CASE NO. 04-50393

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SHERMAN LAMONT FIELDS,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS (WACO DIVISION)

BRIEF OF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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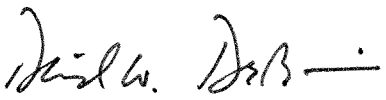

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INTEREST OF AMICUS CURIAE

The American Psychological Association (APA), a voluntary nonprofit scientific and professional organization, serves as the leading association of psychologists in the United States, with more than 155,000 members and affiliates. Among the APA's major purposes are to increase and disseminate knowledge regarding human behavior and to foster the application of psychological learning to important human concerns. The issue at the heart of this case – the reliability of psychological and psychiatric testimony on increased risk of "future dangerousness" – has been the subject of significant research. The APA submits this brief to present relevant scientific knowledge that provides a context for this Court's review of the extent to which a mental health professional reliably can testify in a federal capital case regarding this issue.[1]

BACKGROUND

Appellant Fields was convicted of a federal capital offense. During the sentencing phase of the trial, the prosecution presented a psychiatrist, Dr. Richard Coons, to offer expert opinion testimony regarding the likelihood that Mr. Fields would engage in future acts of violence if he were not executed. Specifically, Dr. Coons concluded: "My opinion is that it's *significantly more likely than not* that

[1] APA acknowledges the assistance of Randy K. Otto, Ph.D., Daniel A. Krauss, J.D., Ph.D., Kirk Heilbrun, Ph.D., John F. Edens, Ph.D., and Mark D. Cunningham Ph.D. in the preparation of this brief. Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

he [Fields] will be of a danger to other people, other inmates and correctional officers and medical personnel and so forth." R.2352-53 (emphasis added).

Dr. Coons testified that his opinion was focused narrowly on the risk of danger Fields would present even if incarcerated in a secure correctional setting. *See* R.2327 ("My prediction of the dangerousness would be if they were – if they were in general population under a life sentence."); R.2350 (opinion directed to "whether this individual would constitute a continuing and serious threat to the lives and safety of others, including inmates and correctional officers in an institutional correctional setting").

Dr. Coons based his opinion solely on his review of records concerning Mr. Fields. R.2321-23. The materials consisted primarily of jail records, Texas Youth Commission records, county juvenile records, federal Bureau of Prison records, the Texas Department of Criminal Justice disciplinary records, and records relating to the instant criminal offense. R.2345-46. Dr. Coons based his opinion upon a detailed "hypothetical" question comprised of various "bad acts" that Fields had committed during his life, as revealed in the institutional records. R.2346-50.

With regard to the opinion he had formed, Dr. Coons testified that he did not know of any "standard psychiatric or medical procedures used in arriving at a determination or predicting future dangerousness." R.2332. When asked "[w]hat sort of empirical data have you relied upon or can you rely upon in reaching your

decision with respect to someone's future dangerousness," Dr. Coons responded, "[i]n terms of empirical data, I don't know about all, you know, specific studies that have been done." R.2319. He added, "in terms of the – any specific study, I'm not aware of one." R.2320. When asked whether he could "show that any studies have approved of your particular technique or theory in arriving at a theory or an opinion about future dangerousness," Dr. Coons responded, "I can't sit here and do that today." R.2330. Dr. Coons acknowledged that "for a person who practices forensic psychiatry who has – who has experience and training and so forth in this area, there is certainly a subjective element to it, considerable subjective element." R.2354.

Dr. Coons' conclusion that it was "significantly more likely than not," R.2352-53, that Fields, even while incarcerated, presented "a continuing and serious threat to the lives and safety of others," R.2350, was based on evidence that Fields had "repeatedly threatened guards, masturbated in the presence of female guards and attempted to establish inappropriate relationships with female officers." R.2347. Dr. Coons acknowledged, however, that "I don't know of him actually physically injuring a guard." R.2358.

Defense counsel objected to the testimony as unreliable under the standards for expert testimony established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). Counsel also argued that the

testimony was inadmissible and unreliable under the Eighth and Fourteenth Amendments, and inadmissible under the Federal Death Penalty Act ("FDPA"), 18 U.S.C. § 3593 (2002), because its probative value, if any, was outweighed by the danger of unfair prejudice. R.2337-38. The district court overruled the objections and allowed the expert testimony to go to the jury. R.2340, 2350. The jury concluded that Fields should be executed.

ARGUMENT

I. EXPERT TESTIMONY IN A FEDERAL CAPITAL SENTENCING HEARING MUST BE RELIABLE, AND ITS PROBATIVE VALUE MUST OUTWEIGH THE DANGER OF UNFAIR PREJUDICE.

Competing principles govern capital sentencing proceedings. While the jury must be able to consider "all possible relevant information about the individual defendants whose fate it must determine," *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983), there is also a "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (procedures surrounding capital sentencing hearings must "aspire to a heightened standard of reliability"). These two principles expand and restrict, respectively, the scope of evidence admissible at capital sentencing hearings. To harmonize these principles, the FDPA contains a unique admissibility structure for evidence introduced during capital sentencing hearings: "Information is admissible regardless of its

admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). Pursuant to this mandate, this Court has imposed two limitations on the admissibility of relevant evidence during capital sentencing hearings: (1) it must be reliable, and (2) "its probative value must outweigh the danger of unfair prejudice." *United States v. Jones*, 132 F.3d 232, 241 (5th Cir. 1998), *aff'd*, 527 U.S. 373 (1999).

In light of the constitutional mandate of heightened reliability in capital sentencing proceedings and the FDPA's evidentiary requirements, the district court should have determined whether Dr. Coons' testimony was sufficiently reliable within the appropriate scientific community to be offered to the jury as expert testimony. The court failed to do so, however, relying simply on the Supreme Court's decision in *Barefoot* and its progeny.

The Supreme Court has not yet established standards for the admissibility of expert testimony in capital sentencing hearings. Several years after its decision in *Barefoot*, however, the Court established general standards for the admissibility of expert testimony, which now are well known. *Daubert*, 509 U.S. at 593-94 (1993) (establishing standards for admissibility of scientific testimony); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (applying *Daubert* factors to all expert

testimony); *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 275 (5th Cir. 1998) (en banc) (adopting *Daubert* factors as standards for admissibility of scientific testimony).

Although the APA endorses the full examination of all relevant mental health information that relates to the critical issues of life and death in a capital sentencing hearing, it is essential that proffered expert testimony be based on legitimate and verified scientific evidence. Capital sentencing hearings demand the utmost accuracy and reliability, and provide a particularly appropriate context for the application of the *Daubert* standards. *See, e.g.*, *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."). The application of *Daubert* requirements also would appear necessary to satisfy the FDPA's explicit evidentiary requirements, as interpreted by this Court in *United States v. Jones*, 132 F.3d at 241 (requiring that all evidence in federal capital sentencing proceedings be reliable and sufficiently probative to outweigh the risk of unfair prejudice).

Adopting the *Daubert* factors to establish the reliability of expert testimony at a federal capital sentencing hearing is preferable to creating new standards out of whole cloth. First, applying the *Daubert* factors to ensure the reliability of expert testimony under the FDPA is sensible because *Daubert* was created for just such a

purpose – to ensure the reliability of expert testimony. *Daubert*, 509 U.S. at 589 ("[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."); *id.* at 597 ("[T]he Rules of Evidence – especially Rule 702 – do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."); *Kumho Tire*, 526 U.S. at 141 (*Daubert* "pointed out that [scientific expert testimony] is admissible only if it is both relevant and reliable"). Second, applying the *Daubert* factors to ensure the reliability of expert testimony under the FDPA is efficient because the *Daubert* factors are by now well-known and frequently applied. Indeed, the *Daubert* factors are intentionally "flexible" to enable courts to apply them in varied circumstances. *United States v. Hicks*, 389 F.3d 514, 525 (5th Cir. 2004). In essence, federal courts already have vetted the *Daubert* standards and they readily may be applied in the context of expert testimony regarding future dangerousness.

Two federal judges have applied *Daubert* to evaluate the reliability of expert predictions of future dangerousness in death penalty cases. *See Flores v. Johnson*, 210 F.3d 456, 463-70 (5th Cir. 2000) (Garza, J., concurring); *United States v. Sampson*, 335 F. Supp. 2d 166, 218-23 (D. Mass. 2004). The careful analyses in these two opinions demonstrate the usefulness of the *Daubert* factors in evaluating the reliability of expert predictions of future dangerousness in capital cases.

The Supreme Court's decision in *Barefoot* does not foreclose examination of the evidentiary reliability of expert testimony regarding future dangerousness in death penalty cases. *Sampson*, 335 F. Supp. at 220-21. First, *Barefoot* decided only whether such expert testimony was unconstitutional, not whether it satisfied a particular evidentiary standard. *Barefoot*, 463 U.S. at 899 n.6 ("The question before us is whether the Constitution forbids exposing the jury or judge in a state criminal trial to the opinions of psychiatrists about an issue that Justice Blackmun's dissent concedes the factfinders themselves are constitutionally competent to decide."); *id.* (distinguishing cases cited by the dissent because they were "decisions of federal evidence law" rather than "constitutional decisions"). The Court in *Barefoot* did not decide the admissibility of expert predictions of future dangerousness under federal evidentiary law, much less under the standards of the FDPA. Second, *Barefoot* was decided before *Daubert* and *Kumho Tire*. Thomas Regnier, Barefoot *in Quicksand: The Future of "Future Dangerousness" Predictions in Death Penalty Sentencing in the World of* Daubert *and* Kumho, 37 Akron L. Rev. 469, 493 (2004). There is no logical reason why the now-broadly accepted criteria established in *Daubert* and *Kumho Tire* for the admissibility of expert testimony should not be applied in the context of a capital sentencing hearing. Finally, as set forth in this brief, there is a significant amount of new

scholarship since *Barefoot* regarding the reliability of opinions of future dangerousness.

To determine whether proffered expert evidence is reliable and thus admissible, the Supreme Court in *Daubert* outlined five non-exclusive factors to assist determinations by trial courts. Those factors are: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique 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 or technique has been generally accepted by the scientific community. 509 U.S. at 593-94.

As explained in this *amicus* brief, there is a substantial amount of scientific analysis regarding the ability of mental health professionals to predict the likelihood that a specific individual will commit future acts of violence. That established science reveals several things. One, predictions of "future dangerousness" that are *not* based upon scientific methods – that is, without consideration of matters such as the "base rate" of violence (explained *infra*) and without consideration of the presence or absence of specific "risk factors" that have been shown, in certain settings, to have a correlation (high or low) with future violence – are unreliable. Two, the application of scientific methods to assess the likelihood of future violence has shown that there are extremely *low* "base rates" of

violence in prison, so that it is highly unlikely that a scientifically reliable opinion can be offered that an individual is "more likely than not" to commit a serious act of violence while confined in prison. Three, to the extent that recent studies have attempted to identify those inmates who present an *increased* risk of violence in prison, findings reveal certain counter-intuitive correlations between particular risk factors and the likelihood of violence. Notably, studies have shown that the severity of the immediate offense and a past history of violence in the community are *not* reliable predictors of prison-based violence.

Measured against these established scientific principles, Dr. Coons' methodology and opinion in this case lacked sufficient indicia of reliability to be offered to the jury as expert testimony. Dr. Coons did not base his opinion on scientific methods. He did not consider applicable base rates of violence or utilize studies showing the correlation between particular risk factors and the likelihood of future violence. Indeed, Dr. Coons based his expert opinion almost exclusively on factors that have been shown *not* to have a strong correlation with the occurrence of serious acts of violence in prison. The admittedly subjective methodology employed by Dr. Coons in this case has not been tested, has not been subjected to peer review and publication, has an unknown rate of error, was not controlled by any standards, and is not generally accepted within the scientific community. Even more troubling is that, although Dr. Coons' expert opinion in this case had no

scientific validity, research also indicates that expert testimony like that offered by Dr. Coons is highly influential with jurors, even when the weaknesses in the methodology are exposed.

II. DR. COONS' METHODOLOGY AND EXPERT OPINION IN THIS CASE WERE NOT BASED UPON RELIABLE SCIENCE, BUT HIS TESTIMONY LIKELY HAD A SUBSTANTIAL INFLUENCE UPON THE JURY.

A. A Significant Amount of Study Has Been Done Regarding the Reliability of Predictions of Future Dangerousness, Which Shows That Predictions Not Based on Scientific Methods Are Unreliable.

There is a tremendous amount of scientific study regarding the ability of psychologists and psychiatrists to predict the likelihood that a specific individual will commit future acts of violence. Most of the early studies that were done failed to find any reliable way that such predictions could be made. *See, e.g.*, Gary B. Melton et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 280-81 (2d ed. 1997); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. Pa. L. Rev. 97, 110-11 (1984). Indeed, an early review of this "first-generation" research found that when mental health professionals assess risk for future danger, they will be accurate only one out of three times when they predict that an individual will be violent in the future. John Monahan, U.S. Dep't of Health & Human Serv., *The Clinical Prediction of Violent Behavior* 47-49 (1981). Based largely upon early studies of this kind, the American Psychiatric Association concluded in an amicus brief filed in 1982 that

"[p]sychiatrists 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."[2]

One important reason that early studies were unable to establish a reliable basis for predictions of "future dangerousness" was that the predictions being reviewed generally had not been developed using scientific methods, but rather had been based on largely unstructured subjective judgments. The subsequent application of more rigorous scientific methods yielded modestly more accurate predictions of violence risk potential in certain settings, as confirmed by later studies.

Several features of these more rigorous scientific methods that are important to the reliability of any prediction of violence risk potential are noteworthy. First, consideration of the "base rate" of violence is critical. Research has established that error rates for predictions of future violence vary significantly depending on the "base rate," or the known frequency that a particular behavior will occur within a specified population over a set period of time. *See* Randy Borum, *Improving the Clinical Practice of Violence Risk Assessment: Technology, Guidelines, and*

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[2] Brief Amicus Curiae for the American Psychiatric Association at 3, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080), *available at*: http://www.psych.org/edu/other_res/lib_archives/archives/amicus/82-6080.pdf.

Training, 51 Am. Psychologist 945, 946-47 (1996). The "base rate" of violent behavior in a given group represents the single most important piece of information in any risk assessment, because it directly affects the accuracy of predictions of future dangerousness. Studies have shown that if the "base rate" is low (in other words, if the overall occurrence of the event in question is very infrequent), it is particularly difficult to predict a specific occurrence of the event with reliability, and there is a tendency to "over-predict." Monahan, *Clinical Prediction*, *supra*, at 33 ("[I]t is virtually impossible to predict any 'low base rate' event without at the same time erroneously pointing the finger at many 'false positives.'").

One of the things that researchers did to improve the reliability of predictions of future violence was to increase the "base rate" by broadening the definition of "dangerousness" to include verbal threats, fear-inducing behavior and physical attacks that did not require medical attention or come to the attention of authorities. This methodological change increased the likelihood that an individual reliably could be predicted to fall within the "dangerousness" pool. Randy K. Otto, *Prediction of Dangerous Behavior: A Review and Analysis of "Second Generation" Research*, 5 Forensic Reps. 103, 109-11, 114 (1992). However, this methodological change obviously did not improve the ability to predict a serious act of violence.

A second technique through which researchers have been able to improve the reliability of predictions of future dangerousness is through the identification of specific "risk factors" that are correlated with either general recidivism or violent recidivism of individuals released to a community setting. *See* Monahan, *Clinical Prediction*, *supra*, at 71-77; John Monahan, *Violence Risk Assessment*, in 11 *Handbook of Psychology: Forensic Psychology* 527, 532-33 (Alan M. Goldstein ed., 2003); Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 Criminology 575, 588 (1996).[3] At the same time, studies have established that there is *less* recidivism relative to certain other variables. James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 Psych. Bull. 123, 124-38 (1998). And contrary to what might be expected, the most notable of the variables with a negative relationship with future violence is the violent offense index, which reveals that committing a homicide or sexual offense has a weaker association with future violent recidivism than many other factors. *Id.* at 127-28.

Researchers also have developed formal assessments or tools to measure such risk factors and thereby enhance the reliability of violence risk assessments. For instance, the HCR-20, a structured professional judgment technique, shows modest to good ability to predict both general and violent recidivism in the

[3] "General recidivism" is the occurrence of a non-violent offense by a former offender. "Violent recidivism" is the occurrence of a violent offense by a former offender.

community, at least based on studies conducted in Canada and Europe. Mairead Dolan & Michael Doyle, *Violence Risk Prediction: Clinical and Actuarial Measures and the Role of the Psychopathy Checklist*, 177 Brit. J. Psychiatry 303, 304-05 (2000); John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?"*, 29 Law & Hum. Behav. 55, 69 (2005). Another risk assessment tool derived and validated predominately with Canadian samples is the Violence Risk Appraisal Guide (VRAG) – an actuarial measure composed of demographic, criminal history, and psychological variables derived from the scientific literature. Again, research indicates moderate to good levels of predictive accuracy, although primarily related to samples consisting predominately of mentally-disordered offenders. Dolan & Doyle, *supra*, at 305; Edens et al., *supra*, at 71-72.

A large body of research shows that predictions of future violence based on greater structure and incorporating empirically-grounded methods such as structured professional judgment techniques and actuarial tools generally produce more accurate results than unstructured clinical approaches similar to that employed by Dr. Coons. Bonta et al., *supra*, at 137; R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 Psychol., Pub. Pol'y, & L. 50, 54 (1998); Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. Consulting & Clinical Psychol. 783, 788 (1994). However,

"even under the best circumstances . . . mental health professionals will still make a considerable number of incorrect predictions, with false-positives being the most common type of error." Otto, *supra*, at 128.

B. The Application of Scientific Methods Has Yielded Important Information Regarding the Ability of Mental Health Professionals to Predict the Occurrence of Violence Within a Secure Prison Setting.

Context is a critical factor in assessing future dangerousness. It is broadly recognized that "predictions of violence concerning settings very different from those in which violence has occurred in the past will be highly subject to error." Thomas R. Litwack & Louis B. Schlesinger, *Assessing and Predicting Violence: Research, Law, and Applications*, in *Handbook of Forensic Psychology* 205, 214 (Irvin B. Weiner & Allen K. Hess eds., 1987); Mark D. Cunningham & Thomas J. Reidy, *Don't Confuse Me With the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 Crim. Just. & Behav. 20, 25 (1999). In that regard, prison obviously is a fundamentally different context from the community or hospital settings. Assessments of the dangerousness of individuals who will be held in secure correctional settings should incorporate only risk factors and empirical measures that have been studied in the context of assessing prison-based violence, taking into account prison-based risk management or violence reduction techniques. *See* Mark D. Cunningham & Alan M. Goldstein, *Sentencing*

Determination in Death Penalty Cases, in 11 *Handbook of Psychology*, *supra*, 407, 426-28.

In a federal proceeding, the issue of future dangerousness is whether a capital defendant presents a continuing threat of violence to prison guards, inmates and other correctional staff, given that federal law provides only two sentencing options – death or life imprisonment without parole. *Simmons v. South Carolina*, 512 U.S. 154, 166 n.5 (1994) (parole ineligibility permits the government only "to argue that the defendant will pose a danger to others in prison and that executing him is the only means of eliminating the threat to the safety of other inmates or prison staff"); *United States v. Sampson*, 335 F. Supp. 2d 166, 223 (D. Mass. 2004) (jury "could not consider Sampson's future dangerousness outside of the prison context because the only alternative to a death sentence in this case was a sentence of life imprisonment"). Thus, in capital cases, like this one, defining "continuing threat to society" to include the community at large has "little or nothing to do with the defendant's ultimate life circumstances following the conclusion of the trial." Edens et al., *supra*, at 60.

Until recently, very few investigators have examined the reliability of predictions of prison-based violence, the specific type of violence that capital cases typically invoke. The extant psychological and psychiatric literature measures future danger outcomes primarily by acts committed in the community or in civil

psychiatric hospitals – environments that are fundamentally different from maximum security correctional facilities, which generally provide much higher levels of management and security than hospitals.

Thus, most of the research that has been conducted regarding the reliability of violence risk assessments has limited applicability to predictions of future dangerousness involving capital defendants. First, as noted above, very few studies have included samples of prisoners, let alone individuals facing a life sentence. Second, most of the "second-generation" studies that revealed modest improvements in the predictive accuracy of risk assessments focused on relatively short-term responses, rather than the long period of time at issue for a capital defendant. Third, the expansion of the definition of "dangerousness" in second-generation studies to include less serious violent acts, such as verbal threats, bears little relationship to the severity of violence that a jury in a capital case should consider before imposing a death sentence to protect the lives and safety of other inmates or prison guards.

Despite these general limitations, certain information recently has been developed regarding the ability to predict future violent behavior by individuals in a secure prison setting. One, it is broadly established that the "base rate" of violence within a secure correctional environment is extremely low. *See, e.g.*, Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of*

Violence Posed by Capital Murder Defendants, 90 J. Crim. L. & Criminology 1251 (2000) (in study of Texas inmates convicted of murder, assessing overall likelihood of inmate-on-inmate homicide of only 0.2% and of aggravated assault on correctional staff member of 1.0% during a 40-year capital life sentence). With such a low "base rate" of violence, it is highly unlikely that a scientifically reliable opinion can be offered that any individual is "more likely than not" to commit a serious act of violence in that setting, and the "false positive" error rate for such predictions will be exceedingly high. Borum, *supra*, at 947; Monahan, *Clinical Prediction*, *supra*, at 33.

Two, investigations recently have been completed which attempt to differentiate those inmates that present an *increased* risk of violence in prison (within the overall low prevalence rate) from those who are at less risk. More specifically, three researchers recently reported the results of a comprehensive study assessing prison violence risk among maximum security inmates and the reliability of an applied "Risk Assessment Scale for Prison" or RASP. Mark D. Cunningham et al., *An Actuarial Model for Assessment of Prison Violence Risk Among Maximum Security Inmates*, 12 Assessment 40, 44-46 (2005). The authors studied all inmates detained for at least six months in a specific maximum security prison for men in Missouri during an 11-year period from January 1991 to January 2002. The risk assessment scale developed "was modestly successful at predicting

violent misconduct among these maximum security inmates." *Id.* at 46. In another study in which an actuarial approach was employed, researchers estimated the probability of violent prison misconduct for a large sample of Texas capital defendants (excluding inmates sentenced to death). Sorenson & Pilgrim, *supra.* Only six risk factors emerged as significantly associated with institutional violence, but individuals meeting all six risk factors had a higher likelihood of future violence than individuals with none of the risk factors. *Id.* at 1264-67.

Significantly, however, these and other studies have established certain counter-intuitive results. For instance, criminal history variables – including past community violence, prior convictions, severity of current offense and escape history – are established predictors of general and violent recidivism in the community, but only weakly or inconsistently correlate with prison violence. *See* Nat'l Inst. of Corrections, U.S. Dep't of Just., *Jail Classification System Development: A Review of the Literature* 28 (rev. ed. 1992); Jack Alexander & James Austin, *Handbook for Evaluating Objective Prison Classifications* 25 (Nat'l Inst. of Corrs. 1992). As the existing research recently was summarized: "[N]either the severity of the offense of conviction nor a history of violence in the community has been consistently associated with prison misconduct or institutional violence. To the contrary, there is counter-intuitive evidence that inmates who have committed more serious offenses in the community and thus face longer

prison sentences have more favorable prison adjustments." Cunningham et al., *supra*, at 42 (internal citations omitted).

Specific findings also have been made regarding capital defendants. Significantly, rates of violence by former death-row inmates who were spared execution by commutation, retrial or plea (but still incarcerated) are consistently low across all studies. *See* Cunningham & Goldstein, supra, at 426-27; Thomas J. Reidy et al., *From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana*, 28 Crim. Just. & Behav. 62, 66 (2001). Results of one investigation revealed that two-thirds of a nationwide sample of individuals whose death sentences were commuted between 1972 and 1987 had no disciplinary records for assaultive or violent behavior during the course of their subsequent incarceration. Cunningham & Goldstein, *supra*, at 426-27 (citing James W. Marquart & Jonathan R. Sorenson, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 Loy. L.A. L. Rev. 5 (1989)). Similarly low rates of disciplinary write-ups for assaultive or dangerous acts emerged in a sample of former death row inmates in Indiana while on death row and after transfer to the general population. Reidy et al., *supra*, at 70-71. Another study established that compared to other inmate groups, including life-sentenced and general population inmates, Texas former capital defendants engage in less violent prison conduct. *See* James W. Marquart et al., *Gazing into the Crystal*

Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?, 23 Law & Soc'y Rev. 451, 460 (1989). The Missouri study described above found that "those sentenced to life or death were only about half as likely to commit violent misconduct compared to parole-eligible inmates sentenced to a term of 20 years or more, holding all other modeled predictor variables constant." *Cunningham et al., supra,* at 44.

C. Measured Against the Established Science Regarding Predictions of Future Violence, Dr. Coons' Methodology and Opinion in This Case Lacked Sufficient Indicia of Reliability to Be Offered to the Jury as Expert Testimony.

Viewed against the established principles set forth above, the work done by Dr. Coons in this case did not satisfy current professional standards regarding the appropriate basis for developing an opinion regarding the future dangerousness of a capital defendant. Dr. Coons did not base his opinion on scientific methods. His testimony during the sentencing phase of Mr. Fields' trial offered nothing more than a wholly unstructured, subjective judgment – the type of prediction of "future dangerousness" that consistently has been shown to be unreliable. Melton et al., *supra*, at 280-81; Monahan, *Clinical Prediction*, *supra*, at 47-49; Slobogin, *supra*, at 110-11. Dr. Coons gave no consideration to applicable base rates of violence, and he concluded without foundation that it was "*significantly more likely than not*," R.2352-53 (emphasis added), that Fields, even while incarcerated, would

present "a continuing and *serious* threat to *the lives and safety* of others," R.2350 (emphasis added).

Further, Dr. Coons admitted that his opinion did not derive from "statistically analyzed data drawn from valid and reliable research," but rather solely from his personal experience. He admitted he did nothing more than review records. R.2322-23. He could not identify *any* "standard psychiatric or medical procedures used in arriving at a determination or predicting future dangerousness." R.2332. He relied on no empirical data. R.2319. He could not identify any study that had validated a particular method for assessing future dangerousness, much less the "method" he had used. R.2320.

Dr. Coons also did not utilize a formal compilation of risk factors or any standardized assessment tool. He openly admitted that his analysis had "certainly a subjective element to it, considerable subjective element." R.2354. Perhaps most significantly, Dr. Coons relied heavily on the nature of the offense of conviction and Mr. Fields' history of violence in the community, two factors that specifically have been shown *not* to have a high correlation with prison misconduct or institutional violence.[4] Moreover, in addition to relying heavily on risk factors without a demonstrated correlation to institutional violence, Dr. Coons also

[4] That is not to say that there might not be other appropriate violence risk factors in this case. However, Dr. Coons' analysis did not appropriately evaluate, using any accepted methodology, whether Mr. Fields in fact presented an increased risk of institutional violence.

undermined the importance of risk management influences. He dismissed the protective measures provided by a secure correctional facility as, in his opinion, "after the fact" issues. R.2357.

Rather than structuring and presenting his opinion to avoid potential errors and biases, Dr. Coons did little to acknowledge to the jury the limitations of his methodology. Rather, Dr. Coons exhibited more confidence in his opinion than may be merited. *See* Randy Borum et al., *Improving Clinical Judgment and Decision Making in Forensic Evaluation*, 21 J. Psychiatry & L. 35, 49-53 (1993); Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based Upon Clinical Judgment and Scientific Research*, 4 Psych., Pub. Pol'y, & L. 1226, 1228-29 (1998). Dr. Coons explicitly claimed that in over 30 years of conducting assessments of future dangerousness, "I tend to be right." R.2326. Yet he admitted he had testified in about 50 different cases that an individual would be dangerous in the future, and he had *never* made any attempt to go back and determine how often he had been right. R.2326-28.

In effect, Dr. Coons did no more in this case than a lay witness could have done – he compiled a history of Mr. Fields' prior violent acts and concluded, from those acts, that it was likely that Fields would commit additional acts of violence in the future. Dr. Coons then extrapolated that conclusion onto a prison setting (where Mr. Fields concededly will be confined if not executed), based solely on the

fact that Fields had been verbally confrontational and had masturbated and made inappropriate comments to female guards. R.2347, 2358.

For all these reasons, Dr. Coons' methodology and opinion in this case did not satisfy any recognized criteria for the reliability of expert testimony. Although the admittedly subjective "methodology" employed by Dr. Coons has not been tested or subjected to peer review, studies of similarly unstructured, subjective predictions of future violence have been shown *not* to be reliable. Dr. Coons acknowledged that he has never studied the rate of error for his predictions of dangerousness, and thus the rate of error for his method is unknown. However, given the established low "base rate" for severe acts of violence within a secure prison setting, particularly by capital defendants, there is every reason to believe that the rate of error for his methodology of predicting dangerousness is exceedingly high. Dr. Coons also acknowledged that he did not utilize any established standards controlling the operation of his technique, and it is clear that his theory for predicting dangerousness in this context has *not* been generally accepted by the scientific community. Rather, he relied heavily on risk factors that the scientific community has shown do not support his hypothesis. Considering all of these criteria, Dr. Coons' opinion did not satisfy accepted standards of reliability and should not have been admitted in this case.

D. Studies Also Have Shown There Is a Substantial Risk That the Danger of Unfair Prejudice Outweighed the Probative Value of Dr. Coons' Testimony.

It is particularly important that courts exercise their "gatekeeper" function with regard to testimony such as that offered by Dr. Coons, because studies also have shown that expert opinions of future dangerousness have a substantial impact on sentencing juries. Studies of capital jurors demonstrate that jurors expend a significant amount of deliberation time on whether a capital defendant is dangerous. For example, interviews with capital jurors in Oregon revealed the future dangerousness of the defendant encompassed a majority of the jurors' discussions and disagreements. Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 Law & Hum. Behav. 151, 168 (1994). Similar results emerged for South Carolina jurors interviewed as a part of the Capital Jury Project, a National Science Foundation-funded research project designed to increase knowledge on juror decision-making in capital cases. Future dangerousness to society emerged as the second-most important factor, eclipsed only by the crime itself. John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 404 (2001).

Although Dr. Coons' opinion in this case added nothing probative on the issue of future dangerousness, there is reason to believe it likely had a severely

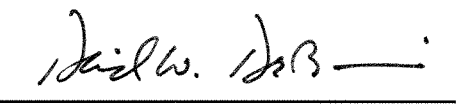
prejudicial effect. Not only do jurors expend significant deliberation time on dangerousness issues, research suggests that jurors are *more* highly influenced when expert opinions derive from unstructured judgments than by opinions based upon empirical methods. In one study, mock jurors initially rated future dangerousness based on a written summary of a capital sentencing case, and then were shown videotapes of experts testifying on the basis of either subjective judgment or actuarial methods. The researchers reported that expert testimony of either type increased the jurors' future dangerousness ratings. More notably, however, opinion testimony based on unstructured subjective judgment influenced jurors' dangerousness ratings more than actuarial-based testimony. Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 Psych. Pub. Pol'y & L. 267, 300 (2001). Even when faced with cross-examination or a competing expert, jurors receiving unstructured, subjective opinion testimony did not revert to their initial dangerousness rating levels. *Id.* at 302. A later mock juror study, which allowed jurors to deliberate, replicated these findings using a different sample and found similar results. Daniel A. Krauss & Dae Ho Lee, *Deliberating on Dangerousness and Death: Jurors' Ability to Differentiate Between Expert Actuarial and Clinical Predictions of Dangerousness*, 26 Int'l J. L. & Psychiatry 113, 130-31 (2003).

Thus, research suggests that unstructured, subjective expert testimony on future dangerousness can highly influence jurors. The "imprimatur of science" that expert testimony by a mental health professional may give to the critical issue of future dangerousness in a death penalty case is not in fact deserved where, as here, that opinion is based on a wholly unsupported technique, procedure or theory. Dr. Coons' testimony in this case did not satisfy established standards of reliability, and the probative value of the testimony readily was "outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted.



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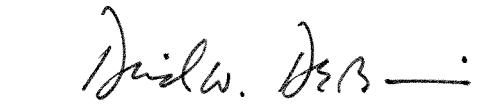
CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). Exclusive of the exempted portions in 5th Cir. R. 32.2, the brief contains 6,451 words. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2000, in the following typeface name and font size: Times New Roman, 14 point.



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I certify that I sent a true and correct copy of the foregoing brief, in both paper and computer disk versions, upon the following counsel of record by placing the same into the United States Mail, first-class postage prepaid, addressed to:

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