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A DANGEROUS PREOCCUPATION WITH FUTURE DANGER: WHY EXPERT PREDICTIONS OF FUTURE DANGEROUSNESS IN CAPITAL CASES ARE UNCONSTITUTIONAL

Abstract: In *Furman v. Georgia*, the United States Supreme Court held that it was unconstitutional to administer the death penalty upon the sole, unguided discretion of juries. In response to *Furman*, some states amended their statutes to suggest or require that a jury assess the defendant's future dangerousness before issuing a death sentence. Generally, this assessment is based on psychiatric expert testimony. This author explores the reliability and accuracy of psychiatric expert testimony of future dangerousness in light of the Court's more recent *Barefoot v. Estelle* and *Daubert v. Merrell Dow Pharmaceuticals* decisions. The author argues that because the death penalty is so extreme and utterly final, heightened standards of reliability and accuracy should be used when determining the admissibility of evidence at the sentencing phases of capital trials.

INTRODUCTION

In 1972, in *Furman v. Georgia*, the United States Supreme Court determined that it was unconstitutional to administer the death penalty upon the sole, unguided discretion of juries.¹ The Court reasoned in part that this abdication to juries necessarily produced arbitrary and capricious results; therefore, it violated the Eighth Amendment's prohibition of cruel and unusual punishment as applied to the states through the Fourteenth Amendment.² Immediately following this de-

¹ See 408 U.S. 238, 239 (1972) (per curiam); *id.* at 309-10 (Stewart, J., concurring). The Court wrote a per curiam opinion which very briefly stated the holding; the five justices which made up the plurality then delineated their interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment in five separate concurring opinions. See *id.* at 239 (per curiam); *id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring).

² See *id.* at 239 (per curiam); *id.* at 295 (Brennan, J., concurring). The Eighth Amendment provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.

cision, death penalty states scrambled to amend their death penalty statutes to comply with *Furman*.³

Some states responded to the *Furman* decision by amending their statutes to suggest or require that a jury determine the defendant's future dangerousness.⁴ Other states relied on the Model Penal Code scheme—a system which guides jury deliberations by asking jurors to weigh aggravating circumstances against mitigating circumstances in order to determine whether to impose a sentence other than death.⁵

Suggesting or even forcing the jury to find future dangerousness causes the prosecution to rely heavily on the most popular means of proving future dangerousness: psychiatric expert testimony.⁶ The arguments against this form of evidence are that it is inaccurate, unreliable, and inordinately prejudicial.⁷

One particularly prolific psychiatric expert who is repeatedly mentioned in Supreme Court cases and capital cases in Texas is Dr. James P. Grigson, commonly dubbed "Dr. Death."⁸ As of 1994, Dr. Grigson had appeared in at least 150 capital trials on behalf of the state, and his predictions of future dangerousness had been used to help convict at least one-third of all Texas death row inmates.⁹

What is most remarkable about Dr. Grigson, however, is not his extensive record of making determinations of future dangerousness for the State of Texas, but the striking similarity of his diagnoses as well as his remarkable confidence in his ability to predict the future.¹⁰

³ See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL. RTS. J. 345, 352–53 (1998).

⁴ See Jonathan R. Sorensen, Ph.D., *Criminology: An Actuarial Risk Assessment of Violence Posed By Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1252 (2000).

⁵ See Shelley Clarke, Note, *A Reasoned Moral Response: Rethinking Texas's Capital Sentencing Statute After Penry v. Lynagh*, 69 TEX. L. REV. 407, 409–10 (1990).

⁶ See Mark David Albertson, *Can Violence Be Predicted? Future Dangerousness: The Testimony of Experts in Capital Cases*, 3-WTR CRIM. JUST. 18, 19 (1989); Brock Mehler, *The Supreme Court and State Psychiatric Examinations of Capital Defendants: Stuck Inside of Jurek with the Barefoot Blues Again*, 59 UMKC L. REV. 107, 110 (1990).

⁷ See *infra* notes 187–242 and accompanying text.

⁸ See *Bennett v. Texas*, 766 S.W.2d 227, 231 (1989) (Teague, J., dissenting) (explaining that Dr. Grigson earned the nickname "Dr. Death" because he frequently testified in capital cases on behalf of state with successful results); Kirchmeier, *supra* note 3, at 372; TEXAS DEFENDER SERVICE, *A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY* 26, available at <http://www.texasdefender.org/study/chapter3.html> (last visited Apr. 11, 2002) (stating Texas prosecutors have used Dr. Grigson's testimony extensively despite his questionable reputation).

⁹ See Kirchmeier, *supra* note 3, at 372.

¹⁰ See *Satterwhite v. Texas*, 486 U.S. 249, 259–60 (1988) (noting Dr. Grigson stated unequivocally that in his expert opinion defendant would be continuing threat to society;

Despite clear concern on the part of the psychiatric community regarding the inability of psychiatric professionals to accurately predict future dangerousness, Dr. Grigson has testified repeatedly that he was one hundred percent certain that the defendant would be dangerous in the future;¹¹ that he could testify to this fact "*within reasonable psychiatric certainty*;"¹² and, in some cases, that there was "a one thousand percent chance" that the defendant would be a future danger.¹³

Such certainty has impressed so many juries and helped to convict so many defendants that one judge sitting on the Texas Court of Criminal Appeals wrote:

[W]hen Dr. Grigson speaks to a lay jury . . . about a person who he characterizes as a "severe" sociopath . . . the defendant should stop what he is doing and commence writing out his last will and testament—because he will in all probability soon be ordered by the trial judge to suffer a premature death. . . . When Dr. Grigson is shown to have testified in a capital murder case in which the defendant challenges his conviction and sentence of death, the captions of those cases in which relief was granted read almost like the following: "THIS IS ANOTHER DR. GRIGSON CASE." The number of these cases is so great that I will simply refer the reader to either Westlaw or Lexis and not cite them.¹⁴

that defendant was "as severe a sociopath as you can be;" that on scale of one to ten, where ten indicated complete disregard for human life, defendant was ten; and that defendant was beyond the reach of psychiatric rehabilitation); *Barefoot v. Estelle*, 463 U.S. 880, 919 (1983) (Blackmun, J., dissenting) (quoting Dr. Grigson as testifying that the defendant was in the "most severe category" of sociopaths meaning that on a scale of one to ten, defendant was "above ten;" that whether defendant was in society at large or in a prison society there was a "one hundred percent and absolute" chance that defendant would commit future violent acts); *Estelle v. Smith*, 451 U.S. 454, 459–60 (1981) (noting that Dr. Grigson testified that defendant was "a very severe sociopath;" that he will continue his behavior and his sociopathic condition will "only get worse;" that defendant has "no regard for another human being's property or for their life, regardless of who it may be;" that there is no treatment or medicine that would change defendant's behavior; and that defendant had no remorse or sorrow for his actions); Texas Defender Service, *supra* note 8, at 32 (describing Dr. Grigson's testimony in Randall Dale Adams case wherein Dr. Grigson stated that on scale of sociopathy, Adams was at worst end of the scale; that there was nothing that could change the defendant; that Adams had no regard for the lives or property of others, whoever they might be; and that Adams would continue to threaten society).

¹¹ Kirchmeier, *supra* note 3, at 372.

¹² *Barefoot*, 463 U.S. at 918.

¹³ Texas Defender Service, *supra* note 8, at 30.

¹⁴ *Bennett*, 766 S.W.2d at 232 (Teague, J., dissenting).

Dr. Grigson has been proven wrong in several cases, the most notable being that of Randall Dale Adams whom Dr. Grigson described as an incurable and extreme sociopath with no regard for the life or property of others and who would continue to present a danger to society.¹⁵ Due mainly to Errol Morris's documentary *The Thin Blue Line*, Adams was exonerated of all charges after twelve years of imprisonment and released from the Texas death row.¹⁶ Not once in his twelve years of imprisonment, nor in the years since his release, has Adams committed a known act of violence.¹⁷ Yet this evidence has not changed Dr. Grigson's mind: Adams, Dr. Grigson asserts, will kill again.¹⁸

In 1995, Dr. Grigson was expelled from the American Psychiatric Association (APA) and from the Texas Society of Psychiatric Physicians (TSPP).¹⁹ The APA and the TSPP determined that Dr. Grigson's testimony in several cases that he could be one hundred percent certain that the defendant would be dangerous in the future was a violation of ethics which could not be tolerated.²⁰ Despite this condemnation, Dr. Grigson continues to be appointed by Texas courts to make psychiatric evaluations of defendants and continues to predict future dangerousness of defendants for the State of Texas.²¹ He has now entered into his third decade of psychiatric determinations of future dangerousness.²²

The case of Dr. Grigson provides just one powerful example of how arbitrariness and caprice still exist in capital sentencing schemes which require the jury to determine whether the defendant will be dangerous in the future—and allow psychiatric experts to present testimony to this effect.²³

¹⁵ See Texas Defender Service, *supra* note 8, at 32–35.

¹⁶ See *id.* at 32–33.

¹⁷ See *id.*

¹⁸ Paul C. Giannelli, "Junk Science": *The Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 105, 116 (1993).

¹⁹ Kirchmeier, *supra* note 3, at 372.

²⁰ See Texas Defender Service, *supra* note 8, at 29–30.

²¹ See *id.* at 31–33.

²² See *id.* at 28.

²³ This Note will argue specifically that psychiatric expert determinations of future dangerousness are unconstitutional. Other methods of questionable constitutionality are also used in some states, but will not be discussed here. One such method is the use of the defendant's prior unadjudicated offenses to indicate future violence. For a more in-depth discussion of the other methods used to prove a defendant's future danger to society see generally Steven Paul Smith, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249 (1993), and Jason J. Solomon, Note, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55 (1999).

Part I of this Note will re-examine the Supreme Court's Eighth Amendment doctrine regarding the death penalty by revisiting each of the landmark cases to illustrate how the early cases called for an end to arbitrary administration of the death penalty as well as for accuracy and reliability in sentencing information.²⁴ Part II will examine the case of *Barefoot v. Estelle* to reveal how the Court's initial interpretation of the requirements of the Eighth Amendment appears to have changed by allowing inherently unreliable evidence to be considered at death penalty sentencing hearings.²⁵ This Part will then explore the Court's more recent *Daubert v. Merrell Dow Pharmaceuticals* decision to determine what that opinion's emphasis on reliability in expert testimony might mean in the context of death penalty adjudications.²⁶ Part III will next examine the use of future dangerousness as an aggravating factor in capital cases.²⁷ This Part will discuss the pervasive use of psychiatric predictions to prove future dangerousness as well as how and why juries rely on expert testimony of this kind.²⁸ This Part will also examine the evidence that suggests that psychiatric predictions of future dangerousness are unreliable.²⁹ In addition, Part III will provide two examples of states which do not consider future dangerousness as an aggravating factor in capital cases.³⁰ Finally, Part IV will argue that the states which consider future dangerousness in sentencing phases of death penalty trials, and allow juries to hear psychiatric predictions of future dangerousness, continue to violate the Eighth Amendment by encouraging the use of unreliable and inaccurate testimony which misguides juries and leads to arbitrary and capricious results.³¹

I. UNRAVELING THE EIGHTH AMENDMENT WITH REGARD TO THE DEATH PENALTY: THE SUPREME COURT CASES

Since its 1972 decision in *Furman v. Georgia*, the Supreme Court has attempted to clarify what will and will not be acceptable in a death penalty statute.³² Because death is different from any length of prison

²⁴ See *infra* notes 32–103 and accompanying text.

²⁵ See *infra* notes 106–145 and accompanying text.

²⁶ See *infra* notes 146–174 and accompanying text.

²⁷ See *infra* notes 175–251 and accompanying text.

²⁸ See *infra* notes 175–211 and accompanying text.

²⁹ See *infra* notes 212–242 and accompanying text.

³⁰ See *infra* notes 243–251 and accompanying text.

³¹ See *infra* notes 252–304 and accompanying text.

³² See Kirchmeier, *supra* note 3, at 346.

term, there is a particular need for reliability in the factors that determine whether the sentence of death is appropriate.³³ The death penalty may not be arbitrarily or capriciously meted out.³⁴ The sentencer must have guided discretion rather than unfettered discretion in the imposition of the death penalty.³⁵

On the other hand, there can be no mandatory death sentences for certain crimes; the state may not take complete control of sentencing after the defendant has been found guilty of a death-penalty-eligible crime.³⁶ There must be individualized sentencing, meaning that the sentencer must be able to consider any mitigating facts that the defendant may present.³⁷

What satisfies the Eighth Amendment prohibition of cruel and unusual punishment remains unclear, however.³⁸ The Supreme Court's doctrine has been called "pathologically incomprehensible."³⁹ A more generous description of the doctrine refers to it as a "confusing array of ill-defined concepts, conflicting pronouncements, ipse dixits, and short-lived precedents."⁴⁰

A. The Supreme Court Weighs In: *Furman v. Georgia*

In 1972, the Supreme Court granted certiorari in *Furman v. Georgia* to determine whether the imposition and enforcement the death penalty in the three cases before the Court constituted a violation of the Eighth and Fourteenth Amendments.⁴¹ In *Furman*, two of the defendants were convicted of rape and a third was convicted of murder; conviction for these crimes was punishable by death.⁴² All three were sentenced under statutes which left the decision of whether to impose death or a lighter sentence up to the jury without articulating any standards by which the jury should exercise this discretion.⁴³

³³ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

³⁴ See *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

³⁵ See *id.*

³⁶ See *Woodson*, 428 U.S. at 303-05.

³⁷ See *id.* at 304.

³⁸ See *Clarke*, *supra* note 5, at 416-23.

³⁹ See *id.* at 418-19.

⁴⁰ See *id.* at 416-18.

⁴¹ 408 U.S. 238, 239 (1972). The *Furman* decision included three death penalty cases from two states in which the jury was given unfettered discretion in deciding whether to grant the death penalty or a lesser sentence. See *id.* at 239 (per curiam); *id.* at 253 (Douglas, J., concurring).

⁴² *Id.* at 252, 253 (Douglas, J., concurring).

⁴³ *Id.* at 240, 253 (Douglas, J., concurring).

The Court held that allowing juries to use this unfettered discretion in determining whether to impose death or life in prison was cruel and unusual punishment violative of the Eighth and Fourteenth Amendments.⁴⁴ For an understanding of the Court's interpretation of the Eighth Amendment with regard to the death penalty, however, one must turn to the five concurring opinions filed in the case.⁴⁵

In his concurrence, Justice Douglas explained that the Court did not hold the death penalty to be unconstitutional in and of itself unless the manner of execution is especially heinous.⁴⁶ Rather, it seemed to interpret the Eighth Amendment as drawing its meaning from "the evolving standards of decency that mark the progress of a maturing society."⁴⁷ Here, there was a violation because the death penalty as administered in *Furman*, by juries with untrammelled discretion, led to a necessarily arbitrary and capricious result; because the juries were given no standards, the decisions were essentially dependent on the whims of twelve people.⁴⁸

Justice Brennan reiterated the Supreme Court's interpretation in his concurrence stating, "the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments."⁴⁹ Justice Brennan also emphasized that death was a unique punishment in the United States because of its severity and finality; this difference has historically resulted in the Court treating the death penalty differently than other punishments administered throughout the country.⁵⁰

Justice Stewart added that "[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."⁵¹ Justice Stewart discerned no basis, aside from the possible impermissible consideration of race, for the selection of the particular petitioners to receive the death penalty when so many others con-

⁴⁴ See *id.* at 239-40 (per curiam).

⁴⁵ The per curiam opinion stated only the holding of the case with no explanation of the Court's reasoning. See *Furman*, 408 U.S. at 239-40.

⁴⁶ See *id.* at 241 (Douglas, J., concurring).

⁴⁷ *Id.* at 242 (Douglas, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

⁴⁸ See *id.* at 241-42, 253 (Douglas, J., concurring).

⁴⁹ See *id.* at 274 (Brennan, J., concurring).

⁵⁰ See *Furman*, 408 U.S. at 286-88 (Brennan, J., concurring).

⁵¹ See *id.* at 309-10 (Stewart, J., concurring).

victed of rape and murder had not received the same penalty for the same crimes.⁵²

As a result of *Furman*, all death penalty statutes in existence in 1972 were discarded or revised in order to comply with the Court's abolition of standardless jury discretion regarding the imposition of the death penalty.⁵³

B. Following up *Furman*

Because the Supreme Court had not closed the door by declaring the death penalty unconstitutional in *Furman*, many death penalty states revised or created new death penalty statutes which gave juries some guidance in the imposition of the death penalty.⁵⁴ These statutes were eventually challenged in several states, and, on July 2, 1976, the Supreme Court heard four cases which presented four states' responses to the mandate of *Furman*.⁵⁵

1. *Gregg v. Georgia*

In 1976, in *Gregg v. Georgia*, the Supreme Court upheld Georgia's revised death penalty statute which allowed the jury to impose death or life in prison after considering evidence of both statutory aggravating circumstances as well as mitigating circumstances.⁵⁶ This statute called for these circumstances to be examined during a sentencing hearing after the defendant was found guilty of a capital crime at trial.⁵⁷ A defendant may only be given the death penalty if the jury finds at least one of ten statutory aggravating factors beyond a reasonable doubt, and the defendant will be given substantial latitude in the presentation of mitigating evidence.⁵⁸

⁵² *See id.* at 310 (Stewart, J., concurring).

⁵³ *See* Kirchmeier, *supra* note 3, at 352-53.

⁵⁴ *See id.* at 352.

⁵⁵ *See* Clarke, *supra* note 5, at 409.

⁵⁶ *See* 428 U.S. 153, 163-64 (1976).

⁵⁷ *See id.*

⁵⁸ *Id.* at 164, 165. The ten aggravating factors were: (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions; (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree; (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a

In *Gregg*, the defendant was found guilty of armed robbery and murder.⁵⁹ During the penalty phase of the trial, neither side offered any mitigating or aggravating evidence, but the judge instructed the jury that it would not be authorized to impose the death penalty unless it found one of the statutory aggravating circumstances beyond a reasonable doubt.⁶⁰ The jury found two aggravating circumstances and returned a verdict of death.⁶¹

The Court reiterated its verdict in *Furman* stating "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."⁶²

The majority further emphasized that discretion in the area of sentencing should be exercised in an informed manner based on accurate information:⁶³

If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of

weapon or device which would normally be hazardous to the lives of more than one person; (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value; (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty; (6) The offender caused or directed another to commit murder or committed murder as the agent or employee of another person; (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim; (8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties; (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; and (10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another. *Id.* at 166 n.9.

⁵⁹ *Id.* at 160.

⁶⁰ *Gregg*, 428 U.S. at 160-61.

⁶¹ *Id.* at 161.

⁶² *Id.* at 189.

⁶³ *See id.*

whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.⁶⁴

The Georgia scheme was accepted by the Court as sufficiently limiting and directing the discretion of the jury so as to minimize the risk of wholly arbitrary and capricious action.⁶⁵ The new statute adequately prevented the jury from "wantonly and freakishly impos[ing] the death sentence."⁶⁶

2. *Proffitt v. Florida*

On the same day, in *Proffitt v. Florida*, the Supreme Court upheld the Florida death penalty statute which, like the Georgia statute, required a sentencing hearing where the jury would hear relevant evidence relating to certain legislatively-outlined aggravating and mitigating circumstances.⁶⁷ At the conclusion of the hearing, the jury would make a recommendation to the judge whether to impose death or life in prison.⁶⁸ The judge would then consider the jury's recommendation and render the final decision.⁶⁹

⁶⁴ *Id.* at 190.

⁶⁵ *See Gregg*, 428 U.S. at 189, 206-07.

⁶⁶ *Id.* at 207.

⁶⁷ *See* 428 U.S. 242, 248, 260 (1976). The aggravating circumstances were: (a) The capital felony was committed by a person under sentence of imprisonment; (b) The defendant was previously convicted of another capital felony or felony involving the use or threat of violence to the person; (c) The defendant knowingly created a great risk of death to many persons; (d) The capital felony was committed while the defendant was engaged, or in flight after committing or attempting to commit, or was an accomplice, in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb; (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (f) The capital felony was committed for pecuniary gain; (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (h) The capital felony was especially heinous, atrocious, or cruel. *Id.* at 250 n.6. The mitigating circumstances are: (a) The defendant has no significant history of prior criminal activity; (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (c) The victim was a participant in the defendant's conduct or consented to the act; (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor; (e) The defendant acted under extreme duress or under the substantial domination of another person; (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; (g) The age of the defendant at the time of the crime. *Id.*

⁶⁸ *See id.* at 248-49.

⁶⁹ *See id.* at 249-50.

Here, the defendant was found guilty of first degree murder.⁷⁰ During the sentencing hearing, the jury heard evidence that the defendant had a prior conviction for breaking and entering.⁷¹ They were also told that the defendant had confessed to a doctor in jail that he had an uncontrollable desire to kill and wanted treatment so that he would not kill again.⁷² The doctor testified that he did think the defendant would be a danger to his fellow inmates, but that his condition could be treated with success.⁷³ The jury then returned an advisory verdict which recommended a sentence of death.⁷⁴ The judge then ordered a psychiatric evaluation of the defendant, which indicated that he was not mentally impaired at the time of the crime. The judge then imposed the death penalty, finding four aggravating circumstances and no mitigating circumstances.⁷⁵ The Court found that because the statute gave the triers of fact "specific and detailed guidance to assist them in deciding whether to impose the death penalty," Florida had established a "meaningful basis for distinguishing the few cases in which (the death penalty) [was] imposed from the many cases in which it [was] not."⁷⁶

3. *Woodson v. North Carolina*

In 1976, in *Woodson v. North Carolina*,⁷⁷ the day's third case, the Supreme Court examined North Carolina's death penalty statute which attempted to comply with *Furman*.⁷⁸ North Carolina's statute mandated the death penalty for all persons convicted of first degree murder regardless of any mitigating circumstances.⁷⁹

In this case, the defendants were among four men involved in an armed robbery which resulted in the death of a cashier and serious injury of a customer.⁸⁰ Two of the men involved were allowed to plead guilty to lesser offenses, but the defendants were found guilty of first

⁷⁰ *Id.* at 244.

⁷¹ *Proffitt*, 428 U.S. at 246.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 246-47.

⁷⁶ *Proffitt*, 428 U.S. at 253 (quoting *Gregg*, 428 U.S. at 188 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring))).

⁷⁷ 428 U.S. 280 (1976).

⁷⁸ *See id.* at 282.

⁷⁹ *See id.* at 286-87.

⁸⁰ *Id.* at 282-83.

degree murder and immediately sentenced to death as required by the North Carolina statute.⁸¹

Because the *Furman* decision had determined that unfettered discretion on the part of the jury was unconstitutional, North Carolina attempted to remove all discretion.⁸² The Supreme Court disapproved of this solution, however, and declared the North Carolina scheme unconstitutional.⁸³ This statute, the Court felt, did not "fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."⁸⁴ The Court held that the Eighth Amendment against cruel and unusual punishment required consideration of the individual offender and the circumstances of the offense:

While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.⁸⁵

In coming to this conclusion, the Court echoed the *Furman* decision, finding that death was qualitatively different from any prison sentence no matter how long.⁸⁶ Because of this difference, the Court emphasized a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."⁸⁷

4. *Jurek v. Texas*

Finally, on the same day in 1976, in *Jurek v. Texas*, the Supreme Court upheld an altogether different type of death penalty statute.⁸⁸

⁸¹ *Id.* at 283-84.

⁸² *Woodson*, 428 U.S. at 302.

⁸³ *See id.* at 305.

⁸⁴ *Id.* at 303.

⁸⁵ *Id.* at 304.

⁸⁶ *See id.* at 303-04; *see also Furman*, 408 U.S. at 286-88 (Brennan, J., concurring).

⁸⁷ *Woodson*, 428 U.S. at 305.

⁸⁸ *See* 428 U.S. 262, 276-77 (1976).

Texas responded to *Furman* by creating a statute listing several categories of crimes considered death penalty eligible, or capital crimes.⁸⁹ After finding a defendant guilty of a capital crime, the jury was given three special issue questions to answer at the sentencing phase.⁹⁰ The second special issue question called for a prediction of the defendant's future dangerousness by asking the jury to determine if the defendant was likely to commit future acts of violence that would constitute a continuing threat to society.⁹¹ The other two special issue questions were: whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; and, if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.⁹²

If the jury found that the state had proved each issue beyond a reasonable doubt and unanimously answered "yes" to all three special questions, the defendant automatically received the death penalty rather than life in prison.⁹³

In *Jurek*, the defendant was convicted of murder committed in the course of attempted kidnapping and forcible rape.⁹⁴ During the sentencing phase of the trial, the jury heard several witnesses testify to the defendant's bad reputation in the community; evidence that the defendant had always been steadily employed and contributed to his family's support was also presented at this time by the defendant's father.⁹⁵ The jury answered "yes" to all of the relevant special issue ques-

⁸⁹ For instance, a crime may be considered death penalty eligible if: the victim holds special status such as a police officer or a young child; the murder is committed during the commission of another felony; the murderer was incarcerated and murdered someone employed in the penal institution; the murder was committed for remuneration, or if the murderer employed another to commit the murder for remuneration or the promise of remuneration. See TEX. PENAL CODE ANN. § 19.03 (Vernon 2001).

⁹⁰ *Jurek*, 428 U.S. at 269.

⁹¹ *Id.*

⁹² *Id.* Since the *Jurek* decision the Texas statute has been modified to include the following special issue question in addition to those previously mentioned: Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed. TEX. CRIM. PROC. CODE ANN. Art. 37.071 § 2(e)(1) (Vernon 2001).

⁹³ *Jurek*, 428 U.S. at 269.

⁹⁴ *Id.* at 264-65, 267.

⁹⁵ *Id.* at 267.

tions and the judge then sentenced the defendant to death in accordance with the statute.⁹⁶

Although Texas did not specifically outline statutory mitigating and aggravating factors for the jury to consider at sentencing, the Court found that the second special issue question pertaining to the future dangerousness of the defendant allowed the defense to bring to the jury's attention any relevant mitigating circumstances.⁹⁷ Thus, the Court found that this solution suitably guided and focused the jury's consideration of the particularized circumstances of the offense and the offender before imposing a sentence of death.⁹⁸ Since the Texas system "assure[d] that sentence of death [would] not be 'wantonly' or 'freakishly' imposed, it [did] not violate the Constitution."⁹⁹

II. *BAREFOOT V. ESTELLE* AND *DAUBERT V. MERRILL DOW PHARMACEUTICALS*: WHEN IS EXPERT TESTIMONY ADMISSIBLE IN CAPITAL SENTENCING HEARINGS?

By the time of the 1983 decision of *Barefoot v. Estelle*,¹⁰⁰ the Supreme Court had established several tenets of its Eighth Amendment doctrine.¹⁰¹ The Court had determined, for example, that juries shall be guided in their determinations of death sentences in order to provide more consistent results; despite the need for consistent results, however, juries must also make individualized determinations regarding each crime and each defendant.¹⁰² The Court had also concluded that death is different from any other punishment, so different standards of evidence apply; because of this difference, the information presented to the jury at sentencing must be particularly accurate so that the jury may make a reliable determination that death is the appropriate punishment.¹⁰³

This last requirement of accuracy and reliability, as articulated in *Gregg v. Georgia* and *Woodson v. North Carolina*, was a source of disagreement among the members of the Court in *Barefoot v. Estelle*.¹⁰⁴

⁹⁶ *Id.* at 267-68.

⁹⁷ *See id.* at 272.

⁹⁸ *Jurek*, 428 U.S. at 274.

⁹⁹ *Id.* at 276.

¹⁰⁰ 463 U.S. 880 (1983).

¹⁰¹ *See supra* notes 32-37 and accompanying text.

¹⁰² *See supra* notes 35-37 and accompanying text.

¹⁰³ *See supra* note 33 and accompanying text.

¹⁰⁴ *See Barefoot*, 463 U.S. at 901 (stating the position of the majority); *id.* at 924-25 (Blackmun, J., dissenting).

The language in these opinions, as well as the ultimate holdings of the cases, has created some confusion regarding the Court's Eighth Amendment jurisprudence.¹⁰⁵ What did the Court mean in *Gregg* when it required "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination" of whether or not to impose a death sentence?¹⁰⁶ What did the Court mean in *Woodson* when it articulated the "need for reliability in the determination that death is the appropriate punishment?"¹⁰⁷

The Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals* may be a clue to what the Court meant by "reliability" in death penalty sentencing information—though that opinion surfaced in a wholly separate context: that of federal civil law.¹⁰⁸

A. *The Barefoot Standard for Admissibility of Psychiatric Experts' Predictions of Future Dangerousness in Sentencing Phases of Capital Trials: No Reliability Required*

In 1983, in *Barefoot v. Estelle*, the Supreme Court held that the United States District Court for the Western District of Texas did not err in admitting psychiatric testimony to predict the future dangerousness of the defendant.¹⁰⁹ The defendant in *Barefoot* was convicted of the capital murder of a police officer.¹¹⁰ During the sentencing phase of the trial, the State called two psychiatrists to testify to the probability that the defendant would commit further violent acts and present a future danger to society.¹¹¹ The jury answered all of the relevant special issue questions in the affirmative, including the question of whether there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.¹¹² Subsequently, the defendant was sentenced to death as required by the Texas statute.¹¹³

Dr. John Holbrook testified that "it was 'within [his] capacity as a doctor of psychiatry to predict the future dangerousness of an individual

¹⁰⁵ See, e.g., Clarke, *supra* note 5, at 418–19.

¹⁰⁶ 428 U.S. 153, 190 (1976).

¹⁰⁷ 428 U.S. 280, 305 (1976).

¹⁰⁸ See 509 U.S. 579, 589, 593–94 (1993).

¹⁰⁹ See 463 U.S. at 905–06.

¹¹⁰ *Id.* at 883.

¹¹¹ See *id.* at 884.

¹¹² See *id.*

¹¹³ *Id.*

within a *reasonable medical certainty*.”¹¹⁴ Dr. James Grigson testified that he had examined “between thirty and forty thousand individuals,” and that if given enough information, he could give an opinion “*within reasonable psychiatric certainty* as to [the] psychological or psychiatric makeup of an individual.”¹¹⁵ He further explained that “this skill was ‘particular to the field of psychiatr[y] and not the average layman.’”¹¹⁶

Neither doctor actually interviewed the defendant; rather, they based their analyses on a lengthy hypothetical question asking them to assume the following: that the defendant had committed four previous non-violent offenses; had a bad reputation for obeying the law in some communities; had escaped from a New Mexico jail (evidence of these things was also presented during the sentencing hearing); and had committed the capital murder of a police officer.¹¹⁷

On the basis of the hypothetical question, Dr. Holbrook diagnosed the defendant as a “criminal sociopath” and stated that no treatment could change the defendant’s condition.¹¹⁸ In fact, Dr. Holbrook felt, though the condition would not change for the better, it “may become accelerated.”¹¹⁹ Dr. Holbrook’s conclusion was that “‘within reasonable psychiatric certainty’ . . . the [defendant would] commit criminal acts of violence in the future that would constitute a continuing threat to society.”¹²⁰

Similarly, Dr. Grigson diagnosed the defendant as a sociopath in the “most severe category” for which there was no known cure.¹²¹ Dr. Grigson concluded that “whether [the defendant] was in society at large, or in a prison society there was a ‘one hundred percent and absolute’ chance that [the defendant] would commit future acts of criminal violence that would constitute a continuing threat to society.”¹²²

In response to the defense’s claims that psychiatric predictions of future dangerousness were completely unreliable, condemned by the APA, and unconstitutional, the majority opinion, written by Justice White, stated: “[n]either petitioner nor the [APA] suggests that psychiatrists are always wrong with respect to future dangerousness, only

¹¹⁴ *Barefoot*, 463 U.S. at 918 (Blackmun, J., dissenting).

¹¹⁵ *Id.* (Blackmun, J., dissenting).

¹¹⁶ *Id.* (Blackmun, J., dissenting).

¹¹⁷ *Id.* (Blackmun, J., dissenting).

¹¹⁸ *Id.* at 918–19 (Blackmun, J., dissenting).

¹¹⁹ *Barefoot*, 463 U.S. at 918–19 (Blackmun, J., dissenting).

¹²⁰ *Id.* at 919 (Blackmun, J., dissenting).

¹²¹ *Id.* (Blackmun, J., dissenting).

¹²² *Id.* (Blackmun, J., dissenting).

most of the time."¹²³ The majority concluded that though psychiatric predictions of future dangerousness may be "generally so unreliable that it should be ignored," this argument could be made on cross-examination.¹²⁴ The Court felt that the jury could be trusted to sort out the reliable from the unreliable through the adversary process.¹²⁵

The APA filed an amicus curiae brief in support of the defendant's contention that psychiatrists individually and as a class are not competent to predict future dangerousness and that their predictions are so likely to encourage erroneous sentences that their use violates the Eighth Amendment.¹²⁶ The brief stated that the APA's best estimate was that psychiatrists' predictions of future dangerousness in an individual are wrong "two out of three" times.¹²⁷

Justice Blackmun's dissent also noted that John Monahan, considered the "leading thinker on the issue" even by the State's expert, concluded that even the best clinical research indicates that psychiatric predictions of future dangerousness are accurate in no more than one out of every three tries.¹²⁸ This dissent further noted that "[n]either the Court nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right."¹²⁹

Justice Blackmun's dissent also argued that it is impossible to justify allowing psychiatric predictions of dangerousness to be considered by a jury when the Constitution's paramount concern in death penalty cases is reliability.¹³⁰ In Texas, the statute requires that the jury find beyond a reasonable doubt that the defendant will commit future acts of criminal violence.¹³¹ Justice Blackmun argued that if psychiatrists with their aura of professional expertise are permitted to testify to this issue in terms of medical certainty then there is a severe danger that this testimony will lead to erroneously-imposed sentences.¹³² The dissent restated the importance of reliability, recognized in *Woodson*, in determining whether death is the appropriate punishment in a

¹²³ *Id.* at 901.

¹²⁴ *Barefoot*, 463 U.S. at 898.

¹²⁵ *Id.* at 899.

¹²⁶ *Id.* at 920 (Blackmun, J., dissenting).

¹²⁷ *Id.* (Blackmun, J., dissenting).

¹²⁸ *Id.* (Blackmun, J., dissenting).

¹²⁹ *Barefoot*, 463 U.S. at 921 (Blackmun, J., dissenting).

¹³⁰ *Id.* at 923 (Blackmun, J., dissenting).

¹³¹ *Id.* at 924 (Blackmun, J., dissenting).

¹³² *Id.* at 924, 926 (Blackmun, J., dissenting).

specific case: "The Court does not see fit to mention this principle today, yet it is as firmly established as any in our Eighth Amendment jurisprudence."¹³³ Though this evidence may be relevant, Justice Blackmun suggested that its unreliability detracts from its probative value.¹³⁴ He argued that this expert testimony is unduly prejudicial to the defendant because unreliable scientific evidence may mislead a jury.¹³⁵

Justice Blackmun also attacked the majority's conclusion that the adversary process can adequately sort reliable from unreliable opinions about future dangerousness.¹³⁶ Blackmun wondered how juries can be expected to separate valid from invalid opinions when psychiatrists themselves are unable to do so.¹³⁷ Blackmun further suggested that there is no doubt that such testimony will have a great effect on juries because judges themselves rely heavily on expert opinions regarding dangerousness.¹³⁸ He noted that the American Bar Association has warned expressly that sentencing juries are particularly incapable of dealing with information relating to future dangerousness and similar predictive judgments.¹³⁹ "Ultimately," Justice Blackmun wrote, "when the Court knows full well that psychiatrists' predictions of dangerousness are specious, there can be no excuse for imposing on the defendant, on pain of his life, the heavy burden of convincing a jury of laymen of the fraud."¹⁴⁰

B. *The Daubert Standard for Admissibility of Expert Testimony in Federal Civil Cases: Relevance and Reliability Are Required*

In 1993, the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*, a more recent opinion dealing with reliability in expert

¹³³ *Id.* at 924 (Blackmun, J., dissenting).

¹³⁴ See *Barefoot*, 463 U.S. at 926-28 (Blackmun, J., dissenting).

¹³⁵ See *id.* at 926-28 (Blackmun, J., dissenting). The Federal Rules of Evidence (FRE) do not apply to the sentencing phase of state capital trials. See, e.g., *Flores v. Johnson*, 210 F.3d 456, 464 n.10 (5th Cir. 2000) (Garza, J., concurring). The text of FRE 403, however, helps to illustrate Justice Blackmun's statement: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

¹³⁶ *Barefoot*, 463 U.S. at 929-30 (Blackmun, J., dissenting).

¹³⁷ *Id.* at 929 (Blackmun, J., dissenting).

¹³⁸ *Id.* (Blackmun, J., dissenting).

¹³⁹ *Id.* at 930 (Blackmun, J., dissenting).

¹⁴⁰ *Id.* at 935-36 (Blackmun, J., dissenting).

testimony.¹⁴¹ In *Barefoot*, the majority determined that the apparent unreliability of expert determinations of future dangerousness was not an issue affecting admissibility of the testimony, but rather an issue for the jury to consider.¹⁴² Justice Blackmun, in his dissent in *Barefoot*, assailed the majority for ignoring the need for reliability of evidence in capital cases which the Court had emphasized in *Woodson v. North Carolina*.¹⁴³

In *Daubert*, a federal civil case, the plaintiffs presented several experts who testified that the drug Bendectin caused birth defects.¹⁴⁴ The experts' testimony was based on animal studies which indicated a link between the drug and malformations.¹⁴⁵ The Court in *Daubert* abandoned the *Frye* test,¹⁴⁶ also known as the "general acceptance"¹⁴⁷ test for admissibility of expert evidence which required only that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."¹⁴⁸

The Court ruled that the *Frye* test had been superceded by the adoption of the Federal Rules of Evidence.¹⁴⁹ Justice Blackmun, now the author of the majority opinion, interpreted Federal Rule of Evidence 702 to include a duty on the part of judges in federal trials to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but *reliable*."¹⁵⁰

The Court went on to list several non-exclusive factors to assist judges in determining the reliability of scientific evidence: whether the evidence can and has been tested; whether the theory or technique has been subjected to peer review; whether the technique or theory has a known or potential rate of error; whether there are standards controlling the operation or technique; and whether the theory or technique has achieved a degree of acceptance within the community of practitioners within the particular field.¹⁵¹ If a federal judge

¹⁴¹ See 509 U.S. at 590; see also Michael H. Gottesman, *From Barefoot to Daubert to Joiner: Triple Play or Double Error?* 40 ARIZ. L. REV. 753, 756 (1998).

¹⁴² See 463 U.S. at 900-01.

¹⁴³ See *id.* at 924-29.

¹⁴⁴ 509 U.S. at 582-83.

¹⁴⁵ *Id.* at 583.

¹⁴⁶ *Id.* at 597.

¹⁴⁷ *Id.* at 585.

¹⁴⁸ *Id.* at 586.

¹⁴⁹ See *Daubert*, 509 U.S. at 588-89.

¹⁵⁰ *Id.* at 589 (emphasis added).

¹⁵¹ See *id.* at 593-94.

determines that the proffered expert testimony does not meet any of these factors, or that the testimony is otherwise irrelevant or unreliable, then the judge has the ability as gatekeeper to exclude it.¹⁵² No one factor is dispositive.¹⁵³ The Court did "not presume to set out a definitive checklist or test."¹⁵⁴

Justice Blackmun went on to echo the language of his dissent in *Barefoot*, this time stating the principle as the position of the majority of the Court:

Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury. . . ." Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses."¹⁵⁵

C. *Would Barefoot Be Overruled Today?*

Daubert, it must be noted, does not apply in the context of sentencing hearings or state criminal cases because it is a case interpreting federal, rather than state, issues.¹⁵⁶ The Court's shift in thinking regarding the reliability of expert testimony seems significant, however.¹⁵⁷ As one Fifth Circuit Judge notes:

It is well settled that, in the federal courts, the rules of evidence generally do not apply at a sentencing hearing, even one in which the death penalty is a possibility. . . . However, the cardinal concern of the rules of admissibility for expert testimony—reliability—is also the paramount concern in addressing the constitutionality of capital sentencing procedures. This cannot be mere coincidence.¹⁵⁸

¹⁵² See *id.* at 592–95.

¹⁵³ See *id.* at 593.

¹⁵⁴ *Daubert*, 509 U.S. at 593.

¹⁵⁵ *Id.* at 595; see also *Barefoot*, 463 U.S. at 926–28.

¹⁵⁶ See G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 974 (1996).

¹⁵⁷ See *Flores*, 210 F.3d at 464–65 (Garza, J., concurring).

¹⁵⁸ See *id.* at 464 n.10 (Garza, J., concurring).

Daubert may suggest an appropriate level of reliability and accuracy required in the specific context of death penalty sentencing hearings to ensure that the defendant's Eighth Amendment rights are not violated.¹⁵⁹ To date, the Court has not yet addressed whether expert predictions of future danger are admissible in the post-*Daubert* era.¹⁶⁰

At least one case, *Nenno v. State*, decided in 1998 by the Court of Criminal Appeals of Texas, suggests that *Daubert* has changed little at the state level.¹⁶¹ In this case, the defendant was convicted of raping and murdering a child.¹⁶² At sentencing, the state presented Kenneth Lanning, a Supervisory Special Agent in the Behavioral Science unit of the FBI, who specialized in studying the sexual victimization of children.¹⁶³ Mr. Lanning did not interview the defendant, but based on a hypothetical question about the defendant and the crime, he stated that the defendant would be "difficult to rehabilitate" and that he "would be an extreme threat to society and especially children within his age preference."¹⁶⁴

The defendant claimed that the admission of the testimony of Mr. Lanning was error because it failed the factors outlined in *Daubert* for the admissibility of expert testimony.¹⁶⁵ The court disagreed with this claim, however, stating "[t]he general principles announced in *Kelly* (and *Daubert*) apply, but the specific factors outlined in those cases may or may not apply depending upon the context."¹⁶⁶

The court went on to conclude that the *Daubert* factors applied to the social sciences "with less rigor than to the hard sciences."¹⁶⁷ The

¹⁵⁹ *See id.*

¹⁶⁰ *See* John Monahan, *Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV. 901, 916 (2000).

¹⁶¹ *See* 970 S.W.2d 549, 552, 560, 562 (Tex. Crim. App. 1998), *overruled on other grounds* by *State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).

¹⁶² *Id.* at 552.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* at 560. Defendant specifically urged that Lanning's testimony was lacking because "the State failed to produce any evidence (1) that the theories underlying Lanning's testimony are accepted as valid by the relevant scientific community, (2) that the alleged literature on the theories supports his theories, (3) that there are specific data or published articles regarding the area of future dangerousness of prison inmates, (4) that his theories have been empirically tested, (5) that he has conducted any studies or independent research in the area of future dangerousness, or (6) that anyone else had tested or evaluated the theories upon which his testimony was based." *Id.*

¹⁶⁶ *Nenno*, 970 S.W.2d at 560; *see also Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992) (requiring satisfaction of reliability test for expert testimony similar to test announced in *Daubert*).

¹⁶⁷ *Nenno*, 970 S.W.2d at 561.

more appropriate questions when referring to predictions of future danger are: "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field."¹⁶⁸

The court determined that Lanning's testimony satisfied this less rigorous test for admissibility of social science evidence; the opinion, however, made no reference to the Supreme Court's finding that the Eighth Amendment required heightened accuracy and reliability within the context of death penalty sentencing.¹⁶⁹

III. FUTURE DANGEROUSNESS AS AN AGGRAVATING FACTOR IN CAPITAL CASES

The Supreme Court's decision in *Barefoot v. Estelle* remains controversial considering the Court's prior disdain for arbitrariness and caprice as well as its emphasis on accuracy and reliability.¹⁷⁰ Some states, including Mississippi and California, do not include future dangerousness among their list of statutory aggravating factors and have determined that the admission of evidence with regard to future dangerousness at the sentencing phase of capital trials was reversible error.¹⁷¹

Twenty-one states, however, include a defendant's possible future dangerousness among the aggravating circumstances to be considered at the sentencing phase; Texas and Oregon actually require the jury to predict future danger in their decision whether to grant life or death.¹⁷²

In states allowing the determination of a defendant's future dangerousness, the use of expert psychiatric testimony is the preferred method of proving the issue.¹⁷³ In fact, requiring the prosecution to prove future danger may implicitly invite the use of expert tes-

¹⁶⁸ *Id.*

¹⁶⁹ *See id.* at 561-62.

¹⁷⁰ *See, e.g.,* Giannelli, *supra* note 18, at 113-14; Kirchmeier, *supra* note 3, at 370-71; Edmund H. Mantell, *A Modest Proposal to Dress the Emperor: Psychiatric and Psychological Opinion in the Courts*, 4 WIDENER J. PUB. L. 53, 62-63 (1994).

¹⁷¹ *See, e.g.,* *People v. Murtishaw*, 631 P.2d 446, 471 (Cal. 1981); *Balfour v. State*, 598 So.2d 731, 748 (Miss. 1992).

¹⁷² *See* Sorensen, *supra* note 4, at 1252.

¹⁷³ *See* Albertson, *supra* note 6, at 19.

timony because that is the most expedient and effective way to prove the issue.¹⁷⁴

To further complicate the fact that psychiatric predictions of future dangerousness are unreliable, many of these predictions are based on long, complicated hypothetical questions rather than on actual interviews with defendants; even when there are actual psychiatric interviews, they are often only minutes long.¹⁷⁵

A. Pervasive Use of Psychiatric Predictions of Future Dangerousness and Jury Reliance on Such Testimony

In states that allow capital sentencing juries to consider the future dangerousness of the defendant, expert testimony is relied upon extensively.¹⁷⁶ Some states, specifically, Texas and Oregon, go so far as to require the jury to be convinced beyond a reasonable doubt that the defendant poses a continuing threat to society before imposing a death sentence.¹⁷⁷

It is no surprise then that prosecutors in such jurisdictions tend to rely primarily on the simplest and most expedient method of convincing juries of the defendant's future dangerousness.¹⁷⁸ Defendants who have been given a death sentence under this form of sentencing often appeal on the ground that such determinations are unreliable and inaccurate.¹⁷⁹ Unfortunately for these defendants, courts, including the United States Supreme Court, have consistently upheld the use of psychiatric predictions of dangerousness apparently reasoning that such testimony is admissible even though it may have no scientific merit.¹⁸⁰

Despite attempts to restrict psychiatric predictions of dangerousness, such testimony remains the preferred means of per-

¹⁷⁴ See Mehler, *supra* note 6, at 110; Texas Defender Service, *supra* note 8, at 26.

¹⁷⁵ See, e.g., *Estelle v. Smith*, 451 U.S. 454, 460 (1981) (noting doctor's prediction based on 90 minute interview with defendant); see also *Barefoot v. Estelle*, 463 U.S. 880, 918 (1983) (Blackmun, J., dissenting) (explaining psychiatrists' testimony was not based on actual examination—because neither examined defendant—but rather on extended hypothetical questions); *Flores v. Johnson*, 210 F.3d 456, 458 (5th Cir. 2000) (Garza, J., concurring) (noting doctor never examined defendant, nor did he make his evaluation based on psychological records or psychological testing).

¹⁷⁶ See Albertson, *supra* note 6, at 19; Clarke, *supra* note 5, at 445–46; Texas Defender Service, *supra* note 8, at 26.

¹⁷⁷ See TEX. CRIM. PROC. CODE ANN. Art. 37.071 § 2(c) (Vernon 2001); OR REV. STAT. § 163.150(1)(d) (2001).

¹⁷⁸ See Mehler, *supra* note 6, at 110; Texas Defender Service, *supra* note 8, at 26.

¹⁷⁹ Albertson, *supra* note 6, at 19–20.

¹⁸⁰ *Id.* at 20.

suading a jury of a defendant's continuing threat to society and the need for the death penalty.¹⁸¹

1. Theories Explaining Prosecutorial Exploitation and Jury Acceptance of Expert Predictions of Dangerousness

One reason for such extensive prosecutorial reliance on psychiatric predictions of future dangerousness may be that such expert testimony achieves a high success rate among jurors.¹⁸² There are several theories that explain why psychiatric predictions of future dangerousness hold great weight with juries.¹⁸³

One reason for the success of expert testimony is that juries tend to lend greater weight to the testimony of a witness who offers a statement of professional opinion than they would to that of a lay witness.¹⁸⁴ The American Psychiatric Association explains the phenomenon: "A psychiatrist comes into the courtroom wearing a mantle of expertise that inevitably enhances the credibility, and therefore the impact, of the testimony."¹⁸⁵

Judge Garza of the Fifth Circuit Court of Appeals also sheds light on juries' great deference to expert opinion:

As some courts have indicated, the problem here (as with all expert testimony) is not the introduction of one man's opinion on another's future dangerousness, but the fact that the opinion is introduced by one whose title and education (not to mention designation as "expert") gives him significant

¹⁸¹ See *id.* at 19-20.

¹⁸² See, e.g., *Flores*, 210 F.3d at 466 (Garza, J., concurring) ("As has been previously recognized, when a medical doctor testifies that 'future dangerousness' is a scientific inquiry on which they have particular expertise, and testifies that a particular defendant would be a 'continuing threat to society,' juries are almost always persuaded."); *Bennett v. State*, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting) ("[W]hen Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror . . . to be the second coming of the Almighty. . . . Dr. Grigson is extremely good at persuading jurors to vote to answer the [future dangerousness] issue in the affirmative."); see also Brief of Amici Curiae for the American Psychiatric Association at 6, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080) [hereinafter APA Brief] (stating that psychiatric opinions regarding future dangerousness are prejudicial to defendant).

¹⁸³ See *Barefoot*, 463 U.S. at 924, 926-27, 934; *White v. Estelle*, 554 F. Supp. 851, 858 (S.D. Tex. 1982); Mantell, *supra* note 175, at 65; APA's Brief at 3-6, *Barefoot* (No. 82-6080).

¹⁸⁴ See APA's Brief at 6, *Barefoot* (No. 82-6080); see also *White*, 554 F. Supp. at 858 ("[W]hen this lay opinion is proffered by a witness bearing the title of 'Doctor,' its impact on the jury is much greater than if it were not masquerading as something it is not.").

¹⁸⁵ APA's Brief at 6, *Barefoot* (No. 82-6080).

credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact.¹⁸⁶

The APA is particularly disturbed by the influence that an "expert" may hold over a jury considering that the Association does not believe that there are any special interpretive skills which psychiatrists bring to this issue.¹⁸⁷ The APA asserts that dressing up the actuarial data with such "expert" opinion impermissibly distorts the fact-finding process due to the undue weight the jury is likely to place on the testimony.¹⁸⁸

Another possible explanation for the success of psychiatric predictions of future dangerousness with juries is that jurors are more likely to rely on the psychiatrist who is one hundred percent certain of his opinion than the psychiatrist who simply states that such predictions are unreliable.¹⁸⁹ Psychiatrists who are willing to state that they can predict the defendant will definitely be violent in the future present the inexperienced juror with an apparent "medical" conclusion that is highly prejudicial as well as difficult to rebut.¹⁹⁰ The prejudice cannot easily be dealt with through cross-examination or rebuttal experts; most psychiatrists do not believe that they are capable of making long-term predictions of future dangerousness so they are unable to counterbalance the testimony of the prosecution experts because they appear less certain.¹⁹¹ Justice Blackmun described the likely result of this unbalanced battle of experts:

Given a choice between an expert who says that he can predict with certainty that the defendant, whether confined in prison or free in society, will kill again, and an expert who says merely that no such prediction can be made, members of the jury charged by law with making the prediction surely will be tempted to opt for the expert who claims he can help them in performing their duty, and who predicts dire consequences if the defendant is not put to death.¹⁹²

¹⁸⁶ *Flores*, 210 F.3d at 465–66 (Garza J., concurring).

¹⁸⁷ See APA's Brief at 3, *Barefoot* (No. 82-6080).

¹⁸⁸ *Id.*

¹⁸⁹ See *id.* at 6; Mantell, *supra* note 175, at 65–66.

¹⁹⁰ See APA's Brief at 6, *Barefoot* (No. 82-6080); Mantell, *supra* note 175, at 65–66.

¹⁹¹ APA's Brief at 6, *Barefoot* (No. 82-6080).

¹⁹² Mantell, *supra* note 175, 65–66 (quoting *Barefoot*, 463 U.S. at 934 (Blackmun, J., dissenting)).

Thus, the jury hears one expert testify that he is certain that the defendant will be dangerous and another expert disputing not that the defendant will be dangerous, but that the state's expert may not be qualified or able to make such a determination.¹⁹³

2. Empirical Evidence of the Jury Decision-Making Process

The success of expert testimony with juries is demonstrated by a 1992 National Law Journal/Lexis poll that interviewed close to 800 jurors in both civil and criminal cases about their opinions on the jury system.¹⁹⁴ In the criminal context, 95% of the 53% of jurors who heard expert testimony found that testimony believable.¹⁹⁵ Among the jurors in criminal cases who heard psychiatric expert testimony, 87% found it believable.¹⁹⁶

It may be, however, that these numbers mainly speak for the experts on the prosecution side of criminal trials.¹⁹⁷ In the mid-1990s, the National Science Foundation undertook a study of the decision-making process of capital juries nationwide.¹⁹⁸ In the California segment of the project, 152 capital jurors who had participated in thirty-six cases were extensively interviewed; of these cases, eighteen resulted in a verdict of death, seventeen resulted in life without parole, and one jury was hung over the penalty.¹⁹⁹

When questioned about the credibility of defense experts, typically psychiatrists or psychologists who explain to the jury why the defendant may have behaved as he did,²⁰⁰ the jurors' impressions were "more than twice as likely to be negative rather than positive."²⁰¹ Jurors negatively cited twenty-seven different defense experts in eighteen cases.²⁰² In contrast, jurors negatively cited only three experts among the prosecution's witnesses in all thirty-six cases.²⁰³ "The pro-

¹⁹³ See APA's Brief at 3, *Barefoot* (No. 82-6080).

¹⁹⁴ Joan M. Cheever & Joanne Naiman, *The View from the Jury Box: Poll: Jurors Have Faith in System*, NAT'L L.J., Feb. 22, 1993, at S2.

¹⁹⁵ *View from the Jury Box: Expert Witnesses Found Credible by Most Jurors*, NAT'L L.J., Feb. 22, 1993, at S4.

¹⁹⁶ *Id.*

¹⁹⁷ See Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123 (1997).

¹⁹⁸ See *id.* at 1112-13; see also William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 10 IND. L. J. 1043, 1043 (1995).

¹⁹⁹ Sundby, *supra* note 202, at 1112-13.

²⁰⁰ See *id.* at 1118.

²⁰¹ *Id.* at 1123.

²⁰² *Id.*

²⁰³ See *id.* at 1125.

fessional experts called by the prosecution, therefore, enjoyed a far better positive to negative ratio than did the defense experts."²⁰⁴

One reason for this disparity is that the jurors interviewed were more likely to see the defense experts as hired guns willing to testify for whoever was paying them.²⁰⁵ "[T]his skepticism of experts as hired guns appear[ed] to work most harshly against the defendant as the party most clearly 'paying' for the expert testimony."²⁰⁶

B. Predictions of Future Dangerousness are Unreliable

Despite the popularity of future dangerousness predictions, such evidence has been subject to assaults by mental health professionals as well as the American Bar Association.²⁰⁷ The American Psychiatric Association has said that the ability of psychiatrists or any other professionals to reliably predict future violence is unproven.²⁰⁸

For example, two attorneys, Bruce J. Ennis, former legal director of the American Civil Liberties Union, and Thomas R. Litwack, professor at John Jay College of Criminal Justice, have challenged psychiatric predictions of future dangerousness as inaccurate.²⁰⁹ These authors assert that flipping a coin would be a more accurate means of making a future dangerousness determination.²¹⁰

In one study reviewed by Ennis and Litwack, 969 prisoner-patients, who had been detained in maximum security hospitals because they had been diagnosed mentally ill and too dangerous for release or transfer to civil hospitals, were released in conformity with the Supreme Court's decision in *Baxstrom v. Herold*.²¹¹ One year after the inmates were transferred to civil hospitals, "147 had been discharged to the community and the 702 who remained were found to present no

²⁰⁴ Sundby, *supra* note 202, at 1125.

²⁰⁵ *See id.* at 1129-30.

²⁰⁶ *Id.*

²⁰⁷ *See, e.g., Barefoot*, 463 U.S. at 930 (Blackmun, J., dissenting) (citing American Bar Association's warning that juries are particularly incapable of dealing with information regarding defendant's future dangerousness); APA's Brief at 6, *Barefoot* (No. 82-6080).

²⁰⁸ *See* APA's Brief at 6, *Barefoot* (No. 82-6080).

²⁰⁹ *See* Albertson, *supra* note 6, at 20-21; *see generally* Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974).

²¹⁰ *See* Ennis & Litwack, *supra* note 214, at 737; *see also* Albertson, *supra* note 6, at 21.

²¹¹ Ennis & Litwack, *supra* note 214, at 712; *see also* *Baxstrom v. Herold*, 383 U.S. 107, 110, 111 (1966) (holding that prisoners detained in Department of Corrections hospitals after their sentence had expired must be released and committed civilly, if committed at all).

special problems to hospital staff."²¹² Only seven of the 969 were found to be so dangerous that they required recommitment to a prison hospital.²¹³

In another study reviewed by Ennis and Litwack, a team of several mental health professionals including at least two psychiatrists conducted "unusually thorough clinical examinations" of individuals convicted of "serious assaultive crimes."²¹⁴ Out of forty-nine patients predicted to be dangerous by the mental health teams, but who were ultimately released after a court hearing, sixty-five percent were not found to have committed a violent crime within five years of release to the community.²¹⁵ "In other words, two-thirds of those released despite predictions of dangerousness by the professional team did not in fact turn out to be dangerous."²¹⁶

More research on the ability of psychiatric professionals to predict dangerousness conducted in the 1980s and 1990s produces slightly more positive results.²¹⁷ Researchers in the 1980s and 1990s have:

- (1) replaced proxy measures of risk with clinicians' specific predictions or assessments, (2) expanded their definitions of violence to include such legally relevant behaviors as verbal threats, (3) expanded their criterion measures beyond official arrest and hospital records to include violence detected through self-report and the report of knowledgeable third parties, and (4) begun to examine the role that situational/environmental factors may play in subsequent violence.²¹⁸

Using this newer body of research and analysis, "more recent studies suggest that one out of every two people predicted to be violent would go on to engage in some kind of legally relevant, violent behavior."²¹⁹

Additionally, Dr. Jonathan R. Sorensen has presented recent data which indicates how often not only expert predictions of future

²¹² Ennis & Litwack, *supra* note 214, at 712.

²¹³ *Id.*

²¹⁴ *Id.* at 713.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ See Randy K. Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 *LAW & PSYCHOL. REV.* 43, 62-63 (1994).

²¹⁸ *Id.* at 63.

²¹⁹ *Id.*

dangerousness are incorrect, but also how these such predictions fail in general.²²⁰ Sorensen describes a study of actual violence among 6,390 incarcerated individuals in Texas serving an average of 4.55 years during January 1990 through March 1999.²²¹ After considering the actual rates of several types of violent acts as well as the characteristics of incarceration, Sorensen concluded:

[T]he estimated likelihood of violence being committed by a newly received capital murderer over the next forty years . . . is .164. The approximate risk of a given capital murderer committing [the considered violent offenses] over the entire period of his incarceration is essentially double (1.95 times) the observed estimates. For example, the probability a capital defendant will kill again while incarcerated over the next forty years is 0.2%, or about two in one thousand.²²²

"Most jurors are unaware," writes Sorensen, "that both correctional administrators and inmates agree that murderers are generally among the most docile and trustworthy inmates in the institution."²²³ In fact, jurors in capital trials often believe the opposite is true.²²⁴ Interviews conducted with jurors serving in capital cases resulting in the death penalty estimated that there was an "85% likelihood that the defendant would commit a violent crime and a 50% likelihood that the defendant would commit a new homicide had they been given a sentence of life imprisonment."²²⁵

Furthermore, mental health professionals do not trust themselves to make accurate predictions of future dangerousness.²²⁶ In one study, several hundred practicing physicians, clinical psychologists, and mental health lawyers were asked to estimate the percentage of accurate predictions made concerning future dangerousness.²²⁷ The mean fell between forty to forty-six percent, or less than half.²²⁸ Though behavioral scientists tend to be skeptical of research data and specific research findings, academics and professionals have quickly and al-

²²⁰ See Sorensen, *supra* note 4, at 1269-70.

²²¹ See *id.* at 1260.

²²² *Id.* at 1264.

²²³ *Id.* at 1256.

²²⁴ See *id.* at 1269.

²²⁵ Sorensen, *supra* note 4, at 1269.

²²⁶ Albertson, *supra* note 6, at 21.

²²⁷ *Id.*

²²⁸ *Id.*

most unanimously accepted the conclusion that professionals are unreliable and inaccurate in predicting future violence.²²⁹

Numerous theories further explain why psychiatric predictions of future dangerousness are unreliable.²³⁰ One explanation for the inaccuracy of these predictions could be that dangerousness has been historically viewed as coming from within a subject's personality, when the factors which may contribute to dangerousness are actually frequently found in interpersonal and situational contexts.²³¹ Dangerousness may also depend on the use of drugs or alcohol.²³² Because external factors need to be examined, a "person-focused" analysis may be inaccurate because humans do not live in complete isolation.²³³ Much psychological research emphasizes external and environmental influences on behavior, but the criminal justice system continues to primarily rely on person-focused predictions.²³⁴

Predictions may also often fail because mental health professionals may not have been trained to perform such assessments.²³⁵ "Simply because one is termed a 'mental health professional' does not mean that he or she understands the cognitive and behavioral processes that create dangerous behavior."²³⁶ However, because a witness may have some psychiatric training, they are presented by the State as "expert witnesses" fit to offer predictions of the future.²³⁷

C. States That Do Not Consider Future Dangerousness

Several states including California and Mississippi do not list future dangerousness among their statutory aggravating factors guiding juries in death penalty cases.²³⁸ In 1981, the Supreme Court of California in *People v. Murtishaw*, determined that admitting a psychiatric expert's prediction that the defendant would be dangerous in the future was reversible error because the testimony was highly unreliable, extraordinarily prejudicial, and of limited relevance because future

²²⁹ *Id.*

²³⁰ *See, e.g., id.* at 21.

²³¹ Albertson, *supra* note 6, at 45.

²³² *Id.*

²³³ *Id.*

²³⁴ *See id.*

²³⁵ *Id.* at 46.

²³⁶ Albertson, *supra* note 6, at 46.

²³⁷ *See id.*

²³⁸ *See, e.g., Murtishaw*, 29 P.2d at 471; *Balfour*, 598 So.2d at 748.

dangerousness was not a specifically enumerated aggravating factor to be considered.²³⁹

In that case, the defendant was convicted of killing three college students and injuring a fourth.²⁴⁰ Despite the fact that California required no finding of future dangerousness and did not list this among the statutory enumerated aggravating factors, the State called Dr. Ronald Siegel, a psychopharmacologist, to testify that the defendant would continue to be violent in the future.²⁴¹

In finding the admission of this evidence to be error, the court concluded that "evidence which is barely reliable enough to justify a civil judgment or a limited commitment is not reliable enough to utilize in determining whether a man should be executed."²⁴²

The court further noted the effects of such testimony on a jury:

Such testimony implants in the mind of each juror the message that the death penalty, promptly carried into effect, is the only way to protect society from the defendant—the only way to forestall another instance in which [the] defendant responds to frustration with deadly violence. "A trier of fact offered the opportunity to base a decision on the affirmative assertion by an apparently well-qualified professional that a defendant's execution is essential to saving the lives of others is likely to take that opportunity rather than face the difficult task of evaluating the offender's ethical culpability."²⁴³

Such evidence, the court concluded, was too prejudicial to set before the jury when future dangerousness was "only marginally relevant to the task at hand."²⁴⁴

Mississippi also does not list future dangerousness among the aggravating factors to be considered at capital sentencing hearings.²⁴⁵ In 1992, in *Balfour v. State*, the Supreme Court of Mississippi held that because aggravating circumstances are to be limited to the eight statutory factors, the trial court erred in allowing the prosecutor to repeatedly emphasize the defendant's propensity for future violence.²⁴⁶

²³⁹ See 29 Cal.3d at 767-68.

²⁴⁰ *Id.* at 740.

²⁴¹ See *id.* at 767.

²⁴² *Id.* at 771.

²⁴³ *Id.* at 773.

²⁴⁴ See *Murtishaw*, 29 P.2d at 469.

²⁴⁵ See *Balfour*, 598 So.2d at 748.

²⁴⁶ *Id.* at 747-48.

IV. WHY PSYCHIATRIC PREDICTIONS OF FUTURE DANGEROUSNESS
VIOLATE THE EIGHTH AMENDMENT'S BAN ON CRUEL
AND UNUSUAL PUNISHMENT AS INTERPRETED BY
THE SUPREME COURT

States which continue to consider a defendant's future dangerousness and allow the presentation of psychiatric predictions of future dangerousness at the sentencing phases of capital trials continue to violate the Eighth Amendment as interpreted by the Supreme Court in *Furman v. Georgia*, *Gregg v. Georgia*, and *Woodson v. North Carolina*.²⁴⁷

The Court's Eighth Amendment jurisprudence is difficult to navigate—especially after the *Barefoot v. Estelle* decision.²⁴⁸ In *Furman*, the Court held that the death penalty as administered at the time—in an arbitrary and capricious manner through the unguided discretion of juries—was in violation of the Eighth Amendment's ban on cruel and unusual punishment.²⁴⁹ In *Woodson*, the Court echoed the language of Justice Brennan's concurrence in *Furman*, expressing that the death penalty was a punishment to be held apart from all others with a heightened need for reliability in the determination that death is the appropriate punishment in a capital case.²⁵⁰

The Court must have meant that juries require some legitimate, helpful guidance in their decision-making.²⁵¹ It would not be in good faith to simply infer from the Court's language that a state can satisfy the requirements of *Furman* by merely placing any aggravating or mitigating factors in their death penalty statutes which might guide a jury's decision-making, no matter how confusing or unreliable that "guidance" might be.²⁵²

A better interpretation of the *Furman* decision would be that juries must be given *meaningful* guidance which would lead them to the most accurate decision possible because death, in its finality, is different from all other punishments.²⁵³ The Court's follow-up cases support this point of view.²⁵⁴ The Court in *Gregg* emphasized that "accu-

²⁴⁷ See *supra* notes 41–68, 80–90 and accompanying text.

²⁴⁸ See *supra* notes 88–90 and accompanying text.

²⁴⁹ See 408 U.S. 238, 239 (1972) (per curiam); *id.* at 253 (Douglas, J., concurring).

²⁵⁰ See 428 U.S. 280, 304 (1976); see also *Furman*, 408 U.S. at 286–88 (Brennan, J., concurring).

²⁵¹ See *supra* notes 41–56 and accompanying text.

²⁵² See *supra* notes 41–56 and accompanying text.

²⁵³ See *supra* notes 41–68, 80–90 and accompanying text.

²⁵⁴ See *supra* notes 41–68, 80–90 and accompanying text.

rate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die."²⁵⁵ In *Woodson*, the Court also explained that because death is so different from other punishments there is a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."²⁵⁶

In *Jurek v. Texas*, however, the Court veered slightly from this emphasis on reliability and accuracy in jury determinations and accepted the Texas death penalty scheme which required a determination of the defendant's future dangerousness beyond a reasonable doubt.²⁵⁷ In that case, the Court seemed to shift from its original determination in *Furman* that the death penalty not be arbitrarily or capriciously assigned to the more liberal conclusion that any death penalty statute would be upheld as long as death was not "wantonly" or "freakishly" imposed.²⁵⁸

The Court's decision in *Barefoot* clearly veered from the path of *Furman*, *Gregg*, and *Woodson*.²⁵⁹ In *Barefoot*, the Court decided that patently unreliable evidence presented in a highly prejudicial manner by an expert was not unconstitutional because the adversarial process could sort the problems out and the jury was well able to separate reliable from unreliable evidence.²⁶⁰ The APA and Justice Blackmun disagreed, however, finding instead that juries are not capable of dealing appropriately with psychiatric predictions of future dangerousness.²⁶¹

Jurek opened the door for psychiatric predictions of future dangerousness to be presented to juries at sentencing phases of capital trials and *Barefoot* cemented the admissibility of this patently unreliable evidence in death penalty determinations.²⁶² Because these decisions appear to contradict the previously established requirements of reliability, accuracy, and the absence of arbitrariness and caprice in death penalty determinations, the Supreme Court's Eight Amend-

²⁵⁵ 428 U.S. 153, 190 (1976).

²⁵⁶ *Woodson*, 428 U.S. at 305.

²⁵⁷ See *supra* notes 91-103 and accompanying text.

²⁵⁸ See *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (quoting *Furman*, 408 U.S. at 310 (Stewart, J., concurring)); see also *supra* notes 91-103 and accompanying text;

²⁵⁹ See *supra* notes 41-68, 80-90, 114-145 and accompanying text.

²⁶⁰ See *supra* notes 128-130 and accompanying text.

²⁶¹ See *supra* notes 128-130; see also *supra* notes 131-145 and accompanying text.

²⁶² See *supra* notes 91-103, 114-130 and accompanying text.

ment jurisprudence has hung in a curious and confusing limbo ever since they came down.²⁶³

In 1993, the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁶⁴ This case articulated a new test for the admissibility of expert testimony in federal civil cases and voiced a concern in the Court for reliability in expert testimony.²⁶⁵ What this means in the criminal setting at the sentencing phase of a state capital trial remains unclear.²⁶⁶

Despite the fact that the *Daubert* discussion of reliability in expert testimony was in the context of a federal civil case, its standard of reliability should be a model for death penalty determinations.²⁶⁷ The Court has determined that because a death sentence is extremely severe and final, there is a heightened need for reliability in the evidence to be presented at capital sentencing hearings.²⁶⁸ If the Court now requires that expert testimony in civil cases survive a particular determination of reliability to assess admissibility, it only follows that in the far more serious context of death penalty determinations, psychiatric expert testimony should have to meet the Court's *Daubert* standard.²⁶⁹ This seems especially necessary considering the Court's requirement that evidence admitted in death penalty sentencing hearings be particularly reliable.²⁷⁰

It is clear, however, that expert predictions of future dangerousness fail each of the *Daubert* factors which test the reliability of such testimony.²⁷¹ Expert testimony with regard to future dangerousness can and has been tested; it has been revealed as unreliable for years.²⁷² Such predictions have been subject to peer review and the reviews are virtually all negative.²⁷³ The APA has condemned psychiatric predictions of future dangerousness as inaccurate and unreliable.²⁷⁴ Future dangerousness predictions have been estimated to have a failure rate of anywhere from two out of three to one out of

²⁶³ See *supra* notes 32–40 and accompanying text.

²⁶⁴ 509 U.S. 579 (1993).

²⁶⁵ See *supra* notes 154–159 and accompanying text.

²⁶⁶ See *supra* notes 161–174 and accompanying text.

²⁶⁷ See *supra* notes 161–174 and accompanying text.

²⁶⁸ See, e.g., *Woodson*, 428 U.S. at 305.

²⁶⁹ See *supra* notes 146–160.

²⁷⁰ See *Woodson*, 428 U.S. at 305.

²⁷¹ See *supra* notes 156, 213–242 and accompanying text.

²⁷² See *supra* notes 213–242 and accompanying text.

²⁷³ See *supra* notes 213–242 and accompanying text.

²⁷⁴ See *supra* notes 213–242 and accompanying text.

two predictions.²⁷⁵ This rate of error suggests that there are not sufficient standards controlling the methods of prediction.²⁷⁶ Finally, among psychiatric professionals, there is not a degree of acceptance of the ability of psychiatric experts to predict future dangerousness.²⁷⁷ Although the failure of one or two *Daubert* factors is not dispositive, the Court's reasoning suggests that the failure of every single factor would lead to a finding of unreliability and, therefore, inadmissibility.²⁷⁸

Despite the findings of *Daubert*, however, the Federal Rules of Evidence and state equivalents do not apply at the sentencing phases of capital trials.²⁷⁹ What *Daubert* does offer is an indication of what the Court means by reliability.²⁸⁰ If reliability for the Court means passing some of the *Daubert* factors, then expert predictions of future dangerousness are not reliable.²⁸¹

Because of this unreliability, psychiatric predictions of future dangerousness have great potential to mislead juries and result in the arbitrary and capricious administration of the death penalty in violation of the Eighth Amendment.²⁸² When psychiatric experts take the stand and declare with certainty that the defendant will be violent in the future, the jury is inclined to agree.²⁸³

The jury is generally presented with horrendous facts of which they have already found the defendant guilty; then they are told by someone labeled as a psychiatric "expert" that the defendant will definitely harm others in the future.²⁸⁴ The only testimony that the defense expert can offer is that the prosecution's expert may not be able to accurately predict future dangerousness.²⁸⁵ Medical professionals who do not think they can predict the future of the defendant have difficulty rebutting the prosecution's expert because they cannot declare to a one hundred percent certainty that the defendant will *not* be violent.²⁸⁶ Therefore, a jury confronted with this difficult decision

²⁷⁵ See *supra* notes 213–242 and accompanying text.

²⁷⁶ See *supra* notes 213–242 and accompanying text.

²⁷⁷ See *supra* notes 213–242 and accompanying text.

²⁷⁸ See *supra* notes 155–160 and accompanying text.

²⁷⁹ See *supra* notes 155–160 and accompanying text.

²⁸⁰ See *supra* notes 155–160 and accompanying text.

²⁸¹ See *supra* notes 155–160 and accompanying text; see also *supra* notes 213–242 and accompanying text.

²⁸² See *supra* notes 182–242 and accompanying text.

²⁸³ See *supra* notes 182–211 and accompanying text.

²⁸⁴ See *supra* notes 187–193 and accompanying text.

²⁸⁵ See *supra* notes 194–198 and accompanying text.

²⁸⁶ See *supra* notes 194–198 and accompanying text.

is likely to feel more comfortable siding with the prosecution's expert who appears more confident in his evaluation of the defendant.²⁸⁷

Empirical evidence from jurors shows that they find psychiatric experts to be very convincing—but generally only when they are presented by the prosecution.²⁸⁸ In other words, juries believe the experts who seem completely convinced that the defendant will wreak terrible violence and murder if he or she is again unleashed on society—or jurors are simply playing it safe because the defense experts cannot offer a guarantee that the defendant will never again be violent.²⁸⁹

The fact that psychiatric predictions of future dangerousness are very persuasive and prejudicial to a jury would not be relevant if it were not also true that these predictions are no more reliable than the flip of a coin.²⁹⁰ Numerous studies conducted over decades have confirmed that psychiatric professionals are not accurate in predicting future dangerousness.²⁹¹

Dr. James Grigson presents an example of everything that is wrong with psychiatric predictions of future dangerousness.²⁹² His predictions are sometimes based not on actual examinations of the defendants, but on long, drawn out hypothetical questions.²⁹³ Time after time, case after case, defendant after defendant, he uses the same language to present the same diagnosis: the defendant is the worst kind of sociopath—on a scale of one to ten, the defendant would be a ten plus; the defendant has no conscience; it does not matter to the defendant who he kills or what property he destroys; the defendant is one hundred percent certain to kill again; and there is no known cure or treatment for the defendant's condition.²⁹⁴

The problem with these canned predictions, besides the fact that Dr. Grigson does not seem to individualize his diagnoses, is that he has been wrong repeatedly.²⁹⁵ His methods have been condemned by judges and fellow psychiatrists alike as unethical, and more importantly, inaccurate.²⁹⁶ He was expelled from the American Psychiatric

²⁸⁷ See *supra* notes 194–198 and accompanying text.

²⁸⁸ See *supra* notes 199–211 and accompanying text.

²⁸⁹ See *supra* notes 190–206 and accompanying text.

²⁹⁰ See *e.g.*, Ennis & Litwack, *supra* note 214, at 737; see also *supra* notes 213–242 and accompanying text.

²⁹¹ See *supra* notes 213–242 and accompanying text.

²⁹² See *supra* notes 8–23 and accompanying text.

²⁹³ See, *e.g.*, Barefoot v. Estelle, 463 U.S. 880, 918–19 (1983) (Blackmun, J., dissenting).

²⁹⁴ See *supra* note 10.

²⁹⁵ See *supra* notes 15–18 and accompanying text.

²⁹⁶ See *e.g.*, *supra* notes 14, 19–21 and accompanying text.

Association for these methods and his bravado.²⁹⁷ Yet, just this one psychiatric expert has played a significant role in the convictions of an enormous portion of the Texas death row.²⁹⁸

That statutes requiring determinations of future dangerousness allow the introduction of psychiatric expert predictions, like those of Dr. Grigson, clearly exposes the fact that arbitrariness and caprice in the administration of the death penalty have not been expunged.²⁹⁹ The Court, therefore, should get back on the track of *Furman*, *Gregg*, and *Woodson*, and return to the notion that death is different and juries require reliable evidence in order not to produce arbitrary and capricious sentence determinations.

CONCLUSION

The Court was correct in *Furman*, *Gregg*, and *Woodson*. Death is different. One does not need the Court to reveal this principle, however; common sense and intuition lead to the same conclusion. Because the death penalty is so extreme—and utterly final, the Court also correctly determined that heightened standards of reliability and accuracy should be used when determining the admissibility of evidence at the sentencing phases of capital trials. The Court should never have veered from this interpretation of the Eighth Amendment as it did in *Barefoot*. In the *Daubert* decision, the Court emphasized the need for reliability in expert testimony, this time in the federal civil setting. With this decision, the Court seems to have found the path back toward its *Furman*, *Gregg*, and *Woodson* Eighth Amendment jurisprudence. The Court should follow this path toward the finding that psychiatric predictions of future dangerousness in capital cases are a violation of the Eighth Amendment because they are unreliable and inaccurate and lead to arbitrary and capricious results.

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²⁹⁷ See *supra* notes 19–21 and accompanying text.

²⁹⁸ See *supra* notes 8–9 and accompanying text.

²⁹⁹ See *supra* notes 8–23 and accompanying text.