Loyola of Los Angeles Law Review

Volume 29
Number 4 *Symposia—The Religious Voice in the Public Square and Executing the Wrong Person: The Professionals' Ethical Dilemmas*

Article 30

6-1-1996

I'll Give You Shelter from the Storm: Privilege, Confidentiality, and Confessions of Crime

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"I'LL GIVE YOU SHELTER FROM THE STORM": PRIVILEGE, CONFIDENTIALITY, AND CONFESSIONS OF CRIME

*Michael L. Perlin**

I. PROLOGUE

I shared this hypothetical with several therapists. To a person, they had the same response, paraphrasing only slightly: "Are you kidding? *Of course*, she's gonna inform the authorities. This privilege stuff is so gray anyway, she'd *never* get in trouble if it looked like she was trying to save the life of an innocent guy."[1] So . . .

II. THE PROBLEM

A. Introduction

It seems to me that there are a few overarching factual questions that must be considered before we move on to the legal issues of privilege law: Did Jones really do it? Was this a true confession or a false confession? Was Jones motivated by a "compulsion to confess"? Should/can/must the psychiatrist assume that the patient is telling "the truth"?

B. The "Confession"

Jones told Dr. Palmer what was apparently a convincing story of his culpability in the bank killing. It is not clear from the hypothetical whether Jones shared any information with Palmer that Jones could not have learned from reading press accounts of the crime or from street talk—say, from other ex-inmates to whom Smith may have told

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1. One therapist added: "There are probably a couple of psychoanalysts on the Upper East Side [of New York City] who'd say they wouldn't divulge this information, but those guys would never treat a street criminal in the first place, so that shouldn't count."

Although the therapists *uniformly* spoke of "privilege," the issue from this perspective, of course, is one of confidentiality.

details of his story. There is, of course, no reason to assume that Dr. Palmer followed reports of the murder case in the media during the trial. So if Jones told her factually impossible information—saying, for example, "I shot him with a revolver," in spite of the fact that ballistics evidence had confirmed that the murder weapon was a sawed-off shotgun—she would not necessarily have any way of knowing or being able to identify the contents of such an error.

"False confessions" are not simply a staple of TV movies; they are real. As many as 740 erroneous convictions each year may be due to false confessions,[2] and a 1973 British study found false confessions the second leading reason for such convictions.[3]

A significant number of these confessions are spontaneous and often arise in high publicity cases.[4] Some are inspired by a desire to protect a friend or peer from prosecution.[5] Others confess because of a " 'morbid desire for notoriety,' " an " 'unconscious need to expiate guilt over previous transgressions via self-punishment,' " or an inability to "distinguish fact from fantasy."[6] The majority of false confessors are "unusually psychologically vulnerable,"[7] and many suffer from mental disorders that "might substantially impair [their]

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2. This inference is based on two separate studies. A 1987 study concluded that 49 of 350 wrongful convictions studied resulted from coerced or other false confessions. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 57 (1987). A 1986 study estimated that there are over 5700 wrongful convictions each year. C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 523 (1986).

3. Laura Hoffman Roppé, Comment, *True Blue? Whether Police Should Be Allowed To Use Trickery and Deception To Extract Confessions*, 31 SAN DIEGO L. REV. 729, 754 n.117 (1994) (reporting on findings in RUTH BRANDON & CHRISTIE DAVIES, WRONGFUL IMPRISONMENT 47 (1973)); *see also* United States v. Koslosky, ACM 30865, 1995 WL 580889, at *2-*3 (A.F. Ct. Crim. App. Sept. 20, 1995) (reviewing expert testimony in three false confession studies).

4. *Koslosky*, 1995 WL 580889, at *2. *See generally* Michael L. Perlin, *Criminal Confessions and the Mentally Disabled:* Colorado v. Connelly *and the Future of Free Will*, *in* 5 CRITICAL ISSUES IN AMERICAN PSYCHIATRY AND THE LAW: CRIMINAL COURT CONSULTATIONS 157 (Richard Rosner & Ronnie Harmon eds., 1989) (discussing spontaneous nature of confession, in Colorado v. Connelly, 479 U.S. 157 (1986), and its relationship to both the defendant's mental disability and the Supreme Court's ultimate decision to reject defendant's *Miranda* argument).

5. Roppé, *supra* note 3, at 755 n.119 (reporting on findings in Gisli Gudjonsson, *The Psychology of False Confessions*, 142 NEW L.J. 1277 (1992)).

6. *Id.* at 754 (quoting Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 76-77 (Saul Kassin & Lawrence Wrightsman eds., 1985)).

7. *Id.* at 756.

ability to make a rational decision."[8] Other studies trace the connection between factors of personality, self-concept, and intelligence in persons who admit to crimes they did not commit.[9]

The extent of Jones's mental illness or disorder is unknown; we are simply told that he received psychiatric counseling in prison and was referred to Dr. Palmer for continuing treatment. If his mental disorder is severe,[10] therefore placing Jones at somewhat higher risk for being a false confessor, it certainly should be within Dr. Palmer's clinical expertise to assess the likelihood of whether his confession is true. This is a factual threshold determination that must be made before any of the legal issues can be meaningfully addressed.

C. A Cusp Issue: Jones's Relationship to Palmer

The fact pattern is ambiguous as to whether Jones's therapy sessions are a condition of parole or whether he was simply referred to Dr. Palmer by a prison social service worker at the time of his release.[11] As I have already stated, my hunch is that seeing Dr. Palmer is a parole condition. If that is so, it raises another question: Does this fact sufficiently alter the patient-psychiatrist relationship so as to affect the ultimate resolution of this case?

Courts have generally held that the requirement to participate in counseling is a valid condition of parole[12] or probation,[13] although

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8. *Id.* (reporting on findings in Gudjonsson, *supra* note 5, at 1278); *see also* Carol Woods Frazier, Note, *Corroboration of Confessions in the Theft by Receiving Context: Is Proof of Theft Enough?*, 44 ARK. L. REV. 805, 812-13 (1991) (reporting on findings in Note, *Proof of the Corpus Delicti Aliunde in the Defendant's Confession*, 103 U. PA. L. REV. 638, 644 (1954-55)).

9. *See, e.g.*, Gisli H. Gudjonsson, *Interrogative Suggestibility: Comparison Between "False Confessors" and "Deniers" in Criminal Trials*, 24 MED. SCI. & L. 56 (1984). *See generally* 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 16.13, at 241 n.328 (1989 & Supp. 1995) [hereinafter PERLIN, MENTAL DISABILITY LAW] (listing recent articles on false confessions).

10. It is not clear whether Jones is a parolee or whether he was simply released from prison after "maxing out," and subsequently referred—on a strictly voluntary basis—to Dr. Palmer. The fact that Jones was referred to a psychiatrist—rather than to a nonphysician mental health professional—suggests that some kind of psychotropic or antipsychotic medication has been prescribed for him. If that is so, my intuitive hunch is that (1) Jones is a parolee—to give the Department of Corrections some sort of "hold" on him and to give them the authority to order him into a post-release treatment program—and (2) Jones's disorder is thus likely to be of some degree of severity.

11. *See supra* note 10.

12. McDonald v. Malone, No. 86-6146, 1987 WL 35911, at *2 (6th Cir. Mar. 17, 1987) (unpublished disposition); Steinberg v. Police Court, 610 F.2d 449, 449 (6th Cir. 1979); *see also* Johnson v. Hyman, No. CIV.A.92-0606(RCL), 1993 WL 62163 (D.D.C. Feb. 26, 1993)

at least one court has held that parolees have the right to refuse antipsychotic drug treatment—not an apparent issue in the present hypothetical.[14] Thus, if Jones did not attend his regularly scheduled therapy sessions, it is likely that he would be in danger of having his parole revoked and subsequently reinstitutionalized.[15] This scenario raises a series of related questions: Does Dr. Palmer become a "double agent" for purposes of Jones's confession?[16] Does the Fifth Amendment attach here?[17] Is it necessary for us to consider the potential existence of a "power imbalance" between Jones and Palmer in analyzing this problem?[18]

In addition we must ask: Does Dr. Palmer have "dual loyalties"?[19] What is her relationship to the Department of Corrections (DOC) or the Parole Board (PB)? When she began therapy with Jones, what promises—if any—did she make of confidentiality? If she is an agent of either the DOC or PB, did she ever reveal that information to Jones? If she did, did they ever discuss the contours

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(granting defendant's motion to dismiss in factually-similar case); Murgerson v. Pennsylvania Bd. of Probation & Parole, 579 A.2d 1335 (Pa. Commw. Ct. 1990) (imposing special parole conditions mandating participation in outpatient therapy program not subject to judicial review absent allegation of violation of constitutional rights); *cf.* Patuxent Inst. Bd. of Review v. Hancock, 620 A.2d 917 (Md. 1993) (reversing parole revocation following failure to adhere to oral conditions set out by therapist, where defendant had not been made aware of parole conditions until time of revocation), *cert. denied*, 114 S. Ct. 284 (1993).

13. *See, e.g.*, United States v. Stine, 521 F. Supp. 808, 809 (E.D. Pa. 1981); State v. Emery, 593 A.2d 77, 78-80 (Vt. 1991). *See generally* Jessica Wilen Berg, Note, *Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications for Court-Ordered Therapy Programs*, 79 CORNELL L. REV. 700, 700-02 (1994) (stating that completion of rehabilitative therapy program is a common condition of probation).

14. Felce v. Fiedler, 974 F.2d 1484, 1493-95 (7th Cir. 1992) (construing Riggins v. Nevada, 504 U.S. 127, 134-35 (1992)). *See generally* PERLIN, MENTAL DISABILITY LAW, *supra* note 9, § 5.65A, at 99 n.1088.60 (Supp. 1995) (discussing *Felce* in this context).

15. *See, e.g.*, CAL. PENAL CODE § 3057 (West 1982); IOWA CODE ANN. § 908.9 (West 1994).

16. *See, e.g.*, Seymour L. Halleck, *The Ethical Dilemmas of Forensic Psychiatry: A Utilitarian Approach*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 279, 279 (1984).

17. *See, e.g.*, Kathy Faulkner Yates, *Therapeutic Issues Associated with Confidentiality and Informed Consent in Forensic Evaluations*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 345 (1994).

18. Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111 (1991) [hereinafter Perlin, *Power Imbalances*].

19. Jerome J. Shestack, *Psychiatry and the Dilemmas of Dual Loyalties*, 60 A.B.A. J. 1521, 1521 (1974).

of that relationship, or how it would affect any of Jones's confidentiality expectations?[20]

Without answers to these questions, it is impossible to fully solve the hypothetical.

D. The Scope of the Privilege

There is no question that some sort of patient-therapist privilege exists. Jones and Dr. Palmer had a preexisting relationship; the disclosure was made in the context of an ongoing treatment relationship; and it can be fairly assumed that, at some point in the development and growth of that relationship, Dr. Palmer reasonably assured Jones that they were embarking upon a privileged relationship[21]—an assurance to which Jones was clearly entitled.[22] The hard question, of course, is whether the disclosure falls within any statutory or common-law exception to confidentiality.

There are three standard exceptions to the expectation of confidentiality:[23] where the patient puts his mental state at issue in other litigation;[24] where a conflict exists between confidentiality and a police-power statute;[25] and where there exists a judicially or

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20. The mere fact that the Jones-Palmer relationship might not mimic the "pure" dyadic patient-therapist relationship does *not* mean that there are no expectations of confidentiality. *See* Perlin, *Power Imbalances*, *supra* note 18, at 115; *see also* Paul S. Appelbaum, *Confidentiality in the Forensic Evaluation*, 7 INT'L J. L. & PSYCHIATRY 285, 288-90 (1984) (discussing the level of confidentiality due a patient after a forensic evaluation).

21. For a comprehensive discussion of all pertinent issues, see State v. Miller, 709 P.2d 225, 231-36 (Or. 1985).

22. REPORT OF THE TASK FORCE ON THE ROLE OF PSYCHOLOGY IN THE CRIMINAL JUSTICE SYSTEM, *reprinted in* WHO IS THE CLIENT? THE ETHICS OF PSYCHOLOGICAL INTERVENTION IN THE CRIMINAL JUSTICE SYSTEM 1, 5 (John Monahan ed., 1980).

23. *See generally* PERLIN, MENTAL DISABILITY LAW, *supra* note 9, § 12.37, at 106 n.655 (listing the three usual exceptions to confidentiality).

24. *See, e.g.*, Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 84 Cal. Rptr. 829 (1970).

25. *See, e.g.*, McKay v. Commonwealth, 415 A.2d 910 (Pa. Commw. Ct. 1980) (involving confidentiality and competency to operate a motor vehicle); Commonwealth *ex rel.* Platt v. Platt, 404 A.2d 410 (Pa. Super. Ct. 1979) (involving confidentiality and involuntary civil commitment law). On therapists' obligations in the case of child abuse reporting statutes, see Elizabeth Anderson et al., *Coercive Uses of Mandatory Reporting in Therapeutic Relationships*, 11 BEHAV. SCI. & L. 335 (1993); Murray Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. SCH. J. HUM. RTS. 711 (1993); Murray Levine & Eric Doherty, *Professional Issues: The Fifth Amendment and Therapeutic Requirements to Admit Abuse*, 18 CRIM. JUST. & BEHAV. 98 (1991). On reporting obligations in cases of persons with AIDS, see MICHAEL L. PERLIN, LAW AND MENTAL DISABILITY § 3.19, at 476 n.28 (1994)

legislatively imposed duty to warn a third party of an individual's foreseeable danger.[26] Assuming that there is no statutory exception mandating a confidentiality override in the jurisdiction where the hypothetical is set,[27] and no question as to Jones's involvement in "other litigation," the question remains whether the so-called *Tarasoff* exception applies here.[28] In *Tarasoff v. Regents of University of California*, the California Supreme Court held that in certain limited circumstances, when a therapist determines—or should have determined—that her patient presents a serious danger of violence to another, she incurs a duty to use "reasonable care to protect the intended victim."[29] If she fails to do this, she may be liable for tort damages.[30]

In its second decision in the case, the supreme court found that a "duty to protect," rather than a "duty to warn" exists

> [w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended

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[hereinafter PERLIN, LAW AND MENTAL DISABILITY] (collecting sources); Stephen B. Bisbing, *Psychiatric Patients and AIDS: Evolving Law and Liability*, 18 PSYCHIATRIC ANNALS 582 (1988) (identifying potential areas of liability for psychiatrist); Howard Zonana, *The AIDS Patient on the Psychiatric Unit: Ethical and Legal Issues*, 18 PSYCHIATRIC ANNALS 587 (1988) (discussing whether all psychiatric patients should be screened for HIV and whether this information should be passed on to other patients).

26. *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

27. On the scope of proposed Federal Rule of Evidence 504, the psychotherapist-patient privilege, and its parallel exceptions, see Brian Domb, Note, *I Shot the Sheriff, But Only My Analyst Knows: Shrinking the Psychotherapist-Patient Privilege*, 5 J.L. & HEALTH 209 (1991).

28. *See* PERLIN, LAW AND MENTAL DISABILITY, *supra* note 25, § 3.19; PERLIN, MENTAL DISABILITY LAW, *supra* note 9, §§ 13.05-.21; Michael L. Perlin, Tarasoff *and the Dilemma of the Dangerous Patient: New Directions for the 1990s*, 16 LAW & PSYCHOL. REV. 29 (1992) [hereinafter Perlin, *Tarasoff*].

29. *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20. The facts of *Tarasoff* are well known. Poddar, a University of California graduate student, told his therapist that he intended to kill Tatiana Tarasoff, a young woman whom he had previously dated. *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21. The therapist consulted with his supervisor and then contacted the campus police who questioned Poddar and released him once he promised to stay away from Ms. Tarasoff. *Id.* Two months later, Poddar went to Ms. Tarasoff's home and killed her. *Id.* at 430, 551 P.2d at 339, 131 Cal. Rptr. at 19. Subsequently, her parents filed suit on a variety of tort theories, including the failure of Poddar's therapists to warn Ms. Tarasoff's parents that Poddar was a "grave danger" to their daughter. *Id.* at 432-33, 551 P.2d at 340-41, 131 Cal. Rptr. at 20-21.

30. *See id.* at 433, 551 P.2d at 342, 131 Cal. Rptr. at 22.

> victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.[31]

In answering the question of whether a plaintiff would be entitled to legal protection against a defendant's conduct in such a case, the supreme court sought to balance the foreseeability of harm to the plaintiff, the degree of certainty that she would suffer injury, the closeness of the connection between the defendant's conduct and the plaintiff's injury, the moral blameworthiness attached to the defendant's conduct, and the potential consequences to the community.[32] In such cases, liability will only lie when the defendant bears a "special relation" to the dangerous person.[33] The therapist-patient relationship satisfies this test.[34]

The supreme court rejected the argument that the mental health professionals' inability to accurately predict dangerousness should insulate them from liability[35] and stressed that the alleged failure here was not in the accuracy of prediction, but in the failure to warn once the prediction was made.[36] While it is possible that unnecessary warnings might be given, that risk is "a reasonable price to pay for the lives of possible victims that may be saved."[37] Finally, the court rejected defendant's argument that confidentiality concerns barred the issuance of warnings.[38] Looking both at the patient's right to privacy and the public's interest in safety, the court concluded that "the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the

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31. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.
32. *Id.* at 434, 551 P.2d at 342, 131 Cal. Rptr. at 22.
33. *Id.* at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23; *see* RESTATEMENT (SECOND) OF TORTS § 315 (1965).
34. *Tarasoff*, 17 Cal. 3d at 436, 551 P.2d at 343-44, 131 Cal. Rptr. at 23-24.
35. *Id.* at 437-38, 551 P.2d at 344-45, 131 Cal. Rptr. at 24-25.
36. *Id.* at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.
37. *Id.* at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26.
38. *Id.* at 440-42, 551 P.2d at 346-47, 131 Cal. Rptr. at 26-27.

extent to which disclosure is essential to avert danger to others."[39] The "protective privilege ends where the public peril begins."[40]

How does the hypothetical fit within the *Tarasoff* criteria? Although Jones does not pose a "serious danger of violence" to Smith, if Dr. Palmer does not divulge Jones's confession, Smith is likely to be executed by the state. The foreseeability of harm to Smith—who becomes the "virtual plaintiff" for these purposes—is clear. The degree of certainty that he will be executed and the closeness of connection between Palmer's conduct—if she chooses not to notify the authorities—and Smith's injury, the execution, is near-absolute. Predictability of dangerousness is not an issue here; the legally sanctioned execution is scheduled to take place. And this appears to be almost a textbook example of a case where "disclosure is essential to avert danger to others."[41]

Clearly, the hypothetical differs from the standard *Tarasoff* fact pattern in at least one significant way. Jones has not threatened direct harm to Smith. *Tarasoff*, of course, focuses on harm that would be caused directly by the patient's violent actions. Nothing in *Tarasoff* or its progeny[42] appears to contemplate the fact pattern presented here. Yet, if *Tarasoff* stands for the proposition that the notion of "absolute confidentiality" must yield to certain other social values, a persuasive argument can be made that the exception should be extended to these facts.[43]

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39. *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

40. *Id.*

41. *Id.*; *see also* Domb, *supra* note 27, at 236 (writing about the first Menendez trial where the testimony in question was by the defendants' psychotherapist, Domb notes "[i]t is not unreasonable to assert that homicide, where the only evidence available relating to the actual crime might be a psychotherapist's testimony, is an example of a compelling area warranting the sacrifice of confidentiality").

42. *See* Perlin, *Tarasoff*, *supra* note 28, at 33-35 n.28 (discussing subsequent cases).

43. Certainly, the concern stated by the first wave of *Tarasoff* commentators—that *Tarasoff* would have a chilling effect on patients' willingness to speak freely in therapy sessions—did not foresee the factual situation set out in this hypothetical as a likely source of post-*Tarasoff* litigation. *Compare* Domb, *supra* note 27, at 226 (reporting on findings in Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 920 (1982) (stating that the most prominent reason for withholding information by patients was not status of privilege but fear of therapist's personal judgment)) *with* PERLIN, LAW AND MENTAL DISABILITY, *supra* note 25, § 3.19, at 479 (quoting commentators predicting that the *Tarasoff* decision "would reduce the success of therapy by decreasing patients' trust in their therapist, by discouraging patients from communicating sensitive information because of fear of subsequent disclosure").

III. CONCLUSION

My title comes from Bob Dylan's compelling song, *Shelter from the Storm*.[44] Verse six suggests the ambiguity of the problem set out in this hypothetical:

> *Now there's a wall between us, somethin' there's been lost*
> *I took too much for granted, got my signals crossed.*
> *Just to think that it all began on a long-forgotten morn.*
> *"Come in," she said,*
> *"I'll give you shelter from the storm"*[45]

Yet, if we assume two facts not in evidence—that Jones actually was the perpetrator of the murder and that nothing in Jones's interaction with Dr. Palmer significantly altered their therapeutic relationship[46]—we are left with the *Tarasoff* question: Is there a "public peril" if an individual is executed for a crime he did not commit? For me this is an easy question. A public peril exists and Dr. Palmer should take whatever steps she can to "protect" Smith from being executed for a crime he did not commit. The price of avoiding a potential future "wall" between Jones and Dr. Palmer is too great. The fact that Jones may have "got [his] signals crossed" pales in significance. Dr. Palmer, in this case, should attempt to give Smith, the death row inmate, "shelter from the storm."

IV. EPILOGUE

I also shared this hypothetical with several veteran defense counsel. Each one offered this response, again, paraphrasing only slightly: "What difference does it make if the psychiatrist dimes the actual perp? Do you think anyone cares? There's not a court in this country in 1996 that would stop the execution based on this evidence. Give it up."

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44. BOB DYLAN, *Shelter From the Storm*, *on* BLOOD ON THE TRACKS (Columbia Records 1974).

45. *Id.*

46. *See supra* part II.B-C.