# CAPITAL PUNISHMENT:
# RACE, POVERTY & DISADVANTAGE

Yale University
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## Class Three - Part Three

## FUTURE DANGEROUSNESS

Most of the death penalty statutes passed in response to *Furman* provided that the circumstances of the crimes and past acts of he defendant – such as prior criminal convictions – could be a basis for a sentence of death. Texas, however, provided that the determination of death was to be based upon future behavior. The most critical of three questions put to a jury at the sentencing phase is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Crim. Code, Article 37.071 (b)(2).

The Texas Court of Criminal Appeals upheld the state's death penalty statute in *Jurek v. State*, 522 S.W.2d 934 (Tex. Cr. App. 1975), *aff'd.,* 428 U.S. 262 (1976). The majority rejected Jurek's contention that the statute was too vauge to provide adequate guidance to the jury. The Court did not discuss the future dangerousness provision. Two members of the Court raised questions in dissent. Judge Odom, concurring in part and dissenting in part, asked:

> 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? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability, yet it is some probability, *a* probability, and no one would say it is no probability or not a probability. It has been written: "It is probable that many things will happen contrary to probability," and "A thousand probabilities do not make one fact." The statute does not require a particular degree of probability but only directs that *some* probability need be found. The absence of a specification as to what degree of probability is required is itself a vagueness inherent in the term as used in this issue. Our common sense understanding of the term leaves the statute too vague to pass constitutional muster.

Judge Odom found the provision "so confusing that even the majority of this Court have been misled" * * * and stated that he would hold the statute unconstitutionally vague in violation of the Texas Constitution and the due process clause the United States Constitution.

Judge Roberts, dissenting, argued :

> [T]his provision basing the imposition of capital punishment upon the probability of future events appears to be unique to this State. A survey of the capital punishment statutes of other states fails to reveal any provision similar to the "probability" issue * * *. In all the statutes reviewed, the aggravating circumstances upon which imposition of the death penalty rests concern either *prior* acts of criminal conduct or the means of circumstances surrounding the commission of the offense for which the accused is on trial.

Observing that a significant part of Jurek's challenge "is that the phrase 'a probability' is so vague and overbroad as to be unconstitutional, and that this overbreadth is compounded beyond

logical and rational understanding by the statutory requirement that the stated 'probability' must be proved beyond a reasonable doubt," Judge Roberts urged, "it is incumbent upon this Court to determine whether it is possible to define the phrase 'a probability.' This the majority has not done." Searching for the meaning himself, he found a widely accepted "technical definition" of the word probability:

> In the doctrine of chance, the likelihood of the occurrence of any particular form of an event, estimated as the ratio of the number of ways in which that form might occur to the whole number of ways in which the event might occur in any form (all such elementary forms being assumed as equally probable); the limit of the ratio of the frequency of that form of the event to the entire frequency of the event in all forms as the number of trials is increased indefinitely. Thus, as an unweighted die thrown up may fall equally well with any of its six faces up, there are six ways of happening; the ace can turn up in only one way; the chance of the ace is 1 out of 6 (1/6).

Judge Roberts continued:

> Thus defined, a probability is simply a chance – however large or small – as measured and defined in mathematical or statistical terms.
>
> Certainly this clear definition of probability, though without vagueness in the meaning of the term itself, leaves much vagueness in the issue submitted under Article 37.071(b)(2), because even with this definition *the question would by its terms, be answered in the affirmative for all individuals*, no matter how saintly. That is, there is beyond any doubt some mathematical chance that all persons "would commit criminal acts of violence that would constitute a continuing threat to society."
>
> * * *
>
> 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 – *could not have been answered in his favor*. It is equally clear that such a procedure violates due process and thus constitutes error.

He added additional reservations in a footnote:

> * * * Under this subsection we go beyond our traditional understanding of reasonable doubt, which is based on the defensible premise that where acts have been performed, they can be proven to have produced an incident beyond a reasonable doubt. This concept has been tried, tested, and proven valid.
>
> But under subsection (b)(2) the jury is required to find beyond a reasonable doubt that an individual, the defendant, will *in the future* perform certain acts. This adopts the principle of predestination: That man is destined to do certain things and hence has no control over his actions. If this be true, we should not punish or attempt to rehabilitate, since the defendant is no more responsible for his acts than an individual who is insane at the time he commits an offense.
>
> However, if individuals are responsible for their acts – as I believe – this cannot be true; yet if individuals are so responsible, (b)(2) is unconstitutional, since it is impossible to prove beyond a reasonable doubt or to a moral certainty that a person will act in a certain manner in the future.

The United States Supreme Court rejected the argument that it is impossible to predict future behavior and that the question is so vague as to be meaningless. In *Jurek v. Texas*, 428 U.S. 262 (1976), Justice Stevens, writing for himself and Justices Stewart and Powell, stated:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a

> defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. 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 have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

Nine states explicitly provide for the consideration of future dangerousness in determining whether to impose death. Oregon's statute is similar to the Texas statute. The jury is asked to answer four questions with "yes" or "no" answers. The second is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Or. Rev. Stat. § 163.150(1)(b)(B). In Virginia, one of two basis for imposing the death penalty is a jury finding beyond a reasonable doubt "that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code § 19.2-264.4(C). Two other states include future dangerousness among their aggravating factors, but a death sentence may be imposed based on other aggravating factors without a finding of future dangerousness. Okla. Stat. Ann. tit. 21, § 701.12(7); Wyo. Stat. Ann. § 6-2- 102(h) (xi). Four states allow juries to consider the absence of future dangerousness as a mitigating factor. Colo. Rev. Stat. Ann. § 18-1.3-1201(4)(k) (West 2002); Md. Code Ann., Crim. Law § 2-303(h)(2)(vii) (2002); N.M. Stat. Ann. § 31-20A-6(G) (Michie 2001); Wash. Rev. Code § 10.95.070(8) (2002). In some other states and in federal capital trials, future dangerousness may be considered as a nonstatutory aggravating factor.

## Testimony by Mental Health Experts

Since adoption of the statute, Texas prosecutors have presented the testimony of mental health professionals to prove that the defendant is a future danger. Initially, these experts interviewed defendants soon after their arrest and based their opinions, in part, on their interviews. However, in 1981 the Supreme Court held that unless a defendant was warned before such interviews with regard to the right to remain silent and that any statement made could be used against the defendant, and the defendants waived the rights, the admission of a psychiatrist's testimony on the issue of future dangerousness violated the privilege against compelled self-incrimination guaranteed by Fifth Amendment. The Court also held that the failure to notify defense counsel in advance that the psychiatric examination would encompass issue of future dangerousness violated the Sixth Amendment right to counsel. *Estelle v. Smith*, 451 U.S. 454 (1981).

No longer able to interview defendants, psychiatrists have, since that time, testified based on hypothetical questions. Some mental health experts testified frequently for the prosecution that defendants were a future danger. The most famous, Dr. James Grigson, testified so often that he became know as "Dr. Death." For a description of Dr. Grigson's success in persuading juries to impose death, *see* Ron Rosenbaum's article, *Travels With Dr. Death*, first published in VANITY FAIR (May 1990), and later with a other articles and essays in a Penguin book by the same title. Dr. Grigson and Dr. John Holbrook, another psychiatrist who frequently testified for Texas prosecutors, both testified that Thomas Barefoot was a future danger. The Supreme Court addressed the reliability of their predictions and the use of hypothetical questions to obtain them in the case that follows.

**Thomas A. BAREFOOT, Petitioner,**
**v.**
**W.J. ESTELLE, Jr., Director, Texas Department of Corrections.**

United States Supreme Court
463 U.S. 880, 103 S.Ct. 3383 (1983)

White, J., delivered the opinion of the Court. Stevens, J., filed opinion concurring in the judgment. Marshall, J., filed a dissenting opinion in which Brennan, J., joined. Blackmun, J., filed a dissenting opinion in which Brennan and Marshall, JJ., joined in part.

**Justice WHITE** delivered the opinion of the Court.

* * *

**I**

On November 14, 1978, petitioner was convicted of the capital murder of a police officer in Bell County, Texas. A separate sentencing hearing before the same jury was then held to determine whether the death penalty should be imposed. Under Tex.Code Crim.Proc.Ann. § 37.071, two special questions were to be submitted to the jury: whether the conduct causing death was "committed deliberately and with reasonable expectation that the death of the deceased or another would result"; and whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The State introduced into evidence petitioner's prior convictions and his reputation for lawlessness. The State also called two psychiatrists, John Holbrook and James Grigson, who, in response to hypothetical questions, testified that petitioner would probably commit further acts of violence and represent a continuing threat to society. The jury answered both of the questions put to them in the affirmative, a result which required the imposition of the death penalty.

On appeal to the Texas Court of Criminal Appeals, petitioner urged, among other submissions, that the use of psychiatrists at the punishment hearing to make predictions about petitioner's future conduct was unconstitutional because psychiatrists, individually and as a class, are not competent to predict future dangerousness. Hence, their predictions are so likely to produce erroneous sentences that their use violated the Eighth and Fourteenth Amendments. It was also urged, in any event, that permitting answers to hypothetical questions by psychiatrists who had not personally examined petitioner was constitutional error. The court rejected all of these contentions and affirmed the conviction and sentence * * *

* * *

The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel. In the first place, it is contrary to our cases. If the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty, which it is, *Jurek v. Texas*, 428 U.S. 262 (1976), and if it is not impossible for even a lay person sensibly to arrive at that conclusion, it makes little sense, if any, to submit that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify. In *Jurek*, seven Justices rejected the claim that it was impossible to predict future behavior and that dangerousness was therefore an invalid consideration in imposing the death penalty. Justice STEVENS responded directly to the argument:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining

what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. 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. * * *

* * *

Acceptance of petitioner's position that expert testimony about future dangerousness is far too unreliable to be admissable would immediately call into question those other contexts in which predictions of future behavior are constantly made. * * * [For example,] "Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, 441 U.S. 418, 429, (1979).

In the second place, the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross examination and contrary evidence by the opposing party. Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but as generally so unreliable that it should be ignored. If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of the State's psychiatrists along with opposing views of the defendant's doctors.[5]

Third, petitioner's view mirrors the position expressed in the *amicus* brief of the American Psychiatric Association (APA). * * * We are [not] convinced * * * that the view of the APA should be converted into a constitutional rule barring an entire category of expert testimony. We are not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.

The amicus does not suggest that there are not other views held by members of the Association or of the profession generally. Indeed, as this case and others indicate, there are those doctors who are quite willing to testify at the sentencing hearing, who think, and will say, that they know what they are talking about, and who expressly disagree with the Association's point of view.[6]

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5. In this case, no evidence was offered by petitioner at trial to contradict the testimony of Doctors Holbrook and Grigson. Nor is there a contention that, despite petitioner's claim of indigence, the court refused to provide an expert for petitioner. In cases of indigency, Texas law provides for the payment of $500 for "expenses incurred for purposes of investigation and expert testimony."

6. At trial, Dr. Holbrook testified without contradiction that a psychiatrist could predict the future dangerousness of an individual, if given enough background information about the individual. Dr. Grigson obviously held a similar view. At the District Court hearing on the habeas petition, the State called two expert witnesses, Dr. George Parker, a psychologist, and Dr. Richard Koons, a psychiatrist. Both of these doctors agreed that accurate predictions of future dangerousness can be made if enough information is provided; furthermore, they both deemed it highly likely that an individual fitting the characteristics of the one in the Barefoot hypothetical would commit future acts of violence. Although Barefoot did not present any expert testimony at his trial, at the habeas hearing he called Dr. Fred Fason, a psychiatrist, and Dr. Wendell Dickerson, a psychologist. Dr. Fason did not dwell on the general ability of mental health professionals to predict future dangerousness. Instead, for the most part, he merely criticized the giving of a diagnosis based upon a hypothetical question, without an actual examination. He conceded that, if a medical student described a patient in the terms of the Barefoot hypothetical, his "highest order of suspicion," to the degree of 90%, would be that the patient had a sociopathic personality. He insisted, however, that this was only an "initial impression," and that no doctor should give a firm "diagnosis" without a full examination and testing. Dr. Dickerson, petitioner's other expert, was the only

Furthermore, their qualifications as experts are regularly accepted by the courts. If they are so obviously wrong and should be discredited, there should be no insuperable problem in doing so by calling members of the Association who are of that view and who confidently assert that opinion in their amicus brief. Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials. We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.

* * * After listening to the two schools of thought testify not only generally but about the petitioner and his criminal record, the District Court found:

> The majority of psychiatric experts agree that where there is a pattern of repetitive assault and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises. The accuracy of this conclusion is reaffirmed by the expert medical testimony in the case at the evidentiary hearing. . . . It would appear that petitioner's complaint is not the diagnosis and prediction made by Drs. Holbrook and Grigson at the punishment phase of his trial, but that Dr. Grigson expressed extreme certainty in his diagnosis and prediction. . . . In any event, the differences among the experts were quantitative, not qualitative. The differences in opinion go to the weight of the evidence and not the admissibility of such testimony. . . . Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal.

We agree with the District Court, as well as with the Court of Appeals' judges who dealt with the merits of the issue and agreed with the District Court in this respect.

**B**

Whatever the decision may be about the use of psychiatric testimony, in general, on the issue of future dangerousness, petitioner urges that such testimony must be based on personal examination of the defendant and may not be given in response to hypothetical questions. We disagree. Expert testimony, whether in the form of an opinion

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person to testify who suggested that no reliable psychiatric predictions of dangerousness could ever be made. We are aware that many mental health professionals have questioned the usefulness of psychiatric predictions of future dangerousness in light of studies indicating that such predictions are often inaccurate. For example, at the habeas hearing, Dr. Dickerson, one of petitioner's expert witnesses, testified that psychiatric predictions of future dangerousness were wrong two out of three times. He conceded, however, that, despite the high error rate, one "excellently done" study had shown "some predictive validity for predicting violence." Dr. John Monahan, upon whom one of the State's experts relied as "the leading thinker on this issue," concluded that "the 'best' clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period among institutionalized populations that had both committed violence in the past ... and who were diagnosed as mentally ill." However, although Dr. Monahan originally believed that it was impossible to predict violent behavior, by the time he had completed his monograph, he felt that "there may be circumstances in which prediction is both empirically possible and ethically appropriate," and he hoped that his work would improve the appropriateness and accuracy of clinical predictions. All of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury. Petitioner's entire argument, as well as that of Justice BLACKMUN's dissent, is founded on the premise that a jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process.

based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the factfinder do its assigned job. * * *

Today, in the federal system, Federal Rules of Evidence 702-706 provide for the testimony of experts. The advisory committee notes touch on the particular objections to hypothetical questions, but none of these caveats lends any support to petitioner's constitutional arguments. Furthermore, the Texas Court of Criminal Appeals could find no fault with the mode of examining the two psychiatrists under Texas law: "The trial court did not err by permitting the doctors to testify on the basis of the hypothetical question. The use of hypothetical questions is a well-established practice. * * * That the experts had not examined appellant went to the weight of their testimony, not to its admissibility."

* * *

**Justice BLACKMUN**, with whom Justice BRENNAN and Justice MARSHALL join in Parts I-IV, dissenting.

* * * The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result – even in a capital case – because, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person's life is at stake – no matter how heinous his offense – a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.

* * *

* * * [T]he prosecution called Doctors Holbrook and Grigson, whose testimony extended over more than half the hearing. Neither had examined Barefoot or requested the opportunity to examine him. In the presence of the jury, and over defense counsel's objection, each was qualified as an expert psychiatrist witness. * * *

* * *

Each psychiatrist then was given an extended hypothetical question * * * . On the basis of the hypothetical question, Doctor Holbrook diagnosed Barefoot "within a reasonable psychiatr[ic] certainty," as a "criminal sociopath." He testified that he knew of no treatment that could change this condition, and that the condition would not change for the better but "may become accelerated" in the next few years. Finally, Doctor Holbrook testified that, "within reasonable psychiatric certainty," there was "a probability that the Thomas A. Barefoot in that hypothetical will commit criminal acts of violence in the future that would constitute a continuing threat to society," and that his opinion would not change if the "society" at issue was that within Texas prisons rather than society outside prison.

Doctor Grigson then testified that, on the basis of the hypothetical question, he could diagnose Barefoot "within reasonable psychiatric certainty" as an individual with "a fairly classical, typical, sociopathic personality disorder." He placed Barefoot in the "most severe category" of sociopaths (on a scale of one to ten, Barefoot was "above ten"), and stated that there was no known cure for the condition. Finally, Doctor Grigson testified that whether Barefoot was in society at large or in a prison society there was a "one hundred percent and absolute" chance that Barefoot would commit future acts of criminal violence that would constitute a continuing threat to society.

On cross-examination, defense counsel questioned the psychiatrists about studies demonstrating that psychiatrists' predictions of future dangerousness are inherently unreliable. Doctor Holbrook indicated his familiarity with many of these studies but stated that he disagreed with their conclusions. Doctor Grigson stated that he was not familiar with most of these studies, and

that their conclusions were accepted by only a "small minority group" of psychiatrists – "[i]t's not the American Psychiatric Association that believes that."

* * *

**II**

**A**

The American Psychiatric Association (APA), participating in this case as amicus curiae, informs us that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession." The APA's best estimate is that two out of three predictions of long-term future violence made by psychiatrists are wrong. The Court does not dispute this proposition, and indeed it could not do so; the evidence is overwhelming. * * *

* * * Neither the Court nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right.

The APA also concludes, as do researchers that have studied the issue, that psychiatrists simply have no expertise in predicting long-term future dangerousness. * * * Thus, while Doctors Grigson and Holbrook were presented by the State and by self-proclamation as experts at predicting future dangerousness, the scientific literature makes crystal clear that they had no expertise whatever. Despite their claims that they were able to predict Barefoot's future behavior "within reasonable psychiatric certainty," or to a "one hundred percent and absolute" certainty, there was in fact no more than a one in three chance that they were correct.

**B**

It is impossible to square admission of this purportedly scientific but actually baseless testimony with the Constitution's paramount concern for reliability in capital sentencing.[5] Death is a permissible punishment in Texas only if the jury finds beyond a reasonable doubt that there is a probability the defendant will commit future acts of criminal violence. The admission of unreliable psychiatric predictions of future violence, offered with unabashed claims of "reasonable medical certainty" or "absolute" professional reliability, creates an intolerable danger that death sentences will be imposed erroneously.

* * *

* * * Although committed to allowing a "wide scope of evidence" at presentence hearings, the Court has recognized that "consideration must be given to the quality, as well as the quantity, of the information on which the sentencing [authority] may rely." * * *

Indeed, unreliable scientific evidence is widely acknowledged to be prejudicial. The reasons for this are manifest. "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

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5. Although I believe that the misleading nature of any psychiatric prediction of future violence violates due process when introduced in a capital sentencing hearing, admitting the predictions in this case – which were made without even examining the defendant – was particularly indefensible. In the APA's words, if prediction following even an in-depth examination is inherently unreliable, "there is all the more reason to shun the practice of testifying without having examined the defendant at all. . . . Needless to say, responding to hypotheticals is just as fraught with the possibility of error as testifying in any other way about an individual whom one has not personally examined. Although the courts have not yet rejected the practice, psychiatrists should." Such testimony is offensive not only to legal standards; the APA has declared that "it is unethical for a psychiatrist to offer a professional opinion unless he/she has conducted an examination." The Court today sanctions admission in a capital sentencing hearing of "expert" medical testimony so unreliable and unprofessional that it violates the canons of medical ethics.

without critical scrutiny." * * * Where the public holds an exaggerated opinion of the accuracy of scientific testimony, the prejudice is likely to be indelible. * * * There is little question that psychiatrists are perceived by the public as having a special expertise to predict dangerousness, a perception based on psychiatrists' study of mental disease. * * * It is this perception that the State in Barefoot's case sought to exploit. Yet mental disease is not correlated with violence, * * * and the stark fact is that no such expertise exists. Moreover, psychiatrists, it is said, sometimes attempt to perpetuate this illusion of expertise, and Doctors Grigson and Holbrook – who purported to be able to predict future dangerousness "within reasonable psychiatric certainty," or absolutely – present extremely disturbing examples of this tendency. The problem is not uncommon.

* * *

Psychiatric predictions of future dangerousness are not accurate; wrong two times out of three, their probative value, and therefore any possible contribution they might make to the ascertainment of truth, is virtually nonexistent. * * * Indeed, given a psychiatrist's prediction that an individual will be dangerous, it is more likely than not that the defendant will not commit further violence. It is difficult to understand how the admission of such predictions can be justified as advancing the search for truth, particularly in light of their clearly prejudicial effect.

**III**

**A**

Despite its recognition that the testimony at issue was probably wrong and certainly prejudicial, the Court holds this testimony admissible because the Court is "unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness." One can only wonder how juries are to separate valid from invalid expert opinions when the "experts" themselves are so obviously unable to do so. Indeed, the evidence suggests that juries are not effective at assessing the validity of scientific evidence. * * *

There can be no question that psychiatric predictions of future violence will have an undue effect on the ultimate verdict. Even judges tend to accept psychiatrists' recommendations about a defendant's dangerousness with little regard for cross-examination or other testimony. * * * There is every reason to believe that inexperienced jurors will be still less capable of "separat[ing] the wheat from the chaff," despite the Court's blithe assumption to the contrary. * * *

* * * [D]espite the availability of cross-examination and rebuttal witnesses, "opinion evidence is not admissible if the court believes that the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted." * * * In no area is purportedly "expert" testimony admitted for the jury's consideration where it cannot be demonstrated that it is correct more often than not. "It is inconceivable that a judgment could be considered an 'expert' judgment when it is less accurate than the flip of a coin." The risk that a jury will be incapable of separating "scientific" myth from reality is deemed unacceptably high.[10]

**B**

The Constitution's mandate of reliability, with the stakes at life or death, precludes reliance on cross-examination and the opportunity to present rebuttal witnesses as an antidote for this distortion

10. The Court observes that this well established rule is a matter of evidence law, not constitutional law. But the principle requiring that capital sentencing procedures ensure reliable verdicts, which the Court ignores, and the principle that due process is violated by the introduction of certain types of seemingly conclusive, but actually unreliable, evidence, which the Court ignores, are constitutional doctrines of long standing. The teaching of the evidence doctrine is that unreliable scientific testimony creates a serious and unjustifiable risk of an erroneous verdict, and that the adversary process at its best does not remove this risk. We should not dismiss this lesson merely by labeling the doctrine nonconstitutional; its relevance to the constitutional question before the Court could not be more certain.

of the truth-finding process. Cross examination is unlikely to reveal the fatuousness of psychiatric predictions because such predictions often rest, as was the case here, on psychiatric categories and intuitive clinical judgments not susceptible to cross-examination and rebuttal. Psychiatric categories have little or no demonstrated relationship to violence, and their use often obscures the unimpressive statistical or intuitive bases for prediction. * * *[11]

* * *

Nor is the presentation of psychiatric witnesses on behalf of the defense likely to remove the prejudicial taint of misleading testimony by prosecution psychiatrists. No reputable expert would be able to predict with confidence that the defendant will not be violent; at best, the witness will be able to give his opinion that all predictions of dangerousness are unreliable. Consequently, the jury will not be presented with the traditional battle of experts with opposing views on the ultimate question. Given a choice between an expert who says that he can predict with certainty that the defendant, whether confined in prison or free in society, will kill again, and an expert who says merely that no such prediction can be made, members of the jury charged by law with making the prediction surely will be tempted to opt for the expert who claims he can help them in performing their duty, and who predicts dire consequences if the defendant is not put to death.[13]

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11. In one study, for example, the only factor statistically related to whether psychiatrists predicted that a subject would be violent in the future was the type of crime with which the subject was charged. Yet the defendant's charge was mentioned by the psychiatrists to justify their predictions in only one third of the cases. The criterion most frequently cited was "delusional or impaired thinking."

13. "Although jurors may treat mitigating psychiatric evidence with skepticism, they may credit psychiatric evidence demonstrating aggravation. Especially when jurors' sensibilities are offended by a crime, they may seize upon evidence of dangerousness to justify an enhanced sentence." Thus, the danger of jury deference to expert opinions is particularly acute in death penalty cases. Expert testimony of this sort may permit juries to avoid the difficult and emotionally draining personal decisions concerning rational and just punishment. Doctor Grigson himself has noted both the superfluousness and the misleading effect of his testimony: "'I think you could do away with the psychiatrist in these cases. Just take any man off the street, show him what the guy's done, and most of these things are so clearcut he would say the same things I do. But I think the jurors feel a little better when a psychiatrist says it -- somebody that's supposed to know more than they know.'" Bloom, *Killers and Shrinks*, TEXAS MONTHLY, pp. 64, 68 (July 1978) (quoting Doctor Grigson).

* * *

*Thomas Barefoot was executed by Texas by lethal injection on August 31, 2006.*

**Miguel Angel FLORES, Petitioner-Appellant,**
**v.**
**Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee.**

United States Court of Appeals,
for the Fifth Circuit
210 F.3d 456 (5th 2000).

Before HIGGINBOTHAM, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

**PER CURIAM:**

Miguel Angel Flores seeks habeas relief on two grounds.[1] First, he urges that he did not receive

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1. * * * Our colleague expresses concern over the admissibility of expert testimony regarding the issue of future dangerousness. Flores has been ably represented on this appeal and counsel have not claimed that the judgment should be reversed because this testimony was admitted in the state trial. And properly so. It is clear that any error was not of a constitutional magnitude under the settled law of the Supreme Court and this court. It is the inescapable fact that a lay jury is asked to judge future dangerousness. We cannot then reject as constitutionally infirm the admission into

effective assistance of counsel during the guilt and penalty phases of his trial. Second, he urges that his conviction should be reversed for failure of the state to advise Flores of his right to inform Mexican consular officials of his arrest and detention and to be informed of his rights under the Vienna Convention on Consular Relations. The district court denied relief.

* * *

AFFIRMED.

**EMILIO M. GARZA, Circuit Judge**, specially concurring. * * *

* * *

When one considers the conduct of Flores's trial attorney, Gene Storrs, it takes little inquiry to determine that this case is troubling. Based on overwhelming evidence, Mr. Storrs's chances of convincing the jury of Flores's innocence were minimal. Storrs's only chance of successfully defending Flores was to limit the applicability of the death penalty. In this regard, the best mitigating evidence Storrs had was Flores's complete lack of a criminal, juvenile, or psychiatric record, evidence which directly mitigated against Flores's alleged "future dangerousness." Inexplicably, Storrs failed to elicit such evidence; in effect, he failed to elicit any evidence in mitigation. * * *

In and of itself, Storrs's failure in this regard may not have been as devastating but for Dr. Clay Griffith's testimony, which condemned Flores to death based on an "objective" evaluation. Before testifying unequivocally that Flores would be a "future danger," Dr. Griffith never examined Flores, nor did he make his evaluation based on psychological records or psychological testimony. Rather, he sat at trial, and based on the facts of the offense and Flores's conduct during the trial (Flores did not testify), Dr. Griffith came to an "expert" opinion on Flores's future dangerousness.

* * *

In cases where the State of Texas seeks the death penalty, the state frequently introduces psychological testimony as "expert" testimony to support its claim of future dangerousness. Dr. Griffith is frequently the state's star witness.[6] The Texas Court of Criminal Appeals has repeatedly upheld the admissibility of such testimony in general and the expert testimony of Dr. Griffith in particular, noting:

> Dr. Griffith's educational background, including the subspecialty of forensic psychiatry, teaching experience, and long-term private practice. This included examining over 8,000 people charged with criminal offenses and testifying in approximately 97 capital murder trials in Texas and other states.

* * *

The inadequacy of the science underlying Dr. Griffith's testimony become strikingly apparent when considered relative to scientific evidence generally admissible at trial. In the federal courts, one does not become qualified to provide "expert scientific" evidence merely by virtue of possessing a medical or other advanced degree; rather, "[t]he adjective 'scientific' implies [that one's opinion has] a grounding in the methods and procedures of science." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-90, (1993). * * * Under the Federal Rules of Evidence, expert testimony is not admissible unless "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

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evidence of the same judgment made by a trained psychiatrist.

6. 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. [citations to cases omitted]

To address this particularized need for reliability in expert scientific testimony, the Supreme Court has set out five non-exclusive factors to assist trial courts' determination of whether scientific evidence is reliable, and thus admissible. Those factors are:

(1) whether the theory has been tested,

(2)whether the theory has been subjected to peer review and publication,

(3) the known or potential rate of error

(4) the existence of standards controlling the operation of the technique, and

(5) the degree to which the theory has been generally accepted by the scientific community.

On the basis of any evidence thus far presented to a court, it appears that the use of psychiatric evidence to predict a murderer's "future dangerousness" fails all five *Daubert* factors. First, "testing" of these theories has never truly been done, as "such predictions often rest . . . on psychiatric categories and intuitive clinical judgments not susceptible to cross-examination and rebuttal." * * * Second, as is clear from a review of the literature in the field, peer review of individual predictions is rare, and peer review of making such predictions in general has been uniformly negative. * * * Third, the rate of error, at a minimum, is fifty percent, meaning such predictions are wrong at least half of the time. Fourth, standards controlling the operation of the technique are nonexistent. Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals who routinely testify to, and profit from, predictions of dangerousness.

As some courts have indicated, the problem here (as with all expert testimony) is not the introduction of one man's opinion on another's future dangerousness, but the fact that the opinion is introduced by one whose title and education (not to mention designation as an "expert") gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact.[13]

* * *

The testimony of Dr. Griffith, who has never met Flores, is particularly assailable. First, Griffith testified that Flores's "character and crime" made him a future danger without ever examining him. The practice of predicting future dangerousness without an individualized meeting with the subject is, while acceptable under Supreme Court precedent, condemned by most in the field as inherently unreliable and unscientific as well as unethical. * * * In fact, one psychiatrist notorious for predicting dangerousness without examining the subject, Dr. James Grigson, has been evicted from the American Psychiatric Association for ignoring repeated warnings to stop the practice.[16] In this case, not only did Griffith testify that he could accurately predict a defendant's future dangerousness from a hypothetical, but he also told the jury that actually examining the defendant is "a hindrance in comparison to a hypothetical question."

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13. In this case, Dr. Griffith's testimony began with his qualifications, wherein he described the "scientific" nature of the inquiry. He testified that "psychiatry is a branch of medicine or a specialty in medicine which deals with the diagnosis and treatment of emotional or mental disorders and evaluation of people to see if they have any," and that because of his "personality," the chances of Flores being rehabilitated were "essentially none."

16. Dr. Grigson's notoriety earned him the title "Dr. Death." Grigson's fame began with his testimony in the trial of Randall Dale Adams, where Grigson testified that he was one hundred percent certain Adams would kill again, and after it was revealed that the evidence against Adams was falsified by the police, Adams was released as innocent. After Grigson testified in hundreds of capital sentencing hearings, the APA and the Texas Society of Psychiatric Physicians ousted him from their organizations for "arriving at a psychiatric diagnosis without examining the individuals in question and for indicating, while testifying as an expert witness, that he could predict with 100 percent certainty that the individuals would engage in future violent acts."

Second, Griffith's deduction, with certainty, that Flores would be a "future danger," was based exclusively on the facts surrounding Flores's crime.

* * *

The Court of Criminal Appeals noted that Griffith's conclusion that Flores was not remorseful was based on the fact that "[t]here was no evidence . . . from which he could deduce any remorse or concern or the victim." Given that Griffith never spoke to Flores, the fact that he failed to find "evidence" of any given personality trait is not surprising. Griffith's testimony to the extent that an individual with this "personality" would be dangerousness, moreover, was based on the "personality" of someone who would commit this unprovoked murder in general, not Flores's personality in particular.[17]

In fact, as noted by the dissent on direct appeal, Dr. Griffith's testimony on cross-examination revealed his feeling that he could predict an individual's future dangerousness merely by knowing their crime, and his belief that anyone who committed capital murder in general, or murder in the course of sexual assault in particular, would be a "future danger" simply for the fact that they committed that particular crime.

* * *

I recognize the viciousness of Flores's crime. I also recognize the jury's statutory right to impose death as an appropriate punishment. However, 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. * * *

17. Griffith's testimony was also based on some items which were found in Flores's mother's car, and there was conflicting testimony on whether those items belonged to Flores.

*Miguel Flores was executed by Texas by lethal injection on November 9, 2000.*

**Victor Hugo SALDANO, Appellant**
**v.**
**STATE OF TEXAS**

Texas Court of Criminal Appeals
September 15, 1999 - Unpublished

**WOMACK, J.**, delivered the opinion of the Court in which Mansfield, P.J., and Meyers, Keller, and Keasler, JJ., joined.

The appellant was convicted in July 1996 of capital murder. Pursuant to the jury's answers to the special issues . . . the trial court sentenced the appellant to death. * * * We shall affirm.

* * *

The State * * * presented the opinion of a psychiatrist, Dr. Quijano. He testified that based on information made available to him, such as the circumstances of the offense charged, the appellant's conduct during and after commission of the offense, the deliberateness of the crime, the lack of expressions of remorse, and the appellant's age, the probability is significant that the appellant would constitute a continuing threat to society.

Multiple shots at close range show the deliberateness of the appellant's conduct. These facts, as well as the fact that the appellant said that he felt nothing when he shot the victim, show the appellant's callous disregard for life. Though the appellant had no criminal record, his crimes escalated within a matter of days from aggravated robbery to capital murder. In addition, though the appellant committed the kidnapping with the assistance of Chavez, the appellant was the one who forced the victim into the woods and shot him. Considering all of the evidence, we hold that the evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that there was a probability that the appellant would commit future acts of criminal violence that would

constitute a continuing threat to society. * * *

In the appellant's sixth point of error, he claims that the trial court erred in allowing the jury to consider Dr. Quijano's testimony regarding an increased risk for future dangerousness based upon the appellant's race because admission of the testimony violated the United States and Texas Constitutions.

During the sentencing phase, Dr. Quijano testified about statistical factors which have been identified as increasing the probability of future dangerousness. He noted that African Americans and Hispanics are over-represented in prisons compared to their representation outside of prison. Dr. Quijano testified that because the appellant is Hispanic, this was a factor weighing in the favor of future dangerousness. Racial statistics of people incarcerated was one of twenty-four different factors that Dr. Quijano discussed regarding future dangerousness.

The appellant failed to object to this testimony at trial and even questioned Dr. Quijano about the racial factor and thus, has not preserved the issue for review. The appellant urges this Court to consider his complaint * * * as fundamental error. We cannot say that this admission of Dr. Quijano's testimony of which the appellant complains was fundamental error. The appellant's sixth point of error is overruled.

**MANSFIELD, J.** concurred with the following note.

I am convinced that, in this case, the reference by Walter Quijano to the fact that Hispanics and African-Americans are incarcerated at a rate greater than their percentage in the general population of this country did not harm appellant. The danger that such testimony could be interpreted by a jury in a particular case as evidence that minorities are more violent than non-minorities is real, however, and this Court should not sanction the use of such testimony.

**JOHNSON, J.**, concurred in the affirmance of guilt, but dissented to the affirmance of the sentence. Price, J., dissented. Holland, J., did not participate.

## Texas confesses error

On Saldano's petition for *certiorari* to the U.S. Supreme Court, the Solicitor General of Texas confessed error with regard to Dr. Quijano's testimony regarding Hispanics. The Supreme Court granted *certiorari* "remanded to the Court of Criminal Appeals of Texas for further consideration in light of the confession of error by the Solicitor General of Texas." *Saladano v. Texas* 530 U.S. 1212 (2000).

**Victor Hugo SALDANO, Appellant,**
**v.**
**The STATE of Texas.**

Court of Criminal Appeals of Texas
70 S.W.3d 873 (2002)

**WOMACK, J.**, delivered the opinion of the Court, in Part I of which all Members of the Court joined, and in Part II of which KELLER, P.J., and MEYERS, KEASLER, HERVEY, HOLCOMB, and COCHRAN, JJ., joined.

This case comes before us again on remand from the Supreme Court of the United States. * * * The Attorney General of Texas filed a response to the petition, in which he confessed that the prosecution's introduction of race as a factor for determining "future dangerousness" constituted a violation of the appellant's rights to equal protection and due process. The Supreme Court granted the petition, summarily vacated our judgment, and remanded the case to us "for further consideration in light of the confession of error by the Solicitor General of Texas."

* * *

A confession of error by the prosecutor in a criminal case is important, but not conclusive, in deciding an appeal.

* * *

* * * Dr. Quijano testified that:

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

In response to the State's questioning, Dr. Quijano also stated that the appellant, an Argentinean, "would be considered a Hispanic."

Appellant did not object. He met the testimony through cross-examination, undermining Dr. Quijano's credibility and demonstrating that his definition of "Hispanic" was questionable. Furthermore, the appellant called his own expert witness, Dr. James McCabe, to testify concerning the appellant's future dangerousness. McCabe made clear that race is not a "causative" factor in recidivism[.]

* * *

Assessing the effect of the State's confession of error in this case is made more difficult because the error that was confessed concerns a claim that has not been properly presented to, or decided by, this Court. * * * [T]he appellant made no objection to the testimony of which he complained on appeal. Our rules require defendants to object at trial in order to preserve an error for review on appeal.* * *

* * *

We have previously recognized two general policies for requiring specific objections. "First, a specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. Second, a specific objection is required to afford opposing counsel an opportunity to remove the objection or supply other testimony," Stated more broadly, objections promote the prevention and correction of errors. When valid objections are timely made and sustained, the parties may have a lawful trial. They, and the judicial system, are not burdened by appeal and retrial. When a party is excused from the requirement of objecting, the results are the opposite.

For these reasons we have said, "All but the most fundamental rights are thought to be forfeited if not insisted upon by the party to whom they belong. Many constitutional rights fall into this category. When we say 'that even constitutional guarantees can be waived by failure to object properly at trial,' we mean that some, not all, constitutional rights may be forfeited."

* * *

* * * We have consistently held that the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence. * * * Specifically, a defendant's failure to object to testimony prevents his raising on appeal a claim that the testimony was offered for the sole purpose of appealing to the potential racial prejudices of the jury.

* * *

If the State's confession of error be construed as a confession that the Fourteenth Amendment requires reversal of a conviction because of the introduction of Dr. Quijano's testimony, without objection, we cannot agree. The appellant has not demonstrated how his constitutional claim is different from the ones we have held forfeited in the past * * *

* * *

We conclude that the State's confession of error in the Supreme Court is contrary to our state's procedural law for presenting a claim on appeal[.] * * *

* * * Under that law a decision on the admissibility of evidence that there is a correlation between ethnicity and recidivism cannot be reached, and we express no view on that issue.

**PRICE, J.,** filed a dissenting opinion:

A sentencing jury may not consider a defendant's race when deciding whether to impose the death penalty. * * * I would reverse the appellant's death sentence. * * *

* * * Dr. Quijano's testimony during the punishment phase of the appellant's trial drew a correlation between the appellant's race and incarceration rates. I would hold that the admission of this evidence was fundamental error, which should be reviewed even in the absence of a trial objection.

The *only* relevant inference to be drawn by the jury from the evidence at issue was an impermissible one. Hispanics are dangerous because they are over represented in the prison population. The appellant is Hispanic. Therefore, the jury could have concluded, the appellant constitutes a future danger.

The analogy of a skunk in the jury box is instructive. Racial prejudice can sneak into the jury box while making the jury's verdict on punishment seem legitimate.

By design, the decision that a capital sentencing jury makes is a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" This range of discretion creates "a unique opportunity for racial prejudice to operate but remain undetected. We need to guard jealously the sentencing phase of a capital trial to keep prejudice from ruining the process.

It is our job to be sure that racial prejudice is not, *in any way,* a component of the jury's decision to impose the death penalty. * * * If the right to a capital sentencing proceeding without the taint of racial prejudice is not a right that requires, *at least,* an affirmative waiver, *it ought to be.*

That the State did not emphasize this unfairly prejudicial evidence in its closing arguments does not affect the analysis. A skunk whether hurled or merely tossed into the jury box still fouls the air.

That there may have been ample evidence supporting a finding of future dangerousness and that there were factors other than race included in Dr. Quijano's testimony are of no moment. If a skunk is allowed into the jury box, nothing will remove its stench.

I cannot condone a decision to impose the death penalty when I am uncertain whether racial prejudice was a component of that decision. I dissent.

**JOHNSON J.**, filed a concurring and dissenting opinion. * * *

I do not think that race or ethnicity should ever be a consideration, in any degree, in the assessment of punishment.

* * * It is impossible to determine to what extent an assertion of race or ethnicity as an indicator of criminality or future dangerousness influences the deliberations of a given jury. Neither can we gauge the effect on the jury of the cross-examination of the original witness or the effect of any defense expert called to rebut such use of race or ethnicity. In one case, an instruction to the jury to disregard such testimony may be sufficient, in another case it may not. We can identify neither the cases in which such an instruction cures any error nor the cases in which the instruction serves to emphasize and exacerbate the error.

Allowing the kind of testimony complained of here violates one of the most fundamental principles of our legal system: a citizen must be found guilty and given appropriate punishment because of what he did, not who he is. It is even more important to stoutly defend that principle when the potential consequence of a violation is as severe as it is here. To do less is to put a cloud

over the state's right to execute this appellant. I would remand for a new punishment hearing.

## Further Developments

Saldano subsequently petitioned the United States District Court for the Eastern District of Texas for a writ of habeas corpus. The Attorney General again confessed error and waived Saldano's procedural default. The District Attorney filed an application to intervene to oppose Saldano's petition on procedural-default and harmless-error grounds. The district court denied the District Attorney's application for intervention and granted Saldano's petition for a writ of habeas corpus. *Saldano v. Cockrell*, 267 F.Supp.2d 635 (E.D.Tex.2003).

The Fifth Circuit affirmed the denial of the District Attorney's application for intervention and held, as a result, that it was without jurisdiction to hear an appeal. *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004), *cert. denied*, 543 U.S. 820 (2004).

At a new sentencing hearing, Victor Hugo Saldano was again sentenced to death. His sentence was upheld on direct appeal, *Saldano v. State*, 232 S.W.3d 88 (Tex. Crim. App. 2007). He remains on death row.

**Duane Edward BUCK,**
**v.**
**Rick THALER, Director, Texas Department of Criminal Justice, Correctional Institutions Division.**

Supreme Court of the United States
132 S.Ct. 32 (2011).

Statement of **Justice ALITO**, with whom Justice SCALIA and Justice BREYER join, respecting the denial of certiorari.

The petition for a writ of certiorari is denied.

One morning in July 1995, petitioner Duane E. Buck went to his ex-girlfriend's house with a rifle and a shotgun. After killing one person and wounding another, Buck chased his ex-girlfriend outside. Her children followed and witnessed Buck shoot and kill their mother as she attempted to flee. An arresting officer testified that Buck was laughing when he was arrested and said "[t]he bitch deserved what she got."

Buck was tried for capital murder, and a jury convicted. He was sentenced to death based on the jury's finding that the State had proved Buck's future dangerousness to society.

The petition in this case concerns bizarre and objectionable testimony given by a "defense expert" at the penalty phase of Buck's capital trial. The witness, Dr. Walter Quijano, testified that petitioner, if given a noncapital sentence, would not present a danger to society. But Dr. Quijano added that members of petitioner's race (he is African–American) are statistically more likely than the average person to engage in crime.

Dr. Quijano's testimony would provide a basis for reversal of petitioner's sentence if the prosecution were responsible for presenting that testimony to the jury. But Dr. Quijano was a defense witness, and it was petitioner's attorney, not the prosecutor, who first elicited Dr. Quijano's view regarding the correlation between race and future dangerousness. Retained by the defense, Dr. Quijano prepared a report in which he opined on this subject. His report stated:

> Future Dangerousness[.] * * * The following factors were considered in answer to the question of future dangerousness: statistical, environmental, and clinical judgment.
>
> **I. STATISTICAL FACTORS**
> 1. **Past crimes**....
> 2. **Age**....
> 3. **Sex**....
> 4. **Race**. Black: Increased probability. There is an over-representation of Blacks among the violent offenders.
> 5. **Socioeconomics**....
> 6. **Employment stability**....
> 7. **Substance abuse**....

The defense then called Dr. Quijano to the stand, and elicited his testimony on this point. Defense counsel asked Dr. Quijano, "[i]f we have an inmate such as Mr. Buck who is sentenced to life in prison, what are some of the factors, statistical factors or environmental factors that you've looked at in regard to this case?" As he had done in his report, Dr. Quijano identified past crimes, age, sex, race, socioeconomic status, and substance abuse as statistical factors predictive of "whether a person will or will not constitute a continuing danger." With respect to race, he elaborated further that "[i]t's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." Not only did the defense present this testimony to the jury but Dr. Quijano's report was also admitted into evidence – over the prosecution's objection – and was thus available for the jury to consider.

* * * The prosecutor asked a single question regarding whether race increased the probability that Buck would pose a future danger to society:

> Q. You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?
>
> A. Yes.

But this colloquy did not go beyond what defense counsel had already elicited on direct examination, and by this point, Dr. Quijano's views on the correlation between race and future dangerousness had already been brought to the jury's attention. Moreover, the prosecutor did not revisit the race-related testimony in closing or ask the jury to find future dangerousness based on Buck's race. * * * In four of the six other cases, the prosecution called Dr. Quijano and elicited the objectionable testimony on direct examination. In the remaining two cases, while the defense called Dr. Quijano, the objectionable testimony was not elicited until the prosecution questioned Dr. Quijano on cross-examination. And, on redirect, defense counsel mentioned race only to mitigate the effect on the jury of Dr. Quijano's prior identification of race as an immutable factor increasing a defendant's likelihood of future dangerousness. Only in Buck's case did defense counsel elicit the race-related testimony on direct examination. Thus, this is the only case in which it can be said that the responsibility for eliciting the offensive testimony lay squarely with the defense.

Although the dissent suggests that the District Court may have been misled by the State's inaccurate statements, the District Court, in denying petitioner's motion under Rule 60 of the Federal Rules of Civil Procedure, was fully aware of what had occurred in all of these cases. It is for these reasons that I conclude that certiorari should be denied.

**Justice SOTOMAYOR**, with whom Justice KAGAN joins, dissenting from denial of certiorari.

Today the Court denies review of a death sentence marred by racial overtones and a record compromised by misleading remarks and omissions made by the State of Texas in the federal habeas proceedings below. Because our criminal justice system should not tolerate either circumstance – especially in a capital case – I dissent and vote to grant the petition.

* * * During the penalty phase of Buck's trial, the defense called psychologist Walter Quijano as a witness. * * * Quijano testified that there were several "statistical factors we know to predict future dangerousness," and listed a defendant's past crimes, age, sex, race, socioeconomic status, employment stability, and substance abuse history. As to race, Quijano said: "Race. It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." The defense then asked Quijano to "talk about environmental factors if [Buck were] incarcerated in prison." Quijano explained that, for example, Buck "has no assaultive incidents either at T[exas] D[epartment of] C[orrrections] or in jail," and that "that's a good sign that this person is controllable within a jail or

prison setting." He also explained that Buck's "victim [was] not random" because "there [was] a pre-existing relationship," and that this reduced the probability that Buck would pose a future danger. Ultimately, when the defense asked Quijano whether Buck was likely to commit violent criminal acts if he were sentenced to life imprisonment, Quijano replied, "The probability of that happening in prison would be low." * * *

On cross-examination, [after] asking Quijano about the financial compensation he received in return for his time and the methods he used to examine Buck[,] [and] inquiring about the statistical factors of past crimes and age and how they might indicate future dangerousness in Buck's case, the prosecutor said: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" Quijano answered, "Yes." After additional cross-examination and testimony from a subsequent witness, the prosecutor argued to the jury in summation that Quijano "told you that there was a probability that [Buck] would commit future acts of violence." The jury returned a verdict of death.

This was not the first time that Quijano had testified in a Texas capital case, or in which the prosecution asked him questions regarding the relationship between race and future dangerousness. State prosecutors had elicited comparable testimony from Quijano in several other cases. In four of them, the prosecution called Quijano as a witness. In two, the defense called Quijano, but the prosecution was the first to elicit race-related testimony from him. In each case, as in Buck's, however, the salient fact was that the prosecution invited the jury to consider race as a factor in sentencing. And in each case, the defendant was sentenced to death.

When one of those defendants, Victor Hugo Saldano, petitioned for this Court's review, the State of Texas confessed error. It acknowledged that "the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process." The State continued, "[T]he 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." We granted Saldano's petition, vacated the judgment, and remanded.

Shortly afterwards, the then-attorney general of Texas announced publicly that he had identified six cases that were "similar to that of Victor Hugo Saldano" in that "testimony was offered by Dr. Quijano that race should be a factor for the jury to consider" in making its sentencing determination. These were the five cases [described] above (besides *Saldano* ), as well as Buck's. The attorney general declared that "it is inappropriate to allow race to be considered as a factor in our criminal justice system." Accordingly, in five of the six cases the attorney general identified, the State confessed error and did not raise procedural defenses to the defendants' federal habeas petitions. Five of the six defendants were thus resentenced, each to death.

Only in Buck's case, the last of the six cases to reach federal habeas review, did the State assert a procedural bar. Why the State chose to treat Buck differently from each of the other defendants has not always been clear. * * *

What we do know is that the State justified its assertion of a procedural defense in the District Court based on statements and omissions that were misleading. The State found itself "compelled" to treat Buck's case differently from Saldano's because of a "critical distinction": "Buck himself, not the State[,] offered Dr. Quijano's testimony into evidence." The State created the unmistakable impression that Buck's case differed from the others in that only Buck called Quijano as a witness. The State asserted, "[T]he Director is obviously aware of the prior confessions of error in other federal habeas corpus cases involving similar testimony by Dr. Quijano. However, this case is *not Saldano*. In Saldano's case Dr. Quijano *testified for the State*." *Id.,* at 20 (citation omitted; emphasis in original); see also *ibid.* ("Therefore, because it was Buck who called

Dr. Quijano to testify and derived the benefit of Dr. Quijano's overall opinion that Buck was unlikely to be a future danger despite the existence of some negative factors, this case does not represent the odious error contained in the *Saldano* cases"). This was obviously not accurate. Like Buck, the defendants in [two other cases] called Quijano to the stand. But on the ground that only Buck had called Quijano as a witness, the State urged the District Court that "the former actions of the Director [in the other five cases] are not applicable and should not be considered in deciding this case." The District Court applied the procedural bar raised by the State and dismissed Buck's petition.

Buck later brought the State's misstatements to light in a motion to reopen the judgment under Rule 60 of the Federal Rules of Civil Procedure. In response, the State erroneously identified [one of the two cases where the defense called Quijano] as a case in which the *prosecution* had called Quijano to the stand, and omitted any mention of [the other case in which the defense called Quijano]. After the District Court denied Buck's Rule 60 motion, Buck highlighted these errors in a motion under Rule 59(e) to alter or amend the judgment, which the District Court also denied. The Fifth Circuit denied Buck's application for a certificate of appealability (COA) to review these two judgments.

I believe the Fifth Circuit erred in doing so. To obtain a COA, a petitioner need not "prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller–El v. Cockrell,* 537 U.S. 322, 338 (2003). Instead, a petitioner must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further."

* * *

* * * The State argues that although the defendants in [the two other] cases [in which the defendant called] Quijano as a witness, they did not, like Buck, elicit race-related testimony on direct examination; instead, the prosecution first did so on cross-examination.

This distinction is accurate but not necessarily substantial. The context in which Buck's counsel addressed race differed markedly from how the prosecutor used it. On direct examination, Quijano referred to race as part of his overall opinion that Buck would pose a low threat to society were he imprisoned. This is exactly how the State has characterized Quijano's testimony. * * * Buck did not argue that his race made him *less* dangerous, and the prosecutor had no need to revisit the issue. But she did, in a question specifically designed to persuade the jury that Buck's race made him *more* dangerous and that, in part on this basis, he should be sentenced to death.

* * *

**Wilbert Lee EVANS, petitioner**
**v.**
**Raymond MUNCY, Warden, et al**

Supreme Court of the United States
498 U.S. 927, 111 S.Ct. 309 (1990)

The application for stay of execution of sentence of death presented to THE CHIEF JUSTICE and by him referred to the Court is denied. The petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit is denied.

**Justice MARSHALL**, dissenting.

* * *

**I**

Evans was convicted of capital murder and sentenced to death. At the sentencing phase, the jury's verdict was predicated on a *single* aggravating circumstance: that if allowed to live Evans would pose a serious threat of future danger to society. Without this finding, Evans could not

have been sentenced to death. * * *.[1]

While Evans was on death row at the Mecklenberg Correctional Facility, an event occurred that casts grave doubt on the jury's prediction of Evans' future dangerousness. On May 31, 1984, six death row inmates at Mecklenberg attempted to engineer an escape. Armed with makeshift knives, these inmates took hostage 12 prison guards and 2 female nurses. The guards were stripped of their clothes and weapons, bound, and blindfolded. The nurses also were stripped of their clothes, and one was bound to an inmate's bed.

According to uncontested affidavits presented by guards taken hostage during the uprising, Evans took decisive steps to calm the riot, saving the lives of several hostages, and preventing the rape of one of the nurses.[2] For instance, Officer Ricardo Holmes, who was bound by the escaping inmates and forced into a closet with other hostages, states that he heard Evans imploring to the escaping inmates, " 'Don't hurt anybody and everything will be allright.' " Officer Holmes continues:

> "It was very clear to me that [Evans] was trying to keep [the escaping inmates] calm and prevent them from getting out of control. . . . Based upon what I saw and heard, it is my firm opinion that if any of the escaping inmates had tried to harm us, Evans would have come to our aid. It is my belief that had it not been for Evans, I might not be here today."

Other guards taken hostage during the uprising verify Officer Holmes' judgment that Evans protected them and the other hostages from danger. According to Officer Prince Thomas, Evans interceded to prevent the rape of Nurse Ethyl Barksdale by one of the escaping inmates. Officer Harold Crutchfield affirms that Evans' appeals to the escapees not to harm anyone may have meant the difference between life and death for the hostages. * * * Officers Holmes, Thomas, and Crutchfield, and five other prison officials all attest that Evans' conduct during the May 31, 1984, uprising was consistent with his exemplary behavior during his close to 10 years on death row.

Evans filed a writ of habeas corpus and application for a stay of his execution before the United States District Court for the Eastern District of Virginia. He urged that the jury's prediction of his future dangerousness be reexamined in light of his conduct during the Mecklenberg uprising. Evans proffered that these events would prove that the jury's prediction was unsound and thereby invalidate the sole aggravating circumstance on which the jury based its death sentence. For this reason, Evans argued that his death sentence must be vacated. The District Court stayed the execution and ordered a hearing. The Court of Appeals reversed and vacated the stay.

**II**

Remarkably, the State of Virginia's opposition to Evans' application to stay the execution barely contests either Evans' depiction of the relevant events or Evans' conclusion that these events reveal the clear error of the jury's prediction of Evans' future dangerousness. In other words, the State concedes that the sole basis for Evans' death sentence – future dangerousness – in fact *does not exist.*

The only ground asserted by the State for permitting Evans' execution to go forward is its interest in procedural finality. According to the

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1. Evans initially was sentenced to death in April 1981. At his first sentencing proceeding, the prosecutor proved Evans' future dangerousness principally through reliance upon seven purported out-of-state convictions, two of which the prosecutor later admitted were false. Two years later, after having relied on these bogus convictions in its successful oppositions to both Evans' direct appeal to the Virginia Supreme Court and his petition for a writ of certiorari to this Court, the State confessed error. Evans' death sentence was vacated, and he was granted a new sentencing hearing. In March 1984, Evans once again was sentenced to death. It is this second death sentence which he now seeks to stay.

2. The affiant prison officials all attest that Evans played no role in instigating the riot.

State, permitting a death row inmate to challenge a finding of future dangerousness by reference to facts occurring after the sentence will unleash an endless stream of litigation. Each instance of an inmate's post-sentencing nonviolent conduct, the State argues, will form the basis of a new attack upon a jury's finding of future dangerousness, and with each new claim will come appeals and collateral attacks. By denying Evans' application for a stay, this Court implicitly endorses the State's conclusion that it is entitled to look the other way when late-arriving evidence upsets its determination that a particular defendant can lawfully be executed.

In my view, the Court's decision to let Wilbert Evans be put to death is a compelling statement of the failure of this Court's capital jurisprudence. This Court's approach since *Gregg v. Georgia* has blithely assumed that strict procedures will satisfy the dictates of the Eighth Amendment's ban on cruel and unusual punishment. As Wilbert Evans' claim makes crystal clear, even the most exacting procedures are fallible. Just as the jury occasionally "gets it wrong" about whether a defendant charged with murder is innocent or guilty, so, too, can the jury "get it wrong" about whether a defendant convicted of murder is deserving of death, notwithstanding the exacting procedures imposed by the Eighth Amendment. The only difference between Wilbert Evans' case and that of many other capital defendants is that the defect in Evans' sentence has been made unmistakably clear for us even before his execution is to be carried out.

The State's interest in "finality" is no answer to this flaw in the capital sentencing system. It may indeed be the case that a State cannot realistically accommodate postsentencing evidence casting doubt on a jury's finding of future dangerousness; but it hardly follows from this that it is *Wilbert Evans* who should bear the burden of this procedural limitation. In other words, if it is impossible to construct a system capable of accommodating *all* evidence relevant to a man's entitlement to be spared death – no matter when that evidence is disclosed – then it is the *system,* not the life of the man sentenced to death, that should be dispatched.

* * * A death sentence that is *dead wrong* is no less so simply because its deficiency is not uncovered until the eleventh hour. * * *

*Justice Marshall's dissent gave Wilbert L. Evans some comfort. "Please bury this with me," he wrote in a childlike scrawl on his copy of the dissent. He needed help spelling "bury." He stuffed the opinion in his pocket before walking into Virginia's death chamber where he was put to death by electrocution on October 17, 1990.*