



“MY BEWILDERING BRAIN TOILS IN VAIN”:
TRAUMATIC BRAIN INJURY, THE CRIMINAL TRIAL
PROCESS, AND THE CASE OF LISA MONTGOMERY*

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INTRODUCTION

Individuals with traumatic brain injuries (“TBI”) have a greater risk of becoming justice-involved¹ due to the role that many TBIs play in impulse control and judgment.² These individuals’ cases are often not handled in the way that the cases of defendants who present with mental illness or intellectual disability may be—there may be no discussion of diversion opportunities or a need for comprehensive evaluation and treatment.³ Additionally, attorneys assigned to represent this cohort may

1. This paper will focus primarily on those involved in the *criminal* justice system. There are also multiple issues that are of great significance when the individual is involved in the *civil* justice system, either in individual negligence actions—see generally, e.g., Joseph M. Desmond, *Mental and Physical Examinations in Cases Involving Brain Injuries and Psychological Injuries*, 90 MASS. L. REV. 2 (2006)—or in cases involving what is characterized as *systematic negligence* (most notably involving former college and National Football League players—see generally, e.g., Elizabeth Etherton, *Systematic Negligence: The NCAA Concussion Management Plan and Its Limitations*, 21 SPORTS LAWS J. 1 (2014)); those issues are beyond the scope of this paper.

2. For example, the estimated prevalence of TBI in the overall offender population is 60.25%, Eric J. Shiroma et al., *Prevalence of Traumatic Brain Injury in an Offender Population: A Meta-Analysis*, 16 J. CORR. HEALTH CARE 147, E2 (2010), and claims of brain injuries are “common” in criminal (as well as in civil) cases. Jane Campbell Moriarty et al., *Brain Trauma, PET Scans and Forensic Complexity*, 31 BEHAV. SCI. & L. 702, 702 (2013). Importantly, these injuries are not always reported in medical records. See, e.g., Robert E. Hanlon et al., *Neuropsychological Features of Indigent Murder Defendants and Death Row Inmates in Relation to Homicidal Aspects of Their Crimes*, 25 ARCHIVES CLINICAL NEUROPSYCH. 1, 6 (2009) (“Eighty-seven percent of the sample [of murder defendants and death row inmates] reported a history of closed head trauma; however, only 10% had a documented history of TBI, based on medical and radiological records.”). TBI is prevalent in general. As of 2014, there were approximately 2.5 million TBI-caused emergency department visits per year. See Jennifer R. Marin et al., *Trends in Visits for Traumatic Brain Injury to Emergency Departments in the United States*, 311 JAMA 1917 (2014).

3. For information on the representation of defendants with mental disabilities, see generally Michael L. Perlin & Alison J. Lynch, “*Mr. Bad Example*”: *Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root Out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYO. L. REV. 299 (2016); Michael L. Perlin & Naomi M. Weinstein, *Said I, ‘But You Have No Choice’: Why a Lawyer Must Ethically Honor a Client’s Decision About Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*,

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not have encountered individuals with TBI before and may not be familiar with behavioral manifestations that could be relevant as a defense or as mitigation in individual cases.⁴ In this regard, TBI is grossly misunderstood.⁵

A grave example of this point, and a foundation for this Article, is the case of Lisa Montgomery, who, despite evidence of serious mental illness and significant brain damage, was convicted, sentenced to death, and ultimately executed for the murder of a pregnant woman and the kidnapping of the woman’s unborn child.⁶ Montgomery was the first woman to face federal execution in the U.S. since 1953, and was executed on January 13, 2021.⁷ Her case reflects all that is wrong with the way we

15 CARDOZO PUB. L. POL’Y & ETHICS J. 73 (2016/2017); MICHAEL L. PERLIN ET AL., *LAWYERING SKILLS IN THE REPRESENTATION OF PERSONS WITH MENTAL DISABILITIES: CASES AND MATERIALS* (2006).

4. It is significant that as many as 60% of TBI cases go undiagnosed. See Brett A. Emison, *A Silent Injury*, TRIAL, Feb. 2018, at 20.

5. For example, a sample of those studied endorsed a wide range of misconceptions, including an astonishing 42% stating that a second blow to the head would improve memory functioning. See Thomas J. Guilmette & Michael F. Paglia, *The Public’s Misconceptions About Traumatic Brain Injury: A Follow Up Survey*, 19 ARCHIVES CLINICAL NEUROPSYCH. 183, 188 (2004).

6. See *United States v. Montgomery*, 635 F.3d 1074, 1079–80 (8th Cir. 2011). Montgomery exhausted her direct appeals in 2012 and her collateral challenges to the sentence in August 2020. See *Montgomery v. United States*, 141 S. Ct. 199 (2020). Montgomery had been the victim of sexual violence and domestic abuse so relentless, it left her severely mentally ill. See *Lisa Montgomery*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, CORNELL L. SCH., <https://deathpenaltyworldwide.org/advocacy/the-case-of-lisa-montgomery/> (last visited Dec. 4, 2021). Department of Justice (“DOJ”) officials announced her execution date on October 16, 2020, during the middle of National Domestic Violence Awareness Month. ‘*This is Not Justice*’—*Federal Execution Spree Ends with Planned Execution of African-American on Martin Luther King Jr’s Birthday*, DEATH PENALTY INFO. CTR. (Jan. 18, 2021), <https://deathpenaltyinfo.org/news/this-is-not-justice-federal-execution-sprees-ends-with-planned-execution-of-african-american-on-martin-luther-king-jr-s-birthday>. Montgomery’s case attracted international attention, with the Inter-American Commission on Human Rights having—vainly—called for a stay of her execution. See *Human Rights Tribunal Calls for Stay of Execution for Lisa Montgomery*, DEATH PENALTY INFO. CTR. (Dec. 18, 2020), <https://deathpenaltyinfo.org/news/human-rights-tribunal-calls-for-stay-of-execution-for-lisa-montgomery>; see also *IACHR Adopts Precautionary Measures in Favor of Woman on Death Row in the United States of America*, OAS (Dec. 2, 2020), https://www.oas.org/en/iachr/media_center/PReleases/2020/288.asp (concluding that Montgomery was “in a situation of serious and urgent risk of irreparable harm to her rights”). A coalition of United Nations (“UN”) human rights experts also issued an unusual joint appeal calling for clemency in Mrs. Montgomery’s case. See *UN Experts Call for Clemency for Lisa Montgomery After US Government Reschedules Execution*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’R (Dec. 3, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26559&LangID=E>.

7. Erik Ortiz & Phil Helsel, *U.S. Executes Lisa Montgomery, First Woman Put to Death in Federal System Since 1953*, NBC NEWS (Jan. 13, 2021, 2:11 AM),

treat criminal defendants with traumatic brain injuries.⁸ In this paper, we discuss common ways that individuals with traumatic brain injuries become involved in the criminal justice system, and how attorneys can better prepare an effective defense or mitigation.⁹ We consider, in some depth, several of the substantive areas of criminal law and procedure in which an understanding of TBI is especially significant (including, but not limited to, competency status, the insanity defense and the death penalty), and assess the quality of counsel—and experts—in such cases, using the *Montgomery* case as a prism.¹⁰

We believe that one (at least partial) remedy for the current situation is a turn to therapeutic jurisprudence. Therapeutic jurisprudence (“TJ”) is a field of legal scholarship that encourages its practitioners to use the law as an agent of therapeutic benefit.¹¹ TJ doctrine emphasizes giving

<https://www.nbcnews.com/news/us-news/judge-halts-execution-lisa-montgomery-only-woman-federal-death-row-n1253658>; see also Tal Axelrod, *Federal Government Executed More Prisoners in 2020 Than All States Combined: Research*, THE HILL (Dec. 16, 2020, 9:54 AM), <https://thehill.com/homenews/administration/530431-federal-government-executes-more-prisoners-in-2020-than-all-states> (“The [DOJ] . . . oversaw a ramp-up in federal executions after a 17-year break, executing 10 prisoners in 2020 compared with seven by states that still employ capital punishment, according to a new report by the Death Penalty Information Center (DPIC).”).

8. No mention was made in any court opinion of the prosecutor’s misconduct, in criticizing the defendant’s decision to have her children testify during the penalty phase of her trial; the defendant had an unquestioned Sixth Amendment right to have her children testify at her trial. See *Washington v. Texas*, 388 U.S. 14, 19 (1967). In the *Montgomery* opinion, Judge Wollman discusses the prosecutor’s comments regarding Montgomery’s decision to have her children testify:

During penalty phase closing argument, the prosecutor argued, “Deception, manipulation is a way of life and they want you to give her credit and say she’s a good wife, a good mother. She never apologized for her actions.” Defense counsel’s objection to the argument was overruled, and the prosecutor set forth the following argument in rebuttal: “And then after all of that she drags those kids into court here to testify in this high profile case in front of all these people and puts them through this again and victimizes them again in front of the whole world. . . . She drug [sic] these kids in here to testify on her behalf. Don’t you think that’s painful for them. She’s a good mom? Most of us, if we had children [and] we were involved in a situation we would want them a thousand miles away from this. We wouldn’t make them come to court and testify.”

Montgomery, 635 F.3d at 1096.

9. See *infra* Section II(a)(iii)(3).

10. See *infra* Sections II (discussing the relationship between TBI, criminal behavior, and criminal procedure), III (discussing the role of counsel), and IV (discussing the role of experts).

11. Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009); see *infra* Section V.

an individual client dignity, voice, validation and voluntariness of action and decision.¹² This is particularly important for an individual with TBI, who will likely have the capacity to make the majority of decisions about his case, but may still need behavioral treatment or interventions for symptoms of the TBI.¹³ It is also likely that such a defendant has been seen in the past as one who did *not* have the capacity for such decision making.¹⁴ We will discuss the ways that TJ plays into these issues, and how the principles of dignity, voice, validation and voluntariness—besides having to inform the law that is relevant to cases of such individuals—are necessities for anyone who works with this population (including caregivers, therapists and counsel).¹⁵ We conclude with some modest suggestions as to how we can begin to make needed changes in the criminal justice system to take all of these issues into account.¹⁶

The paper title comes, in part, from Bob Dylan’s 2006 song, *When the Deal Goes Down*, which includes the following stanza:

My bewildering brain, toils in vain
Through the darkness on the pathways of life
Each invisible prayer is like a cloud in the air
Tomorrow keeps turning around
We live and we die, we know not why
But I’ll be with you when the deal goes down.¹⁷

In his masterful book, *Why Bob Dylan Matters*, Prof. Richard Thomas tells us that the lyrics of this song reflect “a deep sense of humanity, and of survival,”¹⁸ a sentiment with which we agree. When a lawyer represents a defendant with TBI, they must exhibit this same “deep sense of humanity” so as to enhance the client’s chances for “survival.”¹⁹

12. Perlin & Lynch, *supra* note 3; *see infra* Section V(b).

13. *See* Kristen L. Triebel et al., *Neurocognitive Models of Medical Decision-Making Capacity in Traumatic Brain Injury Across Injury Severity*, 31 J. HEAD TRAUMA REHAB. E49, E49–50 (2016); John McMillan, *Acquired Brain Injury, Mental Illness, and the Subtleties of Competence Assessment*, 25 PHIL., PSYCHIATRY & PSYCH. 25, 25, 27 (2018); Laura E. Dreer et al., *Cognitive Predictors of Medical Decision-Making Capacity in Traumatic Brain Injury*, 53 REHAB. PSYCH. 486, 486–87 (2008).

14. *See* Triebel et al., *supra* note 13, at E57–58; McMillan, *supra* note 13, at 26; Dreer et al., *supra* note 13, at 487.

15. *See infra* Section V(b).

16. *See infra* Conclusion.

17. Bob Dylan, *When the Deal Goes Down*, BOB DYLAN, <https://www.bobdylan.com/songs/when-deal-goes-down/> (last visited Dec. 4, 2021).

18. RICHARD F. THOMAS, *WHY BOB DYLAN MATTERS* 230 (2017).

19. *Id.*

We believe that it is through the use of therapeutic jurisprudence that this can best be done.

I. WHAT IS TBI

The term “traumatic brain injury” is not a description for a particular type of injury; rather, it serves as a catch-all term for myriad types of organic brain injury and damage.²⁰ The United States Centers for Disease Control define a TBI as “a disruption in the normal function of the brain that can be caused by a bump, blow, or jolt to the head, or penetrating head injury.”²¹ Traumatic brain injuries can vary widely in their severity, and “may range from ‘mild’ (i.e., a brief change in mental status or consciousness) to ‘severe’ (i.e., an extended period of unconsciousness or memory loss after the injury).”²² The effects from a traumatic brain injury can last anywhere from a couple of days to a week, through the rest of someone’s life.²³ The effects of a traumatic brain injury, regardless of cause or location, can range from mild to severe, and “can include [impairments related to] thinking or memory, movement, sensation (e.g., vision or hearing), or emotional functioning (e.g., personality changes, depression).”²⁴ This type of change in emotional regulation, in particular, will be discussed in greater detail as it relates to the commission of criminal acts.²⁵ The particular type of injury, in addition to the severity, can make a difference in the symptoms expressed and the prognosis. Focal and penetrating injuries tend to injure specific portions of the brain, so a person injured in these ways may have less overall neurological damage, depending on where the injury occurred and the cognitive processes present in the injured area.²⁶ Conversely, a person who suffers a coup-contrecoup injury such as a hard impact after a fall can have injury to both the area of the brain at the

20. Jean A. Langlois et al., *The Epidemiology and Impact of Traumatic Brain Injury*, 21 J. HEAD TRAUMA REHAB. 375, 375 (2006).

21. *Injury Prevention & Control: Traumatic Brain Injury Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/injury/stateprograms/topic_traumatic-brain-injury.html (last visited Dec. 4, 2021).

22. *Concussion and Traumatic Brain Injury Prevention Program*, CT.GOV, <https://portal.ct.gov/DPH/Health-Education-Management--Surveillance/The-Office-of-Injury-Prevention/Concussion-and-Traumatic-Brain-Injury-Prevention-Program> (last visited Nov. 19, 2021).

23. *Id.*

24. *Id.*; see also Sureyya Dikmen et al., *Rates of Symptom Reporting Following Traumatic Brain Injury*, 16 J. INT’L NEUROPSYCH. SOC’Y 401, 403–05 (2010).

25. See *infra* Section II(a).

26. Harvey S. Levin, *Neuroplasticity Following Non-Penetrating Traumatic Brain Injury*, 17 BRAIN INJ. 665, 671 (2003).

center of the impact, and the opposite area of the brain, due to the movement of the brain back and forth during the injury.²⁷

TBIs are also classified as primary and secondary, based on how close in time the injury occurred to the traumatic event.²⁸ Most TBIs are a mix of primary and secondary injuries, and a more severe initial (primary) injury increases the likelihood that secondary injuries will have more significant effect.²⁹ Types of primary injuries include intracranial hematomas (ruptured blood vessel resulting in collection of blood in brain tissue),³⁰ hemorrhage (bleeding in the brain),³¹ skull fracture (either a linear break or a depressed crush of the skull),³² coup-contrecoup (bruising of brain tissue),³³ and diffuse axonal injury (usually the result of twisting or tearing of tissue following a forceful stop).³⁴

A secondary injury that follows the primary injury generally results from metabolic and physiological changes that begin as a result of trauma.³⁵ These injuries can include hypoxia, hypotension, ischemia, cerebral edema, and hydrocephalus.³⁶

The injuries sustained are also generally categorized as being either penetrating or closed.³⁷ A penetrating TBI is one in which the outer layer of the meninges, known as the dura, is compromised.³⁸ This can be caused by projectiles like bullets or knives.³⁹ A well-known example of a penetrating TBI is the case of Phineas Gage, who was injured by a railroad spike that destroyed much of his left frontal lobe, and became a case study in significant personality change following frontal lobe

27. Mohammadreza Ramzanpour et al., *Comparative Study of Coup and Contrecoup Brain Injury in Impact Induced TBI*, 54 BIOMED. SCI. INSTRUMENTATION 76, 78–80 (2018).

28. Eko Prasetyo, *The Primary, Secondary, and Tertiary Brain Injury*, 23 CRITICAL CARE & SHOCK 4, 4 (2020).

29. *Id.*

30. See *Intracranial Hematoma*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/intracranial-hematoma/symptoms-causes/syc-20356145> (last visited Dec. 4, 2021).

31. See *Brain Bleed, Hemorrhage (Intracranial Hemorrhage)*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/14480-brain-bleed-hemorrhage-intracranial-hemorrhage> (last visited Dec. 4, 2021).

32. See Mary Ellen Ellis, *Skull Fractures*, HEALTHLINE (Mar. 8, 2019), <https://www.healthline.com/health/skull-fracture#types>.

33. See Ramzanpour et al., *supra* note 27, at 76.

34. Prasetyo, *supra* note 28, at 4–5.

35. *Id.* at 6.

36. *Id.* at 5.

37. *Types of Brain Injury*, STANFORD HEALTH CARE, <https://stanfordhealthcare.org/medical-conditions/brain-and-nerves/acquired-brain-injury/types.html> (last visited Dec. 4, 2021).

38. *Types of Traumatic Brain Injury*, BRAINLINE (Sept. 8, 2018), <https://www.brainline.org/article/types-traumatic-brain-injury>.

39. *Id.*

injury.⁴⁰ A closed TBI, on the other hand, “is [one] in which the dura remains intact.”⁴¹ These can then be classified as mild, moderate or severe.⁴² The debate on concussion in sports, and the research around helmet-wearing, are all related to trauma resulting in closed TBIs.⁴³

The outcome, physically and mentally, depends in large part on the part of the brain where the injury occurred.⁴⁴ Many connections exist between TBIs in certain areas of the brain and rapid shifts in personality, emotional regulation, executive function, and impulse control.⁴⁵ This is where we turn next for a more in-depth look at the intersection between TBI and criminal behavior.

II. THE RELATIONSHIP BETWEEN TBI, SUBSEQUENT ALLEGED CRIMINAL BEHAVIOR, AND CRIMINAL PROCEDURE QUESTIONS

A. *The Range of Criminal Procedure Topics*

We begin with the reality that research has established “that persons accused of criminal behavior are at a very high risk of [having] traumatic brain injuries that predate the offense with which they are charged.”⁴⁶ And, “[u]nsurprisingly,” claims of brain injuries are “common” in criminal cases.⁴⁷ To exemplify this point, consider the case of Lisa Montgomery, in

40. See generally Malcolm MacMillan & Matthew L. Lena, *Rehabilitating Phineas Gage*, 20 NEUROPSYCH. REHAB. 641 (2010). For a helpful discussion of the Gage case, see Richard Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U.L. REV. 51, 52 (2006), and see generally MALCOLM MACMILLAN, AN ODD KIND OF FAME: STORIES OF PHINEAS GAGE (2000).

41. *Types of Traumatic Brain Injury*, *supra* note 38.

42. See *id.*

43. For a brief discussion about concussions in sports, see Sean D. O'Brien & Kenneth Ferguson, *Traumatic Brain Injury and the Law: Introduction*, 84 UMKC L. REV. 287, 294–97 (2015).

44. See, e.g., Macmillan & Lena, *supra* note 40, at 651–52.

45. See generally Marc C. Obonsawin & Esme Worthington, *A Model of Personality Change After Traumatic Brain Injury and the Development of the Brain Injury Personality Scales*, 78 J. NEUROLOGY, NEUROSURGERY & PSYCHIATRY 1239 (2007).

46. O'Brien & Ferguson, *supra* note 43, at 297. See generally W. Huw Williams et al., *Traumatic Brain Injury in a Prison Population: Prevalence and Risk for Re-Offending*, 24 BRAIN INJ. 1184 (2010). Although most of the research involving this cohort has involved prison inmates (and thus, predominantly those who had been initially charged with felonies), some also focuses on jail inmates, a cohort that would include, in some jurisdictions, those charged with misdemeanors who are unable to make bail. See CTRS. FOR DISEASE CONTROL & PREVENTION, *TRAUMATIC BRAIN INJURY IN PRISONS AND JAILS: AN UNRECOGNIZED PROBLEM* (2007).

47. Moriarty et al., *supra* note 2, at 702. These claims are especially common in death penalty cases. See, e.g., Anthony E. Giardino, *Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury*, 77 FORDHAM L. REV. 2955 (2009); Jessie A. Seiden, *The Criminal Brain:*

which the defendant attacked and killed Bobbie Jo Stinnett, then eight months pregnant.⁴⁸ Montgomery strangled Stinnett, butchered her with a kitchen knife, cut Stinnett’s unborn child from the womb, and tried to pass the baby off as her own.⁴⁹ Montgomery was convicted in federal court of a kidnapping resulting in death and was sentenced to death.⁵⁰ Montgomery’s early childhood was marred by severe beatings and sexual abuse at the hands of her stepfather.⁵¹ Her mother also contributed to the abuse by sexually trafficking her starting when she was a small child, “including allowing her to be gang raped by adult men on multiple occasions and telling Lisa she had to ‘earn her keep.’”⁵² Years of extreme trauma led to significant mental illness and documented brain damage resulting directly from the severe beatings and sexual abuse. As a result of her years of torture at the hands of caregivers, Montgomery “severed her connection with reality . . .”⁵³ and as her grip on reality declined, she fantasized more and more about becoming pregnant.⁵⁴

In reviewing the case, the District Court noted the extensive details of her lengthy history of physical and sexual abuse, brain impairments, and resulting mental disabilities and personality disorders,⁵⁵ but basically ignored the impact of that history.⁵⁶ It stated that “[t]hese

Frontal Lobe Dysfunction Evidence in Capital Proceedings, 16 CAP. DEF. J. 395 (2004). See generally *infra* text accompanying note 150. However, these are *not* the only criminal law cases in which TBI plays a part. See generally *infra* text accompanying notes 72–74.

48. United States v. Montgomery, 635 F.3d 1074, 1079–80 (8th Cir. 2011).

49. *Id.*

50. Montgomery v. Rosen, No. 21-5001, 2021 WL 116391, at *1, *6 (D.C. Cir. Jan. 11, 2021), *rev’d en banc*, No. 21-5001, 2021 WL 112524 (D.C. Cir. Jan. 11, 2021), *vacated sub nom.* No. 20A122, 2021 WL 99974, at *1 (U.S. Jan. 12, 2021).

51. United States v. Montgomery, 635 F.3d 1074, 1080–81 (8th Cir. 2011); Montgomery v. Barr, 507 F. Supp. 3d 711, 723 (N.D. Tex. 2020). For information on the long-lasting impact of childhood trauma, see Amy T. Campbell, *Addressing the Community Trauma of Inequity Holistically: The Head and the Heart Behind Structural Interventions*, 98 DENVER L. REV. 1, 8–9 (2021).

52. See *Lisa Montgomery*, *supra* note 6.

53. See *id.*

54. *Id.* (stating that Montgomery “gave birth to four children. After her fourth child was born, her mother pressured her into an involuntary sterilization”).

55. See, e.g., Montgomery v. Barr, 507 F. Supp. 3d 711, 733 n.4 (N.D. Tex. 2020) (citing Cavazos v. Smith, 565 U.S. 1, 8–9 (2011) (reasoning that clemency is the prerogative granted to the executive to help ensure that justice is tempered with mercy)); Harbison v. Bell, 556 U.S. 180, 187 (2009) (“Federal clemency is exclusively executive: Only the President has the power to grant clemency for offenses under federal law.”). Cf. To William Charles Jarvis. Monticello, Sept. 28, 1820, in XV THE WRITINGS OF THOMAS JEFFERSON 277 (Albert Ellery Bergh ed., 1907) (“To consider the [federal] judges as the ultimate arbiters of all constitutional questions . . . [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.”).

56. Montgomery, 507 F. Supp. 3d at 733 n.4 (citing Cavazos v. Smith, 565 U.S. 1, 8–9 (2011)).

arguments read like a clemency petition . . . [and thus] this Court is not the proper forum in which to make a request for clemency, which lies within the exclusive province of the Executive Branch, not the Judicial Branch.”⁵⁷

With this backdrop, we need to consider the many different points of the criminal trial process—pre-trial, at trial, and post-trial—at which therapeutic jurisprudence could impact a case involving a defendant with TBI. In an earlier article, two of the authors noted that “introduction of a defendant’s TBI could prove to be an effective tool during mitigation, in order to provide a clue as to why he may have performed the crime with which he was charged.”⁵⁸ In fact, “[a] finding of TBI can also help to demonstrate an individual’s current cognitive and emotional functioning, which will be important for a decision-maker to consider during sentencing.”⁵⁹ But, on further consideration, we believe that TBI evidence could be significant in *some* criminal cases at *all* stages of the criminal process.

Thus, beyond the range of cases we are discussing here, we believe that TBI evidence may be relevant to such pre-trial matters as motion practice, bail applications, decisions as to whether to enter into a plea agreement, and preparing the defendant to testify and to hear evidence that might be introduced against him.⁶⁰ But, for the purposes of this

57. *Id.*; see also Lisa Montgomery, *supra* note 6 (“The crime that Lisa committed, though rare, is not unprecedented. More than a dozen women have committed similar crimes around the country, and none, besides Lisa, are condemned to die. The crime itself is a reflection of mental illness. But the Bush Justice Department, under Attorney General Alberto Gonzales, decided that life imprisonment was not a sufficient punishment for her crime.”).

58. Michael L. Perlin & Alison J. Lynch, “*In the Wasteland of Your Mind*”: *Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304, 354 n.171 (2016).

59. *Id.* at 353–54 n.171.

60. For more on bail, see, e.g., *State v. Delacerda*, 140 So.3d 1245, 1249 (La. Ct. App. 2014) (holding that a decision to revoke the bail of a defendant with TBI while the issue of his mental competence to proceed was pending “harmless error” as it was not prejudicial). For more on pleas, see, e.g., *State v. Schaefer*, 385 P.3d 918, 925–26 (Kan. 2016) (holding that there was no abuse of discretion in finding that plea of defendant with TBI was voluntary, knowing, and intelligent, such that good cause did not exist for defendant to withdraw his plea); *United States v. Carter*, No. 1:12-CR-29, 2013 WL 6668715, at *3 (E.D. Tenn. Dec. 18, 2013) (holding that the defendant with TBI was competent to enter into a guilty plea). For more on defendant’s ability to testify, see, e.g., *Morris v. State*, 214 S.W.3d 159, 169 (Tex. App.—Beaumont 2007), *aff’d*, 301 S.W.3d 281 (Tex. Crim. App. 2009) (affirming conviction, notwithstanding testimony from expert neuropsychologist that the defendant with TBI could not testify to relevant evidence or be cross-examined). Two of the co-authors (MLP & HEC) discuss these cases in a new webinar course on *TBI and the Law*, taught under the auspices of Palo Alto University. See Michael L. Perlin & Heather Ellis Cucolo, *Traumatic Brain Injury and the Law*, PALO ALTO UNIV.: CONCEPT,

Article, we are limiting this portion of our inquiry to questions of search and seizure, confessions, and waiver of rights.

1. Pre-Trial

First, in the context of pre-trial matters, we consider what we characterize as “motion practice.”⁶¹ There are many motions that can be filed by a criminal defense lawyer⁶² prior to trial, but the two most important, for these purposes, are motions to suppress evidence that was seized from the defendant⁶³ and motions to exclude confessions or other inculpatory statements.⁶⁴ In both instances, it is highly likely that there will be testimony at a pre-trial hearing, so that the fact finder can assess whether the evidence should be suppressed.⁶⁵ In each circumstance, the question as to whether the defendant was competent to (1) give consent to the search, or (2) waive his *Miranda* rights and make an inculpatory statement is a matter for the fact-finder to assess.⁶⁶

Although it has appeared clear from the caselaw for over fifty years that the confession by an incompetent person is inadmissible,⁶⁷ we know that neither subnormal intelligence, “lack of education and illiteracy,” nor “previous incidents of mental instability” are “necessarily dispositive” of the issue of mental competence at the time the confession

<https://training.concept.paloalto.edu/courses/Traumatic-Brain-Injury-and-the-Law> (last visited Dec. 4, 2021).

61. Edward Labaton, *Book Review*, 56 BROOK. L. REV. 1269, 1269 (1991) (“[E]very civil litigator recognizes the key role of motion practice to all but the most routine lawsuits . . .”). We believe it is just as critical to criminal litigation. See, e.g., ANTHONY G. AMSTERDAM, 2 TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 221-253A (5th ed. 1989); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 370 (1993) (as discussed in Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 747 n.41 (2006)).

62. We are omitting from this discussion motions that might be filed by the prosecutor.

63. This flows from the U.S. Supreme Court decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), and its progeny.

64. This flows from the U.S. Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny.

65. This excludes *Mapp* motions based on insufficiency of warrant as those typically do not involve live testimony. They are much rarer. See, e.g., Steven Duke, *Making Leon Worse*, 95 YALE L.J. 1405, 1409 (1986); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1669 (2012). It has been estimated that suppression motions are filed in about 10% of all criminal cases. See Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223, 228 (1987).

66. For more on competency and these questions in general, see Michael L. Perlin, *Beyond Dusky and Godinez: Competency Before and After Trial*, 21 BEHAV. SCI. & L. 297, 300–02 (2003).

67. *Blackburn v. Alabama*, 361 U.S. 199, 207–11 (1960).

is given.⁶⁸ Thus, it is critical that evidence of TBI be evaluated carefully and sensitively. Remarkably, there has been only a handful of cases on the question of competency to consent to a search, and courts have split between those that have taken the position that mental competency is relevant to any inquiry in determining voluntariness of a consent in such circumstances and those that have concluded that there was “no authority for the proposition that . . . incompetency renders consent to the search invalid.”⁶⁹ Again, such cases make it essential that TBI evidence be carefully examined.

We know that TBI “may make a person . . . more likely to produce false confessions,”⁷⁰ and “even more at risk of incompetency . . . to waive [constitutional] rights [such as the privilege against self-incrimination].”⁷¹ In at least one case, a jury heard virtually no evidence about a defendant’s TBI, and—based in significant part on his confession—sentenced him to death, a sentence that was ultimately carried out.⁷² In one case, involving a jailhouse admission, a defendant with TBI unsuccessfully sought to exclude the introduction of recorded telephone conversations (from when he was in jail), as he had no actual memory of the events in question, and, as such, the conversations could not be fairly characterized as admissions.⁷³

68. Perlin, *supra* note 66, at 300–01; *see id.* at 300–01 nn.35–38 (citing, inter alia, *State v. Jenkins*, 268 S.E.2d 458, 463 (N.C. 1980)); *State v. Osborne*, 330 S.E.2d 447, 448 (Ga. App. 1985); *State v. Vickers*, 291 S.E.2d 599, 604 (N.C. 1982); *State v. Simpson*, 334 S.E.2d 53, 59 (N.C. 1985).

69. Perlin, *supra* note 66, at 301 (citing *United States v. Ocampo*, 492 F. Supp. 1211 (E.D.N.Y. 1980) (competency relevant), and *United States v. Flannery*, 879 F.2d 863, No. 88-5605, 1989 WL 79731, at *4 (4th Cir. July 13, 1989) (finding competency irrelevant)). On the specific question of the competency of a defendant with TBI to consent to a search, see, e.g., *United States v. Wendehake*, No. 06-14040-CR, 2006 WL 3498613, at *16 (S.D. Fla. Dec. 4, 2006) (finding, despite the defendant suffering from a cognitive disorder secondary to a traumatic brain injury, that the disorder “had no impact whatsoever on his ability to freely and voluntarily consent to the search and seizure”); *Taylor v. State*, 937 So.2d 590, 599 (Fla. 2006) (holding that a documented TBI did not affect the defendant’s ability to give free and voluntary consent to search his motel room).

70. John Niland & Riddhi Dasgupta, *Texas Law’s “Life or Death” Rule in Capital Sentencing: Scrutinizing Eighth Amendment Violations and the Case of Juan Guerrero, Jr.*, 41 ST. MARY’S L.J. 231, 262 (2009) (quoting I. Bruce Frumkin, *Mental Retardation: A Primer to Cope with Expert Testimony*, 25 NAT’L LEGAL AID & DEF. ASS’N CORNERSTONE, Fall 2003, at 6); *see, e.g.*, Jerrod Brown et al., *Confabulation in Correctional Settings: An Exploratory Review*, J.L. ENFT, 2015, at 3 (“Inmates with a Traumatic Brain Injury (TBI) may be more likely to confabulate due to memory deficits and distortions of reality caused by damage to the brain.”).

71. Niland & Dasgupta, *supra* note 70, at 262 (quoting Frumkin, *supra* note 70, at 6).

72. *State v. Clayton*, 995 S.W.2d 468 (Mo. 1999) (en banc), as discussed in O’Brien & Ferguson, *supra* note 43, at 288–89.

73. *People v. Matthews*, No. 0980-2016, 2017 WL 4653566, at *5–6 (N.Y. Sup. Ct. Oct. 4, 2017).

TBI also has a profound impact on a defendant’s ability to waive constitutional rights.⁷⁴ The test for waiver has stayed basically the same for almost eighty years: that the waiver was “an intentional relinquishment or abandonment of a known right or privilege.”⁷⁵ Literally, tens of thousands of cases repeat the mantra that a waiver must be “made voluntarily, knowingly and intelligently.”⁷⁶ Such a waiver must be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[,]” and it must be “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”⁷⁷

By way of example, consider the case of *Ward v. Sternes*,⁷⁸ in which federal habeas corpus was granted to a defendant who, because of his TBI, could not knowingly, voluntarily and intelligently waive his right to testify.⁷⁹ In *Ward*, the reviewing court noted that the trial court made no “clear and straightforward” effort to ascertain that the defendant understood the nature and implications of the right he was waiving.⁸⁰ On the other hand, in *State v. Larson*,⁸¹ a conviction was affirmed in a case in which a state appellate court concluded that the defendant’s *untreated* TBI “did not disrupt [his] ability to understand what he was doing or the

74. See *Michigan v. Jackson*, 475 U.S. 625, 633 (1986) (stating that when a defendant purports to waive a fundamental constitutional right, “it is the State that has the burden of establishing a valid waiver”). For more on waiver in the specific context of a defendant with TBI, see *United States v. Duncan*, 643 F.3d 1242, 1249 (9th Cir. 2011), *cert. den.*, 566 U.S. 907 (2012), as discussed in Moriarty et al., *supra* note 2, at 716 (concluding that the appellate court was “impressed by the neuroscience evidence”). On remand, the trial court found the defendant competent to waive his rights, concluding:

- 1) The Defendant is likely suffering from a mental disease or defect to the extent discussed in this Order; (2) The mental disease or defect did not prevent him from understanding his legal position and the options available to him; and (3) The mental disease or defect did not prevent him from making a rational choice among his options.

United States v. Duncan, No. 2:07-00023-EJL, 2013 WL 12057465, at *27 (D. Idaho Dec. 6, 2013).

75. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

76. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

77. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

78. 209 F. Supp. 2d 950 (N.D. Ill. 2002).

79. See *supra* text accompanying notes 75–77; see also *Ward v. Sternes*, 250 F. Supp. 2d 950, 960 (C.D. Ill. 2002).

80. *Ward*, 250 F. Supp. 2d at 959.

81. No. 65-CR-15-292, 2017 WL 2729601 (Minn. Ct. App. June 26, 2017).

consequences of his guilty plea, and that there was nothing about his mental health that warranted the withdrawal of his guilty plea.”⁸²

2. At Trial

i. *Incompetency*

Consider the question of incompetency to stand trial.⁸³ We know that, although traumatic brain injury may predispose a person to the development of symptoms rendering them incompetent to stand trial, courts have expressed skepticism about the presence of TBI and causally-related incompetency. By way of example, in *United States v. Wiggins*, the First Circuit found that there was no reasonable cause to believe that the defendant was incompetent despite claims of memory loss and cognitive impairment caused by traumatic brain injury because the trial judge had seen the way that defendant interacted with his lawyer.⁸⁴ Typical in this area of law is a decision by an intermediate appellate court in New York: “Although defendant unquestionably suffered a traumatic brain injury in the accident, he gave coherent responses to the court’s inquiries and there is nothing in the record to indicate that he did not understand the charges against him or was unable to assist in his defense.”⁸⁵

Elsewhere, there is a handful of cases that consider competency to stand trial in the context of defendants with TBI. In the case of *Georgia Dep’t of Human Resources v. Drust*,⁸⁶ the Georgia Supreme Court applied a state statute ordering a defendant—incompetent because of TBI—to be transferred from a correctional facility to the authority of the Department of Human Resources; on the other hand, in *Harris v.*

82. *Id.* at *3. The trial court had rejected the defendant’s motion to withdraw his plea and be evaluated by a neurologist and psychiatrist. *Id.* at *2.

83. For an analysis of a range of competency cases involving defendants with TBI in which defense sought to introduce neuroimaging evidence, see Moriarty et al., *supra* note 2, at 715–16. Beyond the scope of this paper are investigations of competency to waive counsel, or to plead guilty. See, e.g., *Godinez v. Moran*, 509 U.S. 389 (1993); *Indiana v. Edwards*, 554 U.S. 164 (2008). See generally Michael L. Perlin, “Dignity was the First to Leave”: *Godinez v. Moran*, *Colin Ferguson*, and the Trial of Mentally Disabled Criminal Defendants, 14 BEHAV. SCIS. & L. 61 (1996); Perlin, *supra* note 66; Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 OHIO STATE J. CRIM. L. 391, 392 (2009).

84. *United States v. Wiggins*, 429 F.3d 31, 34–38 (1st Cir. 2005). In this case, defense experts found the defendant to be incompetent to stand trial, but the court-appointed expert disagreed. *Id.*

85. *People v. Dowling*, 937 N.Y.S.2d 729, 730 (N.Y. App. Div. 2012) (failing to present expert testimony).

86. 448 S.E.2d 364 (Ga. 1994).

Kuhlmann,⁸⁷ the Second Circuit found that a state court’s refusal to order a competency hearing after the petitioner was shot in the head was not unreasonable and thus not grounds for the granting of a writ of habeas corpus.⁸⁸ The Georgia case notwithstanding, however, defendants with TBI have rarely been successful at initial competency hearings,⁸⁹ on applications for competency hearings,⁹⁰ or on habeas applications, upon alleging that their TBI should have triggered a competency-to-stand-trial hearing.⁹¹

ii. *Insanity defense*

Consider next the insanity defense.⁹² Although defendants with a history of brain injury are more likely to be found not guilty by reason of insanity than those defendants who did not present any neurological testimony,⁹³ nonetheless, evidence of TBI is generally not enough to support an insanity defense.⁹⁴ According to Professor Litton, “[a]lthough in some very rare cases the cognitive impairments from TBI can rise to the level of insanity, the effects are more often relevant to a judgment of *diminished* responsibility, which is relevant in mitigation at sentencing.”⁹⁵ Note, in this context, that, in a previous article, two of the authors (MLP & AJL) suggested that testimony about TBI might “provide a clue” as to why the defendant committed the crime in question.⁹⁶

This becomes even more significant when we acknowledge how negative and stereotyped beliefs fuel legislative, judicial, and jury decisions about the insanity defense.⁹⁷ If evidence of TBI is presented, it

87. 346 F.3d 330 (2d Cir. 2003).

88. *See id.* at 355.

89. *See, e.g.,* Scott v. Schiro, 567 F.3d 573, 578 (9th Cir. 2009); *Morris v. State*, 301 S.W.3d 281, 307 (Tex. Ct. Crim. App. 2009).

90. *See* United States v. Dahl, 807 F.3d 900, 901 (8th Cir. 2015).

91. *See Harris*, 346 F.3d.; *United States v. Dixon*, 901 F.3d 1322, 1341 (11th Cir. 2018); *United States v. Carter*, No. 12-CR-29, 2013 WL 6668715, at *5 (E.D. Tenn. Dec. 18, 2013).

92. *See generally* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* ch. 14 (3d ed. 2020).

93. Jessica R. Gurley & David K. Marcus, *The Effects of Neuroimaging and Brain Injury on Insanity Defenses*, 26 BEHAV. SCI. & L. 85, 92 (2008).

94. Paul Litton, *Traumatic Brain Injury and a Divergence Between Moral and Criminal Responsibility*, 56 DUQ. L. REV. 35, 43–44 (2018).

95. *Id.*; *see also* *Bowman v. State*, 829 S.E.2d 139, 141–42 (Ga. 2019).

96. Perlin & Lynch, *supra* note 58, at 354 n.171.

97. *See generally* MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1994); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599 (1989-90); Michael L. Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375 (1997) [hereinafter

may be possible to respond successfully to the damaging and inaccurate mythic beliefs that plague the insanity defense.⁹⁸

Importantly, on the collateral question of the aftermath of a conditional release following an insanity acquittal, the research reveals that, where such release was provided in conjunction with community services to provide support (e.g., assignment of a case manager to each patient and multidisciplinary collaboration among mental health professionals to ensure proper “medication management and specialized treatment services”), it was significantly *less* likely that insanity acquittees with TBI would have their conditional release status revoked.⁹⁹

Most significant to consider is the reality that the vast majority of insanity/TBI cases relate to adequacy of counsel questions,¹⁰⁰ the most bizarre of which is *Ansteensen v. Davis*,¹⁰¹ in which trial counsel had told the defendant that “a plea of . . . [NGRI] based on his traumatic brain injury was ‘not allowed by law.’”¹⁰² Even absent such blatant inadequacy of counsel, the inexperience of counsel in presenting TBI evidence in an insanity defense context can be just as detrimental.¹⁰³

Consider again, the Lisa Montgomery case. At trial, Montgomery filed her notice of intent to assert the defense of insanity and to present expert evidence relating to mental disease or defect.¹⁰⁴ She claimed that childhood sexual and physical abuse by her stepfather had caused her to suffer from pseudocyesis, a false belief of being pregnant that the Fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* classified as a somatoform disease.¹⁰⁵ Defense counsel engaged mental health experts Drs. Vilayanur Ramachandran and William Logan, both

Perlin, *Borderline*]; Michael L. Perlin, *The Insanity Defense: Nine Myths That Will Not Go Away*, in *THE INSANITY DEFENSE: MULTIDISCIPLINARY VIEWS ON ITS HISTORY, TRENDS, AND CONTROVERSIES* 3 (Mark D. White ed., 2017).

98. Jane Campbell Moriarty, *Seeing Voices: Potential Neuroscience Contributions to a Reconstruction of Legal Insanity*, 85 *FORDHAM L. REV.* 599, 601–02, n.9 (2016) (quoting MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INANITY DEFENSE* 229–30 (1994)).

99. Michael Vitacco et al., *Evaluating Conditional Release in Not Guilty by Reason of Insanity Acquittes: A Prospective Follow-Up Study in Virginia*, 38 *L. & HUM. BEHAV.* 346, 353 (2014).

100. *See infra* Section III (on effectiveness of counsel in general).

101. No. 11–CV–01099–BNB, 2011 WL 6153107, at *1 (D. Colo. 2011).

102. *Id.* at *2.

103. *See* Kerrin Maureen McCormick, *The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake*, 30 *AM. CRIM. L. REV.* 1329, 1358–60 (1993) (quoting *People v. Anteensen*, No. 07–CA–1852, 2009 WL 869855, at *3 (Colo. Ct. App. 2009)).

104. *United States v. Montgomery*, 635 F.3d 1074, 1082 (8th Cir. 2011).

105. *Id.* (citing *AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV)* 511 (4th ed. 2000) [hereinafter *DSM-IV*]).

of whom diagnosed her with depression, borderline personality disorder, post-traumatic stress disorder, and pseudocyesis.¹⁰⁶

The defense unsuccessfully sought to proffer testimony by Ruben Gur, Ph.D. that—based on neuropsychological, MRI, and PET testing—Montgomery’s brain had structural and functional abnormalities that were consistent with pseudocyesis.¹⁰⁷ “Dr. Gur supervised a PET scan of Montgomery’s brain[,]”¹⁰⁸ and determined that the results “revealed elevated activity throughout the limbic system” and “increased activity in the somatomotor region . . .”¹⁰⁹ Dr. Gur concluded that “Montgomery suffered from functional abnormalities consistent with the diagnosis of pseudocyesis” based on a study that showed that heightened activity in the hypothalamus produced pseudopregnancy in rats.¹¹⁰ “Montgomery’s MRI revealed structural abnormalities, including reduced brain volume in the right parietal lobes and right medial gray matter.”¹¹¹ Dr. Gur was hesitant to say that Montgomery’s brain abnormalities caused her to commit the crime, but testified that the purpose of the PET scan was “to identify any brain abnormalities that might underlie her extreme behavior” and not “to diagnose Montgomery with pseudocyesis or any other condition . . .”¹¹²

The government requested a *Daubert* hearing and presented experts to challenge the scientific validity of the MRI and PET testing testified to by Dr. Gur.¹¹³ To break down Dr. Gur’s expert opinion, the government

106. *Id.*

For years, Montgomery was physically and sexually abused by her stepfather. When she was sixteen, her mother and stepfather divorced...From childhood on, Montgomery had endured a tumultuous relationship with her mother. Montgomery married Carl Boman, her step-brother, when she turned eighteen in August 1986. She had her first child in January 1987, and three more in the three years that followed. In 1990, Montgomery underwent the sterilization procedure described above. The procedure was successful, and a pretrial hysterosalpingogram confirmed that the sterilization rendered Montgomery unable to become pregnant. Montgomery claimed that her mother and Boman forced her to undergo the sterilization procedure.

Id. at 1080–81.

107. *Id.* at 1082–83, 1090.

108. *Id.* at 1088 (“PET scanners measure the level of activity in different areas of the brain.”).

109. *Id.*

110. *Id.*

111. *Id.* at 1092.

112. *Id.* at 1088. Dr. Gur also testified that “the brain she has may explain at least part of what happened.” *Id.* at 1092.

113. *Id.* at 1082 (relying upon *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); FED. R. EVID. 702, 403).

presented experts to explain the differences between MRI results and PET scan results: an MRI “provides quantitative analysis on brain anatomy, brain structure, while PET provides quantitative results on brain physiology, brain function.”¹¹⁴ As to the PET scan, the government expert, Alan Evans, Ph.D., conceded that although the PET scan result was not inconsistent with pseudocyesis, it was also not inconsistent with “numerous [other] neurological states, both normal and pathological,” and therefore did not provide a causal connection to the killing.¹¹⁵ Government expert Helen Mayberg, Ph.D., testified that “no PET scan pattern indicates pseudocyesis” and that PET scan results cannot be used to identify or diagnose psychiatric disorders.¹¹⁶ Drs. Evans and Mayberg also took issue with Dr. Gur’s methodology and argued that Dr. Gur’s principles and methods were unreliable.¹¹⁷ They claimed that Dr. Gur had calculated the data from the normative population differently than he had calculated Montgomery’s data.¹¹⁸ The experts testified that they were able to duplicate his calculations only if they employed one method for Montgomery and a different method for the control group.¹¹⁹

As to the MRI evidence testified to by Dr. Gur, government expert Dr. Evans explained that Montgomery’s results were within the normal range and that approximately fifty percent of the population would have comparable results.¹²⁰ Dr. Gur rendered his conclusion based on his “eyeball” comparison, that Montgomery’s right parietal and medial gray matter appeared abnormally low, and according to Dr. Evans, Dr. Gur had failed to scientifically show that Montgomery’s left-right difference was abnormal.¹²¹

114. *Montgomery*, 635 F.3d at 1082 n.4.

115. *Id.* at 1088.

116. *Id.*

117. *Id.* at 1088–89.

118. *Id.*

119. *Id.* at 1082–83.

120. *Id.* at 1092. Montgomery’s ventricle measurements were one standard deviation from normal, and Dr. Evans stated that there would be similar results in approximately thirty percent of the population. *Id.*

121. *Id.* at 1093. This debate highlights one of the dangers of overreliance on neuroimaging for both traumatic brain injuries, which are far easier to demonstrate through both structural and functional imaging, and mental illness, which is notoriously difficult to conclusively show on imaging. An expert needs to be able to demonstrate through both imaging and assessment, where appropriate, that mental illness exists. If that mental illness stems from organic brain trauma or visible structural differences in the brain, the expert must make clear that s/he has limitations in what can be proven through imaging, and may need to use multiple methodologies to show that behavior associated with a particular mental illness was derived from structural/functional brain abnormalities. Over-relying on imaging is problematic. See David E.J. Linden, *The Challenges and Promise of Neuroimaging in Psychiatry*, 73 NEURON 8, 8 (2012) (“Neuroimaging is central to the quest

As a result of the defense’s failure to offer scientifically supported evidence at the *Daubert* hearing, the trial court excluded evidence of the PET scan results on the ground that they did not show any significant abnormality.¹²² Although initially the trial court planned to allow Dr. Gur to testify on the abnormalities viewed in the PET scans, it later expressed concerns about the reliability of Dr. Gur’s analysis.¹²³ In particular, the trial court was concerned that the dispute over Dr. Gur’s methodology would confuse the jury.¹²⁴

Left without the support of brain imaging evidence,¹²⁵ Montgomery’s attorney attempted to support the defense of insanity through the testimony of defense experts Vilayanur Ramachandran, M.D., and William Logan, M.D.¹²⁶ At the guilt phase of the trial, both experts testified that Montgomery had severe pseudocyesis delusion, was in a dissociative state during the crime, and was unable to appreciate the nature and quality of her acts.¹²⁷ The government’s expert, Dr. Park Dietz, agreed that Montgomery suffered from depression, borderline personality disorder, and post-traumatic stress disorder but did not diagnose her as suffering from pseudocyesis.¹²⁸ Dr. Dietz further opined

for a biological foundation of psychiatric diagnosis but so far has not yielded clinically relevant biomarkers for mental disorders.”).

122. *Montgomery*, 635 F.3d at 1083.

123. *Id.* at 1090.

124. *Id.* at 1089 (although trial court erred by excluding expert’s testimony on PET scan, which showed abnormalities, any error was harmless under *Daubert* because testimony had minimal probative value because PET scan was not used for the specific disease defendant claimed and abnormalities do not predict behavior); *see also* Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000) (citation omitted) (affirming exclusion of PET scan under *Daubert*); *People v. Protsman*, 105 Cal. Rptr. 2d 819, 822-23 (Ct. App. 2001) (depublished) (affirming exclusion of PET scan evidence under California’s state law on this question); *People v. Kelly*, 549 P.2d 1240 (Cal. 1976), *superseded by* CAL. EVID. CODE § 351.1 (West 1983), *as recognized in* *People v. Wilkinson*, 94 P.3d 551 (Cal. 2004); *see generally* *People v. Bowman*, No. B242467, 2014 WL 718416, at *6 n.2 (Cal. Ct. App. Feb. 26, 2014).

125. *Montgomery*, 635 F.3d at 1083. After the jury had been selected and before opening statements, the court ruled that Dr. Gur’s testimony regarding his PET scan analysis would be excluded, finding that the evidence had minimal probative value because the abnormalities were consistent with many disorders, including pseudocyesis. *Id.* We know, however, that the introduction of brain scan evidence, when supported by reliable expert testimony, will lead mock jurors to be more predisposed to mitigation of sentence in death penalty cases. *See* Edith Greene & Brian Cahill, *Effects of Neuroimaging Evidence on Mock Juror Decision Making*, 30 BEHAV. SCI. & L. 280, 282 (2012).

126. *Montgomery*, 635 F.3d at 1082–83.

127. Dr. Ramachandran testified that Montgomery suffered from a severe pseudocyesis delusion and was in a dissociative state when she killed Stinnett and delivered the baby. *Id.* at 1083–84.

128. *Id.* at 1082.

that Montgomery “was entirely capable of appreciating that she engaged in a lengthy and elaborate plan [to commit kidnapping and murder].”¹²⁹ He testified that Montgomery was not delusional, because she gave numerous inconsistent statements about her actions and the origins of the baby both before and after confessing to police that she had killed the baby’s mother, whereas a delusional person would have repeated the same statements consistently.¹³⁰ Relying on Dr. Dietz’s opinion, the jury rejected Montgomery’s insanity defense and unanimously found her guilty beyond a reasonable doubt of the capital crime of kidnapping resulting in death.¹³¹

At the penalty phase, the jury voted for death despite the mitigating testimony given by Dr. Logan and Dr. Ruth Kuncel, Ph.D., that, at the time of the killing, her ability to appreciate the wrongfulness of her actions was substantially impaired and she suffered from a severe mental or emotional disturbance.¹³² On appeal, Montgomery argued that the trial court committed reversible error at both the guilt and penalty phases by excluding Dr. Gur’s evidence.¹³³

The Eighth Circuit affirmed the trial court’s decision, ruling that the defense failed to show in the *Daubert* hearing that Dr. Gur’s opinion was based on scientifically valid principles where he mentioned only one scientific study in passing.¹³⁴ That study, performed on rats and analyzing their sexual activity, was described in detail by government

The *Diagnostic and Statistical Manual of Mental Disorders* (DSM–IV) defines pseudocyesis as “a false belief of being pregnant that is associated with objective signs of pregnancy, which may include abdominal enlargement, . . . reduced menstrual flow, amenorrhea, subjective sensation of fetal movement, nausea, breast engorgement and secretions, and labor pains at the expected date of delivery.” AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 511 (4th ed. text revision 2000). The DSM–IV classifies pseudocyesis as a somatoform disorder. *Id.* “The common feature of Somatoform Disorders is the presence of physical symptoms that suggest a general medical condition, . . . and are not fully explained by a general medical condition, by the direct effects of a substance, or by another mental disorder.”

Id. at 485.

129. *Id.* at 1085.

130. *Id.* at 1084.

131. *Id.* at 1085.

132. *Id.* (“Montgomery asserted the following mitigating factors, among others, to support her case for life imprisonment: her capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law was significantly impaired; she committed the offense under severe mental and emotional disturbance; she had reared and supported four good children, to whom she had offered advice, nurturance, and emotional support and would continue to do so if she was sentenced to life imprisonment.”).

133. *Id.* at 1091.

134. *Id.*

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expert Dr. Mayberg, who testified without rebuttal that the research was not applicable to Montgomery.¹³⁵ Even if Dr. Gur’s interpretation of the PET scan was arguably admissible under the Federal Death Penalty Act’s low threshold for admissibility,¹³⁶ the error to exclude was harmless, because the PET scan could not be used to diagnose pseudocyesis—the basis for Montgomery’s insanity defense—and Dr. Gur conceded that abnormalities do not predict behavior and did not cause Montgomery to commit the crime.¹³⁷ Ultimately, the Eighth Circuit declared that the evidence had minimal probative value and was outweighed by the overwhelming aggravating evidence.¹³⁸

135. *Id.* (“Other than his mention of the study on rats, there was no evidence offered to show the scientific reliability of Dr. Gur’s opinion. Similarly, no evidence was offered that individuals suffering from other somatoform disorders have somatomotor abnormalities similar to Montgomery’s The opinion that the abnormalities were consistent with pseudocyesis, however, did not rise to the level of scientific knowledge.”).

136. *Id.* at 1092; *see also* *Hose v. Chi. Nw. Transp. Co.*, 70 F.3d 968, 973 (8th Cir. 1995) (“[N]o question [exists] that the PET scan is scientifically reliable for measuring brain function.”).

137. *Montgomery*, 635 F.3d at 1092. Dr. Gur did not proffer an opinion that the brain abnormalities caused Montgomery to commit the act, but rather, that the abnormalities contributed to her actions and “may explain at least part of what happened.” *Id.* The *Montgomery* court held that Dr. Gur’s testimony did not meet the reliability standard of Rule 702. *Id.* at 1090 (citing *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 670 (6th Cir. 2010)). Further, the *Montgomery* court explained that, “[a]lthough Rule 702’s inquiry is ‘a flexible one,’ it requires that the principles underlying the proposed submission be scientifically valid.” *Id.* (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594–95). Scientific knowledge requires “more than subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590 (1993); *see also* *United States v. Purkey*, 428 F.3d 738, 757–58 (8th Cir. 2005) (holding it improper to exclude defendant’s expert’s testimony that defendant suffered from fetal alcohol syndrome when it was supported by facts).

On how *Daubert* decisions are disproportionately likely to favor the prosecution, see Perlin & Lynch, *supra* note 58, at 343–44, and Michael L. Perlin & Alison J. Lynch, “My Brain Is So Wired”: *Neuroimaging’s Role in Competency Cases Involving Persons with Mental Disabilities*, 27 B.U. PUB. INT. L.J. 73, 93–94 (2018) (“[J]udges treated biologically-based evidence in criminal cases involving questions of mental disability law (via privileging and subordination) so as to conform to the judges’ pre-existing positions.”), relying on research reported in Nicholas Scurich & Adam Shniderman, *The Selective Allure of Neuroscientific Explanations*, 9 PLOS ONE (Sept. 10, 2014), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0107529>; *see also* Susan Rozelle, *Daubert, Schaubert: Criminal Defendants and the Short End of the Science Stick*, 43 TULSA L. REV. 597, 598 (2007) (“[T]he game of scientific evidence looks fixed.”).

138.

Nevertheless, we conclude that what we said in *Purkey* is of equal force in this case: “[A]lthough we recognize that a jury may be more likely to believe that someone suffers from a problem if its cause is explained, we nevertheless harbor no doubt that considering the minimal probative value of the evidence and the overwhelming evidence and jury findings of serious aggravating factors, its exclusion was harmless.”

The Eighth Circuit decision highlights the fundamental unfairness to a defendant when expert testimony is unsubstantiated in the scientific and medical communities.¹³⁹ Studies have questioned the beneficial weight of neuroimaging-based testimony,¹⁴⁰ and as a result, counsel must be especially cognizant of the potential detriment in failing to adequately present such evidence.¹⁴¹ This supports the recommendation that is offered later in this Article—that counsel use the utmost diligence in choosing a qualified expert when dealing with issues involving brain abnormalities or questions of brain damage in a death penalty case.¹⁴² Particularly, attorneys must understand the range of disabilities that could support an insanity defense (and/or mitigation at sentencing) and ensure that they are presenting persuasive medical and scientific evidence to support their theory of the case.

3. The Death Penalty

i. Introduction

At the outset, it is clear that claims of brain injury are especially common in death penalty cases.¹⁴³ In this Section of this Article, we will consider these issues in three contexts—findings of future dangerousness, mitigation, and competency to be executed—and will then contextualize them through a closer consideration of the case of Lisa Montgomery.

Montgomery, 635 F.3d. at 1092 (citing *United States v. Purkey*, 428 F.3d 738, 758 (8th Cir. 2005) (another federal death penalty case that was handled and lost by Montgomery's attorney)).

139. See *infra* Section III.

140. See Darby Aono, Gideon Yaffe & Hedy Kober, *Neuroscientific Evidence in the Courtroom: A Review*, 4 COGNITIVE RSCH. 40 (2019), <https://doi.org/10.1186/s41235-019-0179-y> (discussing studies on the effects of neuroscientific and neuroimaging-based testimony in jury decisions); see also James Gaines, *Brain Scans in the Courts: Prosecutor's Dream or Civil Rights Nightmare?*, INSIDE SCI. (Mar. 14, 2018), <http://www.insidescience.org/news/brain-scans-courts-prosecutors-dream-or-civil-rights-nightmare>.

141. Aono et al., *supra* note 140, at 3 (citing Deborah W. Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 B.C. L. REV. 493, 508 (2015)) ("Importantly, 87% of . . . *Strickland* claims included arguments that defense counsel presented insufficient neuroscientific evidence. Furthermore, 27.65% of the reported *Strickland* claims were successful (an extraordinarily high rate), with defense counsel's inadequate use of neuroscientific evidence forming the basis of all but one successful claim.").

142. See *infra* Section III.

143. See, e.g., Giardino, *supra* note 47; see also, e.g., Seiden, *supra* note 47.

ii. *Future Dangerousness*

It has been black letter law for 45 years that a state statutory scheme requiring the jury to determine, beyond a reasonable doubt, whether there was a “probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” is constitutional.¹⁴⁴ About seven years later, in *Barefoot v. Estelle*,¹⁴⁵ the Supreme Court countenanced testimony on future dangerousness in a death penalty case in which the witness had never personally examined or evaluated the defendant.¹⁴⁶ One of the lynchpins of the *Barefoot* decision was Justice White’s conclusion that, as a result of vigorous cross-examination, “the jury will . . . be able to separate the wheat from the chaff.”¹⁴⁷

144. *Jurek v. Texas*, 428 U.S. 262, 268 (1976).

145. *Barefoot v. Estelle*, 463 U.S. 880 (1983), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in* *Slack v. McDaniel*, 529 U.S. 473 (2000); *see generally* PERLIN & CUCOLO, *supra* note 92, §§ 17.2-1 to 17.2.2, at 17-3 to 17-15; Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the Ake in Barefoot’s Achilles Heel*, 3 N.Y. L. SCH. HUMAN RTS. ANN. 91 (1985).

146. *Barefoot*, 463 U.S. at 896; *cf. id.* at 926 (Blackmun, J., dissenting) (quoting Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Fyre v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980)) (cautioning that the “major danger of scientific evidence is its potential to mislead the jury” and that “an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny”), *construed in* Michael L. Perlin, “Your Corrupt Ways Had Finally Made You Blind”: *Prosecutorial Misconduct and the Use of “Ethnic Adjustments” in Death Penalty Cases of Defendants with Intellectual Disabilities*, 65 AM. U.L. REV. 1437, 1452 n.81 (2016); *see* Michael L. Perlin, “Deceived Me into Thinking/I Had Something to Protect”: *A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in Which Fact-Finders Rely on Heuristic Reasoning and “Ordinary Common Sense,”* 13 L.J. SOC. JUST. 88, 90 (2020) [hereinafter *Deceived Me*].

147. *Barefoot*, 463 U.S. at 899 n.7; *see Deceived Me*, *supra* note 146, at 90. One commentator has characterized this as a “cavalier attitude toward indiscriminate acceptance of scientifically unreliable testimony.” Cathleen C. Herasimchuk, *A Practical Guide to the Admissibility of Novel Expert Evidence in Criminal Trials Under Federal Rule 702*, 22 SAINT MARY’S L.J. 181, 201 (1990). Significantly, *Barefoot* led researchers to write, some six years later, “[W]e have yet to find a single word of praise for, or in defense of *Barefoot*, in the literature of either science or law.” D. Michael Risinger, Mark P. Denbeaux & Michael J. Saks, *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification “Expertise,”* 137 U. PA. L. REV. 731, 779–80 n.215 (1989). More than thirty years after that article was written, such a single word can still not be found. For more recent critical articles about *Barefoot*, *see, for example*, James Acker, *Snake Oil with a Bite: The Lethal Veneer of Science and Texas’s Death Penalty*, 81 ALB. L. REV. 751, 763–69 (2017); Mayra Reyes, *Danger! The Defendant Is “Disturbed.” Risks of Using Psychiatric Assessments to Predict Future Dangerousness*, 17 CONN. PUB. INT. L.J. 141, 162–63 (2017); Jaymes Fairfax-Columbo & David DeMatteo, *Reducing the Dangers of Future Dangerousness Testimony: Applying the Federal Rules of Evidence to Capital Sentencing*,

The problems seen in *Barefoot* continue to plague the legal system today.¹⁴⁸ As noted in the 2019 *Columbia Law Review* article, *Miller v. Alabama and the Problem of Prediction*, “[s]ubstantial empirical evidence since *Barefoot* suggests the adversarial process indeed cannot be trusted to sort out reliable evidence on future dangerousness. Studies of juries, prosecutors, and psychologists all indicate that predictions of future dangerousness are no better than random guesses.”¹⁴⁹

How does this relate to defendants with TBI? In his clinical evaluations of death row inmates, Professor Jonathan Pincus found that most had been victims of child abuse, had sustained traumatic brain injuries in childhood, and had been dually diagnosed with ADHD and conduct disorder.¹⁵⁰

There is no longer any question that defendants with traumatic brain injury have been executed.¹⁵¹ Of course, there is always the problem of

25 WM. & MARY BILL RTS. J. 1047, 1056–61 (2017). *Barefoot* continues to be perceived as good law, and continues to be regularly cited in published, appellate cases. See, e.g., *Ex Parte Wood*, No. WR-45,500-02, 2018 WL 6076407, at *2 (Tex. Ct. Crim. App. 2018); *In re Detention of Parsons*, No. 46–1–II, 2015 WL 4756464, at *6 (Wash. Ct. App. 2015).

148. See, e.g., Fairfax-Columbo & DeMatteo, *supra* note 147.

149. Mary Marshall, *Miller v. Alabama and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1656 (2019).

150. Jonathan H. Pincus, *Aggression, Criminality, and the Frontal Lobes*, in THE HUMAN FRONTAL LOBES: FUNCTIONS AND DISORDERS 547, 554–55 (Bruce L. Miller & Jeffrey L. Cummings eds., 1999) (noting that most of the individuals with frontal lobe damage who were on death row sustained brain damage in their infancy); see also John Matthew Fabian, *Forensic Neuropsychological Assessment and Death Penalty Litigation*, 33 APR CHAMPION 24, 26 (Apr. 2009) (reporting a study finding that 61% of habitually violent offenders had a history of brain injuries); Redding, *supra* note 40, at 56–57.

151. According to Dr. Dorothy Otnow Lewis, a renowned researcher in psychology studying death penalty cases involving defendants with mental disabilities, the majority of inmates on death row have some form of brain dysfunction. See generally Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986) [hereinafter *Death Row Inmates*]; Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584 (1988). In one study, she found that, of 14 juveniles sentenced to death, all had suffered head trauma, most in car accidents but many by beatings as well. See *id.* at 585–88. Reviewing her work evaluating dozens of death row inmates, Dr. Otnow Lewis has concluded that, almost without exception, they have damaged brains. See *Death Row Inmates* at 840–41. Most, like Lisa Montgomery, were also the victims of vicious battering. See *id.*; see also Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 191 (2002) (“Histories of significant neurological insult are common, as are developmental histories of trauma, family disruption, and substance abuse.”); David Freedman & David Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 SOC. SCI. & MED. 1757, 1757, 1762 (2000) (reporting that, of 16 cases sampled, 12 had a history of traumatic brain injury); John Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should Be Strictly Prohibited By American and International Law*, 58 WASHBURN L.J. 1, 4 (2019)

the “double-edged sword”: although “brain injuries should be mitigating . . . they run the risk of aggravating the culpability calculus since increased impulsivity and decreased self-control suggest future dangerousness.”¹⁵²

Consider next those defendants with intellectual disabilities. In *Atkins v. Virginia*,¹⁵³ the Supreme Court found that subjecting persons with intellectual disabilities to the death penalty violated the Eighth Amendment, reasoning, in part, that this population had “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”¹⁵⁴ Certainly, severely brain-injured individuals may also be at similar risk, as “[t]heir cognitive disabilities can render them unable to effectively assist their counsel and their behavioral impairments may make them poor witnesses on the stand.”¹⁵⁵

Consider how these issues are constructed in individual cases.¹⁵⁶ By way of example, in *Daniel v. State*,¹⁵⁷ a death penalty case involving a defendant who had suffered frontal lobe TBI as a child, the court rejected the defendant’s arguments that the jury’s finding of future dangerousness was in error.¹⁵⁸ The appellate court found that the defendant “had demonstrated an escalating pattern of disrespect for the

(quoting GAIL S. ANDERSON, *BIOLOGICAL INFLUENCES ON CRIMINAL BEHAVIOR* 209 (2007)) (“In one U.S. study of 15 death-row inmates, . . . all had suffered serious head injuries prior to their offense.”).

152. Robert J. Smith et al., *The Failure of Mitigation?*, 65 *HASTINGS L.J.* 1221, 1232 (2014). For a list of cases, see *id.* at 1232–1233. For more information on brain injury as a mitigating factor, see *infra* section II(iii)(3) on mitigation.

153. 536 U.S. 304, 318 (2002).

154. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). On defendants’ regular lack of success on *Atkins* claims in Fifth Circuit cases, see Michael L. Perlin, Talia Roitberg Harmon & Sarah Wetzel, “*Man Is Opposed to Fair Play*”: *An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously Atkins v. Virginia*, 11 *WAKE FOREST J.L. & POL’Y* 451 (forthcoming 2021).

155. Laura Snodgrass & Brad Justice, “*Death is Different*”: *Limits on the Imposition of the Death Penalty to Traumatic Brain Injuries*, 26 *DEV. MENTAL HEALTH L.* 81, 89 (2007).

156. In the Montgomery case, the excluded MRI testimony of Dr. Gur, see *supra* text accompanying notes 97–114, attempted to explain how the defendant’s right parietal dysfunction “manifests itself behaviorally in loss of sense of self, difficulties in emotion processing, attentional neglect and depressed or flat affect.” *United States v. Montgomery*, 635 F.3d 1074, 1092 (8th Cir. 2011) (quoting Dr. Gur’s report).

157. 485 S.W.3d 24 (Tex. Crim. App. 2016).

158. *Id.* at 32.

law,”¹⁵⁹ and noted further that his apparent lack of remorse was a factor in this assessment.¹⁶⁰

In *United States v. Witt*, a concurring opinion (to an opinion subsequently vacated) noted pointedly:

[T]he probability is indeed reasonable that any one [court] member might have embraced the uninvestigated and omitted mitigating evidence regarding an undisputed recent motorcycle accident, the undisputed concomitant closed-head injury, and expert testimony supporting the simple possibility of a traumatic brain injury. Coupled with the emotionally impactful, yet missing, remorse evidence Deputy Sheriff LF could have supplied to rebut the prosecution’s argument the appellant felt no remorse, I find the existence of a reasonable probability, sufficient to undermine the confidence in the outcome of this case.

159. *Id.*

160. *Id.* at 32–33 (describing instances where defendant had bragged about his crime); see also *United States v. Montgomery*, 10 F. Supp. 3d 801, 846 (W.D. Tenn. 2014) (stating that defendant’s mere silence cannot be probative of lack of remorse); *United States v. Caro*, 597 F.3d 608, 629–30 (4th Cir. 2010) (noting that federal courts are divided over whether using silence as evidence of lack of remorse violates the Fifth Amendment, and inclining to follow those holding it to be violative); *United States v. Umana*, 707 F. Supp. 2d 621, 636 (W.D.N.C. 2010) (“[T]he Fifth Amendment limits proof of lack of remorse to ‘affirmative words or conduct’ expressed by the defendant.” (quoting *Caro*, 597 F.3d at 627)); *United States v. Roman*, 371 F. Supp. 2d 36, 50 (D.P.R. 2005) (“[G]overnment may not urge the applicability of [lack of remorse] on information that has a substantial possibility of encroaching on [a defendant’s] constitutional right to remain silent.” (citation omitted)). *But see* Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 65 (2011) (“Most states provide for increased sentences for those defendants who fail to express remorse for their crimes. Federal courts likewise have routinely imposed longer sentences on those who do not express remorse.”) (footnotes omitted) (citations omitted).

However, juries often perceive signs of TBI as a lack of remorse if they are unaware of defendant’s TBI. See Barbara C. Fisher, *Neuropsychological Aspects of a Mild Closed Brain Injury in Children*, 1 ANN. 2000 ATLA–CLE 1131 at *2 (2000) (discussing how behavior that flows from TBI can cause the “false impression of a lack of remorse”). See also, on the possible relationship between TBI and perceptions of lack of remorse in death penalty cases, *United States v. Witt*, 73 M.J. 738, 839–40 (A.F. Ct. Crim. App. 2014) (Saragosa, J., concurring), *vacated*, 75 M.J. 380 (C.A.A.F. 2016).

On the impact of juror *perceptions* of remorse in death penalty cases (and how those perceptions may be wildly inaccurate, especially in cases in which defendants are medicated at their trials), see Michael L. Perlin, “*Merchants and Thieves, Hungry for Power*”: *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1531–33 (2016) [hereinafter Perlin, *Merchants*]; William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51–53 (1988).

There is ample evidence to establish prejudice—that just one member would hear it all and decide against death.¹⁶¹

iii. *Mitigation*

The key elements of mitigation were articulated over forty years ago:

- “whether the offender’s suffering evidences expiation or inspires compassion;
- whether the offender’s cognitive and/or volitional impairment at the time he committed the crime affected his responsibility for his actions, and thereby diminished society’s need for revenge;
- whether the offender, subjectively analyzed, was less affected than the mentally normal offender by the deterrent threat of capital punishment at the time he committed the crime; and
- whether the exemplary value of capitally punishing the offender, as objectively perceived by reasonable persons, would be attenuated by the difficulty those persons would have identifying with the executed offender.”¹⁶²

Thus, in *Lockett v. Ohio*,¹⁶³ the Court held that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering any mitigating factors of the defendant’s character or record as a basis for a sentence less than death.¹⁶⁴ Then, in *Eddings v. Oklahoma*,¹⁶⁵ the Court held that the sentencing authority must consider *any* relevant mitigating evidence.¹⁶⁶ There, the defendant had been the victim of child abuse, emotionally disturbed, with mental and emotional development at a level below his chronological age.¹⁶⁷ Subsequently, in *Penry v. Lynaugh*,¹⁶⁸ the Court held that mitigating evidence of a

161. *Witt*, 73 M.J. at 840.

162. James S. Liebman & Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the “Boiler Plate”: Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 818 (1978).

163. 438 U.S. 586, 604 (1978).

164. *Id.*

165. 455 U.S. 104, 116–17 (1982).

166. *Id.* at 114.

167. *Id.* at 107–08.

168. 492 U.S. 302, 340 (1989).

defendant's mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the "special issues" that jurors must consider in weighing punishment.¹⁶⁹ Without such information, jurors cannot express their "reasoned *moral* response" in determining whether the death penalty is the appropriate punishment.¹⁷⁰

Significantly, in 2005, the American Bar Association called for the implementation of these policies and procedures: "Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a *traumatic brain injury*."¹⁷¹

In the case of Lisa Montgomery, despite the ABA's recommendation that a defense attorney "must . . . at minimum" work with a "mitigation specialist,"¹⁷² defense counsel did not engage one.¹⁷³ This is all especially significant in light of the fact that the use of neurobiological evidence in criminal trials has increased over time and is usually used for mitigation.¹⁷⁴ "Clearly, the existence of brain damage is a factor which

169. *Id.* at 322.

170. *Id.* at 319.

171. *Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty*, 54 CATH. U.L. REV. 1115, 1115 (2005) (emphasis added); see PERLIN & CUCOLO, *supra* note 92, at §17-4.1.5.

172. AM. BAR. ASS'N., *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, reprinted in 31 HOFSTRA L. REV. 913, 925, 959 (2003), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf; see also *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 677 (2008). "A mitigation specialist is . . . an indispensable member of the defense team throughout all capital proceedings." *United States v. Kreuzer*, 61 M.J. 293, 302 (C.A.A.F. 2005) (quoting AM. BAR. ASS'N., *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, reprinted in 31 HOFSTRA L. REV. 913, 959 (2003)). On the "centrality" of the mitigation specialist to the work of defense counsel in such cases, see Mark E. Olive & Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 36 HOFSTRA L. REV. 1067, 1076–78 (2008).

173. Hannah Murphy, *Lisa Montgomery Suffered Years of Abuse and Trauma. The United States Killed Her Anyway*, ROLLING STONE (Jan. 22, 2021, 3:22 PM), <https://www.rollingstone.com/culture/culture-features/lisa-montgomery-kelley-henry-death-penalty-capital-punishment-1117592/> (discussing Montgomery's capital appellate attorney, Kelley Henry).

174. Nita A. Farahany, *Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis*, 2 J.L. & BIOSCIENCES 485, 491–92 (2015); Denno, *supra* note 131, at 503, 544.

may be considered in mitigation.”¹⁷⁵ Thus, according to an important research article by a neuropsychologist and a physician:

An ability to describe how a particular injury may have impacted an individual’s capacity to make good choices and to demonstrate reasonable judgment can be very helpful in criminal cases, especially in capital mitigation. In our experience, these cases ideally would demonstrate well-documented brain injuries, including medical records and be significant injuries in order to provide strong mitigation.¹⁷⁶

It is clear that “[t]he presence and severity of brain damage can be a critical factor in determining whether a death sentence is an appropriate punishment.”¹⁷⁷ It stands to reason that the “introduction of a defendant’s TBI could prove to be an effective tool during mitigation, in order to provide a clue as to why he may have performed the crime with which he was charged.”¹⁷⁸ In one famous study, *every* one of fourteen death row defendants evaluated showed evidence of brain injury.¹⁷⁹ In another article focusing solely on veterans, it was recommended that “presenting . . . TBI . . . evidence to a sentencer during the sentencing phase of a capital trial represents one way to avoid subjecting combat veterans to the death penalty.”¹⁸⁰

There is some case law in accord. In *State v. Sireci*,¹⁸¹ the Florida Supreme Court affirmed upon appeal a new sentencing hearing for a defendant because he failed to receive competent psychiatric examinations to adequately investigate possible brain damage.¹⁸² On the other hand, although the initial panel decision in a Ninth Circuit case found counsel’s work at trial deficient and “especially damaging to Mann’s defense at sentencing,” as he had failed to seek and present results of neuropsychological testing which would likely have shown the defendant’s TBI,¹⁸³ the full court vacated, concluding that, even if the

175. *Robinson v. State*, 761 So. 2d 269, 277 (Fla. 1999) (per curiam) (citing *DeAngelo v. State*, 616 So. 2d 440, 442 (Fla. 1993) (per curiam)).

176. Stacey Wood & Bhushan S. Agharkar, *Traumatic Brain Injury in Criminal Litigation*, 84 UMKC L. REV. 411, 419–20 (2015).

177. Lyn M. Gaudet & Gary E. Marchant, *Under the Radar: Neuroimaging Evidence in the Criminal Courtroom*, 64 DRAKE L. REV. 577, 626 (2016).

178. Perlin & Lynch, *supra* note 58, at 354 n.171.

179. Lewis, *Death Row Inmates*, *supra* note 151, at 840.

180. Giardino, *supra* note 47, at 2995.

181. 536 So. 2d 231 (Fla. 1988) (per curiam).

182. *Id.* at 233–34.

183. *Mann v. Ryan*, 774 F.3d 1203, 1220–22 (9th Cir. 2014), *vacated en banc*, 828 F. 3d 1143 (9th Cir. 2016).

accident (the source of the TBI) had an effect on the defendant's personality, "it hardly changed an altar boy into a callous criminal."¹⁸⁴

Simply put, most cases downplay the significance of TBI as a potential mitigator in death penalty litigation. By way of example, in *Long v. State*,¹⁸⁵ the court held that the execution of a prisoner was not cruel and unusual punishment despite his traumatic brain injury, stressing that "[n]one of the scientific advances at issue establishes that traumatic brain injury or temporal lobe epilepsy is the sole cause of offenses such as those that Long committed against the victim in this case"¹⁸⁶

In other cases, the jury chose simply to ignore the evidence. Consider the astonishing case of *Jackson v. State*.¹⁸⁷ The *Jackson* court denied defendant's petition to vacate conviction in a case in which counsel had called seven mitigation witnesses including a psychologist, the defendant's probation officer, the defendant's mother, and the defendant's sister, who was the mother of two of the defendant's victims.¹⁸⁸ All such witnesses testified to the defendant's remorse, anger disorder, traumatic brain injury, and low I.Q. and gave their opinion that defendant should be punished but not sentenced to death.¹⁸⁹

Consider also cases involving juveniles. In *Miller v. Alabama*,¹⁹⁰ the Supreme Court held that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁹¹ Researchers who studied ninety-four "*Miller* cases" in North Carolina noted that juvenile criminal defendants facing life without parole may rely on "applicable assessments regarding child trauma, sexual and physical abuse, neurological development, substance abuse, traumatic brain injury, and other conditions," which would uncover "essential" information about the presence of TBI.¹⁹²

184. *Mann v. Ryan*, 828 F. 3d 1143, 1161 (9th Cir. 2016).

185. 271 So. 3d 938 (Fla. 2019), *cert. denied sub nom.*, *Long v. Florida*, 139 S. Ct. 2635 (2019).

186. *Id.* at 943 (emphasis added).

187. 860 So. 2d 653 (Miss. 2003).

188. *Id.* at 669–70.

189. *Id.*

190. 567 U.S. 460 (2012).

191. *Id.* at 469–70.

192. Michael L. Perlin & Alison J. Lynch, "Some Mother's Child Has Gone Astray": *Neuroscientific Approaches to a Therapeutic Jurisprudence Model of Juvenile Sentencing*, 59 FAM. CT. REV. 478, 478 (2021); *see also id.* at 481 (citing Ben Finholt et al., *Juvenile Life Without Parole in North Carolina*, 110 J. CRIM. L. & CRIMINOLOGY 141, 147, 154–57, 168 (2020)) (discussing the findings of Finholt and his colleagues).

iv. *Competency to Be Executed*

Over a decade ago, in *Panetti v. Quarterman*, the United States Supreme Court held that a state may not execute a prisoner “whose mental illness prevents him from comprehending the reasons for the penalty or its implications” or is “unaware of the punishment they are about to suffer and why they are to suffer it.”¹⁹³ Panetti’s “severe, documented mental illness [was] the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced.”¹⁹⁴

Subsequent courts have *not* been sympathetic to *Panetti* claims made by defendants with traumatic brain injuries. Thus, in *State ex rel. Clayton v. Griffith*,¹⁹⁵ notwithstanding the fact that the defendant had a traumatic brain injury that resulted in the loss of twenty percent of his frontal lobe,¹⁹⁶ a sharply-split (4-3) state supreme court rejected the defendant’s *Panetti* argument, concluding that he failed to make a “threshold showing” that he lacked competence.¹⁹⁷ Importantly, the *Clayton* court held that *Atkins* did not apply to “conditions not recognized as intellectual disabilities under state law.”¹⁹⁸

Most courts have been unresponsive to TBI claims at this juncture of the proceedings. By way of example, the Florida Supreme Court denied a death row petitioner’s claim that the Eighth Amendment categorically exempts him from execution because he suffers from severe traumatic brain injury and severe mental illness.¹⁹⁹ Elsewhere, a federal court found that the defendant did not establish that there is a “national

193. 551 U.S. 930, 957 (2007). Panetti was grossly psychotic and had been hospitalized numerous times for serious psychiatric disorders. *Id.* at 936.

194. *Id.* at 960. On *Panetti*, see generally, Michael L. Perlin, “*Good and Bad, I Defined These Terms, Quite Clear No Doubt Somehow: Neuroimaging and Competency to be Executed After Panetti*,” 28 BEHAV. SCIS. & L. 671 (2010); PERLIN & CUCOLO, *supra* note 92, § 17-4.1.6, 17-88–17-96. One of the co-authors (MLP) is working with others on an article on how two federal circuits (the Fifth and the Ninth) have interpreted (or in many cases, misinterpreted) *Panetti*. See Michael L. Perlin et al., “*Insanity Is Smashing up Against My Soul: An Assessment of Competency-to-be-Executed Cases (after Panetti v. Quarterman) in the Fifth and Ninth Circuits*” (N.Y. L. Sch. Legal Stud., Research Paper No. 07/08-25, 2008).

195. *State ex rel. Clayton v. Griffith*, 457 S.W.3d 735 (Mo. 2015).

196. *See id.* at 754 (Stith, J., dissenting).

197. *Id.*

198. *Id.* at 753. *See also State ex rel. Barton v. Stange*, 597 S.W.3d 661, 663 (Mo. 2020) (relying on *Clayton* and rejecting defendant’s claim that he was not competent for execution under *Panetti* “because a traumatic brain injury gave him major neurocognitive disorder of sufficient severity that he meets [that] standard.”).

199. *Long v. State*, 271 So.3d 938, 947 (Fla.), *cert. denied*, 139 S. Ct. 2635 (2019). In a procedural decision, a defendant’s claim that he was incompetent to be executed because of his traumatic brain injury and schizophrenia was not ripe for judicial review, where no date had been set for his execution. *Roberts v. State*, 592 S.W.3d 675, 685 (Ark. 2020).

consensus against executing individuals who are criminally responsible and competent, even if they suffer from 'traumatic brain injury.'"²⁰⁰ Thus, "his motion for a categorical exemption from the death penalty due to such injury" was deemed to be "meritless."²⁰¹

There is at least one such case in which the defendant prevailed. There, in *Washington v. State*,²⁰² it was determined that the defendant was incompetent when he was tried and convicted by jury of capital murder; putting this defendant on trial violated his right to due process, where the defendant's IQ score of sixty-five satisfied criteria for a formal diagnosis of an intellectual and developmental disorder, and he was found to have an intellectual disability "attributable to, or was exacerbated by, multiple traumatic brain injuries . . ."²⁰³

v. *The Lisa Montgomery Case*

Consider these issues in the context of the Lisa Montgomery case.²⁰⁴ At the punishment phase, Montgomery's mental health experts testified that she suffered from a severe mental or emotional disturbance at the time of her offense, which substantially impaired her ability to appreciate the wrongfulness of her actions.²⁰⁵ "The jury unanimously found that the Government proved all statutory and non-statutory aggravating factors beyond a reasonable doubt, including that Montgomery committed her offense in an especially heinous or depraved manner in that the killing involved serious physical abuse to Stinnett."²⁰⁶

On the question of mitigation, the district court found that Dr. Gur's proffered testimony was irrelevant to the mitigating factors she had pled, and thus exercised its authority "to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of [her] offense."²⁰⁷ The appeals court highlighted the potential

200. *United States v. Sampson*, No. 01-10384-LTS, 2017 WL 3495703, at *33 (D. Mass. Aug. 15, 2017) (quoting *United States v. Sampson*, Cr. No. 01-10384-MLW, 2015 WL 7962394, at *13 (D. Mass. Dec. 2, 2015)).

201. *Id.* at *33.

202. 584 S.W.3d 929 (Tex. App. 2019).

203. *Id.* at 930.

204. See *Lisa Montgomery*, *supra* note 6.

205. *Montgomery v. Barr*, No. 4:20-cv-01281-P, 2020 WL 7353711, at *3-4 (N.D. Tex. Dec. 15, 2020).

206. *Id.* at *4.

207. *United States v. Montgomery*, 635 F.3d 1074, 1092-93 (8th Cir. 2011) (alteration in original) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 n. 12 (1978) (plurality opinion) (internal quotation marks omitted)). The Eighth Circuit noted that "[u]nder the Federal Death Penalty Act's low threshold for admissibility, Dr. Gur's interpretation of the PET scan was arguably admissible." *Id.* at 1092. Yet "[e]ven if we conclude that the district court

significance of brain imaging scans, but nevertheless supported the exclusion from evidence.²⁰⁸ Even though the jury heard mitigation testimony from other defense experts, as well as from Montgomery’s treating psychiatrist about Montgomery’s background and psychiatric diagnoses, the argument that the crime Montgomery committed had a direct link to her brain-based conditions was never presented to the jury.²⁰⁹ Thus, the significance of such evidence in preventing Montgomery’s death sentence will never be known.²¹⁰

In January 2021, Montgomery’s attorneys filed a petition for writ of habeas corpus and application for stay of execution,²¹¹ stating that the death penalty would violate the Eighth Amendment (as she was not competent for execution) and the Fifth Amendment (as she had not been given the opportunity to prove her incompetence).²¹² The petition referenced scientific imaging that showed her brain was damaged structurally and functionally.²¹³ Dr. George Woods, an expert in neuropsychiatry who evaluated Montgomery while on death row, stated that the kind of brain damage that she had affected her ability to have

erred, we cannot reverse or vacate a federal death sentence on account of an error that is harmless beyond a reasonable doubt.” *Id.* at 1091.

The citation to *Lockett* is nothing but bizarre. *Lockett* has been modified on this point and its holding has been significantly expanded by *Eddings v. Oklahoma*, 455 U.S. 104, 107–08, 114 (1982) (sentencing authority must consider *any* relevant mitigating evidence) and *Penry v. Lynaugh*, 492 U.S. 302, 343 (1989) (mitigating evidence relevant to moral culpability must be admitted). See *supra* text accompanying notes 154–61.

208. *Montgomery*, 635 F.3d at 1092 (quoting *Purkey*, 428 F.3d at 758) (“[A]lthough we recognize that a jury may be more likely to believe that someone suffers from a problem if its cause is explained, we nevertheless harbor no doubt that considering the minimal probative value of the evidence and the overwhelming evidence and jury findings of serious aggravating factors, its exclusion was harmless.”) (alteration in original).

209. *Id.* at 1091–93 (“The district court did not abuse its discretion in excluding the MRI evidence.”).

210. See *Gaudet & Marchant*, *supra* note 177, at 660–61 (noting that “neuroimaging data, when used appropriately, can help make evaluations and decisions [regarding criminal behavior] more informed, fair, and evidence-based.”).

211. Petition for Writ of Habeas Corpus, *Montgomery v. Warden*, No. 2:21-cv-00020-JPH-DLP (S.D. Ind. Jan. 12, 2021) (No. 21-1052).

212. *Id.* at 8, 68–69; see also *Madison v. Alabama* 139 S. Ct. 718, 731 (2019) (finding the Eighth Amendment did not prohibit executing a state prisoner who had been diagnosed with vascular dementia merely because he could not remember committing his crime); *Panetti v. Quarterman*, 551 U.S. 930, 958–59 (2007) (concluding that a prisoner must have a rational understanding of why he’s being executed); *Ford v. Wainwright*, 477 U.S. 399, 418 (1986) (barring the execution of an insane defendant, determining that he was entitled to a competency evaluation and an evidentiary hearing on this question).

213. Petition for Writ of Habeas Corpus, *supra* note 211, at 47, 51, 62–68.

accurate perceptions of reality.²¹⁴ He concluded: “In my professional opinion, which I hold to a reasonable degree of psychiatric certainty, Lisa Montgomery is unable to rationally understand the government’s rationale for her execution as required by *Ford v. Wainwright*, 477 U.S. 399 (1986).”²¹⁵ A stay was granted,²¹⁶ but the Supreme Court vacated the stay of execution without explanation.²¹⁷ Hours later, Montgomery was executed.²¹⁸

Montgomery’s execution reflects the Trump administration Department of Justice’s disregard for constitutional precedent barring the execution of persons with a mental illness and persons with an intellectual disability.²¹⁹ Justice Sotomayor echoed that sentiment in her dissent in *Higgs*:

214. *Id.* at 73, 76–77; George Woods, BERKELEY L., https://www.law.berkeley.edu/our-faculty/faculty-profiles/george-woods/#tab_profile (last visited Dec. 4, 2021).

215. Petition for Writ of Habeas Corpus, *supra* note 211, at 83. Also significant was the expert opinion on torture and mental illness by Dr. Katherine Porterfield, a clinical psychologist and leading expert on torture who also evaluated Montgomery while on death row. *Id.* at 69. Dr. Porterfield concluded:

Mrs. Montgomery[is currently unable to rationally understand the basis for her execution. My opinion is also based on my knowledge and experience as a psychologist who has worked with survivors of torture and other trauma for more than two decades, and the United States Supreme Court opinion in *Madison v. Alabama*, 139 S. Ct. 718 (2019).

Id. at 69.

216. *Montgomery v. Barr*, No. 20-cv-3261, 2020 WL 6799140, at *11 (D.D.C. Nov. 19, 2020) (granting preliminary injunction on clemency claim). On November 19, the district court granted petitioner’s motion in part, explaining that it would “stay Plaintiff’s execution—briefly—to permit [her attorneys] to recover from [COVID-19] and to have a short time to finish their work in supplementing Plaintiff’s placeholder petition for a reprieve or commutation of sentence.” *Id.* at *10; *see also* Brief for Respondent at 8, *Montgomery v. Rosen*, 141 S. Ct. 1144 (2021) (No. 20-922).

217. *See Rosen v. Montgomery*, 141 S. Ct. 1232, 1232 (2021) (mem.); *see also* *Montgomery v. Rosen*, No. 21-5001, 2021 WL 112524, at *1 (D.C. Cir. Jan. 11, 2021) (en banc); *United States v. Higgs*, 141 S. Ct. 645, 649 (2021) (Sotomayor, J., dissenting). Higgs was the final federal death row inmate executed during the Trump administration. *See* Elizabeth Bruenig, *The Government Has Not Explained How These Thirteen People Were Selected to Die*, N.Y. TIMES (Feb. 18, 2021), https://www.nytimes.com/2021/02/18/opinion/federal-death-penalty.html?campaign_id=39&emc=edit_ty_20210218&instance_id=27238&n1=opinion-today®i_id=57026281&segment_id=51882&te=1&user_id=2a04dec6ac07e810f6b2a92435b2c1fe (noting that during President Biden’s campaign, he promised to “work to pass legislation to eliminate the death penalty at the federal level, and incentivize states to follow the federal government’s example”).

218. *See Higgs*, 141 S. Ct. at 649.

219. *See, e.g., Atkins v. Virginia*, 536 U.S. 304 (2002), discussed *supra* text accompanying notes 153–54; *see also* Perlin et al., *supra* note 154; *see generally* Michael L. Perlin, “*Life Is in Mirrors, Death Disappears*”: *Giving Life to Atkins*, 33 N. MEX. L. REV. 315 (2003).

Lisa Montgomery likewise made a “substantial threshold showing” to the District Court that she was incompetent to be executed. . . . Based on expert evidence that Montgomery was experiencing a dissociative psychotic state, the District Court concluded that her “current mental state is so divorced from reality that she cannot rationally understand the government’s rationale for her execution.” . . . These findings . . . raised significant questions as to whether their executions comported with the Constitution. We will never have definitive answers to those questions because this Court sanctioned their executions anyway.²²⁰

Before leaving office, President Trump ramped up federal executions, breaking with a 130-year-old precedent of pausing executions amid a presidential transition. Holly Honderich, *In Trump’s Final Days, a Rush of Federal Executions*, BBC NEWS (Jan. 16, 2021), <https://www.bbc.com/news/world-us-canada-55236260>; see also *Higgs*, 141 S. Ct. at 647 (Sotomayor, J., dissenting) (“After seventeen years without a single federal execution, the Government has executed twelve people since July. They are Daniel Lee, Wesley Purkey, Dustin Honken, Lezmond Mitchell, Keith Nelson, William LeCroy Jr., Christopher Vialva, Orlando Hall, Brandon Bernard, Alfred Bourgeois, Lisa Montgomery, and, just last night, Corey Johnson. Today, Dustin Higgs will become the thirteenth. To put that in historical context, the Federal Government will have executed more than three times as many people in the last six months than it had in the previous six decades.”).

220. *Higgs*, 141 S. Ct. at 651–52. Justice Sotomayor also discussed two other contemporaneous executions: 1) that of Alfred Bourgeois, who was put to death on December 11, 2020, after an earlier execution date was stayed by a federal judge due to evidence that showed he had an intellectual disability; and 2) that of Corey Johnson, who was executed on January 14, 2021, after his legal team argued that he suffered from an intellectual disability related to physical and emotional abuse he experienced as a child. *Id.* at 649; Michael Tarm, *US Executes Louisiana Truck Driver Who Killed Daughter*, 2, AP NEWS (Dec. 11, 2020), <https://apnews.com/article/donald-trump-us-news-executions-terre-haute-indiana-32f7e296aba11d7d749bb996cffe623b>; Danielle Haynes & Darryl Coote, *U.S. Executes Corey Johnson for 1992 Murders*, UPI (Jan. 15, 2021, 1:26 AM), https://www.upi.com/Top_News/US/2021/01/14/US-executes-Corey-Johnson-for-1992-murders/1541610648701/.

Relying on the terms of the Federal Death Penalty Act, 18 U.S.C. § 3596(c), Justice Sotomayor noted that “[a] sentence of death shall not be carried out upon a person who is [intellectually disabled][and that both] Alfred Bourgeois and Corey Johnson presented substantial evidence that they were intellectually disabled under modern diagnostic standards.” *Higgs*, 141 S. Ct. at 649 (Sotomayor, J., dissenting). She reiterated the question of whether Montgomery’s execution and others comported with the Constitution, given that “the district courts concluded they were likely to succeed in showing that they had no ‘rational understanding’ of why the State want[ed] to execute [them].” *Id.* at 651. The answer, Justice Sotomayor concluded, was forever lost due to the Court’s sanction of the executions. *Id.* at 652.

vi. *Conclusion*

In short, TBI has great potential relevance to all three of the major death penalty questions addressed here (dangerousness, mitigation, and competency to be executed), a relevance reflected startlingly clearly in the case of Lisa Montgomery. Although TBI is *occasionally* considered carefully,²²¹ at this point in time, the majority of courts have not taken it remotely seriously enough. The hiding-in-plain-view issue to which we must turn next is the extent to which counsel “gets” the importance of these issues.²²²

III. ADEQUACY OF COUNSEL

No matter which substantive aspect of criminal procedure/law we look at, there is one constant: the adequacy/effectiveness of counsel is globally the single most important issue to consider.²²³

The burden to assure a fair trial “must be placed on the advocate and, particularly, on defense counsel.”²²⁴ The Supreme Court’s standard in *Strickland v. Washington*²²⁵ governs the question of adequacy of counsel in criminal trials.²²⁶ “In its Sixth Amendment analysis, the Court acknowledged that simply assigning a lawyer to a defendant is not constitutionally adequate per se; rather, that lawyer must provide ‘effective assistance of counsel,’ requiring simply that counsel’s efforts be ‘reasonable’ under the circumstances.”²²⁷ The benchmark for judging an

221. For rare examples, see *Georgia Dep’t of Human Resources v. Drust*, 448 S.E.2d 364 (Ga. 1994) (incompetency), discussed *supra* in text accompanying notes 86–91; *Washington v. State*, 584 S.W.3d 929 (Tex. App. 2019) (incompetency; defendant had been tried for capital murder but was sentenced to life without parole), discussed *supra* text accompanying notes 203–04; and *Ward v. Sternes*, 209 F. Supp. 2d 950 (C.D. Ill. 2002) (defendant’s right to testify; defendant had been sentenced to a 40 year term in prison), discussed *supra* in text accompanying notes 79–80.

222. See *infra* Section III.

223. See Michael L. Perlin, Talia R. Harmon & Sarah Chatt, “A World of Steel-Eyed Death”: An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty, 53 U. MICH. J.L. REFORM 261, 265 (2019); see also MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 123–38 (2013).

224. Michael L. Perlin & Heather Ellis Cucolo, “Something’s Happening Here/But You Don’t Know What It Is”: How Jurors (Mis)Construe Autism in the Criminal Trial Process, 82 U. PITT. L. REV. 585, 597 (2021).

225. 466 U.S. 668 (1984).

226. See *id.* at 687–88.

227. Perlin & Cucolo, *supra* note 224, at 597; see also *Strickland*, 466 U.S. at 689 (“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the

ineffectiveness claim is simply “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”²²⁸ For this heightened standard to be met, “counsel must use every resource and tool at his [or her] disposal in order to be effective and offer ethical and rigorous representation.”²²⁹ Moreover, “[c]ounsel must seek out and have access to expert instruction and opinion on the psychiatric, social, and political elements of each case—skills that are most likely beyond most attorneys’ schooling and legal education.”²³⁰ At the very least, counsel in cases with issues of TBI “must demonstrate a familiarity with both the clinical diagnosis and the societal perceptions” of such persons.²³¹

In a recent article, one of the co-authors (MLP) and two other colleagues looked at all Fifth Circuit cases involving defendants with mental disabilities sentenced to death and concluded:

The story of how the Fifth Circuit has dealt with *Strickland* appeals in cases involving defendants with mental disabilities facing the death penalty is bizarre and frightening. In virtually all cases, *Strickland* errors—often egregious errors—were ignored, and in over a third of the cases in which they were acknowledged, defense counsel had confessed error.²³²

Importantly, *Strickland* is merely the constitutional standard; however, the ethical rules that govern attorney conduct do not seem to

presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”) (citation omitted).

228. *Strickland*, 466 U.S. at 686. One of us (MLP) critiques this standard extensively in PERLIN, *supra* note 223, at 123–38. On how this standard is “pallid,” see, for example, Heather Ellis Cucolo & Michael L. Perlin, “Far from the Turbulent Space”: *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J.L. & SOC. CHANGE 125 at 132 (2015).

229. Perlin & Cucolo, *supra* note 224, at 598 (quoting Cucolo & Perlin, *supra* note 228, at 158).

230. *Id.*

231. *Id.* (discussing the parallel misperceptions in cases involving defendants with Autism Spectrum Disorder); see John Blume & Pamela Blume Leonard, *Capital Cases*, CHAMPION 63 (Nov. 2000) (“[D]efense counsel must understand the wide range of mental health issues relevant to criminal cases, recognize and identify the multitude of symptoms that may be exhibited by our clients, and be familiar with how mental health experts arrive at diagnoses and determine how the client’s mental illness influenced his behavior at the time of the offense.”).

232. Perlin, Harmon & Chatt, *supra* note 223, at 308; “Regularly, this Court affirmed convictions (in multiple cases leading to sanctioned executions) in cases where counsel introduced no mitigating evidence, failed to retain mental health experts, and failed to read mental health records. In the aggregate, the Fifth Circuit regularly and consistently mocked the idea of adequate and effective counsel.” *Id.*

fare much better in holding attorneys to a high standard of legal representation.²³³

The American Bar Association (“ABA”) is the main body responsible for monitoring the legal community.²³⁴ This oversight of organizational ethics and the concomitant policing within the legal profession critically assures that attorneys remain diligent in their duties and responsibilities.²³⁵ Thus, the ABA and state bar associations have promulgated ethical rules to standardize attorney behavior and define an attorney’s duties to her clients.²³⁶

Under *Strickland*, “breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.”²³⁷ The burden to prevail on a *Strickland* claim is high because “[j]udicial scrutiny of counsel’s performance must be highly deferential,” and because “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”²³⁸ The *objectively reasonable* standard of *Strickland* looks to “prevailing professional norms.”²³⁹ With regard to criminal practice, the ABA *did* promulgate standards specifically for criminal defense attorneys: the Criminal Justice Standards for the Defense Function (“Standards”).²⁴⁰ These Standards “describe ‘best practices,’ and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a

233. See generally Heather Ellis Cucolo, *The Culpability of Legal Ethics in Failing to Bolster the Shortcomings of Strickland v. Washington*, in JUSTICE OUTSOURCED: THE THERAPEUTIC JURISPRUDENCE IMPLICATIONS OF JUDICIAL DECISION-MAKING BY NON-JUDICIAL OFFICERS (Michael L. Perlin & Kelly Frailing eds. forthcoming 2021) (manuscript in progress).

234. *About Us*, AM. BAR ASS’N, https://www.americanbar.org/about_the_aba/ (last visited Dec. 4, 2021). On the ABA’s role in capital cases, see Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. PITT. L. REV. 521, 527–28 (2005).

235. See Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 956–57 (1995).

236. *About Us*, *supra* note 234. For further information regarding state bar associations, see STATE BAR ASS’NS, <http://www.statebarassociations.org/> (last visited Dec. 4, 2021). Although each state is free to adopt their own code of professional conduct, almost all states have chosen to incorporate the ABA version. Only California has not adopted the Model Rules of Professional Conduct. See *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html.

237. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986).

238. *Strickland v. Washington*, 466 U.S. 669, 689 (1984).

239. *Id.* at 688.

240. AM. BAR ASS’N, CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION (2017).

standard of care for civil liability.”²⁴¹ The *Strickland* Court referenced the Standards as reflecting “[p]revailing norms of practice[,]” but emphasized that they are only *guides* in a determination of what is reasonable.²⁴²

Courts continue to use and cite the Standards in determining whether defense counsel has provided effective assistance.²⁴³ Although, the procedure to hold lawyers accountable under the Model Rules/Standards can be drastically different from the procedure in *Strickland*.²⁴⁴ For instance, in some states, the standard of proof at a disciplinary hearing may be higher. By way of example, in Arizona the defendant must establish that a constitutional defect has occurred by a preponderance of the evidence; at that point, the state has the burden of proving that the defect was harmless beyond a reasonable doubt.²⁴⁵ But Arizona’s grounds for discipline require bar counsel to establish allegations by clear and convincing evidence.²⁴⁶ Thus, if a defendant is unsuccessful in meeting her burden on a *Strickland* ineffective assistance of counsel claim, she will most likely be unable to meet the burden of showing that her attorney’s conduct fell below the “prevailing norms of practice” as defined within the Model Rules and Standards.²⁴⁷

Of course, questions of adequacy of counsel must be considered in the context of those factors that contaminate all of criminal law/mental disability law practice:²⁴⁸

241. *Id.* § 4-1.1(b).

242. *Strickland*, 466 U.S. at 688.

243. See Martin Marcus, *The Making of the ABA Criminal Justice Standards—Forty Years of Excellence*, CRIM. JUST. 10, 14 (Winter 2009).

244. See AM. BAR ASS’N, CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION (2017); *Strickland*, 466 U.S. at 688.

245. ARIZ. R. CRIM. P. 33.13(c).

246. *In re Wolfram*, 847 P.2d 94, 98 n.4 (Ariz. 1993).

247. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). *But see In re Warren*, 321 F. App’x 369, 370 (5th Cir. 2009) (sanctions issued after relief granted on ineffective assistance of counsel grounds).

248. See Perlin & Weinstein, *supra* note 3, at 79–80.

- The ways that sanism²⁴⁹ and pretextuality²⁵⁰ permeate the legal process;
- The ways that fact-finders (often unconsciously) rely on heuristic reasoning²⁵¹ and (false) “ordinary common sense” in their fact-finding (both judges and jurors),²⁵² and

249. See Perlin, Harmon & Chatt, *supra* note 223, at 279 (footnotes omitted) (“Sanism dominates the entire representational process in cases involving individuals with mental disabilities, and it reflects what civil rights lawyer Florynce Kennedy has characterized as the ‘pathology of oppression.’ It is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) racism, sexism, homophobia, and ethnic bigotry. Sanism is ‘largely invisible and largely socially acceptable.’ It ‘infects both our jurisprudence and our lawyering practices . . . [and is] based predominantly upon stereotype, myth, superstition, and deindividualization,’ in ‘unconscious response to events both in everyday life and in the legal process.’ Its ‘corrosive effects have warped all aspects of the criminal process.’”).

250. See *id.* at 280 (footnotes omitted) (“Pretextuality describes the ways in which courts accept testimonial dishonesty—especially by expert witnesses—and engage similarly in dishonest (and frequently meretricious) decision-making. This phenomenon is ‘especially poisonous where courts accept witness testimony that shows a “high propensity to purposely distort their testimony in order to achieve desired ends.” It ‘breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.’”).

251. Heuristics refers to a cognitive psychology construct that describes the implicit thinking devices that individuals use to simplify complex, information-processing tasks. Heather Ellis Cucolo & Michael L. Perlin, “*They’re Planting Stories in the Press: The Impact of Media Distortions on Sex Offender Law and Policy*,” 3 U. DENV. CRIM. L. REV. 185, 212 (2013). The use of such heuristics frequently leads to distorted and systematically erroneous decisions, and it leads decision-makers to ignore or misuse items of rationally useful information. *Id.* Judges thus focus on information that confirms their preconceptions (i.e., confirmation bias), to recall vivid and emotionally charged aspects of cases (i.e., the availability heuristic), and to interpret information that reinforces the status quo as legitimate (i.e., system justification biases). Eden B. King, *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCH. PUB. POL’Y & L. 54, 58 (2011); see also John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCH. 1 (1994); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCH. 207 (1973). Especially pernicious is the “vividness” heuristic, through which “one single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.” Perlin, *Borderline*, *supra* note 97, at 1417. The use of these heuristics blinds us “to the ‘gray areas’ of human behavior.” Michael L. Perlin, “*She Breaks Just Like a Little Girl: Neonaticide, the Insanity Defense, and the Irrelevance of “Ordinary Common Sense,”*” 10 WM. & MARY J. WOMEN & L. 1, 27 (2003); see generally Perlin, Harmon & Chatt, *supra* note 223, at 280–81.

252. OCS is a powerful unconscious animator of legal decision making that reflects idiosyncratic, reactive decision-making, and is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities. See Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737–38 (1988) (OCS exemplified by the attitude of “What I know is ‘self evident’; it is ‘what everybody knows.’”); Michael L. Perlin, *Psychodynamics and the*

- The frequent failure of counsel to grasp the textures of all aspects of the forensic mental health process (competency, insanity, involuntary medication issues, sentencing, the death penalty).²⁵³

Strickland has been raised in over 20 reported cases involving defendants with TBI, but it has rarely been found to require reversal or remand. In one case, the court found that, even if a TBI was present, the defendant did not demonstrate that it “affected his cases[,]” thus reflecting a lack of prejudice under *Strickland*.²⁵⁴ In another case, the court found that trial counsel’s decision to forgo a diminished mental capacity defense (where, in a report to counsel an expert had concluded that, because of TBI, the defendant “was unable to inhibit his impulses, appreciate the criminality of his actions and conform his conduct to the requirements of the law” at the time of the crime) was not based upon an inadequate investigation and was not unreasonable under the circumstances.²⁵⁵

Other cases similarly ignore the *Strickland* mandate. Thus, where the defendant alleged that counsel was ineffective for failing to raise concerns to the court during the change of plea hearing about the defendant’s mental state or history of traumatic brain injury, that claim failed because the defendant offered no evidence to suggest that, had he more fully understood the waiver, he would have decided not to enter the guilty plea or, alternatively, that he could have negotiated different terms.²⁵⁶ And, counsel’s failure to raise the defendant’s alleged inability and incompetence to waive his *Miranda* rights during police transport

Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning, 69 NEB. L. REV. 3, 21, 29 (1990).

OCS presupposes two “self-evident” truths: first, everyone knows how to assess an individual’s behavior; and second, everyone knows when to blame someone for doing wrong. Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5, 17 (1996). OCS is self-referential and non-reflective; “I see it that way, therefore everyone sees it that way; I see it that way, therefore that’s the way it is.” Perlin & Weinstein, *supra* note 3, at 88. OCS is supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information. Michael L. Perlin & Heather Ellis Cucolo, “*Tolling for the Aching Ones Whose Wounds Cannot Be Nursed: The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law*,” 20 J. GENDER, RACE & JUST. 431, 453 (2017); *see generally* Perlin & Cucolo, *supra* note 224, at 606–09 (discussing OCS).

253. *See, e.g.*, PERLIN, *supra* note 223, at 123–38.

254. *Soto v. Ryan*, No. CV-14-02562, 2015 WL 10761165, at *8 (D. Ariz. Dec. 24, 2015).

255. *Morgan v. Joyner*, No. 1:09cv416, 2016 WL 4703977, at *8 (W.D.N.C. Sep. 7, 2016).

256. *United States v. Fields*, No. 08-CR-11-TLS, 2013 WL 1410231, at *7 (N.D. Ind. Apr. 8, 2013).

due to the defendant's brain injury did not constitute deficient performance.²⁵⁷

Perhaps the most jaw-dropping case of this cohort is *Elmore v. Sinclair*,²⁵⁸ where the astonishing facts detail that:

Counsel not only failed to undertake any brain damage investigation, but offered no explanation for this omission other than inexperience.²⁵⁹ Counsel had never represented a death penalty defendant prior to Elmore, and he had never retained a neuropsychologist or neurologist in his previous criminal defense work. He testified that “unless identification of signs or symptoms of traumatic brain injury were covered” in one of the death penalty seminars that he attended, “he did not recall ever having received such training.”²⁶⁰

In one case where a federal appellate court panel *had* found a *Strickland* violation, in a case where it had made a finding of fact that “undisputed brain damage resulting from a traumatic brain injury is inherently mitigating[,]” and that failure to present this to the trial court violated *Strickland*,²⁶¹ the *en banc* court reversed and reinstated the defendant's death penalty sentence, finding that the defendant failed to demonstrate prejudice under *Strickland*.²⁶² But perhaps the most stupefying case of all in this context is *Ansteensen v. Davis*, as discussed previously,²⁶³ in which trial counsel had told defendant that “a plea of not guilty by reason of insanity (NGRI) based on his traumatic brain injury was ‘not allowed by law.’”²⁶⁴

257. *Commonwealth v. Watkins*, 108 A.3d 652, 676 (Pa. 2014). See, for example, *McMillan v. State*, 258 So. 3d 1154, 1177 (Ala. Crim. App. 2017), where defense counsel was found to not be ineffective for failing to investigate capital murder defendant's alleged neurological disorders of fetal alcohol syndrome and traumatic brain injury; defendant had not pled in either his original post-conviction petition or his amended petition that he actually suffered from fetal alcohol syndrome or that he had been diagnosed with traumatic brain injury.

258. *Elmore v. Sinclair*, 799 F.3d 1238 (9th Cir. 2015).

259. *Id.* at 1255.

260. *Id.* at 1255, n.2 (Hurwitz, C.J., concurring).

261. *Evans v. Sec'y, Dept. of Corrs.*, 681 F.3d 1241, 1269 (11th Cir. 2012).

262. *Evans v. Sec'y, Dept. of Corrs.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (*en banc*); see generally Deborah W. Denno, *How Prosecutors and Defense Attorneys Differ in Their Use of Neuroscience Evidence*, 85 *FORDHAM L. REV.* 453, 464–65 (2016) (discussing both decisions in *Evans*).

263. See *supra* text accompanying notes 101–102.

264. *Ansteensen v. Davis*, No. 11-CV-01099-BNB, 2011 WL 6153107, at *2 (D. Colo. Dec. 9, 2011).

The case of Lisa Montgomery is a further example of the dangers of inadequacy of counsel for persons with mental illness and TBI. It is also a further example of how difficult it is for a defendant to succeed on *any* ineffectiveness claim.²⁶⁵ Montgomery’s motion to vacate, set aside, or correct her sentence in which she asserted a variety of complaints about the performance of her trial counsel was continuously denied.²⁶⁶

At trial, Montgomery was represented by Frederick Duchardt, a Kansas City attorney.²⁶⁷ Duchardt’s track record was outlined in a recent article:²⁶⁸

265. See Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1221–22 (1999). The *Strickland* test has been extensively criticized, especially as it is applied in death penalty cases. See, e.g., William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 92–160 (1995) (*Strickland* has corrupted not only the evaluation of counsel’s performance but also other components of the criminal justice system such as the harmless error doctrine and ethical standards governing attorney conduct); Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485, 499–506, 486 (1995) (*Strickland* is largely to blame for the failure of the criminal justice system to ensure that the death penalty is constitutionally applied because *Strickland* ignored “the special nature of capital cases . . . and hindered the assurance of effective legal representation”); Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN L. REV. 461, 463 (1987) (*Strickland* does not ensure effective assistance of counsel to defendants at the punishment phase of death penalty cases); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1930–33 (1994) (*Strickland* imposes too high a standard). This Part builds on these criticisms by examining how the test for ineffective assistance of counsel interfaces with one aspect of a death penalty case—the failure to investigate and present mitigating evidence of childhood abuse.

266. The district court denied relief, the Eighth Circuit denied a Certificate of Appealability (Order, *Montgomery*, No. 17-1716), and the Supreme Court denied Montgomery’s petition for writ of certiorari. *Montgomery v. United States*, 140 S. Ct. 2820, 2820 (2020). The potential application of *Strickland v. Washington*, 466 U.S. 668 (1984) was not raised until 2015 in a motion to vacate, set aside, or correct a sentence pursuant to 28 U.S.C. § 2255. See *Montgomery v. United States*, No. 05-06002-CR-SJ-GAF, 2015 WL 13893079, at *1 (W.D. Mo. Dec. 21, 2015). The *Strickland* claim was rejected, “Movant was not denied effective assistance of counsel . . . nor was the attorney/client relationship unconstitutionally interfered with. Movant has failed to establish that a fraud on the Court occurred or that conflicts of interest denied her effective assistance of counsel.” *Id.* at *32. In addition, even though at trial the government’s experts described Montgomery as being a willing participant in the rapes by her stepfather which the prosecution referenced in closing, the district court held that “there was no prosecutorial misconduct or errors in the Government’s closing argument which would support relief.” *Id.*

267. See *Montgomery v. United States*, No. 05-06002-CR-SJ-GAF, 2015 WL 13893079, at *3 (W.D. Mo. Dec. 21, 2015) (Montgomery’s original attorneys stated they could not work together in her interest and requested to withdraw from the case. On May 12, 2006, Judge Maughmer granted the motion to withdraw and appointed Duchardt).

268. David Rose, *Death Row, The Lawyer Who Keeps Losing*, GUARDIAN (Nov. 24, 2016), <https://www.theguardian.com/world/2016/nov/24/death-row-the-lawyer-who-keeps-losing>.

Out of seven federal death trials, four of Duchardt's clients have received the death penalty, two have been handed life sentences and one has been acquitted after an appeal and a retrial. This tally means that Duchardt has had more clients sentenced to death in federal court than any other defen[s]e lawyer in America.²⁶⁹

According to David Rose, Duchardt visited Montgomery three times prior to her trial.²⁷⁰ Due to Montgomery's distrust of men, Duchardt instead sent his wife, who "had no experience of investigating death penalty cases[,] "to visit her in prison another 16 times."²⁷¹ On appeal it was discovered that "before her trial, neither the prosecution nor the defen[s]e had investigated the relationship between Montgomery's many symptoms and her appalling history. She had seemed to the jury impassive and unemotional, as if she bore no remorse. In fact, this was the result of powerful antipsychotic medication."²⁷²

269. *Id.* Duchardt also represented Wesley Purkey who was executed by the federal government along with Montgomery. *Id.*; see also Tigran W. Eldred, *Motivation Matters: Guideline 10.13 and Other Mechanisms for Preventing Lawyers from Surrendering to Self-Interest in Responding to Allegations of Ineffective Assistance in Death Penalty Cases*, 42 HOFSTRA L. REV. 473, 473–74, 477 (2013) (discussing ineffective assistance of counsel in the Purkey case).

270. Rose, *supra* note 268; see also Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271, 305 n.179 (2016) (discussing Perisha Wallace, *No Equal Justice for the Poor: Mississippi's Failed Attempt to Honor Right to Counsel Mandates*, 9 S.J. POL'Y & JUST. 81, 87 (2015) (providing the example of a defendant who remained in jail for over eleven months without receiving a single visit from a lawyer).

271. Rose, *supra* note 268. Duchardt's wife had no experience of investigating death penalty cases. *Id.* Her recent expertise was in horse therapy for autistic children. *Id.*

272. Rose, *supra* note 268. On the interplay between juror perception of remorse and the administration of antipsychotic medication to defendants facing the death penalty, see Perlin, *Merchants*, *supra* note 160, at 1530–31, discussing *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring), and the research reported in Geimer & Amsterdam, *supra* note 160.

On Duchardt's work in the Montgomery case, the author stated, Duchardt responded to Montgomery's appeal with an affidavit of more than 100 pages defending his conduct, insisting that "none of the issues raised" by her appeal lawyers "has merit". He added: "I have tried and prepared more than a dozen capital cases, and I have addressed complex mental health issues in many . . . My guess is that my credentials stack up as well as any capital case attorney or 'mitigation specialist' to be found. I know that my credentials are as good or better than those who have been relied upon as experts by Current Counsel for Ms[.] Montgomery."

Rose, *supra* note 268.

Duchardt’s initial plan was to claim that Lisa’s brother committed the murder and afterwards gave Lisa the baby. That strategy was abandoned once it was discovered that Lisa’s brother had an alibi.²⁷³ Montgomery’s appellate attorney, federal public defender Kelley Henry, explained in an interview with *Rolling Stone* magazine how Duchardt misunderstood and misinterpreted the information gathered from Lisa:

Lisa had described feeling as if another person was with her. That was a symptom. She was describing something called depersonalization — a symptom of trauma, and you feel like you’re outside yourself. She was giving them a symptom. And they decided that that symptom was truth. And then that was the mistake they just kept making with Lisa.²⁷⁴

Duchardt’s ultimate strategy at trial was not successful. He admitted that although his client was the killer, she was not guilty by reason of insanity because, he believed, she had been suffering from a phantom pregnancy, or pseudocyesis. Any defense proffered evidence supporting pseudocyesis was successfully excluded on the grounds that it had no scientific basis.²⁷⁵ Not only did Duchardt fail to secure the introduction of expert testimony on his defense claim of insanity, he was ineffective in using other witness testimony.²⁷⁶ David Kidwell Sr., Montgomery’s cousin and a deputy sheriff, had testimony to offer that Montgomery had “confided in him as a teenager, telling him that her stepfather and his friends raped her, beat her, and urinated on her afterward.”²⁷⁷ But Duchardt never offered that potentially mitigating testimony at trial.²⁷⁸ The question of whether Duchardt’s decision was strategic or due to a lack of diligence and competency was seemingly answered by Montgomery’s appellate attorney’s investigation into the case. In fact, when Kelley Henry took over the appellate case, she initially considered David Kidwell Sr.’s testimony from the original trial to be weak until she herself actually spoke with him:

[W]e interviewed him at a truck stop in Topeka, Kansas. And I mean, my jaw dropped to the floor. I couldn’t believe what he told us that Lisa had told him when she was 14 years old about these

273. See Murphy, *supra* note 173.

274. See *id.* (discussing Duchardt’s litigation strategies with Montgomery’s capital appellate attorney, Kelley Henry).

275. See Rose, *supra* note 268.

276. See Murphy, *supra* note 173.

277. *Id.*

278. See *id.*

gang rapes. And he was on the witness stand! And in his declaration, he told me, “It took me longer to take the oath than to give my testimony. I couldn’t believe they didn’t ask me any of these questions.” He thought they were gonna ask, and he was ready to get to give that testimony. They never asked him.²⁷⁹

As one article points out, “[t]he evidence that Lisa Montgomery was a victim as much as a perpetrator should have been overwhelming.”²⁸⁰

IV. ROLE OF EXPERTS

A. Introduction

We have previously considered the issue of expert testimony as directly related to the outcome of the Lisa Montgomery case, but to seriously consider cases in which persons with mental, intellectual, or neurological disabilities are at risk, we must take a deeper look into the use of experts in TBI cases. In each case involving defendants with TBI, these are questions that must be addressed:

- Has the trial court authentically complied with the dictates of *Ake v. Oklahoma*²⁸¹ and *McWilliams v. Dunn*²⁸² in providing appropriate expert assistance to indigent persons with such disabilities?
- Have the details and intricacies of what “traumatic brain injury” actually means been explained to the fact-finder by the expert, and have stereotypes based on false “ordinary common sense”²⁸³ been rebutted?

279. *Id.*

280. Rose, *supra* note 268. While being questioned by Montgomery’s appellate attorney, it was suggested that Duchardt,

“didn’t like mitigation specialists”, [but] he denied this, saying: “I don’t know where this comes from.” He refused to accept that pursuing the pseudocyesis line had been an error. As for the evidence of Montgomery’s appalling background, in Duchardt’s view, much of the research into this by other lawyers was “garbage”.

Id.; see also *supra* text accompanying notes 172–73.

281. 470 U.S. 68 (1985).

282. 137 S. Ct. 1790 (2017).

283. See *supra* note 253.

There is a stunning disconnect between the false “ordinary common sense” of fact-finders (both jurors and judges) and the valid and reliable scientific evidence that *should* inform decisions on the full range of questions that are raised in cases involving the forensic mental health systems—predictions of future dangerousness, competency and insanity determinations, sentencing mitigation in death penalty cases, and sexually violent predator commitments.²⁸⁴ This gains in significance because:

1. All of these disconnects are heightened in cases involving defendants with TBI.
2. Abetted by the misuse of “heuristic” reasoning (“the vividness effect,” “confirmatory bias,” and more),²⁸⁵ decisionmakers in such cases frequently “get it wrong” in ways that poison the criminal justice system.
3. Absent the presence of objective diagnostic imaging, lay and expert witnesses may provide the foundation to demonstrate an alteration of consciousness to prove traumatic brain injury.²⁸⁶ Whereas “[l]ay witnesses are key to describe and confirm the TBI victim’s before-and-after behavior and function[,]”²⁸⁷ the most important aspect of a criminal prosecution involving TBI likely will be the expert medical testimony.

One key question that must be considered is this: will such expert testimony be made available to the defendant? In *Ake v. Oklahoma*,²⁸⁸ the Court concluded that a “criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an

284. See, e.g., Perlin et al., *supra* note 224, at 284 (citing in part Ellen Byers, *Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?*, 57 ARK. L. REV. 447, 499 n.336 (2004)) (“[J]urors self-reflectively reject consideration of the sort of scientific evidence that must be relied on in efforts to demonstrate mental impairment as a basis for mitigation, as such evidence may be ‘beyond the understanding of jurors who rely on ordinary common sense in decision-making.’”).

285. See Perlin, *Deceived Me*, *supra* note 145, at 88.

286. Daniel S. Chamberlain, *Tacking the Concussion Case*, TRIAL, Aug. 2016, at 26, 30.

287. *Id.*

288. 470 U.S. 68 (1985).

effective defense.”²⁸⁹ Subsequently, in *McWilliams v. Dunn*,²⁹⁰ the Court built on *Ake*, holding that the defendant had the right to an expert to “translate these data [medical records, other doctors’ reports] into a legal strategy”²⁹¹ What is remarkable is the utter lack of caselaw on this precise question.²⁹²

B. Need for Multiple Experts

Elsewhere, one of the authors (MLP) has proposed that we must provide *two* experts in cases in which inaccuracy is likely (based often on improper reliance on heuristics), one to explain to the fact-finders why their “common sense” is fatally flawed, and one to provide an evaluation of the defendant in the context of the specific question before the court.²⁹³ The reality is that the public—this includes judges as well as jurors along with those whose knowledge base flows from TV news and Internet websites—is dead wrong about everything it thinks it knows about all of the issues that arise in cases involving defendants with TBI.²⁹⁴

Only the use of *multiple* experts can remediate this situation.²⁹⁵ A second expert could explain the roots of this disordered thought (on the part of the fact-finders), demonstrate to jurors how sanist pretexts dominate their thought processes, and illuminate why reliance on heuristics and false “ordinary common sense” is inappropriate in these cases, as they “distort our abilities to rationally consider information.”²⁹⁶ Without the sort of extra witness urged here, it is impossible for the fact finder to actually make a “sensible and educated determination”²⁹⁷ about the case in question. As two of the co-authors (MLP & AJL) have written: “Scientific discovery moves faster than the law, and it is critical to make sure that the legal system is given an opportunity to catch up, rather

289. *Id.* at 77.

290. 137 S. Ct. 1790 (2017).

291. *Id.* at 1800. It should be noted that *McWilliams* had suffered a traumatic brain injury as a child. See Louise Root, Comment, *The Key to Any Successful Relationship Is Communication: Lawyers and Doctors, Take Note*, 57 HOUSTON L. REV. 1135, 1153 (2020).

292. See *Elmore v. Shoop*, No. 1:07-CV-776, 2019 WL 1076858, at *2 (S.D. Ohio Mar. 7, 2019) (finding a prejudicial *Ake* violation where counsel failed to obtain the funds for, and secure the administration of, PET brain scan to adequately prepare defense case), *overruled in part on other grounds sub nom* by *Elmore v. Warden, Chillicothe Corr. Inst.*, No. 1:07-cv-775, 2019 WL 5704042 (S.D. Ohio Nov. 5, 2019).

293. See Perlin, *Deceived Me*, *supra* note 145, at 105–06.

294. Sarah Britto & Krystal E. Noga-Styron, *Media Consumption and Support for Capital Punishment*, 39 CRIM. JUST. REV. 81, 94–96 (2014).

295. See Perlin, *Deceived Me*, *supra* note 145, at 105–06.

296. *Id.* For more on how these stereotypes are conflated with stereotypes of race, gender, and ethnicity, see Perlin & Cucolo, *supra* note 224, at 453.

297. As mandated by *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985).

than risk allowing ‘junk science’ to influence how a defendant is treated.”²⁹⁸

The caselaw is, to be charitable, sparse. In *State v. Woodbury*,²⁹⁹ a registered nurse was qualified to testify as an expert regarding behavior of the defendant, who had a traumatic brain injury, at trial for driving under the influence of intoxicants (“DUII”), although the nurse never received any specialized training or education related to traumatic brain injuries, and had cared for or supervised the care of approximately 20 patients with a traumatic brain injury over ten years of working as a nurse.³⁰⁰ On the other hand, in *State v. Brown*,³⁰¹ a DUII case, an officer did not qualify as an expert to provide testimony about how a person with nystagmus from a traumatic brain injury will perform on a horizontal gaze nystagmus (“HGN”) test because:

- He “had no experience administering the HGN test to or otherwise evaluating people with traumatic brain injuries[;]”
- He “lacked any observational knowledge of whether people with traumatic brain injuries generally exhibit nystagmus and, if they do, whether they exhibit only some of the six ‘clues’ on the HGN test[;]” and
- “[H]e lacked knowledge of the physiology of nystagmus and lacked expertise in traumatic brain injuries or their symptoms.”³⁰²

In short, it is impossible to understand how the legal system deals with criminal defendants with TBI without a fully-textured consideration of questions related to access to qualified experts, in addition to the availability of effective counsel.³⁰³ The subsequent, and essential, question to be posed, then, is this: to what extent can therapeutic jurisprudence better inform legal practices to ensure that adequate counsel and qualified experts are provided to persons with TBI?

298. Perlin & Lynch, *supra* note 58, at 312.

299. 408 P.3d 267, 270 (Or. App. 2017).

300. *Id.* at 271.

301. 430 P.3d 160, 167–69 (Or. App. 2018).

302. *State v. Brown*, 430 P.3d 160, 162, 167–69 (Or. Ct. App. 2018); *see also* OR. R. EVID. 702; *supra* text accompanying notes 122–132 (discussing the Lisa Montgomery case and the failure to effectively submit evidence of Lisa’s PET and MRI results due to the unsupported testimony of Dr. Gur).

303. *See supra* Section III.

V. THERAPEUTIC JURISPRUDENCE

A. *Introduction*³⁰⁴

Therapeutic jurisprudence recognizes that, “as a therapeutic agent,” the law can have “therapeutic or anti-therapeutic consequences”³⁰⁵ It asks whether legal “rules, procedures, and [lawyers’] roles can or should be reshaped . . . to enhance their therapeutic potential, while not subordinating due process principles.”³⁰⁶ Professor David Wexler clearly identifies how the tension inherent in this inquiry must be resolved: the law’s “use [of] mental health information to improve therapeutic functioning [cannot] imping[e] upon justice concerns.”³⁰⁷ As one of the co-authors (MLP) has written elsewhere, “an inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”³⁰⁸ Therapeutic jurisprudence “look[s] at law as it actually impacts people’s lives,”³⁰⁹ and TJ supports “an ethic of care.”³¹⁰ It attempts to bring about healing and wellness,³¹¹ and to value psychological health.³¹²

304. This section is largely adapted from Michael L. Perlin, “*I’ve Got My Mind Made Up*”: *How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 93–95 (2017) [hereinafter Perlin, *Mind Made Up*]; see also Perlin & Lynch, *supra* note 58, at 353 n.169. Further, it distills Perlin’s work over the past 28 years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623, 623 (1993). See generally Michael L. Perlin, “*Have You Seen Dignity?*”: *The Story of the Development of Therapeutic Jurisprudence*, 27 N.Z. UNIVS. L. REV. 1135 (2017); Michael L. Perlin, “*Changing of the Guards*”: *David Wexler, Therapeutic Jurisprudence, and the Transformation of Legal Scholarship*, 63 INT’L J.L. & PSYCHIATRY 3 (2019).

305. Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009).

306. Michael L. Perlin, “*And My Best Friend, My Doctor/Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005).

307. David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

308. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000).

309. Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

310. Perlin, *Mind Made Up*, *supra* note 304, at 94 (quoting in part Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006)).

311. *Id.* (citing Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003)).

312. *Id.*

B. TJ and TBI

Consider specifically the relationship between the TBI-criminal procedure connection and TJ. Look first at questions of confessions. There is some significant literature about the relationship between criminal confessions and therapeutic jurisprudence. Professor David Wexler has emphasized that the fact of a confession does not end the inquiry into the application of TJ principles in a criminal case.³¹³ Professor Amy Ronner, by way of example, argues that “[t]herapeutic jurisprudence can also give us a new perspective on client confession and help dispel what [Professor Robert] Cochran has denominated the ‘authoritarian model,’ which impugns ‘client dignity’ and suffocates ‘moral growth.’”³¹⁴ But the impact of TBI specifically on the questions at hand has yet to be considered.

On incompetency to stand trial, two of the authors (MLP & AJL) have previously explored the therapeutic jurisprudence implications of this stage of the case, and have suggested a series of dialogues that a TJ-focused lawyer might have with her client to discuss the issues raised by a decision that seeks to invoke the TJ status.³¹⁵ Other scholars have similarly explored the connection between lawyers embracing therapeutic jurisprudence and this status.³¹⁶ Yet, until now, there has not been—to the best of our knowledge—any consideration of how a TJ-embracing lawyer might approach a criminal incompetency proceeding with a client with a traumatic brain injury.

On the question of insanity, one of the authors has written frequently about the potential ameliorative implications of TJ on all aspects of insanity defense policy,³¹⁷ and has specifically recommended that we

313. See David B. Wexler, *Lowering the Volume Through Legal Doctrine: A Promising Path for Therapeutic Jurisprudence Scholarship*, 3 FLA. COASTAL L.J. 123, 128–30 (2002).

314. Amy D. Ronner, *Dostoyevsky and the Therapeutic Jurisprudence Confession*, 40 J. MARSHALL L. REV. 41, 111 (2006) (quoting in part Robert F. Cochran, *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUSTON L. REV. 327, 380 (1998)).

315. See, e.g., Perlin & Lynch, *supra* note 3, at 318–20 (discussing Michael L. Perlin, “Too Stubborn To Ever Be Governed by Enforced Insanity”: *Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases*, 33 INT’L J.L. & PSYCHIATRY 475, 477–78 (2010)).

316. See, e.g., Keri A. Gould, *Therapeutic Jurisprudence and the Arraignment Process: The Defense Attorney’s Dilemma: Whether to Request a Competency Evaluation?*, in MENTAL HEALTH LAW AND PRACTICE THROUGH THE LIFE CYCLE 67 (S. Verdun-Jones & M. Layton eds., 1994); David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 279–80 (1993).

317. See, e.g., Michael L. Perlin et al., “On Desolation Row”: *The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means to All of Us*, 24 TEX. J. CIV. LIBERTIES & CIV. RTS. 59, 109–11 (2018); Michael L. Perlin, “God Said to Abraham/Kill Me a Son”: *Why the Insanity Defense and the Incompetency Status Are*

“rigorously apply therapeutic jurisprudence principles to each aspect of the insanity defense.”³¹⁸ The debacle of Lisa Montgomery’s proffered insanity defense should be as clear evidence of this need as one can imagine.

The relationship between TJ and the intersection between TBI and mitigation should be clear. We know that sentencing and mitigation trainings offered nationwide by the National Association of Sentencing Advocates are grounded in the core principles of therapeutic jurisprudence.³¹⁹ Professor Kristine Huskie has looked carefully at the relationship between TBI and the practices of Veteran Courts,³²⁰ one of the types of problem-solving courts premised, in large part, on therapeutic jurisprudence values.³²¹ David Wexler, one of the founders of TJ, discusses the importance of gathering information about mitigation and rehabilitative options in criminal defense practice.³²² Although not specifically denominated as a “TJ piece,” Rebecca Covarrubias’s admonition to defense counsel in death penalty cases—to “gather as much information as possible about the defendant’s history including police reports, medical records, birth records, pediatric records and hospital records”³²³—sets out a TJ blueprint for the representation of defendants with TBI.

In the aggregate, the recognition of a physical component of the illness of the cohort of defendants whom we are writing about here could help to comport with the TJ principles of dignity, voice, and validation. What we face is especially troubling for these individuals, since, again,

Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence, 54 AM. CRIM. L. REV. 477, 512–13 (2017); Perlin, *supra* note 306, at 913–14.

318. PERLIN, *supra* note 97, at 443.

319. Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem-Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve*, 17 SAINT THOMAS L. REV. 781, 788–89 (2005).

320. See, e.g., Kristine A. Huskey, *Reconceptualizing “the Crime” in Veterans Treatment Courts*, 27 FED. SENT’G REP. 178 (2015); Kristine A. Huskey, *Justice for Veterans: Does Theory Matter?*, 59 ARIZ. L. REV. 697 (2017).

321. Julie Marie Baldwin, *Investigating the Programmatic Attack: A National Survey of Veterans Treatment Courts*, 105 J. CRIM. L. & CRIMINOLOGY 705, 713 (2015) (citing Michael L. Perlin, “John Brown Went Off to War”: *Considering Veterans Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445 (2013)).

322. REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (David B. Wexler ed., 2008), as discussed in Beth Caldwell, *Appealing to Empathy: Counsel’s Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 392 n.4 (2012).

323. Rebecca J. Covarrubias, *Lives in Defense Counsel’s Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR 413, 467 (2009), as discussed in PERLIN, *supra* note 223, at 136–37.

“the recognition of a physical component of their disability could help to comport with [these] therapeutic jurisprudence principles of dignity, voice and validation.”³²⁴ The ability to adequately present evidence to represent physical illness is generally available to individuals who have a physical difference; it can even be used as mitigation evidence.³²⁵ The opportunity for individuals with mental illness and brain injury, who are already facing additional discrimination and bias,³²⁶ to have another avenue through which to present legitimate evidence should be granted in the appropriate cases. If used correctly, neuroimaging evidence could serve as a valuable tool for implementing therapeutic jurisprudence principles in these cases.³²⁷

It is important to consider how therapeutic jurisprudence can be used as a tool to remediate judicial stereotyping of defendants with traumatic brain injury. In a series of articles, Professor Colleen Berryessa has shown the impact of such stereotyping in cases involving defendants with mental illness,³²⁸ with dementia,³²⁹ and with autism,³³⁰ and has demonstrated how judges’ false “ordinary common sense”³³¹ has a significant impact on their decision-making processes.³³² Further, she has argued that the therapeutic jurisprudence literature “may also be instrumental in crafting ‘therapeutic interventions’ that promote judges’

324. Perlin & Lynch, *supra* note 58, at 354.

325. *See id.* at 354 n.173; e.g., FLA. STAT. ANN. § 921.0026(2)(d) (West 2012) (treating a situation in which “[t]he defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment” as a mitigating circumstance).

326. Perlin & Lynch, *supra* note 58, at 355. For information on stigma and sanism, see also, e.g., Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431 (1995); Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of “Mitigating” Mental Disability Evidence*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 239, 241 (1994).

327. Perlin & Lynch, *supra* note 58, at 355.

328. *See* Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 L. & SOC’Y REV. 202 (2019) [hereinafter Berryessa, *Judicial Stereotyping*]; Colleen M. Berryessa, *Judges’ Views on Evidence of Genetic Contributions to Mental Disorders in Court*, 27 J. FORENSIC PSYCHIATRY & PSYCH. 586 (2016).

329. *See* Colleen M. Berryessa, *Extralegal Punishment Factors and Judges’ Normative Judgments of Moral Responsibility of bv FTD Patients*, 7 AJOB NEUROSCI. 216 (2016).

330. Colleen M. Berryessa, *Judiciary Views on Criminal Behaviour and Intention of Offenders with High-Functioning Autism*, 5 J. INTELL. DISABILITIES & OFFENDING BEHAV. 97 (2014) [hereinafter Berryessa, *Judiciary Views*]; Colleen M. Berryessa, *Judicial Perceptions of Media Portrayals of Offenders with High Functioning Autistic Spectrum Disorders*, 3 INT’L J. CRIMINOLOGY & SOCIO. 46 (2014).

331. *See supra* text accompanying notes 252–53.

332. Berryessa, *Judiciary Views*, *supra* note 330, at 103 (stating that judges interviewed believed that the behavior of persons with autism was not under their control).

cognitive awareness related to . . . biases and how such biases in cases involving mental disorders may result in anti-therapeutic outcomes by hindering an offender's potential treatment opportunities."³³³

It is also essential to consider the relationship between therapeutic jurisprudence and the quality of counsel in death penalty cases, an issue that is magnified significantly in cases involving defendants with TBI, where, as we have sought to make clear, counsel is near-globally ineffective. As one of the co-authors (MLP) said many years ago, "any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to insure [sic] that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective."³³⁴ The examples we discuss here—not just the case of Lisa Montgomery but others as well—make crystal-clear how our system has utterly failed from a TJ perspective.

There has been virtually no scholarship to this point on the precise issue of TJ and defendants with TBI, save one piece by Professor Evan Seamone, applying the principles of TJ to the punishment of active-duty military offenders with PTSD and TBI who exist in a disciplinary structure that is distinct from the civilian justice system and serves very different ends.³³⁵ We hope that this piece spurs other academics and practitioners to think about the integration of these issues.

CONCLUSION

Persons with TBI in the criminal justice system are at a serious disadvantage and are significantly at risk of being denied necessary constitutional and human rights. A lack of understanding on many fronts—including the basics of TBI, how it differs from the more-typically-seen mental illness, how it should be assessed, presented and effectively argued before a jury, and how clients with TBI can be assisted by TJ principles—contributes to poor outcomes for individuals with TBI facing serious charges. Lisa Montgomery's case is, sadly, not an exception.³³⁶

333. Berryessa, *Judicial Stereotyping*, *supra* note 328, at 209.

334. Michael L. Perlin, "The Executioner's Face Is Always Well-Hidden": *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y. L. SCH. L. REV. 201, 235 (1996); *see also* Perlin et al., *supra* note 225, at 305–07.

335. Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 29 (2011) (discussing TJ in the context of veterans' treatment courts).

336. *Id.*

As we have sought to demonstrate, few judges or defense counsel have any sense of what TBI means and its potential impact on the defendant’s actions. The case law—whether on pre-trial questions, matters of competency or insanity, or the death penalty—starkly demonstrates the failure of all relevant parties to “get” the meaning and impact of TBI on the defendant’s subsequent criminal behavior.

As we have indicated, courts are rarely responsive to *Strickland v. Washington*-based effectiveness-of-counsel claims,³³⁷ and this lack of responsiveness is enhanced in cases involving defendants with TBI. Also, it is clear from the cases we discuss that counsel needs to engage experts—perhaps multiple experts—who can better educate the jury as to the meaning of TBI and how it has affected defendants’ actions.³³⁸ The case of Lisa Montgomery is a jarring example of how everything can (and did) go wrong in a death penalty case involving a defendant with TBI.³³⁹

We believe that if the principles of TJ were to be embraced, we would take a major step toward rectifying the imbalances inherent in the current system. We agree with Professor Amy Ronner and Judge Juan Ramirez that “the right to counsel is . . . the core of therapeutic jurisprudence”³⁴⁰ The lack of adequate counsel at Lisa Montgomery’s trial demonstrates that her trial was, sadly, a charade.³⁴¹ Many years ago, one of the co-authors (MLP) wrote: “Any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to ensure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective.”³⁴² The case of Lisa Montgomery—and many of the other cases we discuss here—similarly fail “miserably.”³⁴³

337. See *supra* notes 255–66 accompanying text.

338. For more on the role of the expert as an educator, see Michael L. Perlin, “Justice’s Beautiful Face”: Bob Sadoff and the Redemptive Promise of Therapeutic Jurisprudence, 40 J. PSYCHIATRY & L. 265, 274 (2012) (discussing the late Dr. Robert L. Sadoff).

339. See generally *United States v. Montgomery*, 635 F.3d 1074 (8th Cir. 2011).

340. Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment*, 41 CAL. W.L. REV. 103, 119 (2004), as quoted in Perlin, *Merchants*, *supra* note 160, at 1542.

341. See, e.g., Perlin, *supra* note 82, at 78–80; see also *Lisa Montgomery*, *supra* note 6.

342. Perlin, *supra* note 323, at 235.

343. See *Lisa Montgomery*, *supra* note 6.

The song from which the first part of our title is drawn is a song about “dwelling in the pain,”³⁴⁴ and perhaps, a song “about death[.]”³⁴⁵ An analysis of the lyric in question phrases it this way:

Darkness, misery and pain is all around him and no matter how hard he tortures his mind, he is unable to understand or to come to terms with all this misery and hardships he encounters in this world. He has no alternative but to walk that lonesome valley, the dark pathways of life which are so puzzling and uncertain.³⁴⁶

Those about whom we write—persons with traumatic brain injury enmeshed in the criminal trial process—often, in Attwood’s phrase, “[can’t] sort it . . . out[.]” and continue to “dwell[] in . . . pain[.]”³⁴⁷ By way of stark example, Lisa Montgomery was never able to “come to terms with all this misery and hardships” she faced in the world.³⁴⁸ As we noted above, a lawyer representing a defendant with TBI must exhibit—per Professor Richard Thomas’s commentary on the song from which our title lyric is drawn—a “deep sense of humanity”³⁴⁹ We hope that, if our recommendations here are taken seriously, lawyers (and courts) will exhibit this “deep sense of humanity[.]”³⁵⁰ and the pain that those with TBI suffer (like Montgomery) may, to some extent, be alleviated.

344. Robert D. Stolorow, *I’ll Be With You When the Deal Goes Down*, PSYCH. TODAY (Mar. 3, 2013), <https://www.psychologytoday.com/us/blog/feeling-relating-existing/201303/i-ll-be-you-when-the-deal-goes-down>.

345. Tony Attwood, *When the Deal Goes Down by Bob Dylan. A Religious Tract or Ruminations on Death?*, UNTOLD DYLAN (July 24, 2017), <https://bob-dylan.org.uk/archives/5016> (“And thus we toil, we work, we try to sort it all out, but in the end we can’t . . .”).

346. Kees de Graaf, *Bob Dylan’s ‘When the Deal Goes Down’ –Lyric Analysis*, <https://www.keesdegraaf.com/media/Misc/2325p166o4c1g31o8m1icvub7fi6esk1.pdf> (last visited Dec. 4, 2021).

347. Attwood, *supra* note 345.

348. de Graaf, *supra* note 346; see *Lisa Montgomery*, *supra* note 6.

349. THOMAS, *supra* note 18, at 230.

350. *Id.*