legal and factual sufficiency of the evidence supporting the jury's verdict. Under the Act, the State must prove beyond a reasonable doubt that a person is a sexually violent predator. *See id.* § 841.062 (Vernon 2003). Because the statute employs a beyond-a-reasonable-doubt-standard, on appeal we review legal sufficiency issues by the standard of review applied in criminal cases for legal sufficiency of the evidence. *See* *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex.App.-Beaumont 2002, pet. denied) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). To test the legal sufficiency of the evidence that supports an affirmative jury finding, we review all of the evidence in a light most favorable to the verdict. *See id.* In this case, we review the evidence at trial to decide if a rational jury could have found beyond a reasonable doubt that Gollihar suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. *See id.* at 887.

With respect to our factual sufficiency review, we apply the factual sufficiency standard applied in criminal cases. In a factual sufficiency review, we view all of the evidence in a neutral light and ask whether a jury was rationally justified in finding guilt beyond a reasonable doubt. *See* *Watson v. State*,

204 S.W.3d 404, 415(Tex.Crim.App.2006). To reverse a case on a factual sufficiency challenge, we must be able to say that the great weight and preponderance of the evidence contradicts the jury's verdict or that the verdict is clearly wrong or manifestly unjust. *See* *Marshall v. State*, 210 S.W.3d 618, 625 (Tex.Crim.App.2006) (citing *Watson*, 204 S.W.3d at 414-15).

Evidence

Gollihar's first issue asserts the State's evidence fails to establish that he is likely to reoffend.[3] (3) During the trial, the State offered the testimony of James Gollihar, Sheri Gaines, M.D., and Antoinette McGarrahan, Ph.D. The trial court also admitted other evidence: Gollihar's pen packet and his answers to requests for admission.

Dr. Sheri Gaines, a board-certified psychiatrist, testified that she met with Gollihar in January 2006 and interviewed him to evaluate whether he had a behavioral abnormality making him likely to reoffend. In reaching her opinion, Dr. Gaines reviewed the offense reports, victim statements, the records from Gollihar's sex offender treatment program, his education records, and his medical records. During the interview with Dr. Gaines, Gollihar related that one month prior to the interview he had a fantasy about a sexual encounter 847*847 with a minor female. Gollihar also told Dr. Gaines that he could not say that he would not reoffend. Based upon her interview of Gollihar and his records, Dr. Gaines diagnosed him as suffering from pedophilia. She also testified that, in her opinion, Gollihar has a behavioral abnormality that makes him likely to engage in predatory acts of sexual violence, and she specifically stated that Gollihar is "highly likely to reoffend sexually on a child, on a female child." When she offered this opinion during trial, Gollihar's attorney made no objection.

The State also called Dr. Antoinette McGarrahan, a psychologist. Dr. McGarrahan interviewed Gollihar and administered two psychological tests, the MnSOST-R and the Static '99. Dr. McGarrahan testified that Gollihar's test results placed him in a group with the following recidivism rates: nine percent, five years after release; thirteen percent, ten years after release; and sixteen percent, fifteen years after release.[4] (4) During his interview, Gollihar related to Dr. McGarrahan that two days prior to the interview he had a fantasy about a child. Dr. McGarrahan testified that she would slightly increase Gollihar's risk and, thus, would classify it as moderate "due to recent fantasies [associated with] masturbation of children." The State also introduced portions of Gollihar's deposition testimony. There, he admitted to a 1987 incident that resulted in his conviction for indecency with a child by contact. Gollihar also testified that he had been convicted for aggravated sexual assault of a child related to an incident in 1990. Gollihar testified that his sexual conduct with his victim in 1990 occurred up to three times per week over an eight month time period. In addition, Gollihar testified that before his imprisonment he had engaged in improper relations with children other than the two children involved in the 1987 and 1990 incidents. Gollihar denied knowing how many children he had victimized.

During the State's presentation of its case, the trial court admitted several of Gollihar's answers to requests for admission. Among these answers, Gollihar admitted that he suffers from a behavioral affliction that causes him to sexually abuse children.

Gollihar was the sole witness called to testify in his defense. During his testimony, Gollihar related that he entered a sexual abuse therapy program in January 2006. At the time of trial, Gollihar testified that he had completed phase one and was entering phase three. Gollihar did not mention whether he had successfully completed phase two. During his cross-examination, Gollihar testified that he gave 848*848 a written statement during 2006 in which he said: "I have a thing about younger women and little girls. . . . I know I have this problem." At the time of his 2006 trial, Gollihar was 65 years of age.

Application of Law to Facts

At the outset, we note that a jury is entitled to make reasonable inferences from basic facts to determine ultimate fact issues. *Lacour v. State*, 8 S.W.3d 670, 671 (Tex.Crim.App.2000). The jury judges the credibility of the witnesses and the weight to accord their testimony. *See* *Barnes v. State*, 876 S.W.2d 316,

321 (Tex. Crim.App.1994); *Mullens*, 92 S.W.3d at 887.

In this case, Dr. Gaines diagnosed Gollihar with pedophilia. This Court has previously recognized that mental health professionals consider pedophilia a serious mental disorder. *Mullens*, 92 S.W.3d at 885 (citing *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 871, 151 L.Ed.2d 856 (2002) and *Kansas v. Hendricks*, 521 U.S. 346, 360, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). In *Crane*, the U.S. Supreme Court referred to pedophilia as "a mental abnormality that critically involves what a lay person might describe as a lack of control. DSM-IV 571-572 (listing as a diagnostic criterion for pedophilia that an individual have acted on, or been affected by, `sexual urges' toward children)." *Crane*, 534 U.S. at 414, 122 S.Ct. 867. Here, Dr. Gaines's diagnosis of pedophilia is uncontradicted by any other diagnosis. Additionally, no witness testified that Gollihar's underlying condition had been cured or that he did not have ongoing symptoms consistent with the condition.

Likely to Reoffend

Gollihar's principal argument attacks the sufficiency of the evidence that he will likely reoffend. He relies heavily on Dr. McGarrahan's classification of his recidivism risk as moderate. Because he likely viewed this opinion as favorable to his case, Gollihar made no pretrial challenges to Dr. McGarrahan's testimony. However, during the trial, Dr. McGarrahan also related that Gollihar described his recent sexual fantasy involving a child and explained that his test scores are consistent with a sixteen percent recidivism rate. While Dr. McGarrahan characterized Gollihar's test score results as showing a low-to-moderate risk, she also said she would adjust Gollihar's risk slightly upwards "due to recent fantasies and masturbation of children." But, Dr. McGarrahan offered her opinion during the trial that "Mr. Gollihar did not meet the statutory criteria as a sexually violent predator" and that he was not likely to reoffend in a sexually violent manner.

Dr. McGarrahan's testimony, however, was not the only evidence addressing the risk that Gollihar might reoffend. Dr. Gaines, a board-certified psychiatrist, characterized this risk in Gollihar's case as "highly likely." In addition to the testimony of the two experts, the jury also was entitled to consider Gollihar's testimony that he continued to fantasize about minor children and that he had not completed therapy. Gollihar also gave no indication of any treatment plans following his release from prison.

When the record contains disputed testimony, "[t]he jury is the exclusive judge of the credibility of witnesses and of the weight to be given testimony, and it is also the exclusive province of the jury to reconcile conflicts in the evidence." *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim.App.2000). More recently, the Texas Supreme Court explained: "Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony. They may choose to believe one 849*849 witness and disbelieve another. Reviewing courts cannot impose their own opinions to the contrary." *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex.2005) (footnotes omitted).

Gollihar asserts that Dr. McGarrahan's opinion shows "there is hardly any likelihood that he is going to reoffend at all." We disagree. Although Dr. McGarrahan's opinion was that Gollihar was not likely to reoffend, her testing was consistent with the State's contention that he carried a significant objective risk of reoffending. In our opinion, Dr. McGarrahan's test results, when considered along with his recent sexual fantasies involving children, tend to support the jury's conclusion that Gollihar posed a serious and well-founded risk of reoffending. *See Crane*, 534 U.S. at 413, 122 S.Ct. 867 ("It is enough to say that there must be proof of serious difficulty in controlling behavior."). Therefore, Dr. McGarrahan's testimony, when viewed as a whole, does not contradict the jury's finding. *See id.* ("[T]he Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules.").

Our review of the record finds fact witness testimony, expert witness testimony, and exhibits from which reasonable jurors could conclude that Gollihar suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. His history, both recent and past, is consistent

with a conclusion that he has serious difficulty controlling his behavior. Having carefully reviewed the record, we find the evidence legally sufficient to support the jury's finding. We also find the evidence factually sufficient under the relevant factual sufficiency standards of review to support the jury's verdict. Issue one is overruled.

Issue Two: Failure to Strike Dr. Gaines

Gollihar's second issue contends the trial court erred in permitting Dr. Gaines to testify that he is highly likely to reoffend. Gollihar premises his second issue on six arguments. First, Gollihar asserts that Dr. Gaines applied a "possibility" standard rather than a "probability" standard in reaching her conclusions. Second, he argues Dr. Gaines failed to demonstrate her competence to testify. Third, Gollihar contends Dr. Gaines applied a meaning of "sexually violent offense" that differs from the statute's definition. Fourth, Gollihar argues that his two previous sex crimes against children are insufficient to support his diagnosis of pedophilia. Fifth, he asserts that Dr. Gaines's opinion about the chance he will reoffend is based solely on her clinical judgment of him and that the State did not prove her clinical judgment was reliable. Finally, Gollihar argues that the alleged error in admitting Dr. Gaines's testimony was harmful to him.[5]

Expert's Standard

With respect to the standard Dr. Gaines employed in reaching her opinion, we find that Gollihar did not preserve this complaint for our review. At the pretrial hearing on Gollihar's motion to exclude Dr. Gaines's testimony, she testified:

> Q. And based on your psychiatric assessment of Mr. Gollihar, do you believe he has a behavioral abnormality which makes him likely to engage in predatory acts of sexual violence?
>
> A. Yes.
>
> Q. And what is your opinion on that?
>
> 850*850 A. My opinion is that Mr. Gollihar has a behavioral abnormality, specifically pedophilia, that makes him likely to reoffend in a sexually violent way.

At the pretrial hearing, Gollihar raised no objection that the expert was applying a "possibility" standard rather than a "probability" standard—the argument he now raises on appeal. At trial, Dr. Gaines also addressed her prediction of the likelihood that Gollihar would reoffend. Dr. Gaines testified as follows:

> Q. Dr. Gaines, do you believe that Mr. Gollihar has a behavioral abnormality which makes him likely to engage in predatory acts of sexual violence?
>
> A. Yes, I believe he does.

Later, the State's attorney again asked Dr. Gaines to address the risk that Gollihar would reoffend:

> Q. And when you say he is likely to reoffend, is that using the definition of "likely" as "probable" or "beyond a mere possibility"?
>
> A. Yes.

Gollihar did not object that Dr. Gaines's opinion was based on a standard of "merely possible" rather than "likely"—the point he now raises. Further, he did not object to the compound nature of the State's question regarding the standard she used.[6]

With respect to error preservation, the Texas Supreme Court held in *Coastal Transport Co., Inc. v. Crown Central Petroleum Corp.* that an expert-reliability challenge asking the court to examine the expert's underlying methodology, technique, or foundational data, requires a timely objection "so that the trial court has the opportunity to conduct this analysis." 136 S.W.3d 227, 232-33 (Tex.2004); *accord* *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex.2002); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409-12 (Tex.1998); *see* Tex.R. Evid.103; Tex.R.App. P. 33.1. Had Gollihar's complaint regarding this question been lodged at trial, rather than on appeal, the trial court could have

required Dr. Gaines to identify the definition of "likely" that she used in determining Gollihar is "likely to reoffend."

In our view, Gollihar's complaint— whether Dr. Gaines applied the proper standard to the issue of the likelihood that he would reoffend—concerns the underlying methodology she used to reach the conclusion that he would reoffend. Here, an objection regarding the standard Dr. Gaines applied, or an objection to the compound nature of the question was required to preserve the complaint now made on appeal. *See Coastal Transport,* 136 S.W.3d at 232-33. Because Gollihar made no objections consistent with the complaint he now makes, he waived this argument. *See* Tex.R.App. P. 33.1.

Expert's Competence

Gollihar's second argument under issue two concerns Dr. Gaines's competence as an expert. Gollihar challenged her qualifications in a motion to exclude her testimony. At the pretrial hearing on Gollihar's motion, Dr. Gaines testified that she is a licensed and board-certified psychiatrist with experience interviewing and testifying in this type of civil commitment proceeding. She personally interviewed Gollihar and reviewed his medical records, 851*851 the records of Texas Department of Criminal Justice, sex offender treatment records, education records, and evaluations by other mental health professionals who had examined him.

Gollihar criticizes Dr. Gaines's competence for two reasons. First, Dr. Gaines expressed an opinion that a pedophile with two prior offenses is likely to reoffend. Second, she testified that another psychiatrist could come to conclusions that differ from hers regarding Gollihar's case. However, Gollihar cites no authority for the proposition that these criticisms render Dr. Gaines an incompetent witness or that her opinions are unreliable. In our opinion, Gollihar's criticisms go to the weight that a jury might give Dr. Gaines's testimony, but they do not demonstrate that she was improperly trained, that she was an incompetent psychiatrist, or that her opinion was unreliable.

Definition of Sexually Violent Offenses

Gollihar's third argument concerns Dr. Gaines's definition for "sexually violent offenses," a term the statute defines. *See* Tex. Health & Safety Code Ann. § 841.002(8) (Vernon Supp.2006).[7] With respect to her understanding of the term "sexually violent offense," Dr. Gaines testified before the jury as follows:

> Q. Dr. Gaines, what is a "sexually violent offense" under Texas Health and Safety Code Chapter 841?
>
> A. Well, again, I will do my best, without having memorized that and without having that statute in front of me. A sexually violent offense is an offense where someone has perpetrated a sexual act against someone in a violent way for the purpose of violating them or abusing them.

Gollihar argues an offense need not necessarily be violent in any ordinary sense to be a sexually violent offense as defined by the statute. *See id.* § 841.002(8)(E)(defining "sexually violent offense" as including attempts, conspiracies, or solicitations to commit certain offenses, such as indecency with a child (by contact) under Penal Code section 21.11(a)(1)). While Dr. Gaines's definition of the term is more narrow than the statute's, her definition falls within the ambit of "sexually violent offenses" under the Act. In our opinion, Dr. Gaines's use of a more narrow definition for "sexually violent offense" goes to the weight that a jury might choose to give her testimony.

Further, in this case, Gollihar's pen packet proved that Gollihar, on more than one prior occasion, had been convicted of sexually violent offenses as defined by the Act. *See id.* § 841.002(8)(A); Tex. Penal Code Ann. §§ 21.11(a)(1), 22.021. In his testimony, Gollihar admitted that he had been convicted of these two prior offenses. Under the facts of this case, Gollihar has not demonstrated that Dr. Gaines's definition of a sexually violent offense rendered her opinion unreliable. Despite her more narrow definition, Dr. Gaines's opinion remains of assistance to the jury in determining a fact in issue. *See* Tex.R. Evid. 702. As a result, it was not error for the trial judge to allow Dr. Gaines to testify even though she was unable to quote from memory the precise statutory definition of "sexually violent offense."

Pedophilia Diagnosis

Gollihar's fourth argument under issue two attacks Dr. Gaines's diagnosis that he 852*852 is a pedophile. With respect to this claim, Gollihar refers us to Dr. Gaines's trial testimony:

> Q. Did not you state, at that time, that anyone who has committed two sexual offenses, "Yes, has a behavioral abnormality that makes them likely to reoffend"?
>
> A. Well, now that, I would have to read my exact words, because my intention was to qualify that the behavioral abnormality is pedophilia.
>
> Q. Okay. I'm going to direct your attention to Page 35 of your deposition, Lines 16 through 21, and have you read that silently and see if that refreshes your recollection.
>
> A. Yes.
>
> Q. All right. And did I quote you accurately?
>
> A. I don't remember, but what I said was behavioral — I mean, two sexual offenses on children. I think that's the key words, "on children."
>
> Q. Isn't it true that under some of the offenses that are sexually violent offense in the statute, those offenses can only be committed against children?
>
> A. Could you repeat the question, please?
>
> Q. Isn't it true — out of the list of sexually violent offenses, isn't it true that some of those offenses can only — that those actions are only criminal if they occur between an adult and a child? Is that a fair statement?
>
> A. Well, I don't really know what document you're referring to; but what you're saying makes sense to me.

The testimony Gollihar cites occurred during Dr. Gaines's cross-examination by Gollihar's attorney. However, Gollihar's argument ignores other support for Dr. Gaines's diagnosis, namely, her interview of him, his admission of current symptoms consistent with pedophilia, and his history of offenses against children for which he was not prosecuted. Thus, it does not appear that Dr. Gaines's pedophilia diagnosis is based solely on Gollihar's two prior convictions, as he asserts. The record does not support his contention.

Clinical Judgment

Gollihar's fifth complaint about Dr. Gaines's testimony contends her opinion was based on unreliable clinical judgment. Gollihar maintains Dr. Gaines's clinical judgment is unreliable for two reasons: first, she used flawed methodology; and, second, there has been no peer review.

Methodology

Gollihar specifically points to Dr. Gaines's admission that it was possible (although hard for her to imagine) other experts might disagree with her that Gollihar would likely reoffend. Gollihar asserts Dr. Gaines's admission supports his argument that her clinical opinion is unreliable.

Gollihar maintains an expert's admission that others might disagree reveals a flaw in the expert's methodology. However, when Dr. Gaines testified that it was possible other experts might disagree with her conclusion, Gollihar did not move to strike her prior opinion as unreliable. Gollihar also fails to explain why experts following the same methodology in assessing a risk of recidivism should necessarily reach the same conclusion. We see no reason why experts who are predicting future events would always reach the same conclusions regarding their risk evaluations, and we are aware of no legal authority holding that an expert's recognition that other experts may reach different conclusions renders the expert's opinion unreliable. Moreover, Gollihar did not make a pretrial 853*853 objection that Dr. Gaines's opinion was unreliable based on this testimony, nor did he object on that basis at trial. Because Gollihar made no objection to the trial judge consistent with the one he now urges, we hold that he waived this reliability argument regarding Dr. Gaines's methodology.

Peer Review

Gollihar also questions the reliability of Dr. Gaines's clinical judgment in the absence of a peer review process. However, the record does not show that the clinical judgments of physicians generally, or psychiatrists specifically, are subjected to peer review.

When we review the trial court's admission of expert testimony, certain legal principles guide us. Generally, a trial court functions as a gatekeeper in deciding whether to admit or exclude expert opinion. *See* Harvey Brown, *Procedural Issues Under Daubert,* 36 Hous. L.Rev. 1133, 1158-59 (1999). The Rules of Evidence permit expert testimony on scientific, technical, or other specialized subjects if the testimony would assist the fact finder in understanding the evidence or determining a fact issue. *See* Tex.R. Evid. 702. Absent an abuse of discretion, an appellate court will not disturb a trial court's ruling on reliability unless the record shows that the court acted without reference to the pertinent guiding rules or principles. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex.1995).

With respect to expert opinion in fields such as the social sciences or fields based primarily on experience and training as opposed to the scientific method, the Court of Criminal Appeals has directed trial courts to consider: "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies on or utilizes the principles involved in the field." *Russeau v. State*, 171 S.W.3d 871, 883(Tex.Crim.App.2005), *cert. denied,* ___ U.S. ___, 126 S.Ct. 2982, 165 L.Ed.2d 990. The *Russeau* Court applied these considerations in a death penalty case to evaluate the admissibility of the opinions of a psychologist and psychiatrist about a defendant's future dangerousness. *Id.* at 883-84. The Court characterized these types of opinions regarding future dangerousness as "soft" science. *Id.* at 883.

Because an opinion on future dangerousness is similar to a prediction that a person will likely reoffend, we apply the *Russeau* factors to evaluate whether the trial court erred in admitting Dr. Gaines's opinion. First, we note that our courts accept that psychiatrists and forensic psychiatrists may testify regarding future dangerousness. *Id.* at 884. Second, Dr. Gaines's opinion regarding the dangerousness of pedophiles appears to fall within her training as a psychiatrist. She testified that she had received training in risk assessment during her formal schooling, during her residency, during her fellowship, and during her eleven years since graduation. Finally, her opinion was based upon the methodology followed by experts in her field: she reviewed the relevant records and conducted a psychiatric interview of the defendant. Although the testimony at the pretrial hearing could have been more detailed, we conclude that the *Russeau* standards favor the trial court's admission of Dr. Gaines's opinion.

Subsequent to *Russeau,* the Court of Criminal Appeals further instructed appellate courts to consider certain factors in cases involving expert opinion. *Rodgers v. State*, 205 S.W.3d 525, 528 (Tex.Crim.App. 2006). We are to consider: (1) whether the field of expertise is complex; (2) 854*854 whether the expert's opinion is conclusive and, if so, to what degree; and (3) whether the testimony is dispositive on the disputed issues. *Id.* Using these standards, the Court of Criminal Appeals held that a trial court did not err in admitting the testimony of an expert who testified that the defendant's shoes and tires were similar to shoe and tire imprints found at a crime scene. *Id.* at 533. In its analysis, the court noted:

The reason this kind of testimony is liberally allowed is that the field of tire and shoe comparisons is not particularly complex, the witness's opinions are not conclusive, and consequently, they are generally not pivotal to the resolution of the case. *Id.*

First, in accord with *Rodgers,* we address the complexity of Dr. Gaines's opinion that Gollihar would reoffend. Her testimony appears principally to be based upon Gollihar's pedophilia diagnosis, his recent history of sexual fantasy, and his current enrollment in a treatment program that he had not completed. Generally, when a patient has not completed his treatment program for a disease and a doctor concludes that the patient has a disease, had past symptoms from the disease, and has current symptoms from the disease, the doctor's opinion that the patient will continue to suffer symptoms does not strike us as

difficult or complex. The evaluation that Gollihar is likely to reoffend is certainly not scientifically complex, as is the science involved in DNA testing Thus, the first *Rodgers* factor favors admissibility.

Next, we evaluate the conclusiveness of Dr. Gaines's opinion on the issue. In this trial, the jury heard testimony from Dr. McGarrahan that tended to contradict Dr. Gaines's risk assessment. Dr. Gaines testified that other qualified witnesses might have different opinions on the issue. In addition to expert testimony, the jury heard that Gollihar had previously committed other sexually violent offenses and that he had not completed his current treatment. The jury also heard about the support system available to Gollihar upon his release from prison and heard his testimony that he did not consider his reoffending to be likely. Thus, the jury had data from which it could form its own conclusions about the likelihood that Gollihar would reoffend. Although the jury likely relied to some extent on Dr. Gaines's opinion, her testimony was not conclusive and the jury could have rejected her opinion. This *Rodgers* factor also favors the admissibility of her opinion.

Third, we evaluate whether Dr. Gaines's opinion was pivotal. She based her testimony on facts and data gathered from her interview with Gollihar, his prior offenses, and his records. She explained the data that she used in forming her opinion and how she applied the information to reach her opinion. The jury heard testimony from sources other than Dr. Gaines regarding Gollihar's past history and his history of recent sexual fantasy that involved a child. While Dr. Gaines's opinion assisted the jury in its decision, the jury was also entitled to rely on its evaluation of all of the evidence. Thus, while Dr. Gaines's opinion was important, we cannot say that her opinion was pivotal to the jury's decision. We consider this factor as neither favoring, nor disfavoring, the trial court's decision in admitting the opinion.

Having reviewed the various considerations potentially applicable to Dr. Gaines's opinion concerning the likelihood of reoffending, we conclude the trial court acted within its discretion in admitting her testimony. We hold that the trial court did not abuse its considerable discretion in allowing into evidence Dr. Gaines's opinion that Gollihar would likely reoffend. Appellant's 855*855 issues are overruled, and we affirm the judgment and order of civil commitment.

AFFIRMED.

[1] The Civil Commitment of Sexually Violent Predators Act is located in Title 11, Chapter 841 of the Texas Health and Safety Code. *See* Tex. Health & Safety Code Ann. §§ 841.001-841.150(Vernon 2003 & Supp.2006).

[2] In addition, the statute requires the trial court to conduct a biennial review of the status of committed persons and to set a hearing if (1) the court determines that the requirements imposed on the sexually violent predator should be changed, or (2) probable cause exists to show that the person is no longer likely to engage in a predatory act of sexual violence. *See* Tex. Health & Safety Code Ann. § 841.102 (Vernon 2003).

[3] To establish that a person is a sexually violent predator, the State must show that the person: "(1) is a repeat sexually violent offender; and (2) suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence." Tex. Health & Safety Code Ann. § 841.003 (Vernon 2003). Gollihar does not contest the State's evidence showing that he is a repeat sexually violent offender.

[4] From the record, we are unable to determine the measure used in the recidivism statistics cited by Dr. McGarrahan. Specifically, we cannot tell whether her testimony was intended to demonstrate an offender's risk of being convicted of additional sex crimes; or, whether her statistics included reoffenders who were convicted as well as those who were not convicted of additional offenses. With respect to recidivism statistics, one commentator noted:

Recidivism can be defined in several ways, and recidivism rates are naturally a function of the definition adopted. Most recidivism studies use reconviction as the outcome measure. This has two problems: First, sex offenses have very low reporting rates (significantly lower than other offenses) and a reconviction measure does not capture unreported sex offenses. Second, even amongst the reported sex offenses, many offenses are plea-bargained down to non-sexual offenses (such as assault). On account of both these factors, it is often argued that reconviction is not a good measure of sex offender recidivism.

Aman Ahluwalia, *Civil Commitment of Sexually Violent Predators: The Search for A Limiting Principle,* 4 Cardozo

Pub.L. Pol'y & Ethics J. 489, 525 (2006) (footnote omitted).

[5] Because we conclude that the trial court did not err in admitting Dr. Gaines's testimony, we need not consider Gollihar's final argument. *See* Tex.R.App. P. 47.1.

[6] In general, where a compound question creates confusion, a party may lodge an objection to the form of the question. *See* Don D. Bush, *Common Objections To the Form of Questions*, 47 Tex. B.J. 996, 1001 (1984); 8 William V. Dorsaneo III, Texas Litigation Guide § 121.101 (2005). The trial court is allowed, upon a party's objection, to control whether such questions are asked or answered. *See generally* Tex.R. Evid. 611(a).

[7] The following is a non-exclusive list of Texas Penal Code offenses that are included in the statutory definition of "sexually violent offense": section 21.11(a)(1) (indecency with a child by contact); section 22.011 (sexual assault); section 22.021(aggravated sexual assault). *See* Tex. Health & Safety Code Ann. § 841.002(8)(A) (Vernon Supp.2006); Tex. Pen.Code Ann. §§ 21.11(a)(1), 22.011, 22.021 (Vernon Supp.2006).

INVOLUNTARY CIVIL COMMITMENT

INVOLUNTARY CIVIL COMMITMENT

Kenneth Donaldson was confined almost 15 years "for care, maintenance, and treatment" as a mental patient in a Florida state hospital. In 1975, Donaldson sued the hospital's superintendent, Dr. J. B. O'Connor, and other staff members, alleging that they had intentionally and maliciously deprived him of his constitutional right to liberty. The evidence showed that Donaldson's frequent requests for release had been rejected notwithstanding undertakings by responsible persons to care for him if necessary, was dangerous neither to himself nor others, and, if mentally ill, had not received treatment. Dr. O'Conner and the staff of the hospital responded that they had acted in good faith, and that state law authorized indefinite custodial confinement of the "sick," even if they were not treated and their release would not be harmful. The Federal Court of Appeals held that:

1. A State cannot constitutionally confine … a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends, and [thus the hospital] had violated respondent's right to liberty.

O'CONNOR

v.

DONALDSON,

422 U.S. 563 (1975)

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Kenneth Donaldson, was civilly committed to confinement as a mental patient in the Florida State Hospital at Chattahoochee in January 1957. He was kept in custody there against his will for nearly 15 years. The petitioner, Dr. J. B. O'Connor, was the hospital's superintendent during most of this period. [422 U.S. 563, 565] Throughout his confinement Donaldson repeatedly, but unsuccessfully, demanded his release, claiming that he was dangerous to no one, that he was not mentally ill, and that, at any rate, the hospital was not providing treatment for his supposed illness. Finally, in February 1971, Donaldson brought this lawsuit under 42 U.S.C. 1983, in the United States District Court for the Northern District of Florida, alleging that O'Connor, and other members of the hospital staff named as defendants, had intentionally and maliciously deprived him of his constitutional right to liberty. 1 After a four-day trial, the jury returned a verdict assessing both compensatory and punitive damages against O'Connor and a codefendant. The Court of Appeals for the Fifth Circuit affirmed the judgment, 493 F.2d 507. We granted O'Connor's petition for certiorari, 419 U.S. 894 , because of the important constitutional questions seemingly presented.

I

Donaldson's commitment was initiated by his father, who thought that his son was suffering from "delusions." After hearings before a county judge of Pinellas County, Fla., Donaldson was found to be suffering from "paranoid schizophrenia" and was committed for "care, maintenance, and treatment" pursuant to Florida statutory provisions that have since been repealed. 2 The state law was less than clear in specifying the grounds necessary for commitment, and the record is scanty as to Donaldson's condition at the time of the judicial hearing. These matters are, however, irrelevant, for this case involves no challenge to the initial commitment, but is focused, instead, upon the nearly 15 years of confinement that followed.

The evidence at the trial showed that the hospital staff had the power to release a patient, not dangerous to himself or others, even if he remained mentally ill and had been lawfully committed. 3 Despite many requests, O'Connor refused to allow that power to exercised in Donaldson's case. At the trial, O'Connor indicated that he had believed that Donaldson would have been unable to make a "successful adjustment outside the institution," but could not recall the basis for that conclusion. O'Connor retired as superintendent shortly before this suit was filed. A few months thereafter, and before the trial, Donaldson secured his release and a judicial restoration of competency, with the support of the hospital staff.

The testimony at the trial demonstrated, without contradiction, that Donaldson had posed no danger to others during his long confinement, or indeed at any point in his life. O'Connor himself conceded that he had no personal or secondhand knowledge that Donaldson had ever committed a dangerous act. There was no evidence that Donaldson had ever been suicidal or been thought likely to inflict injury upon himself. One of O'Connor's codefendants acknowledged that Donaldson could have earned his own living outside the hospital. He had done so for some 14 years before his commitment, and immediately upon his release he secured a responsible job in hotel administration.

Furthermore, Donaldson's frequent requests for release had been supported by responsible persons willing to provide him any care he might need on release. In 1963, for example, a representative of Helping Hands, Inc., a halfway house for mental patients, wrote O'Connor asking him to release Donaldson to its care. The request was accompanied by a supporting letter from the Minneapolis Clinic of Psychiatry and Neurology, which a codefendant conceded was a "good clinic." O'Connor rejected the offer, replying that Donaldson could be released only to his parents. That rule was apparently of O'Connor's own making. At the time, Donaldson was 55 years old, and, as O'Connor knew, Donaldson's parents were too elderly and infirm to take responsibility for him. Moreover, in his continuing correspondence with Donaldson's parents, O'Connor never informed them of the Helping Hands offer. In addition, on four separate occasions between 1964 and 1968, John Lembcke, a college classmate of Donaldson's and a longtime family friend, asked O'Connor to release Donaldson to his care. On each occasion O'Connor refused. The record shows that Lembcke was a serious and responsible person, who was willing and able to assume responsibility for Donaldson's welfare.

The evidence showed that Donaldson's confinement was a simple regime of enforced custodial care, not a program designed to alleviate or cure his supposed illness. Numerous witnesses, including one of O'Connor's codefendants, testified that Donaldson had received nothing but custodial care while at the hospital. O'Connor described Donaldson's treatment as "milieu therapy." But witnesses from the hospital staff conceded that, in the context of this case, "milieu therapy" was a euphemism for confinement in the "milieu" of a mental hospital. 4 For substantial periods, Donaldson was simply kept in a large room that housed 60 patients, many of whom were under criminal commitment. Donaldson's requests for ground privileges, occupational training, and an opportunity to discuss his case with O'Connor or other staff members were repeatedly denied.

At the trial, O'Connor's principal defense was that he had acted in good faith and was therefore immune from any liability for monetary damages. His position, in short, was that state law, which he had believed valid, had authorized indefinite custodial confinement of the "sick," even if they were not given treatment and their release could harm no one. 5

The trial judge instructed the members of the jury that they should find that O'Connor had violated Donaldson's constitutional right to liberty if they found that he had

> "confined [Donaldson] against his will, knowing that he was not mentally ill or dangerous or knowing that if mentally ill he was not receiving treatment for his alleged mental illness.

. . . . .

> "Now, the purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is not a danger to himself or others. Without such treatment there is no justification from a

constitutional stand-point for continued confinement unless you should also find that [Donaldson] was dangerous to either himself or others." 6

the trial judge further instructed the jury that O'Connor was immune from damages if he

"reasonably believed in good faith that detention of [Donaldson] was proper for the length of time he was so confined . . . .

"However, mere good intentions which do not give rise to a reasonable belief that detention is lawfully required cannot justify [Donaldson's] confinement in the Florida State Hospital."

The jury returned a verdict for Donaldson against O'Connor and a codefendant, and awarded damages of $38,500, including $10,000 in punitive damages. 7

The Court of Appeals affirmed the judgment of the District Court in a broad opinion dealing with "the far-reaching question whether the Fourteenth Amendment guarantees a right to treatment to persons involuntarily civilly committed to state mental hospitals." The appellate court held that when, as in Donaldson's case, the rationale for confinement is that the patient is in need of treatment, the Constitution requires that minimally adequate treatment in fact be provided. Id., at 521. The court further expressed the view that, regardless of the grounds for involuntary civil commitment, a person confined against his will at a state mental institution has "a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." Id., at 520. Conversely, the court's opinion implied that it is constitutionally permissible for a State to confine a mentally ill person against his will in order to treat his illness, regardless of whether his illness renders him dangerous to himself or others. See id., at 522-527.

II

We have concluded that the difficult issues of constitutional law dealt with by the Court of Appeals are not presented by this case in its present posture. Specifically, there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment. As we view it, this case raises a single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty.

The jury found that Donaldson was neither dangerous to himself nor dangerous to others, and also found that, if mentally ill, Donaldson had not received treatment. 8 That verdict, based on abundant evidence, makes the issue before the Court a narrow one. We need not decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person - to prevent injury to the public, to ensure his own survival or safety, 9 or to alleviate or cure his illness. See Jackson v. Indiana, 406 U.S. 715, 736 -737; Humphrey v. Cady, 405 U.S. 504, 509 . For the jury found that none of the above grounds for continued confinement was present in Donaldson's case. 10

Given the jury's findings, what was left as justification for keeping Donaldson in continued confinement? The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement. See Jackson v. Indiana, supra, at 720-723; McNeil v. Director, Patuxent Institution, 407 U.S. 245, 248 -250. Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed. Jackson v. Indiana, supra, at 738; McNeil v. Director, Patuxent Institution, supra.

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is

still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.

May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends. See Shelton v. Tucker, 364 U.S. 479, 488 -490.

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty. See, e. g., Cohen v. California, 403 U.S. 15, 24 -26; Coates v. City of Cincinnati, 402 U.S. 611, 615 ; Street v. New York, 394 U.S. 576, 592 ; cf. U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 .

In short, a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. Since the jury found, upon ample evidence, that O'Connor, as an agent of the State, knowingly did so confine Donaldson, it properly concluded that O'Connor violated Donaldson's constitutional right to freedom.

III

O'Connor contends that in any event he should not be held personally liable for monetary damages because his decisions were made in "good faith." Specifically, O'Connor argues that he was acting pursuant to state law which, he believed, authorized confinement of the mentally ill even when their release would not compromise their safety or constitute a danger to others, and that he could not reasonably have been expected to know that the state law as he understood it was constitutionally invalid. A proposed instruction to this effect was rejected by the District Court. 11

The District Court did instruct the jury, without objection, that monetary damages could not be assessed against O'Connor if he had believed reasonably and in good faith that Donaldson's continued confinement was "proper," and that punitive damages could be awarded only if O'Connor had acted "maliciously or wantonly or oppressively." The Court of Appeals approved those instructions. But that court did not consider whether it was error for the trial judge to refuse the additional instruction concerning O'Connor's claimed reliance on state law as authorization for Donaldson's continued confinement. Further, neither the District Court nor the Court of Appeals acted with the benefit of this Court's most recent decision on the scope of the qualified immunity possessed by state officials under 42 U.S.C. 1983. Wood v. Strickland, 420 U.S. 308 .

Under that decision, the relevant question for the jury is whether O'Connor "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson]." Id., at 322. See also Scheuer v. Rhodes, 416 U.S. 232, 247 -248; Wood v. Strickland, supra, at 330 (opinion of POWELL, J.). For purposes of this question, an official has, of course, no duty to anticipate unforeseeable constitutional developments. Wood v. Strickland, supra, at 322.

Accordingly, we vacate the judgment of the Court of Appeals and remand the case to enable that court to consider, in light of Wood v. Strickland, whether the District Judge's failure to instruct with regard to the effect of O'Connor's claimed reliance on state law rendered inadequate the instructions as to O'Connor's liability for compensatory and punitive damages. 12

It is so ordered.

Footnotes

[1] Donaldson's original complaint was filed as a class action on behalf of himself and all of his fellow patients in an entire department of the Florida State Hospital at Chattahoochee. In addition to a damages claim, Donaldson's complaint also asked for habeas corpus relief ordering his release, as well as the release of all members of the class. Donaldson further sought declaratory and injunctive relief requiring the hospital to provide adequate psychiatric treatment.

After Donaldson's release and after the District Court dismissed the action as a class suit, Donaldson filed an amended complaint, repeating his claim for compensatory and punitive damages. Although the amended complaint retained the prayer for declaratory and injunctive relief, that request was eliminated from the case prior to trial. See 493 F.2d 507, 512-513.

[2] The judicial commitment proceedings were pursuant to 394.22 (11) of the State Public Health Code, which provided:

> "Whenever any person who has been adjudged mentally incompetent requires confinement or restraint to prevent self-injury or violence to others, the said judge shall direct that such person be forthwith delivered to a superintendent of a Florida state hospital, for the mentally ill, after admission has been authorized under regulations approved by the board of commissioners of state institutions, for care, maintenance, and treatment, as provided in sections 394.09, 394.24, 394.25, 394.26 and 394.27, or make such other disposition of him as he may be permitted by law . . . ." Fla. Laws 1955-1956 Extra. Sess., c. 31403, 1, p. 62.

Donaldson had been adjudged "incompetent" several days earlier under 394.22 (1), which provided for such a finding as to any person who was

> "incompetent by reason of mental illness, sickness, drunkenness, excessive use of drugs, insanity, or other mental or physical condition, so that he is incapable of caring for himself or managing his property, or is likely to dissipate or lose his property or become the victim of designing persons, or inflict harm on himself or others . . . ." Fla. Gen. Laws 1955, c. 29909, 3, p. 831.

It would appear that 394.22 (11) (a) contemplated that involuntary commitment would be imposed only on those "incompetent" persons who "require[d] confinement or restraint to prevent self-injury or violence to others." But this is not certain, for 394.22 (11) (c) provided that the judge could adjudicate the person a "harmless incompetent" and release him to a guardian upon a finding that he did "not require confinement or restraint to prevent self-injury or violence to others and that treatment in the Florida State Hospital is unnecessary or would be without benefit to such person . . . ." Fla. Gen. Laws 1955, c. 29909, 3, p. 835 (emphasis added). In this regard, it is noteworthy that Donaldson's "Order for Delivery of Mentally Incompetent" to the Florida State Hospital provided that he required "confinement or restraint to prevent self-injury or violence to others, or to insure proper treatment." (Emphasis added.) At any rate, the Florida commitment statute provided no judicial procedure whereby one still incompetent could secure his release on the ground that he was no longer dangerous to himself or others.

Whether the Florida statute provided a "right to treatment" for involuntarily committed patients is also open to dispute. Under 394.22 (11) (a), commitment "to prevent self-injury or violence to others" was "for care, maintenance, and treatment." Recently Florida has totally revamped its civil commitment law and now provides a statutory right to receive individual medical treatment. Fla. Stat. Ann. 394.459 (1973).

[3] The sole statutory procedure for release required a judicial reinstatement of a patient's "mental competency." Public Health Code 394.22 (15) and (16), Fla. Gen. Laws 1955, c. 29909, 3, pp. 838-841. But this procedure could be initiated by the hospital staff. Indeed, it was at the staff's initiative that Donaldson was finally restored to competency, and liberty, almost immediately after O'Connor retired from the superintendency.

In addition, witnesses testified that the hospital had always had its own procedure for releasing patients - for "trial visits," "home visits," "furloughs," or "out of state discharges" - even though the patients had not been judicially restored to competency. Those conditional releases often became permanent, and the hospital merely closed its books on the patient. O'Connor did not deny at trial that he had the power to release patients; he conceded that it was his "duty" as superintendent of the hospital "to determine whether that patient having once reached the hospital was in such condition as to request that he be considered for release from the hospital."

[4] There was some evidence that Donaldson, who is a Christian Scientist, on occasion refused to take medication. The trial judge instructed the jury not to award damages for any period of confinement during which Donaldson had declined treatment.

[5] At the close of Donaldson's case in chief, O'Connor moved for a directed verdict on the ground that state law at the time of Donaldson's confinement authorized institutionalization of the mentally ill even if they posed no danger to themselves or others. This motion was denied. At the close of all the evidence, O'Connor asked that the jury be instructed that "if defendants acted pursuant to a statute which was not declared unconstitutional at the time, they cannot be held accountable for such action." The District Court declined to give this requested instruction.

[6] The District Court defined treatment as follows:

> "You are instructed that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such treatment as will give him a realistic opportunity to be cured or to improve his mental condition." (Emphasis added.)

O'Connor argues that this statement suggests that a mental patient has a right to treatment even if confined by reason of dangerousness to himself or others. But this is to take the above paragraph out of context, for it is bracketed by paragraphs making clear the trial [422 U.S. 563, 571] judge's theory that treatment is constitutionally required only if mental illness alone, rather than danger to self or others, is the reason for confinement. If O'Connor had thought the instructions ambiguous on this point, he could have objected to them and requested a clarification. He did not do so. We accordingly have no occasion here to decide whether persons committed on grounds of dangerousness enjoy a "right to treatment."

In pertinent part, the instructions read as follows:

> "The Plaintiff claims in brief that throughout the period of his hospitalization he was not mentally ill or dangerous to himself or others, and claims further that if he was mentally ill, or if Defendants believed he was mentally ill, Defendants withheld from him the treatment necessary to improve his mental condition.
>
> "The Defendants claim, in brief, that Plaintiff's detention was legal and proper, or if his detention was not legal and proper, it was the result of mistake, without malicious intent.
>
> . . . . .
>
> "In order to prove his claim under the Civil Rights Act, the burden is upon the Plaintiff in this case to establish by a preponderance of the evidence in this case the following facts:
>
> "That the Defendants confined Plaintiff against his will, knowing that he was not mentally ill or dangerous or knowing that if mentally ill he was not receiving treatment for his alleged mental illness.
>
> . . . . .
>
> "[T]hat the Defendants' acts and conduct deprived the Plaintiff of his Federal Constitutional right not to be denied or deprived of his liberty without due process of law as that phrase is defined and explained in these instructions . . . .
>
> . . . . .
>
> "You are instructed that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such treatment as will give him a realistic opportunity to be cured or to improve his mental condition.
>
> "Now, the purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is not a danger to himself or others. Without such treatment there is no justification [422 U.S. 563, 572] from a constitutional stand-point for continued confinement unless you should also find that the Plaintiff was dangerous either to himself or others."

[7] The trial judge had instructed that punitive damages should be awarded only if "the act or omission of the Defendant or Defendants which proximately caused injury to the Plaintiff was maliciously or wantonly or oppressively done."

[8] Given the jury instructions, see n. 6 supra, it is possible that the jury went so far as to find that O'Connor knew not only that Donaldson was harmless to himself and others but also that he was not mentally ill at all. If it so found, the jury was permitted by the instructions to rule against O'Connor regardless of the nature of the "treatment" provided. If we were to construe the jury's verdict in that fashion, there would remain no substantial issue in this case: That a wholly sane and innocent person has a constitutional right not to be physically confined by the State when his freedom will pose a danger neither to himself nor to others cannot be seriously doubted.

[9] The judge's instructions used the phrase "dangerous to himself." Of course, even if there is no foreseeable risk of self-injury or suicide, a person is literally "dangerous to himself" if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends. While it might be argued that the judge's instructions could have been more detailed on this point O'Connor raised no objection to them, presumably because the evidence clearly showed that Donaldson was not "dangerous to himself" however broadly that phrase might be defined.

[10] O'Connor argues that, despite the jury's verdict, the Court must assume that Donaldson was receiving treatment sufficient to justify his confinement, because the adequacy of treatment is a "nonjusticiable" question that must be left to the discretion of the psychiatric profession. That argument is unpersuasive. Where "treatment" is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present. See Jackson v. Indiana, 406 U.S. 715 . Neither party objected to the jury instruction defining treatment. There is, accordingly, no occasion in this case to decide whether the provision of treatment, standing alone, can ever constitutionally justify involuntary confinement or, if it can, how much or what kind of treatment would suffice for that purpose. In its present posture this case involves not involuntary treatment but simply involuntary custodial confinement.

[11] See n. 5, supra. During his years of confinement, Donaldson unsuccessfully petitioned the state and federal courts for release from the Florida State Hospital on a number of occasions. None of these claims was ever resolved on its merits, and no evidentiary hearings were ever held. O'Connor has not contended that he relied on these unsuccessful court actions as an independent intervening reason for continuing Donaldson's confinement, and no instructions on this score were requested.

[12] Upon remand, the Court of Appeals is to consider only the question whether O'Connor is to be held liable for monetary damages for violating Donaldson's constitutional right to liberty. The [422 U.S. 563, 578] jury found, on substantial evidence and under adequate instructions, that O'Connor deprived Donaldson, who was dangerous neither to himself nor to others and was provided no treatment, of the constitutional right to liberty. Cf. n. 8, supra. That finding needs no further consideration. If the Court of Appeals holds that a remand to the District Court is necessary, the only issue to be determined in that court will be whether O'Connor is immune from liability for monetary damages.

Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case. See United States v. Munsingwear, 340 U.S. 36 . [422 U.S. 563, 578]

MR. CHIEF JUSTICE BURGER, concurring.

Although I join the Court's opinion and judgment in this case, it seems to me that several factors merit more emphasis than it gives them. I therefore add the following remarks.

I

With respect to the remand to the Court of Appeals on the issue of official immunity from liability for monetary damages, 1 it seems to me not entirely irrelevant that there was substantial evidence that Donaldson consistently refused treatment that was offered to him, claiming that he was not mentally ill and needed no treatment. 2 The Court appropriately takes notice of the uncertainties of psychiatric diagnosis and therapy, and the reported cases are replete with evidence of the divergence of medical opinion in this vexing area. E. g., Greenwood v. United States, 350 U.S. 366, 375 (1956). See also Drope v. Missouri, 420 U.S. 162 (1975). Nonetheless, one of the few areas of agreement among behavioral specialists is that an uncooperative patient cannot benefit from therapy and that the first step in effective treatment is acknowledgment by the patient that he is suffering from an abnormal condition. See, e. g., Katz, The Right to Treatment - An Enchanting Legal Fiction? 36 U. Chi. L. Rev. 755, 768-769 (1969). Donaldson's adamant refusal to do so should be taken into account in considering petitioner's good-faith defense.

Perhaps more important to the issue of immunity is a factor referred to only obliquely in the Court's opinion. On numerous occasions during the period of his confinement Donaldson unsuccessfully sought release in the Florida courts; indeed, the last of these proceedings was terminated only a few months prior

to the bringing of this action. See 234 So.2d 114 (1969), cert. denied, 400 U.S. 869 (1970). Whatever the reasons for the state court's repeated denials of relief, and regardless of whether they correctly resolved the issue tendered to them, petitioner and the other members of the medical staff at Florida State Hospital would surely have been justified in considering each such judicial decision as an approval of continued confinement and an independent intervening reason for continuing Donaldson's custody. Thus, this fact is inescapably related to the issue of immunity and must be considered by the Court of Appeals on remand and, if a new trial on this issue is ordered, by the District Court. 3

II

As the Court points out, ante, at 570 n. 6, the District Court instructed the jury in part that "a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such treatment as will give him a realistic opportunity to be cured" (emphasis added), and the Court of Appeals unequivocally approved this phrase, standing alone, as a correct statement of the law. 493 F.2d 507, 520 (CA5 1974). The Court's opinion plainly gives no approval to that holding and makes clear that it binds neither the parties to this case nor the courts of the Fifth Circuit. See ante, at 577-578, n. 12. Moreover, in light of its importance for future litigation in this area, it should be emphasized that the Court of Appeals' analysis has no basis in the decisions of this Court.

A

There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. Specht v. Patterson, 386 U.S. 605, 608 (1967). Cf. In re Gault, 387 U.S. 1, 12 -13 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist. See McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249 -250 (1972); Jackson v. Indiana, 406 U.S. 715, 738 (1972).

The Court of Appeals purported to be applying these principles in developing the first of its theories supporting [422 U.S. 563, 581] a constitutional right to treatment. It first identified what it perceived to be the traditional bases for civil commitment - physical dangerousness to oneself or others, or a need for treatment - and stated:

> "[W]here, as in Donaldson's case, the rationale for confinement is the `parens patriae' rationale that the patient is in need of treatment, the due process clause requires that minimally adequate treatment be in fact provided. . . . `To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.'" 493 F.2d, at 521.

The Court of Appeals did not explain its conclusion that the rationale for respondent's commitment was that he needed treatment. The Florida statutes in effect during the period of his confinement did not require that a person who had been adjudicated incompetent and ordered committed either be provided with psychiatric treatment or released, and there was no such condition in respondent's order of commitment. Cf. Rouse v. Cameron, 125 U.S. App. D.C. 366, 373 F.2d 451 (1967). More important, the instructions which the Court of Appeals read as establishing an absolute constitutional right to treatment did not require the jury to make any findings regarding the specific reasons for respondent's confinement or to focus upon any rights he may have had under state law. Thus, the premise of the Court of Appeals' first theory must have been that, at least with respect to persons who are not physically dangerous, a State has no power to confine the mentally ill except for the purpose of providing them with treatment.

That proposition is surely not descriptive of the power traditionally exercised by the States in this area. [422 U.S. 563, 582] Historically, and for a considerable period of time, subsidized custodial care in private foster homes or boarding houses was the most benign form of care provided incompetent or mentally ill persons for whom the States assumed responsibility. Until well into the 19th century the vast

majority of such persons were simply restrained in poorhouses, almshouses, or jails. See A. Deutsch, The Mentally Ill in America 38-54, 114-131 (2d ed. 1949). The few States that established institutions for the mentally ill during this early period were concerned primarily with providing a more humane place of confinement and only secondarily with "curing" the persons sent there. See id., at 98-113.

As the trend toward state care of the mentally ill expanded, eventually leading to the present statutory schemes for protecting such persons, the dual functions of institutionalization continued to be recognized. While one of the goals of this movement was to provide medical treatment to those who could benefit from it, it was acknowledged that this could not be done in all cases and that there was a large range of mental illness for which no known "cure" existed. In time, providing places for the custodial confinement of the so-called "dependent insane" again emerged as the major goal of the States' programs in this area and remained so well into this century. See id., at 228-271; D. Rothman, The Discovery of the Asylum 264-295 (1971).

In short, the idea that States may not confine the mentally ill except for the purpose of providing them with treatment is of very recent origin, 4 and there is no historical basis for imposing such a limitation on state power. Analysis of the sources of the civil commitment power likewise lends no support to that notion. There can be little doubt that in the exercise of its police power [422 U.S. 563, 583] a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease. Cf. Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940); Jacobson v. Massachusetts, 197 U.S. 11, 25 -29 (1905). Additionally, the States are vested with the historic *parens patriae* power, including the duty to protect "persons under legal disabilities to act for themselves." Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972). See also Mormon Church v. United States, 136 U.S. 1, 56 -58 (1890). The classic example of this role is when a State undertakes to act as "`the general guardian of all infants, idiots, and lunatics.'" Hawaii v. Standard Oil Co., supra, at 257, quoting 3 W. Blackstone, Commentaries 47.

Of course, an inevitable consequence of exercising the *parens patriae* power is that the ward's personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a private third party, or committed to an institution. Thus, however the power is implemented, due process requires that it not be invoked indiscriminately. At a minimum, a particular scheme for protection of the mentally ill must rest upon a legislative determination that it is compatible with the best interests of the affected class and that its members are unable to act for themselves. Cf. Mormon Church v. United States, supra. Moreover, the use of alternative forms of protection may be motivated by different considerations, and the justifications for one may not be invoked to rationalize another. Cf. Jackson v. Indiana, 406 U.S., at 737 -738. See also American Bar Foundation, The Mentally Disabled and the Law 254-255 (S. Brakel & R. Rock ed. 1971).

However, the existence of some due process limitations on the *parens patriae* power does not justify the further conclusion that it may be exercised to confine a mentally ill person only if the purpose of the confinement is treatment. Despite many recent advances in medical knowledge, it remains a stubborn fact that there are many forms of mental illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of "cure" are generally low. See Schwitzgebel, The Right to Effective Mental Treatment, 62 Calif. L. Rev. 936, 941-948 (1974). There can be little responsible debate regarding "the uncertainty of diagnosis in this field and the tentativeness of professional judgment." Greenwood v. United States, 350 U.S., at 375 . See also Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693, 697-719 (1974). 5 Similarly, as previously observed, it is universally recognized as fundamental to effective therapy that the patient acknowledge his illness and cooperate with those attempting to give treatment; yet the failure of a large proportion of mentally ill persons to do so is a common phenomenon. See Katz, supra, 36 U. Chi. L. Rev., at 768-769. It may be that some persons in either of these categories, 6 and there may be others, are unable to function in society and will suffer real harm to themselves unless provided with care in a sheltered environment. See, e. g., Lake v. Cameron, 124 U.S. App. D.C 264, 270-

271, 364 F.2d 657, 663-664 (1966) (dissenting opinion). At the very least, I am not able to say that a state legislature is powerless to make that kind of judgment. See Greenwood v. United States, supra.

B

Alternatively, it has been argued that a Fourteenth Amendment right to treatment for involuntarily confined mental patients derives from the fact that many of the safeguards of the criminal process are not present in civil commitment. The Court of Appeals described this theory as follows:

> "[A] due process right to treatment is based on the principle that when the three central limitations on the government's power to detain - that detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where the fundamental procedural safeguards are observed - are absent, there must be a quid pro quo extended by the government to justify confinement. And the quid pro quo most commonly recognized is the provision of rehabilitative treatment." 493 F.2d, at 522.

To the extent that this theory may be read to permit a State to confine an individual simply because it is willing to provide treatment, regardless of the subject's ability to function in society, it raises the gravest of constitutional problems, and I have no doubt the Court of Appeals would agree on this score. As a justification for a constitutional right to such treatment, the quid pro quo theory suffers from equally serious defects.

It is too well established to require extended discussion that due process is not an inflexible concept. Rather, its requirements are determined in particular instances by identifying and accommodating the interests of the individual and society. See, e. g., Morrissey v. Brewer, 408 U.S. 471, 480 -484 (1972); McNeil v. Director, Patuxent Institution, 407 U.S., at 249 -250; McKeiver v. Pennsylvania, 403 U.S. 528, 545 -555 (1971) (plurality opinion). Where claims that the State is acting in the best interests of an individual are said to justify reduced procedural and substantive safeguards, this Court's decisions require that they be "candidly appraised." In re Gault, 387 U.S., at 21, 27-29. However, in so doing judges are not free to read their private notions of public policy or public health into the Constitution. Olsen v. Nebraska, 313 U.S. 236, 246 -247 (1941).

The quid pro quo theory is a sharp departure from, and cannot coexist with, due process principles. As an initial matter, the theory presupposes that essentially the same interests are involved in every situation where a State seeks to confine an individual; that assumption, however, is incorrect. It is elementary that the justification for the criminal process and the unique deprivation of liberty which it can impose requires that it be invoked only for commission of a specific offense prohibited by legislative enactment. See Powell v. Texas, 392 U.S. 514, 541-544 (1968) (opinion of Black, J.). 7 But it would be incongruous, for example, to apply the same limitation when quarantine is imposed by the State to protect the public from a highly communicable disease. See Jacobson v. Massachusetts, 197 U.S., at 29 -30.

A more troublesome feature of the quid pro quo theory is that it would elevate a concern for essentially procedural safeguards into a new substantive constitutional right. 8 Rather than inquiring whether strict standards of proof or periodic redetermination of a patient's condition are required in civil confinement, the theory accepts the absence of such safeguards but insists that the State provide benefits which, in the view of a court, are adequate "compensation" for confinement. In light of the wide divergence of medical opinion regarding the diagnosis of and proper therapy for mental abnormalities, that prospect is especially troubling in this area and cannot be squared with the principle that "courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected." In re Gault, 387 U.S., at 71 (Harlan, J., concurring and dissenting). Of course, questions regarding the adequacy of procedure and the power of a State to continue particular confinements are ultimately for the courts, aided by expert opinion to the extent that is found helpful. But I am not persuaded that we should abandon the traditional limitations on the scope of judicial review.

C

In sum, I cannot accept the reasoning of the Court of Appeals and can discern no basis for equating an involuntarily committed mental patient's unquestioned constitutional right not to be confined without due process of law with a constitutional right to treatment. 9 Given the present state of medical knowledge regarding abnormal human behavior and its treatment, few things would be more fraught with peril than to irrevocably condition a State's power to protect the mentally ill upon the providing of "such treatment as will give [them] a realistic opportunity to be cured." Nor can I accept the theory that a State may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a "trade-off." Because the Court of Appeals' analysis could be read as authorizing those results, it should not be followed.

Footnotes to Concurrence

[1] I have difficulty understanding how the issue of immunity can be resolved on this record and hence it is very likely a new trial on this issue may be required; if that is the case I would hope these sensitive and important issues would have the benefit of more effective presentation and articulation on behalf of petitioner.

[2] The Court's reference to "milieu therapy," ante, at 569, may be construed as disparaging that concept. True, it is capable of being used simply to cloak official indifference, but the reality is that some mental abnormalities respond to no known treatment. Also, some mental patients respond, as do persons suffering from a variety of physiological ailments, to what is loosely called "milieu treatment," i. e., keeping them comfortable, well nourished, and in a protected environment. It is not for us to say in the baffling field of psychiatry that "milieu therapy" is always a pretense.

[3] That petitioner's counsel failed to raise this issue is not a reason why it should not be considered with respect to immunity in light of the Court's holding that the defense was preserved for appellate review.

[4] See Editorial, A New Right, 46 A. B. A. J. 516 (1960).

[5] Indeed, there is considerable debate concerning the threshold questions of what constitutes "mental disease" and "treatment." See Szasz, The Right to Health, 57 Geo. L. J. 734 (1969).

[6] Indeed, respondent may have shared both of these characteristics. His illness, paranoid schizophrenia, is notoriously unsusceptible to treatment, see Livermore, Malmquist, & Meehl, On the Justifications for Civil Commitment, 117 U. Pa. L. Rev. 75, 93, and n. 52 (1968), and the reports of the Florida State Hospital staff which were introduced into evidence expressed the view that he was unwilling to acknowledge his illness and was generally uncooperative.

[7] This is not to imply that I accept all of the Court of Appeals' conclusions regarding the limitations upon the States' power to detain persons who commit crimes. For example, the notion that confinement must be "for a fixed term" is difficult to square with the widespread practice of indeterminate sentencing, at least where the upper limit is a life sentence.

[8] Even advocates of a right to treatment have criticized the quid pro quo theory on this ground. E. g., Developments in the Law - Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1325 n. 39 (1974).

[9] It should be pointed out that several issues which the Court has touched upon in other contexts are not involved here. As the Court's opinion makes plain, this is not a case of a person's seeking release because he has been confined "without ever obtaining a judicial determination that such confinement is warranted." McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249 (1972). Although respondent's amended complaint alleged that his 1956 hearing before the Pinellas County Court was procedurally defective and ignored various factors relating to the necessity for commitment, the persons to whom those allegations applied were either not served with process or dismissed by the District Court prior to trial. Respondent has not sought review of the latter rulings, and this case does not involve the rights of a person in an initial competency or commitment proceeding. Cf. Jackson v. Indiana, 406 U.S. 715, 738 (1972); Specht v. Patterson, 386 U.S. 605 (1967); Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940).

Further, it was not alleged that respondent was singled out for discriminatory treatment by the staff of Florida State Hospital or that patients at that institution were denied privileges generally available to other persons under commitment in Florida. Thus, the question whether different bases for commitment justify differences in conditions

of confinement is not involved in this litigation. Cf. Jackson v. Indiana, supra, at 723-730; Baxstrom v. Herold, 383 U.S. 107 (1966).

Finally, there was no evidence whatever that respondent was abused or mistreated at Florida State Hospital or that the failure to provide him with treatment aggravated his condition. There was testimony regarding the general quality of life at the hospital, but the jury was not asked to consider whether respondent's confinement was in effect "punishment" for being mentally ill. The record provides no basis for concluding, therefore, that respondent was denied rights secured by the Eighth and Fourteenth Amendments. Cf. Robinson v. California, 370 U.S. 660 (1962).

Darrell Burch, while allegedly medicated and disoriented, signed forms requesting "voluntary" admission to, and treatment at, a Florida state mental hospital. Following his release, Burch brought suit against physicians, administrators, and staff members at the hospital on the ground that they had deprived him of his liberty without due process of law, alleging that the staff knew or should have known that he was incompetent to give informed consent to his admission, and that their failure to initiate Florida's involuntary placement procedure denied him constitutionally guaranteed procedural safeguards. The Federal Court of Appeals held that:

It is foreseeable that persons requesting treatment might be incapable of informed consent, and that state officials with the power to admit patients might take their apparent willingness to be admitted at face value. , … only the hospital staff is in a position to take notice of any misuse of the voluntary admission process and to ensure that the proper procedures are afforded both to those patients who are unwilling and to those who are unable to give consent. [Failure to ensure that such procedures are carried out is] sufficient to state a claim [for]or violation of … procedural due process rights.

ZINERMON

v.

BURCH,

494 U.S. 113 (1990)

I

Respondent Darrell Burch brought this suit under 42 U.S.C. § 1983 [1] against the 11 petitioners, who are physicians, administrators, and staff members at Florida State Hospital (FSH) in Chattahoochee, and others. Respondent alleges that petitioners deprived him of his liberty, without due process of law, by admitting him to FSH as a "voluntary" mental patient when he was incompetent to give informed consent to his admission. Burch contends that, in his case, petitioners should have afforded him procedural safeguards required by the Constitution before involuntary commitment of a mentally ill person, and that petitioners' failure to do so violated his due process rights.

Petitioners argue that Burch's complaint failed to state a claim under § 1983 because, in their view, it alleged only a random, unauthorized violation of the Florida statutes governing admission of mental patients. Their argument rests on *Parratt v. Taylor*, 451 U. S. 527 (1981) (overruled in part, not relevant here, by *Daniels v. Williams*, 474 U. S. 327, 474 U. S. 330-331 (1986)), and *Hudson v. Palmer*, 468 U. S. 517 (1984), where this Court held that a deprivation of a constitutionally protected property interest caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim, unless the State fails to provide an adequate post-deprivation remedy. The Court in those two cases reasoned that in a situation where the State cannot predict and guard in advance against a

deprivation, a post--deprivation tort remedy is all the process the State can be expected to provide, and is constitutionally sufficient.

In the District Court, petitioners did not file an answer to Burch's complaint. They moved, instead, for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court granted that motion, pointing out that Burch did not contend that Florida's statutory procedure for mental health placement was inadequate to ensure due process, but only that petitioners failed to follow the state procedure. Since the State could not have anticipated or prevented this unauthorized deprivation of Burch's liberty, the District Court reasoned, there was no feasible pre-deprivation remedy, and, under *Parratt* and *Hudson*, the State's postdeprivation tort remedies provided Burch with all the process that was due him.

On appeal, an Eleventh Circuit panel affirmed the dismissal; it, too, relied on *Parratt* and *Hudson. Burch v. Apalachee Community Mental Health Services, Inc.*, 804 F.2d 1549 (1986). The Court of Appeals, however, upon its own motion, ordered rehearing en banc. 812 F.2d 1339 (1987). On that rehearing, the Eleventh Circuit reversed the District Court, and remanded the case. 840 F.2d 797 (1988). Since Burch did not challenge the constitutional adequacy of Florida's statutory procedure, the court assumed that that procedure constituted the process he was due. *Id.* at 801, n. 8. A plurality concluded that *Parratt* did not apply because the State could have provided predeprivation remedies. *Id.* at 801-802. The State had given petitioners the authority to deprive Burch of his liberty by letting them determine whether he had given informed consent to admission. Petitioners, in the plurality's view, were acting as the State, and, since they were in a position to give Burch a hearing, and failed to do so, the State itself was in a position to provide predeprivation process, and failed to do so. Five judges dissented on the ground that the case was controlled by *Parratt* and *Hudson. Id.* at 810-814.

This Court granted certiorari to resolve the conflict -- so evident in the divided views of the judges of the Eleventh Circuit -- that has arisen in the Courts of Appeals over the proper scope of the *Parratt* rule. [2] 489 U.S. 1064 (1989). Because this case concerns the propriety of a Rule 12(b)(6) dismissal, the question before us is a narrow one. We decide only whether the *Parratt* rule necessarily means that Burch's complaint fails to allege any deprivation of due process, because he was constitutionally entitled to nothing more than what he received -- an opportunity to sue petitioners in tort for his allegedly unlawful confinement. The broader questions of what procedural safeguards the Due Process Clause requires in the context of an admission to a mental hospital, and whether Florida's statutes meet these constitutional requirements, are not presented in this case. Burch did not frame his action as a challenge to the constitutional adequacy of Florida's mental health statutes. Both before the Eleventh Circuit and in his brief here, he disavowed any challenge to the statutes themselves, and restricted his claim to the contention that petitioners' failure to provide constitutionally adequate safeguards in his case violated his due process rights. [3]

II

A

For purposes of review of a Rule 12(b)(6) dismissal, the factual allegations of Burch's complaint are taken as true. Burch's complaint, and the medical records and forms attached to it as exhibits, provide the following factual background:

On December 7, 1981, Burch was found wandering along a Florida highway, appearing to be hurt and disoriented. He was taken to Apalachee Community Mental Health Services (ACMHS) in Tallahassee. [4] ACMHS is a private mental health care facility designated by the State to receive patients suffering from mental illness. [5] Its staff in their evaluation forms stated that, upon his arrival at ACMHS, Burch was hallucinating, confused, psychotic, and believed he was "in heaven." Exhibit B-1 to Complaint. His face and chest were bruised and bloodied, suggesting that he had fallen or had been attacked. Burch was asked to sign forms giving his consent to admission and treatment. He did so. He remained at ACMHS for three days, during which time the facility's staff diagnosed his condition as paranoid schizophrenia

and gave him psychotropic medication. On December 10, the staff found that Burch was "in need of longer-term stabilization," Exhibit B-2 to Complaint, and referred him to FSH, a public hospital owned and operated by the State as a mental health treatment facility. [6] Later that day, Burch signed forms requesting admission and authorizing treatment at FSH. Exhibits C-1 and C-2 to Complaint. He was then taken to FSH by a county sheriff.

Upon his arrival at FSH, Burch signed other forms for voluntary admission and treatment. One form, entitled "Request for Voluntary Admission," recited that the patient requests admission for "observation, diagnosis, care and treatment of [my] mental condition," and that the patient, if admitted, agrees

> "to accept such treatment as may be prescribed by members of the medical and psychiatric staff in accordance with the provisions of expressed and informed consent."

Exhibit E-l to Complaint. Two of the petitioners, Janet V. Potter and Marjorie R. Parker, signed this form as witnesses. Potter is an accredited records technician; Parker's job title does not appear on the form.

On December 23, Burch signed a form entitled "Authorization for Treatment." This form stated that he authorized "the professional staff of [FSH] to administer treatment, except electroconvulsive treatment"; that he had been informed of "the purpose of treatment; common side effects thereof; alternative treatment modalities; approximate length of care," and of his power to revoke consent to treatment; and that he had read and fully understood the Authorization. Exhibit E-5 to Complaint. Petitioner Zinermon, a staff physician at FSH, signed the form as the witness.

On December 10, Doctor Zinermon wrote a "progress note" indicating that Burch was "refusing to cooperate," would not answer questions, "appears distressed and confused," and "related that medication has been helpful." Exhibit F-8 to Complaint. A nursing assessment form dated December 11 stated that Burch was confused and unable to state the reason for his hospitalization and still believed that "[t]his is heaven." Exhibits F-3 and F-4 to Complaint. Petitioner Zinermon on December 29 made a further report on Burch's condition, stating that, on admission, Burch had been "disoriented, semimute, confused and bizarre in appearance and thought . . . not cooperative to the initial interview," and "extremely psychotic, appeared to be paranoid and hallucinating." The doctor's report also stated that Burch remained disoriented, delusional, and psychotic. Exhibit F-5 to Complaint.

Burch remained at FSH until May 7, 1982, five months after his initial admission to ACMHS. During that time, no hearing was held regarding his hospitalization and treatment.

After his release, Burch complained that he had been admitted inappropriately to FHS and did not remember signing a voluntary admission form. His complaint reached the Florida Human Rights Advocacy Committee of the State's Department of Health and Rehabilitation Services. [7] The Committee investigated and replied to Burch by letter dated April 4, 1984. The letter stated that Burch in fact had signed a voluntary admission form, but that there was "documentation that you were heavily medicated and disoriented on admission and . . . you were probably not competent to be signing legal documents."

Exhibit G to Complaint. The letter also stated that, at a meeting of the Committee with FSH staff on August 4, 1983, "hospital administration was made aware that they were very likely asking medicated clients to make decisions at a time when they were not mentally competent."

Ibid.

In February, 1985, Burch filed a complaint in the United States District Court for the Northern District of Florida. He alleged, among other things, that ACMHS and the 11 individual petitioners, acting under color of Florida law, and

> "by and through the authority of their respective positions as employees at FSH . . . as part of their regular and official employment at FSH, took part in admitting Plaintiff to FSH as a 'voluntary' patient."

App. to Pet. for Cert. 200. [8] Specifically, he alleged:

> "Defendants, and each of them, knew or should have known that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH. See Exhibit G attached hereto and incorporated herein.[9] Nonetheless, Defendants, and each of them, seized Plaintiff and against Plaintiff's will confined and imprisoned him and subjected him to involuntary commitment and treatment for the period from December 10, 1981, to May 7, 1982. For said period of 149 days, Plaintiff was without the benefit of counsel and no hearing of any sort was held at which he could have challenged his involuntary admission and treatment at FSH."
>
> ". . . Defendants, and each of them, deprived Plaintiff of his liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution. Defendants acted with willful, wanton and reckless disregard of and indifference to Plaintiff's Constitutionally guaranteed right to due process of law."

Id. at 201-202.

B

Burch's complaint thus alleges that he was admitted and detained at FSH for five months under Florida's statutory provisions for "voluntary" admission. These provisions are part of a comprehensive statutory scheme under which a person may be admitted to a mental hospital in several different ways. [10]

First, Florida provides for short-term emergency admission. If there is reason to believe that a person is mentally ill and likely "to injure himself or others" or is in "need of care or treatment and lacks sufficient capacity to make a responsible application on his own behalf," he may immediately be detained for up to 48 hours. Fla.Stat. § 394.463(1)(a) (1981). A mental health professional, a law enforcement officer, or a judge may effect an emergency admission. After 48 hours, the patient is to be released unless he "voluntarily gives express and informed consent to evaluation or treatment," or a proceeding for court-ordered evaluation or involuntary placement is initiated. § 394.463(1)(d).

Second, under a court order a person may be detained at a mental health facility for up to five days for evaluation, if he is likely "to injure himself or others" or if he is in

> "need of care or treatment which, if not provided, may result in neglect or refusal to care for himself and . . . such neglect or refusal poses a real and present threat of substantial harm to his wellbeing."

§ 394.463(2)(a). Anyone may petition for a court-ordered evaluation of a person alleged to meet these criteria. After five days, the patient is to be released unless he gives "express and informed consent" to admission and treatment, or unless involuntary placement proceedings are initiated. § 394.463(2)(e).

Third, a person may be detained as an involuntary patient, if he meets the same criteria as for evaluation, and if the facility administrator and two mental health professionals recommend involuntary placement. §§ 394.467(1) and (2). Before involuntary placement, the patient has a right to notice, a judicial hearing, appointed counsel, access to medical records and personnel, and an independent expert examination. § 394.467(3). If the court determines that the patient meets the criteria for involuntary placement, it then decides whether the patient is competent to consent to treatment. If not, the court appoints a guardian advocate to make treatment decisions. § 394.467(3)(a). After six months, the facility must either release the patient or seek a court order for continued placement by stating the reasons therefor, summarizing the patient's treatment to that point and submitting a plan for future treatment. §§ 394.467(3) and (4).

Finally, a person may be admitted as a voluntary patient. Mental hospitals may admit for treatment any adult "making application by express and informed consent" if he is "found to show evidence of mental illness and to be suitable for treatment." § 394.465(1)(a). "Express and informed consent" is defined as "consent voluntarily given in writing after sufficient explanation and disclosure . . . to enable the person . .

. to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion." § 394.455(22). A voluntary patient may request discharge at any time. If he does, the facility administrator must either release him within three days or initiate the involuntary placement process. § 394.465(2)(a). At the time of his admission and each six months thereafter, a voluntary patient and his legal guardian or representatives must be notified in writing of the right to apply for a discharge. § 394.465(3).

Burch, in apparent compliance with § 394.465(1), was admitted by signing forms applying for voluntary admission. He alleges, however, that petitioners violated this statute in admitting him as a voluntary patient, because they knew or should have known that he was incapable of making an informed decision as to his admission. He claims that he was entitled to receive the procedural safeguards provided by Florida's involuntary placement procedure, and that petitioners violated his due process rights by failing to initiate this procedure. The question presented is whether these allegations suffice to state a claim under § 1983, in light of *Parratt* and *Hudson.*

III

A

To understand the background against which this question arises, we return to the interpretation of § 1983 articulated in *Monroe v. Pape,* 365 U. S. 167 (1961) (overruled in part not relevant here, *Monell v. New York City Dept. of Social Services,* 436 U. S. 658, 436 U. S. 664-689 (1978)). In *Monroe,* this Court rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution, or are torts under the State's common law. It explained that § 1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." *Id.* at 365 U. S. 173-174. The Court said:

> "It is no answer that the State has a law which, if enforced, would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

Id. at 365 U. S. 183. Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983. A plaintiff, for example, may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common law remedies for trespass and conversion. As was noted in *Monroe,* in many cases there is "no quarrel with the state laws on the books," *id.* at 365 U. S. 176; instead, the problem is the way those laws are or are not implemented by state officials.

This general rule applies in a straightforward way to two of the three kinds of § 1983 claims that may be brought against the State under the Due Process Clause of the Fourteenth Amendment. First, the Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under § 1983 for state officials' violation of his rights to, *e.g.,* freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams,* 474 U. S. 327, 474 U. S. 331 (1986). As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. *Id.* at 474 U. S. 338 (STEVENS, J., concurring in judgments). A plaintiff, under *Monroe v. Pape,* may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.

The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of

a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. *Parratt*, 451 U.S. at 451 U. S. 537; *Carey v. Piphus*, 435 U. S. 247, 435 U. S. 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"). [11] The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

In this case, Burch does not claim that his confinement at FSH violated any of the specific guarantees of the Bill of Rights. [12] Burch's complaint could be read to include a substantive due process claim, but that issue was not raised in the petition for certiorari, and we express no view on whether the facts Burch alleges could give rise to such a claim. [13] The claim at issue falls within the third, or procedural, category of § 1983 claims based on the Due Process Clause.

B

Due process, as this Court often has said, is a flexible concept that varies with the particular situation. To determine what procedural protections the Constitution requires in a particular case, we weigh several factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews v. Eldridge, 424 U. S. 319, 424 U. S. 335 (1976).

Applying this test, the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U. S. 532, 470 U. S. 542 (1985) ("*the root requirement' of the Due Process Clause" is "that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest"; hearing required before termination of employment (emphasis in original)); Parham v. J.R., 442 U. S. 584, 442 U. S. 606-607 (1979) (determination by neutral physician whether statutory admission standard is met required before confinement of child in mental hospital); Memphis Light, Gas & Water Div. v. Craft, 436 U. S. 1, 436 U. S. 18 (1978) (hearing required before cutting off utility service); Goss v. Lopez, 419 U. S. 565, 419 U. S. 579 (1975) (at minimum, due process requires "some kind of notice and . . . some kind of hearing" (emphasis in original); informal hearing required before suspension of students from public school); Wolff v. McDonnell, 418 U. S. 539, 418 U. S. 557-558 (1974) (hearing required before forfeiture of prisoner's good-time credits); Fuentes v. Shevin, 407 U. S. 67, 407 U. S. 80-84 (1972) (hearing required before issuance of writ allowing repossession of property); Goldberg v. Kelly, 397 U. S. 254, 397 U. S. 264 (1970) (hearing required before termination of welfare benefits).*

In some circumstances, however, the Court has held that a statutory provision for a postdeprivation hearing, or a common law tort remedy for erroneous deprivation, satisfies due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 455 U. S. 436 (1982) ("*the necessity of quick action by the State or the impracticality of providing any predeprivation process,'" may mean that a postdeprivation remedy is constitutionally adequate, quoting Parratt, 451 U.S. at 451 U. S. 539); Memphis Light, 436 U.S. at 436 U. S. 19 ("where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous*

determination," a prior hearing may not be required); Ingraham v. Wright, 430 U. S. 651, *430 U. S. 682 (1977) (hearing not required before corporal punishment of junior high school students); Mitchell v. W.T. Grant Co.,* 416 U. S. 600, *416 U. S. 619-620 (1971) (hearing not required before issuance of writ to sequester debtor's property).*

This is where the *Parratt* rule comes into play. *Parratt* and *Hudson* represent a special case of the general *Mathews v. Eldridge* analysis, in which post-deprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide. In *Parratt,* a state prisoner brought a § 1983 action because prison employees negligently had lost materials he had ordered by mail. [14] The prisoner did not dispute that he had a post-deprivation remedy. Under state law, a tort claim procedure was available by which he could have recovered the value of the materials. 451 U.S. at 451 U. S. 543-544. This Court ruled that the tort remedy was all the process the prisoner was due, because any pre-deprivation procedural safeguards that the State did provide, or could have provided, would not address the risk of *this kind* of deprivation. The very nature of a negligent loss of property made it impossible for the State to predict such deprivations and provide pre-deprivation process. The Court explained:

"The justifications which we have found sufficient to uphold takings of property without any pre-deprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Parratt,* 451 U.S. at 451 U. S. 541. Given these special circumstances, it was clear that the State, by making available a tort remedy that could adequately redress the loss, had given the prisoner the process he was due. Thus, *Parratt* is not an exception to the *Mathews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Mathews* equation -- the value of pre-deprivation safeguards -- is negligible in preventing the kind of deprivation at issue. Therefore, no matter how significant the private interest at stake and the risk of its erroneous deprivation, *see Mathews,* 424 U.S. at 424 U. S. 335, the State cannot be required constitutionally to do the impossible by providing pre-deprivation process.

In *Hudson,* the Court extended this reasoning to an intentional deprivation of property. A prisoner alleged that, during a search of his prison cell, a guard deliberately and maliciously destroyed some of his property, including legal papers. Again, there was a tort remedy by which the prisoner could have been compensated. 468 U.S. at 468 U. S. 534-535. In *Hudson,* as in *Parratt,* the state official was not acting pursuant to any established state procedure, but, instead, was apparently pursuing a random, unauthorized personal vendetta against the prisoner. *Id.* at 468 U. S. 521, n. 2, 532. The Court pointed out:

> "The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct."

Id. at 468 U. S. 533. Of course, the fact that the guard's conduct was intentional meant that he himself could "foresee" the wrongful deprivation, and could prevent it simply by refraining from his misconduct. Nonetheless, the Court found that an individual state employee's ability to foresee the deprivation is "of no consequence," because the proper inquiry under *Parratt* is "whether the *state* is in a position to provide for pre-deprivation process," *Id.* at 468 U. S. 534 (emphasis added).

C

Petitioners argue that the dismissal under Rule 12(b)(6) was proper because, as in *Parratt* and *Hudson,* the State could not possibly have provided predeprivation process to prevent the kind of "random, unauthorized" wrongful deprivation of liberty Burch alleges, so the postdeprivation remedies provided by Florida's statutory and common law necessarily are all the process Burch was due. [14] Before turning to that issue, however, we must address a threshold question raised by Burch. He argues that *Parratt* and

Hudson cannot apply to his situation, because those cases are limited to deprivations of property, not liberty. [16]

Burch alleges that he was deprived of his liberty interest in avoiding confinement in a mental hospital without either informed consent [17] or the procedural safeguards of the involuntary placement process. Petitioners do not seriously dispute that there is a substantial liberty interest in avoiding confinement in a mental hospital. *See Vitek v. Jones,* 445 U. S. 480, 445 U. S. 491-492 (1980) (commitment to mental hospital entails "a massive curtailment of liberty," and requires due process protection); *Parham v. J.R.,* 442 U.S. at 442 U. S. 600 (there is a "substantial liberty interest in not being confined unnecessarily for medical treatment"); *Addington v. Texas,* 441 U. S. 418, 441 U. S. 425 (1979) ("civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *Jackson v. Indiana,* 406 U. S. 715, 406 U. S. 738 (1972) (due process requires at least that the nature and duration of commitment to a mental hospital "bear some reasonable relation to the purpose" of the commitment). Burch's confinement at FSH for five months without a hearing or any other procedure to determine either that he validly had consented to admission, or that he met the statutory standard for involuntary placement, clearly infringes on this liberty interest.

Burch argues that postdeprivation tort remedies are never constitutionally adequate for a deprivation of liberty, as opposed to property, so the *Parratt* rule cannot apply to this case. We, however, do not find support in precedent for a categorical distinction between a deprivation of liberty and one of property. *See Lynch v. Household Finance Corp.,* 405 U. S. 538, 405 U. S. 552 (1972) ("the dichotomy between personal liberties and property rights is a false one"); *Wolff,* 418 U.S. at 418 U. S. 557-558 (a hearing is generally required before final deprivation of property interests, and "a person's liberty is equally protected"). In *Parratt* itself, the Court said, 451 U.S. at 451 U. S. 542, that its analysis was "quite consistent with the approach taken" in *Ingraham v. Wright,* 430 U. S. 651 (1977), a liberty interest case.

It is true that *Parratt* and *Hudson* concerned deprivations of property. It is also true that Burch's interest in avoiding six months' confinement is of an order different from inmate *Parratt*'s interest in mail-order materials valued at $23.50. But the reasoning of *Parratt* and *Hudson* emphasizes the State's inability to provide pre-deprivation process because of the random and unpredictable nature of the deprivation, not the fact that only property losses were at stake. In situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking. *See Loudermill,* 470 U.S. at 470 U. S. 542; *Memphis Light,* 436 U.S. at 436 U. S. 18; *Fuentes,* 407 U.S. at 407 U. S. 80-84; *Goldberg,* 397 U.S. at 397 U. S. 264. Conversely, in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, *see Ingraham,* 430 U.S. at 430 U. S. 682, or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, post-deprivation remedies might satisfy due process. Thus, the fact that a deprivation of liberty is involved in this case does not automatically preclude application of the *Parratt* rule.

To determine whether, as petitioners contend, the *Parratt* rule necessarily precludes § 1983 liability in this case, we must ask whether pre-deprivation procedural safeguards could address the risk of deprivations of the kind Burch alleges. To do this, we examine the risk involved. The risk is that some persons who come into Florida's mental health facilities will apparently be willing to sign forms authorizing admission and treatment, but will be incompetent to give the "express and informed consent" required for voluntary placement under § 394.465(1)(a). Indeed, the very nature of mental illness makes it foreseeable that a person needing mental health care will be unable to understand any proffered "explanation and disclosure of the subject matter" of the forms that person is asked to sign, and will be unable "to make a knowing and willful decision" whether to consent to admission. [18] § 394.455(22) (definition of informed consent). A person who is willing to sign forms but is incapable of making an informed decision is, by the same token, unlikely to benefit from the voluntary patient's statutory right to request discharge. *See* § 394.465(2)(a). Such a person thus is in danger of being confined indefinitely without benefit of the procedural safeguards of the involuntary placement process, a process specifically

designed to protect persons incapable of looking after their own interests. *See* §§ 394.467(2) and (3) (providing for notice, judicial hearing, counsel, examination by independent expert, appointment of guardian advocate, etc.).

Persons who are mentally ill and incapable of giving informed consent to admission would not necessarily meet the statutory standard for involuntary placement, which requires either that they are likely to injure themselves or others or that their neglect or refusal to care for themselves threatens their wellbeing. *See* § 394.467(1)(b). The involuntary placement process serves to guard against the confinement of person who, though mentally ill, is harmless and can live safely outside an institution. Confinement of such a person not only violates Florida law, but also is unconstitutional. *O'Connor v. Donaldson*, 422 U. S. 563, 422 U. S. 575 (1975) (there is no constitutional basis for confining mentally ill persons involuntarily "if they are dangerous to no one and can live safely in freedom"). Thus, it is at least possible that, if Burch had had an involuntary placement hearing, he would not have been found to meet the statutory standard for involuntary placement, and would not have been confined at FSH. Moreover, even assuming that Burch would have met the statutory requirements for involuntary placement, he still could have been harmed by being deprived of other protections built into the involuntary placement procedure, such as the appointment of a guardian advocate to make treatment decisions, and periodic judicial review of placement. §§ 394.467(3) and (4). [19]

The very risks created by the application of the informed consent requirement to the special context of mental health care are borne out by the facts alleged in this case. It appears from the exhibits accompanying Burch's complaint that he was simply given admission forms to sign by clerical workers, and, after he signed, was considered a voluntary patient. Burch alleges that petitioners knew or should have known that he was incapable of informed consent. This allegation is supported, at least as to petitioner Zinermon, by the psychiatrist's admission notes, described above, on Burch's mental state. Thus, the way in which Burch allegedly was admitted to FSH certainly did not ensure compliance with the statutory standard for voluntary admission.

We now consider whether predeprivation safeguards would have any value in guarding against the kind of deprivation Burch allegedly suffered. Petitioners urge that here, as in *Parratt* and *Hudson*, such procedures could have no value at all, because the State cannot prevent its officials from making random and unauthorized errors in the admission process. We disagree.

The Florida statutes, of course, do not allow incompetent persons to be admitted as "voluntary" patients. But the statutes do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient. A patient who is willing to sign forms but incapable of informed consent certainly cannot be relied on to protest his "voluntary" admission and demand that the involuntary placement procedure be followed. The staff are the only persons in a position to take notice of any misuse of the voluntary admission process, and to ensure that the proper procedure is followed.

Florida chose to delegate to petitioners a broad power to admit patients to FSH, *i.e.*, to effect what, in the absence of informed consent, is a substantial deprivation of liberty. Because petitioners had state authority to deprive persons of liberty, the Constitution imposed on them the State's concomitant duty to see that no deprivation occur without adequate procedural protections.

It may be permissible constitutionally for a State to have a statutory scheme like Florida's, which gives state officials broad power and little guidance in admitting mental patients. But when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking *Parratt* and *Hudson.* It is immaterial whether the due process violation Burch alleges is best described as arising from petitioners' failure to comply with state procedures for admitting involuntary patients, or from the absence of a specific requirement that petitioners determine whether a patient is competent to consent to voluntary admission. Burch's suit is neither an action challenging the facial adequacy of a State's statutory procedures, nor an action based

only on state officials' random and unauthorized violation of state laws. Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.

This case, therefore, is not controlled by *Parratt* and *Hudson*, for three basic reasons:

First, petitioners cannot claim that the deprivation of Burch's liberty was unpredictable. Under Florida's statutory scheme, only a person competent to give informed consent may be admitted as a voluntary patient. There is, however, no specified way of determining, before a patient is asked to sign admission forms, whether he is competent. It is hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent, and that state officials with the power to admit patients might take their apparent willingness to be admitted at face value and not initiate involuntary placement procedures. Any erroneous deprivation will occur, if at all, at a specific, predictable point in the admission process -- when a patient is given admission forms to sign.

This situation differs from the State's predicament in *Parratt.* While it could anticipate that prison employees would occasionally lose property through negligence, it certainly "cannot predict precisely when the loss will occur." 451 U.S. at 451 U. S. 541. Likewise, in *Hudson,* the State might be able to predict that guards occasionally will harass or persecute prisoners they dislike, but cannot "know when such deprivations will occur."

Second, we cannot say that pre-deprivation process was impossible here. Florida already has an established procedure for involuntary placement. The problem is only to ensure that this procedure is afforded to all patients who cannot be admitted voluntarily, both those who are unwilling and those who are unable to give consent.

In *Parratt,* the very nature of the deprivation made predeprivation process "impossible." 451 U.S. at 451 U. S. 541. It would do no good for the State to have a rule telling its employees not to lose mail by mistake, and it "borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct." *Daniels,* 474 U.S. at 474 U. S. 342, n. 19 (STEVENS, J., concurring in judgments). In *Hudson,* the errant employee himself could anticipate the deprivation since he intended to effect it, but the State still was not in a position to provide pre-deprivation process, since it could not anticipate or control such random and unauthorized intentional conduct. 468 U.S. at 468 U. S. 533-534. Again, a rule forbidding a prison guard from maliciously destroying a prisoner's property would not have done any good; it would be absurd to suggest that the State hold a hearing to determine whether a guard should engage in such conduct.

Here, in contrast, there is nothing absurd in suggesting that, had the State limited and guided petitioners' power to admit patients, the deprivation might have been averted. Burch's complaint alleges that petitioners "knew or should have known" that he was incompetent, and nonetheless admitted him as a voluntary patient in "willful, wanton, and reckless disregard" of his constitutional rights. App. to Pet. for Cert. 201-202. Understood in context, the allegation means only that petitioners disregarded their duty to ensure that the proper procedures were followed, not that they, like the prison guard in *Hudson,* were bent upon effecting the substantive deprivation and would have done so despite any and all pre-deprivation safeguards. Moreover, it would indeed be strange to allow state officials to escape § 1983 liability for failing to provide constitutionally required procedural protections, by assuming that those procedures would be futile because the same state officials would find a way to subvert them.

Third, petitioners cannot characterize their conduct as "unauthorized" in the sense the term is used in *Parratt* and *Hudson.* The State delegated to them the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. In *Parratt* and *Hudson,* the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their own interests) the

procedural safeguards required before deprivations occur. The deprivation here is "unauthorized" only in the sense that it was not an act sanctioned by state law, but, instead, was a "depriv[ation] of constitutional rights . . . by an official's abuse of his position." *Monroe*, 366 U.S. at 172. [20]

We conclude that petitioners cannot escape § 1983 liability by characterizing their conduct as a "random, unauthorized" violation of Florida law which the State was not in a position to predict or avert, so that all the process Burch could possibly be due is a postdeprivation damages remedy. Burch, according to the allegations of his complaint, was deprived of a substantial liberty interest without either valid consent or an involuntary placement hearing, by the very state officials charged with the power to deprive mental patients of their liberty and the duty to implement procedural safeguards.

Such a deprivation is foreseeable, due to the nature of mental illness, and will occur, if at all, at a predictable point in the admission process. Unlike *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where post-deprivation process is all that is due because no pre-deprivation safeguards would be of use in preventing the kind of deprivation alleged.

We express no view on the ultimate merits of Burch's claim; we hold only that his complaint was sufficient to state a claim under § 1983 for violation of his procedural due process rights.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Footnotes

[1] Section 1983 reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ."

[2] Several Courts of Appeals have found *Parratt* inapplicable where the defendant state officials had the state-clothed authority to effect a deprivation, and had the power to provide the plaintiff with a hearing before they did so. *See, e.g., Watts v. Burkhart,* 854 F.2d 839, 843 (CA6 1988); *Wilson v. Civil Town of Clayton,* 839 F.2d 375 382 (CA7 1988); *Fetner v. City of Roanoke,* 813 F.2d 1183, 1185-1186 (CA11 1987); *Freeman v. Blair,* 793 F.2d 166, 177 (CA8 1986); *Patterson v. Coughlin,* 761 F.2d 886, 891-893 (CA2 1985), *cert. denied,* 474 U.S. 1100 (1986); *Bretz v. Kelman,* 773 F.2d 1026, 1031 (CA9 1985) (en banc); *Wolfenbarger v. Williams,* 774 F.2d 358, 363-365 (CA10 1985).

Other Courts of Appeals have held that *Parratt* applies even to deprivations effected by the very state officials charged with providing predeprivation process. *See, e.g., Vinson v. Campbell County Fiscal Court,* 820 F.2d 194, 199 (CA6 1987); *HolIoway v. Walker,* 784 F.2d 1287, 1292-1293 (CA5 1986); *Yates v. Jamison,* 782 F.2d 1182, 1185 (CA4 1986); *Wadhams v. Procunier,* 772 F.2d 75, 77-78 (CA4 1985); *Toney-El v. Franzen,* 777 F.2d 1224, 1227-1228 (CA7 1985); *Collins v. King,* 743 F.2d 248, 254 (CA5 1984).

In addition, the Courts of Appeals are divided on the question whether *Parratt* applies to deprivations of liberty as well as deprivations of property rights. *Compare McRorie v. Shimoda,* 795 F.2d 780, 786 (CA9 1986), and *Conway v. Village of Mount Kisco,* 758 F.2d 46, 48 (CA2 1985), *with Wilson v. Beebe,* 770 F.2d 578, 584 (CA6 1985) (en banc), *Toney-El v. Franzen,* 777 F.2d 1227, *and Thibodeaux v. Bordelon,* 740 F.2d 329, 337-339 (CA5 1984).

[3] *See* Brief for Respondent 6 ("Burch is not attacking the facial validity of Florida's voluntary admission procedures any more than he is attacking the facial validity of Florida's involuntary admission procedures.").

Inasmuch as Burch does not claim that he was deprived of due process by an established state procedure, our decision in *Logan v. Zimmerman Brush Co.*, 455 U. S. 422 (1982), is not controlling. In that case, the plaintiff challenged not a state official's error in implementing state law, but "the *established state procedure' that destroys his entitlement without according him proper procedural safeguards." Id. at 455 U. S. 436.*

Burch apparently concedes that, if Florida's statutes were strictly complied with, no deprivation of liberty without due process would occur. If only those patients who are competent to consent to admission are allowed to sign themselves in as "voluntary" patients, then they would not be deprived of any liberty interest at all. And if all other

patients -- those who are incompetent and those who are unwilling to consent to admission -- are afforded the protections of Florida's involuntary placement procedures, they would be deprived of their liberty only after due process.

[4] ACHMS was a named defendant in this case, but did not petition for certiorari.

[5] Under Fla.Stat. § 394.461(1) (1981), the State Department of Health and Rehabilitative Services may "designate any community facility as a receiving facility for emergency, short-term treatment and evaluation."

[6] *See* §§ 394.457(8) and .455(8).

[7] *See* § 20.19(6)(b)2 (creating statewide Human Rights Advocacy Committee of eight citizens, charged with "[r]eceiving, investigating, and resolving reports of abuse or deprivation of constitutional and human rights" concerning health care).

[8] Burch further alleged that petitioners' "respective roles in the *voluntary' admission process are evidenced by admissions-related documents" attached as exhibits to the complaint. App. to Pet. for Cert. 200. The documents referred to are the request-for-admission and authorization-of-treatment forms described above, and other related forms.*

[9] Exhibit G is the April 4, 1984, letter to Burch from the Human Rights Advocacy Committee. Two specially concurring judges of the Eleventh Circuit expressed the view that this exhibit served as an allegation of a hospital custom and practice of eliciting consent to admission from incompetent patients. 840 F.2d 797, 808 (1988). Since the plurality opinion did not rely on this reading of Burch's complaint, we express no view as to whether the complaint with attached exhibits sufficed to state a custom and practice claim.

[10] We describe the statutory scheme as it existed in 1980-1981, when Burch was confined at FSH. The statutes have been amended since then in details not relevant for present purposes.

[11] The Court in *Carey v. Pinphus* explained that a deprivation of procedural due process is actionable under § 1983 without regard to whether the same deprivation would have taken place even in the presence of proper procedural safeguards. *Id.* at 266 (even if the deprivation was in fact justified, so the plaintiffs did not suffer any "other actual injury" caused by the lack of due process, "the fact remains that they were deprived of their right to procedural due process"). It went on to say, however, that, in cases where the deprivation would have occurred anyway, and the lack of due process did not itself cause any injury (such as emotional distress), the plaintiff may recover only nominal damages. *Id.* at 264, 266.

[12] One concurring judge of the Eleventh Circuit expressed the view that Burch's complaint stated a claim for an unreasonable seizure in violation of Fourth Amendment protections. 840 F.2d 807-808. Burch has not pursued this theory, however, and we do not address it.

[13] Five specially concurring judges of the Eleventh Circuit found Burch's complaint sufficient to state a substantive due process claim. *Id.* at 803-804. The remainder of the en banc court either did not reach the issue, *id.* at 807 (Clark, J., concurring), or took the view that Burch did not state such a claim, and that even if he had, the admission and treatment of a mentally ill person apparently willing to be admitted is not the sort of inherently wrongful and arbitrary state action that would constitute a substantive due process violation. *Id.* at 809 (Anderson, J., concurring specially); *id.* at 815-817 (dissenting opinion for five judges).

[14] *Parratt* was decided before this Court ruled, in *Daniels v. Williams*, 474 U. S. 327, 474 U. S. 336 (1986), that a negligent act by a state official does not give rise to § 1983 liability.

[15] Burch does not dispute that he had remedies under Florida law for unlawful confinement. Florida's mental health statutes provide that a patient confined unlawfully may sue for damages. § 394.459(13) ("Any person who violates or abuses any rights or privileges of patients" is liable for damages, subject to good-faith immunity but not immunity for negligence). Also, a mental patient detained at a mental health facility, or a person acting on his behalf, may seek a writ of habeas corpus to "question the cause and legality of such detention and request . . . release." § 394.459(10)(a). Finally, Florida recognizes the common law tort of false imprisonment. *Johnson v. Weiner*, 155 Fla. 169, 19 So.2d 699 (1944).

[16] Some Courts of Appeals have limited the application of *Parratt* and *Hudson* to deprivations of property. *See* n 2, *supra*.

[17] Of course, if Burch had been competent to consent to his admission and treatment at FSH, there would have been no deprivation of his liberty at all. The State simply would have been providing Burch with the care and treatment he requested. Burch alleges, however, that he was not competent, so his apparent willingness to sign the admission forms was legally meaningless.

[18] The characteristics of mental illness thus create special problems regarding informed consent. Even if the State usually might be justified in taking at face value a person's request for admission to a hospital for medical treatment, it may not be justified in doing so without further inquiry as to a mentally ill person's request for admission and treatment at a mental hospital.

[19] Hence, Burch might be entitled to actual damages, beyond the nominal damages awardable for a procedural due process violation unaccompanied by any actual injury, *see Carey v. Pinphus*, 435 U. S. 247, 435 U. S. 266-267 (1978), if he can show either that if the proper procedure had been followed he would have remained at liberty and that he suffered harm by being confined, or that even if he would have been committed anyway under the involuntary placement procedure, the lack of this procedure harmed him in some way.

[20] Contrary to the dissent's view of *Parratt* and *Hudson*, those cases do not stand for the proposition that, in every case where a deprivation is caused by an "unauthorized . . . departure from established practices," *post* at 494 U. S. 146, state officials can escape § 1983 liability simply because the State provides tort remedies. This reading of *Parratt* and *Hudson* detaches those cases from their proper role as special applications of the settled principles expressed in *Monroe* and *Mathews.*

Justice O'CONNOR, with whom Chief Justice SCALIA and Justice KENNEDY join, dissenting.

Without doubt, respondent Burch alleges a serious deprivation of liberty, yet equally clearly he alleges no violation of the Fourteenth Amendment. The Court concludes that an allegation of state actors' wanton, unauthorized departure from a State's established policies and procedures, working a deprivation of liberty, suffices to support a procedural due process claim even though the State provides adequate postdeprivation remedies for that deprivation. The Court's opinion unnecessarily transforms well established procedural due process doctrine, and departs from controlling precedent. I respectfully dissent.

Parratt v. Taylor, 451 U. S. 527 (1981), and *Hudson v. Palmer*, 468 U. S. 517 (1984), should govern this case. Only by disregarding the gist of Burch's complaint -- that state actors' wanton and unauthorized departure from established practice worked the deprivation -- and by transforming the allegations into a challenge to the adequacy of Florida's admissions procedures can the Court attempt to distinguish this case from *Parratt* and *Hudson.*

Burch alleges a deprivation occasioned by petitioners' contravention of Florida's established procedures. Florida allows the voluntary admission process to be employed to admit to its mental hospitals only patients who have made "application by express and informed consent for admission," and requires that the elaborate involuntary admission process be used to admit patients requiring treatment and incapable of giving such consent. *See* Fla.Stat. §§ 394.465, 394.467 (1979). Burch explicitly disavows any challenge to the adequacy of those established procedural safeguards accompanying Florida's two avenues of admission to mental hospitals. *See* Brief for Respondent 5 ("[T]he constitutional adequacy of Florida's voluntary admission and treatment procedures has never been an issue in this case, since Burch was committed as an involuntary patient for purposes of this appeal"); *id.* at 6 ("Burch is not attacking the facial validity of Florida's voluntary admission procedures any more than he is attacking the facial validity of Florida's involuntary admission procedures"). Nor does the complaint allege any widespread practice of subverting the State's procedural safeguards. Burch instead claims that, in his case, petitioners wrongfully employed the voluntary admission process deliberately or recklessly to deny him the hearing that Florida requires state actors to provide, through the involuntary admission process, to one in his position. He claims that petitioners "knew or should have known" that he was incapable of consent but "with willful, wanton and reckless disregard of and indifference to" his constitutional rights "subjected him to involuntary commitment" without any hearing "at which he could have challenged his involuntary admission and treatment." App. to Pet. for Cert. 200-202 (complaint); *see* Brief for Respondent i, n. 1

("The complaint alleges an intentional, involuntary commitment of Respondent by Petitioners . . ."). Consistent with his disavowal of any attack upon the adequacy of the State's established procedures, Burch alleges that petitioners flagrantly and at least recklessly contravened those requirements. In short, Burch has alleged that petitioners' unauthorized actions worked the deprivation of his liberty.

Parratt and *Hudson* should readily govern procedural due process claims such as respondent's. Taken together, the decisions indicate that for deprivations worked by such random and unauthorized departures from otherwise unimpugned and established state procedures the State provides the process due by making available adequate postdeprivation remedies. In *Parratt,* the Court addressed a deprivation which "occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." 451 U.S. at 451 U. S. 543. The random nature of the state actor's unauthorized departure made it not "practicable for the State to provide a predeprivation hearing," *ibid.,* and adequate postdeprivation remedies available through the State's tort system provided the process due under the Fourteenth Amendment. *Hudson* applied this reasoning to intentional deprivations by state actors and confirmed the distinction between deprivation pursuant to "an established state procedure" and that pursuant to "random and unauthorized action." 468 U.S. at 468 U. S. 532-533; *cf. Logan v. Zimmerman Brush Co.,* 455 U. S. 422, 455 U. S. 435-436 (1982). In *Hudson,* the Court explained that the *Parratt* doctrine was applicable because "the state cannot possibly know in advance of a negligent deprivation of property," and that "[t]he controlling inquiry is solely whether the state is in a position to provide for predeprivation process." 468 U.S. at 534.

Application of *Parratt* and *Hudson* indicates that respondent has failed to state a claim allowing recovery under 42 U.S.C. § 1983. Petitioners' actions were unauthorized: they are alleged to have wrongly and without license departed from established state practices. *Cf. Hudson,* 468 U.S. at 468 U. S. 532-533; *Parratt,* 451 U.S. at 451 U. S. 543. Florida officials in a position to establish safeguards commanded that the voluntary admission process be employed only for consenting patients and that the involuntary hearing procedures be used to admit unconsenting patients. Yet it is alleged that petitioners "with willful, wanton and reckless disregard of and indifference to" Burch's rights contravened both commands. As in *Parratt,* the deprivation "occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." 451 U.S. at 451 U. S. 543. The wanton or reckless nature of the failure indicates it to be random. The State could not foresee the particular contravention and was hardly "in a position to provide for predeprivation process," *Hudson,* 468 U.S. at 468 U. S. 534, to ensure that officials bent upon subverting the State's requirements would in fact follow those procedures. For this wrongful deprivation resulting from an unauthorized departure from established state practice, Florida provides adequate postdeprivation remedies, as two courts below concluded, and which the Court and respondent do not dispute. *Parratt* and *Hudson* thus should govern this case and indicate that respondent has failed to allege a violation of the Fourteenth Amendment.

The allegedly wanton nature of the subversion of the state procedures underscores why the State cannot in any relevant sense anticipate and meaningfully guard against the random and unauthorized actions alleged in this case. The Court suggests that the State could foresee "that a person requesting treatment for mental illness might be incapable of informed consent." *Ante* at 494 U. S. 136. While foreseeability of that routine difficulty in evaluating prospective patients is relevant in considering the general adequacy of Florida's voluntary admission procedures, *Parratt* and *Hudson* address whether the State can foresee, and thus be required to forestall, the deliberate or reckless departure from established state practice. Florida may be able to predict that, over time, some state actors will subvert its clearly implicated requirements. Indeed, that is one reason that the State must implement an adequate remedial scheme. But Florida "cannot predict precisely when the loss will occur," *Parratt, supra,* at Page 494 U. S. 143, and the Due Process Clause does not require the State to do more than establish appropriate remedies for any wrongful departure from its prescribed practices.

The Court attempts to avert the force of *Parratt* and *Hudson* by characterizing petitioners' alleged failures as only the routine but erroneous application of the admissions process. According to the Court,

Burch suffered an "erroneous deprivation," *ante* at 494 U. S. 136, and the "risk of deprivations of the kind Burch alleges" is that incompetent "persons who come into Florida's mental health facilities will apparently be willing to sign forms," *ante* at 494 U. S. 133, prompting officials to "mak[e] random and unauthorized errors in the admission process." *Ante* at 494 U. S. 135. The Court's characterization omits petitioners' alleged wrongful state of mind, and thus the nature and source of the wrongful deprivation.

A claim of negligence will not support a procedural due process claim, *see Daniels v. Williams,* 474 U. S. 327 (1986), and it is an unresolved issue whether an allegation of gross negligence or recklessness suffices. *Id.* at 474 U. S. 334, n. 3. Respondent, if not the Court, avoids these pitfalls. According to Burch, petitioners "knew" him to be incompetent or were presented with such clear evidence of his incompetence that they should be charged with such knowledge. App. to Pet. for Cert., at 201. Petitioners also knew that Florida law required them to provide an incompetent prospective patient with elaborate procedural safeguards. Far from alleging inadvertent or negligent disregard of duty, respondent alleges that petitioners "acted with willful, wanton and reckless disregard of and indifference" to his rights by treating him without providing the hearing that Florida requires. *Id.* at 202. That is, petitioners did not bumble or commit "errors" by taking Burch's "apparent willingness to be admitted at face value." *Ante* at 494 U. S. 135, 494 U. S. 136. Rather, they deliberately or recklessly subverted his rights and contravened state requirements.

The unauthorized and wrongful character of the departure from established state practice makes additional procedures an "impracticable" means of preventing the deprivation.

> "The underlying rationale of *Parratt* is that, when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable,' since the state cannot know when such deprivations will occur."

Hudson, 468 U.S. at 468 U. S. 533; *see Parratt,* 451 U.S. at 451 U. S. 541. The Court suggests that additional safeguards surrounding the voluntary admission process would have quite possibly reduced the risk of deprivation. *Ante* at 494 U. S. 135-136. This reasoning conflates the value of procedures for preventing error in the repeated and usual case (evaluated according to the test set forth in *Mathews v. Eldridge,* 424 U. S. 319 (1976)), with the value of additional predeprivation procedures to forestall deprivations by state actors bent upon departing from or indifferent to complying with established practices. Unsurprisingly, the Court is vague regarding how its proffered procedures would prevent the deprivation Burch alleges, and why the safeguards would not form merely one more set of procedural protections that state employees could willfully, recklessly and wantonly subvert. Indeed, Burch alleges that, presented with the clearest evidence of his incompetence, petitioners nonetheless wantonly or recklessly denied him the protections of the State's admission procedures and requirements. The state actor so indifferent to guaranteed protections would be no more prevented from working the deprivation by additional procedural requirements than would the mail handler in *Parratt* or the prison guard in *Hudson.* In those cases, the State could have, and no doubt did, provide a range of predeprivation requirements and safeguards guiding both prison searches and care of packages. *See Parratt,* 451 U.S. at 451 U. S. 530; *id.* at 451 U. S. 543. ("[T]he deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate . . ."). In all three cases, the unpredictable, wrongful departure is beyond the State's reasonable control. Additional safeguards designed to secure correct results in the usual case do not practicably forestall state actors who flout the State's command and established practice.

Even indulging the Court's belief that the proffered safeguards would provide "some" benefit, *Parratt* and *Hudson* extend beyond circumstances in which procedural safeguards would have had "negligible" value. *Ante* at 494 U. S. 129. In *Parratt* and *Hudson,* additional measures would conceivably have had some benefit in preventing the alleged deprivations. A practice of barring individual or unsupervised shakedown searches, a procedure of always pairing or monitoring guards, or a requirement that searches be conducted according to "an established policy" (the proposed measure rejected as unnecessary in

Hudson, 468 U.S. at 468 U. S. 528-530) might possibly have helped to prevent the type of deprivation considered in *Hudson.* More sensible staffing practices, better training, or a more rigorous tracking procedure may have averted the deprivation at issue in *Parratt.* In those cases, like this one, the State knew the exact context in which the wrongful deprivation would occur. Yet the possibility of implementing such marginally beneficial measures, in light of the type of alleged deprivation, did not alter the analysis. The State's inability to foresee and to forestall the wrongful departure from established procedures renders additional predeprivation measures "impracticable," and not required by the dictates of due process. *See Hudson,* 468 U.S. at 533; *Parratt,* 451 U.S. at 541.

Every command to act imparts the duty to exercise discretion in accord with the command, and affords the opportunity to abuse that discretion. The *Mathews* test measures whether the State has sufficiently constrained discretion in the usual case, while the *Parratt* doctrine requires the State to provide a remedy for any wrongful abuse. The Court suggests that this case differs from *Parratt* and *Hudson* because petitioners possessed a sort of delegated power. *See ante* at 494 U. S. 135-138. Yet petitioners no more had the delegated power to depart from the admission procedures and requirements than did the guard in *Hudson* to exceed the limits of his established search and seizure authority, or the prison official in *Parratt* wrongfully to withhold or misdeliver mail. Petitioners' delegated duty to act in accord with Florida's admissions procedures is akin to the mailhandler's duty to follow and implement the procedures surrounding delivery of packages, or the guard's duty to conduct the search properly. In the appropriate circumstances and pursuant to established procedures, the guard in *Hudson* was charged with seizing property pursuant to a search. The official in *Parratt* no doubt possessed some power to withhold certain packages from prisoners. *Parratt* and *Hudson* distinguish sharply between deprivations caused by unauthorized acts and those occasioned by established state procedures. *See Hudson,* 468 U.S. at 468 U. S. 532; *Parratt,* 451 U.S. at 451 U. S. 541; *accord, Logan,* 455 U.S. at 455 U. S. 435-436. The delegation argument blurs this line and ignores the unauthorized nature of petitioners' alleged departure from established practices.

The suggestion that the State delegated to petitioners insufficiently trammeled discretion conflicts with positions that the Court ostensibly embraces. The issue whether petitioners possessed undue discretion is bound with and more properly analyzed as an aspect of the adequacy of the State's procedural safeguards, yet the Court claims Burch did not present this issue, and purports not to decide it. *See ante* at 494 U. S. 117, and n. 3, 494 U. S. 135-136; *but see infra* at 494 U. S. 150-151. By suggesting that petitioners' acts are attributable to the State, *cf. ante* at 494 U. S. 135-136, the Court either abandons its position that "Burch does not claim that he was deprived of due process by an established state procedure," *ante* at 494 U. S. 117, n. 3, or abandons *Parratt* and *Hudson's* distinction between established procedures and unauthorized departures from those practices. Petitioners were not charged with formulating policy, and the complaint does not allege widespread and common departure from required procedures. Neither do the Court's passing reflections that a hearing is constitutionally required in the usual case of treatment of an incompetent patient advance the argument. *Ante* at 494 U. S. 117, 494 U. S. 135. That claim either states the conclusion that the State's combined admission procedures are generally inadequate, or repudiates *Parratt* and *Hudson's* focus upon random and unauthorized acts and upon the State's ability to formulate safeguards. To the extent that a liberty interest exists in the application of the involuntary admission procedures whenever appropriate, it is the random and unauthorized action of state actors that effected the deprivation, one for which Florida also provides adequate postdeprivation process. *See* Fla.Stat. § 768.28(1) (1979) (partial waiver of immunity, allowing tort suits); § 394.459(13) (1979) (providing action against "[a]ny person who violates or abuses any rights or privileges of patients" provided by the Florida Mental Health Act).

The Court's delegation of authority argument, like its claim that "we cannot say that predeprivation process was impossible here," *ante* at 494 U. S. 135, revives an argument explicitly rejected in *Hudson.* In *Hudson,* the Court rebuffed the argument that "because an agent of the state who intends to deprive a person of his property can provide predeprivation process, then, as a matter of due process, he must do

so." 468 U.S. at 468 U. S. 534 (internal quotation omitted). By failing to consider whether "the *state* cannot possibly know in advance" of the wrongful contravention and by abandoning "[t]he controlling inquiry . . . whether the state is in a position to provide for pre-deprivation process," the Court embraces the "fundamental misunderstanding of *Parratt*." *Ibid.* Each of the Court's distinctions abandons an essential element of the *Parratt* and *Hudson* doctrines, and together they disavow those cases' central insights and holdings.

The Court's reliance upon the State's inappropriate delegation of duty also creates enormous line-drawing problems. Today's decision applies to deprivations occasioned by state actors given "little guidance" and "broadly delegated, uncircumscribed power" to initiate required procedures. *Ante* at 494 U. S. 135, 494 U. S. 136. At some undefined point, the breadth of the delegation of power requires officials to channel the exercise of that power or become liable for its misapplications. When guidance is provided and the power to effect the deprivation circumscribed, no liability arises. And routine exercise of the power must be sufficiently fraught with the danger of "erroneous deprivation." *Ante* at 494 U. S. 136. In the absence of this broadly delegated power that carries with it pervasive risk of wrongful deprivation, *Parratt* and *Hudson* still govern. In essence, the Court's rationale applies when state officials are loosely charged with fashioning effective procedures or ensuring that required procedures are not routinely evaded. In a roundabout way, this rationale states the unexceptional conclusion that liability exists when officials' actions amount to the established state practice, a rationale unasserted in this case and, otherwise, appropriately analyzed under the *Mathews* test.

The Court's decision also undermines two of this Court's established and delicately related doctrines, one articulated in *Mathews v. Eldridge,* 424 U. S. 319 (1976), and the other articulated in *Parratt.* As the Court acknowledges, the procedural component of the Due Process Clause requires the State to formulate procedural safeguards and adequate postdeprivation process sufficient to satisfy the dictates of fundamental fairness and the Due Process Clause. *Ante* at 494 U. S. 127. Until today, the reasoning embodied in *Mathews* largely determined that standard and the measures a State must establish to prevent a deprivation of a protected interest from amounting to a constitutional violation. *Mathews* employed the now familiar three-part test (considering the nature of the private interest, efficacy of additional procedures, and governmental interests) to determine what predeprivation procedural safeguards were required of the State. 424 U.S. at 424 U. S. 335. That test reflects a carefully crafted accommodation of conflicting interests, weighed and evaluated in light of what fundamental fairness requires. *Parratt* drew upon concerns similar to those embodied in the *Mathews* test. For deprivations occasioned by wrongful departures from unchallenged and established state practices, *Parratt* concluded that adequate postdeprivation process meets the requirements of the Due Process Clause because additional predeprivation procedural safeguards would be "impracticable" to forestall these deprivations. 451 U.S. at 451 U. S. 541. The *Mathews* and *Paratt* doctrines work in tandem. State officials able to formulate safeguards must discharge the duty to establish sufficient predeprivation procedures, as well as adequate postdeprivation remedies to provide process in the event of wrongful departures from established state practice. The doctrines together define the procedural measures that fundamental fairness and the Constitution demand of the State.

The Court today discovers an additional realm of required procedural safeguards. Now, all procedure is divided into three parts. In place of the border clearly dividing the duties required by *Mathews* from those required by *Parratt*, the Court marks out a vast *terra incognita* of unknowable duties and expansive liability of constitutional dimension. The *Mathews* test, we are told, does not determine the State's obligation to provide predeprivation procedural safeguards. Rather, to avoid the constitutional violation, a State must have fully circumscribed and guided officials' exercise of power and provided additional safeguards, without regard to their efficacy or the nature of the governmental interests. Even if the validity of the State's procedures is not directly challenged, the burden is apparently on certain state actors to demonstrate that the State sufficiently constrained their powers. Despite the many cases of this Court applying and affirming *Mathews*, it is unclear what now remains of the test. And the *Parratt* doctrine no

longer reflects a general interpretation of the Due Process Clause or the complement of the principles contained in *Mathews*. It is, instead, displaced when the State delegates certain types of duties in certain inappropriate ways. This resulting "no-man's land" has no apparent boundaries. We are provided almost no guidance regarding what the Due Process Clause requires, how that requirement is to be deduced, or why fundamental fairness imposes upon the States the obligation to provide additional safeguards of nearly any conceivable value. We are left only with the implication that where doubt exists, liability of constitutional dimension will be found. Without so much as suggesting that our prior cases have warned against such a result, the Court has gone some measure to "*make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" Parratt, 451 U.S. at 451 U. S. 544 (quoting Paul v. Davis, 424 U. S. 693, 424 U. S. 701 (1976)).*

The Court's departure from the *Mathews* and *Parratt* doctrines is particularly unjustified because it is unnecessary for resolution of this case. While I believe that Burch's complaint and subsequent argument do not properly place before the Court a traditional challenge to Florida's voluntary admission procedures, the Court, without so declaring, has decided otherwise. Yet, rather than acknowledge this course, the Court crafts its doctrinal innovations.

Understandably reluctant to grapple with Burch's framing of his complaint, the Court less understandably avoids that difficulty of pleading by creating the innovation which so disrupts established law. The Court discovers that "Burch's suit is neither an action challenging the facial adequacy of a State's statutory procedures nor an action based only on state officials' random and unauthorized violation of state laws."*Ante* at 494 U. S. 136. That is, Burch's suit is not one that established law supports, and thus requires today's unwarranted departure.

The Court believes that Florida's statutory scheme contains a particular flaw. *Ante* at 494 U. S. 135-137. That statutory omission involves the determination of competence in the course of the voluntary admission process, and the Court signals that it believes that these suggested additional safeguards would not be greatly burdensome. *Ibid.* The Court further believes that Burch's complaint and argument properly raise these issues, and that adopting the additional safeguards would provide relevant benefit to one in Burch's position. The traditional *Mathews* test was designed and, until today, has been employed, to evaluate and accommodate these concerns. *See Washington v. Harper, post,* at 494 U. S. 228-235 (applying *Mathews* test, rather than approach suggested today, to evaluate the adequacy of a State's procedures governing administration of antipsychotic drugs to prisoners). That test holds Florida to the appropriate standard and, given the Court's beliefs set out above, would perhaps have yielded a result favoring respondent. While this approach, if made explicit, would have required a strained reading of respondent's complaint and arguments, that course would have been far preferable to the strained reading of controlling procedural due process law that the Court today adopts. Ordinarily, a complaint must state a legal cause of action, but here it may be said that the Court has stated a novel cause of action to support a complaint.

I respectfully dissent.

WORKING WITH COUPLES

WORKING WITH COUPLES

Working with couples involves of the challenges inherent with individual clinical practices, but is further complicated by possible competing interests between parties. This can exacerbate tensions which most often arise over issues of disclosure involving information that one member of the couple may have regarded as privileged and not to be shared with the other partner. While this issue has not made its way into any recent Texas appellate case, three cases from other jurisdictions provide guidance on likely legal interpretations.

In our first case, the 1982 holding in *MacDonald v. Clinger*, a New York appellate court (in New York its Supreme Court in the next-to-highest court in the State) affirms that disclosure of information to party is actionable, and provides a helpful discussion of its reasoning.

84 A.D.2d 482

V. Paul **MacDONALD**, Respondent,
v.
O. W. **CLINGER**, Appellant

Supreme Court, Appellate Division, Fourth Department, New York
January 22, 1982

APPEARANCES OF COUNSEL

Harris, Beach, Wilcox, Rubin & Levey (*Robert E. Skiver* and *Edward H. Fox* of counsel), for appellant.*William J. MacDonald* for respondent.

OPINION OF THE COURT

Denman, J.

We here consider whether a psychiatrist must respond in damages to his former patient for disclosure of personal information learned during the course of treatment and, if he must, on what theory of recovery the action may be maintained. We hold that such wrongful disclosure is a breach of the fiduciary duty of confidentiality and gives rise to a cause of action sounding in tort.

The complaint alleges that during two extended courses of treatment with defendant, a psychiatrist, plaintiff revealed intimate details about himself which defendant later divulged to plaintiff's wife without justification and without consent. As a consequence of such disclosure, plaintiff alleges that his marriage deteriorated, that he lost his job, that he suffered financial difficulty and that he was caused such severe emotional distress that he required ****483*** further psychiatric treatment. The complaint set forth three causes of action: breach of an implied contract; breach of confidence in violation of public policy; and breach of the right of privacy guaranteed by article 5 of the Civil Rights Law. Defendant moved to dismiss for failure to state a cause of action, asserting that there was in reality only one theory of recovery, that of breach of confidence, and that such action could not be maintained against him because his disclosure to plaintiff's wife was justified. The court dismissed the third cause of action but denied the motion with respect to the first two causes of action and this appeal ensued.

Research reveals few cases in American jurisprudence which treat the doctor-patient privilege in this context. That is undoubtedly due to the fact that the confidentiality of the relationship is a cardinal rule of the medical profession, faithfully adhered to in most instances, and thus has come to be justifiably relied upon by patients seeking advice and treatment. This physician-patient relationship is contractual in nature,

whereby the physician, in agreeing to administer to the patient, impliedly covenants that the disclosures necessary to diagnosis and treatment of the patient's mental or physical condition will be kept in confidence.

Examination of cases which have addressed this problem makes it apparent that courts have immediately recognized a legally compensable injury in such wrongful disclosure based on a variety of grounds for recovery: public policy; right to privacy; breach of contract; breach of fiduciary duty. (See, generally, Ann., 20 ALR3d 1109; 61 Am Jur 2d, Physicians, Surgeons and Other Healers, § 169). As the Supreme Court of Washington stated in *Smith v Driscoll* (94 Wash 441, 442): "Neither is it necessary to pursue at length the inquiry of whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say, it will be assumed that, for so palpable a wrong, the law provides a remedy." ***484**

An excellent and carefully researched opinion exploring the legal ramifications of this confidentiality is *Doe v Roe* (93 Misc 2d 201), a decision after a nonjury trial in which plaintiff sought injunctive relief and damages because of the verbatim publication by her former psychiatrist of extremely personal details of her life revealed during years of psychoanalysis. The court considered several proposed theories of recovery, including violation of public policy and breach of privacy rights. We agree with the court's observation that the several statutes and regulations requiring physicians to protect the confidentiality of information gained during treatment are clear evidence of the public policy of New York (see, e.g., CPLR 4504, subd [a]; 4507; Education Law, § 6509, subd [9]; 8 NYCRR 29.1 [b] [8]; Mental Hygiene Law, § 33.13, subds [c], [d]; Public Health Law, § 2803-c, subd 3, par f; § 2805-g, subd 3), but that there is a more appropriate theory of recovery than one rooted in public policy.

Neither do we believe that an action for breach of the right of privacy may be maintained (see *Flores v Mosler Safe Co.*, 7 NY2d 276; *Roberson v Rochester Folding Box Co*, 171 NY 538) despite some current predictions to the contrary (see, e.g., *Birnbaum v United States*, 588 F2d 319, 323-326; *Spock v United States*, 464 F Supp 510, 514-516; *Doe v Roe*, 42 AD2d 559, 560, affd 33 NY2d 902; but see *Wojtowicz v Delacorte Press*, 43 NY2d 858).

Another instructive discussion of the legal consequences emanating from the physician-patient relationship is found in *Hammonds v Aetna Cas. & Sur. Co*. (243 F Supp 793), in which plaintiff sought damages from an insurance carrier for procuring his medical records from his physician by falsely representing that plaintiff was suing the physician for malpractice. Looking to Ohio law, the court found that such disclosure was contrary to the public policy of the State, evidence of which could be found in the medical code of ethics; the Ohio statute on privileged communications; and the Ohio licensing statute which prohibited betrayal of confidential information.

Attempting to fashion a remedy based on a traditional legal theory, the court discussed the contractual nature of the relationship: "Any time a doctor undertakes the treatment ***485** of a patient, and the consensual relationship of physician and patient is established, two jural obligations ... are simultaneously assumed by the doctor. Doctor and patient enter into a simple contract, the patient hoping that he will be cured and the doctor optimistically assuming that he will be compensated. As an implied condition of that contract, this Court is of the opinion that the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission. Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence. The promise of secrecy is as much an express warranty as the advertisement of a commercial entrepreneur. Consequently, when a doctor breaches his duty of secrecy, he is in violation of part of his obligations under the contract." (*Hammonds v Aetna Cas. & Sur. Co., supra*, p 801.) The court then determined that from that contractual relationship arose a fiduciary obligation that confidences communicated by a patient should be held as a trust (*Hammonds v Aetna Cas. & Sur. Co., supra*, p 803).

That position was generally adopted by the court in *Doe v Roe* (93 Misc 2d 201, 210-211, *supra*), thus:

> "I too find that a physician, who enters into an agreement with a patient to provide medical attention, impliedly covenants to keep in confidence all disclosures made by the patient concerning the patient's physical or mental condition as well as all matters discovered by the physician in the course of examination or treatment. This is particularly and necessarily true of the psychiatric relationship, for in the dynamics of psychotherapy '[t]he patient is called upon to discuss in a candid and frank manner personal material of the most intimate and disturbing nature ... He is expected to bring up all manner of socially unacceptable instincts and urges, immature wishes, perverse sexual thoughts -- in short, the unspeakable, the unthinkable, the repressed. To speak of such things to another human requires an atmosphere of unusual trust, confidence and tolerance. ... Patients will be helped only if they can form a trusting relationship with ***486** the psychiatrist.' (Heller, Some Comments to Lawyers on the Practice of Psychiatry, 30 Temple L Rev 401, 405-406).
>
> "There can be little doubt that under the law of the State of New York and in a proper case, the contract of private parties to retain in confidence matter which should be kept in confidence will be enforced by injunction and compensated in damages (*Karpinski v Ingrasci*, 28 NY2d 45; *Bates Chevrolet Corp. v Haven Chevrolet*, 13 AD2d 27, 16 AD2d 917, affd without opn 13 NY2d 644; *Millet v Slocum*, 4 AD2d 528, affd without opn 5 NY2d 734; *Lynch v Bailey*, 300 NY 615; *Clark Paper & Mfg. Co. v Stenacher*, 236 NY 312)." (See, also, *Doe v Roe*, 42 AD2d 559, *supra*.)

It is obvious then that this relationship gives rise to an implied covenant which, when breached, is actionable. If plaintiff's recovery were limited to an action for breach of contract, however, he would generally be limited to economic loss flowing directly from the breach (5 Corbin, Contracts, § 1019, at pp 113-115) and would thus be precluded from recovering for mental distress, loss of his employment and the deterioration of his marriage. We believe that the relationship contemplates an additional duty springing from but extraneous to the contract and that the breach of such duty is actionable as a tort. Indeed, an action in tort for a breach of a duty of confidentiality and trust has long been acknowledged in the courts of this State. In *Rich v New York Cent. & Hudson Riv. R. R. Co*. (87 NY 382) the court recognized that there was no clear line of demarcation between torts and breaches of contract (see, also, *Greco v Kresge Co*., 277 NY 26, 33-34; *Busch v Interborough Rapid Tr. Co*., 187 NY 388). In its explanation of the relationship between the two, the court in *Rich* stated as follows (p 390): "Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract".

Only recently we had occasion to reaffirm that concept in *Charles v Onondaga Community Coll.* (69 AD2d 144, 146), ***487** declaring "A duty extraneous to the contract often exists where the contract results in or accompanies some relation between the parties out of which arises a duty of affirmative care as in cases involving bailor and bailee, public carrier and passenger, innkeeper and guest, lawyer and client, or principal and agent (see *Albemarle Theatre v Bayberry Realty Corp*. [27 AD2d 172]; Prosser, Law of Torts [4th ed], pp 613-618)".

The relationship of the parties here was one of trust and confidence out of which sprang a duty not to disclose. Defendant's breach was not merely a broken contractual promise but a violation of a fiduciary responsibility to plaintiff implicit in and essential to the doctor-patient relation.

Such duty, however, is not absolute, and its breach is actionable only if it is wrongful, that is to say, without justification or excuse. Although public policy favors the confidentiality described herein, there is a countervailing public interest to which it must yield in appropriate circumstances. Thus where a patient may be a danger to himself or others (see, e.g., *Tarasoff v Regents of Univ. of Cal*., 17 Cal 3d 425; *Berry v Moench*, 8 Utah 2d 191; *Simonsen v Swenson*, 104 Neb 224), a physician is required to disclose to the extent necessary to protect a threatened interest. "The protective privilege ends where the public peril begins" (*Tarasoff v Regents of Univ. of Cal., supra*, at p 442).

Contending that disclosure here was justified because it was made only to plaintiff's wife, defendant relies on *Curry v Corn* (52 Misc 2d 1035) in support of that position. In that case the court found justifiable the disclosure of information to a husband by his wife's doctor who knew the information would be used by the husband in a pending matrimonial action. Even overlooking the shortcomings of that determination, it was based at least in part upon the husband's status as head of the marital household and responsible for his wife's debts. It is thus inapplicable here where it is the wife who sought disclosure and is outmoded in any event (see General Obligations Law, § 3-301, subd 1; § 5-311). ***488**

Although the disclosure of medical information to a spouse may be justified under some circumstances, a more stringent standard should apply with respect to psychiatric information. One spouse often seeks counselling concerning personal problems that may affect the marital relationship. To permit disclosure to the other spouse in the absence of an overriding concern would deter the one in need from obtaining the help required. Disclosure of confidential information by a psychiatrist to a spouse will be justified whenever there is a danger to the patient, the spouse or another person; otherwise information should not be disclosed without authorization. Justification or excuse will depend upon a showing of circumstances and competing interests which support the need to disclose (cf. *Berry v Moench*, 8 Utah 2d 191, *supra*). Because such showing is a matter of affirmative defense, defendant is not entitled to dismissal of the action.

The order should be modified to dismiss the cause of action for breach of contract and as modified should be affirmed.

Simons, J. P. (Concurring).

Plaintiff seeks in this action to recover from defendant, his psychiatrist, for defendant's allegedly unjustified and damaging disclosure of confidential information about plaintiff's condition to plaintiff's wife. The members of the court are agreed that he may do so and that the action sounds in tort. We are divided about the nature of the cause of action, however, the majority believing it to be a “breach of fiduciary duty to confidentiality”, while I believe the cause of action to be for malpractice. The difference is one of substance, for the majority hold plaintiff may recover if he submits evidence of the professional relationship, the disclosure of confidential information and damages. Once plaintiff does so, it is for the doctor to offer evidence of justification and for the jury to weigh it. Plaintiff's right to recover, as they see it, rests on proof of an unauthorized disclosure, the breach of an implied promise to hold confidential information received during treatment. In my view, plaintiff's right to recover must rest upon his proof that the disclosure was wrongful or unjustified. ***489**

When a physician undertakes treatment of a patient, he impliedly represents that he possesses, and the law places upon him the duty of possessing, the reasonable degree of learning and skill possessed by physicians in the community generally. Culpable fault exists if the physician fails to live up to this standard (see *Pike v Honsinger*, 155 NY 201, 209). Confidentiality, particularly in the case of a psychiatrist, is a significant and important aspect of medical treatment and a promise of nondisclosure may readily be implied from the physician-patient relationship. Thus, the relationship has elements of a contract, as plaintiff's first cause of action suggests, but commonly malpractice is a tort action predicated upon the physician's violation of his duty to supply the quality of care promised when he undertook to treat the patient. The physician's duty to honor this implied promise of confidentiality is merely another aspect of the treatment rendered and should be judged similarly.

The majority, by taking the cause of action out of the malpractice area, hold that all unauthorized disclosures, prima facie, violate reasonable medical care. The disclosure may be excused only if defendant proves that it was precipitated by danger to the patient, spouse or another. No other disclosure is permissible, apparently, even if mandated by statute (see, e.g., Public Health Law, § 3372; Penal Law, § 265.25).

But further than that, the established rules of professional malpractice base liability upon an objective standard measured by the general quality of care of the professional community (see *Toth v Community Hosp. at Glen Cove*, 22 NY2d 255, 262). The rule advanced by the majority permits the standard of care in unauthorized disclosure cases to be set by the jury. Thus, in every case of disclosure, the physician is exposed to the danger of a damage verdict resting upon the jury's subjective view of his explanation of his conduct even if it was in accordance with accepted medical practice. Thus, a jury disbelieving a physician's evaluation that a patient is assaultive or suicidal may hold the physician liable for the most limited but necessary disclosure relating to such commonplace matters as advice ***490** to ensure that the patient takes prescribed medication or avoids stressful situations.

In short, to avoid a nonsuit, a plaintiff should submit evidence of more than an unauthorized disclosure by the physician. There should be evidence that the physician has engaged in the unskilled practice of medicine. The relationship between the parties, after all, is medical, not fiduciary. The doctor is hired to treat the patient and his liability, if any, should be predicated upon his failure to do so properly.

The majority rely on *Doe v Roe* (93 Misc 2d 201, *supra*), but the facts of that case are not analogous. In *Doe* the psychiatrist published a book containing confidential information concerning a former patient. This was a commercial use of the information, clearly unrelated to the care of the patient and antagonistic to her best interests. The evidence at trial may establish that the disclosure here was similarly unrelated to plaintiff's treatment, but it was made in a medical setting to a member of plaintiff's family and defendant's conduct should be judged, therefore, by malpractice standards.

Plaintiff should submit evidence that defendant did not exercise reasonable care in disclosing the confidential information to plaintiff's wife and the legal rules governing professional malpractice actions generally should be applied to determine liability at the trial.

Callahan, Doerr and Moule, JJ., concur with Denman, J.; Simons, J. P., concurs in a separate opinion.

Order modified, and as modified affirmed, with costs to defendant, in accordance with opinion by Denman, J. ***491**

The next case in this series, the 1997 New Mexico *Eckhardt v. Charter Hospital of Albuquerque, Inc.*, concurs with *MacDonald v. Clinger*, but looks beyond therapist liability to the often-complex questions involved with assessing liability of an institution or corporation with which the therapist may be associated.

953 P.2d 722

Court of Appeals of New Mexico.
Kathleen **ECKHARDT**, Plaintiff-Appellant/Cross-Appellee,
v.
CHARTER HOSPITAL OF ALBUQUERQUE, INC., A New Mexico Corporation, Defendant-Appellee/Cross-Appellant,
William Kent McGregor, Defendant,
And Courtney Cook, Defendant-Appellee.

No. 17116.
Nov. 12, 1997.

Patient sued hospital and therapist for damages based on alleged sexual assault by therapist and based on alleged disclosure of confidential information to patient's husband. The District Court, Santa Fe County, Steve Herrera, D.J., entered judgment on jury verdict awarding patient $132,000 against hospital on claim of negligent selection and supervision, $70,000 against hospital on claim of fraudulent

misrepresentation, and $80,000 against hospital on claim of negligent misrepresentation. Verdict was directed for hospital on wrongful disclosure and other claims. Appeals were taken. The Court of Appeals, Armijo, J., held that: (1) clinic director owed plaintiff a duty of confidentiality, for purposes of wrongful disclosure claim based on director's revelation to plaintiff's husband that director knew of abuse by husband; (2) good faith and absence of intent to harm did not preclude recovery on wrongful disclosure claim; (3) jury question existed as to whether director's disclosures proximately caused plaintiff's damages; (4) trial court's disclosure to jury that default judgment of $1 million had been entered against absent therapist and that half of award was in punitive damages was abuse of discretion; (5) jury question existed as to whether plaintiff was a patient of hospital, and trial court properly submitted that issue to jury for purposes of deciding whether hospital owed duty to plaintiff; (6) evidence supported verdict against hospital on negligent selection and supervision claim; (7) verdict against hospital on negligent misrepresentation claim was supported by evidence; (8) evidence did not support inference that hospital intended to give false impression regarding employment status of therapist, and thus recovery on fraudulent misrepresentation claim was precluded; (9) trial court properly refused to allow punitive damages on negligent selection, supervision, and misrepresentation claims; and (10) plaintiff failed to show that hospital violated Unfair Trade Practices Act.

Affirmed in part, reversed in part, and remanded.

OPINION

ARMIJO, Judge.

1. This appeal and cross appeal arise out of a civil action filed by Kathleen Eckhardt (Plaintiff) against Charter Hospital of Albuquerque (Charter), William Kent McGregor (McGregor), and Courtney Cook (Cook) for damages sustained as a result of a sexual assault on Plaintiff by McGregor on July 16, 1987, in Santa Fe, New Mexico. Plaintiff alleged that she was assaulted while she was receiving counseling from McGregor, a certified social worker, at the offices of the Charter Counseling Center of Santa Fe (CCC). Cook was the director of the CCC, a facility owned by Charter. The trial court entered a default judgment against McGregor, and he is not a party to this appeal.

2. The case was tried before a jury which awarded Plaintiff the sum of $132,000 against Charter on her claim of negligent selection and supervision of McGregor; the sum of $70,000 against Charter on her claim of fraudulent misrepresentation; and the sum of $80,000 against Charter on her claim of negligent misrepresentation.

3. Plaintiff appeals from the trial court's order granting a directed verdict on her claims for punitive damages, wrongful disclosure, and violation of the Unfair Practices Act. Plaintiff also challenges the trial court's disclosure to the jury of a $1 million default judgment award entered against McGregor. Charter cross-appeals from the trial court's order denying its motion for a directed verdict and the trial court's entry of judgment for separate damage awards for fraudulent misrepresentation and negligent misrepresentation based upon the same conduct. Charter also challenges the trial court's failure to decide Defendant's amended motion for summary judgment and rule on the legal question of whether Charter owed a duty to Plaintiff as a Charter patient.

4. For the reasons discussed below, we affirm the judgment with respect to Plaintiff's claims against Charter for negligent misrepresentation and negligent selection and supervision of McGregor. We affirm the trial court's rulings with respect to summary judgment motions filed by the parties as they related to the claims set forth in the Second Amended Complaint. We affirm the trial court's rulings with respect to the directed verdicts on the claims for punitive damages and violation of the Unfair Practices Act. We reverse the judgment on Plaintiff's claim of fraudulent misrepresentation, and reverse the trial court's decision to grant a directed verdict dismissing Plaintiff's claim against Cook for wrongful disclosure. We determine that the trial court erred in disclosing to the jury the nature and amount of the default judgment entered against McGregor.

I. BACKGROUND

5. The procedural posture of this case is complex. The initial complaint was filed on ****726 *553*** March 15, 1990. Plaintiff sought compensatory and punitive damages from McGregor for wanton and willful misconduct, battery, and intentional infliction of emotional distress. She sought compensatory and punitive damages from Charter under various theories, not all of which are relevant to this appeal. Plaintiff alleged that Cook divulged confidential information to a third party (Plaintiff's husband) and that she suffered damages as a result.

6. During the pendency of the present case, Charter filed a separate declaratory judgment action to determine if Charter had a duty to defend McGregor; the two actions were consolidated. The present (tort) action was stayed pending disposition of the declaratory judgment action which was tried on August 12, 1991. A judgment was filed on December 17, 1991, which determined that McGregor was an independent contractor. No appeal of that judgment followed.

7. Based on the declaratory judgment, Charter moved for summary judgment on all counts against it in the tort action. Plaintiff was granted leave to amend her complaint. The trial court ultimately granted summary judgment in favor of the Defendants on certain issues, and Plaintiff appealed to the Supreme Court. On August 8, 1994, the Supreme Court affirmed the district court's dismissal of Plaintiff's claims that McGregor was an employee and apparent employee of Charter and reversed the district court's dismissal of Plaintiff's negligent selection and supervision claim.

8. On October 26, 1994, the trial court granted Plaintiff's motion to file a Second Amended Complaint, in which Plaintiff stated the claims which relate to the present appeal. Counts I, II and III related to McGregor and are not germane to this appeal because, during a pretrial proceeding, the trial court entered a default judgment against McGregor as to liability due to his failure to appear at the proceedings. Determination of the amount of damages to be assessed against him was left to a later time.

9. The remaining claims, all relating to Charter and Cook, can be summarized as follows. Count IV alleged that Charter was negligent in its employment and supervision of McGregor and in its failure to terminate him. Count V alleged that Charter violated the Unfair Practices Act by engaging in false advertising in its promotional materials with regard to the quality of its services and its affiliation with McGregor. Count VI alleged that Charter made fraudulent or, alternatively, negligent misrepresentations in its advertising and in other statements indicating that McGregor was its employee. Count VII alleged that Charter and Cook breached their duty of confidentiality by intentionally and negligently disclosing confidential information to Plaintiff's husband. The information related to her history of spousal abuse.

10. Plaintiff moved for summary judgment as to Count IV on April 6, 1995, and Charter filed an amended motion for summary judgment on all outstanding claims. The trial court heard the motions for summary judgment on June 5, 1995, and denied both motions. Voir dire began on June 20, 1995, with the trial commencing on July 25, 1995.

11. During the trial, Plaintiff requested that the trial court assess damages against McGregor. The trial court entered an award of $500,000 in compensatory damages and $500,000 in punitive damages against McGregor. The trial court disclosed both the nature and the amount of this award to the jury, over Plaintiff's objection.

12. At the close of Plaintiff's case, Charter moved for a directed verdict on the remaining counts in Plaintiff's Second Amended Complaint. This motion was granted in part and denied in part with respect to Count IV (negligent selection and supervision) and Count VI (fraudulent or negligent misrepresentation). The trial court also granted Charter's motion with respect to Count V (Unfair Practices Act) and Count VII (wrongful disclosure).

13. Plaintiff's request for jury instructions on punitive damages was refused. The trial court instructed the jury on Plaintiff's claims for negligent selection and supervision, and both fraudulent and negligent

misrepresentation. The instructions did not indicate that the misrepresentation claims were pled in the alternative. The jury returned***727 *554*** a verdict awarding Plaintiff damages on each of these claims. These appeals followed.

II. DISCUSSION

14. For the sake of clarity, our discussion departs from the order in which the issues arose in the trial court or were briefed by the parties on appeal. Instead, we address the parties' claims on appeal in the following order: (A) Plaintiff's wrongful disclosure claim against Cook; (B) the trial court's disclosure of the default judgment against McGregor; (C) Plaintiff's negligence claims against Charter; (D) Plaintiff's claim against Charter for fraudulent misrepresentation; (E) Plaintiff's claims against Charter for punitive damages; and (F) Plaintiff's claim against Charter for violation of the Unfair Practices Act.

A. *Wrongful Disclosure of Confidential Communication*

15. In her capacity as director of the CCC, Cook disclosed to Plaintiff's husband (Mr. Eckhardt) that she knew (from talking to Plaintiff, McGregor, or both) that Mr. Eckhardt was an "abusive alcoholic" whose spousal abuse was related to his drinking. On appeal, Cook contends that this information was not privileged or confidential, and therefore its disclosure to Mr. Eckhardt was not wrongful. The trial court granted Defendant's motion for directed verdict on this issue, reasoning that Cook did not intend to harm Plaintiff by disclosing this information, and that the evidence was insufficient to establish that the disclosure was a proximate cause of Plaintiff's damages.

16. We determine that: (1) the information which Plaintiff shared with Cook or McGregor concerning Mr. Eckhardt's alcohol problem and spousal abuse was confidential; (2) Plaintiff was not required to prove that Cook's disclosure of this information was intended to harm her; and (3) the evidence was sufficient to establish a jury question as to whether the disclosure was a proximate cause of Plaintiff's damages. We reverse the trial court's ruling and remand for a jury trial on Plaintiff's wrongful disclosure claim. *See* Sunwest Bank v. Garrett, 113 N.M. 112, 115, 823 P.2d 912, 915 (1992) ("A directed verdict is appropriate only when there are no true issues of fact to be presented to a jury.").

17. We first address whether Plaintiff's wrongful disclosure claim is precluded by the trial court's finding that Cook did not intend to harm Plaintiff by making the disclosure to Mr. Eckhardt. We note that under some theories of recovery, a plaintiff may be required to prove that the disclosure was made with a malicious or harmful intent. *See, e.g.*, Clark v. Geraci, 29 Misc.2d 791, 208 N.Y.S.2d 564, 568-69 (Sup.Ct.1960) (claim under prima facie tort theory required intent to harm). In addition, the fact that the disclosure was made in good faith may constitute one element of an affirmative defense to a wrongful disclosure claim. *See, e.g.*, NMSA 1978, § 32A-4-5(B) (1995) (persons reporting child neglect or abuse "shall be immune from liability ... unless the person acted in bad faith or with malicious purpose"); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831, 832 (1920) (qualified physician reporting diagnosis necessary to halt spread of highly contagious disease is immune from liability if acting in good faith, with reasonable grounds for diagnosis, and without malice). In the present case, however, Plaintiff does not bring her wrongful disclosure claim under a theory that requires an intent to harm, and we determine that the absence of such an intent, standing alone, is insufficient to establish a justification or excuse that would warrant a directed verdict.

18. To support her claim that Cook owed her a duty of confidentiality, Plaintiff relies on *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982). In *Clinger*, 446 N.Y.S.2d at 802, a New York court held that a psychiatrist's wrongful disclosure to a patient's spouse of personal information learned during the course of treatment "is a breach of the fiduciary duty of confidentiality and gives rise to a cause of action sounding in tort." The essence of the claim recognized in *Clinger* is that the relationship between a provider of mental health care and his or her patient is one of trust and confidence, and out of this special relationship springs a fiduciary duty not to disclose. *See* ***728 *555*** *id.*, 446 N.Y.S.2d at 805. In other contexts, New Mexico courts also have recognized that the confidential relationship between a health-care

provider and his or her patient may give rise to a fiduciary duty. *See* Keithley v. St. Joseph's Hosp., 102 N.M. 565, 569, 698 P.2d 435, 439 (Ct.App.1984) (duty to disclose all material information regarding treatment to patient); *Garcia v. Presbyterian Hosp. Ctr.*, 92 N.M. 652, 654-55, 593 P.2d 487, 489-90 (Ct.App.1979) (same).

19. However, the fiduciary duty of confidentiality is not absolute. "The contours of the asserted duty of confidentiality are determined by a legal source external to the tort claim itself[,]" *Humphers v. First Interstate Bank*, 298 Or. 706, 696 P.2d 527, 534 (1985) (en banc); and "its breach is actionable only if it is wrongful, that is to say, without justification or excuse." *Clinger*, 446 N.Y.S.2d at 805.

20. In the present case, we determine the contours of the asserted duty of confidentiality as well as any affirmative defenses of justification or excuse, by reference to expressions of public policy stated in New Mexico's professional licensing statutes, rules of evidence, and our state constitution. The New Mexico legislature has recognized that the duty to safeguard patient confidences extends to psychologists, social workers, mental health counselors and therapists, and their staffs. *See* NMSA 1978, §§ 61-9-18 (1989) (psychologists and psychologist associates); 61-9A-27 (1993) (mental health counselors and therapists); 61-31-24 (1989) (social workers); *cf. Jaffee v. Redmond*, 518 U.S. 1, 13-19, 116 S.Ct. 1923, 1930-32, 135 L.Ed.2d 337 (1996) (recognizing that it serves no discernible public purpose to draw distinctions between clinical social work and other mental health professions with regard to the need for confidentiality). In addition, the New Mexico Rules of Evidence recognize a psychotherapist-patient privilege under which a patient may "prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition ... among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist...." Rule 11-504(B), NMRA 1997; *see also Jaffee*, 518 U.S. at 15, 116 S.Ct. at 1931 (recognizing privilege under federal rules). In the context of the criminal justice process, Article II, Section 24(A)(1) of the New Mexico Constitution recognizes that victims of crimes such as criminal sexual penetration and aggravated assault have "the right to be treated with fairness and respect for the victim's dignity and privacy...." *See also* NMSA 1978, § 31-26-4(A) (1995).

21. The expressions of public policy embodied in these authorities are consistent with the duty of confidentiality that health-care professions impose on their own members. Section 4 of the American Medical Association's Principles of Medical Ethics provides that: "A physician shall respect the rights of patients ... and shall safeguard patient confidences within the constraints of the law." American Psychiatric Ass'n, *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* § IV (1984). The National Association of Social Workers, of which McGregor was a member, also requires that a "social worker should respect the privacy of clients and hold in confidence all information obtained in the course of professional service." *Code of Ethics of the National Association of Social Workers* 2(H) (rev.1993).

22. By her own admission at trial, as the director of CCC, Cook had a relationship of trust and confidence with Charter patients that gave rise to a duty to maintain patient confidences. *See Garcia*, 92 N.M. at 655, 593 P.2d at 490 (hospital and its employees stand in confidential relationship with patient). This duty does not depend on whether Cook and McGregor were employees of the same company; it is sufficient that they both were participating in Plaintiff's diagnosis and treatment. *Cf.* Rule 11-504(A)(4), NMRA 1997; *State v. Gonzales*, 1996 NMCA 026, ¶ 15, 121 N.M. 421, 912 P.2d 297 ("confidentiality of a communication is preserved when disclosure is made as part of another confidential relationship"). Cook acknowledged in her testimony that her duty to maintain patient confidences generally applied to patients***729 *556** at the CCC, and specifically applied to the information that Cook obtained from her meeting with Plaintiff. Plaintiff's intent that both McGregor and Cook maintain confidentiality can be inferred from her consent to undergo diagnosis or treatment. *See State v. Roper*, 1996 NMCA 073, ¶¶ 12-13, 122 N.M. 126, 921 P.2d 322. We find Cook's claim on appeal that the information was not privileged

or confidential to be inconsistent with both New Mexico law and her own testimony at trial. We conclude that Cook owed Plaintiff a duty to maintain confidentiality.

23. We next address whether Cook's good faith and absence of intent to harm Plaintiff in making the disclosure, provide a justification or excuse that bars Plaintiff's claim of wrongful disclosure as a matter of law. New Mexico's statutes and rules of evidence provide for specific exceptions in which the public interest may outweigh the duty of confidentiality and allow or require a health-care provider to make a disclosure. Health-care providers must report actual or suspected cases of child neglect or abuse. *See* NMSA 1978, § 32A-4-3(A) (1997). Such reports are not subject to the psychotherapist-patient privilege insofar as they are communications that the therapist is "required by statute to report to a public employee or state agency." *See* Rule 11-504(D)(4), NMRA 1997. There is an exception for disclosures which are necessary to protect against dangers that patients may pose to themselves or others. *See* §§ 61-9A-27(B), 61-31-24(B) (allowing for disclosure of confidential information that reveals contemplation of crime or harmful act or indicates that person was victim of crime required to be reported by law); *Clinger*, 446 N.Y.S.2d at 805 (recognizing that necessity of disclosing information to protect against danger that patient poses to himself or others may provide affirmative defense to wrongful disclosure claim). Rule 11-504(D) also lists specific exceptions to the psychotherapist-patient privilege for certain communications that involve parties in litigation. Finally, a crime victim may waive this privilege by signing a written release allowing a district attorney to access her medical records. *See* *Gonzales*, 1996 NMCA 026, ¶ 16, 121 N.M. 421, 912 P.2d 297.

24. However, our statutes and rules recognize no general exception covering all disclosures that are made in good faith, and we conclude that Cook's good faith (or lack of bad motive), standing alone, is insufficient to establish a justification or excuse that bars Plaintiff's claim of wrongful disclosure as a matter of law.

25. We next address the trial court's finding that the evidence was insufficient to create a jury question regarding whether Cook's disclosure was a proximate cause of Plaintiff's damages. The trial court questioned whether Plaintiff had met her burden of proving which damages were caused by Cook's disclosure as opposed to McGregor's assault. We disagree with the trial court that Plaintiff's damages stemming from the assault preclude a finding that she sustained damages as a result of the disclosure. As noted in our Uniform Jury Instructions, a proximate cause of an injury "need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury." UJI 13-305, NMRA 1997.

26. Plaintiff testified that the last thing she wanted was to have someone at Charter tell her husband that Plaintiff had told Charter that her husband was abusing her. She was afraid that the abuse would get worse if he found out. Plaintiff told her therapist, Dr. Fineman, that Mr. Eckhardt had been very angry about Cook's disclosure and increasingly angry at Plaintiff. Plaintiff became more fearful of him, the hitting increased, and the marital relationship became "exceedingly difficult." Plaintiff claimed that the disclosure undermined her trust in therapy to such an extent that she did not seek further therapy at that point. This evidence was sufficient to create a jury question on the issue of whether Cook's disclosure was a proximate cause of Plaintiff's damages. *See* *Calkins v. Cox Estates*, 110 N.M. 59, 61, 66, 792 P.2d 36, 38, 43 (1990) (proximate cause is a question of fact for the jury to answer); *Garrett*, 113 N.M. at 115, 823 P.2d at 915 (directed verdict is not appropriate where ***730 *557** there are true issues of fact to be presented to jury).

27. We reverse the trial court's order granting a directed verdict on Plaintiff's claim of wrongful disclosure and remand for a jury trial on this claim.

B. *Disclosure to Jury of Default Judgment Against McGregor*

28. Plaintiff asserts that she was unfairly prejudiced by the trial court's disclosure to the jury of the $1 million default judgment against McGregor in that the jurors substantially reduced their award against

Charter because the disclosure led them to believe that Plaintiff already had been adequately compensated by McGregor. Over Plaintiff's objection, the trial court addressed the jury as follows:

> The court has entered a judgment against Mr. McGregor, again as a default matter, in the amount of $1,000,000.00; $500,000 in compensatory damages and $500,000 in punitive damages ... again that is the matter of a default matter which was the amount requested by the plaintiff.

29. Plaintiff does not seek a new trial on the claims for which she prevailed. However, because the issue could recur on remand of the wrongful disclosure claim, we take this opportunity to examine the circumstances, if any, under which a trial court can disclose to a jury the nature and amount of a default judgment entered against an absent co-defendant.

30. This disclosure presents an issue of first impression in New Mexico. Plaintiff argues that the prejudice resulting from the disclosure of the amount of the default judgment can be likened to the prejudice that a defendant suffers when jurors are informed of the existence of a defendant's insurance coverage. We agree that such disclosures may unfairly prejudice a party by prompting jurors to base their decision on that party's apparent wealth rather than on facts which are material to the issues tried. *See* Rule 11-411, NMRA 1997; *Cardoza v. Town of Silver City*, 96 N.M. 130, 136-37, 628 P.2d 1126, 1132-33 (Ct.App.1981). However, the amount of a judgment against a co-defendant differs significantly from evidence of a defendant's insurance coverage because the former could, by implication, attribute wealth to the plaintiff, and the latter could, by implication, attribute wealth to a defendant. We discern potential damage to both parties in the former circumstance.

31. We believe that our Supreme Court's recent opinion in *Fahrbach v. Diamond Shamrock, Inc.*, 122 N.M. 543, 546-50, 928 P.2d 269, 272-76 (1996), and Rule 11-408, NMRA 1997, as interpreted in *Fahrbach,* provide a more appropriate analogy and basis for analysis. Rule 11-408 states that neither party may introduce evidence of a settlement for the purpose of proving "liability for or invalidity of the claim *or its amount.*" (Emphasis added.) We believe that this rule, and its underlying policy as expressed in *Fahrbach,* strongly suggest that disclosure of the amount of money that a plaintiff is awarded from an absent co-defendant is unfairly prejudicial and does not serve a valid purpose. In *Fahrbach,* the trial court informed jurors that there were additional defendants who had settled the plaintiff's claims against them and would not be participating in the trial, although jurors would hear evidence concerning their conduct and would be given an opportunity to assess their fault in causing the plaintiff's injuries. *Id.* at 545, 928 P.2d at 271. Our Supreme Court concluded that the trial court did not abuse its discretion in informing the jury of the fact of settlement because in doing so the trial court was attempting "to eliminate what it reasonably perceived as unnecessary confusion" regarding the status of the absent co-defendants. *Id.* at 549-550, 928 P.2d at 275-76.

32. In the present case, the trial court's decision to disclose the fact of default judgment fell within its authority to manage the trial and rule on evidentiary matters, and we review that action for abuse of discretion. *Id.* at 548, 928 P.2d at 274. A trial court may inform jurors about the reason for a co-defendant's absence if this absence presents a source of confusion, especially when the parties suggest no alternative means of clearing up the confusion. *Id.* at 549, 928 P.2d at 275. In the present case, however, no state ****731 *558*** of confusion was evident and we find no discernible reason for the court to have made the disclosure. The trial court did not only inform the jury of the fact that a default judgment was entered, it went on to state both the *amount* of the default judgment ($1 million) and that this judgment included the sum of $500,000 in punitive damages. Moreover, the court refused to allow Plaintiff to present evidence to the jury regarding McGregor's insolvency and the uncollectibility of the award. Under these circumstances, we conclude that the trial court abused its discretion in disclosing the amount of the default judgment against McGregor.

33. We further determine that disclosure of the punitive nature of the default judgment was impermissible. Punitive damages are personal to the wrongdoer, and imply nothing with regard to the liability of or damages owed by other defendants. "Punitive damages do not measure a loss to the

plaintiff, but rather punish the tortfeasor for wrongdoing and serve as a deterrent." *Sanchez v. Clayton*, 117 N.M. 761, 766, 877 P.2d 567, 572 (1994); *see also Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 269, 881 P.2d 11, 14 (1994) ("The purpose of punitive damages is to punish a wrongdoer."). Hence, "[i]n determining whether a punitive award is justified, the focus is directed at the nature or character of the conduct of the defendant. It is not directed at the nature or extent of the harm sustained by the plaintiff." 1 James D. Ghiardi & John J. Kircher, *Punitive Damages Law and Practice* § 5.01 (1996). For this reason, "punitive damages against two or more defendants must be separately determined." *Sanchez*, 117 N.M. at 766, 877 P.2d at 572 (citation omitted); *see also* Henry Woods & Beth Deeve, *Comparative Fault* § 7.5 (3d. ed.1996) (majority of jurisdictions will not apportion punitive damages award according to comparative fault principles).

34. We discern no valid purpose for disclosing to the jury the fact that punitive damages were awarded against McGregor and the amount of such award. We also reject the proposition that such a disclosure is harmless. In addition to the concern noted above regarding the unfair prejudice caused by attributing wealth to Plaintiff, this disclosure could prejudice other defendants by implying that they, too, deserve to be punished as McGregor was, or by associating the bad actions of one defendant with another. The disclosure of the punitive nature and amount of the default judgment against McGregor was improper.

C. *Negligence*

35. Charter contends that the judgment on Plaintiff's negligence claims must be reversed because it is premised on an error by the trial court in failing to rule on the legal question of whether Charter owed a duty to Plaintiff as one of its patients. The trial court gave the jury a special-verdict form requiring it to make an initial determination of whether Plaintiff was a Charter patient. If the jury did not find that Plaintiff was a Charter patient, the jury was instructed not to answer any further questions. The jury determined that Plaintiff was Charter's patient.

36. We agree with Charter that Plaintiff's negligence claims must be premised on a duty that Charter owed to Plaintiff, *see Lopez v. Maez*, 98 N.M. 625, 630, 651 P.2d 1269, 1274 (1982), and it is for the court to determine as a matter of law whether such a duty exists. *See Calkins*, 110 N.M. at 61, 792 P.2d at 38; *Sarracino v. Martinez*, 117 N.M. 193, 194, 870 P.2d 155, 156 (Ct.App.1994). However, Plaintiff's case presents circumstances in which the question of whether Charter owed her a duty depends on the existence of particular facts. *See Sarracino*, 117 N.M. at 194, 870 P.2d at 156. We determine that the trial court correctly held that the existence of a duty owed by Charter to Plaintiff depended on whether Plaintiff was a Charter patient, and that Plaintiff's status as a Charter patient presents a mixed question of fact and law for the jury to answer by means of a special interrogatory. We find no error in submitting this question to the jury.

37. The parties agree to the legal definition of "patient" take from the Medical Malpractice Act. A patient is defined as "a natural person who received or should have received health care from a licensed health care provider, under a contract, express or implied." NMSA 1978, § 41-5-3E (1977). *****732 *559*** However, they disagree as to the existence of a contract, either express or implied, under which Plaintiff received (or should have received) health care from Charter.

38. To establish the existence of an implied contract with Charter, Plaintiff points to evidence that she responded to Charter's advertisements, attended Charter's workshop given at Charter's counseling center, and filled-out an evaluation form given to her by Cook, a Charter employee, who then delegated the task of "following up" with Plaintiff to McGregor, a contract therapist whom cook identified as "our therapist" and who was given "temporary privileges" by Charter, including an office in Charter's counseling center, clerical support from Charter employees, Charter business cards listing his name and title next to the Charter logo, and the use of Charter letterhead on which McGregor wrote a letter to request funding for Plaintiff's therapy. Charter contends that this evidence only shows that Plaintiff went to Charter for services, not that Charter (as opposed to McGregor) agreed to provide her with any services.

39. We disagree with Charter's assessment. The question of whether Plaintiff was a patient of Charter involves conflicting evidence for the trier of fact to resolve. "[W]here the facts and circumstances of the relationship between the parties are at issue, [the] existence of a duty may become a mixed question of law and fact under which the fact issue must be submitted to the jury for resolution." *R.A. Peck, Inc. v. Liberty Fed. Sav. Bank*, 108 N.M. 84, 89, 766 P.2d 928, 933 (Ct.App.1988). "[W]hen the existence of a contract is at issue and the evidence is conflicting or permits more than one inference, it is for the finder of fact to determine whether the contract did in fact exist." *Garcia v. Middle Rio Grande Conservancy Dist.*, 99 N.M. 802, 807, 664 P.2d 1000, 1005 (Ct.App.1983), *overruled on other grounds by Montoya v. AKAL Sec., Inc.*, 114 N.M. 354, 357, 838 P.2d 971, 974 (1992).

40. Charter next contends that even if the jury properly determined whether Plaintiff was a Charter patient, that finding is insufficient to establish the scope of the duty that it owed to her without further legal determinations by the trial court. Again, we disagree. The trial court's instructions adequately conveyed to the jury that, if Plaintiff was a Charter patient, then Charter had a duty to act with reasonable care in furnishing services to her. The trial court did not err by instructing the jury to resolve the factual disputes concerning whether Charter breached its duties and whether such breaches were the proximate cause of the damages sustained by Plaintiff.

1. *Negligent Selection and Supervision*

41. In order to establish that Charter was negligent in its selection and supervision of McGregor, the jury was instructed that it had to find that Plaintiff met its burden of proving at least one of the following contentions:

> 1. [Charter] negligently selected William Kent McGregor as a contract therapist by failing to adequately investigate McGregor's current clinical competency;
>
> 2. [Charter] negligently selected William Kent McGregor as a contract therapist by failing to adequately investigate McGregor's drug and alcohol addiction;
>
> 3. [Charter] negligently selected William Kent McGregor as a contract therapist by negligently granting him temporary staff privileges with an incomplete application;
>
> 4. [Charter] negligently failed to supervise William Kent McGregor;
>
> 5. [Charter] negligently selected William Kent McGregor to treat Plaintiff.

These instructions are consistent with New Mexico law which recognizes that the doctrine of corporate negligence may impose liability on a hospital for the negligent granting of staff privileges or the negligent supervision of treatment. *See Diaz v. Feil*, 118 N.M. 385, 389, 881 P.2d 745, 749 (Ct.App.1994).

42. In order to make a prima facie showing that Charter negligently retained or granted staff privileges to McGregor, Plaintiff had to establish that Charter negligently failed to screen McGregor's competency, or that it negligently retained him after it knew or should have known of matters involving his general competency. *See* *****733 *560*** *id.* at 390, 881 P.2d at 750. Charter would have to have had prior notice of McGregor's lack of competency before it could be held liable for either granting or continuing staff privileges. *Id.*

43. Plaintiff presented evidence that members of Charter's staff, including Cook, knew of McGregor's past substance abuse problem and his lack of recent clinical experience following his treatment for substance abuse. Plaintiff also presented evidence that under the required standard of care, Charter's Credentials Committee should have obtained more objective information about McGregor's substance abuse history, and that Charter obtained only two of twelve items required for McGregor's credentials. There is evidence that Charter did not provide clinical supervision, peer review, or quality assurance regarding McGregor's services at the Counseling Center. Before the credential review process was complete, Charter issued business cards to McGregor, failed to supervise his use of the cards, and instructed McGregor to "follow up" with Plaintiff after she attended one of Charter's free workshops.

44. Charter disputes these facts. However, in reviewing the evidence supporting the jury's verdict, this Court resolves all disputed facts in favor of the successful party, indulges all reasonable inferences in support of the verdict, and disregards all evidence and inferences to the contrary. *See Clovis Nat'l Bank v. Harmon*, 102 N.M. 166, 168-69, 692 P.2d 1315, 1317-18 (1984). We therefore affirm the judgment with respect to Plaintiff's claim of negligent selection and supervision.

2. *Negligent Misrepresentation*

45. Plaintiff alleged two separate categories of statements as the basis for her misrepresentation claims: (1) misrepresentations about the nature and quality of Charter programs in its advertisements and brochures; and (2) misrepresentations that McGregor was an employee. Defendant moved for a directed verdict with respect to both of these categories and asserted that Plaintiff lacked standing to make such a challenge with respect to Charter's advertisements and brochures. The trial court granted Charter's motion for a direct verdict with respect to the advertisements and brochures because the court found that these items fairly characterized the services available either through the CCC or the Charter Hospital in Albuquerque. Consequently, only one category of misrepresentation was presented to the jury-Charter's alleged misrepresentation that McGregor was a Charter employee.

46. On appeal, Plaintiff attempts to resurrect her claim that Charter's advertising contained misrepresentations about the nature and quality of its programs. This attempt fails. We agree with the trial court that Charter's advertising and promotional materials, in and of themselves, are not false or misleading. Plaintiff presented no evidence that Charter failed to provide her with the free seminars or other programs that it advertised, or that the quality of such seminars or programs fell below the industry standard. On the contrary, Plaintiff testified that she attended one of Charter's free seminars and found it helpful. However, we agree with Plaintiff that Charter's advertising was relevant to her claim that Charter misrepresented McGregor's status as a Charter employee. Charter's advertisements could have contributed to Plaintiff's belief that, as a Charter employee, McGregor was qualified to conduct therapy or other programs that Charter advertised. The advertisements also specifically represented that McGregor "has been in private practice for seven years" and "has extensive experience as a psychotherapist in private practice as well as leading numerous groups and workshops." Thus, we will consider Charter's advertising in the context of Plaintiff's claim that Charter misrepresented McGregor's employment status.

47. The trial court gave the following instruction on negligent misrepresentation:

To establish a claim of negligent misrepresentation, Plaintiff has the burden of proving that Charter Hospital of Albuquerque, Inc. made the following false misrepresentation:

> 1. Charter Hospital of Albuquerque, Inc. negligently misrepresented to plaintiff ****734 *561*** that McGregor was its employee at the Charter Counseling Center of Santa Fe when he was not its employee;
>
> Plaintiff has the burden of showing that Charter Hospital of Albuquerque, Inc. intended that plaintiff would rely on the false representation and that she did, in fact, rely on the false representation.
>
> Plaintiff also contends and has the burden of proving that such negligent misrepresentation was a proximate cause of her injuries and damages.
>
> The court further instructed the jury that "[a] material misrepresentation is an untrue statement which a party intends the other party to rely on and upon which the other party did in fact rely."

48. In this case, the falsity of any representation that McGregor was a Charter employee is not in dispute, as the trial court instructed the jury that McGregor was an independent contractor, not a Charter employee. Rather, the dispute concerns whether Charter made such a representation to Plaintiff with the intent that she rely upon it, whether Plaintiff did in fact rely upon such a representation, and whether such reliance was a proximate cause of her damages.

49. Plaintiff testified that she was not informed of McGregor's status as an independent contractor either by CCC employees, or by CCC's signs, advertisements, or promotional materials. She presented evidence

that Charter allowed McGregor to use business cards and stationery with the Charter logo, referred to him as “our therapist” at Charter's free seminars, listed him by name in Charter advertisements, and provided him with an office and clerical support in a building that was identified as a Charter facility. Cook acknowledged in her testimony that persons such as Plaintiff might believe that McGregor was a Charter employee under these circumstances, and there was evidence that Charter intended McGregor to facilitate Charter's contact with patients, and thereby generate revenue for Charter, under this arrangement. Plaintiff testified that she relied on these representations as a basis for selecting McGregor as her therapist. As an employee on Charter's clinical staff, McGregor could be expected to have the credentials and supervision required under Charter's Clinical Staff Bylaws. Plaintiff's expert, Dr. Fineman, testified that Charter should have foreseen that a therapist who lacked such credentials or supervision could encounter problems with the transference or counter-transference of sexual feelings between therapist and patient.

50. We determine that the evidence presented at trial was sufficient to support the jury's verdict in this case with respect to the claims for negligent misrepresentation and negligent selection and supervision. *See* *Harmon*, 102 N.M. at 168-69, 692 P.2d at 1317-18. The judgment as to these claims is affirmed.

D. *Fraudulent Misrepresentation*

51. Charter raises several challenges to the judgment regarding Plaintiff's claim of fraudulent misrepresentation. We initially address Charter's contention that the trial court failed to rule on Charter's Amended Motion for Summary Judgment. This issue lacks merit. A review of the record discloses that the trial court heard all motions for summary judgment on June 5, 1995 and denied both the plaintiff's and defendant's motions.

52. Charter next contends that the trial court erroneously permitted the jury to consider the claim of fraudulent misrepresentation and that the Plaintiff was impermissibly allowed a double recovery for both negligence and fraud pertaining to the same misrepresentation. We determine that the trial court erred in submitting the claim of fraudulent misrepresentation to the jury and reverse the judgment with respect to the damages awarded on that claim. Our disposition of Plaintiff's fraud claim makes it unnecessary for us to address the issue of double recovery.

53. As noted in our discussion of negligent misrepresentation, on appeal Plaintiff attempts to resurrect her claim that Charter made misrepresentations about the nature and quality of Charter programs in its advertisements and brochures. Since we agree with the trial court's determination that the advertisements were not false, these advertisements***735 *562** do not provide an independent basis for Plaintiff's claim of fraudulent misrepresentation. We limit our discussion of this issue to Charter's misrepresentations concerning McGregor's status as a Charter employee.

54. The court gave the jury the following instruction on fraudulent misrepresentation:

> To establish a claim of fraudulent misrepresentation, Plaintiff has the burden of proving that Charter Hospital of Albuquerque, Inc. made the following false representation:
>
> 1. Charter Hospital of Albuquerque, Inc. intentionally gave the impression to Kathleen Eckhardt that McGregor was its employee at the Charter Counseling Center of Santa Fe when it knew that he was not its employee;
>
> Plaintiff has the burden of showing that Charter Hospital of Albuquerque, Inc. intentionally made this representation with the intent to deceive plaintiff or with reckless disregard for its truthfulness and to induce plaintiff to rely on the representations;
>
> Plaintiff also has the burden of proving that the plaintiff reasonably relied on the representations made by Charter Hospital of Albuquerque, Inc.

The Plaintiff also contends and has the burden of proving that such fraudulent misrepresentation was a proximate cause of her injuries and damages.

55. We distinguish the elements of negligence and fraud as follows: (1) fraudulent misrepresentation requires an untrue statement, while negligent misrepresentation may involve a statement that is "literally true" but misleading; (2) fraudulent misrepresentation requires the defendant to make the statement recklessly or with knowledge that it is false, while negligent misrepresentation only requires a failure to exercise ordinary care in obtaining or communicating the statement; (3) fraudulent misrepresentation requires an intent to deceive, while negligent misrepresentation only requires an intent that the plaintiff receive and be influenced by the statement where it is reasonably foreseeable that the plaintiff would be harmed if the information conveyed was incorrect or misleading. *See* UJI 13-1632, NMRA 1997 (negligent misrepresentation); UJI 13-1633, NMRA 1997 (fraud); *State ex rel. Nichols v. Safeco Ins. Co.*, 100 N.M. 440, 443 n. 1, 671 P.2d 1151, 1154 n. 1 (Ct.App.1983) (citing Restatement (Second) of Torts § 552 cmt. (a) (1977)).

56. Finally, while negligent misrepresentation may be proven by a preponderance of the evidence, common-law fraud must be proven by clear and convincing evidence. *See* UJI 13-1633; *Safeco*, 100 N.M. at 443, 671 P.2d at 1154; *Eoff v. Forrest*, 109 N.M. 695, 699, 789 P.2d 1262, 1266 (1990). We agree with Charter that there is no direct evidence that Charter or its employees intended to deceive or harm Plaintiff by misrepresenting McGregor's employment status or qualifications. Charter never affirmatively stated to Plaintiff that McGregor was a Charter employee. Rather, the evidence showed that Charter was negligent in failing to clarify McGregor's status during the period when his application for clinical staff privileges was pending. Although the jury was permitted to infer the requisite intent from circumstantial evidence, the inference must be reasonable. *See* UJI 13-308, NMRA 1997; *Cf. Landavazo v. Sanchez*, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990) ("Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion."). In this case, the evidence does not support a reasonable inference that Charter had the intent to deceive Plaintiff regarding McGregor's employment status. We reverse the judgment with respect to Plaintiff's claim of fraudulent misrepresentation.

E. *Punitive Damages*

57. Plaintiff contends that the trial court erred by failing to instruct the jury that it may award punitive damages on Plaintiff's claims for negligent or fraudulent misrepresentation and negligent selection and supervision. "To be liable for punitive damages, a wrongdoer must have some culpable mental state, and the wrongdoer's conduct must rise to a willful, wanton, malicious, reckless, oppressive, or fraudulent level." *****736 *563*** *Ferrellgas*, 118 N.M. at 269, 881 P.2d at 14 (citations omitted). We review the trial court's findings regarding punitive damages for abuse of discretion. *See New Mexico Hosp. Ass'n v. A.T. & S.F. Mem. Hosps. Inc.*, 105 N.M. 508, 513, 734 P.2d 748, 753 (1987). Because an appellate court does not reweigh the evidence, we only examine whether substantial evidence supports the trial court's ruling after viewing the facts and all reasonable inferences in the light most favorable to the party resisting the motion. *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 145, 899 P.2d 576, 588 (1995).

58. We determine that the trial court did not abuse its discretion in finding that Charter's negligence did not rise to the level of culpability required for imposition of punitive damages. There is no evidence of Charter's intent to defraud or harm Plaintiff by deceiving her regarding McGregor's employment status. While we recognize that a breach of duty is more likely to demonstrate a culpable mental state as the risk of danger increases, *Ferrellgas*, 118 N.M. at 269, 881 P.2d at 14, this principle is not dispositive in the present case because there was no evidence that Charter knew prior to the assault on Plaintiff that McGregor presented an especially high risk of danger to its patients. We affirm the trial court's decision to strike the claims for punitive damages as to negligent selection, supervision, and misrepresentation.

F. *Violation of Unfair Practices Act*

59. Plaintiff contends that the trial court erred by granting a directed verdict dismissing her claim that Charter violated the Unfair Practices Act, NMSA 1978, §§ 57-12-1 through -22 (1967, as amended through 1995), by issuing false and misleading advertisements concerning its goods and services on which Plaintiff relied to her detriment.

60. "Generally, the Unfair Practices Act is intended to provide a private remedy for individuals who suffer pecuniary harm for conduct involving either misleading identification of a business or goods, or false or deceptive advertising." *Parker v. E.I. Du Pont de Nemours & Co.*, 121 N.M. 120, 132, 909 P.2d 1, 13 (Ct.App.1995). Thus, an essential element of Plaintiff's claim regarding an "unfair or deceptive trade practice" under the Act is that a "false or misleading oral or written statement, visual description or other representation of any kind [was] knowingly made [by Charter] in connection with the sale, lease, rental or loan of goods or services...." Section 57-12-2(D); *Ashlock v. Sunwest Bank*, 107 N.M. 100, 101, 753 P.2d 346, 347 (1988), *overruled on other grounds by Surgidev*, 120 N.M. at 140, 899 P.2d at 583. The subjective belief of the party receiving the information is not sufficient to establish a violation of the Act. *See Page & Wirtz Constr. Co. v. Solomon*, 110 N.M. 206, 210, 794 P.2d 349, 353 (1990).

61. Since Plaintiff failed to show that Charter's advertising was false or misleading in connection with the sale of its goods and services, she failed to establish a claim under the Unfair Practices Act. *See Ashlock*, 107 N.M. at 101, 753 P.2d at 347. Therefore, we affirm the trial court's decision to dismiss Plaintiff's claim for violation of the Unfair Practices Act.

III. CONCLUSION

62. We affirm the judgment with respect to Plaintiff's claims for negligent misrepresentation and negligent selection and supervision. We affirm the trial court's decision to grant a directed verdict dismissing Plaintiff's claims for violation of the Unfair Practices Act and punitive damages. We reverse the judgment with respect to Plaintiff's claims for fraudulent misrepresentation, and we reverse the trial court's decision to grant a directed verdict dismissing Plaintiff's claim for wrongful disclosure. We remand to the trial court for trial on Plaintiff's wrongful disclosure claim.

63. **IT IS SO ORDERED.**

ALARID and FLORES, JJ., concur.

Finally, our third case addresses the question of whether breach of confidentiality in a couples case can rise to the tort of Intentional Infliction of Emotional Distress. In the 2002 case of *Gracey v. Eaker,* the State of Florida struggled to reconcile an instance of extraordinary harm inflicted by a clinician's disclosers against that state's requirement that Intentional Infliction of Emotional Distress required physical harm. Texas law does not impose the "Impact Rule," and recognizes emotional distress as "when the distress inflicted is so extreme that no reasonable man could be expected to endure it without undergoing unreasonable suffering". *Badgett*, 818 F.Supp. at 1003, citing *Tidelands*, 699 S.W.2d at 941, 945. [Emphasis added]. Nevertheless, the debate reflected in this case has implications for all psychologists.

837 So.2d 348

Supreme Court of Florida.

Donna **GRACEY** and Joseph Gracey, Petitioners,
v.
Donald W. **EAKER**, Respondent.

No. SC00-153.

Dec. 19, 2002.

Patients brought negligence action against psychotherapist, alleging breach of confidentiality. The Circuit Court, Orange County, Richard F. Conrad, J., dismissed complaint. Patients appealed. The District

Court of Appeal, Antoon, C.J., 747 So.2d 475, affirmed and certified question to the Supreme Court. The Supreme Court, Lewis, J., held that: (1) psychotherapist who has created a fiduciary relationship with his or her client owes that client a duty of confidentiality, and a breach of such duty is actionable in tort, and (2) impact rule was inapplicable in cases in which psychotherapist created fiduciary relationship with patient and breached statutory duty of confidentiality to patient.

So ordered.

Pariente, J., concurred and filed separate opinion.

Harding, Senior Justice, dissented and filed separate opinion in which Wells, J., concurred.

Emotional distress damages in invasion of privacy claims typically are not subject to the strictures of the impact rule, that is, requiring a plaintiff seeking to recover emotional distress damages in a negligence action prove that the emotional distress flows from physical injuries the plaintiff sustained in an impact upon his or her person.

We have for review *Gracey v. Eaker*, 747 So.2d 475 (Fla. 5th DCA 1999), in which the district court affirmed the dismissal of an action initiated by the petitioners, Donna and Joseph Gracey ("Graceys"), a couple allegedly injured by the counseling activities of a psychotherapist, against Dr. Donald W. Eaker ("Eaker"). The Graceys sought the recovery of emotional distress damages that were allegedly inflicted by Eaker's actions in revealing the most confidential of information disclosed to him by each individual during and only as part of a confidential and fiduciary relationship. In affirming the dismissal of the Graceys' action, the district court held that their complaint sounded in negligence and failed to adhere to the "requirement [of the impact rule] that some physical impact to a claimant ... be alleged and demonstrated before the claimant can recover [emotional distress] damages." *Id.* at 477.

In addition to affirming the dismissal of the petitioners' action, the district court certified a question of great public importance:

WHETHER AN EXCEPTION TO FLORIDA'S IMPACT RULE SHOULD BE RECOGNIZED IN A CASE WHERE INFLICTION OF EMOTIONAL INJURIES RESULTED FROM THE BREACH OF A STATUTORY DUTY OF CONFIDENTIALITY.

Id. at 478. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. We are concerned that the certified question as phrased by the district court may be more expansive than necessary to resolve this case under the facts before us. Therefore, we rephrase the certified question limited to the facts involved here as follows: [FN1]

FN1. We have rephrased certified questions in the past to conform them more properly to the true issue under review. *See, e.g., Waite v. Waite*, 618 So.2d 1360 (Fla.1993).

WHETHER FLORIDA'S IMPACT RULE IS APPLICABLE IN A CASE IN WHICH IT IS ALLEGED THAT THE INFLICTION OF EMOTIONAL INJURIES HAS RESULTED FROM A PSYCHOTHERAPIST'S BREACH OF A DUTY OF CONFIDENTIALITY TO HIS PATIENT, WHEN THE PSYCHOTHERAPIST HAS CREATED A ***351** STATUTORY CONFIDENTIAL RELATIONSHIP.

For the reasons stated below, we answer the rephrased certified question in the negative and hold that the impact rule is inapplicable to the facts of the case before us.

FACTS

In a fourth amended complaint, the Graceys averred that Eaker is a licensed psychotherapist who, for profit, provided treatment to them in individual counseling sessions, ostensibly seeking to intervene in the most personal of matters directed to marital difficulties. They also alleged that Eaker, during individual therapy sessions, would inquire about, and each of the [petitioners] would disclose to him, very sensitive and personal information that neither had disclosed to the other spouse at any time during their

relationship. [Petitioners] would disclose this information because they were led to believe, by [Eaker], that such information was necessary for treatment purposes.

The petitioners further alleged that a direct violation of Florida law occurred in that despite being under a statutorily imposed duty to keep the disclosed information confidential,[FN2] Eaker nevertheless unlawfully divulged to each of the petitioners "individual, confidential information which the other spouse had told him in their private sessions." Subsequent to these disclosures, the Graceys set forth that they realized that Eaker had devised "a plan of action ... designed to get [them] to divorce each other." The Graceys claimed that such actions by Eaker constituted "breaches ... of his fiduciary duty of confidentiality [that was] owed [individually] to [them]."

> FN2. Section 491.0147, Florida Statutes (1997), discussed *infra,* requires psychotherapists to keep confidential the substance of patient communications.

With regard to the damages resulting from Eaker's actions, the Graceys alleged that they have sustained severe mental anguish upon learning of [the] actions of the other spouse, of which they individually were not aware, and that [Eaker's] disclosure [of these actions] has caused irreparable damage to any trust that they would have had for each other.... [Moreover, they alleged that Eaker's] actions have caused great mental anguish for the[m] individually in their personal relationships with others due to their inability to trust the others in those personal relationships.

Additionally, the Graceys asserted that they have incurred substantial costs and expenses in undergoing further treatment in an attempt to correct the mental damage inflicted upon them by Eaker's actions.

In upholding the trial court's dismissal of the petitioners' action, the district court expressed that it was "constrained to agree" with Eaker's assertion that a dismissal was proper, "because Florida law does not recognize a cause of action for negligent infliction of emotional distress without an accompanying physical injury." *Gracey,* 747 So.2d at 477.

ANALYSIS

We conclude that while the determinations by both the trial court and the district court relied upon general principles of Florida tort law and general application of the "impact rule," such does not accommodate the intent and purpose of section 491.0147 of the Florida Statutes and renders its protection meaningless. Accepting all well-pled allegations as true, which we are required to do because this case is before us on the dismissal of the ****352*** action at the pleading stage,[FN3] we determine that the plaintiffs have presented a cognizable claim for recovery of emotional damages under the theory that there has been a breach of fiduciary duty arising from the very special psychotherapist-patient confidential relationship recognized and created under section 491.0147 of the Florida Statutes.

> FN3. *See Londono v. Turkey Creek, Inc.*, 609 So.2d 14, 19 n. 4 (Fla.1992).

Decades ago, we commented on the nature of the fiduciary relationship:

> If a relation of trust and confidence exists between the parties (that is to say, where confidence is reposed by one party and a trust accepted by the other, or where confidence has been acquired and abused), that is sufficient as a predicate for relief. The origin of the confidence is immaterial.
>
> *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419, 421 (1927).

We have also accepted the concept that "[t]he purpose of a duty in tort is to protect society's interest in being free from harm." *Casa Clara Condominium Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 620 So.2d 1244, 1246 (Fla.1993). Here, the Graceys allege that Eaker advertised himself as a licensed psychologist with special competence as a marital therapist. The relationship between Eaker and the Graceys was not merely of a casual nature, which states typically do not regulate. For profit, Eaker intentionally interjected himself between the Graceys in the role of confidant and counselor, and under a veneer of trust and confidence encouraged each to reveal without hesitation the most private of thoughts, emotions, fears, and hopes. Without justification or authorization, Eaker is alleged to have repaid this repositing of confidence

in him by placing the dagger of damage in the very soul of the Graceys' marriage, thereby exacerbating the problem for which the Graceys sought his assistance.

The Florida Legislature has recognized and found that one's emotional stability and survival must be protected to the same extent as physical safety and personal security. Our representatives have declared for the people of Florida that "emotional survival is equal in importance to physical survival." § 491.002, Fla. Stat. (2001). To preserve the health, safety, and welfare of Florida's citizens, our Legislature found itself compelled to take action to protect the confidentiality of the communications involved in the most private and personal relationships interwoven with mental health practitioners. In undeniable terms the public policy of this state guards emotional survival, which the Legislature has declared "affects physical and psychophysical survival." It is with this background and structure that the Legislature intended to protect the delicate and fragile disclosures within the professional relationship when it established section 491.0147 of the Florida Statutes, which states in pertinent part: "Any communication between any person licensed or certified under this chapter and her or his patient or client shall be confidential." If this legislative provision is to have any life or meaning and afford reliable protection to Florida's citizens, our people must have access to the courts without an artificial impact rule limitation, to afford redress if and when the fiduciary duty flowing from the confidential relationship and statutory protection is defiled by the disclosure of the most personal of information.

In addition to our stated public policy and statutory structure of protection for certain confidential relationships, we have recently recognized the fiduciary duty generally arising in counseling relationships in *Doe v. Evans*, 814 So.2d 370, 373-75 (Fla.2002). There, one having marital difficulties***353*** alleged that a priest intervened in the situation and during counseling activities breached a duty of trust and confidence by becoming sexually involved with her. *See id.* at 372-73. Recognizing the principles suggested in the Restatement (Second) of Torts, we noted that a fiduciary relationship does exist between persons when one is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship. *See id.* at 374. Further, one in such a fiduciary relationship is subject to legal responsibility for harm flowing from a breach of fiduciary duty imposed by the relationship. *See id.*

With this backdrop of both common law and statutory protection the source of Eaker's duty to the petitioners is easily identified. The statutory scheme clearly mandated that the communications between the petitioners and Eaker "shall be confidential." § 491.0147, Fla. Stat. (1997). This created a clear statutory duty that, if violated, generated a viable cause of action in tort. *See, e.g., Lewis v. City of Miami*, 127 Fla. 426, 173 So. 150, 152 (1937); *Alford v. Meyer*, 201 So.2d 489 (Fla. 1st DCA 1967).

The elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages.[FN4] Florida courts have previously recognized a cause of action for breach of fiduciary duty in different contexts when a fiduciary has allegedly disclosed confidential information to a third party. *See Barnett Bank of Marion County, N.A. v. Shirey*, 655 So.2d 1156 (Fla. 5th DCA 1995) (plaintiff entitled to damages for breach of fiduciary duty because bank employee disclosed sensitive financial information to a third party).[FN5] Moreover, courts in other jurisdictions, along with legal commentators, have concluded that a fiduciary relationship exists between a mental health therapist and his patient. *See, e.g., Hoopes v. Hammargren*, 102 Nev. 425, 725 P.2d 238, 242 (1986) (psychiatrists and all physicians have fiduciary relationship with patients); *Eckhardt v. Charter Hosp. of Albuquerque*, 124 N.M. 549, 953 P.2d 722, 727-28 (Ct.App.1997) (non-physician mental health counselors have fiduciary relationship with their patients); *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982) (noting that fiduciary responsibilities were "implicit in and essential to" the relationship between patient and his psychiatrist); ***354*** *Watts v. Cumberland County Hosp. System, Inc.*, 75 N.C.App. 1, 330 S.E.2d 242, 249-50 (1985) (fiduciary relationship exists between psychiatrist and patient), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986); *see also* Benjamin M. Schutz, *Legal Liability in Psychotherapy* 12 (1982); Charles Eger, *Psychotherapists' Liability for Extrajudicial Breaches of Confidentiality*, 18 Ariz. L.Rev. 1061, 1065 (1976); Restatement (Second) of Torts, § 874 cmt. a. ("A fiduciary relation exists between two persons when one of them is

under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation.") (citation omitted).[FN6]

FN4. *See, e.g.*, *Stevens v. Cricket Club Condominium, Inc.*, 784 So.2d 517 (Fla. 3d DCA 2001) (examining damages as element in claim); *Jacobs v. Vaillancourt*, 634 So.2d 667, 670 (Fla. 2d DCA 1994) (examining duty and breach of duty as elements in claim); *Bernstein v. True*, 636 So.2d 1364, 1367 (Fla. 4th DCA 1994) (examining causation as element in claim); *see also Mosier v. Southern California Physicians Ins. Exchange*, 63 Cal.App.4th 1022, 74 Cal.Rptr.2d 550, 565 (1998) ("The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach.").

FN5. In *O'Keefe v. Orea*, 731 So.2d 680, 686 (Fla. 1st DCA 1998), the district court noted the existence of a fiduciary relationship not only between a psychiatrist and his patient who was an emotionally troubled minor prone to violence, but also between the psychiatrist and the parents of the emotionally troubled minor. The parents had consulted with the psychiatrist on how best to control the behavior of their son. *O'Keefe* appears to be the case in which a Florida appellate court has most directly commented on the issue of whether a fiduciary relationship exists between a mental health therapist and his patient. The cause of action in *O'Keefe,* however, was not described as an action for breach of fiduciary duty.

FN6. This Court, along with courts in other jurisdictions, has determined that a fiduciary relationship exists between physician and patient, whether the physician is a psychotherapist or not. *See Nardone v. Reynolds*, 333 So.2d 25, 39 (Fla.1976) (recognizing general nature of fiduciary relationship between physician and patient), *receded from on other grounds, Hearndon v. Graham*, 767 So.2d 1179 (Fla.2000); *see also Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 446 S.E.2d 648, 651 (1994); *Alexander v. Knight*, 197 Pa.Super. 79, 177 A.2d 142, 146 (1962) (fiduciary relationship between physician and patient). *But see Quarles v. Sutherland*, 215 Tenn. 651, 389 S.W.2d 249 (1965) (stating there is no enforceable duty of confidentiality in physician-patient context, in absence of statute contrary to common law rule); *Boyd v. Wynn*, 286 Ky. 173, 150 S.W.2d 648 (1941) (same, dicta).

In *Alexander v. Knight,* the court stated its belief that "members of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients." *Alexander*, 177 A.2d at 146. We believe this statement is equally applicable to non-physician psychotherapists, who are as much engaged in the healing arts as are physicians.

Clearly evident in the decisions of courts that have determined that a fiduciary relationship exists in the psychotherapist-patient and physician-patient contexts is the notion that a fiduciary has a duty not to disclose the confidences reposed in him by his patients. *See Hoopes v. Hammargren*, 725 P.2d at 242 (psychiatrists and all physicians have duty to keep confidences of patients); *Eckhardt v. Charter Hosp. of Albuquerque*, 953 P.2d at 727-29 (non-physician mental health therapists owed duty of confidentiality to patient); *MacDonald v. Clinger*, 446 N.Y.S.2d at 805 ("The relationship of the parties ... was one of trust and confidence out of which sprang a duty not to disclose [confidential information]."); *Watts v. Cumberland County Hosp. System, Inc.*, 330 S.E.2d at 249-50 (psychiatrist had duty not to disclose confidential information).[FN7] These cases are also persuasive authority and support our conclusion that a psychotherapist who has created a fiduciary relationship [FN8] with his client owes that client a duty of confidentiality, and that a breach of such duty is actionable in tort. [FN9]

FN7. The existence, *vel non,* of a duty is a question of law and is appropriate for an appellate court to review. *See, e.g., McCain v. Florida Power Corp.*, 593 So.2d 500, 502 (Fla.1992).

FN8. The Graceys allege that Eaker is licensed under chapter 491, Florida Statutes (1997).

FN9. We make no determination, in reviewing the trial court's dismissal of the Graceys' action, that a fiduciary relationship was formed between Eaker and the Graceys (and if formed, that it was breached). Such determinations are for the finder of fact to make at trial. *See Palafrugell Holdings, Inc. v. Cassel*, 825 So.2d 937, 939 (Fla. 3d DCA 2001); *Uvanile v. Denoff*, 495 So.2d 1177, 1178-79 (Fla. 4th DCA 1986); *Atlantic Nat'l Bank v. Vest*, 480 So.2d 1328, 1333 (Fla. 2d DCA 1985).

We have previously stated that " '[d]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection [or not]." *Rupp v. Bryant*, 417 So.2d 658, 667 (Fla.1982) (quoting William L. Prosser, *Handbook of the Law of Torts* ***355** § 53 at 325-26 (4th ed.1971)). Here, the statute unambiguously indicates the intent of the Legislature to protect from unauthorized disclosure the confidences reposed by a patient in his or her psychotherapist. A breach of this duty not to disclose is therefore actionable under the common law cause of action for breach of fiduciary duty. *See generally* *Berger v. Sonneland*, 101 Wash.App. 141, 1 P.3d 1187, 1192-93 (2000) (allowing action in tort for breach of physicians' duty of confidentiality delineated in state statute), *rev'd on other grounds*, 144 Wash.2d 91, 26 P.3d 257 (2001); *Eckhardt v. Charter Hosp. of Albuquerque*, 953 P.2d at 728-29 (allowing action in tort for breach of psychological counselor's duty of confidentiality, the sources of such duty being both fiduciary relationship and state statutes).[FN10]

FN10. The respondent argues that because section 491.0147 does not explicitly authorize a cause of action, the petitioners may not bring a cause of action for breach of the duty that the statute imposes. This assertion fails to take into account cases such as *Lewis v. City of Miami* and *Alford v. Meyer*, in which the plaintiffs sued under the common law for breach of a duty that was imposed by statute.

We emphasize that while we determine that a duty of confidentiality exists, it is not absolute. For instance, section 491.0147(1)-(3) of the Florida Statutes delineates three instances in which communications between patient and psychotherapist are not cloaked with confidentiality (none of which applies in the instant case). *See also* *MacDonald v. Clinger*, 446 N.Y.S.2d at 805 ("Disclosure of confidential information by a psychiatrist to a spouse [is] justified whenever there is a danger to the patient, the spouse or another person; otherwise information should not be disclosed without authorization."). It is unnecessary for us at this time to define the exact contours of the exceptions to the duty of confidentiality. The Graceys satisfied the "breach" and "causation" elements of their claim by alleging that Eaker disclosed the confidences of one spouse to the other, and that these disclosures were the proximate cause of their emotional distress. The remaining element of their cause of action, for which the district court certified the question of great public importance, concerns the damage element. Specifically, the issue is whether the "impact rule" is applicable when a psychotherapist is alleged to have inflicted emotional distress on the patient as a result of breaching his fiduciary duty of confidentiality.[FN11]

FN11. The questions of whether Eaker breached his duty of confidentiality to the Graceys, and whether that breach was the proximate cause of the emotional distress the Graceys allege they suffered, are for the jury to determine. Also for the jury to determine is the amount of damages to which the Graceys may be entitled.

The "impact rule" requires that a plaintiff seeking to recover emotional distress damages in a negligence action prove that "the emotional distress ... flow[s] from physical injuries the plaintiff sustained in an impact [upon his person]." *R.J. v. Humana of Florida, Inc.*, 652 So.2d 360, 362 (Fla.1995). Florida's version of the impact rule has more aptly been described as having a "hybrid" nature, requiring either impact upon one's person or, in certain situations, at a minimum the manifestation of emotional distress in the form of a discernible physical injury or illness. *See* *Kush v. Lloyd*, 616 So.2d 415, 422 (Fla.1992). We have stated that "the underlying basis for the [impact] rule is that allowing recovery for injuries resulting from purely emotional distress would open the floodgates for fictitious or speculative claims." *R.J.*, 652 So.2d at 362.

We have, however, in a limited number of instances either recognized an exception to the impact rule or found it to be inapplicable.[FN12] In *Kush v. Lloyd*, we noted that the impact rule generally "is inapplicable to recognized torts in which damages often are predominately emotional." *Kush*, 616 So.2d at 422. Also in *Kush*, we held that the emotional distress damages of parents who had endured the wrongful birth of their deformed child, after having been assured by medical personnel that they were not at risk of conceiving a deformed child, were not subject to proof under the impact rule. *See id.* at 423. We

recognized that if the impact rule was inapplicable to emotional distress damages for torts such as defamation or invasion of privacy, in which the emotional distress of the victim was likely less severe, it should also be inapplicable to the more severe emotional distress of parents who had been assured that they were not at risk of bringing a deformed child into the world. *See id.* at 422-23. [FN13]

FN12. *See* *Time Ins. Co. v. Burger*, 712 So.2d 389 (Fla.1998) (within narrowly defined statutory parameters, emotional distress damages not subject to proof under impact rule); *Tanner v. Hartog*, 696 So.2d 705 (Fla.1997) (impact rule inapplicable to claim for negligent stillbirth); *Kush v. Lloyd*, 616 So.2d 415 (Fla.1992) (impact rule inapplicable to parents' claim for wrongful birth of their severely deformed child); *Champion v. Gray*, 478 So.2d 17, 20 (Fla.1985) (claimant "who, because of his relationship to [an] injured party and his involvement in the event causing that injury, is foreseeably injured," is not required to prove impact upon his person but is required to show proof of emotional distress in form of discernible physical illness or injury).

FN13. We also note that the impact rule is not applied to claims for loss of consortium. *See, e.g.*, *Frye v. Suttles*, 568 So.2d 983 (Fla. 1st DCA 1990); *Albritton v. State Farm Mutual Automobile Ins. Co.*, 382 So.2d 1267 (Fla. 2d DCA 1980).

The emotional distress that the Graceys allege they have suffered is at least equal to that typically suffered by the victim of a defamation or an invasion of privacy. Indeed, we can envision few occurrences more likely to result in emotional distress than having one's psychotherapist reveal without authorization or justification the most confidential details of one's life. Our reasoning in *Kush* thus provides ample support for the notion that the impact rule should be inapplicable to the instant case.[FN14]

FN14. The Graceys rely on *Kush* as primary support for a major revamping of the impact rule, which we decline to undertake. Eaker, on the other hand, argues that *Kush* is inapplicable to the case before us because in *Kush* we said that "the impact doctrine should not be applied where emotional damages are an additional 'parasitic' consequence of conduct that itself is a freestanding tort apart from any emotional injury." *Kush*, 616 So.2d at 422. Eaker asserts that this statement means that the impact rule is inapplicable *only* when an independent tort, such as wrongful birth, is committed and emotional distress damages are parasitically attached to that tort. He argues that no independent tort was committed in the instant case because the Graceys' entire cause of action is bottomed on an allegation of the negligent infliction of emotional distress.

Eaker misapprehends the import of our statement in *Kush*, which we made as an alternative basis for holding the impact rule inapplicable to wrongful birth claims; it clearly was not intended to impose a *sine qua non* for the recovery of emotional distress damages. Moreover, in *Kush* we also made clear our feeling that "[t]he essence of the impact rule remain[ed] intact because ... the tort [of wrongful birth] was committed directly against the mother and the father." *Id.* at 423 n. 5. The same logic holds true in the case before us, because the tort of breach of fiduciary duty is alleged to have been committed directly against the Graceys.

We also find unavailing Eaker's reliance, as persuasive authority, on *Doe v. Univision Television Group, Inc.*, 717 So.2d 63 (Fla. 3d DCA 1998). Eaker fails to consider that in *Univision Television Group*, the district court refused to dismiss the plaintiff's claim for invasion of privacy. As we noted in *Kush*, emotional distress damages in invasion of privacy claims typically are not subject to the strictures of the impact rule.

***357** Furthermore, in *MacDonald v. Clinger*, the New York appellate court considered a case very factually similar to the one before us. In *MacDonald*, it was alleged that during two extended courses of treatment with the defendant psychiatrist, [the] plaintiff revealed intimate details about himself which [the] defendant later divulged to plaintiff's wife without justification and without consent. As a consequence of such disclosure, plaintiff alleges that his marriage deteriorated, that he lost his job, that he suffered financial difficulty and that he was caused such severe emotional distress that he required further

psychiatric treatment. 446 N.Y.S.2d at 802. Similar to the instant case, the defendant in *MacDonald* filed a motion to dismiss, which was granted.

The court in *MacDonald* characterized the relationship between the plaintiff and his psychiatrist as "one of trust and confidence out of which sprang a duty not to disclose. Defendant's breach [of that duty] was ... a violation of a fiduciary responsibility to plaintiff implicit in and essential to [their] relation[ship]." *Id.* at 805. Most important for our purposes is that the court in *MacDonald* did not subject the plaintiff to any special pleading requirements, such as proof under the strictures of the impact rule, regarding his emotional distress damages. Instead, the court concluded that "such [a] wrongful disclosure is a breach of the fiduciary duty of confidentiality and gives rise to a cause of action sounding in tort." *Id.* at 802. We see this line of reasoning in *MacDonald* as highly persuasive and hereby adopt it.

Taking into consideration our decision in *Kush,* the decision in *MacDonald v. Clinger*, the case law on the nature of the fiduciary relationship in the psychotherapist-patient and physician-patient contexts and the attendant duty of confidentiality imposed on the practitioner, along with the intent of the Legislature in passing section 491.0147 of the Florida Statutes, there is ample authority to determine that the impact rule should be inapplicable in the case before us. Therefore, we hold that the impact rule is inapplicable in cases in which a psychotherapist has created a fiduciary relationship and has breached a statutory duty of confidentiality to his or her patient. We therefore answer the rephrased certified question in the negative. We make no comment or determination regarding the merits of the instant case.

The concerns voiced that our decision today will "open the floodgates" of litigation are without merit. We note that the civil trial system in our country has withstood the test of time for more than 200 years. It is a system in which the finder of fact ultimately determines which allegations of injury are meritorious and which are not. We are confident this system will continue to function well when it considers claims of the type now before us. Our Legislature has established the public policy of this state, has stated that emotional status is of equal importance as physical status, and has specifically declared the type of information allegedly disclosed as confidential and privileged. The only reasonable and logical injuries generally flowing from a violation of the statutory protection are emotional in nature. Imposition of the impact rule in this context would render the legislative intent and its statutory implementation meaningless and without substance. The artificial impediment of an impact rule should not ***358*** be imposed to override clear legislative intent.

On the other hand, our holding should not be construed as bringing into question the continued viability of the impact rule in other situations. Six years ago, this Court stated its belief in the overall efficacy of the impact rule:

> We reaffirm ... our conclusion that the impact rule continues to serve its purpose of assuring the validity of claims for emotional or psychic damages, and find that the impact rule should remain part of the law of this state.*R.J. v. Humana of Florida, Inc.*, 652 So.2d at 363.

Today we simply hold that the impact rule is inapplicable under the particular facts of the case before us.

Accordingly, we quash the decision of the district court to the extent that it affirmed the dismissal of the petitioners' claim for emotional distress damages on the basis of the applicability of the impact rule. We remand the cause to the district court with directions that the petitioners be allowed to pursue their claims without having to conform proof of their emotional distress damages to the strictures of the impact rule.

It is so ordered.

ANSTEAD, C.J., and SHAW and QUINCE, JJ., concur.

PARIENTE, J., concurs with an opinion.

HARDING, Senior Justice, dissents with an opinion, in which WELLS, J., concurs.

PARIENTE, J., concurring.

I agree with the majority's decision. However, I write to express my view that Florida should join the growing number of states that have abolished the arbitrary restriction on tort claims imposed by the judicially created impact rule.[FN15]

> FN15. "Although a majority of jurisdictions continue to adhere to the traditional rule requiring some form of physical injury ... there is an emerging judicial trend towards the abolition of the physical injury requirement as a guarantee of the genuineness of claims for mental distress. These jurisdictions have abandoned the artificial restrictions and barriers to recovery ... in favor of a greater reliance on general tort law principles and the sophistication of jurors and the medical profession." Scott D. Marrs, *Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases,* 28 Tort & Ins. L.J. 1, 39 (1992). *See, e.g.*, *Taylor v. Baptist Medical Ctr. Inc.*, 400 So.2d 369, 374 (Ala.1981); *Molien v. Kaiser Found. Hosps.*, 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813, 817-21 (1980); *Montinieri v. Southern New Eng. Tel. Co.*, 175 Conn. 337, 398 A.2d 1180, 1184 (1978); *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509, 519-20 (1970); *Corgan v. Muehling*, 143 Ill.2d 296, 158 Ill.Dec. 489, 574 N.E.2d 602, 606-09 (1991); *Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990); *Clomon v. Monroe City Sch. Bd.*, 572 So.2d 571, 574-78 (La.1990), *cited in Nesom v. Tri Hawk Int'l*, 985 F.2d 208, 210 (5th Cir.1993); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772 (Mo.1983); *Johnson v. Supersave Mkts., Inc.*, 211 Mont. 465, 686 P.2d 209, 212-13 (1984); *Sell v. Mary Lanning Mem'l Hosp. Ass'n*, 243 Neb. 266, 498 N.W.2d 522, 524-25 (1993); *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 395 S.E.2d 85, 97-98 (1990); *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759, 765 (1983); *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 652 (Tex.1987), *overruled in part by Boyles v. Kerr*, 855 S.W.2d 593 (Tex.1993); *Bramer v. Dotson*, 190 W.Va. 200, 437 S.E.2d 773, 774-75 (1993).

The impact rule, as applied in Florida, holds that, in the absence of a discernible physical injury or illness flowing from emotional distress or an actual impact, a person cannot recover compensatory damages for mental distress or psychiatric injury. *See generally* ***359** *Hagan v. Coca-Cola Bottling Co.*, 804 So.2d 1234, 1236-38 (Fla.2001). The rationale for the impact rule as a limitation on certain claims is that it serves as a means of "assuring the validity of claims for emotional or psychic damages." *R.J. v. Humana of Florida, Inc.*, 652 So.2d 360, 363 (Fla.1995). However, this Court's wariness of psychic damages has not prevented it from carving out exceptions to the impact rule in a variety of circumstances-as the present case demonstrates. *See, e.g.*, *Kush v. Lloyd*, 616 So.2d 415, 422-23 (Fla.1992); *Champion v. Gray*, 478 So.2d 17, 19-20 (Fla.1985), *receded from on other grounds in Zell v. Meek*, 665 So.2d 1048, 1053 (Fla.1995).

In my view, the impact rule reflects an outmoded skepticism for damages resulting from mental injuries. As best summarized by the Illinois Supreme Court:

> The requirement [of physical manifestation of emotional distress] is overinclusive because it permits recovery for mental anguish when the suffering accompanies or results in any physical impairment, regardless of how trivial the injury. More importantly, the requirement is underinclusive because it arbitrarily denies court access to persons with valid claims they could prove if permitted to do so.

Additionally, the requirement is defective because it "encourages extravagant pleading and distorted testimony." To continue requiring proof of physical injury when mental suffering may be equally recognizable standing alone would force "victim[s] to exaggerate symptoms of sick headaches, nausea, insomnia, etc., to make out a technical basis of bodily injury upon which to predicate a parasitic recovery for the more grievous disturbance, the mental and emotional distress she endured."

> *Corgan v. Muehling*, 143 Ill.2d 296, 158 Ill.Dec. 489, 574 N.E.2d 602, 608 (1991) (quoting *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 652 (Tex.1987)) (citations omitted).

I believe that the traditional foreseeability analysis applicable to negligence claims is the more appropriate framework for a limitation on tort recovery in this State. *See* *McCain v. Florida Power Corp.*, 593 So.2d 500, 502 (Fla.1992) ("The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others."). The respondent psychotherapist in this case owed a duty of confidentiality to the petitioners. The petitioners allege that they were direct victims of the respondent's breach of that duty because the respondent revealed the most confidential communications gained during the psychotherapist-client relationship. There should be no arbitrary limitation on the petitioners' ability to claim damages as a result of the substantial breach of a fiduciary duty such as the one that allegedly occurred in this case. It seems reasonable to entrust Florida juries, which are routinely asked to determine pain and suffering when an emotional injury is accompanied by a physical injury, to determine fault and damages surrounding claims of purely mental injuries. *See* *Corgan*, 158 Ill.Dec. 489, 574 N.E.2d at 609 (noting its faith in jurors or other judicial factfinders to discern whether a claimant has suffered emotional distress that should be compensated). Thus, I certainly concur with the majority that the impact rule should not bar the petitioners' recovery in this case.

HARDING, Senior Justice, dissenting.

While I am sympathetic to the wrong petitioners allege, I see no reason to depart from the long-standing public policy and jurisprudence of this State requiring a plaintiff seeking emotional distress damages to show that the alleged emotional ***360** distress is evident in some form of physical injury, i.e., "impact." With this decision, the majority, in effect, puts the whole camel under the tent, as it is more than likely that this Court will be presented with equally compelling scenarios of alleged emotional trauma which will be difficult to distinguish from this case, and thus the public policy requiring the rule will no longer be policy at all. Indeed, there will be no requirement of impact, and this case is sure to become precedent allowing almost all parties who claim damages for emotional distress to survive dismissal of their actions despite speculative, or even fictitious, claims of emotional injury which the rule was designed to prevent.

Moreover, I find that no rational basis has been presented here to abandon this long-established policy. Rather, by judicial fiat, the majority carves out a major exception based solely on the emotional injury alleged here, which effectively eviscerates the rule requiring any impact in the claim for emotional distress damages. At the outset of its analysis, the majority asserts that the lower courts' determinations "do[ ] not accommodate the *intent and purpose* of section 491.0147 of the Florida Statutes." Majority op. at 351 (emphasis added). Yet nothing in the express language of section 491.0147 or its legislative history comes close to expressing an "intent or purpose" to do away with Florida's long-standing "impact rule." Contrary to the majority's assertion of the existence of "clear legislative intent," majority op. at 358, the legislative history of section 491.0147 is non-illuminating as to any other intended purpose of the statute beyond the regulatory context.[FN16] Even if I were to "read in" a civil cause of action for its violation (as does the majority), I see nothing in the wording of the statute or its legislative history eliminating the requirement for an impact when alleging emotional distress under this statute.

> FN16. Chapter 491 of the Florida Statutes addresses the licensing and regulatory criteria to which psychotherapists must adhere.

Furthermore, based on our decision in *Time Insurance Co. v. Burger*, 712 So.2d 389 (Fla.1998), it also appears that the Legislature knows how to write a statute which allows for emotional distress damages to be claimed under it, without being subject to the impact rule, if it chooses to do so. Specifically, in *Time Insurance*, this Court considered whether the fact that section 624.155, Florida Statutes (1991), authorized damages for first-party suits against certain insurance carriers for bad-faith failure to pay claims, did so in such a manner that proof of emotional distress damages would not be required under the strictures of the impact rule. In holding that emotional distress damages claimed pursuant to the statute were not subject to proof under the impact rule, this Court based its reasoning on the *language of the statute itself*, which stated that damages "shall include those ... which are reasonably foreseeable result of a specified violation of this section." 712 So.2d at 392. In this case, however, the Legislature has made no such authorization

under the statute at issue and, therefore, strictly as a matter of statutory interpretation and this Court's jurisprudence, damages for emotional distress incurred as a result of a violation of section 491.0147 should not be recoverable in the absence of proof which satisfies the impact rule.

In addition, despite the majority's characterization of the requirement to allege some sort of physical manifestation of injury when making a claim for emotional distress damages as "an artificial 'impact rule' limitation," majority op. at 352, this ***361** Court has *for over a century* repeatedly stated that the impact rule supplies a useful function of weeding out fraudulent claims for negligent infliction of emotional distress.

The impact rule has had a long legal history in this state, beginning with this Court's decision in *International Ocean Telegraph Co. v. Saunders*, 32 Fla. 434, 14 So. 148 (1893). In essence, the impact rule requires that "before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact." *Reynolds v. State Farm Mut. Auto. Ins. Co.*, 611 So.2d 1294, 1296 (Fla. 4th DCA 1992), *review denied*, 623 So.2d 494 (Fla.1993). As explained by one commentator, the underlying basis for the rule is that allowing recovery for injuries resulting from purely emotional distress would open the floodgates for fictitious or speculative claims. 1 Thomas M. Cooley, *Cooley on Torts* 97 (3d ed.1906). As this Court stated in *Saunders, compensatory damages for emotional distress are "spiritually intangible," are beyond the limits of judicial action, and should be dealt with through legislative action rather than judicial decisions.* 32 Fla. at 448, 14 So. at 152. Another commentator has stated that the requirement of a physical impact gives courts a guarantee that an injury to a plaintiff is genuine. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §§ 54, at 363 (5th ed.1984). Further, without an impact requirement, defendants would not be sure whom they had injured or where they may have injured a person, thus paralyzing their ability to defend themselves. *Id.* at 364.

In recent years, we have continued to uphold the impact rule, finding that the underlying basis for the rule still exists and that no new reason has been shown to justify overruling prior decisions of this Court regarding this issue. For instance, in *Gilliam v. Stewart*, 291 So.2d 593 (Fla.1974), we found that an individual whose physical injuries were allegedly due to physical fright suffered when an automobile struck her house could not recover for those injuries because she had failed to show the requisite physical impact. Similarly, in *Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla.1985), we found that the driver of a defective automobile that struck and killed the driver's mother had no cause of action for his mental distress because he sustained no physical injury. *R.J. v. Humana of Florida, Inc.*, 652 So.2d 360, 362-63 (Fla.1995) (emphasis added).

Furthermore, the exceptions to the impact rule are few. The first truly recognized exception to the impact rule was recognized in *Champion v. Gray*, 478 So.2d 17 (Fla.1985). In *Champion*, this Court recognized the claim of negligent infliction of emotional distress (not unlike the claim alleged here) in situations in which "damages flow from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeably injured." *Id.* at 20. It is important to note, however, that *Champion* provided only a partial exception to the impact rule, because while the claimant was not required to show impact or impingement upon her physical person, she was nevertheless still required to show a "significant discernible physical injury" as evidence of the alleged psychic trauma. *Id.*

***362** Other exceptions to the impact rule come in the form of judicial decrees that the impact rule should not apply to the seeking of emotional distress damages in connection with certain torts because, unlike the circumstances of the instant case, the very commission of those torts is proof enough that significant emotional distress for the victims will ensue. *See Kush v. Lloyd*, 616 So.2d 415, 422 (Fla.1992) (holding impact rule does not apply when emotional distress damages are sought in connection with the tort of wrongful birth, because those damages are inseparably connected to, and obviously inure

to the victims of, that tort); *see also* *Tanner v. Hartog*, 696 So.2d 705, 708 (Fla.1997) (holding impact rule inapplicable to tort of negligent stillbirth because the emotional distress damages flow obviously from the cause of action).

Moreover, in both *Kush* and *Tanner,* this Court took great pains to say that it was finding the impact rule inapplicable only in very strictly confined circumstances. *See* *Tanner*, 696 So.2d at 709 (noting the desirability of the impact rule for proving the genuineness of emotional distress claims and holding the impact rule inapplicable only to "narrow classes of cases" like negligent stillbirth and wrongful birth); *Kush*, 616 So.2d at 423 n. 5 (noting the inapplicability of impact rule to wrongful birth situations likely reaches the "outer limits" of recovery in the absence of showing of impact and consequent mental distress manifested by physical injury).

While it is also true that emotional distress damages connected with some predominately emotional torts, like defamation and invasion of privacy, are not subject to proof under the impact rule, this Court in *R.J. v. Humana of Florida, Inc.*, 652 So.2d 360 (Fla.1995), also held that emotional distress damages pursuant to a claim for negligent (false) diagnosis of HIV-positive status are subject to the impact rule. In *R.J.*, a patient who was misdiagnosed as being HIV-positive brought suit against the hospital, laboratory, and physician responsible for misdiagnosis. This Court held that although the patient claimed to have suffered "bodily injury including hypertension, pain and suffering, mental anguish, [and] loss of capacity for the enjoyment of life," he did not prove a physical manifestation of resultant emotional distress to satisfy the requirements of the impact rule. *Id.* at 364. Although this Court was not unsympathetic to the possibility that emotional distress might accompany a misdiagnosis of HIV-positive status, it nevertheless declined the plaintiff's request to abolish the impact rule entirely or carve out a further exception to it for victims of a misdiagnosis of HIV-positive status. The Court affirmatively stated that "the impact rule continues to serve its purpose of assuring the validity of claims for emotional or psychic damages, and ... the impact rule should remain part of the law of this state." *Id.* at 363.

As I expressed at the outset of this opinion, I am sympathetic the situation surrounding petitioners' claim. However, I also recognize that, unfortunately, the law does not provide a remedy for every wrong. Despite the majority's assessment of the factual circumstances of this case (e.g., "placing the dagger of damage in the very soul of the Gracey's marriage," majority op. at 352), the essence of the impact rule is in its demand for objective, quantifiable proof of the genuineness of claimed emotional distress. Therefore, I would find reliance on a New York case a slim reed upon which to abandon Florida's long-standing public policy of preventing speculative and fictitious claims for emotional distress damages in negligence actions.

***363** Instead, I would approve district court's finding that the trial court was correct in dismissing with prejudice petitioners' complaint because the complaint alleged a claim of negligence resulting in only emotional injuries, and petitioners failed to allege an impact or impingement upon their person or any physical manifestation of their alleged emotional distress. Accordingly, I would answer the certified question in the affirmative.

WELLS, J., concurs.

INTELLECTUAL DISABILITY AND THE DEATH PENALTY

INTELLECTUAL DISABILITY AND THE DEATH PENALTY

The common law extending back to well before the creation of the United States has held that a person who is incapable of understanding what is being done to him should not be executed. The fine line that defines "understanding" has always been controversial and difficult to define. The United States has, however, followed a clear trend. In *Ford v. Wainwright* (477 U.S. 399) the United States Supreme Court held in a 1986 five to four decision that the Eighth Amendment prohibits a state from carrying out a sentence of death on a prisoner who has, since commission of the crime, become insane. Two years later, in *Thompson v. Oklahoma* (487 U.S. 815) the Court added that the Eighth and Fourteen Amendments prohibit execution of a defendant convicted of first-degree murder for an offense committed when the defendant was fifteen years old.

In 2002, in a five to three decision, the Court in *Atkins v. Virginia* (536 U.S. 304) further restricted use of the death penalty holding that "Construing and applying the Eighth Amendment in the light of our "evolving standards of decency," we … [hold] … that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." At the time of this decision, only five states, including Texas, were actively executing mentally retarded prisoners. In 2004, the Court of Criminal Appeals of Texas attempted to apply *Atkins* in what would become one of many appellate cases involving Jose Garcia Briseno:

135 S.W.3d 1 (2004)

Ex parte Jose Garcia **BRISENO**, Applicant.

(Tex. Crim. App. 2004) No. 29819-03.

February 11, 2004.

2*2 Richard H. Burr, Leggett, for Appellant.

Jose M. Rubio, Jr., DA, Laredo, Matthew Paul, State's Attorney, Austin, for State.

3*3 *ORDER*

COCHRAN, J., delivered the Order of the Court, joined by KELLER, P.J., MEYERS, PRICE, WOMACK, JOHNSON, KEASLER, and HERVEY, JJ.

Applicant was convicted of capital murder and sentenced to death for the 1991 robbery-murder of Dimmitt County Sheriff Ben Murray. After the Supreme Court's decision in *Atkins v. Virginia*,[1] applicant filed a subsequent writ of habeas corpus application alleging that he was mentally retarded and therefore exempt from execution. Based upon applicant's *prima facie* showing, we remanded his writ application to the convicting court for further proceedings. The trial court conducted a lengthy evidentiary hearing and made findings of fact that applicant failed to prove, by a preponderance of the evidence, that he is mentally retarded. We agree and therefore deny relief.

I.

The evidence at applicant's capital murder trial showed that Sheriff Ben Murray was robbed and murdered in his home during the night of January 5, 1991. Sheriff Murray had been stabbed numerous times and then shot in the head. His pistol, a "Thompson" pistol, and an unknown amount of money were

taken. Applicant was arrested the next day. A sample of blood taken from the sheriffs carpet matched applicant's blood, and a sample of blood taken from applicant's clothing matched the sheriff's blood.

While in jail on this charge, applicant suggested an escape plan to another inmate, Ricardo Basaldua.[2] Applicant, who was a jail trustee, obtained a knife and gave it to Basaldua. Applicant instructed him to tell one of the jailors that he, Basaldua, needed to wash some clothes. Then, according to applicant's plan, once Basaldua was outside his cell, he was to grab the jailor's keys and release applicant. Basaldua did so, but he stabbed the jailor when the jailor refused to hand over his jail and truck keys. Applicant, Basaldua, and a third prisoner, Roy Garcia, escaped in the jailer's truck. Applicant drove. They abandoned the truck behind a Wal-Mart in a different town, and applicant led them to a tree where he dug up the gun that he had used to kill Sheriff Murray. Applicant found food and water for the three men who then hid in the woods for three days. During this time, Roy Garcia had two epileptic seizures. Applicant told Basaldua that they needed to kill Garcia because he would only slow them down, but Basaldua said, "No." Finally, police surrounded the escapees who hid in the grass, and applicant threw away the gun before they were recaptured. Basaldua then led the officers to where applicant had thrown his gun. According to Basaldua, applicant was the planner and ringleader of the escape.

After his capture, Basaldua told the police what applicant had told him about the murder of Sheriff Murray. According to Basaldua, applicant and a cohort, Alberto Gonzales, appeared at the Sheriffs home offering to sell some rings.[3] Applicant and 4*4 Gonzales did not actually have any rings to sell, but they used this as a ruse to get into the Sheriffs home. Once inside, a struggle began, and they stabbed the Sheriff. Then applicant grabbed the Sheriffs pistol and shot him. They found some money "on" or "between" the walls of the Sheriffs home. According to Basaldua, applicant had hidden the money he stole from the Sheriffs home and promised to share it with Basaldua if he helped applicant escape from jail.

The jury convicted applicant of capital murder and, based upon their answers to the special punishment issues, the trial court sentenced him to death. We upheld that conviction and sentence in a unanimous unpublished opinion.[4] Applicant filed his original habeas corpus writ application on July 31, 1995. This Court denied relief based on the trial court's findings of fact and conclusions of law on November 27, 1996. Thereafter, applicant filed a writ of habeas corpus in the federal district court, but that too, was denied, and the Fifth Circuit affirmed the district court's judgment on November 26, 2001.

Applicant filed this subsequent writ application on July 10, 2002, the date he was scheduled to be executed, alleging that he was mentally retarded and therefore his execution was constitutionally impermissible under *Atkins v. Virginia*. We issued a stay of execution and remanded the writ application to the convicting court to conduct an evidentiary hearing on applicant's *Atkins* claim. The trial judge who had presided over applicant's capital murder trial conducted a five-day evidentiary hearing on the question of whether applicant was mentally retarded.[5] On October 7, 2003, the trial court made findings of fact and concluded that:

The Applicant, Jose Garcia Briseno, is not mentally retarded, and the State of Texas is therefore not precluded from carrying out the sentence of death in accordance with the verdict of the jury in the trial court.[6]

The trial court forwarded the habeas record to this Court for a final determination on whether to grant or deny relief under *Atkins.*

II.

This Court does not, under normal circumstances, create law. We interpret and apply the law as written by the Texas Legislature or as announced by the United States Supreme Court. In *Atkins,* the 5*5 Supreme Court announced that there is a national consensus that those who suffer from mental retardation should be exempt from the death penalty, but it simultaneously left to the individual states the substantive and procedural mechanisms to implement that decision. The Texas Legislature has not yet enacted

legislation to carry out the *Atkins* mandate. Nonetheless, this Court must now deal with a significant number of pending habeas corpus applications claiming that the death row inmate suffers from mental retardation and thus is exempt from execution.[7] Recognizing that "justice delayed is justice denied" to the inmate, to the victims and their families, and to society at large, we must act during this legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims.[8] Thus, we set out the following judicial standards for courts considering those claims under article 11.071.[9]

A. Defining "mental retardation" for purposes of *Atkins.*

As the Supreme Court had previously noted, the mentally retarded are not "all cut from the same pattern ... they range from those whose disability is not immediately evident to those who must be constantly cared for."[10] In *Atkins,* the Supreme Court noted that any "serious disagreement about the execution of mentally retarded offenders ... is in determining which offenders are in fact retarded." [11] Reasoning that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus,"[12] the Court left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[13]

The term "mental retardation" encompasses a large and diverse population suffering from some form of mental disability. The DSM-IV[14] categorizes the mentally retarded into four subcategories: mildly mentally retarded, moderately mentally retarded, severely mentally retarded, and profoundly mentally retarded.[15] Some 85% of those officially categorized as mentally retarded fall into the highest group, 6*6 those mildly mentally retarded,[16] but "mental retardation is not necessarily a lifelong disorder."[17] The functioning level of those who are mildly mentally retarded is likely to improve with supplemental social services and assistance.[18] It is thus understandable that those in the mental health profession should define mental retardation broadly to provide an adequate safety net for those who are at the margin and might well become mentally-unimpaired citizens if given additional social services support.

We, however, must define that level and degree of mental retardation at which a consensus of Texas citizens would agree that a person should be exempted from the death penalty. Most Texas citizens might agree that Steinbeck's Lennie[19] should, by virtue of his lack of reasoning ability and adaptive skills, be exempt. But, does a consensus of Texas citizens agree that all persons who might legitimately qualify for assistance under the social services definition of mental retardation be exempt from an otherwise constitutional penalty? Put another way, is there a national or Texas consensus that all of those persons whom the mental health profession might diagnose as meeting the criteria for mental retardation are automatically less morally culpable than those who just barely miss meeting those criteria? Is there, and should there be, a "mental retardation" bright-line exemption from our state's maximum statutory punishment? As a court dealing with individual cases and litigants, we decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature.

Although Texas does not yet have any statutory provisions to implement the *Atkins* decision, the 77th Legislature passed House Bill 236 in 2001, even before the *Atkins* decision was announced, which would have prohibited the execution of mentally retarded defendants convicted of capital murder and sentenced to death.[20] That bill adopted the definition of mental retardation found in TEX. HEALTH & SAFETY CODE § 591.003(13): "`mental retardation' means significant subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."[21] This bill, however, was vetoed by the Governor. The 78th Texas Legislature did not 7*7 pass a statute implementing *Atkins,* although several bills were introduced and considered.[22]

This Court has previously employed the definitions of "mental retardation" set out by the American Association on Mental Retardation (AAMR), and that contained in section 591.003(13) of the Texas Health and Safety Code.[23] Under the AAMR definition, mental retardation is a disability characterized by: (1) "significantly subaverage" general intellectual functioning;[24] (2) accompanied by "related"

limitations in adaptive functioning;[25] (3) the onset of which occurs prior to the age of 18.[26] As noted above, the definition under the Texas Health and Safety Code is similar: "`mental retardation' means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."[27]

8*8 Some might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment.[28] However, that definitional question[29] is not before us in this case because applicant, the State, and the trial court all used the AAMR definition. Until the Texas Legislature provides an alternate statutory definition of "mental retardation" for use in capital sentencing, we will follow the AAMR or section 591.003(13) criteria in addressing *Atkins* mental retardation claims.

The adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases. There are, however, some other evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder:

• Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

• Has the person formulated plans and carried them through or is his conduct impulsive?

• Does his conduct show leadership or does it show that he is led around by others?

• Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

• Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

• Can the person hide facts or lie effectively in his own or others' interests?

• Putting aside any heinousness or gruesomeness surrounding the capital 9*9 offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility.[30]

B. *Atkins* does not require a jury determination of mental retardation in a post-conviction proceeding.

Applicant requested that a jury be empaneled to decide the factual issue of his claim of mental retardation. The convicting court denied this request, as did we. We conclude that there is no mechanism set out in our applicable habeas statute, article 11.071, that provides for a jury trial of an issue first raised in a post-conviction habeas corpus proceeding.[31]

Applicant contends that he was entitled to a jury determination of mental retardation pursuant to the Supreme Court's recent decision in *Ring v. Arizona*[32] combined with *Atkins.* For the following reasons, we disagree and hold that *Ring* and *Atkins* do not require a post-conviction jury determination of applicant's claim of mental retardation.

First, we conclude that *Ring* does not have retroactive effect in a post-conviction habeas corpus application.[33] Even if the holding of *Atkins* applied retroactively and may allow a person sentenced to death under Texas law to have a claim of mental retardation first addressed under article 11.071,[34] we join those courts that have held that the Supreme Court's decision in 10*10 *Ring,* requiring a jury

determination of every fact that increases the maximum statutory penalty, is not retroactively applicable to cases on post-conviction habeas corpus review.[35]

Second, even if *Ring* were retroactive, that case does not establish a constitutional requirement that a jury determine the question of mental retardation.[36] A lack of mental retardation is not an implied element of the crime of capital murder which the State is required to prove before it may impose a sentence above the maximum statutory punishment for that crime.[37] Instead, as the Supreme Court made explicit in *Atkins*, proof of mental retardation "exempts" one from the death penalty, the maximum statutory punishment for capital murder.[38] There was certainly no indication from the Supreme Court in *Atkins* that the fact of mental retardation is one that a jury, rather than a judge, must make. Indeed, as one state court has noted:

> the majority of states which have provided a statutory exemption from capital punishment for the mentally retarded have made the finding of mental retardation a matter for the trial judge as opposed to the jury.[39] 11*11 Had the Supreme Court, in its survey of these statutes in *Atkins*, found them constitutionally defective, it surely would have said so. Instead, the Supreme Court explicitly left "`to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'"[40]

Third, our state habeas statute does not provide for a jury determination of fact issues on post-conviction habeas corpus review. Instead, it requires the convicting court to address and determine all previously unresolved factual issues.[41] It is within the Legislature's prerogative to enact a statute requiring or allowing a jury determination of mental retardation on post-conviction review, but unless it does so, we must follow the Legislature's current statutory procedures.[42] Thus, we hold that, when an inmate sentenced to death files a habeas corpus application raising a cognizable *Atkins* claim, the factual merit of that claim should be determined by the judge of the convicting court. His findings of fact and conclusions of law shall be reviewed by this Court in accordance with article 11.071, § 11.[43]

12*12 C. The defendant bears the burden of proof, by a preponderance of the evidence, to establish that he is mentally retarded.

By our count, twelve of the nineteen states with statutes prohibiting the execution of mentally retarded defendants place the burden of proof upon the defendant to show mental retardation by a preponderance of the evidence.[44] Similarly, House Bill 614, though not enacted by the 78th Texas Legislature, provided that the defendant must prove the issue of mental retardation by a preponderance of the evidence. The issue of mental retardation is similar to affirmative defenses such as insanity, incompetency to stand trial, or incompetency to be executed, for which the Texas Legislature has allocated the burden of proof upon a defendant to establish by a preponderance of the evidence.[45] Therefore, we adopt that allocation of the burden and standard of proof, at least in the context of determining mental retardation in the habeas corpus setting where the inmate traditionally bears the burden of proof.[46]

Our review of a trial court's findings of fact and conclusions of law concerning a claim of mental retardation remains the same as it has always been on habeas corpus applications. We defer to the trial court's factual findings underlying his recommendation when they are supported by the record.[47] Thus, we afford almost total 13*13 deference to a trial judge's determination of the historical facts supported by the record, especially when those fact findings are based on an evaluation of credibility and demeanor.[48] However, if the trial court's ruling is not supported by the record, this Court may reject the findings.[49]

With the above substantive and procedural standards as a guide, we turn now to a review of the evidence offered at applicant's *Atkins* evidentiary hearing.

III.

As this case amply demonstrates, determining what constitutes mental retardation in a particular case varies sharply depending upon who performs the analysis and the methodology used.[50] Here, for example, the primary defense expert's background is in the treatment of mental illness and mental retardation.[51] His overall position was that one had to look for the person's adaptive deficits and

limitations, putting aside his positive adaptive skills. His focus is upon socially acceptable and successful skills. The State's expert's background is in statistical methodology and forensic diagnosis. His overall position was that one must look to the person's positive adaptive abilities and coping skills. His focus is upon whether the person has rational responses to external situations, not necessarily whether those responses are lawful or socially appropriate. The defense expert sees the glass half-empty, the State's expert sees the glass half-full. Both experts relied upon the same evidence and objective data to support their conclusions, yet the defense expert diagnosed mental retardation while the State's expert found no mental retardation but did find evidence consistent with antisocial personality disorder.[52]

14*14 A. Applicant did not prove, by a preponderance of the evidence, that he has significantly subaverage general intellectual functioning.

At the *Atkins* evidentiary hearing, applicant's counsel stated that there was not much dispute about applicant's IQ level. He had been tested in June, 2002, when he was 45, by applicant's expert and obtained a full-scale IQ score of 72. He was tested by the State's expert approximately one year later and obtained a full-scale IQ score of 74.[53] According to the DSM-IV, "significantly subaverage intellectual functioning" is defined as an IQ of about 70 or below.[54] Based upon these tests and the experts' interpretation of their significance, the trial court entered a factual finding that:

> [t]he preponderance of the evidence does not show that these test scores over-state the actual intellectual functioning of Applicant; the evidence in fact showed that there are good indications that the test scores understated Applicant's intellectual functioning.

There is ample evidence in the record that supports this factual finding and thus we adopt the trial court's finding.

B. Applicant did not prove, by a preponderance of the evidence, that he had significant limitations in adaptive functioning.

It is in the area of adaptive behavior that applicant's and the State's experts widely differed in their opinions concerning the same historical facts.

The evidence showed that, until the age of nine or ten, applicant was raised by his maternal great-grandmother. According to Diana Villarreal, applicant's cousin, his great-grandmother disciplined applicant by tying him to a bed frame and whipping him. She remembers that applicant's great-grandmother would say, "Ask him why," when Diana asked about the beatings, but applicant would never tell her. 15*15 As a result of this discipline, applicant would run away, often for days at a time.[55] To the defense experts, this was an example of a deficit in adaptive behavior because running away shows poor decisionmaking; a well-adapted person would seek assistance from another family member, teacher, friend, or social services provider. To the State's expert, this was an example of good survival skills,[56] and as one of the first symptoms noted in the DSM-IV of "conduct disorder," a precursor to "antisocial personality disorder."

Applicant attended East Elementary School in Carrizo Springs I.S.D. According to one of applicant's cousins, this was a school for "problem children" who disrupted the classroom, but his other cousin testified that it was a school for those who had fallen behind in their work because of illness, truancy, or migrant living.[57] Applicant's records showed that his early school work was entirely unsatisfactory, but that he improved somewhat and, after being retained in "pre-primer," was promoted to the next grade each year thereafter.[58] Both the defense and State experts agreed that applicant's school records reasonably reflected his academic functioning abilities.

At the age of thirteen, applicant went to Peoria, Illinois, to live with his mother;[59] however, from age fourteen to eighteen applicant was under the care of Illinois juvenile authorities because of repeated acts of delinquency, including five "runaway" violations, truancy, aggravated battery, and two burglaries.[60] According to Illinois juvenile authorities:

> Joe reports that his running away from home is not due to an unpleasant home or family life. Instead, he says he does so because it is sometimes fun to stay out all night and partly because of his dislike for school. Joe also mentioned that sometimes he does not know why he leaves home, "something just comes into my head, I run away. The next day I feel sorry." Joe admits that he has lied many times. He says he realizes that many times he has promised people that he would behave and then would break those promises. Joe feels his parents love and care about him. Both Mr. Briseno [applicant's step-father] and Joe 16*16 feel that there has not been enough discipline given at home, yet Joe says his step-dad has a very bad temper and has on occasion beaten him. Police reports and school records mention that Joe has run away because of fear of such beatings.[61]

From this evidence, the defense experts saw "impulsivity," a trait associated with mental retardation.[62] On the other hand, the State's expert saw this impulsive behavior as consistent with conduct disorder.

According to Illinois juvenile records, applicant had "slithered" through the Texas school system. He had a "high dull normal" or "low average" intelligence,[63] and, at first, functioned academically at about the fourth grade level. After four years in the juvenile facilities, he was issued an eighth grade diploma.[64] His behavior and work performance was "very positive,"[65] although he did not express a desire to continue his education. He wanted to be a mechanic and "pump gas."[66] Both the defense and State experts pointed to the same juvenile records showing applicant's responses to a series of assessment questions as evidence of either poor, or good, reasoning ability.[67] It is highly 17*17 significant that in none of these voluminous records is there any indication from any source that any person thought applicant might be mentally retarded.

Applicant's records and self-reports show that he began drinking alcohol at the age of nine and started abusing other substances, including marijuana, glue, LSD, speed, and barbiturates before he was 18. Both the defense and State experts agreed that applicant's drug use may have impaired his brain functioning as well as his academic and social skills progress.

Once he was released from the Illinois juvenile system at the age of eighteen, applicant returned to Texas. By the time he was twenty-one, he had been sentenced to the Texas Department of Criminal Justice (TDCJ) for burglarizing a jewelry store with an accomplice and stealing $10,000 worth of rings, brooches and necklaces. Before this, he had been arrested for assault with a knife, a previous burglary of a building, and car theft. He returned to TDCJ shortly after he was released on parole for burglary of a vehicle. After his second release from TDCJ, he was returned again on a forgery conviction, and then, when he "escaped" during a prison furlough, he committed aggravated assault and was sentenced to more time in prison. Applicant spent approximately ten out of the fifteen years between his release from Illinois juvenile authorities and the murder of Sheriff Murray in Texas prisons.[68]

To the defense experts, this criminal conduct was not inconsistent with mental retardation because these crimes "were not that hard," and they displayed an impulsivity and lack of successful life skills.[69] To the State's expert, this criminal conduct was consistent with antisocial personality disorder which is typified by problems with finding and keeping a job, with marriage, with law-abiding behavior, with lying, and by reckless disregard for the safety of others. He stated that applicant's impulsivity was antisocial behavior—striking out against other people.[70]

18*18 Four TDCJ officers testified at the *Atkins* hearing that applicant's behavior seemed "normal" and "appropriate" in prison. He could understand them and they could understand him. They saw him reading magazines and filling out commissary forms appropriately.[71] The former Chief Deputy of Dimmit County testified that he had approximately ten different dealings with applicant and found him to be "intelligent, shrewd, and very cunning." This witness had interrogated applicant before and noted that:

> someone that's mentally retarded . . . it's hard to carry a conversation with them sometimes because they wander a lot. [Applicant] does not wander. He can keep a conversation going and he can stay in sequence.

Applicant testified briefly at the *Atkins* hearing and his testimony was clear, coherent and responsive. He denied doing some of the activities that the State's lay witnesses had said he did while he was awaiting

trial on the capital murder charge twelve years earlier, such as using the local law library, cooking Mexican breakfasts for the prisoners, accompanying the jailer and keeping a written tally of the jailer's "prisoner count."

Based upon a lengthy recitation of the testimony at the evidentiary hearing, the trial court entered a factual finding that:

The Applicant has not shown by a preponderance of the evidence that he has such "limitations in adaptive functioning" as would meet that prong of the diagnostic criteria for mental retardation. The preponderance of the evidence showed that Applicant does not have significant limitations in adaptive functioning.

Because there is ample evidence in the record to support this factual finding and the trial court's credibility determinations, we adopt this finding.

In sum, we conclude that, while there is expert opinion testimony in this record that would support a finding of mental retardation, there is also ample evidence, including expert and lay opinion testimony, as well as written records, to support the trial court's finding that applicant failed to prove that he is mentally retarded. We defer to the trial court's credibility determinations, adopt the trial court's ultimate findings of fact, and, based on those findings and our independent review, we deny relief.

HOLCOMB, J., filed a dissenting opinion.

HOLCOMB, J., dissenting.

I dissent from the majority's opinion regarding both the resolution of this case and the judicial guidelines pronounced therein, particularly that the judge of the convicting court shall determine the factual merit of an *Atkins*[1] claim raised on habeas corpus. (Maj. op. Part II B). United States Supreme Court decisions and Texas legal tradition require a jury determination on the issue of mental retardation 19*19 if the applicant is able to make a *prima facie* showing sufficient to raise the issue. This Court found that applicant made a *prima facie* showing of mental retardation, but the trial court, not a jury, made the factual determination during the habeas proceeding. Thus, the procedure employed, though consistent with Texas Code of Criminal Procedure art. 11.071, § 9, was not sufficient to protect the applicant's constitutional rights.

I agree with the majority that this Court does not, under normal circumstances, create law. Our role is to interpret and apply the law as written by the Texas Legislature or as announced by the United States Supreme Court. Where such statutes do not provide procedures sufficient to protect an applicant's constitutional rights, we have an overriding duty to uphold the Constitution. Where constitutionally required procedures are not forbidden by statute, but are also not expressly permitted, the two are not necessarily in conflict.[2] In those situations, the courts must temporarily provide a remedy until the Legislature explicitly provides a constitutionally sufficient procedure.[3] Therefore, although there is no authority in the Code of Criminal Procedure either for this Court to order the trial court to conduct a hearing before a jury on the issue of mental retardation in a habeas proceeding or for the trial court to hold such a hearing on its own accord,[4] we possess the authority, and the responsibility, to recognize the courts' ability to hold such a hearing if the Sixth and Eighth Amendments so require. I find that they do.

The Supreme Court has consistently recognized the uniqueness of the death penalty, and that Court requires a greater degree of reliability when the death sentence is imposed.[5] In *Furman*, Justice Stewart described the unique character of the death penalty:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[6] 20*20 This heightened need for reliability requires a procedure that allows for

a jury determination of the facts in evidence, with the convicting court acting as a gatekeeper and not as the fact-finder.

While some courts have found that *Ring*[7] is not retroactive, at least one has found that it is.[8] I am likewise persuaded that *Ring* is retroactive.

Even if *Ring* is not retroactively applicable as to other issues, *Ring* and *Atkins* were decided in the same month, and *Atkins* most assuredly is retroactive. Although potential applicants' convictions may be final, they should be able to raise *Atkins* claims for the first time post-conviction. Of overriding importance regarding the issue of retroactivity under *Teague* is the finality of convictions.[9] Post-conviction *Atkins* claims do not allege error in the process used to obtain the convictions or sentences, so there is no issue of reviewing the correctness of procedures that did not follow procedural rules that had not yet been annunciated. What will be determined is if the applicant is eligible for the death penalty, under *Atkins,* and the process used to address this decision does not alter the fact that the issue must be addressed. Involving a jury to determine the *Atkins* claims does not threaten the finality of the final conviction any more than does having a trial court determine the *Atkins* claim without a jury. Because these claims are being addressed for the first time, there is no reason to proceed under rules as they were understood at the time the conviction became final. The applicant stands in the same position as defendants currently at trial and those on direct appeal whose *Atkins* claims are being heard for the first time. The process used to address these claims should be subject to the law as it stands influenced by *Ring.*

Ring is also applicable to the determination of mental retardation. Although a conviction for capital murder authorizes a maximum penalty of death in a formal sense, the defendant may not be sentenced to death unless certain findings are made. The Legislature has enumerated some of these findings in the statutory special issues, which have changed over time.[10] After *Atkins,* when the issue of mental retardation is raised, the defendant cannot be put to death—in effect is ineligible for the death penalty—if it is determined, through an as-of-yet undetermined process, that the defendant is mentally retarded. Surely the Sixth Amendment guarantee would apply to a factual determination that the Supreme Court held the Eighth Amendment required. In *Penry,* the Supreme Court reaffirmed the requirement that the jury be able to consider and give effect to all mitigating evidence.[11] While evidence of mental retardation could and can be considered as a mitigating factor in the jury's sentencing determination, such factors are discretionary. Determining whether the defendant is mentally retarded is not an exercise of the jury's discretion, but rather an act of fact finding. In this way, when raised by the defendant, 21*21 the issue of mental retardation functions as an aggravating circumstance and not a mitigating circumstance.

Aside from the Federal Constitutional implications, the Texas Constitution[12] and Code of Criminal Procedure demonstrate a consistent public policy that juries should make factual determinations, especially in death penalty cases where the State does not even permit the defendant to waive the right to a jury trial.[13] Juries are employed in determining a defendant's mental illness as well as incompetency.[14] Although there is no statute setting forth the procedure for determining pre-trial or during trial whether a defendant is mentally retarded, it is unfathomable that juries will not be involved. Though no jury is required post-conviction to determine incompetency to be executed,[15] the question of whether a defendant may be executed requires heightened procedural safeguards that the question of when a defendant may be executed does not.[16] The Fifth Circuit also recognized this distinction when it upheld the constitutionality of the Texas statute providing a procedure to determine competency to be executed.[17]

Because many petitioners were convicted and sentenced to death before *Atkins,* they have not been afforded a jury determination of their claims of mental retardation. Even if such an applicant's trial strategy included presenting evidence of mental retardation during the punishment phase, the jury would have had discretion to determine whether the evidence warranted imposition of a sentence less than death. However, the jury would not have been instructed to determine whether the defendant was mentally retarded—the positive finding of which would disallow jury discretion regarding punishment based on the

Supreme Court's decision. The Supreme Court found that there is a national consensus that execution of mentally retarded defendants constitutes cruel and unusual punishment. Unfortunately, national consensus does not necessarily translate to the consensus of a given jury. Because such applicants have the right to a jury determination on the issue of mental retardation, and the determination was not made at trial, it must be provided postconviction in order to satisfy *Atkins* and *Ring.* Unless we determine that post-conviction *Atkins* claims fall outside the statutory habeas proceedings, we must incorporate the jury proceedings into our habeas corpus process and determine whether the applicant is entitled to relief in the form of commutation of his sentence from death to life in prison.

When the issue of mental retardation is raised post-conviction in a death penalty case, the Sixth and Eighth Amendments require that either the convicting court or the Court of Criminal Appeals review the evidence provided in the writ application to determine whether the evidence propounded by the applicant is sufficient to make a *prima facie* showing of mental retardation, and, if so, whether the evidence argued in the party's brief conclusively establishes that the applicant is mentally retarded. If 22*22 the court finds, based on the pleadings, that the applicant has conclusively proven mental retardation, the court may, without empaneling a jury, grant the relief to which applicant is entitled. The applicant would receive no greater relief from a jury determination. If the applicant has only established a *prima facie* case, the Sixth and Eighth Amendments require the convicting court to empanel a jury and hold a hearing for the limited purpose of resolving the factual issue of mental retardation. At that hearing, the applicant carries the burden of proof and the jury is required to come to a unanimous conclusion regarding whether the applicant has shown by preponderance of the evidence that he is mentally retarded. Depending on the jury's answer, the convicting court must then provide this Court with a recommendation to either deny relief on the applicant's allegation of mental retardation or commute the applicant's sentence to life.

Because I differ with the majority both on the resolution of this case and the judicial guidelines pronounced herein, I respectfully dissent.

FOOTNOTES

[1] 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

[2] Basaldua testified to these events at the 2003 *Atkins* hearing as well as at the capital murder trial.

[3] A few weeks before his murder, Sheriff Murray spoke with applicant about an ongoing burglary investigation he was conducting. The burglary involved the theft of jewelry, including some rings, valued at over $40,000. Sheriff Murray wanted to enlist applicant's help in solving the burglary case, but a deputy sheriff suggested that this was not a good idea.

[4] *Briseno v. State,* No. 71,489 (Tex.Crim.App. 1994) (not designated for publication).

[5] In his objections to the trial court's findings of fact, applicant complains that the trial judge "appeared to have predetermined the issue before him," because he cautioned the defense team to keep pens and pencils out of applicant's reach. Applicant argues that the trial judge was concerned that applicant might attempt to escape "because he is going to be put to death anyway." But, as the trial court noted, the *Atkins* evidentiary hearing has "nothing to do with dangerousness; it has to do with mental retardation[.]" Because a jury had already found applicant guilty of capital murder and found that he was dangerous, we cannot conclude that the trial judge's safety concerns reflected any prejudice against applicant regarding his mental retardation claim.

[6] Applicant also complains that, in orally announcing his ruling, the trial court reflected bias because it "said nothing about its reasoning in reaching the conclusion it reached." We fail to see evidence of judicial bias. Just as a jury returns a verdict without additional comment or explanation, a trial judge need not orally explain the evidentiary basis for his ruling from the bench. In the context of a habeas hearing, the judge's written findings of fact and conclusions of law suffice as the basis for his ruling.

[7] At last count, this Court has remanded thirty-five subsequent writ applications to the convicting court for further proceedings under *Atkins* because the applicant had made a prima facie showing of possible mental retardation. A significant number of these death row inmates had their federal habeas corpus applications dismissed from federal court so they could return to Texas courts to exhaust their *Atkins* claims before a possible return to federal court.

These federal courts are also waiting for Texas to establish this state's substantive and procedural implementation of *Atkins.*

[8] *See, e.g.*, *Ex parte Jordan*, 758 S.W.2d 250 (Tex.Crim.App.1988) (setting out judicial guidelines and procedures to address "incompetency to be executed" habeas corpus claims under *Ford v. Wainwright* because Legislature had not yet enacted statute to implement Supreme Court decision).

[9] *See, e.g.*, *State v. Lott*, 97 Ohio St.3d 303, 779 N.E.2d 1011, 1014 (2002) (judicially setting out substantive standards and procedural guidelines for determining *Atkins* claims "[i]n the absence of a statutory framework to determine mental retardation").

[10] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

[11] *Atkins*, 536 U.S. at 317, 122 S.Ct. 2242.

[12] *Id.*

[13] *Id.*

[14] AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Text Revision, 4th ed. 2000) (DSM-IV).

[15] *Id.* at 41-42.

[16] *Id.* at 41.

[17] *Id.* at 44.

[18] *Id.* (noting that "[i]ndividuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of Mental Retardation").

[19] *See* JOHN STEINBECK, OF MICE AND MEN (1937).

[20] Tex. H.B. 236, 77th Leg., R.S. (2001).

[21] Under HB 236, a capital murder defendant could raise the issue of mental retardation only if he had given notice to the court and the State of his intent to raise the issue at least 30 days prior to the start of trial, and requested a special "mental retardation" jury issue under art. 37.071 § 2(e)(2).

HB 236 also provided for a possible postverdict hearing before the trial court if the jury rejected the defendant's mental retardation claim. The court would appoint two disinterested experts, "experienced and qualified in the field of diagnosing mental retardation to examine the defendant and determine whether the defendant is a person with mental retardation." At this hearing, the court would consider the findings of the experts and independently determine if the defendant was mentally retarded by a preponderance of the evidence. If the court found, by a preponderance of the evidence, that the defendant was mentally retarded, the trial court would sentence the defendant to life in prison despite the jury's finding of no mental retardation.

[22] The 78th Legislature modified its previous attempt at implementing the United States Supreme Court's decision in *Atkins* in House Bill 614. *Compare* Tex. H.B. 236, 77th Leg, R.S. (2001) *with* Tex. H.B. 614, 78th Leg., R.S. (2003). The most noticeable differences between those two bills were the creation of article 37.072 in H.B. 614 and the elimination of any post-verdict judicial determination of mental retardation after the jury's determination.

House Bill 614 defined "mental retardation" as "significantly subaverage general intellectual functioning that is concurrent with significant deficits in adaptive behavior, if those characteristics originate during the developmental period." Tex. H.B., 78th Leg., R.S. (2003). This definition does not differ significantly from that found in the Health and Safety Code. *See* TEX. HEALTH & SAFETY CODE § 591.003(13).

Like H.B. 236, H.B. 614 required pre-trial notice of the intent to raise an issue of mental retardation, but, under the latter bill, the defendant was required to file notice at least 60 days before jury selection began and was required to accompany that notice with "objective evidence indicating that the defendant may be a person with mental retardation."

H.B. 614 also contained a provision for a mental retardation special issue, in which the jury was instructed that the defendant would be required to prove mental retardation by a preponderance of the evidence.

Neither of these bills addressed the issue of determining mental retardation claims on a post-conviction habeas corpus writ brought by inmates sentenced to death before the Supreme Court decision in *Atkins.*

[23] *See* *Ex parte Tennard*, 960 S.W.2d 57, 60-61 (Tex.Crim.App.1997), *cert. granted on other grounds sub nom. Tennard v. Dretke*, U.S. , 124 S.Ct. 383, 157 L.Ed.2d 275 (2003); *see also id.* at 64-65 (Meyers, J., concurring).

[24] "Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)." DSM-IV at 39; *see also* AMERICAN ASSOCIATION ON MENTAL DEFICIENCY (AAMD), CLASSIFICATION IN MENTAL RETARDATION 1 (Grossman ed.1983). Psychologists and other mental health professionals are flexible in their assessment of mental retardation; thus, sometimes a person whose IQ has tested above 70 may be diagnosed as mentally retarded while a person whose IQ tests below 70 may not be mentally retarded. AAMD at 23. Furthermore, IQ tests differ in content and accuracy. *Id.* at 56-57. *But see* *State v. Lott*, 779 N.E.2d at 1015 (holding that "there is a rebuttable presumption that a defendant is not mentally retarded if his or her I.Q. is above 70").

[25] "Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group, as determined by clinical assessment and, usually, standardized scales." AAMD at 11. Under section 591.003(1): "`adaptive behavior' means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group."

[26] AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (9th ed.1992).

[27] TEX. HEALTH & SAFETY CODE § 591.003(13)

[28] For example, the definition of legal "insanity" in TEX. PEN.CODE § 8.01 is not at all the same type of definition that is used in psychiatry or social services for mental illnesses. *See* TEX. PEN.CODE § 8.01(a) (providing that "[i]t is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong"). Moreover, TEX. PEN.CODE § 8.01(b) provides that "[t]he term `mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." Similarly, the legal standards used to determine competency to stand trial or to be executed are not the same standards used in psychiatry or the mental health professions to determine whether a person has a severe mental disability. *See* TEX.CODE CRIM. PROC. art. 46.02 § 1A(a) ("[a] person is incompetent to stand trial if the person does not have: (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings"); *id.* art. 46.05(h) ("A defendant is incompetent to be executed if the defendant does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed").

[29] The social sciences definition of mental retardation has been in a state of flux for over 65 years, as evidenced by the definitions dating from Tredgold (1908, 1937) and Doll (1941, 1947) to the current AAMR 10th edition definition. MENTAL RETARDATION: DEFINTION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 19 (10th ed.2002). *See* *State v. Williams*, 831 So.2d 835, 838 n. 2 (La.2002) (noting that "there is current dissatisfaction with the term `mental retardation,' but there has been no consensus on a substitute term"). Given the importance and impact of *Atkins* upon the criminal justice and the mental health and mental retardation systems, that definitional flux may well continue.

[30] *See* *Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (U.S.Kan. 2002) (noting that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law"); *Williams*, 831 So.2d at 859 (in determining *Atkins* claim, "the trial court must not rely so extensively upon this expert testimony as to commit the ultimate decision of mental retardation to the experts").

[31] *See, e.g., Ex parte Jordan*, 758 S.W.2d 250, 254 (Tex.Crim.App.1988) (applauding trial court's "scrupulous" action on post-conviction writ of habeas corpus in effectuating the intent of *Ford v. Wainwright* and judicially addressing factual question of defendant's competency to be executed "even in the absence of statutory law").

[32] 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (holding that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt").

[33] *See In re Johnson*, 334 F.3d 403, 404-05 n. 1 (5th Cir.2003) (noting that the Fifth Circuit had previously held that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (U.S.2000) did not announce a new rule of substantive law and thus was not applicable to convictions that became final before its announcement, thus *Ring* logically ought not apply retroactively to *Atkins* claims); *Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613, 619 (2003) (refusing to apply *Ring* retroactively to *Atkins* claims); *Walton v. Johnson*, 269 F.Supp.2d 692, 698 n. 3 (W.D.Va.2003) (noting that *Ring* does not apply to *Atkins* claims).

[34] See, e.g., *Hill v. Anderson*, 300 F.3d 679, 681 (6th Cir.2002) (stating that *Atkins* applies retroactively); *Clemons v. State*, So.2d , 2003 WL 22047260, *3, 2003 Ala.Crim. App. LEXIS 217, *8 (Ala.Crim.App.2003); *Williams v. State*, 793 N.E.2d 1019, 1027 (Ind.2003); *Russell v. State*, 849 So.2d 95 (Miss.2003); *Johnson v. State*, 102 S.W.3d 535 (Mo.2003); *State v. Dunn*, 831 So.2d 862 (La.2002); *State v. Lott*, 97 Ohio St.3d 303, 779 N.E.2d 1011(2002).

[35] *See, e.g., Turner v. Crosby*, 339 F.3d 1247, 1279-86 (11th Cir.2003) (holding that *Ring* is not retroactive absent an express pronouncement by the Supreme Court to that effect); *Moore v. Kinney*, 320 F.3d 767, 771 n. 3 (8th Cir.2003), *cert. denied*, 539 U.S. 930, 123 S.Ct. 2580, 156 L.Ed.2d 609 (2003) (holding that *Ring* will not be applied retroactively absent an express pronouncement from the Supreme Court); *State v. Towery*, 204 Ariz. 386, 64 P.3d 828, 835 (2003) ("[t]he new rule of criminal procedure announced in *Ring* . . . does not meet either of the exceptions to *Teague's* general rule that new rules do not apply retroactively to cases that have become final"); *Colwell v. State*, 118 Nev. 807, 59 P.3d 463, 470-73 (2002) (adopting a *Teague*-based retroactivity test and concluding that "retroactive application of *Ring* on collateral review is not warranted"); *but see Summerlin v. Stewart*, 341 F.3d 1082, 1084 (9th Cir.2003) (holding that *Ring* does apply retroactively), *cert. granted sub nom. Schriro v. Summerlin*, U.S. , 124 S.Ct. 833, 157 L.Ed.2d 692 (2003).

[36] *See In re Johnson*, 334 F.3d at 404-05 (concluding that "neither *Ring* and *Apprendi* nor *Atkins* render the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt"); *Head v. Hill*, 587 S.E.2d at 619 (concluding that "the absence of mental retardation is not the functional equivalent of an element of an offense such that determining its absence or presence requires a jury trial under *Ring "); Walton v. Johnson*, 269 F.Supp.2d at 698 n. 3 (stating that "the determination of mental retardation does not increase the penalty for the crime beyond the statutory maximum and thus it is not the equivalent of an element of the offense for *Apprendi* purposes").

[37] *See id.*

[38] *Atkins*, 536 U.S. at 320, 122 S.Ct. 2242; *see also State v. Williams* 831 So.2d 835, 860, n. 35 (La.2002) *("Atkins"* explicitly addressed mental retardation as an exemption from capital punishment, not as a fact the *absence* of which operates "as the functional equivalent of an element of a greater offense," thus a jury determination of that fact is not required).

[39] *State v. Williams*, 831 So.2d at 860 & n. 35 (noting that "the Supreme Court would unquestionably look askance at a suggestion that in *Atkins* it had acted as a super legislature imposing on all of the states with capital punishment the requirement that they prove as an aggravating circumstance that the defendant has normal intelligence and adaptive functions"); *compare Murphy v. State*, 66 P.3d 456, 457 (Okla.2003) (stating that if defendant raises sufficient evidence to create a factual claim of mental retardation, issue must be submitted to a jury to be decided at a hearing held solely on the issue of mental retardation; because defendant failed to show "significant" adaptive limitations or "substantially" limited intelligence, trial court did not err in declining to empanel jury).

[40] *Atkins*, 536 U.S. at 317, 122 S.Ct. 2242 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)).

[41] TEX.CODE CRIM. PROC. art. 11.071, § 9(a) ("If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order... [of] the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection"). *Cf. State v. Lott*, 779 N.E.2d at 1015 (when defendant raises *Atkins* claim in subsequent habeas

petition, "the trial court shall decide whether petitioner is mentally retarded by using the preponderance of the evidence standard").

[42] In his previously denied motion, applicant argued that "mental retardation is the kind of mental state question that Texas law has long required to be determined by a jury apart from the trial of the merits of the case." We disagreed. Mental retardation is not a transitory "mental state" like insanity or incompetency, which are temporary conditions that may excuse criminal conduct or postpone criminal proceedings. Applicant argued that because Texas statutes specifically provide for a jury trial issue on insanity and incompetency, he is therefore entitled to a jury trial determination of mental retardation in a postconviction habeas corpus proceeding. First, there is no extant Texas statute which specifically provides for a jury determination of mental retardation in a criminal trial, so there is no current statutory right involved at any stage of the proceedings. Second, applicant failed to provide sufficient support for his argument that he is entitled to a jury determination of mental retardation in a postconviction proceeding under article 11.071. He cited to a former Texas statute which had specifically provided for a jury determination of sanity if the question of sanity was first raised after conviction. *See* *Welch v. Beto*, 355 F.2d 1016, 1018 n. 2 (5th Cir.1966) (citing to former article 932b, the predecessor of article 46.02). That statute no longer exists and it would not apply to those who claim mental retardation under *Atkins* rather than insanity at the time of the commission of the crime or incompetence to be tried. Finally, he cited to a case from Oklahoma, in which the Oklahoma Court of Criminal Appeals determined that, even in post-conviction habeas corpus proceedings, a defendant who made a prima facie *Atkins* showing was entitled to a jury determination of mental retardation. *Lambert v. State*, 71 P.3d 30 (Okla.Crim.App. 2003). As applicant forthrightly admitted, the Oklahoma court did not explain why it would require the trial court to empanel a jury to determine mental retardation in a post-conviction proceeding. At any rate, in denying applicant's prior motion, we declined to follow *Lambert;* instead, we followed our own statutory procedures as enacted by the Texas Legislature.

[43] TEX.CODE CRIM. PROC. art. 11.071, § 11 ("The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify").

[44] Our sister states that have set the burden of proof at a preponderance of the evidence are: Arkansas, Idaho, Illinois, Louisiana, Missouri, Nebraska, New Mexico, South Dakota, Tennessee, Utah, Virginia, and Washington. *See* ARK.CODE ANN. § 5-4-618 (Michie 2003); IDAHO CODE § 19-2515A (Michie 2003); 2003 Ill. Laws 093-0605; 2003 La. Acts 698; Mo. REV.STAT. § 565.030 (2003); NEB.REV.STAT. § 28-105.01 (2003); N.M. STAT. ANN. § 31-20A-2.1 (2003); S.D. CODIFIED LAWS § 2327A-26.3 (Michie 2003); TENN.CODE ANN. § 39-13-203 (2003); UTAH CODE ANN. § 77-15a-104 (2003); VA.CODE ANN. § 19.2-264.3:1.1 (2003); and WASH. REV.CODE § 10.95.030 (2003). Our sister states that have set the burden of proof at clear and convincing evidence are: Arizona, Colorado, Delaware, Florida, and Indiana. *See* ARIZ. REV.STAT. § 13-703.02 (2003); COLO.REV.STAT. § 18-1.3-1102 (2003); DEL.CODE ANN. tit. 11, § 4209 (2003); FLA. STAT. ANN. § 921.137 (West 2003); and IND.CODE § 35-36-9-4 (2003). Two of the nineteen (Kansas and Kentucky) do not have a statutory burden of proof. *See* KAN. STAT. ANN. § 21-4623 (2002) and KY.REV.STAT. ANN. § 532.135 (Michie 2002).

[45] *See* TEX. PEN.CODE § 8.01(a) (insanity is an affirmative defense); TEX.CODE CRIM. PROC. art. 46.02(b) (a defendant is "competent to stand trial unless proved incompetent by a preponderance of the evidence"); *id.* at art. 46.05(k) (execution shall be stayed if trial court makes a finding by a preponderance of the evidence that the defendant is incompetent to be executed); *see also* *State v. Lott*, 779 N.E.2d at 1015 (holding that defendant "bears the burden of establishing that he is mentally retarded by a preponderance of the evidence").

[46] *See* *Ex parte Peterson*, 117 S.W.3d 804, 818 & n. 60 (Tex.Crim.App.2003) (per curiam) (defendant bears burden of proving double jeopardy claim by preponderance of evidence on writ of habeas corpus); *Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex.Crim.App.1993) (defendant-applicant bears the burden of proof at a habeas hearing to show a constitutional violation); *see also* *Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex.Crim.App.1995) ("[t]he burden of proof in a writ of habeas corpus is on the applicant to prove by a preponderance of the evidence his factual allegations"); *Ex parte Adams*, 768 S.W.2d 281, 287-88 (Tex.Crim.App.1989).

[47] *See* *Cook v. State*, 940 S.W.2d 623, 627 (Tex.Crim.App.1996) (noting that "[w]hile we are not bound by the findings of the habeas court, we generally accept them, absent an abuse of discretion").

[48] *See* *Ex parte Martin*, 6 S.W.3d 524, 526 (Tex.Crim.App.1999).

[49] *See* *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex.Crim.App.1989) ("[i]f the record will not support the trial judge's conclusions, then this Court may make contrary findings").

[50] *See, e.g.*, *Webster v. United States*, 2003 WL 23109787, 2003 U.S.Dist. LEXIS 17383 *36-43 (N.D.Tex.2003) (setting out differing defense and government experts' analysis, use, and view of data in assessing question of mental retardation).

[51] The defense sponsored two qualified expert witnesses, one of whom administered the WAIS-III IQ test to applicant and reviewed educational materials and prison records supplied by applicant's counsel. The other defense expert was primarily a psychotherapy counselor in mental health/mental retardation and an advocate for MHMR services. It was this second expert who provided more extensive testimony concerning applicant's adaptive behavior.

[52] The DSM-IV criteria for Antisocial Personality Disorder are:

• failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest;

• deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure;

• impulsivity or failure to plan ahead;

• irritability and aggressiveness, as indicated by repeated physical fights or assaults;

• reckless disregard for safety of self or others;

• consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations;

• lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

DSM-IV 649-50 (1994). Antisocial Personality Disorder is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three or more of the criteria. *Id.* For diagnostic purposes, the individual is at least 18 years, there is evidence of Conduct Disorder with onset before age 15 years, and the occurrence of antisocial behavior is not exclusively during the course of a Schizophrenic or Manic episode. *Id.* Because of the overlap of diagnostic criteria for both Mental Retardation and Antisocial Personality disorder, equally qualified experts may rationally reach contrary opinions based upon the same data. Compare DSM-IV 39-44 with *id.* 649-50.

[53] There were references to several other IQ tests that applicant had taken as a child and these tests ranged from a low of 67 to a high of 88, but both applicant's and the State's experts agreed that the two recent tests most accurately and comprehensively reflected applicant's true IQ. The trial court found that "[t]he scores of the two tests thus give great confidence that the scores are reliable and accurate."

The experts disagreed about the significance of the 95% confidence interval and whether, given the two similar IQ test results over time, the standard "plus or minus 5 points" to accommodate the statistical "standard error of measurement," should apply. This statistical 95% confidence interval may not be an entirely appropriate measurement when the burden of proof is preponderance of the evidence, not a 95% confidence burden. There is not, however, enough information in this record to decide that question.

After the trial court entered its findings, applicant filed written objections, attaching an unsworn letter from another expert. This letter asserts that the standard measurement of error applies regardless of the number of IQ tests taken or the similarity of scores obtained. This unsworn letter, however, was not timely submitted for the trial court's consideration and it is not a statement made under oath in open court, subject to crossexamination. It is hearsay. Therefore, we decline to consider it for the truth of the matters asserted. TEX.R. EVID. 801-802. But even if a factfinder applied the statistical standard deviation, there is not enough evidence in this record that proves, by a preponderance of evidence, that applicant's true IQ is lower than 72-74 rather than higher than 72-74. Thus, the trial court did not abuse its discretion in finding that applicant failed in his burden of proof even if it did "disregard" the standard error of measurement as applicant asserts.

[54] AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (Text Revision, 4th ed.2000).

[55] According to another cousin, applicant's great-grandmother was a very controlling person and her beatings were "what ruined him, that's what got him off to a pretty bad start."

[56] The State's expert stated that applicant displayed "very adaptive behavior" by getting out of a difficult environment when his greatgrandmother beat him. If he had stayed and simply accepted the beatings, that reaction would show less intelligence and less adaptive conduct.

[57] It is significant that neither of these cousins testified that they thought, at the time they knew him, that applicant was mentally retarded or mentally slow.

[58] Diana Villareal testified that applicant did go to school, but he would cut classes whenever he could, and he started hanging out with "the wrong type" of people.

[59] According to Illinois records, applicant was sent to his mother in Illinois because he was then in a Texas juvenile facility charged with burglary.

[60] Applicant told his Illinois juvenile probation officer that he had burglarized places "to obtain things that he and his family could not afford to buy." His stepfather told the officer that applicant associated with other delinquent boys and that he was easily influenced. To the defense expert, applicant's behavior of stealing or committing forgery to obtain food or other necessary items showed a lack of adaptive behavior because a person who lacks basic necessities should seek assistance from social services. To the State's expert, applicant's behavior showed that he knew what he wanted, could formulate a relatively sophisticated plan to obtain it, and could carry through on those plans.

[61] Other records indicated that applicant was frequently involved in fights although he stated that "he did not like to fight." One recorder opined: "It may be that he gains identity through his aggressive acts especially in light of his stepfather reportedly having a police record for stabbing four men in Chicago. [Applicant] does appear to have some admiration for his stepfather."

[62] One defense expert testified that those with mental retardation are constantly running afoul of family members and law enforcement because of their lack of conceptual abstract abilities to think through what they are doing. Applicant's juvenile records stated:

Joe is impulsive. He doesn't or isn't able to discern the cause and effect relationship between himself and others, much less the consequences of this.

[63] His Illinois probation officer stated that "Joe is felt to possess normal intelligence although there are no test scores to substantiate that."

[64] Nonetheless, at age 17, an Illinois caseworker reported that applicant's achievement levels were: Word Meaning 4.4; Paragraph Meaning 3.4; Math Comprehension 3.9; Total Battery 3.9.

[65] His juvenile pre-parole records state:

Joe's behavior in the classroom directly reflects his group life adjustment. His teachers report that he has proven to be mature, pleasant and amenable to suggestion. His performance in some subjects has been slow, due apparently to some uncertainty in his ability, but indications are that once he gets started he does good work. His grades have been and remain above average.

Another report stated that he had no trouble following staff directions and he interacted well with other students, although he did have a tendency to "bully smaller, less sophisticated peers." He was "a fairly verbal" and "fairly sophisticated" youth who "found little trouble meeting his material and emotional needs."

[66] Applicant points to TDCJ records of a truck driving course applicant took in prison as evidence that he is mentally retarded. These records showed that applicant had the ability to gain the knowledge and skill components to drive a truck, but that he was "just not suited for a truck driver. [H]e gets careless and ... tr[ies] too hard to correct mistakes." The defense expert explained that people with mental retardation "may be able to learn the individual intricate and isolated skills of a particular global behavior but not be able to put it all together in a functional way that works that people accept." The State's expert thought that applicant was just not a careful driver.

[67] The juvenile assessment questions and applicant's answers were:

1) How are you going to avoid trouble on the street? (Be specific)

I am going to avoid trouble by stop doing the things I use to do like stop smoking not and stop drink and by staying away from the cops that how I am going to avoid trouble.

2) Honestly, what do you think you will do if your transfer is denied?

I will tried and keep on trieding till it gose through because this place is not the place for me. Why I say that because school included.

3) What do you think you should do to get paroled?

I should obey all the rules here and where ever I go and stay here if my transfer is denied.

To the defense expert, these responses reflect concrete and simplistic thinking; all of the answers were superficial and showed no insight into the questions asked. To the State's expert, these answers, although replete with spelling and grammatical errors, were appropriate and specific responses to each question. They showed an understanding of what the question was and provided a specific and "correct" answer designed to please the questioner.

[68] According to the defense expert, this pattern of criminality showed that applicant was "not learning from experience ... opened the door for misbehavior again." According to the State's expert, this continued criminal conduct was consistent with antisocial personality disorder.

[69] According to the defense expert, applicant realizes that he "has promised people that he would behave and then would break those promises.... [People with mental retardation] know they shouldn't do this, but they end up doing it anyway because of the characteristics of impulsivity."

[70] According to the State's expert, "we have to look at historical records of the nature of the criminal offense, the person's ability to locate victims, to work in society, to use society to better his or her short-range impulsive needs." He acknowledged that there are mentally retarded persons who are criminals, but they tend to commit fairly primitive crimes, impulsive shoplifting, impulsive robbery, sudden acts of violence. Those who are mentally retarded will have a hard time finding victims, "pulling off a scam," finding and hiding weapons, breaking out of jail, etc. "The more complex the crime, the less likely the person is mentally retarded." Thus, an examination of the type of criminal conduct and the circumstances involved in that conduct are relevant in determining whether a person is mentally retarded.

[71] The defense expert noted that applicant had numerous prison disciplinary reports for refusing to work and arriving late for a work detail. To him, this behavior was "consistent with deficits in adaptive skills around vocational and career areas." To the State's expert, this conduct showed that applicant was averse to working.

FOOTNOTES OF THE DISSENT

[1] *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

[2] *See* *State v. Patrick*, 86 S.W.3d 592, 600-603 (Tex.Crim.App.2002) (Cochran, J., *dissenting)* (mandamus was inappropriate where action taken by trial court was neither permitted nor prohibited by statute and did not harm the interests of society, the State, or the orderly administration of justice).

[3] *State v. McPherson*, 851 S.W.2d 846, 850 (Tex.Crim.App.1992) (trial court did not err in providing a judicially created fourth special issue in a death penalty case to comply with *Penry I* when the Constitution required an additional vehicle and neither the Supreme Court nor Texas Court of Criminal Appeals had provided guidance on the what vehicle to provide the jury.)

[4] The Code of Criminal Procedure art. 11.071, § 9 states:

"If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order ... designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection." Tex.Code Crim. Proc. art. 11.071 § 9.

[5] *See* *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).

[6] *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).

[7] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[8] *See Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir.2003), *cert. granted, Schriro v. Summerlin*, U.S. , 124 S.Ct. 833, 157 L.Ed.2d 692 (2003).

[9] *See Taylor v. State*, 10 S.W.3d 673, 679 (Tex.Crim.App.2000), *citing Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[10] See Tex.Code Crim. Proc. arts. 37.071, 37.0711.

[11] *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001).

[12] Tex. Const. art. I § 15.

[13] Tex.Code Crim. Proc. arts. 1.12, 1.13.

[14] Tex.Code Crim. Proc. art. 46.02 § 4.

[15] Tex.Code Crim. Proc. art. 46.05(k). *See also, Ex parte Jordan*, 758 S.W.2d 250, 254 (Tex.Crim.App.1988) (pre-statute case determining habeas procedure sufficient, regarding competency to be executed, under *Ford v. Wainwright*, 477 U.S. 399, 425, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).).

[16] *See Ford v. Wainwright*, 477 U.S. 399, 425, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

[17] *Caldwell v. Johnson*, 226 F.3d 367, 373 (5th Cir.2000).

The above 2004 *Briseno* opinion is worthy of consideration in its entirety for several reasons, and provides a good example of the appellate court's struggle to provide direction on an evolving legal issue. Normally, the legislative branch determines the law, a jury decides questions of fact, and the appellate courts address only unresolved issues of law and assure that procedures have been correctly followed. Texas is one of twenty-four states in which the defendant bears the burden of proof of mental retardation by a preponderance of the evidence, and one of eleven states that normally leave determination of the question of fact of mental retardation to the jury, but nevertheless permit the trial court judge to act as fact finder post-conviction upon petition by the defendant when the issue has not been resolved by the jury. When the *Briseno* court states that "The Applicant, Jose Garcia Briseno, is not mentally retarded, and the State of Texas is therefore not precluded from carrying out the sentence of death in accordance with the verdict of the jury in the trial court" (135 S.W.3d 1, 4) it is not making a conclusion of fact but simply uphold a finding by the trial judge as permitted under Texas law.

The tradition of fact finding by the jury is nevertheless very strong, and we see this reflected Justice Holcomb's dissent. In June of 2010, the Court of Criminal Appeals again revisited the complex facts and procedural history of *Briseno* in an unpublished holding (2010 Tex. Crim. App. Unpub. LEXIS 338) when the defendant argued that the deliberateness and future-dangerousness special issues raised at trial would "not permit the jury to consider and give effect to all the mitigating circumstances which exist[ed] concerning [him]." In a decision, this time delivered by Justice Holcomb with one dissent, the Court agreed holding that "the jury at Briseno's trial had no vehicle with which to give full mitigating effect to his evidence of significantly sub-average intelligence. We grant the relief requested, and we remand the case for a new punishment hearing."

The 2004 *Briseno* opinion also demonstrates how mental retardation parallels insanity as a judicial issue. Just as there is a key distinction between a clinical assessment of mental illness and the legal determination of insanity; a clinical assessment of mental retardation

does not directly translate to a legal determination of mental retardation. It remains for the finder of fact, normally a jury, to decide whether a defendant is mentally retarded and thus exempt from the death penalty under *Atkins* as applied by the individual states.

This is clearly reflected in the Court's unanimous 2004 holding in the case of Willie Mack Modden (147 S.W.3d 293). As the Court observed, "This is not a case in which we have dueling experts. The three reports from the mental health experts that the trial court considered are consistent with one another and with the report from the TDCJ Mentally Retarded Offender Program. The reports establish that the applicant has (1) significant subaverage general intellectual functioning, (2) concurrent with deficits in adaptive functioning, (3) that occurred before age 18. The applicant's IQ scores of 58 and. 64 are well below the 70-75 score that generally indicates subaverage general intellectual functioning. [A clinician] found that the applicant possesses deficits in several adaptive functioning categories, and she found that the applicant has been retarded since birth." (147 S.W.3d 293, 297-298). The Court therefore had no difficulty concluding that "the record supports the trial court's findings' that the applicant is mentally retarded. As a result, we grant relief. We reform the applicant's sentence to life imprisonment in the Texas Department of Criminal Justice Correctional Institutions Division. (147 S.W.3d 293, 299).

Cases at the borderline are, however, the ones most likely to make their way to appeal, as demonstrated in the following 2002 case of *Stevenson v. State*.

73 S.W.3d 914 (2002)

Exzavier Lamont **STEVENSON**, Appellant,
v.
The **STATE** of Texas.

(Tex. Crim. App. 2002) No. No. 73,963.

Court of Criminal Appeals of Texas.

April 24, 2002.

Janet Morrow, Houston, for Appellant.

Dan McCrory, Asst. DA, Houston, Matthew Paul, State's Atty., Austin, for State.

OPINION

HERVEY, J., delivered the unanimous opinion of the Court.

A jury convicted appellant of capital murder after appellant pled guilty to the offense. The trial court sentenced appellant to death pursuant to the jury's answers to the special issues submitted at the punishment phase. Appellant raises one point of error with several subpoints in an automatic direct appeal to this Court. We affirm.

The evidence showed that the then 31-year-old appellant argued with two clerks in a convenience store. Appellant left the convenience store, returned a short time later with a gun and shot the two clerks to death. At the time of the offense, appellant had been previously convicted of several assaults, of making terroristic threats and of evading arrest. Before trial, a psychologist examined appellant and determined that appellant was sane at the time of the offense (appellant knew the difference between right and wrong when he committed the offense) and that appellant was competent to stand trial (appellant could, among

other things, assist in his defense). *See* Section 8.01, Texas Penal Code; Article 46.02(a), Texas Code of Criminal Procedure.

In one point of error, appellant claims that he is mentally retarded and that executing mentally retarded persons violates the Eighth Amendment to the United 915*915 States Constitution. Appellant implicitly, if not explicitly, concedes that he is only "mildly" and not "profoundly or severely" mentally retarded.[1]

The record, however, reflects that appellant made no such claim at trial. Rather, appellant's assertion at trial and the issue the parties litigated through their psychological experts was that a mental illness reduced appellant's moral culpability for this offense and justified a sentence less than death. Appellant did not assert that his moral culpability should be reduced because of mental retardation.

Appellant used the testimony of his psychological expert to claim during closing jury arguments that his untreated mental illness may have contributed to his killing of the victims:

I ask you to take all those things into consideration. This man is mentally ill. This man was born mentally ill. The question becomes, do we operate under the mad dog theory. Mad dog can't be cured, shoot him. Some people do. I ask you not to.

Was he ever treated?

Not really. Couldn't keep up with the treatment. Nobody to take him. He never was really treated. One thing Dr. Brown said is a positive aspect is, if the man had had prolonged psychiatric treatment, this may never have happened. This may never have happened. Not somebody hell bent on stealing, robbing and killing and carrying on. But somebody, if he had just gotten treated, could have been saved, could have saved [one of the victims] and others out there that day.

The prosecution responded by using the testimony of its psychological expert to claim that appellant's killing of the victims was not caused by any mental illness:

This is what this case is about. And I don't want to—there are so many details to cover. This is what the case is about. [Appellant] suffers from a mental illness. It may be severe, it may not be severe. Psychologists use various tests. Psychologists say one thing today and another thing tomorrow. And all of that is important. And you may be able to help some people if you take them to psychologists and you give them medicine. Medicine sometimes helps. Other things that psychologists use sometimes helps.

But aside from psychology, everybody has a personality. They think if they are rational—and that's what Dr. Friedman was—that's all he was examining for, was he competent and did he know right from wrong. And Dr. Brown agreed with that. They know right from wrong. They pick and choose. They choose to go back to the store instead of staying home. They choose to steal or not to steal. Does not stem from the mental illness. That is a problem that people deal with. But whether you choose to act is a personality.

We set out the entirety of the portion of appellant's brief supporting appellant's argument that he is mentally retarded.

As the factual record in this case makes clear, Appellant Exavier Stevenson exhibits the typical characteristics of mental retardation. His cognitive 916*916 impairment, reflected in his IQ of 68, manifested itself at an early age ("Special Ed classes," "Slow classes where he was a slow learner"). (R. 16, 17) He also displayed adaptive difficulties and "tics" at a young age. He was "distant, off to hisself in a dark room, rocking and speaking to no one." (R. 16, 19) At night in bed he would rock his head on the bed until his nose would bleed. (R. 16, 65) He "always rocked" ... "just like he did now, and banged his head against the wall." (R. 16, 54-56) He pulled his eyelashes out all the time, and his eyebrows. (R. 16, 58) In the hot summertime he put on three jackets and came out in the heat, for which his father beat him. And until he was "trained" to do otherwise, he would not engage in violence, even when everybody picked on him all the time because they knew he would not fight. (R. 16, 46) When he was 12 or 13 and lost a fight with his brother Aubrey in front of girls, he tried to kill himself by taking a bottle of Tylenol. (R. 16, 24, 53-54) Appellant was heavily dependent on others, keeping to himself and relying on those in

his family who were stable, who loved him, and even on his mother, who was chronically mentally ill. ("I am the movie star; Ms. Daisy, and I have plenty of money") (R. 16, 89)

Appellant was vulnerable to abuse as a child. The adults' reaction to his being slow and refusing to fight was to "downgrade him and tell him that he's not going to be nothing" and to beat him repeatedly "until they got tired" (R. 16, 51): his father with a water hose; his mother with a belt or her fists (R. 16, 22, 50); his grandfather with whatever he could get in his hands, a belt, or extension cord (R. 16, 51); his stepfather "until it was so bad (his sister) couldn't watch." (R. 16, 69-70)

The adaptive difficulty continued into his childhood. He could not hold a job for very long, except for one $5-an-hour job as an unarmed night security watchman. Appellant did work at whatever he could find to take care of his daughter and Monique Hayward's two children. He lived off and on with his mother and siblings. He had to move out of his sister Dorothy's apartment, to live with his mother, when a landlord intervened. His mother was living with a man, but the man died, and his family didn't want them there anymore. (R. 16, 19-20, 66-67) After that, he really had no place to go. In January 1999, he went to stay with his cousin Eric Taylor. At that time he was very "distant and depressed." (R. 16, 40)

We have also independently searched the record in review of appellant's claim of mental retardation. While appellant presented evidence of unusual behavior indicative of mental illness, this evidence is nevertheless insufficient to support a finding of mental retardation.[2]

917*917 Appellant's mother testified that a doctor once told her that the then 30-year-old appellant had the mind of a 19-year-old.

Q. Somebody told you he was retarded?

A. The doctor told me—okay, like if he's 30, he has the mind like a 19-year-old. That's what the doctor explained to me.

Likewise, this evidence does not support a finding that appellant is mentally retarded. The only other evidence having some bearing on whether appellant is mentally retarded is the testimony of appellant's psychological expert who testified that appellant's 68 IQ is "in the upper range of mentally retarded."

Q. Dr. Brown, now did you make any independent testing—or do an independent testing to determine his IQ?

A. Yes, yesterday I did administer an intelligence test; and it was consistent with what was reported by the family. He has an IQ in the upper range of mentally retarded, mentally defective range. 68 was his IQ.

Appellant's psychological expert also agreed with the prosecution that a person facing the death penalty might have a strong motivation to score low on an IQ test.

Q. If you believe that having a 68 on an IQ test may save you from the death penalty, don't you have a strong motivation to score low on an IQ test?

A. Might.

A low IQ score by itself, however, does not support a finding of mental retardation. *See* *Ex parte Tennard*, 960 S.W.2d 57, 61 (Tex.Cr.App.1997), cert. denied, 524 U.S. 956, 118 S.Ct. 2376, 141 L.Ed.2d 743 (1998) (low IQ score, standing alone, does not support a finding of mental retardation).[3] We find that on this record the evidence is insufficient to support appellant's claim that he is mentally retarded. *See* *Penry*, 109 S.Ct. at 2941 (Penry's psychological expert testified that Penry was mentally retarded); *Tennard*, 960 S.W.2d at 60-61; *see also* Section 591.003(13), Texas Health & Safety Code, (definition of mentally retarded); Section 591.003(16), Texas Health & Safety Code, (setting out method for determining whether a person is mentally retarded). We, therefore, need not consider his Eighth Amendment claim. Point of error one is overruled.

The judgment of the trial court is affirmed.

[1] *See Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2954-57, 106 L.Ed.2d 256 (1989) (Eighth Amendment may prohibit executing only persons "who are profoundly, or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions" in part because it cannot be said that all mentally retarded people "can never act with the level of culpability associated with the death penalty").

[2] During the punishment phase, defense counsel called several of appellant's family members to recount instances where appellant manifested symptoms of mental illness. Most saliently, they testified that appellant suffered from a split personality, that he was a slow learner, that he suffered physical and mental abuse by authority figures, that he would rock in the corner of a dark room, that he once tried to kill himself with an overdose of Tylenol after he lost a fight, that he once wore three jackets outside in the summertime, that he would pluck out his eyelashes and eyebrows nervously, that he routinely hit his head on the wall but did not remember doing so, and that he would carve symbols on his body with a burned knife or hanger. A defense expert also recalled documents in appellant's file recording other instances of self-mutilation and writing on walls in his own blood.

[3] A contrary holding could have the unintended consequence of threatening the liberty of citizens with low IQ scores or of "mildly" retarded citizens who do not commit capital murder and who are "perfectly capable of a self-sustaining life." *See Penry*, 109 S.Ct. at 2957-58 (relying solely on the "mental age" concept, which is defined as the "chronological age of nonretarded children whose average IQ test performance is equivalent to that of the individual with mental retardation," to hold that execution of any person with a low mental age would constitute cruel and unusual punishment could have a "disempowering effect if applied in other areas of the law" such that "mildly retarded persons could be denied the opportunity to enter into contracts or to marry"); *Tennard*, 960 S.W.2d at 61 (using IQ scores as the sole measure of mental retardation could threaten the liberty of citizens "with low IQ scores who are `perfectly capable of a self-sustaining life'"); David L. Rumley, Comment: *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 St. Mary's Law Journal Number 4 1299, 1338-40 (1993).

The legal definition of mental retardation in Texas is, however, far from firmly established. In *Briseno*, the Court laments that it "must act during this legislative interregnum to provide the bench and bar with temporary judicial guidelines in addressing *Atkins* claims." (135 S.W.3d 1, 5). The Court adopts as its foundation definition that "set out by the American Association on Mental Retardation (AAMR), and that contained in section 591.003(13) of the Texas Health and Safety Code. Under the AAMR definition, mental retardation is a disability characterized by: (1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18. As noted above, the definition under the Texas Health and Safety Code is similar: 'mental retardation' means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." (135 S.W.3d 1, 7).

Throughout its *Atkins* holdings, at least into 2010, the Court has continued to rely upon this mix of definitions despite its awareness that "Some might question whether the same definition of mental retardation that is used for providing psychological assistance, social services, and financial aid is appropriate for use in criminal trials to decide whether execution of a particular person would be constitutionally excessive punishment." (135 S.W.3d 1, 8). Presumably this is because Section 591.003(13) of the Texas Health and Safety Code is the closest the Texas Legislature has yet come to enacting specific *Atkins* language.

The Court, however, adds that the "adaptive behavior criteria are exceedingly subjective, and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases. There are, however, some other evidentiary factors which factfinders in the criminal trial context might also focus upon in weighing evidence as indicative of mental retardation or of a personality disorder:

- **Did those who knew the person best during the developmental stage—his family, friends, teachers,**

employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?

• Has the person formulated plans and carried them through or is his conduct impulsive?

• Does his conduct show leadership or does it show that he is led around by others?

• Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

• Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

• Can the person hide facts or lie effectively in his own or others' interests?

• Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Although experts may offer insightful opinions on the question of whether a particular person meets the psychological diagnostic criteria for mental retardation, the ultimate issue of whether this person is, in fact, mentally retarded for purposes of the Eighth Amendment ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility." (135 S.W.3d 1, 8-9).

The Court qualifies these guidelines in asking "Is there, and should there be, a "mental retardation" bright-line exemption from our state's maximum statutory punishment? As a court dealing with individual cases and litigants, we decline to answer that normative question without significantly greater assistance from the citizenry acting through its Legislature." (135 S.W.3d 1, 6). As *Briseno* demonstrates, however, there are marginal cases, and the fact that Briseno had not only a marginal IQ but appears to have acted as a "ringleader" (135 S.W.3d 1, 3) would make it difficult for IQ alone to specify *Atkins* criteria.

Nor is the Court willing to compromise on IQ measurements. In a recent 2010 case, *Ex Parte Yokamon Laneal Hearn* (AP-76,237), the Court of Criminal Appeals of Texas stated:

"This court has expressly declined to establish a "mental retardation" bright-line exemption from execution without "significantly greater assistance from the legislature." *Briseno*, 135 S.W.3d at 6. Instead, this court interprets the "about 70" language of the AAMR's definition of mental retardation to represent a rough ceiling, above which a finding of mental retardation in the capital context is precluded.

In the present case, applicant attempts to use neuropsychological measures to wholly replace full-scale IQ scores in measuring intellectual functioning. However, this court has regarded non-IQ evidence as relevant to an assessment of intellectual functioning only where a full-scale IQ score was within the margin of error for standardized IQ testing.

Thus, we hold that, while applicants should be given the opportunity to present clinical assessment to demonstrate why his or her full-scale IQ score is within that margin of error, applicants may not use clinical assessment as a replacement for full-scale IQ scores in measuring intellectual functioning.

The evidence before us in this application does not demonstrate significantly subaverage intellectual functioning by applicant. Accordingly, we dismiss the application."

The lack of a Texas legislative criteria for *Atkins* remains troublesome, and in 2010 a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was filed in the Texas case of *Hall v. Thaler* (No. 10-37) asserting in relevant part that:

"History demonstrates that when juries are not guided with proper evaluative criteria for assessing evidence, the death sentence is imposed in a "freakish" manner. *Gregg*, 428 U.S. at 189. … Since *Atkins*, though, the Legislature of the State of Texas has been either unable or unwilling to enact any legislation that responds to Court's mandate. … Absent meaningful guidance and effective judicial review, the Texas-imposed standards for ascertaining mental retardation create a constitutionally impermissible risk of arbitrary and capricious imposition of the death penalty."

SCOPE OF EXPERT TESTIMONY

SCOPE OF EXPERT TESTIMONY

Since the early 1990s, expert scientific testimony has undergone a major transformation. The credentials, procedures, and foundations of experts have come under broad scrutiny, and renewed attention has been paid to the structure of the law and the responsibilities judges and juries. The separate tasks of fact finders – judges and juries – and those of experts who provide the background and support that can assist the finders of fact, are now well delineated. Experts may not cross the line between educator and advisor and the province of the jury. Experts may not testify as to the "ultimate issue" which the finder of fact must decide.

At the same time, the importance of experts has become recognized as essential to justice. The first case below, the 2006 Texas case of *Wright v. State*, provides a systematic look into the workings of the court as it decides that an attorney's failure to assure expert testimony has risen to the level of ineffective assistance of counsel.

223 S.W.3d 36 (2006)

Dennis **WRIGHT**, Appellant,
v.
The **STATE** of Texas, Appellee.

(Tex. App. 2006), Nos. 01-05-00597-CR to 01-05-00599-CR.

Court of Appeals of Texas, Houston (1st Dist.).

July 27, 2006.

Discretionary Review Refused February 28, 2007.

Stanley G. Schneider, Schneider & McKinney, P.C., Houston, for Appellant.

David C. Newell, Assistant District Atty., Richmond, for State of Texas.

Panel consists of Justices JENNINGS, HANKS, and HIGLEY.

OPINION

TERRY JENNINGS, Justice.

A jury found appellant, Dennis Wright, guilty of the offenses of indecency with a child by exposure,[1] indecency with a child 37*37 by contact,[2] and aggravated sexual assault of a child.[3] The jury assessed appellant's punishment at confinement for ten years in the exposure case, twenty years in the contact case, and life in the sexual assault case, with the sentences to run consecutively.[4] In two issues, appellant contends that he was denied his Sixth Amendment[5] right to effective assistance of counsel based on his trial counsel's failure to investigate and use an expert to present a defense and assist in the cross-examination of adverse witnesses.

We reverse and remand to the trial court for proceedings consistent with this opinion.

Factual and Procedural Background

On April 23, 2003, a Fort Bend County Grand Jury issued a true bill of indictment, accusing appellant of the offense of indecency with a child by exposure. The State alleged that appellant had knowingly allowed his daughter, the six year-old complainant, to watch him masturbate. On October 9, 2003, the complainant began seeing Matthew Spears, a therapist. During the course of the sessions with Spears, the

complainant made additional outcries that appellant had allowed her to "help" him masturbate[6] and had penetrated her sexual organ with his sexual organ.[7] On October 11, 2004, another Fort Bend County Grand Jury issued another true bill of indictment, accusing appellant of the additional offenses of indecency with a child by contact and aggravated sexual assault of a child.

Carla Fair-Wright, the complainant's mother, testified that, in March 2001, she and appellant divorced after nine years of marriage. Fair-Wright explained that she and appellant agreed on a visitation schedule in which their two children visited appellant every other weekend and every Tuesday. On these occasions, both children would "usually spend the night at appellant's apartment," but on some occasions, the complainant would go to visit appellant alone.

Fair-Wright further testified that, on March 23, 2003, approximately one week after a scheduled visitation, while giving the complainant a bath at their home, the complainant told her that appellant "had to get the milk out, or he can't get the milk out." Fair-Wright explained that "[t]hen, [the complainant] demonstrated to [her] how he does that." Fair-Wright observed the complainant gesture back and forth with her hands in her groin area, and she understood the complainant to be telling her that appellant had masturbated in front of her. Following this exchange with the complainant, Fair-Wright called Child 38*38 Protective Services ("CPS") and set up an appointment for both children. Fair-Wright also explained that, after the complainant began seeing Spears, and while the indecency with a child by exposure case was pending against appellant, the complainant gave her additional information about what had occurred at appellant's apartment on one other occasion where she "talked a little bit more about her father asking her to help." Fair-Wright then informed Spears, as well as Fort Bend County Assistant District Attorney Mike Hartman of this second outcry.[8]

On cross-examination, Fair-Wright testified that, prior to the allegations of indecency and sexual abuse, she had filed for divorce and pursued custody of the children; however, she denied telling the judge in the divorce proceeding that she wanted to move out of the country with the children. She agreed that the complainant had some previous behavioral problems starting in first grade, including one incident where she had taken a knife to school. The complainant's school had also called Fair-Wright on another occasion because the complainant "was acting in a very sexual manner" by "bumping up against [a] boy." Fair-Wright denied feeling any anger or bitterness toward appellant because of their divorce.

Christine Thomas, a former CPS investigator, testified that she observed the complainant's videotaped interview at the Children's Assessment Center ("CAC").[9] During this interview, the complainant told investigators that she had "seen her dad's penis with `milk' all over it and observed her dad rubbing it." The complainant told investigators that when she asked her dad what he was doing, he became pale and told her that he did not want anyone to know because they "would make fun of him." Thomas believed the complainant's statements during the interview were "very clear and very age-appropriate."

Thomas further testified that she had interviewed appellant regarding the allegations. Thomas described appellant's behavior during the interview as "very evasive." She explained that, after initially denying the allegations, "[appellant] said exactly that [the complainant] had seen him once." Thomas also stated that appellant "admit[ted] to saying that he had told her something about it was called Daddy's milk."

The complainant, who was eight years old at the time of trial, testified that appellant, her father, had stopped living at home with her, her mother, and her brother. After her parent's separation, the complainant and her brother would visit and spend the night with appellant at his new apartment. These visitations stopped after the complainant revealed to her mother that, during many of these visits, 39*39 she had seen appellant's sexual organ. The complainant had seen appellant's hands "on his pennis [sic]" and a "thick white liquid" or "milk" come out.[10] She further testified that she touched appellant's penis with her hands during "a lot" of her visits to appellant's apartment. She also described being on top of appellant and contacting appellant's sexual organ with her sexual organ, an activity that she called "humping."

On cross-examination, when asked whether certain people had "coached [her] on the answers and asked [her] the questions already," the complainant answered, "Yes." When asked to identify those people, the complainant named Suzy Morton, the prosecutor trying the case, as well as her therapist, Spears. However, she denied that her mother had been one of those people.

Appellant presented the testimony of three witnesses—a security guard from appellant's place of employment, the complainant's brother, and appellant. The security guard, Thu Martinez, testified that, according to an attendance log, appellant had signed into work for everyday of March 2003, excepting only the 18th, 19th, and 20th. On cross-examination, Martinez conceded that there were no times on the attendance log and he had no idea when or how long appellant had worked on any given day.

The complainant's brother, who was twelve years old at the time of trial, testified that, after his parents separated, he visited appellant alone and with his sister, but that his sister had never visited appellant without him. When asked whether he "[knew] of any instances where [the complainant] has lied or made up things," the complainant's brother answered, "She lies a lot, you know." He explained that there were "lies like, `I have like $5,000' and stuff like that. That kind of lie, you know, like silly lies."

Appellant testified that he and Fair-Wright divorced in March of 2001, and the divorce "was very acrimonious." Appellant explained that a dispute had arisen regarding custody of the children, and he believed that the charges against him were the result of this dispute. Appellant further testified that, in his opinion, the complainant's testimony consisted of "very well-coached statements." He denied having any sexual contact with the complainant or having the complainant watch him masturbate.

After the jury found appellant guilty and assessed his punishment, the trial court, on June 1, 2005, held a hearing on appellant's motion for new trial. At the hearing, Bernard Sacks, appellant's trial counsel, testified that he had limited access to the State's file prior to trial. Specifically, Sacks explained that he had not received Spears's notes from the complainant's therapy sessions. He testified that the first time he had seen a copy of the handwritten notes from Spears "was approximately a week or two before the trial" and that the first time he received a copy of the notes was "after the jury was impaneled and we were in the courtroom." When asked during the motion for new trial why he did not contact an expert witness, Sacks stated:

> I did not [contact an expert] because I was told . . . I could not have the child interviewed and when I received [Spears's] notes, . . . it was the night before we started putting on testimony, 40*40 so I had not time to take that to an expert.

Sacks added that, although he was aware of literature about child memory and fabrication of charges, he did not have time to obtain the assistance of an expert to help prepare such a defense. Sacks further testified that he had not tried an aggravated sexual assault of a child case prior to the instant case.

Spears's notes, which were introduced into evidence at the hearing, contain his record of the complainant's therapy sessions from the months following the complainant's initial outcry of indecent exposure through the time that the second Fort Bend County Grand Jury issued the second indictment accusing appellant of the more serious offenses of indecency by contact and sexual assault. The notes indicate that Fair-Wright was actually present during most of the sessions. In his initial "Behavioral Health Assessment" of the complainant, dated October 15, 2003, Spears wrote "Dad masturbated in bed while [the complainant] was lying next to him. *Possibility* he had [the complainant] masturbate him as well." (emphasis added). Thus, Spears's notes demonstrate that, from the outset, Spears suspected that appellant had involved the complainant in masturbation. This assessment was made nearly seven months prior to the complainant's May 19, 2004 outcry in which she stated that her father "asked her to help" him masturbate. In his notes of a March 30, 2004 therapy session, Spears reports, "[the complainant] said that the court won't let her see her dad because her mom is making them say that."

One month later, in an April 27, 2004 session, Spears reports, "[the complainant] stated that her dad would pull his pants down and then make the `milk' come out when he thought she was sleeping. She said

he never asked her to help him `get the milk out.' . . . She also said it was her fault for waking up." But in her very next session, on May 19, 2004, Spears's notes indicate that the complainant told him that appellant had the complainant "help" him masturbate and that it started when she was six years old.

Spears's notes also show that he met with assistant district attorney Mark Hartman to discuss the complainant's subsequent outcries[11] and that, on February 3, 2005, Suzy Morton, the lead prosecutor in the case, was present and participated in one of the complainant's therapy sessions. Spears's notes for the February 3rd session indicate that "[the] session was intended to give the complainant a chance to meet Ms. Morton and introduce her to the idea of having to tell her story again."

On cross-examination, Sacks conceded that he was never denied access to the State's file and that he was aware of Spears's existence and contact information at least thirty days prior to trial. However, he explained that, when he had first received Spears's notes, he had "great difficulty reading those." When asked why he did not ask for a continuance on the date of trial, Sacks stated "I didn't believe that [Spears's notes] . . . was [sic] discovery as such, because . . . it's very difficult to read." Sacks also stated that he believed that the trial court had ordered the State to provide him an expert report thirty days in advance of trial and that Spears would provide such a report.

Dr. Jerome Brown, a licensed psychologist, testified that he was very familiar 41*41 with literature regarding false allegations of sexual abuse. Brown explained that his research found that custody disputes generate a high proportion of false allegations of sexual abuse. In his review of the complainant's statements and Spears's interview notes, Brown noticed an "extreme variation from the standard protocol of working with a child victim; and the particular variances from that protocol suggested that there was a very high potential for significant adverse influences upon the child that might have created . . . a coercive environment in which she would be encouraged and pressured in various ways to make false allegations."

Brown noted that in the videotaped CPS interview of the complainant, the child initially told the interviewer that her father, appellant, did not know that she was watching him masturbate; however, "the interviewer ignored the child's statement or otherwise did not pursue it at all." Brown also stated that Fair-Wright's participation in the therapy sessions, as reflected by Spears's notes, would not allow the complainant an opportunity to alter any dynamic occurring between the child and the mother that could encourage the child to make a false statement. Brown added that Spears's notes demonstrated "a significant violation of professional boundaries" by the State's participation in therapy sessions. In Brown's opinion, based on his review of the initial CPS interview of the child and Spears's notes, the investigation of the case and the treatment of the child was not impartial.

Brown opined that a properly qualified expert would have been able to assist appellant's trial attorney in preparing a cross-examination that would clarify whether or not Spears's "improper methodology," and any other adverse influences, would influence the complainant to make false statements. Brown also stated that an expert could have assisted in preparing for the cross-examination of the complainant and mother by providing an understanding of the dynamics of the custody battle between parents and explaining the dynamics between the father, daughter, and mother.

Ineffective Assistance of Counsel

In his two issues, appellant contends that he was denied effective assistance of counsel when his trial counsel did not investigate his case or use an expert to present a defense and assist in the cross-examination of adverse witnesses. He asserts that an expert would have explained the improper impact that Spears's therapy may have had on the complainant and aided in the cross-examination of the complainant and Fair-Wright.

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Strickland* requires a two-step analysis whereby appellant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's unprofessional error, there is a reasonable

probability that the result of the proceedings would have been different. 466 U.S. at 687, 104 S.Ct. at 2064; *Vasquez v. State*, 830 S.W.2d 948, 949 (Tex.Crim.App.1992). *Strickland* defines reasonable probability as a "probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. at 2068. It is appellant's burden to prove ineffective assistance and he must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Gamble v. State*, 916 S.W.2d 92, 93 (Tex.App.-Houston [1st Dist.] 1996, no pet.). A reviewing court determines the reasonableness of counsel's 42*42 challenged conduct in context and views it as of the time of counsel's conduct. *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim.App.2005). In reviewing counsel's performance, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that his performance falls within the wide range of reasonable professional assistance or trial strategy. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999). A claim of ineffective assistance must be firmly supported in the record. *Id.*

Here, appellant complains that although Sacks's theory was that the allegations were false and were the result of acrimony that resulted from appellant's divorce, he did not introduce any evidence other than appellant's own testimony that his ex-wife was upset with him to support his theory of defense and refute the allegations.

As noted, Sacks stated that he had seen, in the State's file, Spears's notes from the therapy sessions "about a week" before trial, but he had great difficulty reading them and thought that Spears would have written a report with his findings prior to trial. Sacks "did not have an opportunity to review [Spears's notes] or have them reviewed by an expert to see if there might be evidence that would support [the] defense of fabrication." Thus, the record reveals that, at the time of appellant's trial, Sacks remained unaware of the contents of Spears's notes. Sacks also conceded that he knew, well in advance of trial, about the existence of Spears and was able to contact him. Sacks reiterated that he had great difficulty reading Spears's notes and "chose to wait for a report from him. Not handwritten notes, . . . but to have a medical—or have an official report that's signed by him, . . . signed by his supervisor . . . that said he met with the child, that this was his conclusions." He further testified that even if Spears's notes had been in the State's file in January 2005, when the State filed its outcry notice, he wouldn't have been able to read them. He added that "[t]here were no conclusions on there, and not being an expert, I would have thought that Mr. Spears would have written a report with his findings, . . . determining if the child was telling the truth or not telling the truth." With respect to the complainant's videotaped interview at the CAC, Sacks did not give specific reasons as to why he did not have an expert review the videotape. Based on this testimony at the motion for new trial, appellant asserts that his trial counsel "had no legitimate strategy to not contact an expert and because of his ignorance of the literature, counsel did not know how an expert might be of assistance based on the facts of the instant case."

The United States Supreme Court has explained "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 521-22, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 690-91, 104 S.Ct. at 2066). In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.* at 521-22, 104 S.Ct. 2052.

43*43 In support of his argument that his counsel was ineffective because of his nonstrategic decision in failing to seek an expert's opinion, appellant relies on the recent Texas Court of Criminal Appeals decision in *Ex parte Briggs*, 187 S.W.3d 458 (Tex.Crim.App.2005). In *Briggs*, an injury-to-a-child case, the court concluded that "the failure by [Briggs's] attorney to take any steps to subpoena the treating doctors, withdraw from the case because [Briggs's] indigency prevented him from providing constitutionally effective assistance of counsel, or request state-funded expert assistance . . . constituted

deficient performance." *Id.* at 469. The court, in discussing trial counsel's failure to consult an expert to review medical records of the deceased child noted, "[t]his was not a `strategic' decision, it was an economic one." *Id.* at 467. The court further noted that there had been no suggestion that trial counsel declined to fully investigate the medical records because he made a strategic decision that such an investigation was unnecessary or likely to be fruitless or counterproductive. *Id.* Instead, Briggs's trial counsel had stated to his client that he could not fully investigate the medical records or consult with experts until he had been paid an additional $2,500-$7,500. *Id.* at 466. The court held that "[Briggs]'s trial counsel's *financial* decision to do nothing about the obvious need to develop evidence concerning [the complainant's] medical history did not reflect reasonable professional judgment." *Id.* at 469 (citing *Wiggins*, 539 U.S. at 534, 123 S.Ct. at 2541-42). The court concluded that "[t]his was not a `strategic' decision made after a full investigation of the facts and law." *Briggs*, 187 S.W.3d at 469.

Here, as in *Briggs,* appellant's trial counsel did not have a strategic motive for not fully investigating the complainant's therapy sessions or utilizing an expert to review Spears's notes or assist in the cross-examination of witnesses. In *Briggs,* trial counsel's decision was based on an economic rationale rather than a strategic one. In this case, Sacks explained that he did not hire an expert because (1) he was told that any expert he hired would not be able to interview the complainant, and (2) by the time he had received Spears's notes, he did not have time to contact an expert. Neither of these offered justifications constitutes a legitimate reason for Sacks's failure to fully investigate the facts relevant to appellant's case. Sacks also stated that he had difficulty reading Spears's report, and thought that Spears would provide a report with his findings. Again, the fact that Sacks had difficulty reading Spears's notes does not constitute a strategic or otherwise permissible reason for Sacks's failure to review the complainant's therapy records, particularly those records containing evidence that was obviously exculpatory. Instead, the record reflects that none of the potentially exculpatory evidence contained in Spears's notes was ever presented to the jury in appellant's trial.

An error in trial strategy will be considered inadequate representation only if counsel's actions are without any plausible basis. *Ex parte Burns*, 601 S.W.2d 370, 372 (Tex.Crim.App.1980); *Nelson v. State*, 881 S.W.2d 97, 101 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd). Given the nature of the allegations, Sacks's defensive theory of the case, and the exculpatory evidence contained in Spears's report, we conclude that it was unreasonable for Sacks to not fully investigate the contents of Spears's notes or consult an expert to pursue appellant's defensive theory. Sacks's stated reasons for not consulting with an expert, namely, that the expert would not be able to interview the complainant, that he did not have time after 44*44 looking at Spears's notes, and that he had difficulty reading the notes, do not justify his failure to fully investigate the complainant's therapy or explore other evidence, such as expert testimony, that would have supported appellant's defensive theory. Counsel's investigation did not reflect reasonable professional judgment. *See* *Wiggins*, 539 U.S. at 534, 123 S.Ct. at 2541-42. Accordingly, we hold that appellant's trial counsel's performance was deficient.

Further, and as noted above, to prevail on a claim of ineffective assistance, an appellant must not only show deficient performance by trial counsel, but must also show, beyond a reasonable probability, that, but for counsel's deficient performance, a different result would have occurred. *Thompson*, 9 S.W.3d at 812. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Initially, we note that the record reflects that appellant's trial counsel did consider possible fabrication and undue influence regarding the complainant's outcries. The record in this case includes a motion, filed December 8, 2003, wherein appellant, represented by Sacks, argued that the complainant's recorded interview should be suppressed at trial because "the questions were leading and suggestive of the answers for the child" and "the mother . . . is extremely biased in this matter." Appellant's subsequent motion to take testimony of the complainant was denied. During Sacks's cross-examination of the complainant, the complainant testified that the prosecutor and Spears had coached her answers and told her what to say. Also, as noted, appellant testified that he believed the charges were due to his refusal to cooperate with Fair-Wright's desire to move out of the country with the children. Sacks also elicited testimony from a

CPS investigator regarding the complainant's statements during her videotaped CAC interview, in which she stated that appellant did not know that she had seen him masturbate.

However, despite the obvious strategy by Sacks to discredit complainant's outcry and prove fabrication or improper influence, he was entirely unaware of the contents of Spears's notes, including exculpatory evidence that would have advanced appellant's defensive theory. Sacks never presented evidence showing Fair-Wright's presence at nearly all of the complainant's therapy sessions. Moreover, Sacks never introduced into evidence the complainant's own statements, contained in Spears's notes, that "the court won't let [the complainant] see her dad because her mom is making them say that." Nor did he introduce into evidence the complainant's statement at the April 27, 2004 session that appellant "thought [the complainant] was asleep" and "never asked her to help him `get the milk out'" —statements consistent with the complainant's initial comments during her CPS interview.

Moreover, we note that because Sacks failed to fully investigate the complainant's therapy notes, he could never have recognized any possible diversions from standard protocol of interviewing child sexual assault victims. If Sacks had uncovered such evidence, expert testimony such as that given by Dr. Brown at the motion for new trial could have been used to further advance appellant's defensive theory. Brown's testimony regarding false allegations of sexual assault occurring after a divorce and the accepted protocols for interviewing suspected child sexual assault victims would have been admissible as long as he did not comment directly about the truthfulness of the complainant in this case. *See* Schutz v. State, 957 S.W.2d 52, 59 (Tex.Crim.App.1997).

The bottom line is that exculpatory evidence in Spears's notes, expert testimony 45*45 about deviations from standard protocol reflected in the notes, and expert testimony regarding false allegations of sexual assault in connection with divorce proceedings constitute powerful evidence that would have supported appellant's defensive theory. At the very least, the assistance of such an expert to assist in the cross-examination of the adverse witnesses in this case could have made a significant difference in regard to the outcome of this case.

Accordingly, "without regard for the idiosyncrasies of the particular decisionmaker," we conclude that there is a reasonable probability, sufficient to undermine our confidence in the outcome of the case, that but for the deficient performance of trial counsel, the result of the proceedings would have been different. *See* Briggs, 187 S.W.3d at 470 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59-60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

We sustain appellant's two issues.

Conclusion

We reverse the judgments of the trial court and remand for proceedings consistent with this opinion.

[1] *See* TEX. PEN.CODE ANN. § 21.11(a)(2)(A) (Vernon 2003); Cause No. 38010A.

[2] *See* TEX. PEN.CODE ANN. § 21.11(a)(1) (Vernon 2003); Cause No. 40922.

[3] *See* TEX. PEN.CODE ANN. § 22.021(a)(1)(B) (Vernon Supp.2005); Cause No. 40923.

[4] *See* TEX. PEN.CODE ANN. § 3.03(b)(2)(A) (Vernon 2003) (allowing sentences to run consecutively for offenses under sections 21.11, 22.011, 22.021, 25.02, or 43.25 committed against a victim younger than seventeen years of age).

[5] U.S. CONST. amend. VI.

[6] The State's notice of outcry, filed January 28, 2005, states that "after [the complainant] had begun counseling, she told her mother that sometimes [appellant] asked her if she wanted to help (make the `milk' come out of his penis) and she said that `sometimes I do help.'"

[7] Spears's notes, contained in the record, reveal that during a May 19, 2004 session, when asked if appellant had ever put his penis inside her, the complainant responded that "[appellant] did sometimes, but it did not hurt." Neither

party called Spears as a witness, and his notes were not admitted into evidence.

[8] The record is not clear on the timing of the complainant's subsequent outcry to her mother. Spears's notes reveal that on April 29, 2004, the complainant told him that "[appellant] never asked her to help him `get the milk out.'" But on May 19, 2004, at the complainant's following therapy session, "[the complainant] asked her mom to leave and said her dad would get her to `help' him. . . ." It was the May 19th session in which the complainant also stated that appellant had contacted her sexual organ with his sexual organ.

[9] Although Fair-Wright testified that she believed Christine Thomas had conducted the CAC interview, Thomas explained that she had only observed the interview "from a room directly connected to the video." It was Claudia Mullen, another investigator, who actually spoke to the complainant. Although Mullen is listed in the State's Notice of Outcry, neither the State nor the defense called Mullins to testify at trial.

[10] At several points during her testimony, in lieu of a verbal response, the complainant answered questions pertaining to the sexual conduct of appellant by writing her responses on a piece of paper. Those answers were then read aloud by the State, and the trial court admitted the paper containing the complainant's responses into evidence.

[11] Spears's notes reflect a "L.M." between Spears and assistant district attorney Hartman on August 17, 2004 to discuss "[the complainant's] statements on [May 19, 2004]" and "possibly testifying this week."

The scientific standards for expert testimony have also risen, but perhaps contrary to expectation, this has often facilitated the introduction of behavioral science testimony. In 1993, the United States Supreme Court set new standards for reviewing the scientific integrity of evidence in *Daubert v. Merrell Dow Pharm., Inc* (509 U.S. 579). This, and a series of subsequent clarifying cases known collectively as *Daubert* or the "Daubert Standard," has been adopted by mosts states. In Texas, this took the form of the *Robinson* Test in civil cases (*E.J.DuPont De Nemours & Company, Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), and the *Kelly* Test in criminal cases (*Kelly v. Texas,* 824 S.W.2d 568 (Tex. Crim. App. 1992).

The following 2007 Texas case, *Stephenson v. State,* allows the reader to watch the court decide whether a often-controversial topic of expert testimony is admissible inder the *Daubert-Kelly* criteria.

226 S.W.3d 622 (2007)

Milton D. **STEPHENSON**, a/k/a Milton Stephenson, a/k/a Milton Dee Stephenson, Appellant,
v.
The **STATE** of Texas, Appellee.

(Tex. App. 2007), No. 07-06-0380-CR.

Court of Appeals of Texas, Amarillo.

April 24, 2007.

623*623 David W. Barlow, Law Office of David W. Barlow, Beaumont, for appellant.

Wayln G. Thompson, Dist. Atty., Beaumont, for appellee.

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

OPINION

PATRICK A. PIRTLE, Justice.

This case involves the admissibility of expert witness testimony in the field of psychology pertaining to

the reliability of eyewitness identification of a suspect from a photographic lineup. Following a *Daubert-Kelly* hearing,[1] the trial court concluded that the proffered expert witness testimony did not meet the threshold requirements for admissibility and excluded the testimony. Finding that, under the circumstances of this case, the trial court erred by excluding such testimony, we reverse and remand this case for a new trial.

Background

At approximately 9:45 p.m. on June 20, 2003, Maria Moreno was vacuuming her car at a car wash. All the doors to the car were open. Her husband had gone to get change, and her young son was in the back seat. While she was cleaning out the back seat area, she looked up and noticed a stranger sitting in the driver's seat. She pushed him and asked what he was doing. He responded by pointing a gun at her and demanding she get away. She removed her son from the car and the man quickly drove away, after which she called 911.

The responding officer secured the scene and obtained information on the stolen 624*624 vehicle. The complainant advised the officer that the suspect had originally approached the scene on a bicycle which was then booked into evidence. She described the suspect as an eighteen year old black male with a small pointed nose.

Thirteen days later, on July 3, 2003, the detective assigned to the case presented a six-person simultaneous photographic lineup to the complainant. According to the detective, the photographs used in the lineup were selected by another detective. He did not make any suggestions to the complainant regarding the lineup. Four to five minutes after viewing the lineup, the complainant positively identified Appellant as the man who had stolen her car from the car wash at gunpoint. The complainant's eyewitness identification of Appellant was the only evidence which tied Appellant to this crime.

At a hearing on Appellant's motion to suppress the photographic lineup identification of Appellant, the complainant testified about the facts surrounding the robbery and her subsequent identification of Appellant from that photographic lineup. The investigating detective testified the complainant positively identified Appellant without any suggestion or pressure from him. At the suppression hearing, the trial court denied Appellant the opportunity to present testimony from Dr. Curtis E. Wills, a forensic psychologist, who had been proffered as an expert witness on the subject of (1) the reliability of eyewitness testimony in the context of simultaneous photographic lineup identifications and (2) "other elements" that create "false positives in photographic lineups." At the conclusion of the hearing, the trial court denied Appellant's motion to suppress both the photographic lineup and the in-court identification.

At trial, Appellant again proffered the testimony of Dr. Wills. In response to this proffer, the State requested a *Daubert-Kelly* hearing. During that hearing, Dr. Wills was allowed to testify and supporting exhibits were received. At the conclusion of that hearing, the court announced that the testimony of Dr. Wills would be excluded from the jury.

The case proceeded to the jury, whereupon Appellant was found guilty of aggravated robbery. At the punishment phase of trial, the jury found that Appellant had previously been convicted of prior felony offenses and assessed his sentence at confinement for 99 years.

Presenting three points of error, Appellant maintains the trial court abused its discretion in (1) excluding testimony of his expert witness; (2) denying his motion to suppress the photograph identification; and (3) denying his motion to suppress the in-court identification.

Standard of Review

A trial court's determination of a witness's qualifications as an expert and its decision to exclude expert testimony is reviewed for abuse of discretion. *Ellison v. State*, 201 S.W.3d 714, 723 (Tex.Crim.App. 2006). The trial court's decision to admit or exclude testimony will not be disturbed absent a clear abuse of discretion. *Id.* The trial court abuses its discretion when its ruling is arbitrary, unreasonable, or without

reference to any guiding rules or legal principles. *Lyles v. State*, 850 S.W.2d 497, 502 (Tex.Crim.App.1993). Under this standard, the appellate court must uphold the trial court's ruling if it was within the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim.App.1991)(op. on reh'g).

Expert Testimony on Reliability of Eyewitness Identification

Under Rule 702 of the Texas Rules of Evidence, the proponent of expert testimony 625*625 must show by clear and convincing evidence that the evidence he seeks to introduce is sufficiently relevant and reliable to assist the trier of fact in accurately understanding other evidence or in determining a fact issue. *Kelly v. State*, 824 S.W.2d 568, 572 (Tex.Crim.App.1992).

Relevance

The standard for relevance is whether the scientific principles "will assist the trier of fact" and are "sufficiently tied" to the pertinent facts of the case. *Jordan v. State*, 928 S.W.2d 550, 555-56 (Tex.Crim.App.1996). In this case, the State's case rested solely upon the complainant's eyewitness identification of Appellant. Likewise, Appellant's defense of mistaken identity rested solely upon the jury being able to judge the credibility of this eyewitness testimony. Expert witness testimony pertaining to the reliability of eyewitness identification of a suspect from a photographic lineup was sufficiently tied to the pertinent facts of this case as to be relevant.

Reliability

Courts have wrestled with the application of the reliability component to a proffer of expert testimony pertaining to the reliability of eyewitness identifications. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex.Crim.App.2000), citing *Nenno v. State*, 970 S.W.2d 549, 561 (Tex.Crim.App. 1998), *overruled on other grounds*, *State v. Terrazas*, 4 S.W.3d 720, 727 (Tex.Crim. App.1999); *Nations v. State*, 944 S.W.2d 795 (Tex.Crim.App.1997). *See also Jordan*, 928 S.W.2d at 553.

In *Kelly* the Court of Criminal Appeals held that Rule 702 required satisfaction of a three-part reliability test before "novel" scientific evidence would be admissible: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Kelly*, 824 S.W.2d at 573. Factors the trial court might consider in determining whether this reliability component has been met include, but are not limited to: (1) acceptance by the relevant scientific community, (2) qualifications of the proffered expert, (3) literature concerning the technique, (4) the potential rate of error of the technique, (5) the availability of other experts to test and evaluate the technique, (6) the clarity with which the underlying theory or technique can be explained to the court, and (7) the experience and skill of the person applying the technique. *Id.; see also Nenno*, 970 S.W.2d at 560.

In *Nenno* the Court of Criminal Appeals suggested that the *Kelly* framework applies to the soft sciences but with "less rigor" than to the hard sciences.[2] *Nenno*, 970 S.W.2d at 561; *Roberts v. State*, 220 S.W.3d 521, 530 (Tex.Crim.App., 2007)(not yet released for publication). Expert witness testimony in the field of psychology pertaining to the reliability of eyewitness identification of a suspect from a photographic lineup is a "soft science." In the field of "soft sciences," the three-prong *Kelly* test for reliability can be restated as requiring that the proponent of the evidence to show that the (1) field of expertise involved is a legitimate one, (2) subject matter of the expert's testimony is within the scope of that field, and (3) expert's 626*626 testimony properly relies upon or utilizes the principles involved in that field. *Nenno*, 970 S.W.2d at 561.

Analysis

Was the Testimony of Dr. Wills Admissible?

During the *Daubert-Kelly* hearing conducted by the trial court, Dr. Wills testified concerning his psychological research and publication of articles in the areas of eyewitness memory and the reliability of

eyewitness testimony. He also testified he has been involved in approximately 400 presentations, articles, and papers. He specifically offered testimony on sequential versus simultaneous lineups, as well as the rules and evaluation process involved in preparing a photographic lineup.[3] For purposes of establishing whether Dr. Wills had relied upon and utilized the appropriate methodology and principles involved in the field of the reliability of eyewitness identifications in photographic lineups, the trial court admitted two exhibits (Defendant's Exhibit No. 2 and Defendant's Exhibit No. 3) in support of his testimony.

Defendant's Exhibit 2 is an article written by the Honorable Pat Priest, Senior District Judge from Bexar County, entitled *"Eyewitness Identification and the Scientific Method,"* published in the December 2002 issue of the *Texas Bar Journal.* According to Judge Priest's article, the scientific method for eyewitness identification is as follows:

- the person conducting the lineup interview should not know which member of the lineup is the suspect;
- the interviewee should be informed that the suspect may or may not be in the lineup and that the interviewer does not know which person is the suspect;
- the suspect must not stand out from the others;
- a clear statement of the witness's level of confidence should be taken immediately after the identification and prior to any feedback;
- the interviewer should conduct a sequential and not a simultaneous lineup; and
- for purposes of *ad hoc* review, the lineup procedure should be videotaped.

Defendant's Exhibit 3 is a paper presented at the 2004 Advanced Criminal Law Course, sponsored by the State Bar of Texas, entitled *"Restoring Integrity in Eyewitness Cases: Sequential Photo Lineups."* It includes several appendices, one of which is a paper on photographic lineup procedures prepared by Dr. Wills for the Texas Rangers. Two other articles also included in Exhibit 3 are: (1) *"Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison,"* and (2) *"Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case."*

Dr. Wills testified that his paper for the Texas Rangers involved the importance of suspect photos being consistent with one another and with the complainant's description of the suspect. For example, he explained that if the complainant's description included a mole, then a mole would either have to be apparent or unapparent in all photographs in the lineup to reduce the risk of a witness identifying a suspect based solely on the appearance of a mole rather than an actual identification of the suspect.

627*627 Based upon his review of the facts in this case, Dr. Wills then offered his opinion that the lineup in question had "some real problems." According to Dr. Wills, the lineup was biased. Specifically, he pointed out that the simultaneous lineup included several photographs that did not sufficiently match the complainant's description of the suspect. Furthermore, he noted that some of the photographs stood out from the others because some included facial hair while others did not, and some included suspects with broad noses while others did not.

Simultaneous with the introduction of Defendant's Exhibit Nos. 2 and 3, the trial court announced that the admission of these exhibits was for the benefit of the review to be conducted by the Court of Appeals. Based on this comment and the time frame reflected by the record, we are persuaded that the trial court did not take the time to actually consider this evidence.[4] Notwithstanding the fact that the trial court may not have considered this evidence, said exhibits were properly before it for purposes of consideration and analysis as to whether Appellant had met his burden pertaining to the admissibility of Dr. Wills's testimony. We must, therefore, review the totality of this evidence to determine whether the trial court's decision to exclude the testimony of Dr. Wills was an abuse of discretion.

Dr. Wills was proffered as an expert witness in the field of psychology. Psychology is a legitimate and recognized field of expertise. *Tiede v. State*, 76 S.W.3d 13, 14 (Tex.Crim.App.2002). The reliability of

eyewitness identification is a legitimate subject matter within the field of psychology. *Weatherred v. State*, 963 S.W.2d 115, 122-31 (Tex.App.-Beaumont 1998), *rev'd. on other grounds,* 15 S.W.3d 540 (Tex.Crim.App.2000). Dr. Wills's testimony, in particular his opinion that the photographic lineup in question was biased, relies upon and utilizes the principles involved in that field. In preparation for his testimony, Dr. Wills reviewed the statement given to the police by Maria Moreno. He also reviewed the probable cause affidavit and the photographic lineup in question. He applied the concept of "relative judgment" to simultaneous photographic lineups and opined the benefits of sequential photographic lineups versus simultaneous photographic lineups. Furthermore, he applied the concepts of "cueing and unintentional behavior" to the process of preparing and presenting non-suggestive photographic lineups.

Having determined that the proffered expert testimony of Dr. Wills was (1) within the legitimate field of psychology, (2) concerning a subject matter within the scope of that field, to-wit: the reliability of eyewitness identifications in photographic lineups; and (3) arrived at after proper utilization of the principles involved in that field, we conclude the proffered expert testimony met the three prong analysis of *Kelly* and *Nenno* and was admissible. Concomitantly, the trial court abused its discretion in excluding that testimony.

Was the Appellant Harmed by the Exclusion of the Expert Testimony?

In *Cain v. State*, 947 S.W.2d 262 (Tex.Crim.App.1997), the Court of Criminal Appeals held that except for certain federal constitutional errors deemed structural by the United States Supreme Court, 628*628 no error is categorically immune from a harm analysis. *See also Wheat v. State*, 178 S.W.3d 832, 833 (Tex.Crim.App.2005). Although a trial court's decision to exclude defensive evidence can substantially affect the rights of the accused, erroneous evidentiary rulings rarely rise to the level of denying an accused the fundamental constitutional right to present a meaningful defense. *Tiede v. State*, 76 S.W.3d 13, 14 (Tex.Crim.App.2002); *Potier v. State*, 68 S.W.3d 657, 663 (Tex.Crim.App.2002). As explained in *Potier,* there are, however, two distinct types of evidentiary rulings which potentially rise to the level of a constitutional violation: (1) state evidentiary rulings which categorically and arbitrarily prohibit an accused from offering otherwise relevant, reliable evidence which is vital to his defense; and (2) a trial court's clearly erroneous ruling excluding otherwise relevant, reliable evidence which "forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Potier*, 68 S.W.3d at 665.

Therefore, when a trial court excludes relevant, reliable evidence which forms such a vital portion of the case that the accused is effectively prevented from presenting a meaningful defense, the appellate court must reverse the judgment of the trial court unless it determines beyond a reasonable doubt that the error did not contribute to the conviction or to the punishment assessed. Tex.R.App. P. 44.2(a).

Having determined that the trial court erred in excluding the testimony of Dr. Wills, we must assess whether that testimony was vital to Appellant's presentation of a meaningful defense. In this regard, we start with the observation that the accuracy and reliability of the complainant's identification of Appellant as the perpetrator of this crime was pivotal to the State's case. The State presented no other inculpatory evidence tying Appellant to the crime for which he was convicted. Likewise, Appellant's defense of mistaken identity turns on the ability of the jury to judge the reliability of that very same testimony. Therefore, we conclude that the reliability of the eyewitness identification was a vital aspect of the case at bar.

Although the proffer of expert testimony on eyewitness identification has increased, it remains controversial. *Weatherred*, 15 S.W.3d at 541 n. 2. Courts from all levels, psychologists, and commentators have accepted the premise that the "identification of strangers is proverbially untrustworthy." *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967); *U.S. v. Brownlee*, 454 F.3d 131, 141 (3rd Cir.2006); *Cook v. State*, 741 S.W.2d 928, 952 (Tex.Crim.App.1987)(Clinton J., dissenting). The hazards of eyewitness identifications are established by a formidable number of instances of misidentification in the records of American criminal

jurisprudence.[5] Making the situation even more problematic is the fact that "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable."[6] Given these vagaries, a defendant's ability to effectively challenge the certainty and confidence of an eyewitness identification is a matter of paramount importance to the fair administration of justice.

Under the facts of this case, the trial court's decision to exclude the testimony of 629*629 Dr. Wills significantly impaired Appellant's ability to present his defense and was, therefore, of constitutional proportions. In light of these considerations, we cannot determine beyond a reasonable doubt that the error did not contribute to the conviction.

Conclusion

Having determined that Appellant was harmed by the exclusion of Dr. Wills's testimony, we sustain point one. Although Appellant addresses the denial of his motion to suppress in points two and three, he neither argues nor references any authority in support of those contentions. Accordingly, he presents nothing for review as to points two and three. Tex. R.App. P. 38.1(h). *See also* *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex.Crim.App. 2000).

Consequently, having sustained Appellant's first point of error, the judgment of the trial court is reversed and this cause is remanded for a new trial.

[1] *See* Tex.R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex.Crim.App.1992).

[2] "Hard sciences" are generally considered to be those sciences which are based upon scientific method and are susceptible to rigid scientific testing and validation, such as chemistry, physics, or mathematics; whereas, "soft sciences" are generally considered to be those nonscientific disciplines that rely upon technical or specialized knowledge, skill or experience, such as the social sciences of psychology, sociology, or criminology.

[3] According to Dr. Wills's testimony, a simultaneous lineup refers to multiple photographs appearing on one page whereas a sequential lineup consists of viewing one photograph at a time and either rejecting or accepting it.

[4] While the record of proceedings is ultimately for the benefit of appellate review, a trial court is duty-bound to consider evidence proffered for purposes of a *Daubert-Kelly* analysis and it may not shirk that duty by simply deferring to the appellate court to do that which it had the obligation to do in the first place.

[5] Samuel R. Gross *et al., Exonerations in the United States: 1989-2003,* 95 J.Crim.L & Criminology 523 (2004); 3 Wigmore, Evidence § 786a (3d ed.1940).

[6] Rudolf Koch, Note, *Process v. Coutcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony,* 88 Cornell L.Rev. 1097, 1099 n. 7 (2003)

EXPERT WITNESS IMMUNITY

EXPERT WITNESS IMMUNITY

Traditionally, experts have enjoyed near total immunity from litigation stemming from their testimony and reports. As with attorneys, court documents and proceedings are viewed as part of process serving the public interest, and as such it would defeat that purpose if parties could sue for libel or slander because they took exception to testimony or pleadings. For example, in the Texas case of *James v. Brown* (637 S.W.2d 914, Tex., 1982):

> A suit for damages was instituted by reason of an involuntary hospitalization proceeding under the mental health code. The District Court, No. 162, Dallas County, Dee Brown Walker, J., granted summary judgment for the defendants, and the plaintiff appealed. The Dallas Court of Appeals, Fifth Supreme Judicial District, Carver, J., 629 S.W.2d 781, affirmed in part and reversed and remanded in part, and plaintiff brought error. The Supreme Court held that: (1) reports by defendant psychiatrists to the probate judge in plaintiff's mental health proceedings were absolutely privileged and did not give rise to an action for defamation; (2) unavailability of a defamation action did not preclude plaintiff from recovering against defendants for negligent misdiagnosis-medical malpractice; (3) fact questions regarding bad faith, unreasonableness, or negligence precluded summary judgment on cause of action for negligent misdiagnosis; (4) plaintiff failed to state a cause of action against defendant psychiatrists for either false imprisonment or malicious prosecution.

Similarly, in the 1996 Texas case of *Delcourt v. Silverman* (919 S.W.2d 777, Tex. App. 1996):

> Mother brought action against psychiatrist and guardian ad litem who were appointed by court in child custody case in which mother lost custody. The 190th District Court, Harris County, Eileen O'Neill, J., granted summary judgment for psychiatrist and guardian ad litem. Mother appealed. The Court of Appeals, O'Neill, J., held that: (1) psychiatrist was entitled to absolute derived judicial immunity, and (2) guardian ad litem was entitled to absolute derived judicial immunity.

The Court went on to explain that:

> This case presents questions of first impression in Texas: whether a psychologist, appointed under Rule 167a(d)(1) in a case arising under Title II of the Texas Family Code, and a guardian ad litem, appointed under article 11.10 of the Texas Family Code, are entitled to absolute immunity for actions taken pursuant to their appointments.
>
> It is well-established that judges are absolutely immune from liability for judicial acts that are not performed in the clear absence of all jurisdiction, no matter how erroneous the act or how evil the motive. *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir.), *cert. denied*, 492 U.S. 921, 109 S.Ct. 3250, 106 L.Ed.2d 596 (1989); *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (1961). Judges are granted this broad immunity because of the special nature of their responsibilities. *Kegans*, 870 F.2d at 995. Judicial immunity, which is firmly established at common law, protects not only the individual judges, but benefits the public "whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences." *Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 350, 20 L.Ed. 646 (1871) (citations omitted).
>
> When judges delegate their authority or appoint others to perform services for the court, the judicial immunity that attaches to the judge may follow the delegation or appointment. *Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex.App.-Dallas 1994, writ denied). Officers of the court who are integral parts of the judicial process, such as court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees are entitled to judicial immunity if they

actually function as an arm of the court. *Id. See also Babcock v. Tyler*, 884 F.2d 497 (9th Cir.1989), *cert. denied*, 493 U.S. 1072, 110 S.Ct. 1118, 107 L.Ed.2d 1025 (1990) (holding social worker absolutely immune); *Demoran v. Witt*, 781 F.2d 155 (9th Cir.1985) (holding probation officers absolutely immune); *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812 (10th Cir.) (holding state supreme court justices and clerk absolutely immune), *cert. denied*, 459 U.S. 840, 103 S.Ct. 90, 74 L.Ed.2d 83 (1982); *Ashbrook v. Hoffman*, 617 F.2d 474 (7th Cir.1980) (holding partition commissioner absolutely****782*** immune). This type of absolute immunity is referred to as "derived judicial immunity." *See Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex.1992). The policy underlying derived judicial immunity that protects participants in judicial and other adjudicatory proceedings is sound. Not only does the policy guarantee an independent, disinterested decision-making process, these immunities prevent the harassment and intimidation that might otherwise result if disgruntled litigants could vent their anger by suing either the person who presented the decision maker with adverse information, or the person or persons who rendered an adverse opinion. *Kegans*, 870 F.2d at 996-97.

Courts around the country have followed the lead of the United States Supreme Court and adopted a functional approach in determining whether a party is entitled to absolute immunity. *See Gardner v. Parson*, 874 F.2d 131, 145-46 (3d Cir.1989); *Hodorowski v. Ray*, 844 F.2d 1210, 1213-15 (5th Cir.1988); *Meyers v. Contra Costa County Dep't of Social Serv.*, 812 F.2d 1154, 1157 (9th Cir.), *cert. denied*, 484 U.S. 829, 108 S.Ct. 98, 98 L.Ed.2d 59 (1987); *Malachowski v. City of Keene*, 787 F.2d 704, 712 (1st Cir.), *cert. denied*, 479 U.S. 828, 107 S.Ct. 107, 93 L.Ed.2d 56 (1986). Under the functional approach, courts determine whether the activities of the party seeking immunity are intimately associated with the judicial process. *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 994-96, 47 L.Ed.2d 128 (1976). The question is whether the activities undertaken by the party are "functions to which the reasons for absolute immunity apply with full force." *Imbler v. Pachtaman*, 424 U.S. at 430, 96 S.Ct. at 995. In other words, a party is entitled to absolute immunity when the party is acting as an integral part of the judicial system or an "arm of the court". *Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S.Ct. 1108, 1115, 75 L.Ed.2d 96 (1983).

The rule of expert witness immunity is by no means absolute, however. In 1981, the United States Supreme Court handed down its ruling in *Estelle v. Smith* (451 U.S. 454) reprinted in its entirety below. Stemming from a Texas event, this holding did more than any other to transform forensic psychology into a true professional specialty.

451 U.S. 454

Supreme Court of the United States

W. J. **ESTELLE**, Jr., Director, Texas Department of Corrections, Petitioner,

v.

Ernest Benjamin **SMITH**.

No. 79-1127.

Argued Oct. 8, 1980.
Decided May 18, 1981.

Texas prisoner sought federal habeas corpus relief. The United States District Court for the Northern District of Texas, Robert W. Porter, J., 445 F.Supp. 647, issued writ, and the state appealed. The Court of Appeals, 602 F.2d 694, affirmed. Certiorari was granted. The Supreme Court, Chief Justice Burger, held that: (1) where prior to in-custody court-ordered psychiatric examination to determine competency to

stand trial defendant had not been warned that he had right to remain silent and that any statement made could be used against him at capital sentencing proceeding, admission at penalty phase of capital felony trial of psychiatrist's damaging testimony on crucial issue of future dangerousness violated Fifth Amendment privilege against compelled self-incrimination; because of lack of appraisal of rights and a knowing waiver thereof death sentence could not stand, and (2) Sixth Amendment right to counsel was violated as defense counsel was not notified in advance that the psychiatric examination would encompass issue of future dangerousness.

Decision of Court of Appeals affirmed.

Justice Brennan filed a concurring statement.

Justice Marshall filed a statement concurring in part.

Justice Stewart filed an opinion concurring in the judgment, in which Mr. Justice Powell joined.

Justice Rehnquist filed an opinion concurring in the judgment.

After respondent was indicted in Texas for murder, the State announced its intention to seek the death penalty. At an ensuing psychiatric examination, ordered by the trial court to determine respondent's competency to stand trial and conducted in the jail where he was being held, the examining doctor determined that respondent was competent. Thereafter, respondent was tried by a jury and convicted. A separate sentencing proceeding was then held before the same jury as required by Texas law. At such a proceeding the jury must resolve three critical issues to determine whether or not the death sentence will be imposed. One of these issues involves the future dangerousness of the defendant, i. e., whether there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. At the sentencing hearing, the doctor who had conducted the pretrial psychiatric examination was allowed to testify for the State over defense counsels' objection that his name did not appear on the list of witnesses the State planned to use at either the guilt or penalty stages of the proceedings. His testimony was based on the pretrial examination and stated in substance that respondent would be a danger to society. The jury then resolved the issue of future dangerousness, as well as the other two issues, against respondent, and thus under Texas **1869 law the death penalty was mandatory. The Texas Court of Criminal Appeals affirmed the conviction and death sentence. After unsuccessfully seeking a writ of habeas corpus in the state courts, respondent petitioned for such relief in Federal District Court. That court vacated the death sentence because it found constitutional error in admitting the doctor's testimony at the penalty phase. The United States Court of Appeals affirmed.

Held :

1. The admission of the doctor's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination, because he was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a capital sentencing proceeding. Pp. 1872-1876.

(a) There is no basis for distinguishing between the guilt and penalty *455 phases of respondent's trial so far as the protection of the Fifth Amendment privilege is concerned. The State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to the examining doctor infringed the Fifth Amendment just as much as would have any effort to compel respondent to testify against his will at the sentencing hearing. Pp. 1872-1873.

(b) The Fifth Amendment privilege is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination. The fact that respondent's statements were made in the context of such an examination does not automatically remove them from the reach of that Amendment. Pp. 1873-1875.

(c) The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. An accused who neither initiates a

psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. When faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to the doctor were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. Miranda v. Arizona, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694. Since these safeguards of the Fifth Amendment privilege were not afforded respondent, his death sentence cannot stand. Pp. 1875-1876.

2. Respondent's Sixth Amendment right to the assistance of counsel also was violated by the State's introduction of the doctor's testimony at the penalty phase. Such right already had attached when the doctor examined respondent in jail, and that interview proved to be a "critical stage" of the aggregate proceedings against respondent. Defense counsel were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his counsel in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed. Pp. 1876-1877.

5 Cir., 602 F.2d 694, affirmed.

*456 Anita Ashton, Austin, Tex., for petitioner.

Joel Berger, New York City, for respondent.

Chief Justice BURGER, delivered the opinion of the Court.

We granted certiorari to consider whether the prosecution's use of psychiatric testimony at the sentencing phase of respondent's capital murder trial to establish his future dangerousness violated his constitutional rights. 445 U.S. 926, 100 S.Ct. 1311, 63 L.Ed.2d 758 (1980).

**1870 I

A

On December 28, 1973, respondent Ernest Benjamin Smith was indicted for murder arising from his participation in the armed robbery of a grocery store during which a clerk was fatally shot, not by Smith, but by his accomplice. In accordance with Art. 1257(b)(2) of the Tex.Penal Code Ann. (Vernon 1974) concerning the punishment for murder with malice aforethought, the State of Texas announced its intention to seek the death penalty. Thereafter, a judge of the 195th Judicial District Court of Dallas County, Texas, informally ordered the State's attorney to arrange a psychiatric *457 examination of Smith by Dr. James P. Grigson to determine Smith's competency to stand trial. FN1 See n. 5, infra.

FN1. This psychiatric evaluation was ordered even though defense counsel had not put into issue Smith's competency to stand trial or his sanity at the time of the offense. The trial judge later explained: "In all cases where the State has sought the death penalty, I have ordered a mental evaluation of the defendant to determine his competency to stand trial. I have done this for my benefit because I do not intend to be a participant in a case where the defendant receives the death penalty and his mental competency remains in doubt." App. A-117. See Tex.Code Crim.Proc.Ann., Art. 46.02 (Vernon 1979). No question as to the appropriateness of the trial judge's order for the examination has been raised by Smith.

Dr. Grigson, who interviewed Smith in jail for approximately 90 minutes, concluded that he was competent to stand trial. In a letter to the trial judge, Dr. Grigson reported his findings: "[I]t is my opinion that Ernest Benjamin Smith, Jr., is aware of the difference between right and wrong and is able to aid an attorney in his defense." App. A-6. This letter was filed with the court's papers in the case. Smith was then tried by a jury and convicted of murder.

In Texas, capital cases require bifurcated proceedings-a guilt phase and a penalty phase.FN2 If the defendant is found guilty, a separate proceeding before the same jury is held to fix the punishment. At the penalty phase, if the jury affirmatively answers three questions on which the State has the *458 burden of

proof beyond a reasonable doubt, the judge must impose the death sentence. See Tex.Code Crim.Proc.Ann., Arts. 37.071(c) and (e) (Vernon Supp. 1980). One of the three critical issues to be resolved by the jury is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071(b)(2).FN3 In other words, the jury must assess the defendant's future dangerousness.

FN2. Article 37.071(a) of the Tex.Code of Crim.Proc.Ann. (Vernon Supp. 1980) provides:

"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 of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

FN3. The other two issues are "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" and "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." Tex.Code Crim.Proc.Ann., Arts. 37.071(b)(1) and (3) (Vernon Supp. 1980).

At the commencement of Smith's sentencing hearing, the State rested "[s]ubject to the right to reopen." App. A-11. Defense counsel called three lay witnesses: Smith's stepmother, his aunt, and the man who owned the gun Smith carried during the robbery. Smith's relatives testified as to his good reputation and character.FN4 The owner of the pistol testified as to Smith's **1871 knowledge that it would not fire because of a mechanical defect. The State then called Dr. Grigson as a witness.

FN4. It appears from the record that Smith's only prior criminal conviction was for the possession of marihuana. See App. A-64.

Defense counsel were aware from the trial court's file of the case that Dr. Grigson had submitted a psychiatric report in the form of a letter advising the court that Smith was competent to stand trial.FN5 This report termed Smith "a severe *459 sociopath," but it contained no more specific reference to his future dangerousness. Id., at A-6. Before trial, defense counsel had obtained an order requiring the State to disclose the witnesses it planned to use both at the guilt stage, and, if known, at the penalty stage. Subsequently, the trial court had granted a defense motion to bar the testimony during the State's case in chief of any witness whose name did not appear on that list. Dr. Grigson's name was not on the witness list, and defense counsel objected when he was called to the stand at the penalty phase.

FN5. Defense counsel discovered the letter at some time after jury selection began in the case on March 11, 1974. The trial judge later explained that Dr. Grigson was "appointed by oral communication," that "[a] letter of appointment was not prepared," and that "the court records do not reflect [the entry of] a written order." Id., at A-118. The judge also stated:

"As best I recall, I informed John Simmons, the attorney for the defendant, that I had appointed Dr. Grigson to examine the defendant and that a written report was to be mailed to me." Ibid. However, defense counsel assert that the discovery of Dr. Grigson's letter served as their first notice that he had examined Smith. Id., at A-113, A-116.

On March 25, 1974, the day the trial began, defense counsel requested the issuance of a subpoena for the Dallas County Sheriff's records of Dr. Grigson's "visitation to ... Smith." Id., at A-8.

In a hearing outside the presence of the jury, Dr. Grigson stated: (a) that he had not obtained permission from Smith's attorneys to examine him; (b) that he had discussed his conclusions and diagnosis with the State's attorney; and (c) that the prosecutor had requested him to testify and had told him, approximately five days before the sentencing hearing began, that his testimony probably would be needed within the week. Id., at A-14-A-16. The trial judge denied a defense motion to exclude Dr. Grigson's testimony on

the ground that his name was not on the State's list of witnesses. Although no continuance was requested, the court then recessed for one hour following an acknowledgment by defense counsel that an hour was "all right." Id., at A-17.

After detailing his professional qualifications by way of foundation, Dr. Grigson testified before the jury on direct examination: (a) that Smith "is a very severe sociopath"; (b) that "he will continue his previous behavior"; (c) that his sociopathic condition will "only get worse"; (d) that he has no "regard for another human being's property or for their life, regardless of who it may be"; (e) that "[t]here is *460 no treatment, no medicine ... that in any way at all modifies or changes this behavior"; (f) that he "is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so"; and (g) that he "has no remorse or sorrow for what he has done." Id., at A-17-A-26. Dr. Grigson, whose testimony was based on information derived from his 90-minute "mental status examination" of Smith (i. e., the examination ordered to determine Smith's competency to stand trial), was the State's only witness at the sentencing hearing.

The jury answered the three requisite questions in the affirmative, and, thus, under Texas law the death penalty for Smith was mandatory. The Texas Court of Criminal Appeals affirmed Smith's conviction and death sentence, Smith v. State, 540 S.W.2d 693 (Tex.Cr.App.1976), and we denied certiorari, 430 U.S. 922, 97 S.Ct. 1341, 51 L.Ed.2d 601 (1977).

B

After unsuccessfully seeking a writ of habeas corpus in the Texas state courts, Smith petitioned for such relief in the United States District Court for the Northern District of Texas pursuant to **1872 28 U.S.C. § 2254. The District Court vacated Smith's death sentence because it found constitutional error in the admission of Dr. Grigson's testimony at the penalty phase. 445 F.Supp. 647 (1977). The court based its holding on the failure to advise Smith of his right to remain silent at the pretrial psychiatric examination and the failure to notify defense counsel in advance of the penalty phase that Dr. Grigson would testify. The court concluded that the death penalty had been imposed on Smith in violation of his Fifth and Fourteenth Amendment rights to due process and freedom from compelled self-incrimination, his Sixth Amendment right to the effective assistance of counsel, and his Eighth Amendment right to present complete evidence of mitigating circumstances. Id., at 664.

*461 The United States Court of Appeals for the Fifth Circuit affirmed. 602 F.2d 694 (1979). The court held that Smith's death sentence could not stand because the State's "surprise" use of Dr. Grigson as a witness, the consequences of which the court described as "devastating," denied Smith due process in that his attorneys were prevented from effectively challenging the psychiatric testimony. Id., at 699. The court went on to hold that, under the Fifth and Sixth Amendments, "Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination." Id., at 709. Because Smith was not accorded these rights, his death sentence was set aside. While "leav [ing] to state authorities any questions that arise about the appropriate way to proceed when the state cannot legally execute a defendant whom it has sentenced to death," the court indicated that "the same testimony from Dr. Grigson, based on the same examination of Smith" could not be used against Smith at any future resentencing proceeding. Id., at 703, n. 13, 709, n. 20.

II

A

Of the several constitutional issues addressed by the District Court and the Court of Appeals, we turn first to whether the admission of Dr. Grigson's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination because respondent was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding. Our initial inquiry must be whether the Fifth Amendment privilege is applicable in the circumstances of this case.

*462 (1)

[1] The State argues that respondent was not entitled to the protection of the Fifth Amendment because Dr. Grigson's testimony was used only to determine punishment after conviction, not to establish guilt. In the State's view, "incrimination is complete once guilt has been adjudicated," and, therefore, the Fifth Amendment privilege has no relevance to the penalty phase of a capital murder trial. Brief for Petitioner 33-34. We disagree.

[2] The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." Culombe v. Connecticut, 367 U.S. 568, 581-582, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961) (opinion announcing the judgment) (emphasis added). See also Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596-1597, 12 L.Ed.2d 678 (1964); E. Griswold, The Fifth Amendment Today 7 (1955).

**1873 The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." In re Gault, 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made " 'the deluded instrument of his own conviction,' " Culombe v. Connecticut, supra, at 581, 1867, quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.

[3] [4] We can discern no basis to distinguish between the guilt *463 and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.FN6 Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. See Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 2152, 60 L.Ed.2d 738 (1979); Presnell v. Georgia, 439 U.S. 14, 16, 99 S.Ct. 235, 236, 58 L.Ed.2d 207 (1978); Gardner v. Florida, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204-1205, 51 L.Ed.2d 393 (1977) (plurality opinion). Any effort by the State to compel respondent to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment.FN7 Yet the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to Dr. Grigson similarly infringes Fifth Amendment values.

FN6. Texas law does provide that "[n]o statement made by the defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding." Tex.Code Crim.Proc.Ann., Art. 46.023(g) (Vernon 1979) (emphasis added). See also 18 U.S.C. § 4244; Fed.Rule Crim.Proc. 12.2(c); United States v. Alvarez, 519 F.2d 1036, 1042-1044 (CA3 1975); Note, Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination, 83 Harv.L.Rev. 648, 649, and cases cited at nn. 8-9 (1969).

FN7. The State conceded this at oral argument. Tr. of Oral Arg. 47, 49.

(2)

[5] The State also urges that the Fifth Amendment privilege is inapposite here because respondent's communications to Dr. Grigson were nontestimonial in nature. The State seeks support from our cases holding that the Fifth Amendment is not violated where the evidence given by a defendant is neither related to some communicative act nor used for the testimonial content of what was said. See, e. g., United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) (voice exemplar); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (handwriting exemplar); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (lineup); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (blood sample).

*464 [6] However, Dr. Grigson's diagnosis, as detailed in his testimony, was not based simply on his observation of respondent. Rather, Dr. Grigson drew his conclusions largely from respondent's account of the crime during their interview, and he placed particular emphasis on what he considered to be respondent's lack of remorse. See App. A-27-A-29, A-33-A-34. FN8 Dr. Grigson's**1874 prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, in reciting the details of the crime.FN9 The Fifth *465 Amendment privilege, therefore, is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.

FN8. Although the Court of Appeals doubted the applicability of the Fifth Amendment if Dr. Grigson's diagnosis had been founded only on respondent's mannerisms, facial expressions, attention span, or speech patterns, 602 F.2d 694, 704 (CA5 1979), the record in this case sheds no light on whether such factors alone would enable a psychiatrist to predict future dangerousness. The American Psychiatric Association suggests, however, that "absent a defendant's willingness to cooperate as to the verbal content of his communications, ... a psychiatric examination in these circumstances would be meaningless." Brief for American Psychiatric Association as Amicus Curiae 26 (emphasis in original).

FN9. On cross-examination, Dr. Grigson acknowledged that his findings were based on his "discussion" with respondent, App. A-32, and he replied to the question "[w]hat ... was the most important thing that ... caused you to think that [respondent] is a severe sociopath" as follows:

"He told me that this man named Moon looked as though he was going to reach for a gun, and he pointed his gun toward Mr. Moon's head, pulled the trigger, and it clicked-misfired, at which time he hollered at Howie, apparently his other partner there who had a gun, 'Watch out, Howie. He's got a gun.' Or something of that sort. At which point he told me-now, I don't know who shot this man, but he told me that Howie shot him, but then he walked around over this man who had been shot-didn't ... check to see if he had a gun nor did he check to see if the man was alive or dead. Didn't call an ambulance, but simply found the gun further up underneath the counter and took the gun and the money. This is a very-sort of cold-blooded disregard for another human being's life. I think that his telling me this story and not saying, you know, 'Man, I would do anything to have that man back alive. I wish I hadn't just stepped over the body.' Or you know, 'I wish I had checked to see if he was all right' would indicate a concern, guilt, or remorse. But I get didn't get any of this." Id., at A-27-A-28.

[7] The fact that respondent's statements were uttered in the context of a psychiatric examination does not automatically remove them from the reach of the Fifth Amendment. See n.6, supra. The state trial judge, *sua sponte*, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, but the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent. Consequently, the interview with Dr. Grigson cannot be characterized as a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense. Indeed, if the application of Dr. Grigson's findings had been confined to serving that function, no Fifth Amendment issue would have arisen.

Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. See, e. g., United States v. Cohen, 530 F.2d 43, 47-48 (CA5), cert. denied, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976); Karstetter v. Cardwell, 526 F.2d 1144, 1145 (CA9 1975); United States v. Bohle, 445 F.2d 54, 66-67 (CA7 1971); United States v. Weiser, 428 F.2d 932, 936 (CA2 1969), cert. denied, 402 U.S. 949, 91 S.Ct. 1606, 29 L.Ed.2d 119 (1971); United States v. Albright, 388 F.2d 719, 724-725 (CA4 1968); *466 Pope v. United States, 372 F.2d 710, 720-721 (CA8 1967) (en banc), vacated and remanded on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968). FN10

> FN10. On the same theory, the Court of Appeals here carefully left open "the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state." 602 F.2d, at 705.

[8] Respondent, however, introduced no psychiatric evidence, nor had he indicated that he might do so. Instead, the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death. Respondent's future dangerousness was a critical issue at the sentencing hearing, and one on **1875 which the State had the burden of proof beyond a reasonable doubt. See Tex.Code Crim.Proc.Ann., Arts. 37.071(b) and (c) (Vernon Supp. 1980). To meet its burden, the State used respondent's own statements, unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty. In these distinct circumstances, the Court of Appeals correctly concluded that the Fifth Amendment privilege was implicated.

(3)

[9] In Miranda v. Arizona, 384 U.S. 436, 467, 86 S.Ct. 1602, 1624, 16 L.Ed.2d 694 (1966), the Court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." Miranda held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Id., at 444, 86 S.Ct., at 1612. Thus, absent other fully effective procedures, *467 a person in custody must receive certain warnings before any official interrogation, including that he has a "right to remain silent" and that "anything said can and will be used against the individual in court." Id., at 467-469, 86 S.Ct., at 1624-1625. The purpose of these admonitions is to combat what the Court saw as "inherently compelling pressures" at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for "an intelligent decision as to its exercise." Ibid.

The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] perso [n] acting solely in his interest." Id., at 469, 86 S.Ct., at 1625. Yet he was given no indication that the compulsory examination would be

used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.

[10] [11] The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard," *468 Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." FN11 Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493-1494, 12 L.Ed.2d 653 (1964). We agree with the Court of Appeals that respondent's **1876 Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase. FN12

FN11. While recognizing that attempts to coerce a defendant to submit to psychiatric inquiry on his future dangerousness might include the penalty of prosecutorial comment on his refusal to be examined, the Court of Appeals noted that making such a remark and allowing the jury to draw its own conclusions "might clash with [this Court's] insistence that capital sentencing procedures be unusually reliable." 602 F.2d, at 707. See also Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

FN12. For the reasons stated by the Court of Appeals, we reject the State's argument that respondent waived his Fifth Amendment claim by failing to make a timely, specific objection to Dr. Grigson's testimony at trial. See 602 F.2d, at 708, n. 19. In addition, we note that the State did not present the waiver argument in its petition for certiorari. See this Court's Rule 40(1)(d)(2) (1970).

[12] [13] A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, *469 but the State must make its case on future dangerousness in some other way.

"Volunteered statements ... are not barred by the Fifth Amendment," but under Miranda v. Arizona, supra, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not "given freely and voluntarily without any compelling influences" and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. Id., at 478, 86 S.Ct., at 1630. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.FN13

FN13. Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination.

B

[14] [15] When respondent was examined by Dr. Grigson, he already had been indicted and an attorney had been appointed to represent him. The Court of Appeals concluded that he had a Sixth Amendment right to the assistance of counsel before submitting to the pretrial psychiatric interview. 602 F.2d, at 708-709. We agree.

The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." The "vital" need for a lawyer's advice and aid during the pretrial phase was recognized by the Court nearly 50 years ago in Powell v. Alabama, 287 U.S. 45, 57, 71, 53 S.Ct. 55, 60, 65, 77 L.Ed. 158 (1932). Since then, we have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer "at or after the time that adversary judicial proceedings have

been initiated against him ... whether by way of formal *470 charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972) (plurality opinion); Moore v. Illinois, 434 U.S. 220, 226-229, 98 S.Ct. 458, 463-465, 54 L.Ed.2d 424 (1977). And in United States v. Wade, 388 U.S., at 226-227, 87 S.Ct., at 1932 the Court explained:

"It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (Footnote omitted.)

**1877 See United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). See also White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961).

Here, respondent's Sixth Amendment right to counsel clearly had attached when Dr. Grigson examined him at the Dallas County Jail,FN14 and their interview proved to be a "critical stage" of the aggregate proceedings against respondent. See Coleman v. Alabama, 399 U.S. 1, 7-10, 90 S.Ct. 1999, 2002-2004, 26 L.Ed.2d 387 (1970) (plurality opinion); Powell v. Alabama, supra, 287 U.S., at 57, 53 S.Ct., at 60. Defense*471 counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness,FN15 and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.

FN14. Because psychiatric examinations of the type at issue here are conducted after adversary proceedings have been instituted, we are not concerned in this case with the limited right to the appointment and presence of counsel recognized as a Fifth Amendment safeguard in Miranda v. Arizona, 384 U.S. 436, 471-473, 86 S.Ct. 1602, 1626-1627, 16 L.Ed.2d 694 (1966). See Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378. Rather, the issue before us is whether a defendant's Sixth Amendment right to the assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination. But cf. n. 15, infra.

Respondent does not assert, and the Court of Appeals did not find, any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." 602 F.2d at 708. Cf. Thornton v. Corcoran, 132 U.S.App.D.C. 232, 242, 248, 407 F.2d 695, 705, 711 (1969) (opinion concurring in part and dissenting in part).

FN15. It is not clear that defense counsel were even informed prior to the examination that Dr. Grigson had been appointed by the trial judge to determine respondent's competency to stand trial. See n. 5, supra.

Because "[a] layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advise from someone who is trained and skilled in the subject matter." Maness v. Meyers, 419 U.S. 449, 466, 95 S.Ct. 584, 595, 42 L.Ed.2d 574 (1975). As the Court of Appeals observed, the decision to be made regarding the proposed psychiatric evaluation is "literally a life or death matter" and is "difficult ... even for an attorney" because it requires "a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing." 602 F.2d, at 708. It follows logically from our precedents that a defendant should not be forced to resolve such an important issue without "the guiding hand of counsel." Powell v. Alabama, supra, 287 U.S., at 69, 53 S.Ct., at 64.

Therefore, in addition to Fifth Amendment considerations, the death penalty was improperly imposed on respondent because the psychiatric examination on which Dr. Grigson testified at the penalty phase proceeded in violation of respondent's Sixth Amendment right to the assistance of counsel.FN16

FN16. We do not hold that respondent was precluded from waiving this constitutional right. Waivers of the assistance of counsel, however, "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends ... 'upon the particular facts and circumstances surrounding [each] case....' " Edwards v. Arizona, 451 U.S., at 482, 101 S.Ct., at 1883-1884, quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). No such waiver has been shown, or even alleged, here.

*472 C

Our holding based on the Fifth and Sixth Amendments will not prevent the State in **1878 capital cases from proving the defendant's future dangerousness as required by statute. A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty. In addition, a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase. See n. 10, supra.

Moreover, under the Texas capital sentencing procedure, the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts. Indeed, some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are "fundamentally of very low reliability" and that psychiatrists possess no special qualifications for making such forecasts. See Report of the America Psychiatric Association Task Force on Clinical Aspects of the Violent Individual 23-30, 33 (1974); A. Stone Mental Health and Law: A System in Transition 27-36 (1975); Brief for American Psychiatric Association as Amicus Curiae 11-17.

In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), we held that the Texas capital sentencing statute is not unconstitutional on its face. As to the jury question on future dangerousness, the joint opinion announcing the judgment emphasized that a defendant is free to present whatever mitigating factors he may be able to show, e. g., the range and severity of his past criminal conduct, his age, and the circumstances surrounding the crime for which he is being sentenced. Id., at 272-273, 96 S.Ct., at 2956-2957. The State, of course, can use the same type of evidence in seeking *473 to establish a defendant's propensity to commit other violent acts.

In responding to the argument that foretelling future behavior is impossible, the joint opinion stated:

"[P]rediction 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. And 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." (Footnotes omitted.) Id., at 275-276, 96 S.Ct., at 2957-2958 (footnotes omitted).

While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in Jurek was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts.

III

Respondent's Fifth and Sixth Amendment rights were abridged by the State's introduction of Dr. Grigson's testimony at the penalty phase, and, as the Court of Appeals concluded, his death sentence must be vacated.FN17 Because respondent's underlying conviction has not been challenged and remains undisturbed, the State is free to conduct further proceedings*474 not inconsistent with this opinion. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice BRENNAN.

FN17. Because of our disposition of respondent's Fifth and Sixth Amendment claims, we need not reach the question of whether the failure to give advance notice of Dr. Grigson's appearance as a witness for the State deprived respondent of due process.

I join the Court's opinion. I also adhere to my position that the death penalty is in all circumstances unconstitutional.

**1879 Justice MARSHALL, concurring in part.

I join in all but Part II-C of the opinion of the Court. I adhere to my consistent view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. I therefore am unable to join the suggestion in Part II-C that the penalty may ever be constitutionally imposed.

Justice STEWART, with whom Justice POWELL joins, concurring in the judgment.

The respondent had been indicted for murder and a lawyer had been appointed to represent him before he was examined by Dr. Grigson at the behest of the State. Yet that examination took place without previous notice to the respondent's counsel. The Sixth and Fourteenth Amendments as applied in such cases as Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246, and Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424, made impermissible the introduction of Dr. Grigson's testimony against the respondent at any stage of his trial.

I would for this reason affirm the judgment before us without reaching the other issues discussed by the Court.

Justice REHNQUIST, concurring in the judgment.

I concur in the judgment because, under Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), respondent's counsel should have been notified prior to Dr. Grigson's examination of respondent. As the Court notes, ante, at 1876, respondent had been indicted and an attorney had been appointed to represent *475 him. Counsel was entitled to be made aware of Dr. Grigson's activities involving his client and to advise and prepare his client accordingly. This is by no means to say that respondent had any right to have his counsel present at any examination. In this regard I join the Court's careful delimiting of the Sixth Amendment issue, ante, at 1877, n. 14.

Since this is enough to decide the case, I would not go on to consider the Fifth Amendment issues and cannot subscribe to the Court's resolution of them. I am not convinced that any Fifth Amendment rights were implicated by Dr. Grigson's examination of respondent. Although the psychiatrist examined respondent prior to trial, he only testified concerning the examination after respondent stood convicted. As the court in Hollis v. Smith, 571 F.2d 685, 690-691 (CA2 1978), analyzed the issue: “The psychiatrist's interrogation of [defendant] on subjects presenting no threat of disclosure of prosecutable crimes, in the belief that the substance of [defendant's] responses or the way in which he gave them might cast light on what manner of man he was, involved no ‘compelled testimonial self-incrimination’ even though the consequence might be more severe punishment.”

Even if there are Fifth Amendment rights involved in this case, respondent never invoked these rights when confronted with Dr. Grigson's questions. The Fifth Amendment privilege against compulsory self-incrimination is not self-executing. “Although Miranda's requirement of specific warnings creates a limited exception to the rule that the privilege must be claimed, the exception does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.” Roberts v. United States, 445 U.S. 552, 560, 100 S.Ct. 1358, 1364, 63 L.Ed.2d 622 (1980). The Miranda requirements were certainly not designed by this Court with psychiatric examinations in mind. Respondent was simply not in the inherently coercive situation considered in Miranda. He had already been indicted, and counsel had been appointed to represent him. No claim is raised that respondent's answers to Dr. Grigson's questions *476 were “involuntary” in the normal sense of the word. Unlike the police officers in Miranda, Dr.

Grigson was not questioning respondent in order to ascertain his guilt or innocence. Particularly since it is not necessary to decide this case, I **1880 would not extend the Miranda requirements to cover psychiatric examinations such as the one involved here.

The public had grown accustomed to viewing mental health experts as sympathetic and supportive allies. When a psychologist takes on the role of evaluator in a criminal case in which her professional judgments may shape the freedom and even life of a defendant, that defendant must be advised in advance that the clinician is not working for the defendant but for the court, and that consequently the clinician's interest and duty may conflict with the interests of the defendant.

Similarly, the potential erosion of absolute immunity can be seen in *Laub v. Pesikoff*; a 1998 Texas civil case reprinted in its entirety below.

979 S.W.2d 686 (1998)

Levi Lee **LAUB**, Appellant,
v.
Dr. Richard **PESIKOFF**, Appellee.
Levi Lee LAUB, Appellant,
v.
Dr. Rita JUSTICE, PH.D., Appellee.

(Tex. App. 1998) Nos. 01-96-01408-CV, 01-96-01559-CV.

Court of Appeals of Texas, Houston (1st Dist.).

July 30, 1998.

Rehearing Overruled August 31, 1998.

688*688 Robert Piro, Houston, for Appellant.

John Wesley Raley, Thomas R. Conner, David W. Jones, Houston, for Appellees in No. 01-96-01408CV.

Susan K. Cardwell, Mary Angela Meyer, Houston, for Appellees in No. 01-96-01559-CV.

Before ANDELL, TAFT and PRICE.[*]

OPINION

TAFT, Justice.

Appellant, Levi Lee Laub (Levi), appeals from summary judgments granted to appellees in these cases, Dr. Richard Pesikoff and Dr. Rita Justice, Ph.D. We consider (1) whether Levi's claims are barred by the judicial communication privilege and (2) whether the trial court's award of sanctions against Levi was appropriate. We reform the trial court's judgments, and as reformed, affirm.

Factual and Procedural Background

These appeals arise out of a divorce proceeding styled *In the Matter of the Marriage of Mary Maher Laub and Levi Lee Laub,* filed by Mary Laub (Mary) on January 4, 1995.[1] On January 9, 1996, Levi filed a motion for partial summary judgment, requesting the court to uphold certain gifts allegedly made by Mary to Levi during their marriage. Levi alleged that, on or about September 7, 1984, Mary signed a quitclaim gift deed conveying to him a one-half interest in parcels of real property located in Houston. Levi also alleged that, on or about June 7, 1990, he and Mary signed a memorandum of gift to "confirm" that, in 1984, Mary had made a gift to Levi of a one-half interest in a securities portfolio that she inherited

from her father. In his motion, Levi argued that he owned a one-half interest in the real property and the securities portfolio as his sole and separate property.

On January 29, 1996, Mary filed a response to Levi's motion for partial summary judgment. She argued that, at the time she executed the quitclaim gift deed and the memorandum of gift, she did not possess the requisite donative intent to make those transfers. In support of this position, Mary attached the affidavits of Dr. Richard Pesikoff, her treating psychiatrist, and Dr. Rita Justice, her treating psychologist. In their affidavits, both Dr. Pesikoff and Dr. Justice expressed opinions concerning Mary's mental health and its effect on her ability to enter into the 1984 and 1990 agreements. Specifically, the affidavits stated that Mary revealed to the doctors that Levi had physically abused her in the past. Both affidavits concluded that, if not for her reduced mental capacity resulting from Levi's abusive behavior, she would never have entered into the agreements at issue in the divorce proceeding.

On February 14, 1996, Levi filed an amended cross-petition in which he asserted third-party actions against Dr. Pesikoff and Dr. Justice based on the statements contained in their affidavits. Levi asserted multiple claims against both Dr. Pesikoff and Dr. Justice, including (1) "intentional" libel and slander; (2) intentional infliction of emotional distress; (3) engaging in a conspiracy to defraud Levi of his property by making false statements; (4) denial of due process under the United States and Texas Constitutions; and (5) tortious interference with the contractual 689*689 relationship between Levi and Mary. In addition, Levi asserted a negligence claim against Dr. Justice, based on an alleged doctor-patient relationship arising from therapy sessions he attended in conjunction with Mary's treatment.

A. Dr. Pesikoff's Summary Judgment

On June 4, 1996, Dr. Pesikoff filed a motion for summary judgment, claiming that his affidavit, submitted in the course of a judicial proceeding, was protected by the judicial communications privilege and, therefore, could not serve as the basis for any tort action. On August 26, 1996, the trial court granted Dr. Pesikoff's motion for summary judgment. The summary judgment was amended on September 20, 1996, with an award of sanctions in the amount of $86,251.26, representing attorney's fees and costs, pursuant to rule 13 of the Texas Rules of Civil Procedure and chapter 10 of the Texas Civil Practice and Remedies Code. TEX.R.CIV.P. 13; TEX.CIV.PRAC. & REM.CODE ANN. §§ 10.001-.006 (Vernon Supp.1998).

B. Dr. Justice's Summary Judgment

On June 7, 1996, Dr. Justice filed a motion for summary judgment, which, like Dr. Pesikoff's, asserted the judicial communication privilege. On September 16, 1996, Dr. Justice filed an additional motion for partial summary judgment, claiming that Levi's negligence claims were barred by the applicable statute of limitations. On September 20, 1996, the trial court signed an order granting both of Dr. Justice's motions for summary judgment, and ordering sanctions in the amount of $27,973.04 against Levi, representing attorney's fees and costs incurred by Dr. Justice in defending the suit.

Granting of Summary Judgments

In Levi's first point of error, he asserts that the trial court erred in granting summary judgment for Drs. Pesikoff and Justice. He argues that, based on Texas case law, the judicial communication privilege does not protect the intentional and malicious statements made by Drs. Pesikoff and Justice in their affidavits.

Summary judgment is proper if the summary judgment record shows there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX.R.CIV.P. 166a(c). Summary judgment exists to eliminate patently unmeritorious claims or untenable defenses, not to deprive litigants of their right to a full hearing on any real issue of fact. *See* Gulbenkian v. Penn, 151 Tex. 412, 252 S.W.2d 929, 931 (1952). In reviewing the propriety of a summary judgment, we are bound by these standards: (1) the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material

fact issue, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant, and any doubts must be resolved in its favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985).

At common law, the absolute immunity of parties and witnesses from subsequent liability for their testimony in judicial proceedings is well established. *Briscoe v. LaHue*, 460 U.S. 325, 331-32, 103 S.Ct. 1108, 1113, 75 L.Ed.2d 96 (1983). Any communication, even perjured testimony, made in the course of a judicial proceeding, cannot serve as the basis for a suit in tort. *See Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex.1994); *Leigh v. Parker*, 740 S.W.2d 101, 103 (Tex. App.—Austin 1987, writ denied). The proper administration of justice requires full and free disclosure from witnesses unhampered by fear of retaliatory lawsuits. *Bird*, 868 S.W.2d at 772.

Levi argues that the judicial communication privilege is limited to defamation actions based on negligence, and does not extend to the "intentional" claims he asserts against Drs. Pesikoff and Justice. He cites no cases so limiting the privilege, relying instead on "loose language" in several Texas decisions, and upon several statutory sections that he claims evince a policy to restrict the 690*690 privilege.[2]

Although most cases addressing the judicial communication privilege involve claims of libel or slander, Texas courts have consistently applied the privilege to claims arising out of communications made in the course of judicial proceedings, regardless of the label placed on the claim.[3] In *Bird,* the Texas Supreme Court considered the effect of the privilege on an affidavit filed by a psychologist in a family law matter. 868 S.W.2d at 768. In the affidavit, the psychologist concluded that her patient had been abused. *Id.* When the abuse charges were later dropped, the family member sued the psychologist for negligence. *Id.* The court found that the affidavit was privileged and noted that, although the plaintiff's claims were couched in terms of negligent misdiagnosis, the essence of the claim was that the psychologist's *communication* of her diagnosis caused the damages of which the plaintiff complained. *Id.* at 772, 767-68. In reaching its decision, the court cited with approval *Doe v. Blake*, 809 F.Supp. 1020, 1028 (D.Conn.1992), which recognized that the privilege must extend beyond defamation actions in order to "avoid the circumvention [of the policy behind the privilege] by affording an almost equally unrestricted action under a different label." *Id.* at 772.

In *Morales v. Murphey*, 908 S.W.2d 504, 506-507 (Tex.App.—San Antonio 1995, writ denied), the San Antonio Court of Appeals addressed a situation similar to that in *Bird.* In a suit to terminate parental rights, the child's doctor testified that the father had sexually abused the child. *Morales*, 908 S.W.2d at 505. The father subsequently brought suit against the doctor, alleging intentional and negligent infliction of emotional distress and defamation. *Id.* The court found that the father's claims, although couched in different terms, actually attacked the alleged erroneous diagnosis and subsequent communication of the doctor's conclusions to the court. *Id.* at 506-507. The court held that the father's claims were barred by the judicial communication privilege. *Id.*

Levi argues that "loose language" in several Texas decisions supports his position that the privilege does not bar his claims against Drs. Pesikoff and Justice. He first attempts to distinguish the result in *Bird,* arguing that the decision limits the scope of the privilege to "negligent defamation" claims. In addition, he asserts that this Court should follow the "clear directive" contained in Justice Gammage's concurring opinion, which suggested that a qualified, not absolute, privilege should apply. However, our reading of *Bird* leads us to a different conclusion. First, the court did not limit the scope of the privilege to "negligent defamation" claims. *Bird*, 868 S.W.2d at 771. The court held that, although earlier decisions have limited the privilege to libel and slander, the judicial communication privilege cannot be circumvented by disguising a claim under a different label. *Id.* at 771-72. In addition, although Justice Gammage's concurrence cautioned against a grant of absolute immunity upon mental health professionals, the seven-member majority of the court held that "communications made during the course of judicial proceedings are privileged." *Bird*, 868 S.W.2d at 772.

Second, Levi refers us to *James v. Brown*, a pre-*Bird* opinion, in which the supreme 691*691 court, based on the facts presented, declined to extend the privilege beyond libel and slander. *James v. Brown*, 637 S.W.2d 914, 918 (Tex.1982). In *James*, a patient who had been involuntarily committed to a mental institution sued her treating psychiatrists alleging, *inter alia*, libel and negligent misdiagnosis. *Id.* at 916. The trial court granted a summary judgment in favor of the psychiatrists on the ground that publication of the doctors' opinions in the mental health and guardianship proceedings was privileged. *Id.* The supreme court affirmed the summary judgment in part and reversed in part, stating:

While the doctors' communication to the court of their diagnoses of Mrs. James' mental condition, regardless of how negligently made, cannot serve as the basis for a defamation action, the diagnoses themselves may be actionable on other grounds.

Id. James does not limit the privilege in the manner suggested by Levi. *James* holds that the communication of allegedly false statements in a judicial proceeding cannot serve as the basis for a defamation action. *Id.* at 917. Although the case does stand for the proposition that a doctor is not immune from a claim for negligent misdiagnosis brought by his or her patient, it does not state that a third-party, such as Levi, can sue a mental health professional for a misdiagnosis of the professional's patient. Indeed, such an effort was expressly rejected in *Bird*.[4]

Finally, Levi relies on *City of Brady v. Bennie*, another pre-*Bird* opinion, in which the Eastland Court of Appeals held that a letter written by an attorney to an opposing party, although absolutely privileged in a libel action, was not absolutely privileged in a claim for tortious interference with a contract. 735 S.W.2d 275, 279 (Tex. App.—Eastland 1987, no writ). However, other courts have found that the privilege does extend to claims for tortious interference. *Griffin v. Rowden*, 702 S.W.2d 692, 694-95 (Tex.App.—Dallas 1985, writ ref'd n.r.e.) (holding that notice of lis pendens, filed as part of a judicial proceeding, is absolutely privileged and cannot form basis for tortious interference claim). *Bird* makes it clear that, to avoid the circumvention of the policy behind the privilege, the privilege should be extended beyond defamation when the essence of a claim is damages that flow from communications made in the course of a judicial proceeding. *See Bird*, 868 S.W.2d at 771.

On appeal, Levi attempts to show that his claims for libel and slander, intentional interference, civil conspiracy, intentional infliction of emotional distress, negligence, and constitutional violations are not merely defamation claims under different labels. However, the essence of each of these claims is that he 692*692 suffered injury as a result of the *communication* of allegedly false statements during a judicial proceeding. *See Morales*, 908 S.W.2d at 504-05 ("[w]ere it not for the [the psychologist's] communication of her diagnosis, [the father] would have no complaint..."). We hold that Levi's claims against Drs. Pesikoff and Justice were barred, as a matter of law, by the judicial communications privilege, and that summary judgment was proper as to those claims.

We overrule Levi's first point of error.

Sanctions

In his second, third, and fourth points of error, Levi claims that the trial court erred in (1) awarding sanctions against him in favor of Drs. Pesikoff and Justice, (2) denying him an opportunity to present a defense to the rule 13 sanctions, and (3) awarding attorney's fees to Drs. Pesikoff and Justice as sanctions.

Hearings were conducted on the sanctions issue on August 13, September 13, and September 20, 1996. During those hearings, Drs. Pesikoff and Justice attempted to show that, because Levi's claims were groundless, brought in bad faith, and for the purpose of harassment, attorney's fees should be awarded against Levi as sanctions. The doctors alleged that Levi's claims were groundless because they were clearly barred by the judicial communication privilege, and that his arguments did not request a reasonable extension or modification of existing law. The doctors claimed the suits were brought in an attempt to coerce them into changing their sworn affidavit testimony.

Levi's counsel and counsel for both doctors testified at the hearings. Counsel for Dr. Pesikoff testified that he had been approached by Levi's counsel, who offered to nonsuit Dr. Pesikoff if he would modify his earlier affidavit to state that he could not render opinions regarding Mrs. Laub's condition prior to the date his treatment began. Dr. Justice's counsel testified that Levi's counsel made a similar offer to her client in writing.[5] Upon reading the proposed affidavit language submitted to Dr. Justice by Levi's counsel, the trial court informed Levi's counsel of his right to remain silent, in response to accusations that the witness tampering statute may have been violated. *See* TEX.PENAL CODE ANN. § 36.05 (Vernon 1994). Levi's counsel denied these allegations, and contends on appeal that the proposed affidavit merely clarified issues raised in the original affidavit, and was suggested as part of a settlement offer.

On September 20, 1996, the trial court granted summary judgments to both Dr. Pesikoff and Dr. Justice. In separate orders, the court awarded $27,973.04 as sanctions against Levi in favor of Dr. Justice, and $86,251.26 against Levi in favor of Dr. Pesikoff. These amounts represent the attorney's fees incurred by counsel for Drs. Pesikoff and Justice, as found by the court. The trial court's orders state that the sanctions were awarded pursuant to rule 13 of the Texas Rules of Civil Procedure *and* chapter 10 of the Texas Civil Practice and Remedies Code. TEX.R.CIV.P. 13; TEX.CIV.PRAC. & REM. CODE ANN. §§ 10.001-.006.

A. Chapter 10 as a Basis for Sanctions

Before addressing Laub's points of error challenging the award of sanctions, we note that chapter 10 of the Texas Civil Practice and Remedies Code was an improper basis upon which to award sanctions in this case. Chapter 10 applies only to pleadings and motions filed in cases commenced on or after September 1, 1995. TEX.CIV.PRAC. & REM.CODE ANN. § 10.001 (Vernon Supp.1998) (historical note). Although Levi's first amended cross-petition, in which Levi first raised his claims against Drs. Pesikoff and Justice, was filed in February 1996, Mary's original petition for divorce and Levi's original cross-petition were both filed prior to 693*693 September 1, 1995. Therefore, because rule 13 was the only ground upon which the trial court could have based its award of sanctions, we limit our analysis to that issue.

B. Rule 13 as a Basis for Sanctions

In his second point of error, Levi alleges that the trial court erred in awarding sanctions against him in favor of Drs. Pesikoff and Justice. We review a court's order of rule 13 sanctions under an abuse of discretion standard. *Lawrence v. Kohl*, 853 S.W.2d 697, 699 (Tex.App.—Houston [1st Dist.] 1993, no writ). The test for determining if the trial court abused its discretion is whether the trial court acted without reference to any guiding rules or principles. *Aldine Indep. Sch. Dist. v. Baty*, 946 S.W.2d 851, 852 (Tex.App.—Houston [14th Dist.] 1997, no writ).

Pursuant to rule 13, a court may impose sanctions against a party, a party's attorney, or both, if they file pleadings, motions, or other papers that are both groundless *and* either (1) brought in bad faith or (2) for the purpose of harassment. *Lawrence*, 853 S.W.2d at 699. The rule further provides that the court may impose any appropriate sanction available under TEX.R.CIV.P. 215(2)(b), including the assessment of attorney's fees. *Lawrence*, 853 S.W.2d at 699. "Groundless" means without basis in law or fact and not warranted by a good faith argument for an extension, modification, or reversal of existing law. *Miller v. Armogida*, 877 S.W.2d 361, 365 (Tex.App.—Houston [1st Dist.] 1994, writ denied).

Drs. Pesikoff and Justice argue that Levi's claims were groundless because the judicial communication privilege clearly bars the claims which Levi has raised in this case. They refer us to a series of letters, in which defense counsel notified Levi's counsel of this fact, exchanged between the parties prior to the filing of the motions for summary judgment. They also argue that Levi never specifically argued for an extension, modification, or reversal of Texas law. In addition, they claim that, because the evidence shows that Levi's claims were brought only to intimidate Drs. Pesikoff and Justice and to coerce them into changing their testimony, the suit was brought in bad faith and for an improper purpose.

Clearly, rule 13 is a tool that must be available to trial courts in those egregious situations where the worst of the bar uses our system for ill motive without regard to reason and the guiding principles of the law. *Dyson Descendant Corp. v. Sonat Exploration Co.*, 861 S.W.2d 942, 951 (Tex.App.— Houston [1st Dist.] 1993, no writ). The rule, however, cannot become a weapon used to punish those with whose intellect or philosophic viewpoint the trial court finds fault. *Id.* Innovative changes in the law or applications of the law must by necessity come from creative and innovative sources. *Id.* By their very definition, changes in the law are different from and in disagreement with what has been historically accepted. *Id.* We cannot allow rule 13 to have a chilling effect on those who seek change in legal precedent. *Id.*

Before reaching the issue of whether harassment or bad faith existed in any given case, the trial court must first find that the claims brought by the party to be sanctioned are groundless. TEX.R .CIV.P. 13. Although Levi has not specifically argued that adopting his position would call for a modification, extension, or reversal of existing law, his claims are not patently unmeritorious or frivolous, with no arguable basis in law or fact. Although we hold today that Levi's claims are barred by the judicial communications privilege, he has argued that they are not, based in part on Justice Gammage's concurrence in *Bird* and on other cases and statutes which he claims support his position.

As stated earlier, most Texas decisions in this area involve claims of defamation. Levi correctly points out that many Texas decisions involve negligent conduct, as opposed to intentional conduct, as alleged here. In addition, Justice Gammage's concurrence in *Bird* may not constitute a "directive," but it did urge that a qualified privilege, not an absolute privilege, should apply. Based on the state of the law surrounding the judicial communication privilege, Levi's arguments, although unsuccessful, are not "groundless" as contemplated by rule 13. As this Court stated in *Dyson*, we should not allow rule 13 694*694 to have a chilling effect on those who seek change in legal precedent. 861 S.W.2d at 951. Therefore, we hold that, to the extent that the court based its award of sanctions on rule 13, it abused its discretion.

We sustain Levi's second point of error. Because we so hold, we need not address Levi's third and fourth points of error which also challenge the sanctions award.

Findings of Fact

In his fifth point of error, Levi claims that the trial court erred in failing to make findings of fact and conclusions of law. However, findings of fact and conclusions of law have no place in a summary judgment hearing. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex.1994). Accordingly, we overrule Levi's fifth point of error.

Award of Sanctions Against Drs. Pesikoff and Justice

In his sixth point of error, Levi contends the trial court erred in not awarding sanctions against Drs. Pesikoff and Justice. He argues that the assertions by Drs. Pesikoff and Justice that Levi's actions were groundless were, themselves, groundless as a matter of law. However, he cites no authority and does not reference any portion of the record that supports his position. Therefore, we hold that he has waived any error on this point. *Metzger v. Sebek*, 892 S.W.2d 20, 45 (Tex.App.—Houston [1st Dist.] 1994, writ denied).

We overrule Levi's sixth point of error.

Conclusion

We reform the trial court's judgment in cause number 95-00198A by deleting both the $86,251.26 in sanctions awarded to Dr. Pesikoff and the findings of fact upon which those sanctions were based. Likewise, we reform the trial court's judgment in cause number 95-00198B by deleting both the $27,973.04 in sanctions awarded to Dr. Justice and the findings of fact upon which those sanctions were based. As reformed, we affirm both judgments of the trial court.

[*] The Honorable Frank C. Price, former Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

[1] An appeal of the judgment in the divorce proceeding is pending before this court as *Laub v. Laub*, 01-97-00386-CV.

[2] Levi argues that the existence of section 261.106 of the Family Code and section 571.019 of the Health and Safety Code provides evidence that the judicial communication privilege is not absolute. TEX.FAM.CODE ANN. § 261.106 (Vernon 1996) (granting statutory immunity to those who testify in child abuse cases); TEX. HEALTH & SAFETY CODE ANN. § 571.019(a) (Vernon 1992) (addressing liability of mental health providers to those for whom they provide professional services). However, we find that the qualified privileges addressed in those statutes serve different purposes from those of the judicial communications privilege, and, thus, do not act to modify the common law. *See* *Hernandez v. Hayes*, 931 S.W.2d 648, (Tex.App.—San Antonio 1996, writ denied) (holding that limited statutory immunity in Education Code serves different purpose from that of the quasi-judicial privilege afforded public school employees, and does not protect integrity of process, as does common-law privilege).

[3] *See* *Bird*, 868 S.W.2d at 772; *Morales v. Murphey*, 908 S.W.2d 504 (Tex.App.—San Antonio 1995, writ denied) (holding that judicial communication privilege precludes claims for, *inter alia,* intentional infliction of emotional distress and defamation).

[4] In her motion for partial summary judgment, Dr. Justice argued that she last saw Levi in conjunction with Mary's treatment on April 22, 1993, and, therefore, his negligence claim was filed outside the two-year limitations period. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 16.003 (Vernon Supp.1998). However, the negligent acts of which Levi complained were the statements made in her affidavit, filed in 1996. The statute would begin to run from that date, not the date on which Dr. Justice last saw Levi.

In one order, the trial court granted both this motion and Dr. Justice's earlier motion, which had asserted that Levi's remaining claims failed because of the judicial communication privilege. If the trial court's order does not state the grounds on which summary judgment was granted, as in this case, we will affirm the summary judgment if any of the theories advanced is meritorious. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex.1993). On appeal, Levi argues that the trial court erred in granting partial summary judgment on the negligence claim, because he has raised a fact issue as to whether a doctor-patient relationship existed between Doctor Justice and himself. However, Levi's negligence claim is based upon the same judicial communication as his other claims. Those judicial statements related to medical treatment and diagnosis of Dr. Justice's patient of five years, Mary Laub. By raising the doctor/patient issue, Levi may have sought to invoke the reasoning of cases such as *Bird* and *Brown*, which recognize that the judicial communication privilege may not protect a doctor who testifies in a judicial proceeding from a claim of negligent misdiagnosis *brought by his own patient. See* *Bird*, 868 S.W.2d at 771-72; *Brown*, 637 S.W.2d at 918. In this case, Dr. Justice offered her opinions concerning the mental state of Mary, and the factors which impacted upon her mental state. She did not provide a medical diagnosis of Levi, and, therefore, the exception recognized in *Bird* and *Brown* is inapplicable. Therefore, we hold that Levi's negligence claim was properly disposed of based on the judicial communications privilege. *See* *Bird*, 868 S.W.2d at 771-72.

[5] The substitute language proposed by Levi's counsel is as follows:

"It was not and is not my opinion that Mary Laub has, at any time, been incompetent or insane or of unsound mind. On the contrary, it is my opinion that she was not, at any time, incompetent, insane or of unsound mind since she became my patient, and I have no reason to believe she was otherwise before she became my patient. So far as I know, she has always been capable of caring for herself, managing her affairs and assisting counsel in litigation."

Finally, the following 2002 Louisiana case of *Marrogi v. Howard* provides an excellent illustration of the way in which courts are now recognizing the limits of immunity as it relates simple failure to meet work product obligations.

282 F.3d 854

United States Court of Appeals, Fifth CircuitAizenhawar (Aizen) J. **MARROGI**, Plaintiff-Appellant,

v.

Ray **HOWARD** and Ray Howard & Associates, Inc., Defendants-Appellees.

(La. 2002) No. 00-30786.

Feb. 14, 2002.

Employee filed suit against expert witness, claiming damages caused by his deficient performance in a the state litigation against his employer. The United States District Court for the Eastern District of Louisiana, Helen Ginger Berrigan, dismissed the suit, and employee appealed. After answer to certified question of controlling state law, the Court of Appeals, Wiener, Circuit Judge, ruled that witness immunity did not bar a claim against a retained expert witness, asserted by a party who in prior litigation retained that expert, arising from the expert's allegedly deficient performance of his duties to provide litigation services, such as the formulation of opinions and recommendations, and to give opinion testimony before or during trial.

Reversed and remanded.

***854** Jeffrey Collin Vaughan (argued), Breazeale, Sachse & Wilson, New Orleans, LA, for Plaintiff-Appellant.

Kenneth B. Wright (argued), Datz, Jacobson, Lembcke & Wright, Jacksonville, FL, Anthony Paul Dunbar, New Orleans, LA, for Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WIENER, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

WIENER, Circuit Judge:

We first heard this appeal in 2001, with federal jurisdiction based on diversity of citizenship. As the case involved a determinative but unanswered question of Louisiana law, we filed an opinion on April 12, 2001, certifying that question to the Supreme Court of Louisiana.[FN1] The court graciously accepted our certification,[FN2] and in a unanimous opinion rendered on January 15, 2002,[FN3] answered the question we had posed by certification: "Under Louisiana law, does witness immunity bar a claim against a retained expert witness, asserted by a party who in prior litigation retained that expert, which claim arises from the expert's allegedly deficient performance of his duties to provide litigation services, such as the formulation of opinions and recommendations, and to give opinion testimony before or during trial?" [FN4] ***855** Answering our certified question in the negative, the Supreme Court of Louisiana held that such a claim is not barred by the doctrine of witness immunity.

FN1. *Marrogi v. Howard*, 248 F.3d 382 (5th Cir.2001)(" *Marrogi I*").

FN2. *Marrogi v. Howard*, 794 So.2d 778 (La.2001).

FN3. 2002 WL 47842 (La.2002).

FN4. *Marrogi I*, 248 F.3d at 386.

The operable facts and procedural history of this case are set forth in detail in *Marrogi I.* For purposes of this opinion, it suffices that Dr. Marrogi brought suit in a Louisiana state court against his former employer, the Tulane University School of Medicine, seeking a money judgment for alleged underbilling of his services by Tulane. Dr. Marrogi retained Howard as an expert to provide specified litigation support services. Following several purported miscues on the part of Howard, which culminated in Howard's refusal to complete his participation in a deposition and to provide any of the other litigation support that he had contracted to furnish, Tulane filed a motion for summary judgment seeking dismissal of Dr. Marrogi's action, and the state trial court granted Tulane's motion.

This prompted Dr. Marrogi to file suit against Howard in federal court, claiming damages caused by his deficient performance in the state litigation. Dr. Marrogi asserted that Tulane had based its successful motion to dismiss on the doctor's inability to produce any credible summary judgment evidence of underbilling. And, according to Dr. Marrogi, that inability was the direct result of Howard's deficient performance of the litigation support obligations that he had contracted to provide.

FN5. Howard filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss Dr. Marrogi's action for failure to state a claim on which relief could be granted. Howard's motion was granted by the district court, which concluded that Louisiana had never expressly recognized an exception to its general rule of witness immunity to allow claims to be asserted against witnesses who, like Howard, were retained as experts to provide litigation services such as those at issue here.[FN5] In granting Howard's dismissal motion, the district court declined to make an "Erie guess" that Louisiana's highest court would recognize such an exception.

We represented to the Supreme Court of Louisiana that "[i]f an exception to witness immunity is recognized for retained expert witnesses, [this] case will be remanded to the federal district court for further proceedings consistent with that ruling."[FN6] As the Supreme Court of Louisiana recognized such an exception, we reverse the district court's dismissal of Dr. Marrogi's action and remand for further consistent proceedings.

FN6. *Marrogi I*, 248 F.3d at 386.

REVERSED and REMANDED.

CHILD WITNESSES AND THE CONFRONTATION CLAUSE

CHILD WITNESSES AND THE CONFRONTATION CLAUSE

Of all of the United States Supreme Court holdings in the past decade, few have had greater impact than *Crawford v. Washington* 541 U.S. 36 (2004). *Crawford* and its progeny specify that "testimonial" witnesses in a criminal case must appear in person before the defendant in court. While this has always been true of eyewitnesses and other primary parties to the proceeding, *Crawford* now requires that even laboratory technicians offering evidence, and persons who have had only a limited role in shaping an investigation must "confront" the defendant and be subject to cross-examination.

Psychologists have had particular concern for the possible impact of *Crawford* on child witnesses who may be particular disturbed by having to testify in court against an adult, often a family member. The courts have since provided important guidance for dealing with such situations. Below, in the Memorandum Opinion from the 2006 New Mexico Federal District Court case of *U.S. v. Sandoval* (WL 1228953), we see the logic of the court in grappling with just such a challenge.

MEMORANDUM OPINION

BROWNING, J.

***1**THIS MATTER comes before the Court on the United States' Motion for Two-Way Closed Circuit Television Testimony, filed June 28, 2005 (Doc. 42). The Court held an evidentiary hearing on October 19, 2005. Pursuant to 18 U.S.C. § 3509(b)(1)(C), the Court also met with and questioned Jane Doe in chambers on November 17, 2005. The primary issues are: (i) whether Jane Doe is unable to testify in open court in the presence of her father because of fear of her father; (ii) whether Jane Doe is unable to testify in open court in the presence of her father because there is a substantial likelihood, established by expert testimony, that Jane Doe would suffer emotional trauma from testifying; and (iii) whether the ruling in *Maryland v. Craig*, 497 U.S. 836, 845 (1990), finding that procedures similar to those prescribed by 18 U.S.C. § 3509(b) satisfied the requirements of the Confrontation Clause, is still controlling law after the Supreme Court of the United States' decision in *Crawford v. Washington*, *541 U.S. 36 (2004)*

Based on the expert testimony of Dr. Candace Kern, and the Court's own observations of Jane Doe in chambers, the Court finds that Jane Doe will be unable to testify in open court in the presence of her father: (i) because of fear of her father; and (ii) because there is a substantial likelihood, based on Dr. Kern's testimony, that Jane Doe will suffer emotional trauma from testifying-directly linked to fear of her father. The Court also finds that the holding in *Maryland v. Craig* is still controlling law. Because the Court finds that Jane Doe will not be able to testify in the presence of her father because of both fear and emotional trauma, and that *Maryland v. Craig* is still controlling law, the Court will grant the United States' motion.[FN1]

FN1. The Court entered an Order on this matter on February 2, 2006 (Doc. 94). In footnote 1 of that Order, the Court represented that it would issue a memorandum opinion explaining the reason for its decision, and would support its ruling with findings on the record pursuant to 18 U.S.C. § 3509(b)(1)(C). This opinion more fully explains the Court's reasoning for its decision and provides the Court's findings on the record pursuant to 18 U.S.C. § 3509(b)(1)(C).

FACTUAL BACKGROUND

1. *Underlying Alleged Facts.*

Jane Doe is Sandoval's biological daughter by his girlfriend of approximately nine years, Andrea Bedoni. *See* Defendant's Response to Motion for Two-Way Closed Circuit Television Testimony ("Response") ¶ 1, at 1, filed July 14, 2005 (Doc. 62). Jane Doe is five years old, and was four years old at

the time of the alleged incidents charged in the Indictment. *See id.* ¶ 2, at 1; Motion for Two-Way Closed Circuit Television Testimony ¶ 3, at 2.

The United States hopes to adduce the following facts at trial concerning the alleged molestation of Jane Doe: (i) on September 1, 2004, Jane Doe's mother, Andrea Bedoni, was awakened at 4:15 a.m., and Jane Doe was lying by James Sandoval; (ii) Bedoni saw that Sandoval was awake with Jane Doe lying on his arm; (iii) Sandoval had his other hand in a fist by Jane Doe's waistline; (iv) Jane Doe's hand was over her genital area as if she was trying to protect it; (v) Bedoni asked Sandoval why Jane Doe was lying by him, and Sandoval responded that he didn't know why; (vi) later that morning, Bedoni again asked Sandoval what he was doing, and Sandoval said he had moved Jane Doe because their son had been lying on top of Jane Doe; (vii) on September 6, 2004, Bedoni asked Jane Doe if anything had happened to her while Bedoni was out of town on a business trip from June 5 to June 10, 2004: Jane Doe told Bedoni that she should not have gone away and "Daddy was touching me"; (viii) on September 7, 2004, Bedoni again asked Sandoval what he had been doing on September 1, 2005, and Sandoval said Jane Doe had been kicking and crying, so he held her and had moved their son next to Bedoni; (ix) on September 9, 2004, Special FBI Agent Travis Witt interviewed Jane Doe. Jane Doe told Witt that her dad touched her "peepee." Jane Doe told Witt that he touched the outside of her peepee and put something inside her peepee. Jane Doe further told Witt that her dad touched her peepee "when her mother was lying in back of her sleeping" and another time when her mom was at the airport. Jane Doe also told Witt that her dad got her to touch his peepee with her mouth; (x) on September 16, 2004, Bedoni took Jane Doe to be examined at Presbyterian Care Center. Before the examination, Mary Dentz asked Bedoni for some background information. During the examination, Dentz asked Jane Doe to show her how her dad touched her "gina" area. Jane Doe pointed to her right labia majora. Following the physical examination, Bedoni was alone with Jane Doe in the examination room. When they left the room, Bedoni told Dentz that Jane Doe told her that her dad had also touched her with his "private." Bedoni asked Jane Doe where her dad had touched her and she opened her mouth, and told Bedoni that she had not told Dentz this because she was scared; (xi) some time after the examination, Jane Doe told Bedoni that she was just kidding and that her father did not do it. After she made this statement, she stated: "It hurt when he put it in my butt."; and (xii) Sandoval called Bedoni sometime after September 1, 2005, and suggested that Bedoni or one of their sons "did it" to Jane Doe, and suggested that one of the boys touched Jane Doe. There are times when Jane Doe misses her father and is sad. United States' Reply to Defendant's Response to Motion for Two-Way Closed Circuit Television Testimony Filed on July 14, 2005 ("Reply") at 1-3, filed July 22, 2005 (Doc. 72).

***2**Sandoval asserts that the family consists of three other children, all boys, and there is "no suggestion of any abuse of any sort of the other children." Response ¶ 2, at 1, filed July 14, 2005, (Doc. 62). He also contends that there is no physical or medical evidence to support the charge, that there are no eyewitnesses to the alleged offense other than Jane Doe, and that Sandoval has consistently denied any allegations of sexual impropriety with Jane Doe. *See id.* ¶¶ 3-4, at 2.

Sandoval represents that Jane Doe has been in the exclusive care and control of her mother since Bedoni asked Sandoval to leave the family home on September 1, 2004, and that, since he left the home, he has neither seen nor had any contact with Jane Doe and Jane Doe has neither seen nor had contact with Sandoval's family. *See id.* ¶¶ 5-6, at 2.

Sandoval asserts that Jane Doe's allegations have come in response to questioning-first by her mother, then by FBI Special Agents, and later by Dentz. *See id.* ¶ 10, at 3. None of these interviews were recorded either by tape or by video recording. *See id.* After her mother questioned Jane Doe, one or more FBI Special Agents interviewed her on September 9, 2004, eight days after the alleged contact. *See id.* Sandoval contends that Jane Doe's account differed from what she had previously told her mother; elaboration of more serious, penetrating contact marked the account to the FBI. *See id.*

Sandoval also asserts that, shortly before Jane Doe reported the alleged abuse, Kayla Sandoval and Pamela Garcia returned to New Mexico and the San Felipe Pueblo. *See id.* ¶ 9, at 2-3. Sandoval is Kayla's father, and Pamela Garcia is Kayla's mother. *See id.* ¶ 8, at 2. Kayla is now fifteen years old. *See id.* Sometime around July 2004, Sandoval told Bedoni that Garcia had accused him of touching Kayla inappropriately when she was a child of 2 1/2 to 3 years old, and that he had denied it. *See id.* ¶ 9, at 3. According to Bedoni, she waited until September 7th or 8th to make any report because she wanted to talk to Pamela Garcia first. *See* Response ¶ 8, at 2. Finally, Sandoval contends that Jane Doe has never suggested-under questioning by her mother, the FBI, or Dentz, as well as her reported conversations with others at school-that she had actually been threatened or felt threatened by Sandoval. *See id.* ¶ 12, at 4.

2. *Dr. Candace Kern.*

Dr. Candace Kern was licensed as a psychologist in New Mexico in 2002. *See* Curriculum Vitae of Dr. Candace Kern at 1 (Exhibit 1 to the evidentiary hearing); Motion for Two-Way Closed Circuit Television Testimony (Doc. 42). She received her Ph.D. in Counseling Psychology from the University of New Mexico. *See id.* at 1. From 1979-2001, Dr. Kern was a licensed attorney. *See id.* She is currently a staff psychologist at the Samaritan Counseling Center in Albuquerque, New Mexico. *See id.* at 2.

PROCEDURAL BACKGROUND

***3**The United States will call Jane Doe as a witness. *See* Motion for Two-Way Closed Circuit Television Testimony ¶ 1, at 1. The United States represents that, earlier in 2005, the United States' counsel consulted with Sandoval's counsel, Charles Fisher, to address the issue of a qualified psychologist to evaluate Jane Doe with regard to 18 U.S.C. § 3509(b), and that Mr. Fisher recommended Dr. Kern. *See* Reply at 3. Based upon that recommendation, the United States' counsel contacted Dr. Kern and obtained her curriculum vitae. *See id.* Before the examination, the United States' counsel provided a copy of Dr. Kern's curriculum vitae to Mr. Fisher. *See id.*

Based upon an interview and review of her curriculum vitae, the United States retained Dr. Kern's services. *See id.* At the United States' request, Dr. Kern performed a psychological examination. *See* Motion for Two-Way Closed Circuit Television Testimony ¶ 4, at 2. Dr. Kern has examined and evaluated Jane Doe for the specific purpose of determining whether Jane Doe should testify in court in the presence of her father. *See* Report Concerning Ability of [Jane Doe] to Testify in Court ("Report") at 1 (dated June 10, 2005). To form an opinion, Dr. Kern reviewed several documents, administered psychological tests, interviewed witnesses with regard to Jane Doe's current functioning, and clinically interviewed Jane Doe on three days over a four-week period. *See id.*

Dr. Kern performed clinical interviews with Jane Doe on May 10th, May 17th, and June 7th to determine whether Jane Doe should testify in a courtroom in the presence of her father or outside the courtroom via closed-circuit television. *See id.* at 1, 5. Dr. Kern wrote a report entitled "Report Concerning Ability of [Jane Doe] to Testify in Court." *Id.* at 1. The United States' counsel has provided a copy of the Report to Mr. Fisher. *See* Motion for Two-Way Closed Circuit Television Testimony ¶ 5, at 2.

Jane Doe appears to have been distressed and uncooperative during the first two sessions of Dr. Kern's psychological testing when no mention was made of Sandoval. *See* Report at 2. Only at the third session did Jane Doe speak about Sandoval, saying that he scared her and that she missed him and wished she could stay with him. *See id.* at 3.

Dr. Kern asked Jane Doe about two things she liked and disliked about her father and her mother. *See id.* In response, Jane Doe told Dr. Kern that her father "touched my peepee and my bottom." *Id.* Jane Doe stated that her father was not at home, that she missed him, and that she wished she could stay with him. *See id.* Jane Doe remarked and stated: "Daddy has a mustache. He is mean. He scares me." *Id.* During one of the sessions, Dr. Kern asked Jane Doe to draw a picture of her family doing something together. *See id.* at 4. Jane Doe drew a spiral with no human figures in the drawing. *See id.* Dr. Kern asked Jane Doe to tell her about the picture, and Jane Doe said: "The little kid fell in the hole. They are looking for that little kid

in there." *Id.* According to Dr. Kern, "[t]his representation of her dilemma illustrates the dangerous losses she experiences." *Id.*

***4**Dr. Kern made four findings and opined that "[Jane Doe] should testify outside of the presence of her father because there is a substantial likelihood that she will suffer emotional trauma if required to testify in [open] court." *Id.* at 2. Dr. Kern based her opinion on Jane Doe's "expressed fear of her father, which is also confused with her feelings of loss at his absence." *Id. See* 18 U.S.C. § 3509(b)(1)(B)(1). Dr. Kern also based her opinion on Jane Doe's high level of anxiety-an emotional infirmity. *See id.* According to Dr. Kern, Jane Doe "is highly attuned to threats, and feels overwhelmed when under stress, affecting her capacity to think logically." *Id.* Jane Doe's response to her anxious feelings is "to refuse to interact, at which time she shuts down verbally and emotionally." *Id.* Dr. Kern's report states that Jane Doe "needs the Court to support her when testifying so she is not emotionally and cognitively overwhelmed." *Id.* at 5.

The United States requests that the Court order Jane Doe's testimony be taken and shown by two-way closed circuit television in accordance with 18 U.S.C. § 3509(b). *See* Motion for Two-Way Closed Circuit Television Testimony at 1. Sandoval opposes this motion. *See id.* ¶ 7, at 2.

FINDINGS OF FACT

1. Dr. Kern performed clinical interviews with Jane Doe on May 10th, May 17th, and June 7th, 2005. *See* Transcript of Hearing at 22:22-23 (Dr. Candace Kern) (taken October 19, 2005).[FN2]

FN2. The Court's citations to the transcript of the hearing refer to the Court Reporter's original, unedited version. Any final transcript may contain slightly different page and/or line numbers.

2. Dr. Kern was retained to evaluate Jane Doe only for the purpose of determining whether the child would be able to testify, and not to determine whether any abuse had taken place. *See id* . at 45:23-46:5.

3. At the first interview on May 10, 2005, Jane Doe understood that Dr. Kern was affiliated in some way with the issue concerning her father. *See id.* at 23:8-10. Even though Dr. Kern never mentioned Sandoval, Jane Doe became "very anxious," "shut down," and "refused to speak." *Id.* at 23:10-14. Jane Doe made whining sounds, refused to be comforted by her mother, and refused to leave the office. *See id.* at 23:22-24:1.

4. Jane Doe and Dr. Kern were able to complete one test during the first interview before Jane Doe shut down. *See id.* at 26:22. Jane Doe "had many anxious thoughts and feelings in response to the stimulus" presented by the test. *Id.* at 27:3-4. As Jane Doe "talked about topics that were more anxiety-provoking to her, she would get a little bit illogical in her thinking." *Id.* at 27:7-9.

5. During the second interview on May 17, 2005, Jane Doe "would not let her mother leave the office. She clung to her mother, she refused to participate in any type of interaction with [Dr. Kern]. And it was apparent that attempts to interact with her increased her level of distress." *Id.* at 27:20-23. Dr. Kern was unable to conduct any kind of session with Jane Doe. *See id.* at 27:25-28:2.

***5** 6. Dr. Kern was able to talk with Andrea Bedoni on May 17th, and the two discussed Jane Doe's functioning. *See id.* at 28:7-8. Ms. Bedoni explained that Jane Doe had not seen her father since September, 2004, *see id.* at 29:8-9, and that Jane Doe had "some nightmares, ... and that [she] had drawn a picture of her father's face and then had hit it and said that she missed her father," *id.* at 30:1-3. Ms. Bedoni also said that "[a]t one time the child had hit her father [ ] when he had said let me hold you and had scratched his face and that the mother at the time didn't understand really what was going on...." *Id.* at 30:20-23.

7. The third interview, which took place on June 7, 2005, again proved problematic. Dr. Kern asked Jane Doe to tell her two things she liked and disliked about her father, and the child "began to just focus on anything [other] than what it was that we were discussing." *Id.* at 47:4-6. Jane Doe "was clearly getting more distressed." She picked up a box of tissue and said that her dad scared her in the closet and that he is mean. *Id.* at 47:9-11. She ripped up the tissue and she put it above her lip, started walking around the

room, and stated that her dad had a mustache, was mean, and scared her. *See id.* at 47:11-14. She eventually left Dr. Kern's office to go to the bathroom, where she was unable to care for herself the way a normal five-year old child would. *See id.* at 47:16-48:19.

8. Dr. Kern concluded that Jane Doe experienced emotional trauma because she was talking to Dr. Kern about her father. *See id.* at 48:11-13. Jane Doe was later unable to perform a test at her normal cognitive capacity because she "was feeling distressed and upset about what had happened immediately previously, and she was having difficulty pulling herself together." *Id.* at 51:15-17.

9. Dr. Kern stated that the kind of trauma that Jane Doe would experience is based on her expressed fear of her father, as well as her demonstrated "distressed" feelings, "discombobulated" feelings, and feelings of "turmoil" that she feels "just talking about her feelings about her father," and that from such emotional trauma it is very difficult for Jane Doe to recover. *Id.* at 53:1-7.

10. Dr. Kern testified that she believes there is a substantial likelihood that Jane Doe will suffer emotional trauma, as opposed to merely nervousness, if forced to testify in open court. *See id* . at 58:8-12. This opinion was based on Jane Doe's fear of her father and various other factors, and not on her ability to testify in open court: "emotional trauma" is an exposure to a significant stressor which the child responds to, "with fear or disorganization of functioning or anxiety or helplessness," which is exactly how Jane Doe responds to the stressor of her father. *Id.* at 58:14-22.

11. Dr. Kern also testified that the probable emotional trauma would be so severe that it could last throughout Jane Doe's lifetime. *See id.* at 141:23-142:7.

***6** 12. Dr. Kern stated explicitly that her opinion was based not on Jane Doe's possible nervousness in testifying. Rather, Dr. Kern's opinion is that fear of her father would cause Jane Doe to experience emotional trauma if forced to testify in the open courtroom in the presence of her father. *See id.* at 59:5-13.

13. Furthermore, Dr. Kern's opinion would not change despite the five months that had passed since she evaluated Jane Doe. Dr. Kern explained that Jane Doe's anxiety was an emotional infirmity that required healing of some kind before it could go away, and that no such healing event had occurred. *See id.* at 61:9-13.

14. 18 U.S.C. § 3509(b)(1)(B) allows the court to order that a child's testimony be taken by closed-circuit television if any of the four listed reasons are present. Dr. Kern's written findings and oral testimony explicitly state that the child would be unable to testify for two of those reasons that the Court will rely on. Dr. Kern found that Jane Doe would be unable to testify because of fear of her father for purposes of § 3905(b)(1)(B)(i); and that there is a substantial likelihood that Jane Doe would suffer emotional trauma from testifying for purposes of § 3905(b)(1)(B)(ii). *See id.* at 89:11-19; 149:1-15. Dr. Kern testified that "[Jane Doe] has expressed fear to me of her father specifically, and that she has an anxiety infirmity, and that ... if required to testify there's a substantial likelihood that she'll suffer emotional trauma." *Id.* at 90:14-18.

15. The court suggested that Jane Doe begin her testimony in open court and then move to a separate room to continue via closed-circuit television, but Dr. Kern felt that was an inadequate solution because Jane Doe would have been exposed to her father and might not be able to continue at all. *See id.* at 148:2-19.

16. In addition to hearing Dr. Kern's testimony, the Court personally examined Jane Doe on November 17, 2005. *See* Transcript of Hearing (taken November 17, 2005). The Court asked Jane Doe a series of questions to determine the child's level of comfort with the courtroom, and she generally responded by either nodding her head "yes," or shaking her head "no." *See generally id.*

17. When asked if she felt like she could come in to the courtroom and tell her story, Jane Doe first responded by shrugging her shoulders. *See id.* at 12:9-15. When prompted by the Court for an answer, Jane Doe responded by shaking her head, indicating "no." *See id.* at 12:16-17.

18. The Court then asked Jane Doe how she would feel if her father were in the room, and she responded, "scared." *Id.* at 15:13-16. When the Court asked her if she could sit on the witness stand and answer the lawyers' questions, Jane Doe shook her head to indicate "no." *See id.* at 15:17-21.

19. When asked by the Court how she would feel if she had to talk about her home and her family if she came to court, she responded, "happy." And when asked if she thought she could do that, she nodded her head "yes." *Id.* at 15:22-16:2. The Court then asked Jane Doe how she would feel the next time she saw her father, and she answered, "scared." And, when asked if she would still feel scared of her father in a courtroom in front of a lot of people, she nodded her head "yes." *Id.* at 16:16-22.

***7** 20. Given Dr. Kern's testimony and the Court's examination of Jane Doe, the Court finds that:

a. Testimony via two-way closed circuit television is necessary to protect Jane Doe's welfare.

b. Sandoval's presence would traumatize Jane Doe if the Court forced her to testify in open court in Sandoval's presence, and such trauma would impair her ability to communicate. The courtroom generally would not traumatize her.

c. The emotional trauma that Jane Doe is likely to suffer is much more than *de minimis,* and more than just nervousness; she is likely to suffer severe emotional trauma that could significantly impact her for the rest of her life.

d. Jane Doe is unable to testify in Sandoval's presence because of her fear of him.

LAW REGARDING CONFRONTATION CLAUSE AND 18 U.S.C. § 3509(B)(1)(B)(II)

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const., amend. VI. In *Maryland v. Craig,* the Supreme Court of the United States rejected a Confrontation Clause challenge to a Maryland statute that allowed a child witness in a child molestation case, under certain circumstances, to testify via a one-way closed circuit television, which did not allow the witness to view the defendant. *See* 497 U .S. at 860. While upholding the constitutionality of a child's testimony outside the defendant's presence, the Supreme Court in *Maryland v. Craig* recognized that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." 497 U.S. at 845.

The Supreme Court in *Maryland v. Craig* recognized that the context of an adversary proceeding before the trier of fact involved "[t]he combined effect of these elements of confrontation-physical presence, oath, cross-examination, and observation of demeanor by the trier of fact" that "is the norm of Anglo-American criminal proceedings." *Id.* at 846. The Supreme Court in *Maryland v. Craig* also acknowledged the peculiar power of face-to-face confrontation in that "face-to-face confrontation enhances the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person," *id.* (citing *Coy v. Iowa,* 487 U.S. 1012, 1019-20 (1988), and that "face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause' ...," *Maryland v. Craig,* 497 U.S. at 847 (quoting *California v. Green,* 399 U.S. 149, 157 (1970)).

The Supreme Court explained that the Confrontation Clause "reflects a preference for face-to-face confrontation at trial," but that the preference "must occasionally give way to considerations of public policy and the necessities of the case." *Id.* at 849 (citations and internal quotations omitted). The Supreme Court emphasized that the preference for face-to-face confrontation is strong, and that a defendant's Sixth Amendment confrontation right "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 850.

***8** The Supreme Court set out three findings that the trial court must make to sufficiently implicate an important public policy to allow testimony via one-way-closed-circuit television:

The trial court must hear evidence and determine whether ... the ... procedure is necessary to protect the welfare of the particular child who seeks to testify. The trial court must also find the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.... Finally, the trial court must find that the emotional stress suffered by the child witness in the presence of the defendant is more than de minimis, *i.e.*, more than mere nervousness or excitement or some reluctance to testify.

Id. at 855-56 (citations and internal quotations omitted).

Five months after the Supreme Court decided *Maryland v. Craig*, Congress enacted the Child Victims' and Child Witnesses' Rights Act of 1990, 18 U.S.C. § 3509, as a part of the Crime Control Act of 1990, Pub.L. 101-647. The legislative history of the statute reveals Congress' concern over the "increase in child abuse cases nationwide, and in particular, statistics revealing a high incidence of child abuse on Indian reservations." *United States v. Broussard*, 767 F.Supp. 1536, 1539 (D.Or.1991). "[W]hile recognizing that most cases involving child abuse would proceed through the states, Congress felt the need to keep pace with procedural innovations enacted by states for dealing with unique problems associated with child abuse prosecutions." *Id.* (citing H.R.Rep. No. 101-681, 101st Cong., 2d Sess., pt. 1 (1990), reprinted in 1990 U.S.Code Cong. & Admin. News 6472, 6571; Senate Congressional Record, June 28, 1990 S. 8976). The statute "preserves and expands upon the protections that the [Supreme] Court found important in *Craig."* *United States v. Miguel*, 111 F.3d 666, 669 (9th Cir.1997).

18 U.S.C. § 3509(b)(1) provides in relevant part:

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant for any of the following reasons:

(i) The child is unable to testify because of fear;

(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(iii) The child suffers a mental or other infirmity.

***9** The United States Court of Appeals for the Tenth Circuit has upheld the application of 18 U.S.C. § 3509 and has summarized the required findings under both *Maryland v. Craig* and § 3509: "Together, the statute and *Craig* require a case-specific finding that closed circuit testimony is necessary for a child because the child would suffer more than de minimis fear or trauma, and in fact would be unable to testify because of such fear or trauma, brought on by the physical presence of the defendant." *United States v. Carrier*, 9 F.3d 867, 871 (10th Cir.1993).

The Tenth Circuit in *Carrier* held that the district court's findings satisfied both the statute and *Maryland v. Craig*, and left open the question whether the statute's requirements satisfied *Maryland v. Craig*. *See United States v. Carrier*, 9 F.3d at 870-71. The district court heard case-specific evidence, and the Tenth Circuit held that the record supported the findings pursuant to both *Maryland v. Craig* and § 3509. *See United States v. Carrier*, 9 F.3d at 870-71. An expert had testified that "the presence of [the defendant] in the courtroom was the children's primary source of fear, and that, in her opinion, his presence would cause them severe distress," and that the presence of the defendant would "cause the children to be unable to testify accurately." *Id.* at 870.

Since the Supreme Court decided *Maryland v. Craig*, the Supreme Court has overruled one of the cases upon which it partly rested, *Ohio v. Roberts*, 448 U.S. 56 (1980). *See Crawford v. Washington*, *541 U.S. 36 (2004)* at 62-69. In the case of *Crawford v. Washington,* the Supreme Court held that a witness' testimonial out-of-court statements were inadmissible because the defendant did not have an opportunity to confront and cross-examine the declarant at an earlier proceeding. *See id.* 59, 68. In *Crawford v. Washington,* the Supreme Court reaffirmed the Court's commitment to a literal interpretation of the Confrontation Clause. *See id.* at 51, 68. The Supreme Court overruled, at least in part,[FN3] the decision in *Ohio v. Roberts,* upon which the Supreme Court based its decision in *Maryland v. Craig*, and may have called into question whether the Supreme Court has correctly permitted "virtual confrontation" by closed circuit television. The Supreme Court in *Crawford v. Washington* concluded that the Confrontation Clause precluded the holding in *Ohio v. Roberts,* which permitted out-of-court testimonial statements, even when the court deems them reliable. *See id.* at 62-69.

FN3. The Supreme Court in *Crawford v. Washington* expressly overruled the holding in *Ohio v. Roberts* at least for testimonial evidence, *see Crawford v. Washington*, 541 U.S. at 62-63, but *Ohio v. Roberts* is still applicable for nontestimonial evidence, *see McKinney v. Bruce*, 125 Fed. Appx. 947, 950 (10th Cir. February 7, 2005).

Crawford v. Washington reaffirmed that "the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner; by testing in the crucible of cross-examination." 541 U.S. at 61. The Supreme Court, however, did not overrule, and has not overruled, *Maryland v. Craig. See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)("[I]t is this Court's prerogative alone to overrule one of its precedents.").

ANALYSIS

***10** Dr. Kern's testimony and report in conjunction with Jane Doe's testimony show that Jane Doe is unable to testify in Sandoval's presence because of her fear of her father, and there is a substantial likelihood, established by expert testimony, that Jane Doe would suffer emotional trauma from testifying. Jane Doe would not be traumatized merely by the courtroom generally, but rather Sandoval's presence would traumatize her if she is forced to testify in open court in his presence, and such trauma would impair her ability to communicate. The emotional trauma Jane Doe is likely to suffer is much more than *de minimis,* and more than just nervousness; she is likely to suffer severe emotional trauma that could significantly impact her for the rest of her life. Finally, *Maryland v. Craig* is still controlling law.

I. *THE TENTH CIRCUIT HAS FOUND THAT 18 U.S.C. § 3509(b)(1)(B) IS CONSTITUTIONAL.*

Although Sandoval never explicitly so states, he appears to ask the Court to deny the United States' Motion for Two-Way closed-circuit television testimony because the introduction of testimony in this manner violates the Confrontation Clause of the Sixth Amendment. He contends that *Crawford v. Washington* may suggest that the Supreme Court of the United States "now believes that *Craig* was wrongly decided...." Response at 7. The Tenth Circuit's precedent, however, binds the Court. The Court is not free to decide that the Supreme Court will, at some future point, overrule *Maryland v. Craig. See Agostini v. Felton*, 521 U.S. 203, 237 (1997)("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (citation omitted)).

A worried mother, law enforcement agents investigating and building a case, a pediatric nurse practitioner, and a psychologist have questioned, interviewed, examined, and tested Jane Doe, looking for evidence consistent with sexual abuse or attempting to determine whether she would be adversely affected by testifying in open court in her father's presence. Throughout these events over the course of nine months, Jane Doe has been insulated from any contact with the person she has been accusing, her father. There is a question whether she should now be subjected to the procedure that the Framers of the

Constitution thought might ensure the reliability of accusations: face-to-face confrontation between accuser and accused.

Where, as here, other than the disputed allegations, there is no history of Sandoval threatening or abusing Jane Doe or any of his children by Bedoni, or tampering with witnesses; where there are reasons for concern about the inherent unreliability of Jane Doe's statements; where she has been insulated from the father she accuses and subjected to questioning and examination only by her mother and by those that may perceive Sandoval as guilty, face-to-face confrontation may be the best way to assure the reliability of Jane Doe's testimony. Moreover, one has only to recall a videotaped deposition to recognize that there can be little doubt that the presentation of the testimony on a closed circuit television screen is less vivid, and clearly less revealing, to the factfinder as to the witness' demeanor. Nevertheless, it is not this Court's role to question the continuing validity of *Maryland v. Craig. See* Agostini v. Felton, 521 U.S. at 238 ("The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent."). *See also Lynch v. Fulks,* No. 79-1244, 1980 U.S. Dist. LEXIS 16099, at *6-7 (D.Kan. December 12, 1980)("Federal District Courts do not overrule the United States Supreme Court....").

***11**The decision in *Crawford v. Washington* to overrule the underpinnings of *Ohio v. Roberts,* upon which the Supreme Court partly relied in *Maryland v. Craig,* may suggest that a majority of the Supreme Court now believes that the Court wrongly decided *Maryland v. Craig. Crawford v. Washington* may suggest that the Supreme Court, analyzing again whether anything less than a traditional form of confrontation passes constitutional scrutiny, will direct trial courts to examine all the circumstances to decide whether any lesser form of confrontation unduly interferes with the constitutionality required procedures for assuring reliability. In the end, however, this district court must reject Sandoval's argument, not because it totally lacks merit, but because it is inconsistent with controlling precedent. A district court is not the proper court to question a Supreme Court decision that the Supreme Court has not overruled. *See* Agostini v. Felton, 521 U.S. at 237-38; *State Oil Co. v. Khan*, 522 U.S. at 20; *Powers v. Harris*, 379 F.3d 1208, 1214 (10th Cir.2004)("[I]t is the Supreme Court's prerogative alone to overrule one of its precedents.").

The Court also notes that, even in relying on *Ohio v. Roberts,* the Supreme Court in *Maryland v. Craig* recognized that, "to the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), [the] assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause," as in *Ohio v. Roberts. Maryland v. Craig,* 497 U.S. at 851-52 (citing *Ohio v. Roberts*, 448 U.S. at 66).

Finally, the few courts that have addressed the issue of whether *Maryland v. Craig* is still controlling law, in light of *Crawford v. Washington,* have upheld the continued validity of *Maryland v. Craig* as the case that controls admissibility of live two-way video conference testimony presented at trial. *See United States v. Yates,* 2006 U.S.App. LEXIS 3433, 12, 13 n. 4 (11th Cir.2006); *State v. Henriod,* No. 20050311, 2006 Utah LEXIS 10, at *14-15 (Utah February 24, 2006)(Durham, C.J.)("[W]e do not believe *Crawford* implicitly overruled *Craig* because neither the majority nor the concurrence even discussed out-of-court testimony by child witnesses. By its own terms, the *Crawford* holding is limited to testimonial hearsay."). In addressing whether *Crawford* or *Maryland v. Craig* controlled this issue, the United States Court of Appeals for the Eleventh Circuit stated:

Notably, both dissenting opinions argue (but the Government does not) that the proper standard to be applied is that stated in *Crawford v. Washington*, 541 U.S. 36,124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the most recent Supreme Court case governing the admissibility of out-of-court testimonial statements. No doubt the Government passes on this argument because it recognizes that *Crawford* applies only to testimonial statements made prior to trial, and the live two-way video testimony at issue in this case was presented at trial.

***12**The dissenters contend that the fact that a witness is legally unavailable necessarily means that any testimony given by that witness, by any means, is hearsay testimony subject only to the requirements of *Crawford*-unavailability and an opportunity to cross-examine. In addition to its departure from longstanding precedent, this reasoning assumes away the constitutional issue in this case-whether the confrontation that occurred is constitutionally sufficient. *Crawford* does not answer this question.

United States v. Yates, 2006 U.S.App. LEXIS 3433, at 12, 13 n .4.

The Supreme Court of Utah stated: "We [ ] believe that *Craig* is the clearly applicable precedent in the case before us. Whereas *Crawford* dealt solely with the Confrontation Clause implications of the admission of testimonial hearsay-in other words, prior out-of-court statements- *Craig* addressed the in-court testimony of an allegedly abused child via closed circuit television ." *State v. Henriod*, 2006 Utah LEXIS 10, at *15; *cf.* *United States v. Bordeaux*, 400 F.3d 548, 554-57 (8th Cir.2005)(applying *Craig* to hold that the district court's allowance of two-way, closed circuit television did not satisfy *Craig* and was therefore unconstitutional, and applying *Crawford* to child's out-of-court statements to forensic interviewer).

II. *THE COURT FINDS THAT JANE DOE IS UNABLE TO TESTIFY IN OPEN COURT IN SANDOVAL'S PRESENCE.*

There is the potential for distress in having to testify in open court, regardless whom the witness is. It is doubtful whether even the most experienced and hardened law enforcement officer or retained expert ever finds the experience of testifying in court to be comfortable or enjoyable. Testifying represents an ordeal for most, if not all, witnesses. Thus, for a five-year old child, even with all of the support that the Court could give her, and even if the Court exercises every sensitivity to the child's situation, testifying will be difficult.

The Court has studied with care Dr. Kern's report and testimony at the October 19, 2005, evidentiary hearing concerning Jane Doe's ability to testify in court, as well as Jane Doe's testimony in chambers on November 17, 2005. The unique requirements of the statute and of *Maryland v. Craig* are met. Based upon Dr. Kern's opinion, there is a substantial likelihood that Jane Doe would suffer emotional trauma from testifying in open court. The Court is concerned that Jane Doe's mental state, as Dr. Kern has discerned it, represents more than unwillingness to testify in her father's presence. The Court is convinced that the person Jane Doe views as "mean" and "scares" her, will emotionally traumatize her. Jane Doe will suffer emotional trauma if forced to testify in open court, in the same courtroom, with the person who allegedly abused her, and will thus be unable to testify. Jane Doe will also be unable to testify because of her fear of her father-Dr. Kern's opinion does not rest on Jane Doe's ability to testify in a court room setting generally, but is based upon the fear of her father. The Court had an opportunity to examine Dr. Kern's findings at a hearing before trial and to make specific findings to satisfy the factors set forth in *Maryland v. Craig* and § 3509. The Court will best protect Jane Doe's welfare if it allows her to testify by two-way closed circuit television, and Sandoval's Confrontation Clause rights will not be violated.

***13** THEREFORE, the Court finds:

1. Jane Doe seeks to testify;

2. Jane Doe is unable to testify in open court in the Defendant's presence:

   (i) because of her fear of her father; and

   (ii) because there is a substantial likelihood, established by expert testimony, that Jane Doe would suffer emotional trauma from testifying;

3. The two-way closed circuit television testimony is necessary to protect the welfare of Jane Doe;

4. Jane Doe would not be traumatized by the courtroom generally;

5. Jane Doe would be traumatized by Sandoval's presence;

6. The emotional stress that Jane Doe would suffer in Sandoval's presence is more than *de minimis;*

7. The emotional stress that Jane Doe would suffer in Sandoval's presence is more than mere nervousness;

8. The emotional stress that Jane Doe would suffer in Sandoval's presence is more than mere excitement; and

9. The emotional stress that Jane Doe would suffer in Sandoval's presence is more than some reluctance to testify.

IT IS ORDERED that the United States' Motion for Two-Way Closed Circuit Television Testimony is granted and two-way closed circuit testimony for Jane Doe is ordered in this case.

In 2010, the State of Texas confronted a similar fact pattern in *Coronado v. Texas*. Reprinted below in its entirety, the court reaches a similar conclusion in allowing videotaped child testimony with the defendant permitted to cross-examine only through written questions presented to the witness out of court.

TOMMY **CORONADO**, Appellant,
v.
THE STATE OF **TEXAS**, Appellee.

(Tex. App. 2010) No. 07-08-0496-CR.

March 31, 2010.

Panel C: Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

OPINION

PATRICK A. PIRTLE, Justice.

This case addresses the question of whether a defendant's Sixth Amendment rights are violated when an unavailable complainant's testimonial hearsay statements are admitted into evidence pursuant to the statutory authority found in article 38.071, § 2(b).[1] On November 19, 2008, following a plea of "not guilty," Appellant, Tommy Coronado, was convicted by a jury of the offense of aggravated sexual assault[2] (Count I), a first degree felony, and indecency with a child[3] (Count II), a second degree felony. Following a plea of "true" to the allegations contained in the enhancement portion of the indictment, the jury assessed Appellant's sentence, as to each offense, at confinement for life and a fine of $10,000. Because the trial court did not order the sentences to run consecutively, by operation of law, the sentences run concurrently.[4] By issues one and five, Appellant contends the evidence is both legally and factually insufficient; and by issues two, three, and four, he contends his constitutional right to confront and cross-examine the complaining witness was abridged. We affirm.

Background

In early August 2007, Sylvester Dominguez noticed that the personality of his three-year old daughter, R.D.,[5] had dramatically changed. In response to questioning as to whether "anybody had touched her, anybody hurt her, anybody touch her cookie,"[6] R.D. responded "yes." When asked whether "Tommy" had done this, she again answered "yes." Based upon these statements, on August 8, 2007, R.D. was examined by Danielle Livermore, a sexual assault nurse examiner, and interviewed by Brandi Johnson, a forensic examiner associated with the Bridge Children's Advocacy Center. The sexual assault examination revealed that R.D.'s hymen was irregular and showed evidence of healed trauma. Based on this examination, Livermore concluded that R.D. had been sexually assaulted. In the forensic interview,

R.D. stated that Appellant had touched her "cookie" and that it hurt. As a result of that information, on December 19, 2007, Appellant was indicted for aggravated sexual assault and indecency with a child.

On November 14, 2008, a pretrial hearing was held to determine the admissibility of the videotaped recording of R.D.'s August 8, 2007, forensic interview at the Bridge Children's Advocacy Center, in accordance with the provisions of article 38.071 of the Texas Code of Criminal Procedure. At that hearing, the court heard testimony from R.D.'s mother, Vanessa Dominguez, and a child psychologist, Priscilla Kleinpeter, to the effect that requiring R.D. to give testimony in the presence of Appellant, or even by closed-circuit television, would have a significant traumatic impact on the child. The court then concluded that the child was "unavailable to testify" in the presence of Appellant, as that term is used in article 38.071.[7] Appellant has not contested the trial court's determination of unavailability. As a condition precedent to the admissibility of that recording, the court then ordered that Appellant have the opportunity to present written interrogatories to the child through a subsequent recorded interview to also be conducted by Ms. Johnson. After discussing the pros and cons of allowing the forensic interviewer the "leeway" of following up on answers given by the child, as opposed to allowing counsel the opportunity to present follow up written questions, the court determined that allowing leeway was "the best way to do it." Appellant's counsel did object to the general procedure of allowing cross-examination through the use of written interrogatories; however, no objection was made as to the specific procedure of disallowing follow up questions. Accordingly, the issue of follow up questions was not preserved for review and we express no opinion as to the propriety of this portion of the procedure employed. Following the conclusion of the pretrial hearing, the interview on written questions was conducted that day.

At trial, in lieu of R.D.'s live testimony, the State offered the videotaped recording of her August 8, 2007, Bridge interview. A videotaped recording of the court-ordered interview on written interrogatories was also played for the jury. In addition to the recordings of R.D.'s two forensic interviews, the jury heard testimony from Vanessa and Sylvester Dominguez, as well as Danielle Livermore, Brandi Johnson, and Priscilla Kleinpeter. In addition to testifying on his own behalf, Appellant offered the testimony of his mother, Maria Quintana, and his wife, Victoria Coronado. Upon being duly charged, the jury returned a verdict of guilty as to both counts. Judgment was entered and this appeal followed.

Legal and Factual Sufficiency

When, as here, an appellant challenges both the legal and factual sufficiency of the evidence, we are required to conduct an analysis of the legal sufficiency of the evidence first and, then, only if we find the evidence to be legally sufficient, do we analyze the factual sufficiency of the evidence. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App. 1996). We review legal sufficiency by viewing the evidence in the light most favorable to the verdict to determine whether, based on that evidence and reasonable inferences to be drawn therefrom, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. 2007). The conviction will then be sustained unless it is irrational or unsupported by more than a "mere modicum" of evidence. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App. 1988). The fact finder is the sole judge of the credibility of the witnesses and of the weight to be afforded their testimony. *Barnes v. State*, 876 S.W.2d 316, 321 (Tex.Crim.App. 1994). Reconciliation of conflicts and contradictions in the evidence is within the fact finder's province and is usually conclusive. *See Van Zandt v. State*, 932 S.W.2d 88, 96 (Tex.App.-El Paso 1996, pet. ref'd).

When an appellant challenges the factual sufficiency of the evidence supporting his conviction, the reviewing court must determine whether, considering all the evidence in a neutral light, the jury was rationally justified in finding the appellant guilty beyond a reasonable doubt. *Zuniga v. State*, 144 S.W.3d 477, 484 (Tex.Crim.App. 2004), *overruled in part by Watson v. State*, 204 S.W.3d 404, 415-17 (Tex.Crim.App. 2006). In performing a factual sufficiency review, we must give deference to the fact finder's determinations if supported by any evidence and may not order a new trial simply because we may disagree with the verdict. *Watson*, 204 S.W.3d at 417. As an appellate court, we are not justified in

ordering a new trial unless there is some objective basis in the record demonstrating that the great weight and preponderance of the evidence contradicts the jury's verdict. *Id.*

Additionally, as directed by the Texas Court of Criminal Appeals, when conducting a factual sufficiency review, we must include a discussion of the most important and relevant evidence that supports the appellant's complaint on appeal. *Sims v. State*, 99 S.W.3d 600, 603 (Tex.Crim.App. 2003). This does not, however, mean that we are required to discuss *all* evidence admitted at trial. *See id. See also Roberts v. State*, 221 S.W.3d 659, 665 (Tex.Crim.App. 2007).

Analysis

In order to establish the offense of aggravated sexual assault, the State was required to prove that Appellant intentionally or knowingly caused the penetration of the sexual organ of a child who was then and there younger than 14 years of age. *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(1) and (2)(B) (Vernon Supp. 2009). In order to establish the offense of indecency with a child, the State was required to prove Appellant, with the intent to arouse or gratify his sexual desire, intentionally or knowingly touched the genitals of a child who was younger than 17 years and not Appellant's spouse. *See* Tex. Penal Code Ann. § 21.11 (a)(1) (Vernon Supp. 2009).

Reviewing the evidence in the light most favorable to the verdict, the videotaped statements of R.D. alone were sufficient to establish every essential element of the offenses of aggravated sexual assault and indecency with a child. While Appellant acknowledges that testimony of a single witness can be legally sufficient to substantiate a finding of guilt, *Castillo v. State*, 913 S.W.2d 529, 535 n.3 (Tex.Crim.App. 1995); *Rodriguez v. State*, 955 S.W.2d 171, 174 (Tex.App.-Amarillo 1997, no pet.), he contends that this principle has no application where the defense was given no opportunity to rigorously cross-examine the complaining witness. Appellant cites no authority supporting his contention. Without same, the issue is inadequately briefed and, therefore, waived. *See* Tex. R. App. P. 38.1(h); *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex.Crim.App. 2000).

Furthermore, because Appellant's contentions concerning his right to cross-examine the complaining witness are more fully discussed with respect to issues two, three, and four, we overrule issue five challenging the legal sufficiency.

Appellant contends the evidence is factually insufficient because, other than the medical evidence of trauma to R.D.'s hymen, the State's case rests solely upon the testimony of a three year old child as recorded in the forensic interviews of Brandi Johnson and the hearsay statements of the child as given to Priscilla Kleinpeter. Appellant maintains that the scarcity of evidence undermines both the issue of whether an offense occurred, and whether he committed the offense, if one in fact did occur.

In addition to the medical testimony and R.D.'s recorded statements implicating Appellant in the commission of both offenses, the State offered R.D.'s outcry statement to her father to the effect that Appellant hurt her by touching her "cookie." A child victim's outcry statement alone can be sufficient to sustain a conviction for aggravated sexual assault. *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex.Crim.App. 1991).

Appellant's suggestion that he did not have an opportunity to commit the charged offenses was contradicted by the testimony of R.D.'s mother, father, grandmother, and great-grandmother, as well as Appellant's own testimony. Furthermore, Appellant's suggestion that R.D.'s physical symptoms could be rationally explained by other possibilities does not preclude the possibility that they were caused by the criminal conduct of Appellant. As such, the jury was free to listen to the evidence, judge the credibility of the witnesses, and make its own determination as to the truth of the matters asserted. Based upon the evidence presented, we cannot say that the jury was not rationally justified in finding guilt beyond a reasonable doubt. In other words, we conclude there is no objective basis in the record demonstrating that the great weight and preponderance of the evidence contradicts the jury's finding of guilt. *See Watson*, 204 S.W.3d at 417. Appellant's first issue challenging the factual sufficiency is overruled.

Confrontation of Witnesses

Appellant contends that because he was allowed to cross-examine R.D.'s videotaped statements only through the use of written interrogatories, presented by a third person, via a videotaped interview, he was denied his right to face-to-face confrontation and cross-examination as guaranteed by the Sixth Amendment. The State contends that Appellant was accorded every right guaranteed by the Sixth Amendment when the trial court, consistent with provisions of section 2(b) of article 38.071, allowed him to submit written questions that were then presented by a neutral individual and recorded under the same or similar circumstances as the original interview. Thus, the issue before this Court is whether the post-interview submission of written interrogatories pursuant to the procedure authorized by section 2(b) of article 38.071 is a meaningful and effective substitute for in-court, sworn testimony, subject to face-to-face confrontation and cross-examination in a criminal trial.[8]

The Sixth Amendment guarantees the accused, in every criminal prosecution, the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This right is secured for the defendant in state as well as federal criminal prosecutions. *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The Supreme Court has determined that this provision, commonly referred to as the Confrontation Clause, bars "admission of testimonial statements of a witness who did not appear at trial unless [the witness] is unavailable to testify and the defendant has had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

This right of confrontation has further been construed to include not only the right to face-to-face confrontation, but also to the right to meaningful and effective cross-examination. *Davis v. Alaska*, 415 U.S. 308, 315-316, 94 S.Ct. 1105, 39 L.Ed.2d 347 1974). Professor J. Wigmore has described the "main and essential purpose" of confrontation to be the opportunity for cross-examination through the process of putting direct and personal questions to the witness and the obtaining of immediate answers. 5 J. Wigmore, *Evidence* § 1395, at 123 (3d ed. 1940). Cross-examination is the principal means by which an accused can test the credibility of a witness and the truth of their testimony. *Davis*, 415 U.S. at 316. It provides the accused with a process whereby the motivation for testifying or bias of a witness can be exposed to truth-finding function of the trier of fact. *Id.*

Analysis

Whether a particular out-of-court statement is testimonial is a question of law. *De La Paz v. State*, 273 S.W.3d 671, 680 (Tex.Crim.App. 2008). Generally speaking, an out-of-court statement is testimonial when the surrounding circumstances objectively indicate that the primary purpose of the interview or interrogation is to establish or prove past facts or events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266 165 L.Ed.2d 224 (2006); *De La Paz*, 237 S.W.3d at 680. Error in admitting evidence in violation of a defendant's right of confrontation is constitutional error, which necessitates reversal unless the reviewing court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *See* Tex. R. App. P. 44.2(a); *Langham v. State*, No. PD-1780-08, 2010 Tex.Crim.App. LEXIS 21, at *34-35 (Tex.Crim.App. March 3, 2010); *Wood v. State*, 299 S.W.3d 200, 214 (Tex.App.-Austin 2009, pet. filed).

Here, the primary purpose of the August 8th interview was to preserve a record of past facts or events for purposes of a later criminal prosecution and the purpose of the follow up interview was to comply with the requirements of article 38.071 for the admissibility of that original recording during that prosecution. The accuracy and truthfulness of R.D.'s statements were crucial to the State's case against Appellant. In both situations, R.D.'s statements clearly constitute testimonial hearsay for Confrontation Clause purposes.

Having determined that the videotaped interviews were testimonial under the United States Supreme Court decisions in *Crawford v. Washington* and *Davis v. Washington*, this case highlights the tension existing between the right of an accused to confront the witnesses against him, as determined by decisions

like *Davis v. Alaska,* and the State's policy of protecting child witnesses in sexual assault cases from further trauma. Despite serious concerns pertaining to the reliability of child witness testimony, and notwithstanding the due process significance of the right of confrontation of witnesses, the trend among courts and legislatures has been to relax evidentiary and procedural requirements pertaining to the admissibility of child witness testimony in child sexual abuse prosecutions in an effort to balance these competing public policy interests. Article 38.071 is such an attempt.

In *Maryland v. Craig,* 497 U.S. 836, 857, 110 S.Ct. 3157, 111 L.Ed.2d 656 (1990) the United States Supreme Court recognized that the constitution does not guarantee the absolute right to face-to-face confrontation. In *Craig,* the Court approved certain limitations on the right of confrontation, holding that states may use closed-circuit television or other methods of confrontation short of "face-to-face confrontation" where a court makes a case-specific finding that there is potential for trauma to a child witness from testifying in open court, in the presence of the defendant. *Id,* at 857.

Here, Appellant contends the trial court should have considered less restrictive alternatives to the use of written questions in lieu of live, face-to-face cross-examination. A similar argument was rejected by the Supreme Court in *Craig* when the Court declined to establish "any such categorical evidentiary prerequisite," so long as the trial court makes a case-specific finding that the procedure employed was necessary under the facts of that particular case. *Id.* at 860.

Additionally, whether a particular method of confrontation is deemed constitutionally sufficient depends upon a determination as to whether the procedure adequately ensures that the testimony is both reliable and subject to "rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 845. In this context, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to test the witness's recollection, sift his conscience, observe his demeanor, judge the manner in which he gives his testimony, and make a reasonable assessment of the credibility of the witness and the weight to be given his testimony. *Id.*

In *Rangel v. State,* the Fort Worth Court of Appeals held that (1) a child victim's videotaped statement was "testimonial" and therefore governed by *Crawford,* and (2) by providing a defendant with the opportunity to submit written questions, section 2(b) of article 38.071 serves as a constitutionally sufficient alternative to face-to-face confrontation of witnesses. *Rangel v. State*, 222 S.W.3d 523, 535-37 (Tex.App.-Fort Worth 2006, pet. dism'd).[9]

While the right to confront our accusers through face-to-face cross-examination is not a right that is absolute and unbendable, it is a right that should not be quickly or carelessly compromised. Although limited, section 2(b) of article 38.071 does provide the accused with a means of testing the testimony of the witnesses against him through the submission of cross-examination questions. Where a video recording of the child-witness is made, the fact finder is further afforded the opportunity to observe the child's demeanor, judge the manner in which he gives his testimony, and make reasonable assessments concerning the weight and credibility of his testimony.

Furthermore, it should be noted that article 38.071 does not disqualify the child from testifying.[10] It merely provides a means whereby a videotaped interview of the child may be used when the trial court determines that the child is "unavailable" based on certain relevant factors, including the factors set out by article 38.071, § 8. In those situations where the child is physically available to be called as a witness, both the prosecution and the defense are faced with the unenviable task of deciding whether to seek leave of the trial court to call the child to the stand. Not only do they face the uncertainty of knowing how a child of tender years might react to the pressure of being placed under the piercing spotlight of interrogation, they also run the very real danger of seriously alienating the fact finder (usually a jury) for having traumatized such a tender witness. In an attempt to find a suitable solution to this Hobson's choice, while at the same time providing a meaningful compromise between the defendant's right of confrontation and society's interest in protecting young child victims from additional trauma occasioned by placing them within the crucible of confrontation and cross-examination in a courtroom setting, we find that the

procedures governed by section 2(b) of article 38.071 can be an appropriate constitutional accommodation.

Here the trial court made a case-specific determination, based upon competent testimony, that the child was unavailable. Appellant was accorded the opportunity to, and did, submit questions to the child through the use of written interrogatories under the procedure outlined by section 2(b). Under the facts of this case, we find no error in the trial court's decision to allow cross-examination through written questions only. Accordingly, we find no error in the trial court's decision to allow the admission of R.D.'s videotaped interview in face of Appellant's Confrontation Clause objection. Issues two, three, and four are overruled.

Conclusion

Having overruled each of Appellant's issues, the judgment of the trial court is affirmed.

[1] *See generally* Tex. Code Crim. Proc. Ann., art. 38.071 (Vernon Supp. 2009). For convenience, articles of the Texas Code of Criminal Procedure will subsequently be cited as "article ___" or "Article ___".

[2] *See* Tex. Penal Code Ann. § 22.021(a)(1)(B)(1) and (2)(B) (Vernon Supp. 2009).

[3] *See* Tex. Penal Code Ann. § 21.11 (a)(1) (Vernon Supp. 2009).

[4] *See* Tex. Penal Code Ann. § 3.03 (a) (Vernon Supp. 2009).

[5] To protect the privacy of the complaining witness, we refer to her by her initials.

[6] "Cookie" was R.D.'s word for her vaginal area.

[7] In making a determination of unavailability under article 38.071, the court shall consider relevant factors including the relationship of the defendant and the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because of: (1) emotional or physical causes, including confrontation with the defendant; or (2) the child would suffer undue psychological or physical harm through involvement at the hearing or proceeding. *See* Art. 38.071, § 8 (Vernon Supp. 2009).

[8] To date, the Texas Court of Criminal Appeals has not squarely addressed this issue. Although petition for discretionary review was granted on a similar issue in *Rangel v. State*, 222 S.W.3d 523 (Tex.App.-Fort Worth 2006), that petition was subsequently dismissed as improvidently granted. *Rangel v. State*, 250 S.W.3d 96 (Tex.Crim.App. 2008). Rangel's ground for discretionary review read as follows:

Whether [Rangel's] Sixth Amendment rights were violated when the unavailable complainant's testimonial hearsay statements were admitted into evidence pursuant to statutory authority. [Article 38.071, § 2(b)].

[9] See n. 8 supra.

[10] Section 6 of article 38.071 does provide that the child may not be *required* to testify in court if the trial court finds the testimony of the child taken under sections 2 or 5 of that article is admissible into evidence. However, even if the child's testimony taken under those sections is admitted into evidence, a trial court may still allow the child to testify upon a finding of good cause. Because we are not presented with the question of whether the trial court in this cause erred by denying the accused the right to call the child as a witness, we express no opinion as to whether or not the denial of a defendant's right to call the complaining witness as a witness at trial would affect the defendant's due process rights or the constitutionality of limiting his right of confrontation.

LEGAL RESEARCH FOR PSYCHOLOGISTS

LEGAL RESEARCH FOR PSYCHOLOGISTS

All three branches of government, at both the state and federal level, play a role in the creation of law. The Executive branch (upon delegation or sanction by the Legislative branch) may create and promulgate procedural and operational "codes" (or "Administrative" laws) that provide the structure through which government can carry out its mission. The Legislative branch enacts actual laws ("Statute" law) that codify the broad will of the people …typically in an evolving topical compendium divided into "Titles".

The Judicial branch applies the law to the facts, and also reviews the constitutionality of laws enacted by the Legislative branch in order to assure that emerging law is consistent with enduring national founding principles. The Judicial branch carries out its responsibilities by considering cases on an individual basis, thus over time building our nation's "Case" law; the "common law" which operates parallel to Legislative statutes.

Legal research has undergone major transformations over the past two decades, the most important result of which is that virtually all law is now easily available to anyone over the internet. All of the codes and statutes necessary to prepare, for example, for the Texas Psychologists' Jurisprudence examination are available online, and most through the home page of the Texas State Board of Examiners of Psychologists (http://www.tsbep.state.tx.us). A further guide to Texas statute and administrative code research appears in the companion to this volume, ***Texas Law and the Practice of Psychology: A Sourcebook***.

Actual findings of fact are made in the Trial courts (Districts and Superior courts) by a jury or, with agreement by the parties, by a judge. Only questions of law are addressed in the higher Appellate courts (although appellate courts can assess the *procedures* through which a finding of fact has been made, and if found wanting, return the case for a new trial). In Texas, civil cases have two levels of appeal -- first to the Court of Appeals (abbreviated "Tex. App.") and then possibly to the Texas Supreme Court (simply abbreviated "Tex"; in citation conventions, the shorter the name the higher the court). Criminal cases can be appealed only to the Court of Criminal Appeals (Abbreviated "Tex. Crim. App.") unless advanced to the U.S. Supreme Court. See http://www.courts.state.tx.us/ for more details.

In Texas, as in all jurisdictions, holdings of a higher appellate court are "**binding *precedent***"; they create the case or common law upon which all subsequent lower court decisions must be based. There are two exceptions to this. The first applies in instances in which the facts of a new case arguably do not fit the existing law closely enough to avoid viewing the case as one of "**first impression**;" a new matter to viewed on its own independent merit. One skill of a good attorney is to be able to identify and argue such distinctions.

The second exception is a by-product of the structure of the law. In Texas, and nationally, first level appeals courts are distributed geographically. Nationally, this distribution is into Federal "Circuit" Courts, of which there are eleven, plus the District of Columbia. Moreover, the 9th Circuit that includes California may be very different from the 4th Circuit that includes Virginia. Therefore, the law in California may actually differ from the law in Virginia. An attorney litigating a case in Virginia may therefore prefer California's version of the federal law, and elect to appeal the distinction between these circuits to the U.S. Supreme Court for resolution. Similarly, a Texas lawyer with a civil case in Houston may prefer a state appellate holding from Fort Worth, and appeal the dispute to the Texas Supreme Court. This involves high-level legal strategy, so for all practical purposes, this volume considers the law to be the law. Nevertheless, it is important to appreciate the complexity of legal strategic practice.

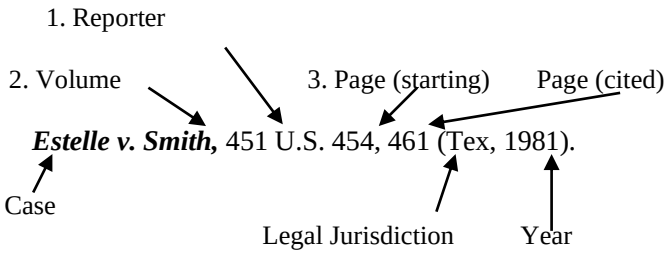
The good news is that, for a psychologist seeking to research state case law, things have never been easier. Where it was once necessary to search the record rooms of state court paper files, anyone today with a working knowledge of Google can retrieve any state appellate case by going to Google Advanced Scholar (http://scholar.google.com/advanced_scholar_search). Enter a case number (e.g. "2-03-080-CV"), date range, the names of parties, a Reporter citation (e.g. "224 S.W.3d 843"; more on this shortly), or any set of Google topical search terms (e.g. "psychologist, liability"); move to the bottom and check "search only court opinions from the following states" and check only Texas – and you will retrieve all of the Texas appellate and many trial court cases that meet your search criteria. Keep in mind, however, that several cases involving psychologists are handed down in almost any given week, so you do need some sense of your specific objectives.

However, not all cases shaping Texas law are handed down from Texas appellate courts. Texas Supreme Court cases can be and are appealed directly to the U.S. Supreme Court if they raise unique constitutional issues. Moreover, many Texas cases are tried, and subsequently appealed through, the federal courts (since the U.S. Constitution delegates professional licensure and criminal law to the states, this may rarely involve cases of interest to psychologists, but murders in post offices, malpractice at the VA, diversity cases involving parties from more than one state, and cases posing constitutional issues are tried in federal court). It is here that things start to become complicated.

Most state courts are interested primarily in the law of their own state. Once you start to mix state and federal law, or write for a law review read across jurisdictions, your research and citation conventions move to those governed by ***The Blue Book: A uniform System of Citation***, published out of Harvard Law School and now in its 19th edition. Citations also move to the national "Reporters;" a series of case law books that trace back to early English law.

All Texas case law is reported in the South West Reporter (S.W., S.W.2d and now S.W.3d). Texas, along with Louisiana and Mississippi, are in the 5th Federal Circuit. Mississippi and Louisiana however are reported in the Southern Reporter. Arkansas and Missouri (8th Circuit) as well as Kentucky and Tennessee (6th Circuit) join Texas in making up the South West Reporter. You can quickly see why state courts prefer to handle their own cases in their own way.

Over many decades, sophisticated legal research systems, led by Westlaw and Lexis, evolved to serve lawyers in this complex environment. Now, however, the ease and universal availability of computer searching has brought new challenges into the field. None of the proposed solutions are ideal, and it is far from clear where it will all end. A good place for the reader to start, however, it to be able to read the basics of a legal citation:



Above is the citation to the case of ***Estelle v. Smith*** which was published in the **U.S.** Report (report of the "final" versions of U.S. Supreme Court cases) in volume 451 starting at page 454 with the cited words starting on page 461. This case, included the present volume, was from Texas and was decided in 1981. Page breaks from original paper Reporter(s) appear imbedded in the case bracketed by asterisks (in Estelle, two sets of page numbers are shown from two different Reporters – the U.S. and a reporter than prints preliminary versions of the same cases. Case names are the names of first parties for each side, and the first shown name is usually the brief case name unless it is "State", "U.S." or other administrative entity.

When selecting cases with which to buttress a legal argument, cases must be located that are not only about the same topic, but about the same pivotal issue on which the case is seen to most likely turn – it must be "**on point**." The most desired cases are therefore the highest ranking "**binding** precedent." Clearly, a U.S. Supreme Court is binding upon the Texas Supreme Court; but issues of precedents can become complicated. When there is no binding precedents in a case of first impression, counsel may draw upon "**persuasive** precedent." ***Tarasoff*** was undoubtedly argued as persuasive precedent in Texas, but since it was not binding upon Texas, Texas was able to elect to move in a minority direction that has since been widely viewed as preferable. Counsel must also, of course, assure that the case has not been overturned an is still "good law."

In this volume, we have attempted to provide not only an optimal combination of classic and new landmark cases from a range of state and federal binding and persuasive jurisdictions; but also to present these cases in a way that best reflects the logical process through by which the courts apply the law to the facts, how

they frame their own internal debates, and how cases relevant to Texas psychologists are reported and presented in different reporting systems and formats.

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