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Habeas Corpus--Expedited Appellate Review of Habeas Corpus Petitions Brought by Death-Sentenced State Prisoners

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HABEAS CORPUS—EXPEDITED APPELLATE REVIEW OF HABEAS CORPUS PETITIONS BROUGHT BY DEATH-SENTENCED STATE PRISONERS

Barefoot v. Estelle, 103 S. Ct. 3383 (1983).

I. INTRODUCTION

In *Barefoot v. Estelle*,[1] the United States Supreme Court held that a court of appeals could properly decide the merits of a habeas corpus appeal[2] brought by a state prisoner sentenced to death together with an application for a stay of execution in one proceeding.[3] The Court's approval of such summary proceedings does not appear to be supported by its precedents in the area of habeas corpus appellate procedure and seems to be a departure from the Court's prior emphasis on special procedural protection and thorough review in death penalty cases. Moreover, important policy considerations indicate that summary proceedings should not be used.

II. FACTS

Petitioner Thomas A. Barefoot was convicted in Bell County, Texas, of the capital murder of a police officer and sentenced to death.[4]

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[1] 103 S. Ct. 3383 (1983).

[2] As used in this Note, "habeas corpus appeal" refers to the appeal of a district court judgment denying a writ of habeas corpus.

[3] The Court also passed on the merits of the appeal involved in *Barefoot*. It held that a state may constitutionally introduce psychiatric testimony regarding a convicted defendant's potential for future dangerousness at a capital sentencing hearing. It also held that such testimony may be given in response to hypothetical questions. *See infra* notes 64-65 and accompanying text.

[4] Barefoot was sentenced to death on November 14, 1978 pursuant to Section 37.071 of the Texas Code of Criminal Procedure. That section provides:

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

Unsuccessful in his attempt to overturn his conviction,[5] Barefoot filed an application for writ of habeas corpus,[6] pursuant to 28 U.S.C. § 2254,[7] in the United States District Court for the Western District of Texas.[8] Barefoot based his claim to habeas corpus relief on several constitutional grounds, including that the introduction of certain psychiatric testimony at his sentencing hearing was unconstitutional.[9] Barefoot's execu-

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defendant or his counsel shall be permitted to present argument for or against sentence of death.

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

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

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

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

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

TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981) (relevant statutory language unchanged from the language governing Barefoot's sentencing). Because the sentencing jury in Barefoot's case responded affirmatively to questions (1) and (2), a death sentence was imposed.

[5] The Texas Court of Criminal Appeals affirmed Barefoot's conviction on March 12, 1980 and rehearing was denied April 30, 1980. Barefoot v. State, 596 S.W.2d 875 (Tex. Crim. App. 1980). Barefoot petitioned the United States Supreme Court for writ of certiorari, but certiorari was denied. Barefoot v. Texas, 453 U.S. 913 (1981).

[6] The privilege of the writ of habeas corpus is guaranteed by the United States Constitution: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The writ of habeas corpus is a common law writ of a civil nature. 7B J. MOORE, M. WAXNER, H. FINK, D. EPSTEIN & G. GROTHEER, JR., MOORE'S FEDERAL PRACTICE ¶ 153-1 (2d ed. 1983). The purpose of the writ, according to Congress, is to secure the release of a prisoner held in violation of the Constitution, federal laws, or treaties of the United States. *See infra* note 7. The Supreme Court has explained the importance of the writ:

> The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under the law. In England where it originated and in the United States, this high purpose has made the writ both the symbol and guardian of individual liberty.

Peyton v. Rowe, 391 U.S. 54, 58 (1968)(footnotes and citations omitted).

[7] Section 2254 provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (1976).

[8] Prior to seeking a writ of habeas corpus in federal court, Barefoot had petitioned the Texas state courts for habeas relief. An application for writ of habeas corpus was filed in the state court on September 29, 1981. The Texas Court of Criminal Appeals denied the writ on October 7, 1981. Brief for Respondent at 3, Barefoot v. Estelle, 103 S. Ct. 3383 (1983) [hereinafter cited as Brief for Respondent].

[9] Barefoot also argued: (1) that Section 37.071 of the Texas death penalty statute was unconstitutional because it contained no explicit provisions regarding the jury consideration of mitigating circumstances; and (2) that a prospective juror had been excluded in violation

tion, which was scheduled for October 13, 1981, was stayed pending consideration of his constitutional objections. On November 12, 1982, the district court denied habeas relief, holding against Barefoot on all of the claims he had raised.[10]

Although the district court denied Barefoot's petition for a writ, it apparently had not considered his claims frivolous, and therefore it issued a certificate of probable cause so that Barefoot could appeal the district court's denial of habeas corpus relief to a federal appellate court.[11] Barefoot did appeal the district court's judgment, filing notice of appeal to the Fifth Circuit on November 24, 1982.[12] The district court vacated the stay of execution on December 8, 1982. The state trial court set January 25, 1983 as the new date of execution.

On January 14, 1983, petitioner moved the Court of Appeals for the Fifth Circuit to stay execution pending consideration of his appeal. The court scheduled oral argument on the motion for January 19,[13] and the parties were "afforded an unlimited opportunity to make their contentions upon the underlying merits by briefs and oral argument."[14] The next day the court of appeals issued a sixteen-page opinion denying the stay.[15]

The court of appeals initially noted that, in deciding whether to issue a stay, it should consider the likelihood that the appeal will be successful. Using a standard it typically applied in civil cases,[16] the Fifth Circuit said that a stay should be granted only if there is "a substantial case on the merits" supporting the petitioner's grounds for

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of Witherspoon v. Illinois, 391 U.S. 510 (1968), and that his attorneys did not understand *Witherspoon*. Barefoot v. Estelle, No. W-81-CA-191, slip op. at 2-3 (W.D. Tex. Nov. 12, 1982), *aff'd*, 697 F.2d 593 (5th Cir.), *aff'd*, 103 S. Ct. 3383 (1983).

10 Barefoot v. Estelle, No. W-81-CA-191, slip op. (W.D. Tex. Nov. 12, 1982), *aff'd*, 697 F.2d 593 (5th Cir.), *aff'd*, 103 S. Ct. 3383 (1983).

11 According to 28 U.S.C. § 2253, a state prisoner must obtain a certificate of probable cause before he can appeal a district court's denial of a writ of habeas corpus in the federal courts. Such a certificate may be issued by the district judge or a circuit judge or justice. 28 U.S.C. § 2253 (1976). Congress established the requirement of a certificate of probable cause to prevent frivolous appeals from delaying the imposition of sentences, including death sentences. *Barefoot*, 103 S. Ct. at 3393-94. Although the statute is silent as to the circumstances under which a certificate of probable cause should issue, the certificate is generally granted when there has been a substantial showing of a denial of a federal right. *See infra* note 52 and accompanying text.

12 *Barefoot*, 103 S. Ct. at 3390.

13 According to petitioner, the motion was filed on Friday, January 14, 1983. At approximately 3:00 p.m. on Monday, January 17, the court scheduled oral argument on the motion for 9:00 a.m. on Wednesday, January 19. Brief for Petitioner at 25, Barefoot v. Estelle, 103 S. Ct. 3383 (1983) [hereinafter cited as Brief for Petitioner].

14 Barefoot v. Estelle, 697 F.2d 593, 596 (5th Cir.), *aff'd*, 103 S. Ct. 3383 (1983) .

15 697 F.2d 593 (5th Cir.), *aff'd*, 103 S. Ct. 3383 (1983).

16 *See* Ruiz v. Estelle, 666 F.2d 854 (5th Cir. 1982); Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981).

habeas corpus relief.[17] The court noted that generally a district court issues a certificate of probable cause only if it finds that there has been a substantial showing of the denial of a federal right.[18] The Fifth Circuit maintained, however, that while the issuance of a certificate should be given "weighty consideration," it did not preclude a court of appeals from arriving at its own determination as to whether a stay should issue.[19] The Fifth Circuit viewed its position as consistent with Supreme Court decisions such as *Carafas v. LaVallee*[20] and *Brooks v. Estelle*.[21]

The Fifth Circuit then discussed the merits of the one claim Barefoot had pressed on appeal as entitling him to habeas corpus relief: that the introduction of certain psychiatric testimony at his sentencing hearing was unconstitutional.[22] The court stated, "Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that that motion for stay should be denied."[23]

Barefoot filed an application for stay of execution with Supreme Court Justice White, the Circuit Justice for the Fifth Circuit, who referred the matter to the Court. On January 24, 1983, the Supreme

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17 697 F.2d at 595.

18 *Id.*

19 The court of appeals maintained that "Rule 8 [of the Federal Rules of Appellate Procedure] clearly contemplates that it is the appellate court's responsibility to decide the merits of the stay." *Id.* Rule 8 provides:

> Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of the appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action.

FED. R. APP. P. 8(a).

20 391 U.S. 234 (1968). For a discussion of *Carafas*, see *infra* notes 85-88 and accompanying text.

21 103 S. Ct. 1490 (1982). In *Brooks*, the Supreme Court denied a stay of execution as well as a petition for certiorari following a Fifth Circuit denial of a stay under circumstances substantially similar to those in *Barefoot*. The Supreme Court quoted language from the appellate court opinion, Brooks v. Estelle, 697 F.2d 586 (5th Cir. 1982), indicating that no substantial question had been presented. *Brooks*, 103 S. Ct. at 1490-91. Justices Brennan, Marshall, and Stevens dissented, objecting to the Fifth Circuit's denial of the stay in *Brooks* on grounds similar to those expressed in the *Barefoot* dissent. *See infra* notes 66-75 and accompanying text.

The Fifth Circuit believed that the Supreme Court's denial of a stay and certiorari in *Brooks* indicated the Supreme Court's approval of its procedures regarding motions for stays of executions. *See Barefoot*, 697 F.2d at 596. *But see infra* note 90.

22 Although the court of appeals noted that this was the only issue raised on appeal, it addressed two other claims as well: (1) that the state had no jurisdiction to set another execution date while his present habeas appeal was still pending in the federal court system, and (2) that there had been prosecutorial misconduct at his trial. 697 F.2d at 598-99.

23 *Id.* at 600.

Court stayed the execution[24] and granted certiorari,[25] directing the parties to

> brief and argue the question presented by the application, namely, the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner, and also the issues on the appeal[26] before the United States Court of Appeals for the Fifth Circuit.[27]

III. THE SUPREME COURT'S DECISION

A. THE MAJORITY OPINION

In a six-to-three decision, the Supreme Court affirmed the decision of the district court.[28] With Justice White writing for the majority,[29] the Court held that the Fifth Circuit had not erred in refusing to stay Barefoot's death sentence and that the district court had not erred in denying Barefoot habeas corpus relief.

The majority first addressed the propriety of the procedure used by the Fifth Circuit in denying the stay. The majority indicated that if the appellate court had denied the stay of execution without deciding the merits of the appeal, its procedure would have been improper under the Supreme Court's holdings in *Nowakowski v. Maroney*,[30] *Carafas v. LaVallee*,[31] and *Garrison v. Patterson*.[32] Thus, the Court made it clear that if the Fifth Circuit had not ruled on the merits of the appeal, but had simply denied the stay because it was unlikely that Barefoot *would* succeed on the merits, the appellate court's procedure would have been improper.[33]

The majority found, however, that the Fifth Circuit had not applied a "likelihood of success on the merits" test but rather had actually ruled on the merits in the process of denying the stay.[34] To support this

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[24] Barefoot's execution had been scheduled for January 25, 1983. *Id.* at 595.

[25] The Court treated the application for stay of execution as a petition for writ of certiorari before judgment. Barefoot v. Estelle, 103 S. Ct. 841 (1983).

[26] The Court consequently addressed only the issue of whether the introduction of certain psychiatric testimony at Barefoot's sentencing hearing had been constitutional. *See infra* notes 64-65 and accompanying text.

[27] 103 S. Ct. at 841.

[28] The court of appeals had not technically affirmed the district court decision denying habeas corpus relief. 697 F.2d at 599-600. *See infra* notes 36-38 and accompanying text.

[29] Justice White was joined by Chief Justice Burger, and Justices Powell, Rehnquist, and O'Connor. Justice Stevens wrote a concurring opinion. *See infra* note 34.

[30] 386 U.S. 542 (1967) (per curiam). *See infra* notes 41-42 and accompanying text.

[31] 391 U.S. 234 (1968). *See infra* notes 43-44 and accompanying text.

[32] 391 U.S. 464 (1968) (per curiam). *See infra* notes 45-46 and accompanying text.

[33] Indeed, later in its opinion, the majority indicated that the "likelihood of success on the merits" should not play any role in the decision of whether to grant a stay. According to the Court, a stay should issue whenever it is necessary to prevent a petitioner's execution from mooting the appeal pending disposition. *See infra* note 54 and accompanying text.

[34] In his dissent, Justice Marshall objected to the majority's finding on this issue. *See infra*

finding, the majority noted that the court of appeals had been aware of the Court's precedents requiring a decision on the merits of an appeal after the granting of a certificate of probable cause and had characterized its actions as consistent with these precedents.[35] The majority also pointed out that the parties had addressed the merits and had been given unlimited time to present argument. The Fifth Circuit had also addressed the merits in its opinion and rejected Barefoot's claims.

The majority would have deemed it advisable for the Fifth Circuit expressly to have affirmed the district court's denial of habeas relief as well as denying the stay. It found that failure to do so, however, was not in conflict with *Garrison* and related cases.[36] The majority claimed that, though the court of appeals' decision on the stay and the merits had been swift, it had not been cursory or inadequate.[37] The Court thus found that remand to the court of appeals for verification that the district court judgment had been affirmed was unnecessary and would be "an unwarranted exaltation of form over substance."[38]

Having concluded that the Fifth Circuit had ruled on the merits, the majority then considered whether it was proper procedure for an appellate court to rule on the merits of a habeas corpus appeal and an application for a stay of execution in the same proceeding.

The majority began by examining the role of federal habeas corpus proceedings. Pointing out that direct appeal in the state court system is the primary avenue for review of a conviction or sentence, the Court noted that a presumption of finality and legality attaches to the conviction and sentence when that process of state appellate review is con-

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notes 67-68 and accompanying text. Justice Stevens, in his concurring opinion, apparently agreed with this determination as well. He wrote:

> I agree [with Justice Marshall] that the Court of Appeals made a serious procedural error in this case. Nevertheless, since this Court has now reviewed the merits of petitioner's appeal and since I agree with the ultimate conclusion that the judgment of the District Court must be affirmed, I join the Court's judgment.

103 S. Ct. at 3400-01 (Stevens, J., concurring).

35 The majority asserted that the court of appeals had justified its action by reference to the Supreme Court's decision in *Garrison*. 103 S. Ct. at 3392. The Fifth Circuit actually had relied on *Carafas*, and, indeed, had found *Garrison* to be "inapposite." 697 F.2d at 596.

36 The majority noted that in *Garrison* "in an effort to determine whether the merits had been addressed . . . this Court solicited further submissions from the parties in the case." 103 S. Ct. at 3393 (quoting Garrison v. Patterson, 391 U.S. 464, 466 n.2 (1968) (per curiam)). As Justice Marshall correctly points out, the use of this language as support for not remanding for express affirmation is out of context. *Id.* at 3403 (Marshall, J., dissenting). In *Garrison*, the court of appeals did expressly affirm the district court's denial of habeas corpus, although without explanation. The additional submissions were necessary because the appellate hearing was unrecorded. This fact rendered a finding as to whether the court of appeals had addressed the merits on more than a *pro forma* basis difficult if not impossible without further submissions.

37 *But see infra* note 111 and accompanying text.

38 103 S. Ct. at 3393.

cluded. Federal habeas corpus proceedings, the Court asserted, are therefore necessarily secondary and limited.[39] The Court thus maintained that procedures adopted to facilitate the orderly consideration and disposition of habeas corpus petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make to discovery of constitutional error.[40]

The Court next discussed its previous decisions regarding the certificate of probable cause, stays, and proper appellate procedure. The Court noted[41] its decision in *Nowakowski v. Maroney*, where it had held that "when a district judge grants . . . a certificate [of probable cause], the court of appeals must grant an appeal *in forma pauperis* (assuming the requisite showing of poverty), and proceed to a disposition of the appeal in accord with its ordinary procedure."[42] The majority in *Barefoot* found, through reference to its later holding in *Carafas v. LaVallee*,[43] that, while *Nowakowski* required courts of appeals to decide the merits, it did " 'not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases.' "[44]

The majority also discussed *Garrison v. Patterson*,[45] where, according

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39 That federal habeas corpus proceedings are considered "secondary and limited" is certainly evidenced by the numerous limitations Congress has placed on the right of prisoners to seek habeas relief. For example, before a prisoner may seek habeas relief in the federal courts, he must have exhausted all state remedies. *See* 28 U.S.C. § 2254 (1976). Moreover, before a prisoner can appeal a district court's denial of a writ of habeas corpus in the federal courts of appeals, a certificate of probable cause must be issued. *See supra* note 11.

40 103 S. Ct. at 3391.

41 *Id.* at 3392.

42 Nowakowski v. Maroney, 386 U.S. 542, 543 (1967) (per curiam). In *Nowakowski*, the district court had denied a state prisoner's petition for a writ of habeas corpus, but had issued a certificate of probable cause. The Court of Appeals for the Third Circuit thereafter denied Nowakowski's petition to appeal *in forma pauperis*. The Supreme Court granted certiorari and vacated the court of appeals' order. *Id.*

43 391 U.S. 234 (1968).

44 103 S. Ct. at 3392. Although the majority attributed this language to *Carafas*, it does not appear in *Carafas*, but is a quote from Garrison v. Patterson, 391 U.S. 464, 466 (1968) (per curiam), restating the *Carafas* Court's interpretation of *Nowakowski*: "As we only recently noted in *Carafas v. LaVallee*, . . . *Nowakowski* does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases." *Garrison*, 391 U.S. at 466. For a further discussion of *Carafas*, see *infra* notes 85-88 and accompanying text.

45 391 U.S. 464 (1968) (per curiam). The majority quoted extensively from its *Garrison* decision:

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

103 S. Ct. at 3392 (footnote omitted in original, citation omitted, bracketed material in original except as noted) (quoting Garrison v. Patterson, 391 U.S. 464, 466 (1968) (per curiam)).

to the *Barefoot* majority, the Court had indicated that "there must be ample evidence that in disposing of the appeal, the merits have been addressed, but . . . nothing in the cases or the applicable rules prevents a Court of Appeals from adopting summary procedures in such cases."[46] The majority concluded that, while approving the execution of a defendant before his appeal is decided on the merits would be improper under *Nowakowski*, *Carafas*, and *Garrison*, a practice of deciding the merits of an appeal together with the application for a stay is not inconsistent with those cases.[47]

Although the Court determined that the Fifth Circuit's handling of the instant appeal had been tolerable, it did not mean to suggest that the Fifth Circuit's "course" should be accepted as the "norm" or as the "preferred" way of conducting summary proceedings.[48] The majority outlined, in dicta, five guidelines for courts of appeals to follow should they elect to use summary proceedings in habeas corpus appeals.[49]

First, the Court pointed out that the decision to grant or withhold a certificate of probable cause should be the primary means of separating meritorious from frivolous appeals.[50] The Court noted that Congress had established the probable cause requirement to prevent frivolous appeals from delaying the imposition of sentences, including capital sentences.[51] The Court agreed with the prevailing view "that a certificate of probable cause requires petitioner to make 'a substantial showing of the denial of [a] federal right.' "[52]

Second, when a certificate is issued, the "petitioner must . . . be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal."[53] According to the Court, a stay should be granted where necessary to prevent a petitioner's execution from mooting his appeal pending disposition.[54]

Third, the majority counseled that "courts should consider whether the delay that is avoided by summary procedures warrants departing from the normal, untruncated processes of appellate review."[55] The

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The *Garrison* Court had continued that "[w]ithin this general framework, the promulgation of specific procedures is a matter for the courts of appeals." 391 U.S. at 466-67.

46 103 S. Ct. at 3392. For a further discussion of *Garrison*, see *infra* notes 89-97 and accompanying text.

47 103 S. Ct. at 3392.

48 *Id.* at 3393.

49 The Court made no effort to scrutinize the Fifth Circuit's handling of Barefoot's appeal under these guidelines.

50 103 S. Ct. at 3394.

51 *Id.* at 3393-94.

52 *Id.* at 3394 (quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971)).

53 103 S. Ct. at 3394.

54 *Id.*

55 *Id.* at 3395.

Court advised circuits choosing to use summary proceedings to promulgate a rule "stating the manner in which such cases will be handled and informing counsel that the merits of an appeal may be decided upon the motion for a stay."[56] The Court noted that if an appeal is "frivolous and entirely without merit,"[57] dismissal may be appropriate even without such procedures.[58] The Court also suggested other ways in which circuit courts could expedite habeas corpus appeals. The majority indicated that briefing and argument on the merits may be expedited and that capital cases could be advanced on the docket, so that the decision of these appeals "is not delayed by the weight of other business."[59]

Fourth, the Court distinguished between initial federal habeas corpus petitions and successive petitions. It noted that a court properly may dismiss some successive petitions under the rules governing habeas corpus cases.[60] According to the Court, where dismissal is not appropriate, consideration of successive petitions nevertheless may be expedited. The majority noted that in such cases, "[t]he granting of a stay should reflect the presence of substantial grounds upon which relief might be granted."[61]

Finally, the Court pointed out that "[s]tays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the Court of Appeals that has denied a writ of habeas corpus."[62] The Court stated that a stay of execution should

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[56] *Id.* at 3394.

[57] *Id.*

[58] The Court cautioned:

> [T]he issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous, and that a court of appeals should be confident that petitioner's claim is squarely foreclosed by statute, rule or authoritative court decision, or is lacking any factual basis in the record of the case, before dismissing it as frivolous.

Id. In his dissent, Justice Marshall agreed that an appeal may be dismissed as frivolous if it foreclosed by an "authoritative court decision," but added:

> [I]n view of the frequent changes in recent years in the law governing capital cases, . . . the fact that an appeal challenges a holding of this Court does not make it frivolous if a plausible argument can be made that the decision in question has been called into question by later developments.

Id. at 3404 n.9 (Marshall, J., dissenting).

[59] *Id.* at 3395.

[60] *Id.* According to Section 2254:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and if the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 U.S.C. § 2254, Rule 9(b) (1976).

[61] 103 S. Ct. at 3395.

[62] *Id.* The Court also noted that "[a]pplications for stays in death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted." *Id.*

first be sought from the court of appeals and that the Supreme Court "generally places considerable weight on the decision reached by the circuit courts . . . ."[63]

The majority then turned to a consideration of the merits of Barefoot's habeas appeal: namely, Barefoot's claim that "his death sentence must be set aside because the Constitution of the United States barred the testimony of the . . . psychiatrists who testified against him at the punishment hearing."[64] The Court rejected this claim, affirming the judgment of the district court, which had denied habeas relief.[65]

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[63] *Id.*

[64] *Id.* At the sentencing hearing, the psychiatrists had testified, in response to hypothetical questions, that Barefoot would probably commit further acts of violence and be a continuing threat to society. *Id.* at 3389. The Court summarized the grounds of Barefoot's objections to this psychiatric testimony as follows:

> First, it is urged that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community. Second, it is said that in any event, psychiatrists should not be permitted to testify about future dangerousness in response to hypothetical questions and without having examined the defendant personally. Third, it is argued that in the particular circumstances of this case, the testimony of the psychiatrists was so unreliable that the sentence should be set aside.

Id. at 3395-96.

[65] *Id.* at 3400. First, the Court rejected Barefoot's claim that psychiatrists are "incompetent" to predict "dangerousness" with an acceptable degree of reliability. The Court pointed out that in Jurek v. Texas, 428 U.S. 262 (1976), it had held that the likelihood that a defendant would continue to commit crime may be a criterion for imposition of the death penalty. The *Barefoot* majority noted that in *Jurek* seven Justices had rejected the claim that it was impossible to predict future behavior and that predicted dangerousness could not therefore be a consideration in imposing the death penalty. 103 S. Ct. at 3396. The Court also quoted language in Estelle v. Smith, 451 U.S. 454 (1981), implicitly approving of psychiatric testimony about criminal propensity. 103 S. Ct. at 3396.

Second, the *Barefoot* majority held that psychiatric testimony about future dangerousness could be based on hypothetical questions, and that actual observation of the defendant by the testifying doctor was not necessary. The Court cited Spring Co. v. Edgar, 99 U.S. 645 (1878), as recognizing the admissibility of expert opinions based on hypothetical facts. 103 S. Ct. at 3399.

The Court also rejected several of petitioner's claims that related to the particular circumstances of his case. Barefoot had argued that his right to due process of law had been violated because the psychiatrists were permitted to give opinions on the ultimate issue before the jury; that the hypothetical questions assumed controverted facts; and that "the answers to the questions were so positive as to be assertions of fact and not opinion." *Id.* at 3400. The Court noted that all of petitioner's particular objections had been rejected by the Texas courts, the district court, and the court of appeals. *Id.*

In his dissent, Justice Blackmun objected to the majority's ruling on the merits of Barefoot's appeal. Justice Blackmun argued that psychiatrists were incapable of predicting future dangerousness with a sufficient degree of reliability. He maintained that it is "the unanimous conclusion of professionals . . . that psychiatric predictions of long-term future violence are wrong more often than they are right." *Id.* at 3408 (Blackmun, J., dissenting) (footnote omitted).

Justice Blackmun criticized the majority's contention that any problems regarding reliability could be adequately handled through the adversary process. According to Justice Blackmun, "expert" testimony on future dangerousness could only mislead a sentencing jury.

B. THE DISSENT

In his dissenting opinion,[66] Justice Marshall took issue with the majority's interpretation of the procedural context of Barefoot's appeal as well as with the majority's approval of summary proceedings in capital cases. Agreeing that once a certificate of probable cause has been granted a petitioner must be afforded an opportunity to address the merits, Justice Marshall found it "simply false" to claim that the Fifth Circuit had ruled on the merits of Barefoot's appeal.[67] In his view, "What the court decided, and all that it decided, was that the likelihood of petitioner's prevailing on the merits was insufficient to justify the delay that would result from staying his execution pending the disposition of his appeal."[68]

Justice Marshall contended that even what the court of appeals had decided—the stay—had been wrongly decided. Justice Marshall pointed out that the "likelihood of success on the merits" is not the standard to be applied when deciding whether to grant a stay in this situation. According to Justice Marshall, "[T]he courts of appeals have consistently held that a stay of execution must be granted unless it is

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The majority had maintained that professional disagreement over the reliability of such testimony could be called to the attention of the jury, which could then "separate the wheat from the chaff." *Id.* at 3398 n.7. Justice Blackmun did not share the majority's confidence in the jury's ability, recalling language in Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion), that "[s]ince the members of the jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Id.* at 192 (citation omitted); *see* 103 S. Ct. at 3413 (Blackmun, J., dissenting). Because he believed that the introduction of such unreliable evidence has a detrimental effect on overall reliability of capital sentencing, Justice Blackmun maintained that it is unconstitutional to introduce such psychiatric evidence at capital sentencing hearings. *Id.* at 3414 & n.10.

66 Justice Brennan joined Justice Marshall's dissent. Justice Blackmun wrote a separate dissent, objecting to the majority's ruling on the merits of the appeal. *See supra* note 65. Blackmun indicated, however, that he agreed "with most of what Justice Marshall ha[d] said in his dissenting opinion." *Id.* at 3406 (Blackmun, J., dissenting).

67 *Id.* at 3402 (Marshall, J., dissenting). Justice Marshall maintained that the court of appeals could not have affirmed the district court judgment, because "[n]either the Federal Rules of Appellate Procedure, nor the local rules of the Fifth Circuit, nor any decision of the Fifth Circuit, would have authorized an affirmance prior to filing of briefs on the merits." *Id.* (Marshall, J., dissenting) (footnote omitted). Justice Marshall also argued that the court of appeals could not have dismissed the petitioner's appeal as frivolous, because it simply was not frivolous. *Id.* at 3402 (Marshall, J., dissenting).

68 *Id.* (footnote omitted). Although it is clear that the lower court did discuss the merits, it is not clear that this discussion amounted to (or was intended to constitute) an actual decision on the merits. It seems reasonable to conclude that this discussion was aimed only at determining the likelihood of success on appeal. In a section of the appellate court opinion entitled, "The Nature of Our Decision," the Fifth Circuit explained: "That decision is a limited one. . . . Upon the question of whether to stay execution until the appeal has been processed, we consider the likelihood of success of that appeal." 697 F.2d at 595 (citation omitted). It seems clear from this language that the appellate court saw its action as a limited interlocutory proceeding, pending full processing of Barefoot's appeal.

clear that the prisoner's appeal is frivolous."[69] He further criticized the Fifth Circuit's reliance on a standard used in ordinary civil cases,[70] where "the denial of a stay will not result in the execution of one of the litigants before his appeal can be decided."[71] Justice Marshall noted that, in denying a stay and reaching a summary decision, the risk of irreversible mistake was very great. He further contended that the state had no legitimate interest in executing a prisoner before full appellate review had been completed.[72]

Justice Marshall also attacked the Court's approval of summary procedures and its suggestions of other ways to expedite review. He maintained that, given the death penalty's irrevocability, capital cases presenting substantial constitutional questions were the least appropriate class of cases in which to adopt summary proceedings. Justice Marshall noted that the Court has traditionally required greater procedural safeguards in capital cases than in other cases,[73] and that in capital cases the Court has insisted on a strong showing that the death penalty is the appropriate punishment.[74] He expressed concern that summary proceedings would result in truncated review and hasty disposition of otherwise meritorious appeals.[75]

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69 103 S. Ct. at 3401 (Marshall, J., dissenting). Justice Marshall cited a number of circuit court opinions in this regard. *See, e.g.*, Goode v. Wainwright, 670 F.2d 941, 942 (11th Cir. 1982); Shaw v. Martin, 613 F.2d 487, 492 (4th Cir. 1980) (Phillips, J.); United States *ex rel.* DeVita v. McCorkle, 214 F.2d 823 (3d Cir. 1954); Fouquette v. Bernard, 198 F.2d 96, 97 (9th Cir. 1952) (Denman, C.J.).

70 *See supra* note 16 and accompanying text.

71 103 S. Ct. at 3402 n.8 (Marshall, J., dissenting).

72 *See also infra* notes 118-21 and accompanying text.

73 103 S. Ct. at 3404-05 (Marshall, J., dissenting). *See, e.g.*, Bullington v. Missouri, 451 U.S. 430 (1981) (double jeopardy clause prohibits consideration of death penalty on retrial where defendant previously acquitted in sentencing proceeding); Beck v. Alabama, 447 U.S. 625 (1980) (death sentence unconstitutional as applied in capital offense where jury was not permitted to consider verdict of guilt of a lesser included offense); Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (exclusion of favorable hearsay evidence constituted violation of due process where petitioner was denied a fair trial on issue of punishment, thus requiring vacating of death sentence); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (capital sentencing scheme limiting range of mitigating circumstances that can be considered by the sentencer unconstitutional); Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion) (petitioner denied due process when death sentence imposed, at least in part, on basis of information that he had no opportunity to deny or explain); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion) (mandatory death sentence violates eighth and fourteenth amendments).

74 103 S. Ct. at 3405 (Marshall, J., dissenting). *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ., for the Court); Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring).

75 Citing statistics provided by Amicus Curiae National Association for the Advancement of Colored People (NAACP), Justice Marshall noted that most habeas corpus petitions are based on substantial constitutional claims. 103 S. Ct. at 3405 nn.10 & 11 (Marshall, J., dissenting). The NAACP statistics indicate that most habeas corpus appeals in capital cases are successful:

Justice Marshall concluded his dissent by stating that, consistent with his view that the death penalty is unconstitutional,[76] he would vacate Barefoot's death sentence.

IV. Discussion and Analysis

It is not clear that the Court's approval of summary proceedings was, as the majority suggests, supported by Supreme Court precedents regarding appellate review procedures in habeas corpus cases. Indeed, the decision in *Barefoot* appears to be a departure from the Court's prior emphasis on special procedural protection and thorough review in death penalty cases. Moreover, important policy considerations suggest that summary procedures should not be favored.

A. PRECEDENT

The *Barefoot* majority apparently viewed its earlier decisions in *Nowakowski v. Maroney*,[77] *Carafas v. LaVallee*,[78] and *Garrison v. Patterson*,[79] as supporting the use of summary proceedings in cases where a certificate of probable cause has been obtained. It is not clear, however, that these precedents support the use of summary proceedings in cases where the petitioner's claims are not frivolous. The holdings in these cases involved proper procedure for ostensibly nonfrivolous appeals in which a certificate of probable cause had issued. Language in these opinions discussing the use of summary procedures appears to have been aimed not at nonfrivolous appeals where a certificate had issued, but at appeals that were found to be frivolous by the court of appeals, despite the granting of the certificate of probable cause.[80]

In *Nowakowski v. Maroney*,[81] the Court made no mention of summary proceedings. The *Nowakowski* Court held that in cases where a certificate of probable cause had been issued, the circuit courts must

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Since 1976 the federal courts of appeals nationally have decided 41 capital cases on the merits. According to our records, 30 (73.2%) of these have been decided in favor of the death-sentenced individual. In the Fifth Circuit, 27 capital cases have been decided on the merits during this period. Of the 27, 21 (77.7%) have been decided in favor of the death-sentenced individual.

Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc. at 26-27, Barefoot v. Estelle, 103 S. Ct. 3383 (1983) [hereinafter cited as NAACP Brief].

[76] 103 S. Ct. at 3406 (Marshall, J., dissenting). *See* Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting); Furman v. Georgia, 408 U.S. 238, 358 (1972) (Marshall, J., concurring).

[77] 386 U.S. 542 (1967) (per curiam).

[78] 391 U.S. 234 (1968).

[79] 391 U.S. 464 (1968) (per curiam).

[80] For the Court's distinction between habeas appeals that are frivolous despite the issuance of a certificate of probable cause and those that are not, see *supra* notes 57-58 and accompanying text.

[81] 386 U.S. 542 (1967) (per curiam).

grant the appeal and decide the merits.[82] In *Nowakowski*, the Court did specifically state that the disposition of the habeas corpus appeal should be "in accord with its ordinary procedure."[83] The Court gave no indication, however, whether summary proceedings would be proper, as the court of appeals there had not reviewed the appeal but had simply denied the right to appeal.[84]

In those cases where the Court has mentioned the use of summary proceedings, it seems to have suggested that they could be used in cases involving frivolous appeals. In *Carafas v. LaVallee*,[85] for example, the Second Circuit had denied petitioner's motion to proceed *in forma pauperis* and dismissed his appeal, despite the district court's issuance of a certificate of probable cause. The Supreme Court vacated the Second Circuit's order because there was no indication in the order that the appeal had been "duly considered on its merits as *Nowakowski* requires in cases where a certificate of probable cause has been granted."[86] The Court went on to add, in dicta, that *Nowakowski* did not necessarily require circuit courts to permit "full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is *frivolous*. . . ."[87] It noted that even where an appeal was found frivolous despite the issuance of a certificate, the court of appeals was required "to demonstrate the basis for the court's summary action" because "[a]nything less than this . . . would negate the office of the certificate of probable cause."[88] It is clear, then, that language in *Carafas* as to the permissibility of "summary action" foregoing "full opportunity to submit briefs and argument" was addressed to those habeas appeals that the courts of appeals deemed frivolous on the merits despite the issuance of the certificate of probable cause.

Garrison v. Patterson[89] is the only decision of the three cited by the *Barefoot* Court to involve a stay of execution.[90] There, the district court

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82 *Id.* at 543.

83 *Id.*

84 One commentator at the time of *Nowakowski* characterized that decision as requiring "full dress treatment by the court of appeals once the district court had issued a certificate of probable cause." Blackmun, *Allowance of In Forma Pauperis Appeals in Section 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 353 (1967). For a discussion of the facts of *Nowakowski*, see *supra* notes 41-42 and accompanying text.

85 391 U.S. 234 (1968).

86 *Id.* at 242. The court of appeals in *Carafas* did not indicate its reasons for dismissing the appeal. Its order provided simply: "Application for Leave to Proceed *in Forma Pauperis*. Application denied. Motion to dismiss appeal granted." *Id.* at 241.

87 *Id.* at 242 (emphasis added).

88 *Id.*

89 391 U.S. 464 (1968) (per curiam).

90 The Court does discuss its decision in Brooks v. Estelle, 103 S. Ct. 1490 (1982), which did involve a stay of execution in the context of an appeal from a denial of habeas corpus relief. For a discussion of the facts of *Brooks*, see *supra* note 21. However, any suggestion by

had denied habeas relief and a certificate of probable cause, but granted a two-week stay to allow appeal.[91] After holding an unrecorded hearing and staying execution, the court of appeals issued an order granting the certificate of probable cause and, in the next sentence, affirming the district court's denial of habeas relief.[92] The Supreme Court vacated the order, holding that the court of appeals' procedure violated *Nowakowski*'s standards, which required that the appellant be afforded adequate opportunity to address the merits.[93] In dicta the Supreme Court mentioned that, as the Court had noted in *Carafas*, *Nowakowski* did not prevent "the courts of appeals from adopting appropriate summary procedures for final disposition of such cases."[94]

It is by no means clear that the *Garrison* Court intended its language to authorize summary procedures in nonfrivolous appeals. Indeed, the context of the Court's language indicates otherwise. The *Carafas* "summary action" language on which the Court in *Garrison* had relied had been in reference to frivolous appeals in which a certificate of probable cause had nonetheless issued.[95] Moreover, the *Garrison* Court had noted that *Nowakowski* did not necessarily require "full briefing and oral argument in every instance in which a certificate is granted."[96] It therefore seems reasonable to conclude that the Court in *Garrison* was limiting its language in this regard to those appeals that were frivolous despite issuance of the certificate.[97]

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the *Barefoot* majority that its action in *Brooks* could guide or control its determination in *Barefoot* seems incorrect. As Justice Marshall pointed out in his dissent, a denial of certiorari does not have precedential value. 103 S. Ct. at 3401 n.5 (Marshall, J., dissenting). *See* Brown v. Allen, 344 U.S. 443, 497 (1953); Sunal v. Large, 332 U.S. 174, 181 (1947); House v. Mayo, 324 U.S. 42, 48 (1945). Similarly, Justice Marshall noted that a denial of a stay does not serve as precedent where the Court's order does not discuss the standard that the courts of appeals should apply in issuing stays. *See* 103 S. Ct. at 3401 n.5 (Marshall, J., dissenting).

91 The Tenth Circuit therefore had before it on appeal an application for stay, an application for a certificate of probable cause, and a motion for leave to proceed *in forma pauperis*. 391 U.S. at 465.

92 *Id.*

93 *Id.* at 466-67.

94 *Id.* at 466.

95 *See supra* notes 87-88 and accompanying text. Thus, the *Garrison* Court's reference to "such cases" seems to clearly refer to the "frivolous cases" in which the *Carafas* Court had apparently sanctioned "summary action."

96 391 U.S. at 466.

97 The *Garrison* Court had also indicated that *Nowakowski* did not prevent "the courts of appeals from considering the questions of probable cause and the merits together . . . ." *Id.* An appellate inquiry into whether probable cause exists necessarily involves the question of whether the appeal is frivolous on the merits. This language would therefore seem to support the contention that the *Garrison* language regarding summary procedures was intended to apply to frivolous appeals only.

The Court held in *Garrison* that "where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed, by rule or otherwise,

Prior Supreme Court decisions in this area, therefore, do not clearly support the *Barefoot* Court's approval of summary or expedited proceedings in the appellate review of denials of habeas corpus petitions that involve nonfrivolous claims where a certificate of probable cause has been issued. The Court's decision in *Barefoot* also appears to conflict with those Supreme Court precedents that emphasize the importance of procedural protections and thorough review in death penalty cases. Because of the "obviously irreversible"[98] nature of the death penalty, capital defendants have traditionally been accorded greater procedural protections than have noncapital defendants.[99] Only last term in *Zant v. Stephens*,[100] the Court asserted that "although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error."[101] Because of the "significant constitutional difference between the death penalty and lesser punishments,"[102] the Court has also recognized the "need for reliability in the determination that death is the appropriate punishment in a specific case."[103]

The majority's stance in *Barefoot* seems inconsistent with the Court's previous emphasis on greater protections and careful review in the area of the death penalty. Indeed, the Court's position appears to relegate the death-sentenced state prisoner with a nonfrivolous, "colorable claim of error" and a certificate of probable cause in hand to a procedurally and substantively less thorough appeal than that available to the vast

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that his opportunity will or may be limited." *Id.* This language is not, however, inconsistent with a conclusion that the *Garrison* Court contemplated application of such "summary procedure" to purely frivolous claims where a certificate of probable cause had nonetheless issued.

It is also important to note that in *Garrison* the court of appeals had stayed petitioner's execution pending its consideration of his motion for leave to appeal *in forma pauperis* and application for certificate of probable cause. *Id.* at 465. Thus, none of these cases had specifically held that the merits could be addressed on application for stay of execution. *Garrison* had only addressed the practice of deciding the questions of probable cause and the merits together.

98 Evans v. Bennett, 440 U.S. 1301, 1306 (1979) (Rehnquist, J., as Circuit Justice).

99 For a review of a number of such holdings, see *supra* note 73.

100 103 S. Ct. 2733 (1983). The Court in *Zant* upheld a death sentence where the jury had found three statutory aggravating circumstances to exist, even though one of the circumstances was later found to be unconstitutionally vague.

101 *Id.* at 2747. Justice Marshall has similarly noted that "[b]ecause of the unique finality of the death penalty, its imposition must be the result of careful procedures and must survive close scrutiny on post-trial review." Coleman v. Balkcom, 451 U.S. 949, 955 (1981) (denial of certiorari) (Marshall, J., dissenting).

102 Beck v. Alabama, 447 U.S. 625, 637 (1980).

103 Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). Indeed, last term the Court in Zant v. Stephens, 103 S. Ct. 2733 (1983), characterized this need for reliability as a major "them[e] . . . reiterated in . . . [its] opinions discussing the procedures required by the Constitution in capital sentencing determinations." *Id.* at 2746-47.

majority of other criminal defendants. The Court apparently assumes that a thorough review is still possible in summary proceedings. However, such proceedings are by their nature meant to entail quick review. It seems clear, therefore, that such new procedural routes can only reduce the likelihood of appellate courts engaging in the kind of "careful scrutiny" insisted upon by the Supreme Court in its previous decisions.[104]

In light of the Court's precedents emphasizing the importance of procedural protections and thorough review in death penalty cases, the Court's decision in *Barefoot* might be explained by the Court's general hostility to federal habeas corpus review of state court judgments. Recently, the Court has restricted the scope of federal habeas review in several ways.[105] The *Barefoot* decision may well be premised, then, on the Court's initial discussion of the "secondary and limited" role of federal habeas corpus review.[106] The decision in *Barefoot* may also be attributed to the Court's recognition that "an increasing number of death-sentenced petitioners are entering the appellate stages of the federal habeas process."[107]

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104 *See infra* notes 111-14 and accompanying text.

105 *See, e.g.*, Rose v. Lundy, 102 S. Ct. 1198 (1982) (federal district courts must dismiss a state prisoner's habeas corpus petition containing both exhausted and unexhausted claims); Wainwright v. Sykes, 433 U.S. 72 (1977) (failure of petitioner to make timely objection under state contemporaneous-objection rule to admission of inculpatory statements, absent showing of cause for noncompliance and some showing of actual prejudice, bars federal habeas corpus review of *Miranda* claim); *see also infra* note 106.

106 103 S. Ct. at 3391. Such a restrictive view of the scope of federal habeas corpus review of state court judgments is not new. Commentators have noted the Court's growing hostility to federal habeas review. *See, e.g.*, Reynolds, Sumner v. Mata: *Twilight's Last Gleaming for Federal Habeas Corpus Review of State Court Convictions? Speculations on the Future of the Great Writ*, 4 U. ARK. LITTLE ROCK L.J. 289, 302-03 (1981) ("In the final analysis, one conclusion seems inescapable: from the petitioner's perspective, the Court's demonstrated hostility toward the writ of habeas corpus portends nothing good for the future."); Comment, Lundy, Isaac *and* Frady: *A Trilogy of Habeas Corpus Restraint*, 32 CATH. U.L. REV. 169, 219 (1982) ("In curbing the scope of federal habeas corpus review, the Court has come perilously close to disregarding, if not reinterpreting, the habeas corpus statutes.").

Members of the Supreme Court and Congress have proposed procedural curtailments on habeas corpus review, *see, e.g.*, Rose v. Lundy, 102 S. Ct. 1198 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977), and broad limitations on the consideration of certain constitutional claims. For a critical evaluation of a number of proposals, see Olsen, *Judicial Proposals to Limit the Jurisdictional Scope of Federal Post-Conviction Habeas Corpus Consideration of the Claims of State Prisoners*, 31 BUFFALO L. REV. 301 (1982).

107 103 S. Ct. at 3393. Statistics indicate that since the death penalty was held constitutional in Gregg v. Georgia, 428 U.S. 153 (1976), the courts of appeals have decided 41 habeas corpus cases brought by prisoners sentenced to death. Approximately 60 more are pending. NAACP Brief, *supra* note 75, at 20. Moreover, roughly 100 cases are pending in the federal district courts. *Id.* at 35.

B. POLICY CONSIDERATIONS

Two important policy considerations indicate that summary proceedings should not be used. First, summary proceedings pose a risk that death row prisoners seeking habeas relief will receive inadequate legal representation. Capital inmates are often represented by unpaid, volunteer, solo practitioners.[108] Summary proceedings, which necessarily entail expedited schedules, "will place an enormous financial burden on these attorneys—for the rapid reproduction of documents, for overnight delivery services, for trips to hastily convened oral arguments—and may disrupt for weeks at a time the attorneys' other practice."[109] Thus, these attorneys may be unable to provide the kind of representation they have in the past. In addition, "a disturbingly large number of death row prisoners are not represented on federal habeas corpus by attorneys with specialized competence in capital litigation. Indeed, many are now represented by criminal law practitioners with minimal past exposure to constitutional law, appellate practice and the federal courts."[110] Such attorneys simply may not have time to acquaint themselves with the relevant law if they are held to the expedited schedules involved in summary proceedings.

Second, summary proceedings create a real potential for less than adequate judicial review.[111] Appellate courts have recognized that, in

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[108] Brief of Amicus Curiae American Bar Association at 21, Barefoot v. Estelle, 103 S. Ct. 3383 (1983).

[109] *Id.*

[110] NAACP Brief, *supra* note 75, at 31.

[111] Barefoot's appeal seems to support this conclusion. The Fifth Circuit established an extremely short schedule for briefing and argument. *See supra* notes 13-15 and accompanying text. The time between the initial application for stay of execution and the court of appeals' decision spanned only five working days. Nevertheless, the issues presented had been adjudged sufficiently meritorious by the district court to warrant issuance of a certificate of probable cause. They were also issues of first impression. Application for Stay of Execution in the Supreme Court at 2, Barefoot v. Estelle, 103 S. Ct. 3383 (1983) [hereinafter cited as Application for Stay of Execution]. The reliability of psychiatric testimony regarding future dangerousness was a legal issue over which courts had disagreed, *see, e.g.*, White v. Estelle, 554 F. Supp. 851 (S.D. Tex. 1982), *aff'd*, 720 F.2d 415 (5th Cir. 1983); People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981), *cert. denied*, 455 U.S. 922 (1983), and which the Court of Criminal Appeals of Texas had characterized as "the subject of widespread debate." Barefoot v. State, 596 S.W.2d 875, 887 (Tex. Crim. App. 1980), *cert. denied*, 453 U.S. 913 (1981).

Although the court of appeals said that it had "studied the briefs and record," Barefoot v. Estelle, 697 F.2d at 595, it is worth noting the conditions under which this study occurred. The transcript of petitioner's habeas corpus hearing in the district court involved approximately 260 pages of text, while the record of petitioner's state court trial and sentencing hearing involved approximately 1400 pages. Application for Stay of Execution, *supra*, at 4-5. None of the three panelists on the circuit court saw these records until the day before the court issued its 16-page opinion. Brief for Petitioner, *supra* note 13, at 26. Yet, at least one of the issues that the court of appeals handled involved an analysis of the impact certain alleg-

practice, the time constraints on a motion for stay of execution simply preclude any "fine-tuned inquiry" into the merits of an appeal.[112] Members of the Supreme Court[113] and commentators[114] have cautioned against the expedition of appellate review of death penalty cases on the ground that it might result in inadequate review.

Of course, the states and the federal government have certain interests in the expedition of federal habeas corpus review. The states certainly have an interest in minimizing any delay in the carrying out of their sentences,[115] and the federal government has an interest in reduc-

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edly improper evidence may have had on the determination of Barefoot's guilt. *See supra* note 22.

112 *See* Shaw v. Martin, 613 F.2d 487, 492 (4th Cir. 1980) ("In the very nature of proceedings on a motion for a stay of execution, the limited record coupled with the time constraints imposed by imminence of execution preclude any fine-tuned inquiry into the actual merits."); *see also* Dobbert v. Strickland, 670 F.2d 938, 940 (11th Cir. 1982) ("Because the brief period of time between the filing of this appeal and the scheduled execution is insufficient to consider properly the merits of the issues raised, this Court must stay the execution of the death sentence.").

113 Justice Stevens has noted:

> This Court should endeavor to conclude capital cases—like all other litigation—as promptly as possible. We must, however, also be as sure as possible that novel procedural shortcuts have not permitted error of a constitutional magnitude to occur. For after all, death cases are indeed different in kind from all other litigation. The penalty, once imposed, is irrevocable.

Coleman v. Balkcom, 451 U.S. 949, 953 (1981) (denial of certiorari) (Stevens, J., concurring). In *Coleman*, Justice Stevens, in concurring in the denial of certiorari in a capital habeas appeal, criticized Justice Rehnquist's proposal to, in Justice Stevens' words, "grant certiorari and decide the merits of every capital case coming from the state courts in order to expedite the administration of the death penalty." *Id.* at 949 (Stevens, J., concurring).

114 *See* Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 922 (1982) ("the number of capitally sentenced defendants who have been found innocent argues powerfully against adopting limitations that would have allowed them to be executed. The much larger number who have been found illegally or unfairly convicted or sentenced argues with similar force.").

115 As the Respondent in *Barefoot* explained:

> [T]he states suffer irreparable injury by the passing of every day that its constitutionally obtained death sentences are not carried out. The unconscionable delays attendant to death penalty litigation in this country frustrate society's mandate; promote the public perception that the law cannot be carried out; destroy whatever deterrent effect the imposition of the death penalty might otherwise have; and unfairly penalize prisoners with unconstitutional convictions who remain on death row for interminable lengths of time.

Brief for Respondent, *supra* note 8, at 24.

Justice Rehnquist has frequently focused on this state interest. In Evans v. Bennett, 440 U.S. 1301 (1979) (Rehnquist, J., as Circuit Justice), he explained:

> [J]ust as the rule of law entitles a criminal defendant to be surrounded with all the protections which do surround him under our system prior to conviction and during trial and appellate review, the other side of that coin is that when the State has taken all the steps required by that rule of law, its will, as represented by the legislature which authorized the imposition of the death sentence, and the state courts which imposed and upheld it, should be carried out.

Id. at 1303; *see also* Coleman v. Balkcom, 451 U.S. 949, 959 (1981) (denial of certiorari) (Rehnquist, J., dissenting) ("[w]hen society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the

ing the expense of valuable court time and judicial resources.[116] Habeas corpus cases admittedly often involve issues that have been thoroughly briefed several times before several courts in two judicial systems.[117]

Nevertheless, these interests do not outweigh the interests in adequate representation and review in death penalty cases. That an execution will be delayed for a few additional months hardly seems to warrant the adoption of summary proceedings that are likely to lead to inadequate appellate review.[118] A significant period of incarceration on death row is inevitable whether federal habeas review is expedited or not.[119] Moreover, the purpose of this "well-established" avenue of review[120] is the detection of constitutional error in clearly nonfrivolous cases where a certificate of probable cause has issued. A justification of summary proceedings based on claims of delay and judicial expense simply ignores the fact that such appeals raise legitimate, and often meritorious, claims for relief.[121]

V. CONCLUSION

The Court in *Barefoot v. Estelle* relies on its earlier decisions in the area of habeas appellate procedure in holding that summary proceedings may be used in review of habeas corpus appeals brought by state prisoners sentenced to death. It is not clear, however, that those deci-

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threat of capital punishment, they undermine the integrity of the entire criminal justice system"); *cf.* Brief of Amicus Curiae State of Florida at 1, Barefoot v. Estelle, 103 S. Ct. 3383 (1983) (arguing that requests for last minute stays of scheduled executions plague the state's efforts to carry out its law and that a state has a legitimate interest in the finality of its courts' judgments).

116 *See* Schneckloth v. Bustamonte, 412 U.S. 218, 260-61 (1973) (Powell, J., concurring). For a discussion of the drain of judicial docket time resulting from habeas corpus filings in the federal district courts, see Bagwell, *Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits*, 95 F.R.D. 435, 437 (1982).

117 Justice Powell explained:

> When raised on federal habeas, a claim generally has been considered by two or more tiers of state courts. It is the solemn duty of these courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law. The task which federal courts are asked to perform on habeas is thus most often one that has or should have been done before. The presumption that "if a job can be well done once, it should not be done twice" is sound and one calculated to utilize best "the intellectual, moral, and political resources involved in the legal system."

Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring) (footnote omitted).

118 *See supra* notes 111-14 and accompanying text.

119 Justice Stevens has noted that, given bifurcated punishment hearings, post-trial proceedings in the trial court, direct and collateral review in the state judicial system, collateral federal review, and clemency review, "it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution." Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (denial of certiorari) (Stevens, J., concurring).

120 Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980).

121 *See supra* note 75 and accompanying text.

sions actually support the Court's holding. Moreover, the Court's decision seems to conflict with its precedents that emphasize the importance of procedural protections and thorough review in death penalty cases.

The impact of the *Barefoot* decision depends largely on the courts of appeals. The Court indicated that the decision to use summary proceedings lies with the circuit courts.[122] Given the recent decisions of other circuits, it seems unlikely that the circuit courts will quickly join the Fifth Circuit and use summary proceedings.[123] Important policy considerations certainly indicate that courts of appeals should not use such proceedings. Any interests the states may have in expediting the appellate review of habeas corpus petitions brought by state prisoners sentenced to death seem outweighed by the consequences that may follow from the use of summary proceedings: namely, inadequate legal representation and judicial review.

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[122] *See* 103 S. Ct. at 3393.

[123] Language in recent decisions of the Fourth and Eleventh Circuits, for instance, has emphasized the problems involved in deciding the merits of an appeal in the short time preceding executions. *See supra* note 112. Furthermore, Amicus Curiae NAACP noted that since 1976 every circuit court other than the Fifth has granted a stay of execution in every capital case to come before it. NAACP Brief, *supra* note 75, at 2d.