

January 2014

## The Death of Fairness: Texas's Future Dangerousness Revisited

Ana M. Otero

Follow this and additional works at: <https://digitalcommons.du.edu/crimlawrev>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Ana M. Otero, The Death of Fairness: Texas's Future Dangerousness Revisited, 4 U. Denv. Crim. L. Rev. 1 (2014)

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in University of Denver Criminal Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

## The Death of Fairness: Texas's Future Dangerousness Revisited

### Keywords

Evidence, Fourteenth amendment, Jury, Procedure, Psychiatrists and Psychologists, Science and technology, Sentencing, Testimony

## THE DEATH OF FAIRNESS: TEXAS'S FUTURE DANGEROUSNESS REVISITED

*Ana M. Otero* \*

### Abstract

The death penalty in America continues to be a controversial topic; a rapidly changing landscape, whose efficacy is eroding under the weight of glaring injustices and proven error. In the last eight years, six states have abolished it and 146 exonerations nationwide rattle confidence in its accuracy and fairness. This article examines the future dangerousness inquiry of the Texas death penalty statute, a unique and lethal provision hastily engrafted into the revamped statute when it was enacted in 1973. Predictions of future dangerousness – whether a convicted capital defendant will engage in subsequent acts of violence and constitute a continuing danger or threat to society – are offered by the State in the sentencing stage of capital litigation to persuade a jury to render a sentence of death, rather than life imprisonment. This article argues that these predictions are unconstitutional and inadmissible under Texas law.

---

\* This article is dedicated to Craig Washington, a staunch champion for justice, and indefatigable advocate for truth. This article is a labor of love; a long journey derailed by life's vicissitudes. I owe a debt of gratitude to many who have accompanied me in this long and winding road. To Sally Green, for not only encouragement and support throughout, but for getting down and dirty with the first run of this piece and for letting my voice shine. To Docia Rudley, an endless source of sustenance, and to Fernando Colon, for carrying my load while I was down. A debt of gratitude to Lynda Cevallos who gave up a bit of sun to keep me from catching fire. My thanks for your passion and for feeling the pain. I want to thank Ken Williams for his time and his invaluable insights and suggestions. I am deeply grateful to my numerous research assistants for their contributions to this article. To Benjamin James, for his meticulous and thoughtful excursion into the amendments to the Texas death penalty statute. I am grateful for his patience, our long conversations, and his measured insights. I am grateful for Aaron Cowart's brilliant and analytical mind, and for his ability to excavate deep in the chambers of the 63rd Texas Legislature and the Court of Criminal Appeals. To Kavita Nair Brignac, for lending me her sharp eye, for her unyielding scalpel, and for her masterful edits. To Christopher Self, for his thoughtful ideas, excellent research, and for walking with me to the end of the road. My sincere thanks goes to the University of Denver Criminal Law Review for outstanding editorial assistance. Finally, to an unsung hero for an endless reserve of patience and support; my deepest thanks for standing by me when the road seemed impossibly hard to traverse.

**INTRODUCTION: A CONVINCING CASE FOR CHANGE**

Texas law governing the punishment phase of capital litigation has been incisively and fittingly described “as difficult to navigate as a trip blindfolded across Texas.”<sup>1</sup> One aspect of this law – predictions of future dangerousness – allows the introduction of junk science into the courtroom, duping judges and juries, and oftentimes creating irreparable consequences for defendants.

Predictions of future dangerousness – whether a convicted capital defendant will engage in subsequent acts of violence and constitute a continuing danger or threat to society<sup>2</sup> – are offered by the state of Texas in the sentencing stage of capital litigation to persuade a jury to render a sentence of death, rather than life imprisonment.<sup>3</sup> Presumably designed to eliminate arbitrariness and to better guide the jurors in making this difficult decision, these predictions have been widely challenged and criticized because they are used to support a death sentence based on unreliable and faulty scientific evidence.

Of the thirty-two capital jurisdictions,<sup>4</sup> Texas and Oregon are the only two states that require future dangerousness determinations by the jury.<sup>5</sup> The sentencing stage of most capital jurisdiction requires jurors to weigh aggravating and mitigating circumstances in deciding whether to render a verdict of death. In some jurisdictions, future dangerousness plays a role as an important factor to be considered by jurors in making their sentencing decision while in others, it is influential in determining the presence of aggravating factors; and in some states, evidence of the lack of future dangerousness acts as a mitigating factor.<sup>6</sup> In Texas, future dangerousness is the touchstone of the death sentence because jurors must answer one question unanimously – “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society,”<sup>7</sup> before they can consider mitigating evidence to support a verdict less than death.<sup>8</sup>

<sup>1</sup> Janet Morrow & Robert Morrow, *In a Narrow Grave: Texas Punishment Law in Capital Murder Cases*, 43 S. TEX. L. REV. 979, 982 (2002).

<sup>2</sup> TEXAS DEFENDER SERVICE, DEADLY SPECULATION — MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 4, (2004) [hereinafter *Deadly Speculation*], available at [http://texasdefender.org/wp-content/uploads/TDS\\_Deadly-Speculation.pdf](http://texasdefender.org/wp-content/uploads/TDS_Deadly-Speculation.pdf) (“Thus, the institutional adjustment or ability of capital defendants to conform their behavior to a prison setting is generally the critical issue to consider when evaluating whether they actually continue to represent a threat to others.”); In Texas, for example, effective September 1, 2005, a capital defendant who does not get the death sentence will serve life without parole. See TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013).

<sup>3</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013); Predictions of future dangerousness may be offered in other criminal settings as well. For example, one of the statutory factors the court may consider in setting the amount of bail is the future safety of the victim and the community. TEX. CODE CRIM. PROC. ANN. art. 17.15 (West 2013). Additionally, the courts may consider future dangerousness in making probation determinations, offering deferred adjudication, and approving plea bargaining agreements. Finally, future dangerousness is one of the factors considered by parole boards in making their determinations.

<sup>4</sup> DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated May 21, 2014).

<sup>5</sup> Eugenia T. La Fontaine, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional*, 44 B.C. L. REV. 207, 228 (2002) (stating that Oregon is the only other state that allows this factor when making the decision to grant life or death.).

<sup>6</sup> William W. Berry, III, *Ending Death By Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 893 (2010) (explaining the varied use of future dangerousness as it applies to all capital jurisdictions).

<sup>7</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071 § (b)(1) (West 2013).

<sup>8</sup> *Id.* at § 2(e)(1).

Noted psychiatrist, Alan Stone, alluded to the difficulties of predicting future dangerousness:

The decision to impose the sentence of execution is an awesome human responsibility. The retributive taking of a life in the name of justice forces the law-givers to reexamine the very concept of justice. Judges and juries should not be led to believe that the discipline of psychiatry has a scientific shoulder on which their terrible burden of decision can rest. I would, therefore, urge psychiatrists, on the grounds of humility if not truth, to inform courts that we have no professional or scientific basis for participating in a capital sentencing hearing.<sup>9</sup>

These unreliable predictions became a staple of the sentencing scheme and a prerequisite to capital punishment after Texas revamped its statute pursuant to *Furman v. Georgia*,<sup>10</sup> the 1972 U.S. Supreme Court case which struck down the then existing death penalty statutes. While the Court did not rule that capital punishment was *per se* violative, the Court held that the death penalty statutes reviewed were arbitrary and capricious and constituted a violation of the 8<sup>th</sup> Amendment.<sup>11</sup> Although *Furman's* plurality opinion lacked clarity, its effect was enormous—invalidating the death penalty statutes of over thirty-five states and sending legislative bodies into a frenzied scramble to revamp their statutes to meet *Furman's* mandate.<sup>12</sup>

The Texas legislature acted quickly. By 1973, it had enacted a new death penalty statute designed to address the concerns of the *Furman* Court. In fact, the legislative history of the bills, presented to both the House and the Senate, indicates that many hours were spent in drafting and amending the proposed law, in public hearings, and in heated debates on the floor of the legislature. Nevertheless, the future dangerousness inquiry was added with seemingly little discussion or legislative scrutiny.

In 2004, the Texas Defender Service,<sup>13</sup> reviewed 155 cases in which prosecutors had used experts to predict a defendant's future dangerousness.<sup>14</sup> Its comprehensive study found that the experts were wrong 95% of the time,<sup>15</sup> and it made the following salient findings: (1) of the total 155 inmates against whom state experts testified, five percent

<sup>9</sup> Alan A. Stone, *Revisiting the Parable: Truth Without Consequences*, 17 INT'L J.L. & PSYCHIATRY 79, 91 (1994). Unfortunately, Stone also states "[I have] been unable to convince my colleagues that our epistemological problems create an unbridgeable abyss in the criminal courtroom." *Id.*

<sup>10</sup> *Furman v. Georgia*, 408 U.S. 238 (1972). In a plurality decision, the United States Supreme Court held that the current form of the death penalty was unconstitutional and violated the 8<sup>th</sup> and 14<sup>th</sup> Amendments. *Id.* at 255-56. The Court reasoned that abdicating the decision 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. *Id.* Immediately following this decision, death penalty states scrambled to amend their death penalty statutes to comply with *Furman's* mandates. Marcia A. Widder, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 TUL. L. REV. 1341, 1347 (1994).

<sup>11</sup> *Furman*, 408 U.S. at 239-40. The U.S. Supreme Court decided two other death penalty cases along with *Furman*: *Jackson v. Georgia* and *Branch v. Texas*. *Id.*

<sup>12</sup> See John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 148 (1986).

<sup>13</sup> The Texas Defender Service is a nonprofit organization established in 1995 by experienced Texas death penalty attorneys. The organization's mission is to improve the quality of legal representation for those who are facing the death penalty and to expose and eradicate the systemic flaws within the Texas death penalty statutes. TEX. DEFENDER SERVICE, <http://texasdefender.org/about> (last visited Jun. 9, 2014).

<sup>14</sup> *Deadly Speculation*, *supra* note 2, at xiii.

<sup>15</sup> *Id.*

engaged in seriously assaultive behavior; (2) many inmates sentenced to death based on predictions of future dangerousness have proven to be non-assaultive, compliant inmates who pose no risk to other inmates or prison guards; and (3) the use of future dangerousness question injects impermissible racial components into the sentencing process.<sup>16</sup>

The study aptly concluded that this component of the Texas sentencing process was highly flawed. Further, it questioned the validity and fairness of many Texas death sentences<sup>17</sup>—a grave and disturbing concern given Texas’s dubious distinction of leading the nation by approximately 400 executions.<sup>18</sup> With Texas’s top governmental leader either seemingly clueless to the depth of its broken system, or cunningly unwilling to acknowledge it, the Texas death penalty statutes have been long ignored and only serve to perpetuate a grievously flawed system.

#### A. TEXAS’S “THOUGHTFUL [AND] VERY CLEAR PROCESS”: THE EGREGIOUS CASE OF CAMERON TODD WILLINGHAM

On September 7, 2011 at the Republican debate held at the Ronald Reagan Presidential Foundation and Library, the moderator, Brian Williams, asked Governor Perry whether he struggled to sleep at night with the idea that any one of the 234 death row inmates executed in Texas might have been innocent.<sup>19</sup> Fueled by an unexpected round of applause in support of Texas’s executions, Perry responded confidently.<sup>20</sup>

While he may glibly boast that Texas has in place a “thoughtful [and] very clear process,” the opposite is true. Texas’s death penalty system is profoundly flawed and the irrevocable consequences of its myriad problems, many of which resonate embarrassingly in the national news, are disconcerting and shameful. As this section will show, Governor Perry’s statement reflects, at best, a profound ignorance; at worst, an intentional and flagrant indifference to a serious and endemic problem that continues to rattle the minds of those who battle deep in the trenches of the Texas death penalty system.

In a recent article, noted prohibitionist, David Dow, mentioned possibly one of the most egregious “mistakes” – well-known to Perry – that should have caused him to lose a bit of sleep.<sup>21</sup> On December 23, 1991, a fire moved quickly through a one-story

<sup>16</sup> *Id.* at xiv.

<sup>17</sup> *Id.* at xv.

<sup>18</sup> Juan A. Lozano, *Texas Woman Set to be 500<sup>th</sup> Execution in State*, YAHOO NEWS (June 26, 2013), <http://news.yahoo.com/texas-woman-set-500th-execution-state-073800079.html>.

<sup>19</sup> *The Republican Debate at the Regan Library*, N.Y. TIMES (Sept. 7, 2011), <http://www.nytimes.com/2011/09/08/us/politics/08republican-debate-text.html?pagewanted=all>

<sup>20</sup> Perry said the following:

No, sir. I’ve never struggled with that at all. The state of Texas has a very thoughtful, a very clear process in place of which —when someone commits the most heinous of crimes against our citizens, they get a fair hearing, they go through an appellate process, they go up to the Supreme Court of the United States, if that’s required. But in the state of Texas, if you come into our state and you kill one of our children, you kill a police officer, you’re involved with another crime and you kill one of our citizens, you will face the ultimate justice in the state of Texas, and that is, you will be executed.

*Id.*

<sup>21</sup> David Dow, *Rick Perry’s Lethal Overconfidence*, THE DAILY BEAST (Sept. 9, 2011, 4:17 PM), <http://www.thedailybeast.com/articles/2011/09/09/rick-perry-and-the-death-penalty-executing-innocents.html> (“There are some I think could well have been innocent—Frances Newton, for example, who supposedly killed

house in the city of Corsicana in northeast Texas.<sup>22</sup> The neighbors hurried to see Cameron Todd Willingham's house engulfed in flames as he was screaming, "My babies are burning up!"<sup>23</sup> His three daughters were trapped inside the house while he remained helpless standing on the front porch. He told the neighbors to call the fire department as he attempted to reenter the house, but it was too late. Willingham had lost all three of his children to smoke inhalation.<sup>24</sup>

The trial began in August 1992 in downtown Corsicana and ended after two days with the jury only deliberating for barely an hour; they returned with a unanimous guilty verdict.<sup>25</sup>

The prosecution brought forth two medical experts to confirm for the jury that Willingham was a sociopath. The first medical expert, Tim Gregory, was a psychologist with a master's degree in marriage and family issues who had also previously gone hunting with the assistant district attorney, John Jackson.<sup>26</sup> The other medical expert was James P. Grigson, a forensic psychiatrist also known as Dr. Death because of how frequently he testified for the prosecution in capital punishment cases.<sup>27</sup> Dr. Grigson diagnosed Willingham as an "extremely severe sociopath."<sup>28</sup> Neither had even met Willingham.<sup>29</sup> Three years after Willingham's trial, Grigson was expelled from the American Psychiatric Association for ethics violations.<sup>30</sup>

---

her husband and two children without getting even a spot of blood or speck of gunpowder on herself, or Charles Nealy, who did not remotely match the description of the person who killed the convenience store clerk. But there was no DNA in either case, and so I am left being unsure."). Anthony Graves, Ernest Willis, Michael Toney, Michael Blair, and Robert Springsteen are just a few of the men exonerated during Perry's tenure. *Id.* David Dow is a professor at the University of Houston Law Center, where his teaching areas include constitutional law, contract law, and death penalty law. U. HOUS. L. CENTER, <http://www.law.uh.edu/faculty/ddow2/dpage2/> (last visited May 20, 2014). Dow formed the Texas Innocence Network, where he has represented more than a hundred death row inmates and worked to exonerate them. *Id.*

<sup>22</sup> David Grann, *Trial By Fire*, NEW YORKER (Sept. 7, 2009), [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann) (last visited May 20, 2014). This article was featured in 2009 asking the question, "Did Texas execute an innocent man?" It is a detailed article portraying the events that took place in the life of Cameron Todd Willingham and his family. *Id.* It reveals the step-by-step record of the tragic fire that killed Willingham's three daughters, the investigation of the fire, the alleged charges brought against Willingham, faulty arson forensic science, false expert witness testimony, incompetent counsel, and other errors that contributed to his execution. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* While in prison, Willingham wrote letters to his prison pen pal, Elizabeth Gilbert, a forty-seven year-old French teacher and playwright from Houston. She began corresponding with Willingham and took an interest in his case when she noticed several contradictions in the eyewitness accounts. She filtered through the statements of witnesses that became complete opposites by the time the news spread throughout the community and the trial had begun over eight months later. *Id.* ("Diane Barbee had reported that, before the authorities arrived at the fire, Willingham never tried to get back into the house—yet she had been absent for some time while calling the fire department. Meanwhile, her daughter Buffie had reported witnessing Willingham on the porch breaking a window, in an apparent effort to reach his children. And the firemen and police on the scene had described Willingham frantically trying to get into the house.). Furthermore, several of Willingham's friends and relative had doubts that he was guilty, including his former probation officer, Polly Goodin, and even former Judge Bebe Bridges. *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*; Mike Tolson, *Effect of 'Dr. Death' and His Testimony Lingers*, HOUS. CHRON. (June 17, 2004), <http://www.chron.com/news/houston-texas/article/Effect-of-Dr-Death-and-his-testimony-lingers-1960299.php>.

<sup>28</sup> Grann, *supra* note 22

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; Laura Beil, *Groups Expel Texas Psychiatrist Known for Murder Cases*, DALL. MORNING NEWS (July 26, 1995) ("A statement issued last week by the psychiatric association says that Dr. Grigson violated the organization's ethics code by 'arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100 percent

In 1996, Willingham received a new court-appointed attorney by the name of Walter Reaves, who filed a writ of habeas corpus to introduce new evidence such as perjured testimony, unreliable medical experts, and false scientific findings.<sup>31</sup> The Texas Court of Criminal Appeals denied the writ in October of 1997.<sup>32</sup> However, Willingham was granted a temporary stay of execution when he filed another writ in federal court.<sup>33</sup> By 2002, the Federal District Court and the Fifth Circuit Court of Appeals denied Willingham's writ without even a hearing, and the U.S. Supreme Court later declined to hear his case in December of 2003.<sup>34</sup>

Thirteen years later, in the days leading up to Willingham's execution, [in a last-ditch clemency appeal,] his attorneys sent to Governor Rick Perry and the Board of Pardon and Parole a report from Gerald Hurst, a nationally recognized arson expert, saying that Willingham's conviction was based on erroneous forensic analysis. Documents obtained by the Innocence Project show that state officials received that report but apparently did not act on it.<sup>35</sup>

At 6:20 p.m. on February 17, 2004, Cameron Todd Willingham was executed at the Texas State Penitentiary in Huntsville, TX.<sup>36</sup>

A few months after Willingham's execution, the Chicago Tribune published an investigative report challenging the forensic analysis.<sup>37</sup> Five of the nation's leading independent arson experts, assembled by the Innocence Project, reviewed the evidence in the case, issuing a forty-eight page report that none of the scientific analysis used to convict Willingham was valid.<sup>38</sup>

In 2005, the Texas Legislature created the Forensic Science Commission to regulate state crime labs and investigate complaints that allege professional scientific negligence or misconduct.<sup>39</sup> In 2008, the agency began looking into the Willingham case, and the Ernest Ray Willis case, another similar arson case. The agency retained a well-known national arson expert, Craig Beyler, to do an analysis of the fire investigation

---

certainty that the individuals would engage in future violent acts.'"). In response to inquiries about Dr. Grigson, Dr. Jonas Rappoport, medical director for the American Academy of Psychiatry and the Law, stated that "no psychiatrist can predict with 100 percent certainty whether someone will be dangerous to society." *Id.*

<sup>31</sup> Grann, *supra* note 22.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Cameron Todd Willingham's Surviving Relatives Petition for Posthumous Pardon 20 Years After Conviction: Nation's Arson Experts Uniformly Agree Evidence Was Flawed*, INNOCENCE PROJECT (Oct. 24, 2012), [http://www.innocenceproject.org/Content/Cameron\\_Todd\\_Willinghams\\_Surviving\\_Relatives\\_Petition\\_for\\_Post\\_humous\\_Pardon\\_20\\_Years\\_After\\_Conviction.php#](http://www.innocenceproject.org/Content/Cameron_Todd_Willinghams_Surviving_Relatives_Petition_for_Post_humous_Pardon_20_Years_After_Conviction.php#).

<sup>36</sup> *Id.* For an article comparing the Willingham case with another very similar arson case, that of Ernest Ray Willis, see Michael Hall, *Separated at Death*, TEX. MONTHLY (December 2009), <http://www.texasmonthly.com/story/separated-death?fullpage=1>.

<sup>37</sup> Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB. (Dec. 9, 2004), <http://www.chicagotribune.com/news/nationworld/chi-0412090169dec09,0,1173806.story>.

<sup>38</sup> Douglas J. Carpenter et al., *Report on the Peer Review of the Expert Testimony in the Cases of State of Texas v. Cameron Todd Willingham and State of Texas v. Ernest Ray Willis*, INNOCENCE PROJECT (Mar. 28, 2006), <http://www.innocenceproject.org/docs/ArsonReviewReport.pdf>.

<sup>39</sup> House Bill 1068, amended Chapter 38, Code of Criminal Procedure by adding 38.01 Texas Forensic Science Commission ("FSC"). The bill's authors were Senator Whitmire, Senator Hinojosa and Representative Driver. *About Us*, TEX. FORENSIC SCI. COMM'N, <http://www.fsc.state.tx.us/about/> (last visited February 8, 2014).



methods and procedures used in both criminal arson cases.<sup>40</sup> On August 17, 2009, Dr. Beyler issued a comprehensive sixty-four page report, in which he concluded:

The investigations of the Willis and Willingham fires did not comport with either the modern standard of care expressed by NFPA 921, or the standard of care expressed by fire investigation texts and papers in the period 1980-1992. The investigators had poor understanding of fire science and failed to acknowledge or apply the contemporaneous understanding of the limitations of fire indicators. Their methodologies did not comport with the scientific method or the process of elimination. A finding of arson could not be sustained based upon the standard of care expressed by NFPA 921, or the standard of care expressed by fire investigation texts and papers in the period 1980-1992.<sup>41</sup>

Dr. Beyler was scheduled to testify before the Forensic Science Commission in October 2009, and the commission's final report on the cases was scheduled to appear in early 2010. However, just two days before Dr. Beyler was scheduled to present its damaging findings to the commission, Governor Perry replaced the Chairman of the commission, along with three other appointees.<sup>42</sup> In what many called a cover-up, Perry appointed to the seat a Williamson County District Attorney, whom he had originally appointed to the district attorney's office in 2001: "It looked an awful lot like the governor had used a crony to scuttle a meeting at which the commission was going to hear from an expert that Perry had overseen the execution of an innocent man."<sup>43</sup>

Despite national outcry and ridicule for the many Texas cases gone awry, there continues to be endemic indifference to the problems plaguing the Texas's criminal justice system. Despite the realities that confront them, the Texas movers and shakers remain disconcertingly steadfast about the "thoughtful" implementation of capital punishment and recalcitrant on the issue of modifying statutes to follow advancements in forensic medical data. In Texas a flawed capital punishment system is particularly disturbing because of the staggering statistics. Since the revision of its death penalty statutes in 1976, Texas has executed 515 individuals as of June 30, 2014; the most recent on April 16, 2014, when Texas executed #999417, Jose Villegas.<sup>44</sup> With the diligent efforts of the Innocence Project, Texas has had 12 exonerations from 1973 – 2012, and they continue to work on hundreds of cases every year.<sup>45</sup>

2014 marks the 41st anniversary of the post-*Furman* Texas death penalty statute. This article argues that, as enacted, Article 37.071 did not meet the requirements set forth in *Furman*. Namely that the future dangerousness provision of that statute allows the

<sup>40</sup> CRAIG L. BEYLER, ANALYSIS OF THE FIRE INVESTIGATION METHODS AND PROCEDURES USED IN THE CRIMINAL ARSON CASES OF ERNEST RAY WILLIS AND TODD CAMERON WILLINGHAM 1 (2009), available at <http://i.cdn.turner.com/cnn/2009/images/11/09/rpt.tx.forensic.willes.willingham.anaylsis.final.pdf>.

<sup>41</sup> *Id.* at 52.

<sup>42</sup> Matt Smith & Ed Lavandera, *Perry "Squashed" Texas Execution Probe. Ex-official Says*, CNN POLITICS (Sep. 8, 2011, 11:01 PM), <http://www.cnn.com/2011/POLITICS/09/07/texas.execution.probe/>.

<sup>43</sup> Hall, *supra* note 36.

<sup>44</sup> *Executed Offenders*, TEX. DEP'T CRIM. JUST. (June 30, 2014), [http://www.tdcj.state.tx.us/death\\_row/dr\\_executed\\_offenders.html](http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html).

<sup>45</sup> See *Exoneration Statistics by State*, DEATH PENALTY INFO. CENTER (Mar. 12, 2014), <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>. Per the National Registry of Exonerations, total exonerations in Texas number 133; in 2013, Texas had 13 exonerations -the highest number of all states for that year. See NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2013 1-19 (2014), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2013\\_Report.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf).

admissibility of unreliable expert testimony in violation of the Due Process Clause of the U.S. Constitution and the Eighth Amendment. Further, it argues that these unreliable predictions are inadmissible under Texas Rule of Evidence 702 because they do not meet the requirements for scientific reliability established under Texas law. Thus, there is no alternative but to abolish it to prevent further abuses and injustices.

Future dangerousness has been the subject of a voluminous jurisprudence from mental health and legal professionals. Yet there has been no systematic attempt to examine both the legislative history of the 1973 statute, and its amendment history to show the consequences of its flawed inception. Additionally, there has been no critical analysis of Texas Court of Criminal Appeals' opinions involving these unreliable predictions to show the inexplicable pattern of incongruent holdings, the result of which being precisely the arbitrary decisions *Furman* sought to eradicate. This article attempts to fill that void in numerous ways. Part I examines in detail the legislative history of the 1973 statute, and concludes that the hasty addition of the future dangerousness provision was simply a codification of then existing practice. This part will show that long before 1973 prosecutors were already relying on the testimony of unreliable forensic mental health professionals to convince a jury to render a death verdict. Since 1973, the Texas Legislature has amended Article 37.071 at least nine times.<sup>46</sup> Part II explores three of the amendments that relate to future dangerousness to show the constitutional deficiencies of the statute, and how a hodgepodge of repairs has failed to yield the lofty promises of *Furman*. It argues that, despite legislative tinkering and the significant transformations of expert admissibility, the future dangerousness provision remains immutable. Part III examines the early decades following the enactment of the statute, showcasing the infamous testimony of "Dr. Death" to show the State's abuse of future dangerousness predictions. This section examines the evolution of stricter standards of expert admissibility and judicial gatekeeping. Further, this section argues that in spite these changes, Texas continues to admit unreliable scientific testimony to support its death sentences. It concludes with a brief review of Dr. Richard Coons's testimony, and the landmark *Coble* case, where the Texas Court of Criminal Appeals was forced to acknowledge the unreliability of this testimony.

Part IV explores the futility of appellate review in Texas to correct trial error. It examines a number of opinions from the Court of Criminal Appeals that demonstrate an evident pattern of judicial contradiction. This section demonstrates how failure to correct error in the trial court proceedings results in an ineffective and meaningless appellate review of capital opinions ultimately resulting in impermissible constitutional outcomes.

#### **PART I. THE TEXAS LEGISLATURE AND *FURMAN*: FUTURE DANGEROUSNESS INQUIRY - A HASTY ADDITION TO THE REVAMPED DEATH PENALTY STATUTE**

Under the current death penalty scheme, once a defendant is convicted of a capital offense, the court holds a separate sentencing proceeding to determine whether the defendant is sentenced to death or life imprisonment without parole.<sup>47</sup> During this hearing, both sides may present evidence that the court deems relevant to the sentence.<sup>48</sup> Upon the conclusion of the presentation of the evidence, the jury must answer two questions

<sup>46</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013).

<sup>47</sup> *Id.* § 2(a)(1). In 2005, Texas passed a bill that gave juries the option of sentencing a defendant to life without parole. See *Texas Governor Signs Life Without Parole Bill Into Law*, DEATH PENALTY INFO. CENTER (2014), <http://www.deathpenaltyinfo.org/node/158>.

<sup>48</sup> TEX. CODE CRIM. PROC. ANN. § 2(a)(1) (West 2013).

unanimously: 1) “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”; and 2) “whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.”<sup>49</sup> The state is required to prove each issue beyond a reasonable doubt, and the jury must answer “yes” unanimously, or “no” only if ten jurors agree.<sup>50</sup> Once the jury answers both issues affirmatively, it must then answer the following issue:

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 a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.<sup>51</sup>

But to understand how future dangerousness became the touchstone of the death penalty statute, a short journey into the 63<sup>rd</sup> Legislature in 1973 is warranted.

#### A. TEXAS IS FORCED TO MOVE QUICKLY TO REVAMP ITS DEATH PENALTY STATUTE

Prior to *Furman*, the Texas death penalty statutes contained no sentencing guidelines; there were no mitigating or aggravating circumstances or objective standards of any kind to guide or regularize the process, so that death penalties throughout Texas were “wantonly” and “freakishly” imposed.<sup>52</sup> It was precisely this unfettered and arbitrary discretion that *Furman* sought to eliminate. After *Furman*, Texas moved quickly to revamp its death penalty legislation to ensure its compliance with *Furman*'s constitutional mandate against the arbitrary or capricious imposition of the death penalty. The Texas statute that ultimately became effective on June 14, 1973,<sup>53</sup> contained five capital offenses,<sup>54</sup> and a procedure for the sentencing stage of a capital trial. This procedure was designed to provide structure for the jury, based on three special questions or issues that the jury had to answer during deliberations. On May 28, 1973, a Conference Committee of the 63<sup>rd</sup> Legislature, composed of ten members, produced the future dangerousness inquiry as one of three special questions or issues in HB 200:

- 1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- 2) whether there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- 3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.<sup>55</sup>

<sup>49</sup> *Id.* § 2(b)(1)(2).

<sup>50</sup> *Id.* § 2(d)(2).

<sup>51</sup> *Id.* § 2(e)(1).

<sup>52</sup> See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”).

<sup>53</sup> Act of June 14, 1973, ch. 426 art. 1-3, 1973 Tex. Gen. Laws 1122, 1125.

<sup>54</sup> See *id.* art. 2 § 1, at 1123.

<sup>55</sup> CONF. COMMITTEE, CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess., at 8-9 (Tex. 1973).

Under the statute, the state was required to prove each issue beyond a reasonable doubt.<sup>56</sup> The capital defendant would receive either a sentence of death or life imprisonment based on the jury's answer to these questions. Although the statute did not direct the jury's vote either way, it required them to answer the questions where an affirmative answer by twelve jurors to all issues would result in a death sentence. However, a negative response to any issue would result in a life sentence, but the jury could not give a negative response to any issue unless ten or more jurors agreed.<sup>57</sup>

While the legislative history of the death penalty statute reveals numerous hours of debate and haggling over the bill itself, these three special issues came out of the Conference Committee with little, if any, debate or legislative scrutiny—a significant flaw that would ominously presage lethal consequences. Unquestionably, heated debates on the floor of the legislature and the numerous amendments to the bill reveal a single-minded objective: to ensure that the revamped death penalty statute would pass *Furman*'s constitutional mandate. Yet, amazingly, the section of the bill that has been most problematic—the future dangerousness inquiry—remains shrouded in mystery. The record reveals that it was engrafted into the bill by a handful of members over the weekend before the session came to a close, and received no thoughtful consideration or debate on the issue in either House.

#### **B. LEGISLATIVE STRUGGLE TO RESTORE A DEATH PENALTY THAT WOULD COMPLY WITH FURMAN - A BRIEF JOURNEY TO THE 63<sup>RD</sup> TEXAS LEGISLATURE**

The Senate introduced two death penalty bills, which were not considered in a public hearing until shortly after the House passed H.B. 200: S.B. 10, authored by Senator William Meier<sup>58</sup> and S.B. 20, authored by Senator Ogg.<sup>59</sup> As introduced, both bills contained the same leniency provision as H.B. 200, but upon consideration in committee, Meier convinced the committee to substitute for S.B. 10 a completely revamped bill.<sup>60</sup> Discussion from the Senate Jurisprudence Committee hearings reveals that some senators took the District and County Attorneys Opinions and the House's response to mean that a mandatory bill would be the only way to make H.B. 200 constitutionally permissible.<sup>61</sup> Senator Meier disagreed with the idea that a mandatory bill would be constitutional; in fact, he stated that this was erroneous.<sup>62</sup> Focusing not on the swing justices in the majority,

<sup>56</sup> *Id.* at 9.

<sup>57</sup> *Id.*

<sup>58</sup> S. JOURNAL, 63d Leg., Reg. Sess., at 593 (Tex. 1973).

<sup>59</sup> *See id.* at 71.

<sup>60</sup> S. Subcomm. on Criminal Matters, 63d Leg. Reg. Sess. (Tex. 1973); *Hearings on Tex. H.B. 200 Before the S. Comm. on Jurisprudence*, 63d Leg., Reg. Sess. (Tex. 1973) [hereinafter *Hearings*], *Deb. on H.B. 200 on the Floor of the S.*, 63d Leg., Reg. Sess. (Tex. 1973).

<sup>61</sup> S. Subcomm. on Criminal Matters, 63d Leg. Reg. Sess. (Tex. 1973) (statement of Sen. Ogg on May 23, 1973).

<sup>62</sup> *Id.* In 1976, Meier's views were proved correct by the holding of the Supreme Court in *Woodson v. North Carolina*, a case which struck down the state's mandatory death penalty statute for a broad category of homicides. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society -- jury determinations and legislative enactments -- both point conclusively to the repudiation of automatic death sentences. At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict. As we have seen, the initial movement to reduce the number of capital offenses and to separate murder into degrees was prompted in

but those in the minority in *Furman*, Meier believed that neither Chief Justice Burger nor Justice Blackmun would vote for a mandatory death penalty, but that their votes were necessary to uphold any death penalty statute.<sup>63</sup> Meier convinced the Committee to report to the Senate Floor Meier's substitute for S.B. 10, as part of an agreement with Senator Ogg to "debate the two different philosophies of how the death penalty may be reinstated in light of the Supreme Court decision this past summer. . . ."<sup>64</sup> Meier and Ogg came to an agreement that Meier's bill would be reported out by the Committee, and Ogg would offer an amendment to the bill striking the remainder of Meier's bill below the enacting clause and substitute it with the mandatory bill passed by the House.<sup>65</sup> Ogg's amendment was tabled after a discussion of the merits between the two approaches.<sup>66</sup> Meier reiterated his view before the Senate Floor, as he did before the Committee, that the Supreme Court would hold a mandatory death penalty bill unconstitutional.<sup>67</sup> Additionally, Senator Meier believed that a second aspect of the bill, which made it constitutionally impermissible under *Furman*, was the lack of guidance given to the jury in making the decision to render the death penalty.<sup>68</sup> Referring to the three companion cases decided by the *Furman* Court, he noted that there were no "statutory guidelines for the juries in any of those three cases."<sup>69</sup> Meier's argument ultimately prevailed in the Senate, and his proposed amendment was the one accepted by the Senate as the starting point for further amendments of the bill from the Senate floor.<sup>70</sup> All subsequent amendments after Meier's bill were accepted with regard to the substantive elements of a capital offense.<sup>71</sup> No amendment purported to change the procedure as enunciated in Meier's bill.<sup>72</sup> The record indicates that legislators were more concerned with death penalty eligible offenses than they were with the procedure under which someone would be sentenced to death, a miscalculation that has become more significant as the multiple subsequent amendments to cure an initially procedurally flawed statute have proven.

Meier's answer to *Furman*'s mandate, with respect to the procedure under which juries were to sentence capital defendants, was to bifurcate the guilt and innocence phase before the same jury.<sup>73</sup> The language in Meier's bill regarding aggravating and mitigating

---

part by the reaction of jurors as well as by reformers who objected to the imposition of death as the penalty for any crime.").

<sup>63</sup> See *Deb. on H.B. 200 on the Floor of the S.*, 63d Leg., Reg. Sess. (Tex. 1973).

<sup>64</sup> *Id.*; *Hearings*, *supra* note 60 (statement of Sen. Meier).

<sup>65</sup> See *Hearings*, *supra* note 60 (statement of Sen. Meier); See also S. JOURNAL, 63d Leg., Reg. Sess., at 1441-42 (Tex. 1973).

<sup>66</sup> See S. JOURNAL, 63d Leg., Reg. Sess., at 1442 (Tex. 1973).

<sup>67</sup> *Deb. on H.B. 200 on the Floor of the S.*, 63d Leg., Reg. Sess. (Tex. 1973).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See S. JOURNAL, 63d Leg., Reg. Sess., at 1442 (Tex. 1973).

<sup>71</sup> *Id.* at 1442-53

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1442, 1445. Although the Model Penal Code formulation and procedure was in existence for some time before *Furman*, it was adopted by no state until after *Furman* was decided:

In recent years[,] academic and professional sources have suggested that jury sentencing discretion should be controlled by standards of some sort. The American Law Institute first published such a recommendation in 1959. Several States have enacted new criminal codes in the intervening 12 years, some adopting features of the Model Penal Code. Other States have modified their laws with respect to murder and the death penalty in other ways. **None of these States have followed the Model Penal Code and adopted statutory criteria for imposition of the death penalty.**

McGautha v. California, 402 U.S. 183, 202-03 (1971) (emphasis added).

circumstances was substantially the Model Penal Code's formulation.<sup>74</sup> However, Meier omitted one aggravating factor covering multiple or serial murders and one mitigating factor concerning circumstances that the defendant believed provided a "moral justification" for his conduct.<sup>75</sup> Although the Texas statute was later amended to give the prosecutor discretion whether or not to seek the death penalty in a capital case, a prosecutor who charged a capital offense under Meier's bill, as first passed by the Senate, would necessarily proceed after a guilty finding by the jury to the sentencing phase.<sup>76</sup> As in the former statutes, the jury chooses between confinement or death. Under the new bill, the jury would be instructed on the aggravating factors, which make a particular crime death-eligible; and mitigating factors, which make the individual characteristics of the defendant inappropriately suited for the punishment of death.<sup>77</sup> The recurring tension between Senator Ogg's belief that a mandatory bill would be constitutional and Meier's belief that it would not was that Senator Ogg did not believe a mandatory death penalty was ideal from a policy perspective.<sup>78</sup> The bill was ultimately passed by the Senate on

<sup>74</sup> Compare S. JOURNAL, 63d Leg., Reg. Sess., at 1445-46 (Tex. 1973) (offering an amendment so as to substitute Sen. Meier's bill), with MODEL PENAL CODE § 210.6(3)-(4) (Proposed Official Draft 1962) (listing the aggravating and mitigating circumstances of criminal homicide). The aggravating and mitigating circumstances listed in the Model Penal Code were as follows:

(3) Aggravating Circumstances. (a) The murder was committed by a convict under sentence of imprisonment. (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person. (c) At the time the murder was committed the defendant also committed another murder. (d) The defendant knowingly created a great risk of death to many persons. (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat or force, arson, burglary, or kidnapping. (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody. (g) The murder was committed for pecuniary gain. (h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) Mitigating Circumstances. (a) The defendant has no significant history of prior criminal activity. (b) The murder 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 homicidal conduct or consented to the homicidal act. (d) The murder was committed under circumstances which the defendant believed to provide moral justification or extenuation for his conduct. (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. (f) The defendant acted under duress or under the domination of another person. (g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. (h) The youth of the defendant at the time of the crime.

*Id.*

<sup>75</sup> Compare S. JOURNAL, 63d Leg., Reg. Sess., at 1445-46 (Tex. 1973) (offering an amendment so as to substitute Sen. Meier's bill), with MODEL PENAL CODE § 210.6(3) to (4) (listing the aggravating and mitigating circumstances of criminal homicide).

<sup>76</sup> See S. JOURNAL, 63d Leg., Reg. Sess., at 1442, 1445 (Tex. 1973).

<sup>77</sup> COMM. SUBSTITUTE H.B. 200, 63d Leg., Reg. Sess., (Tex. 1973); S. JOURNAL, 63d Leg., Reg. Sess., 1445-46 (1973). Commenting on these factors before the Senate Jurisprudence Committee, Meier interpreted the intent of the drafters of the Model Penal Code, "what I would think they're trying to get at is that it's going to have these narrowly confined circumstances to look at in terms of aggravating and mitigating factors." S. *Subcomm. on Criminal Matters*, 63d Leg. Reg. Sess. (Tex. 1973).

<sup>78</sup> As the chair of the Senate Jurisprudence Committee remarked, "My heart goes with Meier's bill if we're going to have one, because at least there's a—but I think it would be unconstitutional, and [Ogg's] is just cold [laughter]." Then Ogg interjected: "it's just cold, it's callous, it's killing, but if anything we've got for us it's constitutional." S. *Subcomm. on Criminal Matters*, 63d Leg. Reg. Sess. (Tex. 1973); Commentator Eric Citron describes the Senate debate as "Justice vs. Discretion," where the illustrative exchange between Senator Meier and Senator Adams on May 23, 1973, reflects the "ways in which the legislators' constitutional confusion prevented them from fully reaching the deep moral issues that could have been at stake in an ideal debate about

May 23, 1973, but rejected by the House, which did not concur with the Senate Amendments.<sup>79</sup> On Friday, May 25<sup>th</sup>, the Senate bill was referred to a joint Conference Committee to “adjust the differences between the two Houses on the bill.”<sup>80</sup> It is in this 10-man committee that the future dangerousness language of the special issues was mysteriously crafted into the bill.<sup>81</sup>

### C. PREDICTIONS OF FUTURE DANGEROUSNESS: A HASTY ADDITION TO THE BILL

The Conference Committee met every day of the weekend from the Friday it was appointed.<sup>82</sup> The changes made retained Senator Meier’s framework for capital sentencing,<sup>83</sup> but also included the three special issues for the jury to determine, one of which is the future dangerousness inquiry.<sup>84</sup> Of the original three issues passed by the Legislature in 1973, only the issue of future dangerousness remains in the death penalty statute today.<sup>85</sup> The other two issues the jury was mandated to answer under the statute: 1) “whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;” and 2) “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”—reflected the influence of the House Bill calling for a mandatory statute.<sup>86</sup> The absurdity, that these two issues essentially duplicate the findings of the jury in the guilt phase of the capital murder trial, was not lost on all legislators.<sup>87</sup>

---

capital punishment policies.” Eric F. Citron, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL’Y REV. 143, 166-67 (2006); Adams offered no policy justification for a mandatory bill, but rested his argument on the fact that Meier’s version gave the jury a guided discretion, which was, in fact, more discretion than existed in the mandatory bill passed in the House. *Deb. on Tex. H. B. 200 on the Floor of the S.*, 63d Leg., Reg. Sess. (Tex. 1973).

<sup>79</sup> H. JOURNAL, 63d Leg., Reg. Sess. 4678, 4985 (Tex. 1973).

<sup>80</sup> *Id.*

<sup>81</sup> The Conference Committee was composed of Representatives Cobb, Washington, Lombardino, Doyle, and Maloney; Senators Ogg, Wallace, Meier, Sherman, and Adams. S. JOURNAL, 63d Leg., Reg. Sess., 1535, 1539 (Tex. 1973). Of these ten members, Members Washington, Wallace, and Sherman did not sign the Conference Committee report, but this is not indicative of lack of participation in the conference committees. HOUSE CONFERENCE COMM., CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess. (Tex. 1973). The Conference Committee met each day over the weekend from the Friday it was appointed. *Deb. on Tex. H.B. 200 on the Floor of the H.*, 63d Leg., Reg. Sess. (May 28, 1973).

<sup>82</sup> *Hearings, supra* note 60.

<sup>83</sup> HOUSE CONFERENCE COMM., ANALYSIS OF THE HOUSE CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess. (Tex. 1973).

<sup>84</sup> *Id.* at ¶¶ 8-10; HOUSE CONFERENCE COMM., CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess., at 8 (Tex. 1973).

<sup>85</sup> Act of May 28, 1973, ch. 426, 1973 Tex. Gen. Laws 1122, 1125 (current version at TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013)).

<sup>86</sup> HOUSE CONFERENCE COMM., CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 200, 63d Leg., Reg. Sess., at 8-9 (Tex. 1973).

<sup>87</sup> The point here is that, arguably, these issues are covered by the guilt phase finding of an “intentional” or “knowing” killing, and the unreasonableness issue covered by then existing law providing for a jury charge of Voluntary Manslaughter, if raised by the evidence. H. JOURNAL, 63d Leg., Reg. Sess., 4978 (Tex. 1973); This absurdity was observed by Representative Spurlock:

I want to make a motion that the House not concur in the report of the Conference Committee and instruct our conferees to go back and try again. Look on page one, you have the punishment for murder with malice aforethought shall be death or life imprisonment if this, this—then you turn over to page eight and see what the criteria are to put someone to death. You find those criteria stated there are the same, basically, as the criteria that are required under a finding of murder with malice aforethought. You’ve got to have a jury find murder with malice aforethought in effect in two different places. That’ll never hold up.

The special issues were recognized simply as a condensed version of Senator Meier's "much lengthier bill."<sup>88</sup> There were two aggravating factors in Meier's Senate bill, which related to a defendant's future dangerousness. One aggravating factor being whether "the murder was committed by a person under sentence of imprisonment" or whether "the defendant was previously convicted of another murder or of a felony involving the use or threat of violence."<sup>89</sup> The mitigating circumstances stated in Meier's bill relevant to future dangerousness were the converse of the aggravating factors—whether "the defendant has no significant history of prior criminal activity."<sup>90</sup> Presumably, the assumption underlying Meier's criteria, which mirrored the Penal Code, is that a past criminal history can be used to predict continued future violence.<sup>91</sup> The point of these criteria is not to punish for past conduct, which has already been addressed by the legal system by barring double jeopardy, but to use a history of criminal behavior as predictions of future conduct. These rearward looking factors that a jury could consider became a single unifying dispositive formula that mandated the special issue the jury had to answer: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."<sup>92</sup>

Representative Robert Maloney, a member of the committee, is credited with authoring the issue of future dangerousness.<sup>93</sup> On Monday, May 28, 1973, the Dallas Morning News reported that a legislative compromise had been reached on Sunday night and that the ten-man conference committee would meet later in the day to review the bill one more time and to resolve any final problems before it was signed.<sup>94</sup> The article listed the special issues to be decided by the jury in sentencing, but these were different from the ones that were ultimately crafted into the committee's report<sup>95</sup>—indicating that the compromise bill was tweaked and tugged into its final form up to the last minute of the last week of the session. Amazingly, despite the new language engrafted into the bill in the committee, it was adopted by both houses with little, if any, legislative scrutiny.<sup>96</sup> The

*Deb. on Tex. H.B. 200 on the Floor of the H.*, 63d Leg., Reg. Sess. (Tex. 1973).

<sup>88</sup> *Deb. on Tex. H.B. 200 on the Floor of the H.*, 63d Leg., Reg. Sess. (Tex. 1973).

<sup>89</sup> S. JOURNAL, 63d Leg., Reg. Sess. 1445-46 (Tex. 1973).

<sup>90</sup> *Id.*

<sup>91</sup> This assertion is not unsupported by research. See, e.g., Gordon Hall, *Prediction of Sexual Aggression*, 10 CLINICAL PSYCHOL. REV. 229, 239 (1990), as cited in Russell Covey, *Exorcizing Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 257 n.330 (2004).

<sup>92</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2013).

<sup>93</sup> *Deb. on Tex. H.B. 200 on the Floor of the H.*, 63d Leg., Reg. Sess. (Tex. 1973) (showing that Cobb wanted Maloney to be recognized for helping Lombardino and Cobb come up with the language of the death penalty statute).

<sup>94</sup> *Compromise Reached on Death Penalty Bill*, DALL. MORNING NEWS, May 28, 1973, at A8.

<sup>95</sup> *Id.*

<sup>96</sup> However, the record does show definite references made by the district attorneys regarding the issue of a defendant's future dangerousness. In the February 6, 1973 public meeting attended by Representative Maloney, one of the members of the ten-man conference committee, John Green, Ector County's District Attorney, testified in an exchange that uncannily prophesied the use of psychiatrists to make these predictions. Mr. Green spoke of a defendant who had committed multiple murders to which he eventually confessed, and had plead guilty to life on the hopes of getting out on early parole. He said that he had the defendant examined by one of the top psychiatrists in the State of Texas who said: "The man, if he gets back out of the penitentiary will again continue to kill." During Mr. Green's testimony, Representative Craig Washington probed him further: "You indicated that no matter how long he stays in the penitentiary, if he ever gets out, that he will more than likely, if he gets another opportunity, kill again?" Subsequently, at the same hearing, Carol Vance, Harris County D.A. made the following statement:



only time the issue is specifically mentioned, other than when it was read before the House, is Cobb's reference to the future dangerousness issue as a showing the defendant is a "menace to society."<sup>97</sup> During the debate on the final passage of the bill in the House, Cobb observed that the criteria provided by the three special issues were to be narrowly construed.<sup>98</sup> In a last-ditch attempt to force discussion on the new language added by the Committee, Representative Craig Washington, one of the ten members of the committee, and a vocal advocate against the proposed death penalty bill, raised a point of error against consideration of the Committee Report on the bill "on the grounds that it contains language not included in either the House or Senate versions of the bill."<sup>99</sup> The point of order was overruled.<sup>100</sup>

On June 14, 1973, H.B. 200 was signed into law.<sup>101</sup> The bill amended Article 1257 of the 1925 Penal Code, and added as part of the new penal code §19.03 to include five capital offenses. In addition, it added Article 37.071—the capital sentencing scheme containing the three special jury issues. The hybrid bill reflected a compromise between the two houses of the legislature. Yet, the last-minute inclusion of the special issues reflected only the will of the seven lawmakers who signed the conference committee report. As one commentator has shrewdly observed:

The effect of the conference committee's decision to add new language never before debated was thus to transform themselves into a seven-person state legislature, for it was impossible for either house to alter the bill without dooming it and unlikely that either would vote to kill it. Future dangerousness thus became law without a word.<sup>102</sup>

Arguably, the Texas legislature merely codified an existing statewide practice by district attorneys of relying on psychiatrists to make predictions of future dangerousness to convince the jury to render a death sentence; a practice well-documented and explained by prosecutors at that fateful House Committee on Criminal Jurisprudence. Between 1970 and 1972, at least four newspaper articles had appeared in the Dallas Morning News recounting the use of forensic psychiatrists, most notably, Doctors Grigson and Holbrook to testify at the

---

I think that there are just certain types of cases that juries look on as being death penalty cases. I wish we had a crystal ball, and could go into the minds of these individuals and find out exactly what's wrong and give them an instant shot to counteract whatever it may be and to make them well. But despite all of our progress in other areas, I don't even think we've dented the surface so far as doing this...but the psychiatrists could not give an answer...[I] just think that there are certain persons, either because they will kill again, or else because the death penalty should be in our law, or that there are a lot of persons that sit and think "well, if I hijack that store and take the money, I better not kill this person because the 10 years, or five years to life that I might get might turn into the death penalty."

*Pub. Hearing on H.B. 200*, 63d Leg., Reg. Sess. (Tex. Feb. 6, 1973).

<sup>97</sup> *H. Deb. on Tex. H.B. 200 on the Floor of the H.*, 63d Leg., Reg. Sess. (1973).

<sup>98</sup> "[T]he criteria is so narrow and the burden upon the prosecution so great—the burden is such that he won't attempt to seek the death penalty in a case where there appears to be any circumstantial. . . ." At this point, Representative Cobb is interrupted, but it seems that the thrust of this statement, derived from the context of the discussion, is that the presence of mitigating circumstantial evidence would contraindicate to the jury the imposition of the death penalty under H.B. 200. *Id.*

<sup>99</sup> *H. JOURNAL*, 63d Leg., Reg. Sess., at 4985 (Tex. 1973).

<sup>100</sup> *Id.*

<sup>101</sup> *See Act of June 14, 1973*, ch. 426 art. 3 § 1(c)-(d), 1973 Tex. Gen. Laws 1125.

<sup>102</sup> Citron, *supra* note 78, at 173.

sentencing hearing of capital defendants.<sup>103</sup> The testimony by prosecutors at the public hearings of HB 200 clearly shows that prosecutors honestly relied on these doctors' predictive ability—a reliance that at best was grounded on sheer ignorance, and at worst a blind determination to obtain a verdict of death even if the scientific testimony was shrouded in junk science.

**D. TEXAS'S DEATH PENALTY SCHEME IS CHALLENGED: JUREK V. STATE – THE U.S. SUPREME COURT UPHOLDS THE STATUTE AS CONSTITUTIONAL**

From its inception, the future dangerousness element of the revised capital sentencing statute in Texas has attracted much deserved criticism.<sup>104</sup> Critics have argued that the purpose of Texas's revised statute

[A]imed to make the individualized assessment required by *Furman* the touchstone of the infliction of the State's ultimate punishment<sup>105</sup> ... [a]s implemented has backfired: the sentencing procedure fails to give juries meaningful—rather than merely inflammatory—information about defendants. It has led to an obscene ballooning of the number of people sentenced to death, an expansion far beyond those deserving the death penalty.<sup>106</sup>

Texas cases support this contention. The first challenge to the constitutionality of the revamped capital scheme in Texas was made by Jerry Lane Jurek who was charged with the capital murder of ten-year old Wendy Adams in Cuero, Texas.<sup>107</sup> Jurek argued that the imposition of the death penalty under Articles 1257 and 37.071 constituted cruel and unusual punishment under *Furman*.<sup>108</sup> The Court of Criminal Appeals reviewed salient points of *Furman* and examined in detail portions of the revamped Texas statute to conclude that the latter were constitutional.

The Court's examination of the special issues offered to the jury under the statute is particularly relevant to the subsequent amendments of the statute. The Court considered Jurek's argument that the special issues submitted to the jury under Art. 37.071(b) were too vague to provide adequate guidance to the jury in choosing between life and death.<sup>109</sup> The Court, however, rejected this argument focusing only on the second special issue, the future dangerousness inquiry. The court stated that in reaching an answer the jury could consider: (1) whether the defendant had a significant criminal record; (2) the range and severity of the prior criminal record; (3) the age of the defendant at the time of the commission of the offense; (4) whether the defendant at the time of the offense was under

<sup>103</sup> See, e.g., *Accused Killer Called Sociopath by Doctor*, DALL. MORNING NEWS, Oct. 24, 1970, at 17A; Tom Johnson, *Nathan Curry, 25, Left Enigmatic Legacy*, DALL. MORNING NEWS, Apr. 4, 1971, at 1A, 26A; *Psychiatrist Feels Calley Didn't Have Intent to Kill*, DALL. MORNING NEWS, May 28, 1972, at 13A; Marc Bernabo, *Five Testify Gross Is Insane*, DALL. MORNING NEWS, June 18, 1972, at 23A; Marc Bernard, *Doctors Testify In Murder Case*, DALL. MORNING NEWS, June 21, 1972, at 4A; *Final Arguments Set in Gross Murder Trial*, DALL. MORNING NEWS, June 22, 1972, at 13A; and Henry Tatum, *Jury Finds Daniels Guilty In Slaying of NASA Man*, DALL. MORNING NEWS, Feb. 13, 1971, at 1D.

<sup>104</sup> *Deadly Speculation*, *supra* note 2, at 2-3.

<sup>105</sup> Michael Kuhn, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 Hous. L. REV. 410, 423 (1973-1974), as cited in *Deadly Speculation*, *supra* note 2, at 2 n.17, 3-4.

<sup>106</sup> *Deadly Speculation*, *supra* note 2, at 3-4.

<sup>107</sup> *Jurek v. State*, 522 S.W.2d 934, 937 (Tex. Crim. App. 1975). It is worth noting that the court stated that this case was the first to reach the court under the new Texas Penal Code. *Id.* at 936 n.1.

<sup>108</sup> *Id.* at 937.

<sup>109</sup> *Id.* at 939.

duress or domination of another and; (5) whether the defendant at the time of the offense was under an extreme form of mental or emotional pressure less than insanity.<sup>110</sup> The Court held that the ability of the jury to consider these factors gave the jury a reasonable and controlled discretion required by *Furman* in imposing the death penalty.<sup>111</sup>

However, the dissenting justices agreed with Jurek that the second special issue was too vague to be constitutional.<sup>112</sup> They both noted that the word “probability” was not defined by statute and, therefore, the usual acceptance of the word in common language applied.<sup>113</sup> Potentially it could mean that a jury would vote for the death penalty even if they believed that there was only “a chance” the convicted defendant would be dangerous in the future. As the Justices aptly pointed out, such a definition would almost always compel an affirmative answer.<sup>114</sup>

In 1976, the Supreme Court of the United States reviewed Jurek’s case, and the new death penalty statutes of three other states: Florida, Georgia, and North Carolina.<sup>115</sup> In his appeal, Jurek argued “that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”<sup>116</sup> Jurek further argued that the substantial legislative changes made to the

<sup>110</sup> *Id.* at 939-40. Over twenty years later, the Texas high court in *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987), outlined eight specific factors that the jury could consider:

1. the circumstances of the capital offense, including the defendant’s state of mind and whether he was acting alone or with other parties;
2. the calculated nature of the defendant’s acts;
3. the forethought and deliberateness exhibited by the crime’s execution;
4. the existence of a prior criminal record and the severity of the prior crimes;
5. the defendant’s age and personal circumstances at the time of the offense;
6. whether the defendant was acting under duress or the domination of another at the time of the commission of the offense;
7. psychiatric evidence; and
8. character evidence.

*See also* Dewberry v. State, 4 S.W.3d 735, 743 (Tex. Crim. App. 1999) (holding that the jury could find that the defendant would be a continuing threat to society by evidence presented of the brutal nature of the crime, and the lack of remorse or contrition); Baker v. State, 956 S.W.2d 19, 21 (Tex. Crim. App. 1997) (finding evidence in the punishment phase of the trial supported the jury’s finding of future dangerousness, where the evidence showed that the defendant set out to kill his employer but killed someone else instead so he could steal his car when, besides the murder weapon, the victim was carrying a number of other weapons, and a notebook that included his plans for the year stated: “30 + victims dead. 30 + armed robberies. Steal a lot of cars.”); Alvarado v. State, 912 S.W.2d 199, 209 (Tex. Crim. App. 1995) (holding that in addition to the circumstances of the capital case, the jury can consider criminal history, reputation evidence, and psychiatric testimony of a violent personality).

<sup>111</sup> *Jurek*, 522 S.W.2d at 940.

<sup>112</sup> *Id.* at 945 (Odom, J., concurring in part and dissenting in part) (“Article 37.071 is so confusing that even the majority of this Court have been misled. They have not even addressed the vagueness of that issue upon which the operation of this mandatory statute pivots. I would hold the statute unconstitutionally vague in violation of Article 1, Section 10, Texas Constitution and the due process clause of Amendment XIV, United States Constitution.”); *Id.* at 946 (Roberts, J., dissenting) (“The conclusion is thus inescapable that the appellant’s punishment was decided to a significant degree by the answer to a question which— as a result of its vagueness and overbreadth —[c]ould not have been answered in his favor. It is equally clear that such a procedure violates due process and thus constitutes error.”).

<sup>113</sup> *Id.* at 945-46 (Odom, J., concurring in part and dissenting in part); *Id.* at 947-48 (Roberts, J., dissenting).

<sup>114</sup> *Id.* at 945-46 (Odom, J., concurring in part and dissenting in part); *Id.* at 948 (Roberts, J., dissenting).

<sup>115</sup> *Jurek v. Texas*, 428 U.S. 262 (1976). On the same day that *Jurek* was decided, the Supreme Court upheld the validity of the Florida and Georgia statutes in *Proffitt v. Florida*, and *Gregg v. Georgia*, respectively. 428 U.S. 242 (1976); 428 U.S. 153 (1976). However, the Court struck down the death penalty scheme in *Woodson v. North Carolina*, 428 U.S. 280 (1976).

<sup>116</sup> *Jurek*, 428 U.S. at 268.

Texas capital sentencing statute in response to *Furman* were “cosmetic” in nature and failed to eliminate the ‘arbitrariness’ and ‘caprice’ that *Furman* held to be violations of the Constitution.<sup>117</sup> With respect to the second statutory question, Jurek argued that “it is impossible to predict future behavior and that the question is so vague as to be meaningless.”<sup>118</sup>

The U.S. Supreme Court upheld the constitutionality of the Texas statute. In specifically, with respect to the issue of future dangerousness, the Court reasoned that while this determination may be difficult, it can be made.<sup>119</sup>

The task that a Texas jury must perform in answering the statutory question *in issue* is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury has before it all possible relevant information about the individual defendant whose fate it must determine.<sup>120</sup>

Not surprisingly, “the tasks performed countless times each day” alluded to by the court were instances in criminal litigation. Such instances include admitting a defendant to bail, determining sentencing alternatives, and parole determinations—none of which involved the serious consequences of capital litigation.<sup>121</sup>

In the last forty-one years, Article 37.071 has been amended at least nine times. The next section examines the three amendments that relate to future dangerousness - the 1991, 2001, and 2005 amendments. The analysis of the reasons prompting the amendments show how the procedural infirmities, highlighted by Justices Odom and Roberts in their dissent in *Jurek*, have resulted in irreparable consequences.

## **PART II. THE IMPLEMENTATION OF THE DEATH PENALTY STATUTE: THE BUMPY ROAD OF AMENDMENTS**

---

<sup>117</sup> *Id.* at 274.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 276. Justice Stewart, joined by Justices Powell and Stevens, noted that the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed, “but a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we have held in *Woodson v. North Carolina* to be required by the Eighth and Fourteenth Amendments.” *Id.* at 271. *Woodson v. North Carolina*, decided the same day as *Jurek*, invalidated the North Carolina death penalty statute on Eighth Amendment grounds. 428 U.S. 280, 304 (1976). The death penalty in *Woodson* was mandatory upon a guilty finding. *Id.* at 305. (Brennan, J., and Marshall, J., concurring). The Court of Criminal Appeals interpretation of the second special issue curiously led the Stewart plurality to conclude that the Texas Court’s interpretation, listing five factors that could be considered with reference to future dangerousness, broadly authorized the defense to present evidence of “whatever mitigating circumstances relating to the individual defendant can be adduced.” *Jurek*, 428 U.S. at 276. The plurality also found that “Texas law clearly assures that all such evidence will be adduced,” in spite of the fact that the statute does not explicitly speak of mitigating circumstances. *Id.* at 272, 276. The touchstone of *Jurek* is that “the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.” *Id.* at 272. Having found that these dictates were satisfied in this case, the Court affirmed the judgment. *Id.* at 277 (Burger, J., and Blackmun, J., concurring).

<sup>120</sup> *Jurek*, 428 U.S. at 275-76. The court alluded to a number of instances where predictions of future criminal conduct were essential elements of decisions rendered throughout the criminal justice system: whether to admit a defendant to bail; determining sentencing alternatives, parole determinations. *Id.* at 275. But none of these decisions alluded to by the court involved capital litigation—a process that has been repeatedly attacked for the fatal consequences of its endemic flaws.

<sup>121</sup> *Id.* at 275-76.

Despite numerous amendments, future dangerousness has remained intact. This history of constant change and revision and the apparent immutability of future dangerousness, highlights the impossibility of establishing an infallibly accurate death penalty system. It also speaks to the long, dark consequences of a procedure that was hastily conceived and poorly vetted.

#### **A. THE 1991 AMENDMENT: THE PENRY FACTOR—TWO OF THE SPECIAL ISSUES ARE DELETED**

In yet another effort to comply with *Furman*, Texas amended Article 37.071 twice in 1991. The second amendment was the result of *Penry v. Lynaugh*.<sup>122</sup> Eighteen years after the enactment of the revamped death penalty statute, the 72<sup>nd</sup> Legislature abolished two of the special issues, which were hastily engrafted into the bill. However, the future dangerousness inquiry remained intact.

In 1989, the United States Supreme Court decided *Penry v. Lynaugh*.<sup>123</sup> In *Penry*, the Court held that although Art. 37.071, as interpreted by *Jurek v. Texas*,<sup>124</sup> allowed a defendant to present mitigating evidence on his or her behalf, the jury was not able to give any meaningful effect to such mitigating evidence.<sup>125</sup> In other words, if the jury answered affirmatively to the three special issues set forth in Art. 37.071 but, at the same time did not think the convicted defendant deserving of death due to mitigating evidence offered, then the jury had no vehicle through which to express its leniency. Under this circumstance the jury would have to give an intentionally false answer to one of the special issues in order to avoid the death penalty. Moreover, the *Penry* Court held that some evidence that had a mitigating effect such as an abused childhood, the effects of which are irreversible, also served to increase the likelihood of an affirmative answer to the future dangerousness special issue (the “two-edged sword”).<sup>126</sup> The Court concluded that “in the absence of instructions informing the jury that it could consider and give effect to mitigating evidence,” the abovementioned problems inherent in Art. 37.071 rendered the Texas statute unconstitutional as a violation of the Eighth and Fourteenth Amendments.<sup>127</sup>

*Penry* was predictable given a line of cases that were decided by the U.S. Supreme Court between 1976 and 1982 dealing with individualized consideration at capital sentencing. In *Woodson v. North Carolina*, the Supreme Court held that North Carolina’s mandatory death sentence statute violated the Eighth and Fourteenth Amendments because of the fear that the jury, finding a mandatory death penalty unduly harsh and unworkably rigid, would factor in the severity of the penalty in finding guilt.<sup>128</sup> Harkening back to Justice Stewart’s admonitions in *Jurek* that sentencing procedures must allow for consideration of particularized mitigating factors,<sup>129</sup> in *Lockett v. Ohio* and

<sup>122</sup> *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>123</sup> *Id.*

<sup>124</sup> *Jurek*, 428 U.S. at 269, 276.

<sup>125</sup> *Penry*, 492 U.S. at 327-28; Lisa L. Havens-Cortes, *The Demise of Individualized Sentencing in the Texas Death Penalty Scheme*, 45 BAYLOR L. REV. 49, 56 (1993) (discussing the Supreme Court’s requirement that a jury be able to give meaningful effect to mitigating evidence offered by a convicted defendant).

<sup>126</sup> 492 U.S. at 323-24; *See* Havens-Cortes, *supra* note 125, at 56-57.

<sup>127</sup> *Penry*, 492 U.S. at 328; *See* Havens-Cortes, *supra* note 125, at 57-58.

<sup>128</sup> 428 U.S. 280, 304-05 (1976).

<sup>129</sup> *Jurek*, 428 U.S. at 271-72 (“Thus, in order to meet the requirement of the Eighth and Fourteenth Amendment, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances . . . the Texas statute does not explicitly speak of mitigating circumstances; it directs only that the jury answer three

in *Eddings v. Oklahoma* the court expanded the rule from *Woodson*.<sup>130</sup> The Court held that the Eighth and Fourteenth Amendments require that the sentencer in capital trials “not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”<sup>131</sup> The jury must be afforded an opportunity to give independent mitigating weight to the circumstances presented by the defendant at the sentencing hearing.<sup>132</sup> This rule, the Court explained, “is the product of a considerable history reflecting the law’s effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual.”<sup>133</sup>

In 1988, the habeas petitioner in *Franklin v. Lynaugh* seized upon these principles in seeking to attack the constitutionality of his death sentence.<sup>134</sup> *Franklin v. Lynaugh* involved a case where the only mitigating circumstance that the defendant was able to present at his sentencing hearing was that his conduct record during time periods where he was incarcerated showed no disciplinary infraction.<sup>135</sup> The petitioner argued that even if the jury believed that the two special issues submitted to them under the Code of Criminal Procedure, Art. 37.071, ought to be answered yes, then the mitigating evidence offered by petitioner at his sentencing hearing stripped the jury of an opportunity to impose life imprisonment as an alternative to the death penalty. This was because the mitigating evidence had no weight toward imposing a life sentence except as relevant to and channeled through the special issues.<sup>136</sup> The court held that the Eighth Amendment was not violated in sentencing the petitioner to death.<sup>137</sup> While the plurality’s reasoning rested on the grounds that it was appropriate for the mitigating evidence, presented by the defendant, to influence the jury’s consideration of the answers to the special issues,<sup>138</sup> Justice O’Connor’s cautious concurrence affirming the death sentence rested on narrower grounds. In expressing her doubts about the Texas death penalty scheme, Justice O’Connor observed that the principle underlying *Lockett* and *Eddings* is that “punishment should be directly related to the personal culpability of the criminal defendant.”<sup>139</sup> The statute as drafted left open the possibility that mitigating evidence, offered by a defendant against the death penalty, would have relevance towards the defendant’s moral culpability. Yet the sentencer would not be permitted to give effect to its consideration in answering

---

questions. Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors.”).

<sup>130</sup> *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

<sup>131</sup> *Lockett*, 438 U.S. at 604 (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”). Recognizing that the “imposition of death by public authority is... profoundly different from all other penalties,” the Court held that the sentence must be free to give “independent mitigating weight to aspects of the defendant’s character and to circumstances of the offense proffered in mitigation.” *Id.* at 604-05. In *Eddings*, the Court cited to the rule in *Lockett* as cited above. *Eddings*, 455 U.S. at 110 (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

<sup>132</sup> *Lockett*, 438 U.S. at 605.

<sup>133</sup> *Eddings*, 455 U.S. at 110-11.

<sup>134</sup> 487 U.S. 164, 177 (1988).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 183 (plurality opinion); *Id.* at 188 (O’Connor, J., concurring).

<sup>138</sup> *Id.* at 182.

<sup>139</sup> *Id.* at 184.

the special verdict questions.<sup>140</sup> As applied, such a situation would present an Eighth Amendment violation.<sup>141</sup> However, Justice O'Connor concluded that the death sentence in this case was constitutional because the defendant's single piece of mitigating evidence "had no relevance to any other aspect of petitioner's character."<sup>142</sup> The jurors were able to weigh with the fullest consideration the mitigating effect of this evidence without exceeding the built-in limitations of the statute.

Thus, *Penry v. Lynaugh* presented the Court with a case where the mitigating effect of the evidence presented at sentencing was capable of expanding beyond the constraints of the three issues presented under the Code of Criminal Procedure, Art. 37.071.<sup>143</sup> The constitutional proviso reserved by Justice O'Connor in *Franklin v. Lynaugh* was triggered, and the Texas Legislature once again was sent to the drawing board to revise its death penalty statutes. Justice O'Connor joined the *Franklin* dissenters to conclude for the Court in *Penry* that the sentencing jury was not able to consider and give effect to the defendant's mental retardation and history of childhood abuse "without any jury instructions on mitigating evidence."<sup>144</sup>

The Court found that the jury could not give full effect to Penry's mitigating factors through Special Issue Two, which asks whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.<sup>145</sup> The defendant's retardation and consequent inability to learn from mistakes is a mitigating factor in the moral sense, but it is turned into an aggravating factor in evaluating whether the defendant shall be a future danger.<sup>146</sup> A jury that wanted to use the defendant's retardation as a mitigating factor was precluded from doing so by the wording of Special Issue Two.<sup>147</sup> Lastly, the third special issue, which requires the jury to evaluate "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased," was examined.<sup>148</sup> The Court found that it did not provide the jury with a vehicle for expressing their disapproval of the death penalty in Penry's case. Even if a juror concluded that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime in a moral sense, this in itself did not diminish the "unreasonableness" of committing murder. None of the special issues satisfied constitutional scrutiny "in the absence of instructions informing the jury it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background."<sup>149</sup> As a result, Penry received a new sentencing hearing.<sup>150</sup>

A year earlier in *Franklin*, Justice White had characterized the dissenting view that effectively imposed an additional special issue to be given to the jury: "Does any

---

<sup>140</sup> *Id.* at 185. In her discussion, Justice O'Connor alluded to the holding in *Jurek* where the Court had noted that the Texas statute did not explicitly mention mitigating circumstances but the Texas Court of Criminal Appeals had construed the special issue regarding future dangerousness to permit consideration of the defendant's prior criminal record, age, mental state, and the circumstances of the crime in mitigation. *Id.* at 183-84.

<sup>141</sup> *Id.* at 185.

<sup>142</sup> *Id.*

<sup>143</sup> 492 U.S. 302, 302, 310-13 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>144</sup> *Id.* at 322.

<sup>145</sup> *Id.* at 324.

<sup>146</sup> *Id.* at 323.

<sup>147</sup> *Id.* at 324.

<sup>148</sup> *Id.* at 310.

<sup>149</sup> *Id.* at 328.

<sup>150</sup> *Id.*

mitigating evidence before you, whether or not relevant to the above two questions, lead you to believe that the death penalty should not be imposed?"<sup>151</sup> Ironically, the Texas Legislature's response to *Penry* hewed close to Justice White's assessment.

While the basic sentencing statute remained, the *Penry* decision provoked many significant changes to Art. 37.071 when the Texas legislature convened in 1991.<sup>152</sup> Special issues one and three were deleted; special issue two on future dangerousness was retained, and is now re-designated as the first special issue under Code of Criminal Procedure, Art. 37.071(b). A second special issue was added to subsection (b), which asks, in cases where the capital murder conviction is obtained under a theory of vicarious liability, "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that human life would be taken."<sup>153</sup> As before, both issues must be answered "yes" unanimously under the standard of beyond a reasonable doubt in order for the defendant to receive the death penalty.<sup>154</sup> When answering these one or two issues, the statute is explicitly amended so that the jury is instructed that

[i]n deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.<sup>155</sup>

This hearkens back to the flaws in the death sentence in *Penry*. The amendment, by its deletion of special issues one and three, places all of the argument during a death sentencing hearing (not encompassing a theory of vicarious liability) squarely on the issue of future dangerousness. Arguably this was the practical result under the pre-1991 statute. Special issues one and three escaped a judicial declaration of unconstitutionality; nevertheless, they were subject to constant attack in the courts as duplicative of the finding of guilt in a capital trial.<sup>156</sup>

The House Research Organization's analysis of the 1991 amendments notes that the purpose of deleting these two special issues was to clarify the questions presented and make them less vulnerable to appeal.<sup>157</sup> Supporters of the bill admitted that "juries have often interpreted "deliberate" to mean "intentional."<sup>158</sup> Lastly, the reason for deleting special issue three is that it will now be subsumed under an additional step included in the amendment to the statute, addressing the *Penry* mandate of allowing the jury to properly

<sup>151</sup> *Franklin v. Lynaugh*, 487 U.S. 164, 180 n.10 (1988).

<sup>152</sup> S.B. 880, 1991 Leg., 72nd Reg. Sess. (Tex. 1991) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)); SENATE COMM. ON CRIMINAL JURISPRUDENCE., BILL ANALYSIS FOR S.B. 880, 1991 Leg., 72nd Reg. Sess. (Tex. 1991) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)).

<sup>153</sup> SENATE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR S.B. 880, 1991 Leg., 72nd Reg. Sess. (Tex. 1991).

<sup>154</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071(d) (West 2013).

<sup>155</sup> *Id.*

<sup>156</sup> *Sattiewhite v. State*, 786 S.W.2d 271, 289-90 (Tex. Crim. App. 1989); *Marquez v. State*, 725 S.W.2d 217, 244 (Tex. Crim. App. 1987); *Heckert v. State*, 612 S.W.2d 549, 552-53 (Tex. Crim. App. 1981) (finding "deliberate" under art. 37.071(b)(1)(pre-1991) not to be the linguistic equivalent of "intentionally" so as to avoid rendering art. 37.071(b)(1) a nullity).

<sup>157</sup> See HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR H.B. 1240, 72nd Leg., Reg. Sess. (Tex. 1991).

<sup>158</sup> *Id.*



consider factors which mitigate against the imposition of capital punishment.<sup>159</sup> The additional step dictates that the jury considers an additional question that must be answered before the death penalty may be assessed:

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 a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.<sup>160</sup>

The jury, in order to answer the question so as to assess the death penalty, must unanimously answer this question “no,” while a “yes” finding requires the agreement of only 10 jurors.<sup>161</sup> A “yes” finding or a failure to agree results in a sentence of life imprisonment. Specifically in response to *Penry*, the jury decides the special issue with the specific instruction that the jury “shall consider mitigating evidence to be evidence that a juror might regard as reducing a defendant’s moral blameworthiness.”<sup>162</sup>

Thus, the 1991 amendments<sup>163</sup> underscored the glaring deficiencies of the 1973 statute. The deletion of the two original special issues speaks directly to the flawed process under which the statute was crafted; the addition of the mitigation language, a recognition that the original three issues that were upheld in *Jurek*, in fact, failed to allow consideration of particularized mitigating factors.<sup>164</sup> Opponents of the bill, however, astutely observed that “although th[is] bill attempts to conform current law to recent judicial decisions . . . still would leave the sentencing statute subject to a number of potential constitutional challenges.”<sup>165</sup>

Between 1982 and 1991 Texas executed forty individuals,<sup>166</sup> arguably under a sentencing scheme that was not consistent, principled, humane, or sensible to the uniqueness of the individual.<sup>167</sup> The 2001 amendment, however, reveals an even more

<sup>159</sup> *Id.*

<sup>160</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071(e) (West 2013).

<sup>161</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071(f)(1)-(2) (West 2013).

<sup>162</sup> *Id.*; art. 37.071(f)(4); *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>163</sup> Act of Sept. 1, 1991, ch. 838 §§1-6, 1991 Tex. Sess. Law Serv. 838 (West). The amendments retain the requirement that neither the court, nor the attorneys inform the jury of the effect of a failure to agree as to any issue. *Id.* Lastly, the 1991 bill created a statutory exception to the requirement that the sentencing phase be conducted as soon as practicable in the trial court. *Id.* This exception is provided for in article 44.29(c), and provides for a procedure in the event that a resentencing procedure is held after reversal of error affecting the punishment stage of the trial, if the punishment after reversal is not reformed to life under article 44.251. TEX. CODE CRIM. ANN. art. 44.29(c) (West 2013). The entire conviction is not reversed, but a new jury is empanelled for the sentencing hearing as if proceeding directly from a guilt finding. *Id.*

<sup>164</sup> *Jurek v. Texas*, 428 U.S. 262, 272 (1976). Recall that “*Lockett* underscored *Jurek*’s recognition that the constitutionality of the Texas scheme ‘turns on whether the enumerated questions allow consideration of particularized mitigating factors.’” *Penry*, 492 U.S. at 317 (citing *Jurek*, 428 U.S. at 272).

<sup>165</sup> See HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR H.B. 1240, Tex. H.B. 1240, 72nd Leg., Reg. Sess., at 14-16 (Tex. 1991). Opponents observed that the bill still contained vague language that would lead to confusion, inconsistency, and appeals, and they recommended that it define several terms. *Id.* Specifically, they alluded to the “watered down” mitigation definition, and vague, undefined terms like “probability,” which “lead to inconsistent application of the law, which has been a principal reason why the Texas capital punishment law has been invalidated in the past.” *Id.*

<sup>166</sup> 1982—1 individual; 1984—3 individuals; 1985—6 individuals; 1987—6 individuals; 1988—3 individuals; 1989—4 individuals; 1990—4 individuals; 1991—3 individuals (data through June 1991, before the statute was amended). *Executions*, TEX. DEP’T. CRIM. JUST., [http://www.tdcj.state.tx.us/death\\_row/dr\\_executions\\_by\\_year.html](http://www.tdcj.state.tx.us/death_row/dr_executions_by_year.html) (last updated Apr. 17, 2014).

<sup>167</sup> See *Eddings v. Oklahoma*, 455 U.S. 104, 110-11 (1982).

insidious problem with the statute – it permitted the jury to consider race as a predictor of future violence.

### **B. THE 2001 AMENDMENT – PROHIBITS RACE AS A PREDICTOR OF FUTURE DANGEROUSNESS**

In 2001, the Texas legislature again amended Art. 37.071 at the indirect behest of the U.S. Supreme Court in *Saldano v. Texas*.<sup>168</sup> In 1999, the Texas Court of Criminal Appeals upheld<sup>169</sup> on procedural grounds<sup>170</sup> Victor Hugo Saldano's death sentence, despite the sentencing jury hearing the testimony of Dr. Walter Quijano, a licensed clinical psychologist.<sup>171</sup> Quijano testified that Saldano constituted a future danger to society in part because he is Hispanic.<sup>172</sup> In fact, Dr. Quijano had testified in six other capital murder

<sup>168</sup> S.B. 133, 77th Reg. Sess. (Tex. 2001) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)); see *Saldano v. Texas*, 530 U.S. 1212 (2000).

<sup>169</sup> *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. App. 1999), *vacated*, *Saldano v. Texas*, 530 U.S. 1212 (2000); Diana L. Hoermann, *Why the Injection of Race in Saldano v. State Constitutes a Fundamental Error*, 4 SCHOLAR 261, 262-63, 265 n.18, 268 (2002).

<sup>170</sup> *Saldano*, 70 S.W.3d at 891 (holding that Saldano's race claim was procedurally defaulted as his defense attorney failed to object to Dr. Quijano's testimony regarding Saldano's race); Hoermann, *supra* note 169, at 268.

<sup>171</sup> Hoermann, *supra* note 169, at 265 n.18.

<sup>172</sup> *Saldano*, 70 S.W.3d at 891; Hoermann, *supra* note 169, at 265 nn.21 & 23, 267-68 nn.24-25 (citations omitted). The following are the pertinent excerpts from Dr. Quijano's testimony at Saldano's sentencing proceeding. At Victor Hugo Saldano's trial, Dr. Quijano testified on direct examination by the prosecutor as follows:

Q. Okay. What is the fourth category?

A. The fourth category is race.

Q. Well, let's talk about that. In this age of political correctness, that somehow it is an item that we tend to gloss over. But, empirically, there is a statistical analysis of it. Is that correct?

A. Yes. This is one of those unfortunate realities also that blacks and Hispanics are over-represented in the criminal justice system.

Q. And there may be social problems for that; we don't know. But that doesn't alter the fact that, statistically, that's a reality of life.

A. The race itself may not explain the over-representation, so there are other subrealities that may have to be considered. But statistically speaking, 40 percent of inmates in the prison system are black, about 20 percent are - - about 30 percent are white, and about 20 percent are Hispanics. So there's much over-representation.

Q. In the category - categorization of races, how is an Argentinean fitted?

A. That - he would be considered a Hispanic.

Reporters Record, *supra* note 22, at 75-76. Not only did Mr. Saldano's trial defense attorney not object to Dr. Quijano's testimony, he elicited even more of it on cross-examination:

Q. Now, one of the factors - one of your other statistical factors you mentioned was the factor of race. Is that right?

A. Yes.

Q. Okay. And you - you pointed out a fact that's probably pretty well-known to everybody; that blacks and Hispanics are over-represented in the United States prison population.

A. Yes.

Q. And, basically, what we mean by that is, if African-American people make up about 16 percent of the population, but 40 percent of the people in prison are African-American people, then we can say, Well, if the population in prison corresponded to the free population, then there should only be 16 percent African-American people in prison, so that fact that there's only 40 shows that they're over-represented. Right?

A. Yes.

....

sentencing proceedings stating that the defendant's race should be a factor in considering future dangerousness.<sup>173</sup> Saldano subsequently requested certiorari to the U.S. Supreme Court, asking the Court to consider whether the State could constitutionally impose the death penalty on the basis of the petitioner's race.<sup>174</sup> In response to Saldano's filing with the High Court, then Texas Attorney General John Cornyn confessed that "the infusion of race as a factor for the jury to weigh in making its determination violated [Saldano's] constitutional right to be sentenced without regard to the color of his skin."<sup>175</sup> In light of Cornyn's confession of error, the Supreme Court vacated Saldano's death sentence and remanded the case to the Texas Court of Criminal Appeals.<sup>176</sup> Prior to 2001, Art. 37.071 permitted either the state or the defense to present any evidence "that the court deems relevant to sentence."<sup>177</sup> The Texas Legislature did not wait for the Court of Criminal Appeals to hear *Saldano* on remand before amending Articles 37.071 and 37.0711 of the Texas Rules of Criminal Procedure. The legislature added the proviso that during the capital sentencing hearing "evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct."<sup>178</sup>

Supporters of the amendment argued that [it] would correct a wrong in the Texas criminal justice system. It is fundamentally unfair for the state to present evidence that a defendant's race is a predictor of his or her likelihood to commit new crimes. The AG has argued before the U.S. Supreme Court that this practice is inappropriate and that race should not be considered as a factor in the criminal justice system. This pseudoscience should be disallowed in a

---

Q. ... Now, the Hispanics that have been considered in coming up with these statistical factors are the Hispanics that are in American prisons. Is that correct?

A. Or American criminal justice system.

Q. All right. And do you think it would be fair to say that the overwhelming majority of those Hispanics would be Mexican people?

A. In this part of the country, yes. In the East Coast, Puerto Ricans.

Hoermann, *supra* note 169, at 265 n.23.

<sup>173</sup> See *John Cornyn*, Statement from Attorney General John Cornyn Regarding Death Penalty Cases, OFF. ATT'Y GEN. (June 9, 2000), <https://www.texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609/saldanocases.htm> (identifying the following six capital defendants (in addition to Saldano) at whose sentencing proceedings the state used Dr. Quijano's testimony, using race as a foundation for finding future dangerousness, to seek the death penalty: Julian Garcia, Eugene Alvin Broxton, John Alba, Michael Dean Gonzales, Carl Henry Blue, Duane Buck (all were sentenced to death)); Hoermann, *supra* note 169 at 269 n.34; HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR S.B. 133, 77th Leg., Reg. Sess. (Tex. 2001) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)).

<sup>174</sup> See *Saldano*, 530 U.S. at 1212; Hoermann, *supra* note 169, at 261, 268..

<sup>175</sup> See *Saldano*, 530 U.S. at 1212; SENATE RESEARCH CTR., BILL ANALYSIS FOR S.B. 133, 77th Leg., Reg. Sess. (Tex. 2001) (amending TEX. CODE CRIM. PROC. art. 37.071 (1973)); Hoermann, *supra* note 169, at 261, 268-69.

<sup>176</sup> See *Saldano*, 530 U.S. 1212; Hoermann, *supra* note 169, at 269. On remand from the Supreme Court, the Texas Court of Criminal Appeals affirmed Saldano's death sentence primarily on the grounds that the Attorney General's confession of error did not address the issue on which Saldano's death sentence had originally been upheld by the Court of Criminal Appeals: procedural default (at trial, Saldano did not object to Dr. Quijano's testimony and the Court of Criminal Appeals held that Dr. Quijano's introduction of race and recidivism into the sentencing proceeding did not constitute fundamental error.). *Saldano v. State*, 70 S.W.3d 873 (Tex. App. 1999); Hoermann, *supra* note 169, at 270 n.41 & 46. Saldano presently remains on death row. *Offenders on Death Row*, TEX. DEP'T CRIM. JUST., [http://www.tdcj.state.tx.us/death\\_row/dr\\_offenders\\_on\\_dr.html](http://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html), (last updated May 20, 2014).

<sup>177</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1999) amended by S.B 133, 77th Reg. Sess. (Tex. 2001); SENATE RESEARCH CTR., BILL ANALYSIS FOR S.B. 133, 77th Leg., Reg. Sess. (Tex. 2001).

<sup>178</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (a)(2) (West 2013); TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3 (a)(2) (West 2013); Act of Sept. 1, 2001, ch. 585 §§ 2-3, 2001 Tex. Sess. Law Serv. (West) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071, 37.0711 (West 1973)).

courtroom just as other unreliable evidence, like lie detector tests, already is.<sup>179</sup>

Amazingly, despite this acknowledgement that the future dangerousness inquiry permits unreliable pseudoscience to enter the courtroom, the latter remained intact.

The next amendment demonstrates how the statute as enacted did not permit reasonable notice of expert testimony in death penalty cases, although under the law it was required in non-capital cases.

### C. THE 2005 AMENDMENTS – TO PERMIT REASONABLE NOTICE OF EXPERT TESTIMONY IN CAPITAL CASES

Subject to the prohibition on the state using race to demonstrate future dangerousness during the capital sentencing hearing of a Texas defendant, “evidence may be presented by the state . . . that the court deems relevant to sentence . . . .”<sup>180</sup> This provision of the Code of Criminal Procedure called for the types of evidence typically offered under Texas Rules of Evidence 404(b).<sup>181</sup> The notice requirements of Rule 404(b) as a prerequisite to admissibility under the rule are read into the requirements of the introduction of such extraneous evidence in non-capital cases.<sup>182</sup> However, no provision was made governing notice in capital sentencing in Art. 37.071, and Art. 37.07 did not govern in capital cases.

In 2005, the legislature amended Art. 37.071 § 2(a)(1)<sup>183</sup> to incorporate the notice requirement under Art. 37.07(3)(g),<sup>184</sup> which in turn is that under Texas Rule of Evidence

<sup>179</sup> HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS FOR S.B. 133, 77th Leg., Reg. Sess. (Tex. 2001) (amending TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973)).

<sup>180</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (a)(1) (West 2013).

<sup>181</sup> *Id.* (stating that the introduction of extraneous evidence is governed by notice requirements of TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3 (g) (West 2013)).

<sup>182</sup> TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3 (a), (g) (West 2013). The notice requirement under Texas Rules of Evidence 404(b) is as follows:

**Other Crimes, Wrongs or Acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.

TEX. R. EVID. 404(b).

<sup>183</sup> This statute reads:

If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The introduction of evidence of extraneous conduct is governed by the notice requirements of Section 3(g), Article 37.07. The court, the attorney representing the state,

404(b).<sup>185</sup> The amendment to Art. 37.071, as said in the Bill Analysis, codifies existing practice, as the notice requirement of 37.07(3)(g) is “followed routinely by prosecutors.”<sup>186</sup> Yet the distinction did previously preclude claims under Rule 404(b) for a new sentencing hearing based on the reasonableness of the notice provided by the prosecutor in sentencing hearings.

Prior to the amendment and during the time that Texas Rule of Criminal Evidence 404(c) governed in capital sentencing hearings, the applicable rule read:

In the penalty phase, evidence may be offered by an accused or by the prosecution as to the prior criminal record of the accused. Other evidence of his character may be offered by an accused or by the prosecution. Nothing herein shall limit provisions of Article 37.071, Code of Criminal Procedure.<sup>187</sup>

The Court of Criminal Appeals specifically held the notice provision of Rule 404(b) did not govern in capital cases. As such, the defendant was not entitled to object on the basis that the notice provided was unreasonable.<sup>188</sup> The standard in capital cases was whether the introduction of such evidence without reasonable notice constituted unfair surprise.<sup>189</sup> The Court acknowledged the change in the notice standard governing capital sentencing hearings, and rejected the claims raised under it in a number of cases.<sup>190</sup> For example, in *Vuong v. State*, the defendant argued on appeal that the trial court erroneously allowed the State’s expert to testify at the punishment phase without providing him with reasonable notice of the expert’s testimony pursuant to TRE 404(b).<sup>191</sup> The Texas Court of Criminal Appeals held that 404(b) did not apply:

---

the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e).

TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (a)(1) (West 2013).

<sup>184</sup> The notice requirement under article 37.07 (3)(g) is as follows:

On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Evidence. If the attorney representing the state intends to introduce an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated or suspended sentence, notice of that intent is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3 (g) (West 2013).

<sup>185</sup> Act of Sept. 1 2005, ch. 399, § 1, 2005 Tex. Sess. Law Serv. (West).

<sup>186</sup> HOUSE COMM. ON CRIMINAL JURISPRUDENCE, BILL ANALYSIS OF S.B. 1507, 79th Leg., Reg. Sess. (Tex. 2005).

<sup>187</sup> *Vuong v. State*, 830 S.W.2d 929, 942 & n.7 (Tex. Crim. App. 1992) (en banc).

<sup>188</sup> *Id.*; *See also Hughes v. State*, 24 S.W.3d 833, 842 (Tex. Crim. App. 2000); *See also Rojas v. State*, 986 S.W.2d 241, 251 (Tex. Crim. App. 1998).

<sup>189</sup> *Adanandus v. State*, 866 S.W.2d 210, 233 (Tex. Crim. App. 1993).

<sup>190</sup> *Leza v. State*, 351 S.W.3d 344, 358-60 (Tex. Crim. App. 2011) (holding that the government provided adequate notice of its intent to introduce a prison guard’s testimony that the defendant threatened to kill the guard during the punishment phase); *See Robertson v. State*, No. AP-71224, 2011 WL 1161381, at \*12-13 (Tex. Crim. App. March 9, 2011) (holding that the government provided sufficient notice for testimony offered in rebuttal to mitigation evidence suggesting that the defendant valued human life); *Wilkins v. State*, No. AP-75878, 2010 WL 4117677, at \*8-9 (Tex. Crim. App. Oct. 20, 2010) (holding that no harm was caused by the lack of notice of the evidence and the effect that the lack of notice had on the defendant’s ability to present an adequate defense).

<sup>191</sup> 830 S.W.2d at 942.

In deciding questions concerning the admissibility of character evidence at the punishment stage of the trial, the appropriate governing statute is Rule 404(c) of the Texas Rules of Criminal Evidence. Rule 404(c) contains no notice provision, nor does Article 37.071 of the Texas Code of Criminal Procedure, the provisions of which specifically govern the scope of Rule 404(c) in capital murder cases.<sup>192</sup>

#### **D. THE LOFTY PROMISES OF FURMAN UNFULFILLED BY THE TEXAS LEGISLATURE**

In the modern world of business, the effectiveness and success of a new product launch is directly tied to rigorous pre-launching activities: long hours of meticulous design, planning, preparation, defining, and testing. Once launched, an unsuccessful product with proven errors is recalled or abandoned. The launching of Texas's new product – Article 37.071- was from its inception beset with challenges. The numerous revisions to Art. 37.071 underscore the criticisms leveled against the statute in Judge Odom's 1973 dissent in *Jurek v. State*, when he labeled it "so confusing that even the majority of this Court have been misled."<sup>193</sup> Further, Judge Odom argued that the statute was unconstitutionally vague in violation of both the Texas and the U.S. Constitution.<sup>194</sup> Arguably, the amendments reflect an attempt by the legislature to rectify the constitutional deficiencies, but this piecemeal effort spanning a period of over forty years shows that *Furman's* promise of eradicating arbitrary and capricious statutes has not been fulfilled. Furthermore this begs the question: After forty years of dicey implementation, shouldn't Texas abandon future dangerousness?

The next two parts squarely address this question. Together, they demonstrate how neither evolving stricter standards of admissibility, nor appellate review have deterred the parade of forensic experts willing to offer predictions of future dangerousness on the reliability of a crystal ball. Part III covers the early decades following the launch of Art. 37.071 which briefly features the infamous testimony of "Dr. Death," and the evolution of stricter judicial gatekeeping. Additionally, Part III features the testimony of Dr. Richard Coons in numerous capital cases, leading to the landmark 2008 *Coble* case, which forced a unanimous Court of Criminal Appeals to find his testimony inadmissible. Part IV questions the effectiveness of appellate review as it showcases a litany of capital cases reviewed by the Court of Criminal Appeals whose opinions are rife with judicial contradictions.

#### **PART III. HANGING PSYCHIATRISTS' PREDICTIONS OF FUTURE DANGEROUSNESS : THE LONG AND WINDING ROAD FROM BAREFOOT TO COBLE**

##### **A. "SLIDE INTO ETHICAL CHAOS"<sup>195</sup> - "DR. DEATH" REIGNS SUPREME IN TEXAS**

The amendment history of Art. 37.071 incisively demonstrates how twenty-eight years after its enactment, the Texas Legislature amended the statute after the debacle with Dr. Quijano's testimony in a number of cases. Although acknowledging that pseudoscience is unreliable, the legislature chose not to abolish predictions of future dangerousness. For almost forty years, Texas has relied on the testimony of psychiatrists to persuade juries to

<sup>192</sup> *Id.*

<sup>193</sup> 522 S.W.2d 934, 946 (Tex. Crim. App. 1975) (Odom, J., concurring in part and dissenting in part).

<sup>194</sup> *Id.*

<sup>195</sup> The phrase is borrowed from Paul S. Appelbaum, *The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm*, 13 INT'L J.L. & PSYCHIATRY 249, 255 (1990).

render a death verdict in answering the special issue. Although some defendants' convictions were ultimately reversed after the use of future dangerousness led the jury to impose a death sentence, others have not been as fortunate. A litany of Texas cases shows how the State used Dr. Grigson to abuse future dangerousness with irreparable consequences.

In 1973, Ernest Benjamin Smith was indicted for murder by a Texas grand jury.<sup>196</sup> The State sought the death penalty, and its attorney was informally ordered to arrange a psychiatric examination for Smith to determine his competency to stand trial.<sup>197</sup> The State called Dr. Grigson, who concluded in a letter to the judge that Smith was competent after interviewing the defendant for only 90 minutes.<sup>198</sup> Smith was then convicted of murder, and Grigson was once again asked to testify at his sentencing hearing,<sup>199</sup> this time on his assessment of Smith's future dangerousness.<sup>200</sup> Over defense counsel's objection, Grigson testified to the jury:

(a) that Smith 'is a very severe sociopath'; (b) that 'he will continue his previous behavior'; (c) that his sociopathic condition will 'only get worse'; (d) that he has no 'regard for another human being's property or for their life, regardless of who it may be'; (e) that '[t]here is no treatment, no medicine...that in any way at all modifies or changes this behavior,'; (f) that he 'is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so'; and (g) that he 'has no remorse or sorrow for what he has done.'<sup>201</sup>

As a result, Smith was sentenced to death, and the Texas Court of Criminal Appeals affirmed the conviction.<sup>202</sup> However, the U.S. Supreme Court vacated the death sentence, holding that Smith's Fifth and Sixth Amendment rights were violated by the introduction of Dr. Grigson's testimony during the penalty phase.<sup>203</sup> This makes *Smith* problematic on a number of levels, but principally because Dr. Grigson's role as an examiner in a competency hearing was entirely different from his role as an expert witness regarding future dangerousness during the sentencing phase. As a noted psychiatrist indicated, in the former, the examiner's role is neutral, while testifying in the latter, he is acting as an agent for the state.<sup>204</sup> In addition, despite Grigson's damning prognosis that Smith's sociopathic condition would worsen, a 2005 study reported that Smith has been a model prisoner for the past twenty years. Smith obtained a college degree while

<sup>196</sup> *Estelle v. Smith*, 451 U.S. 454, 456 (1981).

<sup>197</sup> *Id.* at 456-57.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 457-59; In Texas, capital cases are statutorily bifurcated into a guilt phase and a sentencing phase. *Id.* at 457, and the applicable statute at the time of Mr. Smith's trial was Article 37.071(a) of TEX. CODE CRIM. PROC. ANN. (West 1980), *Id.* at 458.

<sup>200</sup> *Id.* at 467. Although the State had been ordered to disclose the name of all the witnesses it planned to use at both stages of the trial, it did not provide Grigson's name. *Id.* at 459.

<sup>201</sup> *Id.* at 459-60.

<sup>202</sup> *Id.* at 460.

<sup>203</sup> *Id.* at 473. As noted by Dr. Paul Appelbaum, the Supreme Court's ruling that Smith should have been given his 5<sup>th</sup> Amendment rights is in accord with the American Psychiatric Association's Annotation on ethics in psychiatry: "The Psychiatrists must fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination." Paul S. Appelbaum, *Psychiatrists Role in the Death Penalty*, 32 n.11 HOSP. & CMTY. PSYCHIATRY 761, 761 (1981).

<sup>204</sup> Appelbaum, *supra* note 203, at 761.

incarcerated, trained other prisoners on computers, and worked as a clerk in the prison.<sup>205</sup> Although Smith's rehabilitation in prison shows the glaring inaccuracy of Grigson's predictions, one of the most damaging decisions regarding future dangerousness is the Supreme Court's holding in *Barefoot v. Estelle*.<sup>206</sup> One scholar has correctly argued that *Estelle* is "egregiously wrong-headed by current standards for relevance" with an "effect on capital sentencing proceedings [that] has been pernicious and pervasive, undermining basic rule-of-law precepts."<sup>207</sup>

**B. THE DANGER OF GOING BAREFOOT: SUPREME COURT'S "WRONG ONLY MOST OF THE TIME STANDARD"**<sup>208</sup>

In 1978, during the capital murder trial of Thomas A. Barefoot, Dr. James Grigson served as an expert witness for the State of Texas yet again, this time along with Dr. John Holbrook.<sup>209</sup> When asked to testify as to the future dangerousness of the defendant, both psychiatrists were given a lengthy hypothetical based on Barefoot's prior convictions, his bad reputation in his community, and the events surrounding the murder for which he was on trial.<sup>210</sup> However, neither Holbrook, nor Grigson ever requested the opportunity to examine Barefoot.<sup>211</sup>

Dr. Grigson told the jury that he had examined "between thirty and forty thousand individuals..." and that he would be able to "give a medical opinion within reasonable psychiatric certainty as to the psychological or psychiatric makeup of an individual."<sup>212</sup> Grigson also stated that based on the hypothetical, Barefoot could be diagnosed as having a sociopathic personality disorder<sup>213</sup> and that "that there was a 'one hundred percent and absolute' chance that Barefoot would commit further acts of criminal violence that would constitute a continuing threat to society."<sup>214</sup> After only an hour of deliberation, Barefoot's jury sentenced him to death.<sup>215</sup>

In 1983, the U.S. Supreme Court reviewed Barefoot's case and upheld the use of future dangerousness in capital cases.<sup>216</sup> The American Psychiatric Association (APA)—the nation's largest organization of psychiatrists—filed an *amicus curiae* brief on behalf of

<sup>205</sup> *Deadly Speculation*, *supra* note 2, at 29; see also *Holloway v. State*, 613 S.W.2d 497, 500 (Tex. Crim. App. 1981). Grigson testified in this case without ever examining Holloway and based his review on the offense report and interviews with people who knew Holloway. *Id.* Holloway was sentenced to death, but this conviction was ultimately reversed in 1981. *Id.* at 503.

<sup>206</sup> *Barefoot v. Estelle*, 463 U.S. 880, 938 (1983).

<sup>207</sup> Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 359 (2003).

<sup>208</sup> Subheading borrowed from Paul S. Appelbaum, *Death, The Expert Witness, and the Dangers of Going Barefoot*, 34 N. HOSP. AND CMTY. PSYCHIATRY 1003, 1004 (Nov. 1983).

<sup>209</sup> *Barefoot*, 463 U.S. at 884 (1983).

<sup>210</sup> *Id.* at 918 (Blackmun, J., dissenting).

<sup>211</sup> *Id.* at 917.

<sup>212</sup> *Id.* at 918. Grigson also stated "that this skill was "particular to the field of psychiatry and not to the average layman." *Id.*

<sup>213</sup> *Id.* at 919. Grigson also stated that on a scale of one to ten, Barefoot was "above ten," in the "most severe category" of sociopaths, and stated that there was no cure for the condition. *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 896 (majority opinion).



Barefoot,<sup>217</sup> in which it unequivocally stated its position against the use of psychiatric testimony to predict a defendant's future dangerousness:

Psychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness of a defendant in a capital case, at least in those circumstances where the psychiatrist purports to be testifying as a medical expert possessing predictive expertise in this area. Although psychiatric assessments may permit short term predictions of violent or assaultive behavior, medical knowledge has simply not advanced to the point where long-term predictions – the type of testimony at issue in this case – may be made with even reasonable accuracy. The large body of research in this area indicates that, even under the best of conditions, *psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases* ... Contrary to the claims of the prosecution psychiatrists who testified in this case, psychiatric predictions of long-term future dangerousness – even under the best of conditions and on the basis of complete medical data – are of fundamentally low reliability. Although a likelihood of future violent behavior may be assigned to a given individual solely on the basis of statistical 'base rates' and other information of an actuarial nature, psychiatric determinations in this area have little or no independent validity. We believe, therefore, that diagnoses of 'sociopathy' or 'antisocial personality disorder,' and predictions of future behavior characterized as 'medical opinions,' serve only to distort the fact-finding process. Because the prejudicial impact of such assertedly 'medical' testimony far outweighs its probative value, it should be barred altogether in capital cases.<sup>218</sup> (emphasis added)

The APA further argued that “[a]t a minimum, psychiatrists should not be allowed to offer medical opinions concerning the likelihood of long-term future dangerousness unless they have: 1) conducted an in-depth psychiatric examination of the defendant<sup>219</sup> and 2) indicated that “hypothetical questions...fail to provide sufficient information to make the diagnosis.”<sup>220</sup> The questions posed to Holbrook and Grigson, the APA argued, contained no information that would have allowed the psychiatrists to rule out other mental disorders, or to offer alternative explanations for Barefoot's behavior.<sup>221</sup> Finally, the APA asserted that the “inadequate procedures used in this case allow a psychiatrist to masquerade his personal preferences as ‘medical’ views, without providing a meaningful basis for rebutting his conclusions.”<sup>222</sup> However despite this argument, the U.S. Supreme Court made an astonishing statement that revealed its profound disregard

<sup>217</sup> Brief for American Psychiatric Ass'n as Amici Curiae Supporting Defendant at 1, *Barefoot v. Estelle*, 463 U.S. 880 (1982) (No. 82-6080).

<sup>218</sup> *Id.* at 3-4.

<sup>219</sup> *Id.* at 6.

<sup>220</sup> *Id.* at 7. For additional arguments rejecting the use of hypotheticals in these cases, see also Appelbaum, *supra* note 208, at 1003; Paul S. Appelbaum, *Hypotheticals, Psychiatric Testimony, and the Death Sentence*, 12 BULL. AM. ACAD. PSYCHIATRY & L., 169, 171 (1984) (arguing that hypotheticals as the “sole source of evidence for a psychiatric opinion...raises enormous problems of the validity of expert judgments”).

<sup>221</sup> Brief for the Defendant, *supra* note 217, at 7 (“Dr. Holbrook and Dr. Grigson presumably assumed that petitioner had no history of delusions or hallucinations – symptoms that might have suggested the alternative diagnosis of schizophrenia – simply because the hypothetical questions contained no information in that regard.”).

<sup>222</sup> *Id.* at 9.

for organized psychiatry, encouraging prosecutors to continue leveling death penalties on the precarious edifice of speculation. The court noted: “Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time.”<sup>223</sup> Thomas Barefoot was executed on October 30<sup>th</sup>, 1984.<sup>224</sup>

In 1985, three years after the APA issued its opinion on future dangerousness, Grigson testified in the capital murder case of Stephen Ray Nethery.<sup>225</sup> At the trial, Grigson testified that:

he was competent to give his opinion based upon a hypothetical question because of his medical and psychiatric training, and his experience in examining murder and capital murder defendants over the past sixteen years. When asked if he could cite any medical authority or research that states that a psychiatrist is competent to testify based solely on a hypothetical question, Grigson said he was probably the best authority in that area. He then cited two articles which he said stated that the best indication of future acts of violence are a history of prior acts of violence in the past.

Grigson admitted being familiar with the brief filed by the American Psychiatric Association, in a Supreme Court case, involving his testimony, *Estelle v. Smith*... in which the association said that making a prediction of future violent behavior is beyond psychiatry and verges on quackery. ... Grigson also stated that he was 100% accurate in his predictions of future violence and that he based his answers... on the facts given in the hypothetical.<sup>226</sup>

Mr. Nethery was found guilty and sentenced to death.<sup>227</sup> On appeal, he argued that the state failed to qualify the psychiatric witnesses as experts in predicting future dangerousness, and the predictions were too speculative and lacking in scientific basis.<sup>228</sup> Stephen Ray Nethery was executed on May 27, 1994.<sup>229</sup>

In 1985, Dr. Grigson also testified in the capital case of Baby Ray Bennett, who was convicted and sentenced to death.<sup>230</sup> In a scathing dissent, Judge Teague referring to him by the then well-earned epithet of “Dr. Death,” said:

It seems to me that when Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be the second coming of the Almighty.

After having read many records of capital murder cases in which Dr. Grigson testified at the punishment stage of the trial, I have concluded that, as a general proposition, when Dr. Grigson speaks to a lay jury, or an uninformed jury, about a person who he characterizes as a

<sup>223</sup> Barefoot v. Estelle, 463 U.S. 880, 901 (1983).

<sup>224</sup> TEX. DEP’T CRIM. JUST., *supra* note 44.

<sup>225</sup> Nethery v. State, 692 S.W.2d 686, 708-09 (Tex. Crim. App. 1985).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 691.

<sup>228</sup> *Id.* at 708.

<sup>229</sup> TEX. DEP’T CRIM. JUST., *supra* note 44.

<sup>230</sup> Bennett v. State, 766 S.W.2d 227, 227-28 (Tex. Crim. App. 1989).

“severe” sociopath, which a defendant who has been convicted of capital murder always is in the eyes of Dr. Grigson, the defendant should stop what he is then 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.<sup>231</sup>

In 1995, the APA expelled Grigson from its ranks because he had violated its code of ethics by “arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, that he could predict with 100 percent certainty that the individuals would engage in future violent acts.”<sup>232</sup> Grigson, who had been certified to testify in over 150 cases, stated that the expulsion would not affect his license to practice.<sup>233</sup>

Unfortunately, despite the conclusions made by the APA in *Barefoot*, and continued criticism from members of the psychiatric profession, Texas continues to proffer predictions of future dangerousness. However, in the last two decades, the legal landscape of expert admissibility has evolved considerably, with tectonic changes occurring in the 1990’s. As one scholar has noted, the courts’ “foray”<sup>234</sup> into the realm of expert admissibility was inevitable given the society’s growing dependence on technology.<sup>235</sup> Complex technological and scientific evidence has become the centerpiece of much litigation, forcing the gates of admissibility to be more meticulously guarded by the gatekeepers.

### C. THE BRAVE NEW WORLD OF EXPERT ADMISSIBILITY: THE *DAUBERT*, *KELLY*, AND *NENNO* STANDARDS

In 1993, the Supreme Court rejected the *Frye* “general acceptance” standard for admissibility<sup>236</sup> in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which enumerated a two-prong test for the admissibility of expert testimony.<sup>237</sup> In *Daubert*, the parties were reduced to a veritable battle of experts, both sides proffering testimony by well-credentialed experts.<sup>238</sup> The U.S. Supreme Court held that *Frye*’s “general acceptance” test was not a prerequisite for the admission of scientific evidence and was superseded by the Federal Rules of Evidence.<sup>239</sup> Moreover, under FRE 104, the Court stated that trial judges

<sup>231</sup> *Id.* at 232. Baby Ray Bennett was sentenced to death. After serving ten years on death row, his sentence was commuted to life. By 2004, Bennet was a trustee in prison, disciplined for only four minor infractions, and had not lost a single day of good-time credits in 17 years. *Deadly Speculation*, *supra* note 2, at xiv.

<sup>232</sup> Laura Beil, *Groups Expel Psychiatrist Known for Murder Cases*, DALL. MORNING NEWS July 26, 1995, at 21A.

<sup>233</sup> *Id.*

<sup>234</sup> Margaret A. Berger, *What Has a Decade of Daubert Wrought*, 95 AM. J. PUB. HEALTH S59, S59 (2005).

<sup>235</sup> *Id.*

<sup>236</sup> *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that as long as there is a consensus among those in the field, an expert’s testimony would be allowed because expert admissibility turns on “general acceptance in the particular field in which it belongs”). However, critics of the *Frye* standard state that it merely looks at the number of followers rather than the validity of the theory; it does not account for determination of the relevant field, and this standard has a propensity to lead to “self-validating experts.” Berger, *supra* note 234, at S60. For a thorough analysis of the *Daubert* trilogy and its impact on scientific testimony, see Berger, *supra* note 234.

<sup>237</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587, 592-93 (1993).

<sup>238</sup> *Id.* at 582-83.

<sup>239</sup> *Id.* at 587. Both the District Court and the Ninth Circuit Court of Appeals held that the plaintiff’s evidence failed to meet *Frye*’s general acceptance standard because it “had not been published or subjected to peer review.” *Id.* at 584.

act as gatekeepers<sup>240</sup> to ensure that “any and all scientific testimony ... is not only relevant but reliable” in order to be admissible.<sup>241</sup> On December 1, 2000 in response to *Daubert*, Article VII of the Federal Rules of Evidence was amended. FRE 701, 702, and 703 were all modified to incorporate the principles established in the *Daubert* trilogy and subsequent line of cases.<sup>242</sup>

In Texas, one year prior to the *Daubert* decision, in *Kelly v. State*<sup>243</sup> the Texas Court of Criminal Appeals had pronounced *Frye*'s general acceptance test already dead and enunciated its own reliability factors, which were eerily similar to *Daubert*'s.

Acknowledging that the court had used the *Frye* standard in previous occasions, the court stated that it had never explicitly adopted it,<sup>244</sup> and proceeded to conclude that the *Frye* test was no longer part of Texas law.<sup>245</sup> The Court held that Texas Rule of Criminal Evidence 702 incorporated the analyses in rules 402 and 403, mandating a finding that the evidence was relevant and reliable,<sup>246</sup> and stated that the requirements of R. 702 do not apply specifically or exclusively to novel scientific evidence.<sup>247</sup> To be considered reliable, evidence from a scientific theory had to satisfy three criteria: “1) the underlying scientific theory must be valid; 2) the technique applying the theory must be valid; and 3) the technique must have been properly applied on the occasion in question.”<sup>248</sup>

The court outlined seven factors that could potentially affect the trial court's determination of reliability:

---

<sup>240</sup> *Id.* at 589. The Court established four “general” yet nonexclusive factors the gatekeepers could consider: 1) whether the theory can and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) technique's known or potential rate of error; and (4) whether there has been widespread acceptance of the technique. *Id.* at 593-94.

<sup>241</sup> *Id.* at 589. In addition, gatekeepers must assess “whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” *Id.* at 592-93.

<sup>242</sup> The post-*Daubert* modifications were as follows: In Rule 701, Opinion Testimony By Lay Witnesses, the following language was added: “and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” FED. R. EVID. 701. Rule 702 was amended “to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” FED. R. EVID. 701 advisory committee's notes (2000 Amendment). Specifically Rule 702, Testimony by Expert Witnesses was amended to include the following, “(b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” FED. R. EVID. 702. The following language was added to Rule 703: “An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.” FED. R. EVID. 703.

<sup>243</sup> 824 S.W.2d 568, 572-73 (Tex. Crim. App. 1992).

<sup>244</sup> *Id.* at 572 (“Although this Court has never explicitly adopted the *Frye* test, on several occasions we have used a general acceptance test when reviewing lower court decisions regarding the admission of scientific evidence. See *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988); *Reed v. State*, 644 S.W.2d 479 (Tex. Crim. App. 1983); *Cain v. State*, 549 S.W.2d 707 (Tex. Crim. App. 1977); *Romero v. State*, 493 S.W.2d 206 (Tex. Crim. App. 1973). In all those cases, however, the trials were held before the promulgation of the Texas Rules of Criminal Evidence.”).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* (stating explicitly in footnote 11 that 702 incorporates 402 and 403).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 573.

(1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community[;] ... (2) the qualification of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.<sup>249</sup>

The *Daubert* and *Kelly* tests, while useful in guiding the gatekeepers with respect to scientific testimony, presented problems for non-scientific expert testimony or the “soft sciences.” In 1998, in *Nenno v. State*,<sup>250</sup> the Texas Court of Criminal Appeals explicitly stated that the “flexible” *Daubert* factors “do not necessarily apply outside the hard science context; instead, methods of proving reliability will vary, depending upon the field of expertise.”<sup>251</sup>

When addressing fields of study ... that are based primarily upon experience and training as opposed to the scientific method..., the appropriate questions 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.<sup>252</sup>

Although some courts have held it to be inapplicable,<sup>253</sup> the *Kelly* and *Daubert* tests remain the standards of admissibility of scientific and non-scientific testimony.<sup>254</sup> However, it seems that courts require less scrutiny of prosecution expert witnesses in criminal cases.<sup>255</sup>

<sup>249</sup> *Id.*

<sup>250</sup> 970 S.W.2d 549 (Tex. Crim. App. 1998).

<sup>251</sup> *Id.* at 561 (citing numerous federal cases in the court’s analysis).

<sup>252</sup> *Id.* The Court further explained: “These questions are merely an appropriately tailored translation of the *Kelly* test to areas outside of hard science. And, hard science methods of validation, such as assessing the potential rate of error or subjecting a theory to peer review, may often be inappropriate for testing the reliability of fields of expertise outside the hard sciences.” *Id.*

<sup>253</sup> See *Green v. Tex. Workers’ Comp. Ins. Facility*, 993 S.W.2d 839 (Tex. App. 1999) (concluding that evidence of fact learned in capacity as treating doctor should have been admitted, even if proper to exclude causation testimony of doctor); *Harris v. Belue*, 974 S.W.2d 386 (Tex. App. 1998) (holding the *Robinson* test factors inapplicable to the logical deduction employed by the medical expert witnesses, and further inapplicable because objection to the reliability of the proffered testimony did not come until after the case had rested, which did not allow the trial court’s discretion as a “gatekeeper”); *Frohne v. State*, 928 S.W.2d 570 (Tex. App. 1996) (deciding inapplicability of *Kelly* in light of the expert testimony was not based on a novel scientific test or theory, but on her consultations).

<sup>254</sup> See *Rousseau v. State*, 171 S.W. 3d 871 (Tex. Crim. App. 2005); *Roberts v. State*, 220 S.W. 3d 521, 529-30 (Tex. Crim. App. 2007). See also *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 579-80 (Tex. 2006) and *Walker v. Thomasson Lumber Co.*, 203 S.W.3d 470 (Tex. App. 2006) (concluding that the non-exclusive list of six *Robinson* test factors should be utilized when determining the reliability of an expert witness involving scientific knowledge); *Doyle Wilson Homebuilder, Inc. v. Pickens*, 996 S.W.2d 387 (Tex. App. 1999) (utilizing the “reliability” and “relevancy” requirements of *Robinson* to determine the scientific reliability of the plaintiff’s expert witness testimony); *Weathered v. State*, 15 S.W.3d 540, 542-43 (Tex. Crim. App. 2000) (finding psychologist’s testimony on reliability of eyewitness identifications excludable where defendant failed to show that said proffered expert testimony was scientifically reliable).

<sup>255</sup> *Berger*, *supra* note 234 at S63.

Arguably, the decade of the 90s forced judges to be more cautious and guarded to prevent unreliable testimony from slipping through the gates. But in Texas, despite this safety net, unreliable predictions of future dangerousness continued undeterred. This begs many questions, but one interesting theory posited by a recent study is that when a judge gives the green light to expert testimony, even unreliable and junk science is “imbue[d] ... with underserved credibility” in the eyes of the jury, tipping the scale in favor of the party offering the evidence.<sup>256</sup> This theory is amply supported by the litany of cases that follow.

#### D. POST-GRIGSON PREDICTIONS OF FUTURE DANGEROUSNESS – ARE THE GATEKEEPERS EFFECTIVELY GUARDING THE GATES OF ADMISSIBILITY?

In 1994, Miguel Angel Flores was convicted of capital murder and sentenced to death.<sup>257</sup> In this case, Dr. Clay Griffith offered his expert opinion on Flores’s future dangerousness without examining Flores or his psychiatric records.<sup>258</sup> As Dr. Grigson before him, Griffith based his conclusion on the facts of the case and Flores’s conduct during trial. In his concurrence, Judge Emilio Garza made some scathing observations regarding this type of “expert” testimony:

Such testimony lacking objective scientific testing or personal examination defies scientific rigor and cannot be described as expert testimony. It is simply subjective testimony without any scientific validity by one who holds a medical degree. Given the paucity, indeed

---

<sup>256</sup> N. J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges’ Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 PSYCHOL. PUB. POL’Y & L. 1, 1, 13 (2009) (“Ironically, a landmark Supreme Court decision motivated in large part by a desire to shield jurors from “junk science” could serve to heighten the impact of false or misleading scientific evidence when judges allow it through the courtroom gates. If a judge’s decision to admit evidence endows that evidence with additional weight, and if that phenomenon is exacerbated by a *Daubert* ethos, then the burden on judges to make the correct gatekeeping decision is that much greater.”).

<sup>257</sup> *Flores v. Johnson*, 210 F.3d 456 (5th Cir. 2000).

<sup>258</sup> *Id.* at 458. At the time of *Flores*, Dr. Griffith had examined over 8,000 people charged with criminal offenses and had testified in at least 146 capital murder trials. *Id.* at 462. In a footnote Judge Garza noted as follows:

A brief search of the cases reveals that, in those cases which have produced published opinions, Dr. Griffith has testified “yes” to the second special issue on twenty-two occasions, and “no” on zero occasions. See *Miller v. Johnson*, 200 F.3d 274, 287 (5th Cir.2000); *Barber v. Johnson*, 145 F.3d 234, 235 & n.9 (5th Cir.1998); *Moody v. Johnson*, 139 F.3d 477, 484 (5th Cir.1998); *Ex Parte Gardner*, 959 S.W.2d 189, 190 (Tex.Crim.App.1996); *Massey v. State*, 933 S.W.2d 141, 156 (Tex.Crim.App.1996); *Soria v. State*, 933 S.W.2d 46, 52 (Tex.Crim.App.1996); *Purtell v. State*, 761 S.W.2d 360, 373, *reh’g granted* 1994 WL 18209, *appeal after new trial* 910 S.W.2d 145, 146 (Tex.App.Eastland 1995, *pet. ref’d*); *Clark v. State*, 881 S.W.2d 682, 697 (Tex.Crim.App.1994) (en banc); *Ex Parte Barber*, 879 S.W.2d 889, 891 (Tex.Crim.App.1994) (en banc); *McBride v. State*, 862 S.W.2d 600, 607 (Tex.Crim.App.1993) (en banc); *Joiner v. State*, 825 S.W.2d 701, 707 (Tex.Crim.App.1992) (en banc); *Spence v. State*, 795 S.W.2d 743, 762 (Tex.Crim.App.1990) (en banc); *Beathard v. State*, 767 S.W.2d 423, 435 (Tex.Crim.App.1989) (en banc); *Fearance v. State*, 771 S.W.2d 486, 512 (Tex.Crim.App.1988) (en banc); *Holland v. State*, 761 S.W.2d 307, 323 (Tex.Crim.App.1988); *Pyles v. State*, 755 S.W.2d 98, 118 (Tex.Crim.App.1988) (en banc); *Gardner v. State*, 733 S.W.2d 195, 198 (Tex.Crim.App.1987) (en banc); *Mays v. State*, 726 S.W.2d 937, 950 (Tex.Crim.App.1986) (en banc); *Nethery v. State*, 692 S.W.2d 686, 709 (Tex.Crim.App.1985) (en banc); *Smith v. State*, 683 S.W.2d 393, 408 (Tex.Crim.App.1984) (en banc); *Holloway v. State*, 691 S.W.2d 608, 616 (Tex.Crim.App.1984) (en banc), *vacated* 475 U.S. 1105, 106 S.Ct. 1508, 89 L.Ed.2d 908 (1986); *Ex Parte Padgett*, 673 S.W.2d 303, 308 (Tex.App.Dallas 1984), *aff’d* 717 S.W.2d 55 (Tex.Crim.App.1986).

*Id.* at 462 n.6.

the complete lack of mitigating evidence presented in this case, Dr. Griffith's testimony virtually compelled the jury's answer to the second special issue. In short, the truly troubling facet of this case is the sole evidence upon which the jury found Flores to be a future danger: the testimony of a doctor who had never met the defendant.<sup>259</sup> ... The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific. It is as true today as it was in 1983 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 future dangerousness are wrong more often than they are right.' ... As those in the field have often noted, nothing within the training of a psychiatrist makes him or her particularly able to predict whether a particular individual will be a continuing threat to society. ... The inadequacy of the science underlying Dr. Griffith's testimony becomes strikingly apparent when considered relative to scientific evidence generally admissible at trial.<sup>260</sup>

In the last decades, Texas's predictions of future dangerousness and its parameters have evolved but not shifted. In fact, in a recent appeal, a death row defendant argued in his appellate brief that the use of psychological testimony by the State demonstrated that "a so-called expert can be found to say anything."<sup>261</sup> The brief referred to the State's mental health witness as having "no question at all about his godlike ability to see into the future and to see into another's soul."<sup>262</sup> The brief referred to him as the "new Doctor Death, one who can determine the future with absolute accuracy, even without testing and without considering Robert's behavior when incarcerated."<sup>263</sup>

Perhaps the most notorious forensic psychiatrist of the last two decades is Dr. Richard E. Coons who in 2008 testified that he had practiced forensic psychiatry for thirty-one years, evaluated the competence or sanity of between 8,000 to 10,000 people, performed 150 "future dangerousness" evaluations, and testified in fifty trials as an expert.<sup>264</sup> Dr. Coons testified in the 2008 retrial of Billie Wayne Coble, where a unanimous Court of Criminal Appeals was finally forced to admit that his testimony was inadmissible because it failed to meet the requirements of Rule 702 and the scientific admissibility criteria established in landmark cases, such as *Daubert*, *Kelly*, and *Nenno*.<sup>265</sup> However, to fully understand the lethal consequences of future dangerousness as it intersects with junk science and poor judicial gatekeeping, a quick plunge through the rabbit hole of the Court of Criminal Appeals' capital opinions leading to *Coble* is imperative.

#### **E. DEATH AND THE EXPERT WITNESS: DR. RICHARD E. COONS'S WINDING ROAD TO COBLE**

<sup>259</sup> *Id.* at 458.

<sup>260</sup> *Id.* at 463-64.

<sup>261</sup> Brief for Appellant at 19, *Roberts v. State*, 220 S.W.3d 521 (Tex. Crim. App. 2007) (No. 75.051), 2006 WL 3751270 at \*19.

<sup>262</sup> *Id.* at \*20.

<sup>263</sup> *Id.* at \*27.

<sup>264</sup> *Coble v. State*, 330 S.W.3d 253, 270 (Tex. Crim. App. 2010).

<sup>265</sup> *Id.* at 277-80.

In 1978, David Lee Powell was charged with capital murder and sentenced to death.<sup>266</sup> Dr. Richard E. Coons was appointed by the court to examine David Lee Powell to establish his competency to stand trial and sanity at the time the crime was committed.<sup>267</sup> After meeting with Mr. Powell on four different occasions, Dr. Coons testified at trial that “there was no indication that appellant had been insane” on the date of the offense. Dr. Coons “specifically disclaimed having observed any evidence that appellant was suffering from paranoid schizophrenia.”<sup>268</sup> Over defendant’s objection, Dr. Coons then testified at the punishment hearing that in his opinion there was a “high” probability that Powell “would commit future acts of violence that would constitute a continuing threat to society.”<sup>269</sup> Relying on the Supreme Court’s ruling on *Estelle v. Smith*,<sup>270</sup> Powell appealed, but the Texas Court of Criminal Appeals affirmed his death sentence. The court distinguished *Smith* by holding that Powell had waived his Fifth and Sixth Amendment rights because he introduced the testimony on the issue of insanity at the guilt-innocence stage of the trial.<sup>271</sup> In 1989,<sup>272</sup> reviewing the *Powell* case for a second time,<sup>273</sup> the United States Supreme Court again reversed the judgment of the Court of Criminal Appeals, holding that its decision was inconsistent with the Supreme Court’s rulings in *Satterwhite*<sup>274</sup> and *Estelle v. Smith*.<sup>275</sup>

In deciding that petitioner waived his right to object to the Coons and Parker testimony, the Court of Criminal Appeals in its initial opinion concentrated almost exclusively on petitioner’s Fifth Amendment claim to the exclusion of his separate contention that counsel should have been informed that he was to be examined on the issue of future dangerousness. Moreover, even after we remanded for further consideration in light of *Satterwhite*, a case that was premised exclusively on the Sixth Amendment, the Court failed to give any further attention to the Sixth Amendment claim. Because the evidence of future dangerousness was taken in deprivation of petitioner’s right to the assistance of counsel, and because there is no basis for concluding that petitioner waived his Sixth Amendment rights, we now hold that *Smith* and *Satterwhite* control and, accordingly, reverse the judgment of the Court of Criminal Appeals.<sup>276</sup>

<sup>266</sup> *Powell v. State*, 742 S.W.2d 353, 354 (Tex. Crim. App. 1987).

<sup>267</sup> *Id.* at 355.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 356.

<sup>270</sup> *Estelle v. Smith*, 451 U.S. 454 (1981).

<sup>271</sup> *Powell*, 742 S.W.2d at 357. The Court relied on a loose reading of *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981), which Judge Onion in dissent aptly refuted through his own analysis of *Estelle v. Smith*. *Id.* at 361 (Onion, J., dissenting).

<sup>272</sup> *Powell v. Texas*, 492 U.S. 680 (1989).

<sup>273</sup> After the Texas Court of Criminal Appeals affirmed his conviction and death sentence in 1989, Powell filed a petition for writ of certiorari. The United States Supreme Court vacated and remanded the case for further consideration. *Powell v. Texas*, 487 U.S. 1230 (1988). On remand, the Texas Court of Criminal Appeals again reaffirmed Powell’s death sentence. *Powell v. State*, 767 S.W.2d 759 (1989).

<sup>274</sup> *Satterwhite v. Texas*, 486 U.S. 249 (1988).

<sup>275</sup> *Estelle*, 251 U.S. at 454.

<sup>276</sup> *Powell*, 492 U.S. at 686.



In 1991, Texas retried Powell, and Dr. Coons testified again.<sup>277</sup> The defendant was once again convicted and sentenced to death a second time. The Court of Criminal Appeals affirmed the conviction in 1994.<sup>278</sup> David Lee Powell was executed on June 15, 2010.<sup>279</sup>

In 1992 Dr. Coons testified on the issue of future dangerousness for the state at the punishment phase of John Avalos Alba's capital trial.<sup>280</sup> The prosecutor posed a lengthy hypothetical question and asked Dr. Coons to opine as to Alba's future dangerousness.<sup>281</sup> Before Dr. Coons responded, the defense objected and requested a voir dire hearing pursuant to Texas Rule of Crim. Evid. 705(b).<sup>282</sup> The trial court refused to hold the hearing and Dr. Coons testified.<sup>283</sup> Alba was convicted and sentenced to death.<sup>284</sup> In 1995, on appeal, Alba argued that the trial court erred in denying him the opportunity to conduct a voir dire examination of Dr. Coons outside the presence of the jury, as provided by 705(b).<sup>285</sup> The Texas Court of Criminal Appeals affirmed the conviction and death sentence holding that, notwithstanding the mandatory nature of the rule, the trial court did not err in denying the voir dire hearing because the hypothetical question satisfied the purpose of the rule by putting before the jury the facts and data upon which Dr. Coons opined.<sup>286</sup> Both Judge Baird and Judge Clinton took issue with the plurality's cavalier reading of the statute.<sup>287</sup> Judge Clinton's dissent went much further, chastising the plurality not only for its flawed analysis, but its dismissive holding that even if the trial court's denial was an error, it was harmless.<sup>288</sup> Judge Clinton's dissent echoed his dissent in *Flores*<sup>289</sup> where he questioned the admissibility of future dangerousness. Here, he stated that the court's denial of voir dire was particularly egregious given the nature of future dangerousness:

But just because the law tolerates admission of expert testimony of the kind at issue here does not mean appellant should not be permitted, as part of the discovery that Rule 705(b) contemplates, to adduce not just the factual, but also the psychiatric, basis for the expert's opinion. Under 705(b) an opponent of psychiatric expert testimony ought to be allowed

<sup>277</sup> *Powell v. State*, 897 S.W.2d 309 (1994). Appellant argued that the trial court violated Texas law by appointing Dr. Coons to examine him, even though Dr. Coons had testified at this trial fourteen years earlier. "At a pretrial hearing, appellant asserted that Coons was not a disinterested party because he had testified at appellant's first trial. The trial judge declined to appoint another psychiatrist and ordered counsel not to interfere with Coon's examination." *Id.* at 314. The Court of Criminal Appeals held that "the fact that Coons testified against appellant fourteen years ago does not alone establish that he was or is biased against appellant. Some evidence of bias is required." *Id.*

<sup>278</sup> *Id.* at 309. Although the death sentence was vacated in 1994, on March 6, 1999, after a third punishment trial, Powell was again sentenced to death. *Powell v. Quarterman*, 536 F.3d 325, 326 (5th Cir. 2008).

<sup>279</sup> TEX. DEP'T CRIM. JUST., *supra* note 44.

<sup>280</sup> *Alba v. State*, 905 S.W.2d 581, 588 (Tex. Crim. App. 1995).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* The Texas Rules of Evidence provided as follows: "Voir Dire. Prior to the expert giving his opinion or disclosing the underlying facts or data, a party against whom the opinion is offered shall, upon request, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury." TEX. R. EVID. 705(b).

<sup>283</sup> *Alba*, 905 S.W.2d at 588.

<sup>284</sup> *Id.* at 583.

<sup>285</sup> *Id.* at 588.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 590 (Baird, J., concurring); *Id.* at 591 (Clinton, J., dissenting).

<sup>288</sup> *Id.* at 591 (Clinton, J., dissenting).

<sup>289</sup> *Flores v. State*, 871 S.W.2d 714, 724 (Tex. Crim. App. 1993) (Clinton, J., dissenting); *See also supra* notes 257-60 (discussing the federal opinion in the *Flores* case).

to inquire precisely what it is about an accused's past conduct that would lead a forensic psychiatrist to conclude he will continue to commit violent acts in the future.<sup>290</sup>

Although Alba's death sentence was later vacated by the 5<sup>th</sup> Circuit in 2000<sup>291</sup> due to Walter Quijano's racially-charged testimony,<sup>292</sup> he was tried a second time on punishment in 2003, and again, was sentenced to death. After a number of unsuccessful appeals,<sup>293</sup> John Avalos Alba was executed on May 25, 2010.<sup>294</sup>

In 1993, Dr. Coons testified in the capital murder trial of Edward Louis Lagrone, who was convicted and sentenced to death.<sup>295</sup> In his 1997 appeal, Lagrone challenged Dr. Coons's testimony on future dangerousness in a prison context. A unanimous court found the challenge "untenable."<sup>296</sup> Affirming the conviction, the Court held that:

the trial court was able to rely on Dr. Coons' [sic] professional qualifications—Dr. Coons is a medical doctor specializing in psychiatry who has a law degree and extensive professional experience as an expert witness in both capital and non-capital cases—to justify the admission of the contested future dangerousness testimony. These qualifications provided the trial court with a more than adequate basis for admitting Dr. Coons' [sic] testimony.<sup>297</sup>

Edward Louis Lagrone was executed on February 11, 2004.<sup>298</sup>

In 1998, Dr. Coons testified in the punishment phase of the capital murder trial of Brittany Marlowe Holberg. Dr. Coons testified that, based on her record, there was a "significant probability that [she] would commit criminal acts of violence in the future."<sup>299</sup> Although Holberg raised fifty points of error in her 2000 appeal, she did not challenge Dr. Coons's qualifications as an expert. Instead, Holberg argued that there was insufficient evidence to support the jury's affirmative finding to the punishment issue regarding her future dangerousness.<sup>300</sup> Dr. Coons's evidence in support of a "yes" finding on the issue of future dangerousness contributed to the court finding that the evidence, taken as a whole, was sufficient to support the jury's finding of future dangerousness.<sup>301</sup>

<sup>290</sup> *Alba*, 905 S.W.2d at 592 (Clinton, J., dissenting).

<sup>291</sup> *Alba v. Johnson*, 232 F.3d 208 (5th Cir. 2000).

<sup>292</sup> *Id.* at 208. On June 9, 2000, Attorney General John Cornyn identified the Alba case as one of Quijano's tainted cases: "After a thorough audit of cases in our office, we have identified eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in determination about the sentence in a capital murder trial." *Office of the Attorney General News Release Archive*, TEX. ATT'Y GEN., <https://www.texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609death.htm> (last visited June 5, 2014).

<sup>293</sup> *See, e.g., Ex parte Alba*, 256 S.W.3d 682 (Tex. Crim. App. 2008).

<sup>294</sup> TEX. DEP'T CRIM. JUST., *supra* note 44.

<sup>295</sup> *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997).

<sup>296</sup> *Id.* at 616.

<sup>297</sup> *Id.*

<sup>298</sup> TEX. DEP'T CRIM. JUST., *supra* note 44.

<sup>299</sup> *Holberg v. State*, 38 S.W.3d 137, 139 (Tex. Crim. App. 2000).

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

The composition of the Texas Court of Criminal Appeals has remained relatively stable over the last few years, which raises the question: what happened in the Court in ensuing years which caused at least five justices to rule that Dr. Coons's testimony is unreliable? Despite the APA's scathing rebuke of Dr. Grigson's unscientific predictions in its 1982 amicus curiae brief, widespread judicial efforts to curtail "junk science" in the courtroom have proven fruitless. Even after Texas's embarrassing debacle with Dr. Quijano's racially-charged predictions, Dr. Coons's dubious methodology reigned supreme and unchanged for at least three decades. Part of the explanation may lie with the Court itself, which has earned scathing criticism; one 1998 case was so unfairly decided that one of its own justices said it made the court a "national laughingstock."<sup>302</sup> Referring to the same case, a Texas journalist reported how the national media characterized our highest court of criminal appeals:

The CCA, the national media reported, was a powerful group of nine conservative Republicans. Though they were public officials, elected in staggered six-year terms, theirs was a "stealth court," shrouded in secrecy, whose sometimes outrageous decisions often came with no explanation. The court handled only criminal appeals (the Texas Supreme Court took care of civil matters), and the judges were mostly ex-prosecutors whose main goal seemed to be to satisfy the state's appetite for execution; the court reversed only 3 percent of the death penalty convictions that came before it, less than any other state high court. It even had a group of staff lawyers called the Death Squad who worked on nothing but death penalty cases.<sup>303</sup>

Arguably, this may not be an accurate description of the current court. Still, what the following Texas Court of Criminal opinions reveal is disturbing on many levels: at best, sheer inattentiveness to capital cases by members of the Court; at worst, a total disregard for precedent. This indifference resulting in unexplainable judicial contradictions highlights Texas's endemic fault lines leading directly to the death chamber.

#### **PART IV. THE FUTILITY OF APPELLATE REVIEW: THE ROAD TO *COBLE* RIDDLED WITH JUDICIAL CONTRADICTION**

In 2004, when George Rivas appealed his death sentence to the Court of Criminal Appeals, the Court was composed of Presiding Judge, Sharon Keller, and Associate Judges Johnson, Price, Womack, Keasler, Hervey, Holcomb, Cochran, and Meyers.<sup>304</sup> Rivas argued that Dr. Coons's predictions of future dangerousness in the punishment stage of his 2001 capital case was inadmissible under Texas Rule of Evidence 702 because it did not meet the requirements for scientific reliability established in *Kelly v. State* and *Nenno v. State*.<sup>305</sup> Dr. Coons based his opinion on Rivas's future dangerousness on statements

<sup>302</sup> Michael Hall, *And Justice for Some*, TEX. MONTHLY (November 2004), <http://www.texasmonthly.com/story/and-justice-some> ("For a long time the court was ridiculed for its tolerance of careless trial attorneys, such as the infamous cases in which it upheld death sentences even though the attorneys were known to have fallen asleep during trial. Horror stories such as these led the legislature in 2001 to pass the Fair Defense Act, setting standards for court-appointed trial lawyers and procedures for appointing them.").

<sup>303</sup> *Id.*

<sup>304</sup> Rivas v. State, No. 74,143 (Tex. Crim. App. June 23, 2004) (unpublished).

<sup>305</sup> *Id.* See generally *supra* notes 243-49 (discussing *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992)); *supra* notes 250-52 (discussing *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998)).

made by Rivas, police and autopsy reports, witness statements, and psychiatric evaluations previously conducted by other psychiatrists who examined Rivas.<sup>306</sup> In response to a question posed by the defense outside the hearing of the jury, Dr. Coons testified:

(1) that he himself had not examined appellant, (2) that he had not consulted with other experts in the field regarding his opinion, (3) that he was unaware of any literature or studies regarding predictions of future dangerousness in capital cases, and (4) that he himself had never performed any follow-up study to determine the accuracy of his own predictions, and thus did not know the rate of error.<sup>307</sup>

The defense objected to the admissibility of Dr. Coons's testimony, but the State argued that Dr. Coons, who had testified in similar capital cases, was qualified to offer his opinion.<sup>308</sup> Dr. Coons told the jury that he had "extensive qualifications as a practicing psychiatrist," and that he had "evaluated thousands of criminal defendants for issues such as competency to stand trial, sanity at the time of the offense, and the risk of future dangerousness."<sup>309</sup> His criteria in making future dangerousness assessments, he told the jury relied on several factors:

First, he determined whether the defendant had an 'active mental illness.' He looked at the defendant's history of violence, his attitude about violence, and at the facts of the offense in question. Then he looked at the defendant's personality and behavior patterns during his life so far. He considered whether the defendant appeared to have a conscience to help him control his behavior. And lastly, he looked at the future society of the defendant ( i.e., whether that person would be on death row or in general population).<sup>310</sup>

Based on a lengthy hypothetical posed by the prosecutor grounded on facts established in Rivas's trial, Dr. Coons opined "that the person described in the hypothetical would probably commit criminal acts of violence in the future, which would constitute a continuing threat to society."<sup>311</sup>

The Court of Criminal Appeals acknowledged the *Nenno* and *Kelly* factors and recognized that "the proponent of scientific evidence bears the burden of showing that the proffered evidence is relevant and reliable."<sup>312</sup> However, the court stated that the "trial court's acceptance of the reliability of psychiatric testimony on this subject without requiring the state to present extrinsic evidence of that reliability is not unusual."<sup>313</sup> It further stated that the U.S. Supreme Court in *Barefoot* held such evidence not to be *per se* inadmissible. Further, since that time predictions of future dangerousness had been widely used in the Court of Criminal Appeals.<sup>314</sup> The Court compared the holding in *Barefoot*, stating that Dr. Coons's testimony was much more restrained than Dr. Grigson's 100%

---

<sup>306</sup> *Rivas*, No. 74,143.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* (citing *Weathered v. State*, 15 S.W.3d, 540, 542 (Tex. Crim. App. 2000)).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

certainty predictions. Further the court stated that Dr. Coons's statements "regarding an individual's propensity to commit violent acts in the future were based on common-sense principles (for example, individuals with a long history of violence tend to continue to commit acts of violence)."<sup>315</sup> Accordingly, a unanimous court overruled Rivas's points of error, and affirmed the trial court's judgment.<sup>316</sup> George Rivas was executed on February 29, 2012.<sup>317</sup>

Just two years later, however, Judge Womack who had no quarrel with the validity of future dangerousness testimony in *Rivas*, filed a dissenting opinion in Raphael Deon Holiday's appeal.<sup>318</sup> In *Holiday*, the forensic psychiatrist who testified as to Holiday's future dangerousness, was not Dr. Coons, but Dr. Edward B. Gripon. Dr. Gripon, on cross exam, explained that he based his predictions on the "clinical/demographic approach"—which looks at the presence of mental illness and accounts for other factors, such as education level, family support, and age.<sup>319</sup> Dr. Gripon stated "that most actuarial studies show that most people fall below the probability of being a future danger."<sup>320</sup> "He agreed that the position of the American Psychiatric Association was that psychiatrists are not better qualified than anyone else to make predictions about future danger in capital cases."<sup>321</sup> "Gripon stated that he had not done any studies to determine if his predictions were reliable because 'it is proven to be impossible to date to do any kind of study that will either validate or invalidate that issue.'"<sup>322</sup>

In overruling Holiday's point of error, Judges Keasler, Keller, Meyers, Price, Hervey, Holcomb, Cochran, and Johnson held that:

the trial court was within the zone of reasonable disagreement in holding that the State had met its burden of establishing Gripon's qualifications and the reliability of his testimony. As a board certified psychiatrist with years of experience and specializing in forensic psychology, Gripon was shown to be qualified. While making predictions of future behavior is controversial among psychiatrists, forensic psychiatry is a legitimate and recognized field by the American Psychiatric Association. Gripon testified that his method of assessing future-dangerousness was considered valid<sup>323</sup>

Judge Womack's dissenting opinion took no issue with forensic psychiatry as a recognized field of medicine or with Dr. Gripon as an experienced practitioner, but he made a frontal challenge to the validity of dangerousness predictions.<sup>324</sup> Citing to Dr. Gripon's own statement regarding the impossibility of validating the reliability of future

---

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> TEX. DEP'T CRIM. JUST., *supra* note 44.

<sup>318</sup> *Holiday v. State*, Nos. AP-74446, AP-74447, AP-74448, 2006 WL 288661, at \*1 (Tex. Crim. App. Feb. 8, 2006) (Womack, J., dissenting).

<sup>319</sup> *Holiday v. State*, Nos. AP-74,446, AP-74,447, AP-74,448, (Tex. Crim. App. Feb. 8, 2006) (unpublished).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Holiday v. State*, Nos. AP-74446, 2006 WL 288661, at \*1 (Tex. Crim. App. Feb. 8, 2006) (Womack, J., dissenting).

dangerousness, he stated: “If it cannot be validated, it’s not science. Not even soft science. It may be soft, as many things are, but it’s not science.”<sup>325</sup>

Judge Womack’s dissent unambiguously stated that while he would allow “Dr. Gripon’s opinions on medical or psychiatric issues—diagnoses or treatments that have been validated,” he would exclude his testimony on future dangerousness because “predicting dangerousness is not medicine or psychiatry.”<sup>326</sup> Then, he acknowledged that though the Court has received this testimony in a number of death penalty cases, (citing to Court of Criminal Appeals decisions between 1978 and 1991), he argued these opinions were rendered before “[*Kelly*] led the way in raising the requirements for the admission of expert opinion.”<sup>327</sup> Today, he stated, these so called “experts” would not pass muster and should be excluded.<sup>328</sup> Forcefully, he added: “When he [Dr.Gripon] said his predictions were immune from being proved right or wrong, he should have been shown to a seat next to the others whose ‘expert’ opinions have been admitted in the past, but should be excluded today.”<sup>329</sup> Yet, that was the precise challenge made by Rivas in 2004 when he argued that Dr. Coons’s testimony “was inadmissible under Texas Rule of Evidence 702 because it failed to meet the requirements for scientific reliability, as defined in [*Kelly* and *Nenno*].”<sup>330</sup> Furthermore, while the *Rivas* Court spent a great deal of time discussing both the *Kelly* and *Nenno* factors, Judge Womack sided with the majority and expressed no concerns regarding the validity of predictions of future dangerousness.<sup>331</sup>

*Holiday* was decided on February 8, 2006.<sup>332</sup> Just four months later, on June 28, the Court rendered its opinion in the capital murder appeal of Guy Len Allen, who made a very similar challenge to Dr. Coons’s testimony based on the *Kelly* factors.<sup>333</sup> While the Court overruled the points of error and affirmed the death sentence,<sup>334</sup> Judge Womack authored a short, but forceful concurrence, joined by Judges Meyers, Johnson, and Cochran, which suggests that only two months later, members of the Court that affirmed *Holiday*’s sentence, suddenly took notice of the concerns regarding the validity of future dangerousness predictions.<sup>335</sup> In *Allen*, Judge Womack simply asked:

How have earlier predictions turned out? ... Why doesn’t somebody ask an expert witness, has he (or any other “expert”) bothered to look at the records? If he has, how did the predictions turn out? If no one has looked, why not? Isn’t science the careful and systematic study of observations, and tests of the conclusions that are based on the observations?<sup>336</sup>

---

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Rivas v. State*, No. 74,143 (Tex. Crim. App. June 23, 2004) (unpublished).

<sup>331</sup> *Id.*

<sup>332</sup> *Holiday v. State*, Nos. AP-74,446, AP-74,447, AP-74,448 (Tex. Crim. App. Feb. 8, 2006) (unpublished).

<sup>333</sup> *Allen v. State*, No. AP-74951, 2006 WL 1751227, at \*5 (Tex. Crim. App. June 28, 2006).

<sup>334</sup> *Id.* at \*1.

<sup>335</sup> *Id.* at \*7 (Womack, J., concurring).

<sup>336</sup> *Id.* at \*7-8.

In a concurrence reminiscent of Judges Odom and Robert's dissent in *Jurek* thirty-one years earlier,<sup>337</sup> Judge Johnson filed a concurrence joined by Judge Price that highlighted the "difficulty with asking witnesses to testify about the probability that a given defendant will be a danger in the future."<sup>338</sup>

If we want to know the probability that an individual will engage in a certain behavior within a given time frame, the only probability that can be accurately and truthfully stated must assume a person who is *like* the members of the reference group on which the estimate of probability is based. By its very nature, probability cannot, and does not, exist based on one observation of a group of one, nor can it be used to predict the behavior of a given individual. It is misleading to purport to be able to state a probability that a given individual will act in a given way in the future.<sup>339</sup>

Then, referring to Dr. Grigson's prediction in *Barefoot*, she said: "Dr. Grigson may have been committing the common mistake of conflating probability and possibility. Probability does not exist without large numbers of observation of a defined reference group."<sup>340</sup> Although four out of nine judges expressed reservations with Dr. Coons's testimony, none of these judges would have held the evidence inadmissible, and none voted to reverse the death sentence.<sup>341</sup>

In 2008, just two years after the Court of Criminal Appeals decided *Allen*, Noah Espada challenged Dr. Coons's testimony in the punishment phase of his capital trial.<sup>342</sup> His arguments, in point of error two, echoed those made by many capital defendants before him that Dr. Coons's testimony did not satisfy Rule 702's requirement for admissibility.<sup>343</sup> Specifically he argued that:

Coons: (1) 'never authored a paper on the subject of future dangerousness'; (2) 'had no 'hard core data' to support his opinion'; (3) had ... no research to confirm the error rate of his previous predictions of future dangerousness.' and (4) '[was][u]nable to cite any established body of scientific work on the prediction of future dangerousness.'<sup>344</sup>

Espada's arguments were based on a number of assertions made by Dr. Coons at a hearing outside the presence of the jury, where he testified, among other things that:

he did not know his rate of error, ... his opinion regarding a defendant's future dangerousness was ultimately based on his professional training and experience, ... his methodology was not based on any specific scientific study, ... [and] it is impossible to conduct accurate scientific

<sup>337</sup> *Jurek v. State*, 552 S.W.2d 934, 945 (Tex. Crim. App. 1975) (Odom, J., dissenting) ("What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists a 'probability' that he will perform certain acts in the future? Did it mean, as the words read, is there a probability, some probability, any probability?"); *See also supra* note 85.

<sup>338</sup> *Allen v. State*, No. AP-74951, 2006 WL 1751227, at \*8 (Tex. Crim. App. June 28, 2006).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at \*9 n.1.

<sup>341</sup> *Id.* at \*7-8 (Womack, J., concurring); *Id.* at 8-9 (Johnson, J., concurring).

<sup>342</sup> *Espada v. State*, AP-75, 219, 2008 WL 4809235, at \*8 (Tex. Crim. App. Nov. 5, 2008).

<sup>343</sup> *Id.* at \*8.

<sup>344</sup> *Id.*

research regarding capital defendants' future dangerousness because such defendants 'go to death row'.<sup>345</sup>

In overruling the point of error and affirming his conviction and death sentence, the Court of Criminal Appeals citing to *Nenno* stated:

On this record, we discern no abuse of discretion on the part of the trial court in its admission of Coons's testimony. Given the arguments, information, and evidence before the trial court at the time it ruled, the trial court could have reasonably concluded that psychiatry was a legitimate field of expertise, that predicting future dangerousness was within the scope of psychiatry, and that Coons's testimony would properly rely upon the principles involved in psychiatry. Coons testified that he was an experienced psychiatrist, that psychiatrists are called upon to make predictions of future dangerousness "all the time," and that they do so utilizing such factors as he set forth. Appellant offered no evidence to rebut Coons's testimony. The fact that Coons did not know his rate of error is not dispositive. We overrule point of error two.<sup>346</sup>

Inexplicably, Judge Price, who just two years prior in *Allen*, had joined Judge Johnson in her concerns with the issue of "probability," joined the majority opinion here in finding no error in Dr. Coons's testimony.<sup>347</sup> However, four judges did not join the majority in its opinion. Judges Meyers and Cochran, who had joined in Womack's concurrence in *Allen* asking the pivotal question: "How have the earlier predictions turned out?" concurred with the Court's result on point of error two, but did not join in the

---

<sup>345</sup> *Id.* The full testimony before the jury was as follows:

(1) he was a board-certified psychiatrist with thirty-one years of experience in forensic psychiatry; (2) in the course of his career, he had "evaluated" more than 7,000 persons charged with crimes; (3) taking various factors into account, he could oftentimes formulate an opinion regarding a defendant's future dangerousness; (4) he did not know his rate of error; (5) his opinion regarding a defendant's future dangerousness was ultimately based on his professional training and experience; (6) among the factors he considered were the defendant's personality, the defendant's history of violence, the defendant's attitude toward violence, the nature of the crime in question, the defendant's "behavior patterns" during his lifetime, the defendant's physical abilities, whether the defendant has expressed remorse, whether the defendant has a conscience to help him control his behavior, and the defendant's probable future location (prison); (7) other professionals used the same factors in assessing future dangerousness; (8) his methodology was not based on any specific scientific study; (9) it is impossible to conduct accurate scientific research regarding capital defendants' future dangerousness because such defendants "go to death row"; (10) it is impossible to "get the same level of hard data reliability [about future dangerousness] that you can [get] in [the] hard sciences"; (11) he had attended many professional seminars concerning future dangerousness but had written no papers on that subject; (12) he had read much about, and had consulted many other professionals about, future dangerousness; (13) "psychiatrists are called upon to make judgments about people's [future] dangerousness all the time," e.g., before "commit[ting] somebody [involuntarily to a mental institution], we're asked to determine whether they're likely to be dangerous to themselves or others"; (14) psychiatrists "rely on history to make predictions about the future"; and (15) psychiatrists "can reach conclusions [about future dangerousness], and do [so] all the time, about people who are charged with crimes."

*Id.* at \*9.

<sup>346</sup> *Id.* (citation omitted).

<sup>347</sup> *Id.* at \*16.



Court's opinion on that point of error.<sup>348</sup> On the other hand, Judge Womack filed a punchy dissenting opinion, which Judge Johnson joined.<sup>349</sup>

The Court's opinion says that the fact that the psychiatrist 'did not know his rate of error is not dispositive.'

The fact that there seems to be no evidence at all, anywhere, of the reliability of these predictions of future dangerousness should be dispositive. 'Now the ordinary rules of evidence require that evidence be reliable in order to be admissible. Reliability in the context of scientific evidence requires scientific validity. It is doubtful that testimony about future dangerousness could withstand *Daubert* analysis.' We apply that analysis to psychiatrists' and psychologists' predictions of future dangerousness.

The expert in this case said that the predictions could not be tested because the defendants "go to death row." First, not all of them do; some are sentenced to life in prison. Second, those who do go to death row spend years in prison before they are put to death. It wouldn't be very hard to research how many persons convicted of capital murder committed acts of violence after being sentenced. It must always be remembered that the capital murderer who is not sentenced to death will be sentenced to prison for life without parole. So the relevant question is whether they will commit violent acts in prison.

Our laws permit people with communicable diseases to be quarantined. The laws are based on scientific research that has shown that, without quarantining, the diseases will be spread. Before we accept an opinion that a capital murderer will be dangerous even in prison, there should be some research to show that this behavior can be predicted.<sup>350</sup>

But perhaps even more egregious and inexplicable than Judge Price's contradictory indifference to Dr. Coons's testimony in *Espada* is Judge Womack's position in *Ramey v. State*,<sup>351</sup> just three months after delivering his forceful dissent in *Espada*.

Ramey challenged Dr. Coons's testimony at the punishment phase of his trial on the grounds that his qualifications were insufficient to satisfy the *Daubert*, *Kelly*, and *Robinson* criteria for expert admissibility.<sup>352</sup> Judge Womack delivered the opinion for a unanimous court affirming Ramey's conviction and death sentence.<sup>353</sup> In a brief, innocuous, and formulaic recitation of the facts and legal authorities, Judge Womack wrote:

The evidence was that Dr. Coons held both a law degree and a medical degree, served in the United States Army Medical Corps, and was a consultant for the Brook Army Medical Center. He was certified by the Board of Psychiatry and Neurology, trained in neurology and

<sup>348</sup> *Id.* at \*19.

<sup>349</sup> *Id.* at \*20 (Womack, J., dissenting).

<sup>350</sup> *Id.* at \*20 (citations omitted).

<sup>351</sup> *Ramey v. State*, No. AP-75678, 2009 WL 335276 (Tex. Crim. App. Feb. 11, 2009).

<sup>352</sup> *Id.* at \*14.

<sup>353</sup> *Id.* at \*1.

psychiatry, and had been in private practice since 1975. Dr. Coons had evaluated approximately 8,000 people for competency to stand trial, and had consulted on 150 capital cases for either the prosecution or the defense.

In evaluating the appellant for the special issue on future dangerousness, Dr. Coons examined “twenty pounds of printed material and quite a number of CDs regarding statements” as well as offense reports, pictures, and educational records. While he did not personally interview the appellant, the Rules do not require an expert to complete personal interviews in order to make such determinations. Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

We find that the trial court did not abuse its discretion in finding Dr. Coons qualified as an expert witness with respect to future dangerousness.<sup>354</sup>

On the heels of Judge Womack’s impassioned dissent in *Espada*, the unanimous approval of Judges Meyers, Price, and Johnson evinces a disturbing lack of meaningful appellate review and an intolerable gross indifference in capital cases.

In 2010, the Court of Criminal Appeals ruled on *Coble v. State*, a case that has become a lightning rod for expert admissibility in Texas.<sup>355</sup> Dr. Coons had testified as to Coble’s future dangerousness both at Coble’s 1990 trial, as well as his retrial in 2008, at which he testified that Coble “would still be a future danger even though [he] did not have a single disciplinary report for the eighteen years that he had been on death row.”<sup>356</sup> Predictably, as other capital defendants before him, Coble argued that Dr. Coons’s testimony was inadmissible under Rule 702.<sup>357</sup> Here, however, in sheer contrast with *Ramey*’s five paragraphs, the Court<sup>358</sup> spent over twenty pages meticulously examining Dr. Coons’s methodology and thoughtfully exploring the evolution of expert admissibility since *Barefoot*. The court concluded “that the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons’s methodology for predicting future dangerousness by clear and convincing evidence during the *Daubert/Kelly* gatekeeping hearing in this particular case.”<sup>359</sup>

Notably, neither Dr. Coons’s testimony, nor Coble’s direct challenge were distinctively different from the previous capital cases where the Court summarily affirmed the death sentences. Which begs the question: what caused the Court to radically shift and pointedly ask: “the issue ... is whether [Dr. Coons’] future dangerousness testimony is

<sup>354</sup> *Id.* at \*14-15 (quoting TEX. R. EVID. 703).

<sup>355</sup> *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010).

<sup>356</sup> *Id.* at 264.

<sup>357</sup> *Id.* at 270.

<sup>358</sup> Three members of the Court, Presiding Judge Keller, and Associate Judges Meyers and Keasler did not concur in the Court’s opinion that Dr. Coons’ testimony was inadmissible. *Id.* at 300-01 (Keller, P.J., concurring).

<sup>359</sup> *Id.* at 279 (majority opinion).

based upon the scientific principles of forensic psychiatry?”<sup>360</sup> Suddenly, the same qualifications and methodology admissible by the Court in myriad cases since *Barefoot*, but most notably in 2009 in *Ramey*, were inexplicably inadmissible. Certainly, the arguments that caused the shift were neither novel nor new. Almost thirty years prior, the APA had offered uncontroverted reasons as to why these predictions were unreliable. Subsequently, appellants in countless capital cases had cited scientific studies corroborating the invalidity of future dangerousness since *Barefoot*—all of which fell upon deaf ears. This renders the *Coble* Court’s epiphany, regarding Dr. Coons’s methodology, hollow:

From this record, we cannot tell what principles of forensic psychiatry Dr. Coons might have relied upon because he cited no books, articles, journals, or even other forensic psychiatrists who practice in this area. There is no objective source material in this record to substantiate Dr. Coons’ methodology as one that is appropriate in the practice of forensic psychiatry. He asserted that his testimony properly relied upon and utilized the principles involved in the field of psychiatry, but this is simply the *ipse dixit* of the witness. Dr. Coons agreed that his methodology is idiosyncratic and one that he has developed and used on his own for the past twenty to thirty years. Although there is a significant body of literature concerning the empirical accuracy of clinical predictions versus actuarial and risk assessment predictions, Dr. Coons did not cite or rely upon any of these studies and was unfamiliar with the journal articles given to him by the prosecution.

Dr. Coons stated that he relies upon a specific set of factors: history of violence, attitude toward violence, the crime itself, personality and general behavior, conscience, and where the person will be (i.e., the free community, prison, or death row). These factors sound like common-sense ones that the jury would consider on its own, but are they ones that the forensic psychiatric community accepts as valid? Have these factors been empirically validated as appropriate ones by forensic psychiatrists? And have the predictions based upon those factors been verified as accurate over time? Some of Dr. Coons’ factors have great intuitive appeal to jurors and judges, but are they actually accurate predictors of future behavior? Dr. Coons forthrightly stated that “he does it his way” with his own methodology and has never gone back to see whether his prior predictions of future dangerousness have, in fact, been accurate. Although he had interviewed appellant before the first trial in 1990, Dr. Coons had lost his notes of that interview in a flood and apparently had no independent memory of that interview. He relied entirely upon the documentary materials given to him by the prosecution, including his 1989 report. Dr. Coons, therefore, did not perform any psychiatric assessment of appellant after his eighteen years of nonviolent behavior on death row, nor did he refer to any psychological testing that might have occurred in that time frame.<sup>361</sup>

Relying on the precedent of *Barefoot*, the court rejected *Coble*’s argument that this type of testimony “fails to meet the heightened reliability requirement of the Eighth

---

<sup>360</sup> *Id.* at 277.

<sup>361</sup> *Id.* at 277-79.

Amendment.”<sup>362</sup> Predictably, it held that the error in admitting Dr. Coons’s testimony did not affect Coble’s substantial rights to a fair sentencing trial, and it overruled Coble’s points of error, and affirmed the death sentence.<sup>363</sup> Five members of the court—Judges Cochran, Price, Womack, and Johnson—who in *Allen* appeared to scrutinize Dr. Coons’s testimony under a more stringent standard—joined the majority. Judge Holcomb changed his view from *Allen* to *Coble*, as did Judge Meyers. Judge Meyers, who had previously joined Judge Womack in questioning Dr. Coons’s testimony in *Allen*, and who had previously refused to join the Court on this issue in *Espada*, joined Presiding Judge Keller and Judge Keasler’s concurrence. Here, they argued the trial court did not err in admitting Dr. Coons’s testimony because his testimony shows that:

[F]orensic psychiatry is a legitimate field, that predicting future dangerousness is within the scope of that field, and that using education and experience to assess future dangerousness is a proper application of the principles involved in the field. Notably, appellant has presented no evidence to the contrary. The Court faults Dr. Coons for failing to cite “books, articles, journals, or even other forensic psychiatrists who practice in this area” to substantiate his methodology, while acknowledging that Dr. Coons is “a genuine forensic psychiatrist with a lengthy medical career.” But appellant did not introduce any “books, articles, journals, or even other forensic psychiatrists” to testify that, contrary to Dr. Coons’ testimony, Dr. Coons’ experience-based method of evaluating future dangerousness is inappropriate.<sup>364</sup>

In the last two months of 2011, following *Coble*, the Court ruled in three additional cases where Dr. Coons testified: *Gobert*,<sup>365</sup> *Devoe*,<sup>366</sup> and *Brewer*.<sup>367</sup> In each case, a unanimous Court affirmed the convictions and death sentences. In *Gobert*, the Court was forced to acknowledge that Dr. Coons’s testimony was inadmissible, but it concluded that given “appellant’s life-long penchant for violence,”<sup>368</sup> and other factual circumstances, Dr. Coons’s testimony was harmless.<sup>369</sup>

In *Devoe*, the appellant argued that the evidence at the punishment stage of the trial was insufficient to prove his future dangerousness beyond a reasonable doubt. His argument focused on the weight that the Court should give to his “pristine” behavioral record while incarcerated.<sup>370</sup> Citing to the *Keeton* factors,<sup>371</sup> the court examined the facts of the case and the testimony at the penalty phase, and stated that “while good behavior in prison is a factor to consider, it did not preclude a finding of future dangerousness.”<sup>372</sup> The court concluded “that there was sufficient evidence to support the jury’s affirmative

---

<sup>362</sup> *Id.* at 270.

<sup>363</sup> *Id.* at 287.

<sup>364</sup> *Id.* at 300 (Keller, J., concurring).

<sup>365</sup> *Gobert v. State*, No. AP-76345, 2011 WL 5881601 (Tex. Crim. App. Nov. 23, 2011).

<sup>366</sup> *Devoe v. State*, 354 S.W.3d 457 (Tex. Crim. App. 2011).

<sup>367</sup> *Brewer v. State*, No. AP-76378, 2011 WL 5881612 (Tex. Crim. App. Nov. 23, 2011).

<sup>368</sup> *Gobert*, 2011 WL 5881601, at \*7.

<sup>369</sup> *Id.*

<sup>370</sup> *Devoe*, 354 S.W.3d at 461.

<sup>371</sup> *Id.* at 461-62.

<sup>372</sup> *Id.* at 468.

finding on the future dangerousness issue, and we defer to the jury's conclusion that the mitigating evidence was not sufficient to warrant a sentence of life imprisonment."<sup>373</sup>

In *Brewer*, decided the same date as *Gobert*, the Court found that appellant failed to preserve error for appeal.<sup>374</sup> However, the arguments for non-preservation are surprisingly unpersuasive in light of the facts. At trial, appellant filed a motion which, although he titled motion in limine, explicitly asked that such expert predictions be excluded since they "do not meet the standards for reliability articulated in the rules of evidence or the common law."<sup>375</sup> The motion specifically stated:

Such predictions are unreliable due to (a) their overwhelming rate of error; (b) their lack of acceptance in the relevant scientific community, (c) the inconsistent, ad hoc and standardless manner in which they are formed, (d) the absence of a proper and adequately reliable data source upon which to base them. Any testimony the State seeks to admit incorporating such predictions does not satisfy the reliability requirements of Tex. R. Evid. 702, and must be excluded.<sup>376</sup>

The trial court denied the motion, but at trial when the State sought to present the testimony of Dr. Coons, the defense asked for a Tex. R. Evid. 702 and 705 hearing, which the court granted.<sup>377</sup> At this *Daubert* hearing, Dr. Coons testified, among other things, that he "believes his assessments can be made without examining the prisoner, if enough data can be gleaned from sources. He did not know, though, if any specific standards on predictions of future dangerousness had been generally accepted by the scientific community."<sup>378</sup> On cross, "he stated that he did not know the error rate on his style of risk assessments, but in any event he finds the literature on this topic almost meaningless due to poor data on the 'huge amount' of unreported prison violence."<sup>379</sup> The trial judge stated: "I'm going to hold that Dr. Coons is qualified and that the field—the psychiatric field of future dangerousness is a valid scientific theory and that—that the technique he used to apply it was valid, and that it was applied validly here in this *Brewer* case."<sup>380</sup>

The Court held that the record was insufficient to show that the trial judge understood the motion to be a *Daubert* motion rather than a motion in limine. However, even assuming the judge understood it to be a *Daubert* motion, *Brewer* failed to preserve error for appeal because his motion did not specifically refer to Dr. Coons but, instead was a general attack on the admissibility of expert testimony on future dangerousness.<sup>381</sup> The Court appeared to go a great distance to support its non-preservation argument:

Appellant's motion did not refer to Dr. Coons but generally castigated psychiatric and psychological expert testimony on future dangerousness as not meeting the applicable standards of reliability and relevance under Rule 702 and as unfairly prejudicial under Rule 403. With respect

---

<sup>373</sup> *Id.*

<sup>374</sup> *Brewer v. State*, No. AP-76378, 2011 WL 5881612, at \*6 (Tex. Crim. App. Nov. 23, 2011).

<sup>375</sup> Brief for Appellant at 15, *Brewer v. State* AP-76378 (Tex. Crim. App. 2011), 2011 WL 1299685 at \*15.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.* at \*15-16.

<sup>379</sup> *Id.* at \*16.

<sup>380</sup> *Brewer v. State*, No. AP-76378, 2011 WL 5881612, at \*7 (Tex. Crim. App. Nov. 23, 2011).

<sup>381</sup> *Id.* at \*6.

to the reliability claim under Rule 702, the motion was in essence an attack under the second prong of *Nenno*—whether future-dangerousness predictions are properly within the scope of the fields of psychiatry and psychology. Although we have held Dr. Coons' methodology to be unreliable under Rule 702, we did so solely on the basis of the third prong of *Nenno*—whether Dr. Coons' testimony properly applied the principles in his field. There are other psychiatrists and psychologists that use methodologies for assessing future dangerousness that differ radically from the methodology employed by Dr. Coons. The motion's attack under the second prong of *Nenno* did not place the trial court on notice of appellant's current complaint relating to the third prong of *Nenno*. Indeed, it seems difficult to envision how an attack under the third prong could be made as a general matter, without reference to a specific expert witness's anticipated testimony. The broad-based attack on all psychiatric and psychological testimony on future dangerousness in the motion *in limine* simply did not preserve a contention that Dr. Coons' methodology in particular was unreliable, and appellant does not now, in his brief, attempt to argue that all psychiatric and psychological assessments of future dangerousness are inadmissible.<sup>382</sup>

In addition, the Court found that *Brewer* did not lodge an objection to the reliability of Dr. Coons's testimony at the *Daubert* hearing.<sup>383</sup>

Texas's contemporaneous objection rule is governed by Rule of Appellate Procedure 33.1(a), which requires that in order to preserve a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely objection which stated the grounds for the ruling sought with sufficient specificity, unless those grounds are apparent, and that the trial court ruled or refused to rule on the objection.<sup>384</sup> Texas Rule of Evidence 103(a) provides: "In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."<sup>385</sup> Arguably, *Brewer's* motion, though concededly mislabeled, was sufficiently specific to put the trial judge on notice of his complaint regarding the admissibility of expert testimony, so that its denial by the trial judge would have preserved error. Thus, the failure to object was not fatal because the specific ground of objection was apparent from the context as required by Rule 103. In addition, any doubts as to whether *Brewer* was challenging expert admissibility evaporated after Dr. Coons's testimony at the *Daubert* hearing, and the judge's decision to allow him to testify.

After *Coble*, the Court's concerted effort to deny *Brewer* relief based on non-preservation error appears contrived. In an earlier case, the Court stated:

It follows that the trial judge's role in the admission and exclusion of evidence is generally not called into play unless a dispute develops between the parties concerning the proper application of an evidentiary rule. And because, absent any such dispute, our system generally expects him not to interfere with the presentation of evidence, it likewise

---

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at \*7.

<sup>384</sup> TEX. R. APP. P. 33.1.

<sup>385</sup> TEX. R. EVID. 103(a)(1).

does not fault him for refusing to interfere when a party fails to make the basis for his objection known. Beyond this, there are no technical considerations or form of words to be used. Straightforward communication in plain English will always suffice.

The standards of procedural default, therefore, are not to be implemented by splitting hairs in the appellate courts. As regards specificity, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it. Of course, when it seems from context that a party failed effectively to communicate his desire, then reviewing courts should not hesitate to hold that appellate complaints arising from the event have been lost. But otherwise, they should reach the merits of those complaints without requiring that the parties read some special script to make their wishes known.<sup>386</sup>

The *Brewer* ruling of non-preservation heralded the Court's decision in its denial of Ramey's writ of habeas corpus a year later. After the Court's unanimous decision in 2009 affirmed Ramey's conviction and death sentence,<sup>387</sup> he filed a habeas petition in March 2011.<sup>388</sup> In light of *Coble*, in April 2011, the Court ordered Ramey's application to be set on the following issues: "Whether the trial court erred in admitting testimony of Dr. Richard Coons with regards to the future dangerousness of applicant because Coons' testimony violates the Eight Amendment and applicant's rights to due process."<sup>389</sup>

On November 7, 2012, in a perfunctory and dismissive one-page opinion, the Court denied relief: "Habeas corpus is available only for jurisdictional defects and violations of constitutional or fundamental rights; a claim alleging the violation of a rule of evidence is not cognizable on habeas corpus. *Coble* was a direct appeal case, and it's holding was based upon a rule of evidence. Consequently, the holding in *Coble* does not give rise to a claim that is cognizable on habeas corpus."<sup>390</sup> Resting Dr. Coons' admissibility on the precedent of *Barefoot v. Estelle*, the court rejected Ramey's contention that the testimony violated the heightened reliability requirement of the Eighth Amendment.<sup>391</sup> The opinion delivered by Presiding Judge Keller was joined by Price, Keasler, Hervey, Cochran, and Alcalá. Judges Womack and Johnson concurred. Judge Meyers filed a five-page dissenting opinion. In a footnote, the dissent minced no words in frontally attacking the majority's contrived denial:

It seems apparent that the majority is going to great lengths to prevent Applicant from bringing forth his claim by unsubstantiated claims of non-preservation and cognizability. I have seen previous 11.071 writs with only a fraction of the amount of preservation evidence that this writ contains where we have not rejected the claim based on preservation or cognizability. This also seems particularly peculiar in light of this

<sup>386</sup> Lankston v. State, 827 S.W.2d 907, 908-09 (Tex. Crim. App. 1992).

<sup>387</sup> Ramey v. State, No. AP-75678, 2009 WL 335276, at \*1 (Tex. Crim. App. Feb. 11, 2009).

<sup>388</sup> *Ex parte* Ramey, No. AP-76533, 2011 WL 1288284, at \*1 (Tex. Crim. App. Apr. 6, 2011).

<sup>389</sup> *Id.*

<sup>390</sup> *Ex parte* Ramey, 382 S.W.3d 396, 397 (Tex. Crim. App. 2012).

<sup>391</sup> *Id.*

Court's previous scrutiny of Dr. Coons' methodology in *Coble*. Also, as our dissenting opinion further shows, the harm created by his testimony was clearly established in this case using the same analysis this Court used in *Coble*.<sup>392</sup>

The dissent underscored the majority's hasty and shoddy conclusion that the allegations failed to raise a habeas claim: "If the majority would have taken the time to research the record, it would have discovered that Applicant's claim was raised, but not addressed by this Court on direct appeal. Therefore, the majority's entire analysis is based on a false premise."<sup>393</sup> Then, it challenged the majority's conclusion regarding the issue of non-preservation:

The majority alleges that the issue of reliability was not preserved at trial. ... [E]ven if it had not been preserved at trial, the fact that it wasn't preserved should have been addressed in the direct appeal opinion. Instead this Court completely avoided the issue. In effect, this claim has not been raised and rejected on direct appeal and the failure of this Court to properly address the argument on direct appeal violated Applicant's due process rights. We made a mistake, and now we have the opportunity and obligation to correct it.<sup>394</sup>

After a lengthy examination of the legal principles governing expert admissibility and scrutinizing the requirements of *Daubert*, *Kelly*, and *Nenno*, the dissent concluded that Dr. Coons's testimony failed to meet the third *Nenno* standard, and that the prosecution did not satisfy its burden to show scientific reliability.<sup>395</sup> Further, the dissent held that the error affected Applicant's substantial right to a fair sentencing hearing.<sup>396</sup>

Arguably, the review of a litany of cases where defendants have been convicted of vicious and indefensible crimes is a cumbersome task. However, so long as the death penalty is condoned in Texas, the Constitution requires meaningful appellate review – one that fulfills "its basic historic function of correcting error in the trial court proceeding,"<sup>397</sup> because "what separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes. If that process is flawed because it allows evidence without any scientific validity to push the jury toward condemning the accused, the legitimacy of our legal process is threatened."<sup>398</sup>

## CONCLUSION

If the contradictions, errors and missteps—intentional or otherwise—of appellate review are insufficient to convince the Texas Legislature that future dangerousness is hopelessly flawed, perhaps the legislature will heed the advice and recommendations of the mental health professionals in reassessing its merit. Since 1983 when the APA denounced predictions of future dangerousness in *Barefoot*, both the U.S. Supreme Court, and presumably, the Texas Court of Criminal Appeals have demanded greater scrutiny on

<sup>392</sup> *Id.* at 400 n.3 (Meyers, J., dissenting).

<sup>393</sup> *Id.* at 398.

<sup>394</sup> *Id.* at 399-400.

<sup>395</sup> *Id.* at 403.

<sup>396</sup> *Id.* at 405.

<sup>397</sup> *Barclay v. Florida*, 463 U.S. 939, 988 (1983) (Marshall, J., dissenting).

<sup>398</sup> *Flores v. Johnson*, 210 F.3d 456, 469-70 (5th Cir. 2000).



the validity and merit of expert testimony. However, as this article reveals, unreliable testimony continues to escape the evidentiary net to bypass the putative safeguards of judicial gatekeeping, and remain unchecked by appellate review.

In 2011 the American and the Texas Psychological Associations joined as Amici Curiae in support of *Coble's* petition to the U.S. Supreme Court.<sup>399</sup> Once again, the brief urged the Court to grant the petition “because the integrity of the legal system and the mental health profession are undermined if unscientific, unreliable, but purportedly expert testimony about future dangerousness is deemed constitutionally admissible in capital sentencing.”<sup>400</sup> Predictably, citing to numerous studies, they argued that Dr. Coons’s “unstructured clinical” testimony cannot accurately assess future dangerousness.<sup>401</sup> The American and Psychological Associations explained that in the last twenty years “mental health professionals have made much progress in developing three risk-assessment approaches that are based on scientific principles and can be reliable in assessing risk of future dangerousness in appropriate cases.”<sup>402</sup> However, pointing to the challenges of developing these studies for capital offenders, they acknowledged that these more reliable approaches have been developed outside that context.<sup>403</sup>

Despite the extensive evidence provided in their brief, at least three justices of the *Coble* Court were not persuaded, which begs the question: if sophisticated and experienced jurists can be swayed by the “aura of scientific infallibility that shrouds the evidence,”<sup>404</sup> what can be expected of capital jurors?

As of 2014, the death penalty exists in 32 states, the U.S. Government, and the military,<sup>405</sup> but during the last forty years the national landscape has changed considerably as more states recognize that the administration of capital punishment is endemically flawed. In the last eight years, six states have abolished it,<sup>406</sup> and 1,394 exonerations nationwide since 1989 continue to rattle confidence in its accuracy and fairness.<sup>407</sup>

<sup>399</sup> Brief for Amici Curiae American Psychological Ass’n & Texas Psychological Ass’n in Support of Petition for a Writ of Certiorari at 2, *Coble v. Texas*, 131 S.Ct. 3030 (2011) (No. 10-1271) 2011 WL 2002207 at \*2 (“[B]ecause the integrity of the legal system and the mental health profession are undermined if unscientific, unreliable, but purportedly expert testimony about future dangerousness is deemed constitutionally admissible in capital sentencing.”).

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at \*8. The brief explained: “This approach imposes no structure on any of the four key decisions in the assessment process: (1) determining which risk factors to consider; (2) determining how to measure them; (3) combining the factors into a ‘single overarching estimate of violence risk’; and (4) ‘generating a final risk estimate.’” *Id.* (Citing John Monahan, Ph.D., *Structured Risk Assessment of Violence*, in *TEXTBOOK OF VIOLENCE ASSESSMENT AND MANAGEMENT* 17, 20-21 (Robert I. Simon & Kenneth Tardiff eds., 2008)).

<sup>402</sup> *Id.* at \*14 (“These three methods- (1) actuarial assessment, (2) structured professional judgment, and (3) the anamnestic approach – incorporate varying degrees of structure in one or more of the four steps of the risk assessment process.”).

<sup>403</sup> *Id.* at \*20.

<sup>404</sup> The phrase is borrowed from Giannelli’s now oft-cited phrase: “The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny.” Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence*: Frye v. United States, a Half-Century Later, 80 COLUM. L. REV. 1197, 1237 (1980).

<sup>405</sup> *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER., <http://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited June 5, 2014).

<sup>406</sup> *Id.* (listing New York and New Jersey, 2007; New Mexico, 2009; Illinois, 2011; Connecticut, 2012; and, Maryland, 2013).

<sup>407</sup> *Exonerations in 2013*, NAT’L REGISTRY EXONERATIONS (July 7, 2014), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2013\\_Report.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf).

However, whether grounded on ignorance or indifference, Texas remains recalcitrant to self-examine the considerable flaws of its “runaway criminal justice system.”<sup>408</sup>

To be fair, in the last five years Texas has made some impressive inroads to improve capital procedures, including, most recently, revamping criminal discovery in response to the infamous Michael Morton case.<sup>409</sup> In the same session, Texas passed SB 344, which allows for relief where a defendant is convicted of a crime based on scientific evidence.<sup>410</sup> The “junk science” bill, as it is colloquially known, creates a new source of habeas corpus relief, provided that the applicant can prove: (1) that exculpatory scientific evidence is currently available; (2) that was not ascertainable through the exercise of reasonable diligence by the applicant at the time of trial; and (3) the applicant would not have been convicted, had the evidence been presented at trial.<sup>411</sup> While this new remedy is available even to those applicants who have exhausted their prior writs,<sup>412</sup> the sad truth is that for many people who have already been executed, like Todd Willingham, this reform is too little, too late. Furthermore Texas has established the Regional Public Defender for Capital Cases, and the Office of Capital Writs, two offices to provide capital representation in the state.<sup>413</sup> And as recently reported, “For the sixth year in a row, Texas

<sup>408</sup> Hall, *supra* note 302.

<sup>409</sup> Michael Morton was convicted of the murder of his wife in 1987. After decades in prison, Morton’s motion for the State to turn over its sealed case file was granted. The file revealed that the prosecutor had withheld exculpatory evidence, such as a bloody bandana and the identification of the actual killer by Morton’s son. In 2011, Morton’s innocence was proven and he was released from prison. See *Know the Cases: Michael Morton*, THE INNOCENCE PROJECT, (May 27, 2014), [http://www.innocenceproject.org/Content/Michael\\_Morton.php](http://www.innocenceproject.org/Content/Michael_Morton.php). In response to this highly publicized case, the 2013 session of the Texas Legislature amended TEX. CODE CRIM. P. art. 39.14 to provide for a more open discovery process in criminal cases. Michael Morton Act, 2013 Tex. Gen. Laws § 2, ch. 49 (S.B. 1611), eff. Jan. 1, 2014 (*amending* TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2013)). Generally, the amendment provides that:

- (1) The State is required to turn over any evidence requested by the defense, save for work product, within a reasonable time after the request;
- (2) Should the State choose to withhold evidence or redact it in part, the court must, upon request by the defendant, conduct a hearing to determine whether the State has good cause in doing so;
- (3) The State has a duty to “disclose . . . any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged” at any time before, during, or after trial.
- (4) The State must keep electronic records of items disclosed under the article; and
- (5) Before accepting a guilty or nolo contendere plea, an inventory of items obtained under these discovery provisions.

*Id.* There is no constitutional right to discovery in a criminal case, so legislation such as this is much needed and long overdue.

<sup>410</sup> TEX. CODE CRIM. PROC. art. 11.073 (West 2013). This article was added by Acts 2013, 83rd Leg., ch. 410 (S.B. 344), § 1, eff. Sept. 1, 2013.

<sup>411</sup> See *id.*

<sup>412</sup> TEX. CODE CRIM. PROC. art. 11.07 § 4(a)(1) (West 2013) (a court may consider the merits of a “subsequent application . . . after final disposition of an initial application,” provided that “the application contains specific facts establishing that . . . the legal basis for the claim was unavailable on the date the applicant filed the previous application . . .”).

<sup>413</sup> See *About Us*, REG’L PUB. DEFENDER FOR CAPITAL CASES, <http://rpdo.org/about.php> (last visited June 5, 2014) (“The office represents only indigent defendants charged with a capital case where the death penalty is sought at the trial level.”); Maria Sprow, *Murder Insurance*, COUNTY MAG., 20 (Sept./Oct. 2008), <http://www.courts.state.tx.us/tidc/pdf/MurderInsuranceSprowCountyMagazineSeptOct2008.pdf> (explaining not only does the office have a mission to provide competent defense for its clients, but it also aims to help keep the indigent defense budgets of smaller counties in check by aggregating the costs amongst the whole and providing a consistent formula for fee calculation); OFF. CAPITAL WRITS, <http://www.ocw.texas.gov/> (last visited June 5, 2014) (“[The office] is a capital post-conviction state agency charged with representing death sentenced persons in state post-conviction habeas corpus and related proceedings.”); Michael Graczyk, *Year-Old State Office*

had fewer than 10 death sentences, a stark difference from 1999, when it recorded 48.”<sup>414</sup> But future dangerousness, the most widely challenged provision of the statute remains intact.

Oregon is the only other state where future dangerousness is a special issue that the jury must answer to render a verdict of death, but the effect of that provision is significantly diminished by a glaring distinction: while Texas has executed 515 individuals since 1976; Oregon has executed 2.<sup>415</sup>

In September 2013, the American Bar Association’s Due Process Review Project launched its Texas Capital Punishment Assessment Report – a comprehensive evaluation of Texas’s capital procedures, laws, and practices.<sup>416</sup> Among its key findings, it recommended that Texas should restructure its capital punishment statute “to abandon altogether the use of the ‘future dangerousness.’”<sup>417</sup> Harkening back to the criticisms leveled by the dissenters in *Jurek*, it argues that the lack of precise explanation of the key terms in the future dangerousness provision, leaves juror to discern the meaning of terms such as “probability,” “criminal acts of violence,” and “society,” “so broadly that a death sentence would be deemed warranted in virtually every capital murder case.”<sup>418</sup> Second, the reliance on unreliable testimony has a persuasive effect on the jury;<sup>419</sup> an argument that is amply supported by numerous reputable psychiatric journals, and mental health organizations.<sup>420</sup> Finally, the fact that life without parole is the only sentencing alternative, there is no longer a concern that capital defendants pose an imminent threat to society.<sup>421</sup>

This last point is significant. Recall the words of Justice Stevens in a recent opinion:

---

*Challenges Death Sentences*, OFF. CAPITAL WRITS, <http://www.ocw.texas.gov/news/year-old-state-office-challenges-death-sentences.aspx> (last visited June 5, 2014) (“Sen. Rodney Ellis... who sponsored the measure creating the agency [said,] ‘Considering the mistakes made in Texas to date, we should pay for this safety net and pray it’s adequate enough to get the job done right.’”) (alluding to the troubled history of death penalty litigation in Texas).

<sup>414</sup> See *The Death Penalty in 2013: Year End Report*, DEATH PENALTY INFO. CTR., 2 (Feb. 11, 2014), <http://deathpenaltyinfo.org/documents/YearEnd2013.pdf>.

<sup>415</sup> See *Facts About the Death Penalty*, DEATH PENALTY INFO. CENTER, 3 (June 2014), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

<sup>416</sup> *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*, A.B.A., 3 (Sept. 2013),

[http://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_-\\_moratorium/tx\\_complete\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/death_penalty_-_moratorium/tx_complete_report.authcheckdam.pdf) [hereinafter A.B.A., *Assessment Report*]. The ABA’s Death Penalty Due Process Review Project was established in the fall of 2001. Originally titled the Death Penalty Moratorium Implementation Project, the project was created “[T]o conduct research and educate the public and decision-makers on the operation of capital jurisdictions’ death penalty laws and processes in order to promote fairness and accuracy in death penalty systems, both in the United States and abroad. The Project encourages legislatures, courts, administrative bodies, and state and local bar associations to adopt the ABA’s Protocols on the Fair Administration of the Death Penalty; provides technical assistance to state, federal, international, and foreign stakeholders on death penalty issues; and collaborates with other individuals and organizations to develop new initiatives to support reform of death penalty processes, including adoption of the ABA’s 1997 resolution promoting a suspension of executions.” *ABA Death Penalty Due Process Review Project: About Us*, A.B.A., [http://www.americanbar.org/groups/individual\\_rights/projects/death\\_penalty\\_due\\_process\\_review\\_project/about\\_us.html](http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/about_us.html). (last visited June 5, 2014).

<sup>417</sup> A.B.A., *Assessment Report*, *supra* note 413, at viii.

<sup>418</sup> *Id.* at xxxix.

<sup>419</sup> *Id.* at xxxix-xl.

<sup>420</sup> See, e.g., Schweitzer & Saks, *supra* note 256.

<sup>421</sup> A.B.A., *Assessment Report*, *supra* note 413, at xl-xli.

While incapacitation may have been a legitimate rationale in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty. Moreover, a recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option. And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence.<sup>422</sup>

Myriad opinions of the U.S. Supreme Court have consistently held that the “Eighth Amendment insists upon ‘reliability in the determination that death is the appropriate punishment in a specific case.’”<sup>423</sup> This article offers irrefutable proof that future dangerousness is neither reliable, nor constitutional. Its continued use casts a pall in the legitimacy of Texas’s capital punishment. A system that inflicts the ultimate punishment must be anchored to principles of fairness and justice in its rules and procedures. Anything less will harbor a society denuded of the most basic of moral and social values. The execution of innocent people and the unfair administration of death affects all of us, for at the end: “It is tempting to pretend that [those] on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined... [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.”<sup>424</sup>

---

<sup>422</sup> *Baze v. Rees*, 553 U.S. 35, 78-79 (2008) (Stevens, J., concurring).

<sup>423</sup> *Oregon v. Guzek*, 546 U.S. 517, 525 (2006).

<sup>424</sup> *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting). Justice Brennan was specifically referring to minorities on death row. I have borrowed from the essence of this quote. Here’s the actual quote: “It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. ‘The destinies of the two races in this country are indissolubly linked together,’ ... and the way in which we choose those who will die reveals the depth of moral commitment among the living.” *Id.* (citation omitted).



