

Daubert Won't Do: Why Expert Testimony Regarding Future Dangerousness Requires a New Rule of Evidence

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*You walk into a courtroom. You see a man at the defendant's table. His arms and legs are shackled. His nerves are visible. His fear is potent. The judge instructs him to stand. He faces the jury. Guilty. Guilty of capital murder. But the jury is not done with this man. Now it must decide whether he deserves the ultimate penalty: death. Into the courtroom walks a woman waving a résumé covered with every psychiatric degree that exists. She sits in the witness chair. You hear the prosecutor describe the defendant's past actions with excruciating detail. You see the prosecutor turn to that psychiatrist and ask her, hypothetically, if the person that the prosecutor just described would be likely to commit a violent crime in the future. The psychiatrist, in turn, looks each member of the jury in the eye and says, "I am 100% certain that such a man would commit another violent crime." The jury hears this "expert testimony." The jury sentences the man to die. Although this scene might seem like something out of a tasteless Hollywood drama, in nine states across the country, juries are permitted to hear this type of expert testimony when making determinations of future dangerousness. Despite the seriousness of the question the jury must confront, there are no rules of evidence to protect against unreliable proclamations by these experts. Some have argued that the evidentiary standard laid out by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* could help protect against unreliable expert testimony about future dangerousness. But *Daubert* won't do. A balancing test, modeled as a reverse 403 test of weighted considerations of the probative and prejudicial value of such testimony, will better protect capital defendants during sentencing. This Note explores why this solution is both needed and proper.*

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INTRODUCTION

Thomas Andy Barefoot killed a police officer.¹ A jury convicted him of capital murder in 1978. That same jury sentenced him to death by answering "yes" to one simple question required by the Texas Code of Criminal Procedure: "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."² Barefoot was, without question, found guilty of a heinous crime. His jury believed he would commit another. So, on October 30, 1984, Thomas Andy Barefoot was executed.³

Wilbert Lee Evans killed a police officer, too.⁴ A jury convicted him of capital murder in 1981. That same jury sentenced him to death by answering "yes" to one simple question required by the Virginia Code: Would Evans pose a serious

1. See *Barefoot v. Estelle*, 463 U.S. 880, 883 (1983).

2. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West 2013); *Barefoot*, 463 U.S. at 884.

3. Associated Press, *Two Put to Death After Pleas Fail*, N.Y. TIMES (Oct. 30, 1984), <http://www.nytimes.com/1984/10/30/us/two-put-to-death-after-pleas-fail.html> [https://nyti.ms/2nQeXqB].

4. *Evans v. Muncy*, 916 F.2d 163, 164 (4th Cir.), *cert. denied*, 498 U.S. 927 (1990).

threat of future danger to society?⁵ Evans was, without question, found guilty of a heinous crime. His jury believed he would commit another. So, on October 18, 1990, Wilbert Lee Evans was executed, too.⁶

Both of these cases have become notorious for the juries' findings of future dangerousness.⁷ Each decision was questioned for different reasons. After the jury told Evans he would be a danger to society in the future, Evans helped quell a prison riot.⁸ Several guards said Evans saved their lives; one guard credited Evans with preventing another inmate from raping a captive nurse.⁹ Would Evans have committed another violent crime? Who knows. But, in his dissent in *Evans v. Muncy*, Justice Marshall believed Evans's post-conviction actions indicated he would not.¹⁰

Meanwhile, the decision in *Barefoot* has been questioned for a different reason. Dr. James Grigson testified that he was "100% sure" Barefoot would reoffend.¹¹ Despite the American Psychological Association arguing that this kind of fortunetelling by psychiatrists is wrong two out of every three times, the Supreme Court in *Barefoot v. Estelle* did not find the admission of this psychiatrist's testimony to be grounds for a stay of execution.¹² Would Barefoot have committed another violent crime? Who knows. But Dr. Grigson's expert testimony convinced the jury that he would.

This Note is primarily concerned with this type of expert testimony. Specifically, this Note seeks to use evidentiary rules and procedures to tackle a problem with using psychiatric and psychological testimony to aid a jury in making a finding of future dangerousness. Future dangerousness has proved difficult to define.¹³ Some argue that future dangerousness determinations should be an inquiry into whether a defendant, if returned to society, would hurt or kill again.¹⁴ But whatever the definition, expert testimony remains a critical weapon wielded by prosecutors in convincing jurors to make a finding of future dangerousness.

The use of future dangerousness considerations arose out of the Court's decision in *Furman v. Georgia*.¹⁵ In *Furman*, Justice Douglas, in one of the Court's many concurrences, wrote that juries were not permitted to administer the death

5. See VA. CODE ANN. § 19.2-264.4(C) (West 2010); *Evans*, 498 U.S. at 927 (Marshall, J., dissenting).

6. Associated Press, *Virginia Executes Killer of Deputy*, N.Y. TIMES (Oct. 18, 1990), <http://www.nytimes.com/1990/10/18/us/virginia-executes-killer-of-deputy.html> [<https://nyti.ms/2MV7p0J>].

7. See ERICA BEECHER-MONAS, EVALUATING SCIENTIFIC EVIDENCE: AN INTERDISCIPLINARY FRAMEWORK FOR INTELLECTUAL DUE PROCESS 127–28 (2007); Jeffrey Kirchmeier, *DNA Reminds Us That to Err Is Human*, CATO UNBOUND: A JOURNAL OF DEBATE (Mar. 9, 2012), <https://www.cato-unbound.org/2012/03/09/jeffrey-kirchmeier/dna-reminds-us-err-human> [<https://perma.cc/A6WS-FXKY>].

8. *Evans*, 498 U.S. at 928 (Marshall, J., dissenting).

9. *Id.*

10. *See id.*

11. *Barefoot v. Estelle*, 463 U.S. 880, 905 n.11 (1983).

12. *Id.* at 916 (Blackmun, J., dissenting).

13. See Eric F. Citron, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL'Y REV. 143, 156 (2006).

14. *See id.* at 157.

15. 408 U.S. 238 (1972).

penalty with unguided discretion.¹⁶ To be able to constitutionally permit the death penalty, states had to give their juries some kind of structure by which to impose the sentence. In response, Texas and Oregon adopted statutes that require juries to find future dangerousness at the sentencing phase in order for the defendant to receive the death penalty.¹⁷ Other states use future dangerousness as an aggravating factor.¹⁸ In total, nine states permit juries to overtly consider future dangerousness when deciding whether to impose a sentence of death.¹⁹

Extensive scholarship has been dedicated to assessing the accuracy of future dangerousness determinations.²⁰ Much of this work has suggested that future dangerousness predictions by juries are inaccurate.²¹ Scholarship has also dissected the quality of expert testimony in assessing whether a defendant is likely to commit violent acts again.²² Again, much of this scholarship has suggested that experts are incapable of accurately predicting future dangerousness.²³

As a result of scholastic skepticism of the accuracy of future dangerousness, authors, academics, and advocates alike have scrambled to come up with a solution. One popular suggestion is to have states adopt the evidentiary standard articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁴ Evidentiary rules ordinarily do not apply at the sentencing phase of a capital case.²⁵ *Daubert* itself does not apply to states per se because it was a case dealing with federal issues. However, *Daubert*'s focus on heightened reliability requirements for expert testimony has attractive qualities to those concerned about the inaccuracy of future dangerousness determinations by expert

16. See *id.* at 255–56 (Douglas, J., concurring).

17. OR. REV. STAT. ANN. § 163.150(1)(b)(B) (West 2017); TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (West 2013).

18. See IDAHO CODE ANN. § 19-2515(9)(i) (West 2006); OKLA. STAT. ANN. tit. 21, § 701.12 (West 2011); WYO. STAT. ANN. § 6-2-102(h)(xi) (West 2001).

19. Stephen B. Bright, *Class Three – Part Three: Future Dangerousness, in CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE 3* (2014) (unpublished class material for an open course taught at Yale University), <https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/2/115/files/2014/12/Class-3-Part-3-Future-Dangerousness-sbsnkt.pdf>.

20. See, e.g., James W. Marquart, Sheldon Ekland-Olson & Jonathan R. Sorensen, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & SOC. REV. 449 (1989); Brian Sites, *The Danger of Future Dangerousness in Death Penalty Use*, 34 FLA. ST. U. L. REV. 959 (2007); see also TEX. DEF. SERV., DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS, at xiii (2004), http://texasdefender.org/wp-content/uploads/TDS_Deadly-Speculation.pdf (concluding expert predictions of future dangerousness in 155 cases were wrong ninety-five percent of the time).

21. See TEX. DEF. SERV., *supra* note 20, at xiii.

22. See, e.g., Carla Edmondson, *Nothing Is Certain but Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK L. REV. 857 (2016); Eugenia T. La Fontaine, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional*, 44 B.C. L. REV. 207 (2002).

23. See, e.g., Brief for Am. Psychiatric Ass'n as Amicus Curiae, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080).

24. 509 U.S. 579, 593–94 (1993); see La Fontaine, *supra* note 22, at 226–27.

25. 18 U.S.C. § 3593(c) (2002). But see *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) (holding that evidence must have some degree of relevance to be admissible at sentencing).

witnesses.²⁶ Some suggest that applying the *Daubert* standard during sentencing could be the saving grace for those being subjected to a future dangerousness inquiry.²⁷ But *Daubert* is not the answer. This Note will explain why.

Part I will explain the jurisprudence revolving around expert witnesses testifying that a defendant will commit a crime in the future. Part II will discuss why this type of testimony is problematic. Part III will discuss how advocates have suggested *Daubert* could be used to ameliorate issues with expert testimony of future dangerousness. Part IV will show that *Daubert* is not the solution for those who wish to rid the world of future dangerousness determinations by experts in capital cases. Part V will introduce the reader to a new rule of evidence modeled as a “reverse 403” balancing test that should be employed at the sentencing phase of capital cases when expert witnesses are called to testify.

This Note will not argue that future dangerousness determinations are unconstitutional; it will not argue that future dangerousness determinations are normatively right or wrong; and it will not rehash the lack of accuracy of expert testimony regarding future dangerousness. Instead, it will recommend a new rule of evidence, grounded in other evidentiary precedent, that will restrict suspect expert testimony regarding future dangerousness, but still give the state the opportunity to convince a judge that, on balance, the testimony should be admitted.

I. THE EVOLUTION OF EXPERT TESTIMONY REGARDING FUTURE DANGEROUSNESS

Future dangerousness became a way of narrowing the jury’s discretion in death cases in a post-*Furman* world.²⁸ The Supreme Court found this to be an acceptable means of simultaneously making the imposition of a sentence of death less arbitrary and permitting defendants to assert mitigating circumstances.²⁹ As juries pondered the probability of whether the defendant would commit another violent crime in the future, prosecutors used expert psychiatrists and psychologists to try to make that determination easier.³⁰ The use of these experts did not go unchallenged.³¹ But in two seminal cases, the Court laid the groundwork to permit

26. See *Flores v. Johnson*, 210 F.3d 456, 464 n.10 (5th Cir. 2000) (Garza, J., concurring) (noting that although the rules of evidence do not apply at sentencing, reliability of expert testimony should be of paramount concern at capital sentencing hearings).

27. See, e.g., Erinrose Walsh Lavin, Note, *Psychiatric Prediction of Future Dangerousness* 3 (Seton Hall Univ. Law Sch. Student Scholarship, Paper No. 634, 2014), https://scholarship.shu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1629&context=student_scholarship [<https://perma.cc/9WL5-S3L2>] (arguing that clinical predictions of future dangerousness would be found entirely unreliable under *Daubert*).

28. See *Furman v. Georgia*, 408 U.S. 238, 255–56 (1972) (Douglas, J., concurring); Edmondson, *supra* note 22, at 860.

29. *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

30. See Adam Liptak, *Appealing a Death Sentence Based on Future Danger*, N.Y. TIMES (June 14, 2004), <https://www.nytimes.com/2004/06/14/us/appealing-a-death-sentence-based-on-future-danger.html> [<https://nyti.ms/2yXlo01>] (outlining the future dangerousness determination made by Dr. Edward Gripon regarding David Harris in 1986).

31. See, e.g., *Estelle v. Smith*, 451 U.S. 454, 461 (1981); *Clark v. State*, 627 S.W.2d 693, 696 (Tex. Crim. App. 1981).

psychiatrists to tell juries that defendants were likely to commit violent crimes in the future.

A. *ESTELLE V. SMITH*

Ernest Benjamin Smith participated in an armed robbery in which his accomplice shot and killed a store clerk.³² Dr. James Grigson, a psychiatrist, examined Smith prior to the start of proceedings and determined he was mentally capable to stand trial.³³ Smith was convicted of capital murder for his role.³⁴ At sentencing, the jury was required to make a finding as to whether there was a probability that Smith would present a danger to society in the future.³⁵ The prosecution called Dr. Grigson to the stand. He testified that Smith would “continue his previous behavior” and that he would “go ahead and commit other similar or same criminal acts if given the opportunity to do so.”³⁶ Grigson—who today is known as “Dr. Death” for his perpetual findings of future dangerousness for capital defendants³⁷—based this testimony on his ninety-minute interview with Smith to determine whether he was competent to stand trial.³⁸ After Grigson’s testimony, the jury answered “yes” to the question whether Smith presented a future danger to society.³⁹

The Court held that use of Dr. Grigson’s testimony violated Smith’s Fifth and Sixth Amendment rights.⁴⁰ Because the state did not inform Smith of his right to remain silent or consult with Smith’s counsel prior to initial examination by Grigson, the examination and subsequent testimony violated Smith’s rights.⁴¹

The Court was careful to point out, however, that its holding did not bar the state from using expert psychiatrists to aid the jury in findings of future dangerousness.⁴² As long as the state informed the defendant of his Fifth and Sixth Amendment rights and secured appropriate waivers, an expert would be permitted to examine the defendant and make determinations of his future dangerousness.⁴³ However, once defendants are made aware of what these examinations can be used for and that they have the right to remain silent, they, or their lawyers, would generally not consent to psychiatric examinations by the state.⁴⁴ To get over this hurdle, prosecutors began using hypothetical questions to guide expert

32. *Smith*, 451 U.S. at 456.

33. *Id.* at 457.

34. *Id.*

35. See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West 2013).

36. *Smith*, 451 U.S. at 459–60.

37. See Sites, *supra* note 20, at 992.

38. *Smith*, 451 U.S. at 460.

39. *Id.*

40. *Id.* at 462, 469.

41. *Id.* at 473.

42. *Id.* at 472.

43. *Id.*

44. See Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. CRIM. L. & CRIMINOLOGY 943, 951 n.37 (1983) (implying that defendants would likely not consent to an examination and, unless the waiver doctrine applies, would not waive the Fifth Amendment privilege resulting in the evidence being inadmissible at trial).

testimony.⁴⁵ Expert testimony in response to hypothetical questions is standardly admissible in federal courts and in state courts that follow the same or similar rules of evidence for expert testimony.⁴⁶

But hypothetical questions during direct examinations of expert witnesses for the purpose of finding future dangerousness are different. Often, the facts presented by the prosecutor in these “hypotheticals” perfectly mirror the facts presented about the defendant to the jury during the guilt phase of the trial. For example, during the sentencing phase of Billy Joe Woods’s capital murder case, the prosecutor asked the following hypothetical of the state’s expert psychiatrist, Dr. Garcia:

Assume that a person in 1970 was convicted of the offense of attempted rape, felony, sentenced to the penitentiary and then in 1975 at three in the morning, climbed up a porch, up onto a porch on the second floor balcony, kicked in a lady’s door forcibly, went inside and completely ransacked, turned everything in the apartment upside down, knocked things over, took the lady’s bracelet, pill bottle, carried a television downstairs from her apartment, beat her about the head in such a way that her facial features were obscure to the point of almost not being able to identify the way she looked, tremendous beating, in other words, fractured skull, strangulation, two fractures in the hyoid bone, and then in some manner caused his pubic hair to come in contact with her head while his pants were down and at least he dressed in no more than his under wear, had his pubic hair touching the lady’s head, and the lady was sixty-two years old, invalid, who had to get around on a walker in order to move about, and that he killed this lady by beating her and strangling her and was then caught in the room with her, if *that hypothetical situation* applied to this defendant, *knowing his mental background as you do*, can you tell us whether it’s more likely than not that this defendant would commit criminal acts of violence that would constitute a continuing threat to society?⁴⁷

Dr. Garcia responded: “*My answer to that would be yes.*”⁴⁸

Use of these hyper-specific, elongated hypotheticals and responsive expert testimony for future dangerousness inquiries in capital sentencing trials has been

45. See, e.g., *Coble v. State*, 330 S.W.3d 253, 272 (Tex. Crim. App. 2010); *Fuller v. State*, 829 S.W.2d 191, 212 (Tex. Crim. App. 1992); see also *Matson v. State*, 819 S.W.2d 839, 852 (Tex. Crim. App. 1991) (recognizing that defendants may also use hypothetical questions with their own expert witnesses).

46. See FED. R. EVID. 703; TEX. R. EVID. 703; see, e.g., *Spring Co. v. Edgar*, 99 U.S. 645, 657 (1878) (“Medical men, for example, may give their opinions not only as to the state of a patient they may have visited . . . but also in cases where they have not themselves seen the patient, and have only heard the symptoms and particulars of his state detailed by other witnesses at the trial.”); *United States v. Offill*, 666 F.3d 168, 177 (4th Cir. 2011) (“It is well established that experts may offer opinions based on hypothetical questions proposed by the attorneys questioning them.”); *Blasdell v. State*, 384 S.W.3d 824, 830 (Tex. Crim. App. 2012) (“[A]s with any other expert witness, sufficient information to support an informed expert opinion . . . may be supplied in the form of facts . . . embraced within a hypothetical question . . .”).

47. *Woods v. Johnson*, 75 F.3d 1017, 1023 (5th Cir. 1996).

48. *Id.*

challenged.⁴⁹ However, the Court's decision in *Barefoot* quashed those challenges and opened the door for prosecutors to develop the type of expert testimony used to support juries in findings of future dangerousness today.

B. *BAREFOOT V. ESTELLE*

Thomas Barefoot was convicted of capital murder for shooting and killing a police officer.⁵⁰ At sentencing, the state asked two psychiatrists, including Dr. Grigson, an extended hypothetical question about Barefoot's likelihood of future dangerousness.⁵¹ This hypothetical asked the experts whether a person with four prior convictions, who had a "bad reputation" for not abiding by the law, who escaped from a New Mexico prison, and who then shot and killed a police officer—all facts the state had elicited about Barefoot in front of the jury—would be likely to commit a violent crime in the future.⁵² Grigson said there was a "*one hundred percent and absolute*" chance that Barefoot would violently offend again.⁵³

Despite challenges to this hypothetical questioning based on a lack of reliability,⁵⁴ the Court found "no constitutional barrier" to these types of hypotheticals.⁵⁵ Instead, the Court decided the proper remedy for potentially suspect hypotheticals was simply an adherence to the adversarial system.⁵⁶ In essence, cross-examination could be used to attack the reliability of the scientific category as a whole or the particular application of that scientific exercise in each discrete case.⁵⁷

II. WHY CROSS-EXAMINATION IS NOT GOOD ENOUGH

Perhaps unsurprisingly, the Court's holding in *Barefoot* and its rationale declaring cross-examination as the solution to reliability concerns has come under scrutiny.⁵⁸ The primary argument against expert testimony in this context is the general acceptance that it is wrong "most of the time," as the majority in *Barefoot* admitted.⁵⁹ Empirically, the American Psychiatric Association ("APA") asserts future dangerousness predictions are wrong two out of three times.⁶⁰ The Texas Defender Service upped the ante, finding future dangerousness predictions by expert witnesses to be wrong ninety-five percent of the time.⁶¹ These statistics

49. See *Barefoot v. Estelle*, 463 U.S. 880, 885 (1983).

50. *Id.* at 883.

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

52. *Id.* at 918.

53. *Id.* at 919.

54. See *id.* at 921–22 (describing the American Psychiatric Association's determination that psychiatrists cannot accurately predict this type of future dangerousness).

55. *Id.* at 904 (majority opinion).

56. *Id.* at 900–01.

57. *Id.* at 898–99.

58. See, e.g., Edmondson, *supra* note 22, at 900.

59. See *Barefoot*, 463 U.S. at 901; see also Brief for Am. Psychological Ass'n as Amicus Curiae at 4, *Coble v. Texas*, 564 U.S. 1020 (2011) (No. 10-1271) (asserting that unstructured clinical testimony like that of an expert predicting future dangerousness in the form of a hypothetical is unreliable).

60. Brief for Am. Psychiatric Ass'n as Amicus Curiae at 3, *supra* note 23, at 3.

61. TEX. DEF. SERV., *supra* note 20, at 23.

are particularly jarring for two reasons. First, juries tend to hold expert testimony in higher regard than lay witness testimony, regardless of cross-examination. Second, “death-qualified” juries tend to rely more heavily on expert witnesses called by the government.

A. JURIES’ RELIANCE ON EXPERT WITNESSES REGARDLESS OF CROSS-EXAMINATION

If future dangerousness testimony came from a lay witness—someone without special qualifications or expertise—the lack of reliability *is* something that could be dealt with via cross-examination. But juries treat expert testimony differently than other forms of testimony.⁶² Empirical studies revealed that jurors are greatly influenced by expert testimony in general.⁶³ Jurors are even more likely to be swayed by expert testimony that is unstructured.⁶⁴ Unstructured expert testimony is “based solely on ‘the evaluator’s judgment about risk unaided by additional materials,’” as opposed to testimony that is based on a curated study with hard numbers and codified procedures.⁶⁵ This unstructured testimony is simply more compelling to jurors.⁶⁶ Importantly, the APA has found that jurors’ reliance on expert testimony in the future dangerousness context continues even after cross-examination, introduction of competing experts, and after deliberations with co-jurors.⁶⁷ This happens because jurors are often unwilling to question someone who purports to have so much experience and expertise in a field.⁶⁸

Some scholars have suggested that this reliance on expert testimony by juries is only amplified when the person is an expert witness called by the state.⁶⁹ Because of this, it is no surprise that using expert witnesses to predict future dangerousness is one of the most popular tools used by prosecutors.⁷⁰

62. See *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) (holding expert testimony must be subjected to additional tests of reliability because of its “aura of special reliability and trustworthiness” in the eyes of jurors); La Fontaine, *supra* note 22, at 230.

63. Brief for Am. Psychological Ass’n, *supra* note 59, at 22.

64. *Id.*

65. *Id.* at 8–9.

66. *Id.* at 21–23.

67. *Id.* at 23.

68. See *Flores v. Johnson*, 210 F.3d 456, 466 (5th Cir. 2000) (Garza, J., concurring) (arguing that jurors are almost always persuaded by experts’ testimony of future dangerousness); *Bennett v. State*, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting) (“[W]hen Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror . . . to be the second coming of the Almighty.”); Edmondson, *supra* note 22, at 899 (arguing that “honorific titles such as ‘Doctor’” have caused juries to rely heavily on what experts say).

69. See La Fontaine, *supra* note 22, at 232–33 (suggesting that defense experts are viewed less favorably by juries because they are seen as “hired guns,” willing to say anything for the person who hired them).

70. See Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 L. & PSYCHOL. REV. 63, 66 (2005).

B. "DEATH-QUALIFIED" JURIES' RELIANCE ON STATE-SPONSORED EXPERTS

Jury reliance on expert testimony is not unique to future dangerousness considerations at capital sentencing hearings.⁷¹ But reliance in this context, at this stage of a capital case, should be disconcerting. In states that permit the death penalty, jurors must be "death-qualified" in capital cases,⁷² meaning that jurors must be willing to impose the death penalty and can be removed for cause if they are not.⁷³ Death-qualified juries have been found to think, deliberate, and decide differently than standard petit juries.⁷⁴ Most importantly for this Note, death-qualified jurors have been found more likely to favorably evaluate scientific evidence presented by expert witnesses, particularly when those witnesses are called by the state, than their counterparts on non-capital juries.⁷⁵

Because of this heightened willingness by capital juries to rely on expert testimony, cross-examination cannot be, despite the Court's suggestion in *Barefoot*,⁷⁶ singularly relied upon to deal with issues of reliability in predicting future dangerousness.⁷⁷ This is especially true because the Court has long recognized that death is a different kind of punishment and requires a heightened level of procedural safeguards as a result.⁷⁸ Those heightened procedural safeguards for death-sentenced defendants can include multiple layers of appeal, required bifurcation, and presentation of mitigating factors, to name only a few examples.⁷⁹ Instead of relying on standard cross-examination to protect against erroneous findings of future dangerousness, rules of evidence need to be put in place at the sentencing phase of capital cases to protect against unduly persuasive expert testimony.⁸⁰ The rest of this Note will address which rule would be most effective.

71. See, e.g., Harmon M. Hosch, E. Link Beck & Patricia McIntyre, *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 L. & HUM. BEHAV. 287, 288 (1980) (discussing the merits of using expert testimony to "inform the jury of the limitations of eyewitness identification").

72. E.g., TEX. CODE CRIM. PROC. ANN. art. 35.16(b)(1) (West 2005); *Cooper v. State*, 889 P.2d 293, 306 (Okla. Crim. App. 1995), *rev'd on other grounds*, 517 U.S. 348 (1996).

73. See *Lockhart v. McCree*, 476 U.S. 162, 167 (1986).

74. See Brooke Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process*, 25 BEHAV. SCI. & L. 857 (2007); Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 L. & HUM. BEHAV. 175 (2002).

75. Brooke Butler & Gary Moran, *The Role of Death Qualification and Need for Cognition in Venirepersons' Evaluations of Expert Scientific Testimony in Capital Trials*, 25 BEHAV. SCI. & L. 561, 561 (2007).

76. *Barefoot v. Estelle*, 463 U.S. 880, 898–99 (1983).

77. See Hary T. Edwards & Jennifer L. Mnookin, Opinion, *A Wake-Up Call on the Junk Science Infesting Our Courtrooms*, WASH. POST (Sept. 20, 2016), https://www.washingtonpost.com/opinions/a-wake-up-call-on-the-junk-science-infesting-our-courtrooms/2016/09/19/85b6eb22-7e90-11e6-8d13-d7c704ef9fd9_story.html?utm_term=.22a219438e1d [<https://perma.cc/H2JD-6U6Y>] ("[E]xperience has shown that, at least in criminal trials, the suggestion that the 'adversarial system' represents an adequate means of demonstrating the unreliability of forensic evidence is mostly fanciful.").

78. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

79. See *id.* at 155, 164, 188.

80. *But cf.* *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) ("This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'").

III. THE *DAUBERT* STANDARD AND WHY SOME THINK IT WILL HELP

A decade after *Barefoot*, the Court considered a seminal evidence case—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*—in an area of law entirely unrelated to capital punishment.⁸¹ The facts of *Daubert* are inconsequential for this Note; it is the holding that matters. The Court held that Rule 702 of the Federal Rules of Evidence superseded the traditional standard⁸² of “general acceptance” for scientific evidence to be admissible.⁸³ This created a new standard for the admissibility of scientific evidence in federal courts.⁸⁴ *Daubert*’s flexible threshold for admitting scientific evidence applies when seeking to admit both hard science—grounded in the quantitative—and soft science—grounded in the more abstract and qualitative.⁸⁵

Daubert requires a judge to make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”⁸⁶ The *Daubert* Court recommended that, in making this determination, a judge determine at least (1) whether the theory or technique in question can be, and has been, tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate and the existence and maintenance of standards controlling its operation; and (4) whether it has attracted widespread acceptance within a relevant scientific community.⁸⁷

States are permitted, but not required, to adopt *Daubert*. States can instead choose to adopt the traditional *Frye* test which bases admissibility of expert testimony on whether the concept being testified to is generally accepted in its particular field.⁸⁸ Alternatively, states can create their own standard of admissibility.⁸⁹ In all, seventy-eight percent of states have adopted *Daubert*, sixteen percent have adopted *Frye*, and six percent have created their own standard of admissibility for expert testimony at the trial stage.⁹⁰

81. 509 U.S. 579 (1993).

82. *Id.* at 589.

83. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

84. See 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, 493–95 (2004).

85. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (holding *Daubert*’s standard for admissibility applies to technical and other specialized knowledge); *Daubert*, 509 U.S. at 589. For a discussion of what constitutes the distinction between hard sciences and soft sciences, see generally Larry V. Hedges, *How Hard is Hard Science, How Soft is Soft Science?: The Empirical Cumulateness of Research*, 42 AM. PSYCHOLOGIST 443 (1987).

86. *Daubert*, 509 U.S. at 592–93.

87. *Id.* at 593–94.

88. See *Frye*, 293 F. at 1014.

89. See generally Michael Morgenstern, *Daubert v. Frye – A State-by-State Comparison*, EXPERT INST. (Apr. 3, 2017), <https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/> [<https://perma.cc/DT69-CWV6>].

90. *Id.*

Texas, for example, has adopted a nearly identical standard to *Daubert*,⁹¹ adding, however, two additional factors to the inquiry: (1) the extent to which the technique relies on the subjective interpretation of the expert and (2) the non-judicial uses of the theory or technique.⁹² These standards have created a flexible, but nonetheless present, requirement of reliability before a jury can hear expert testimony during the actual trial.⁹³

At first glance, then, *Daubert* seems to be the long-lost answer to keeping experts like Dr. Grigson from testifying about future dangerousness. If a state would be willing to adopt *Daubert* at the sentencing phase of capital cases, the argument goes, the pure unreliability of psychiatrists predicting future dangerousness will mean those experts will no longer be allowed to influence juries.⁹⁴ Scholars suggest that expert predictions of future dangerousness would fail to pass muster under the totality of *Daubert*'s factors.⁹⁵ The primary underpinnings of this argument are the APA's finding that expert predictions of future dangerousness are unreliable and empirical evidence suggesting that same lack of reliability.⁹⁶ Proponents present two possible solutions using *Daubert* as a backdrop. The first solution is to require that states adopt *Daubert* as a threshold inquiry for expert testimony at capital sentencing hearings.⁹⁷ The second is to require that courts use *Daubert* to interpret what the Court meant when it said that evidence must have indicia of reliability and relevance to be admissible at sentencing.⁹⁸ Either way, there is a field of scholarship suggesting that *Daubert* is the answer. But it is not.

IV. WHY *DAUBERT* WON'T DO

Assuming that states would be willing to adopt certain rules of evidence at the sentencing phase of capital cases, *Daubert*'s specification of Rule 702 is not the best rule of evidence for those states to adopt. *Daubert* falls short of creating the ideal roadblock for faulty expert predictions of future dangerousness for two reasons. First, the standard would treat the Dr. Deaths of the world as equally reliable to those experts who are more considerate about who is and is not likely to be a future danger. Second, *Daubert* has proved to be ineffective at screening out other forms of "junk science."

91. See, e.g., *Nenno v. State*, 970 S.W.2d 549, 560 (Tex. Crim. App. 1998).

92. See *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

93. See Kenneth R. Berman, *Daubert Turning 20: Junk Science Replaced by Junk Rulings?*, A.B.A. SEC. LITIG. (2012), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/18-2_daubert_turning.authcheckdam.pdf (presented at the American Bar Association Section of Litigation's Annual Conference).

94. See La Fontaine, *supra* note 22, at 240–41.

95. See *id.*; Lavin, *supra* note 27, at 9–10; Regnier, *supra* note 84, at 494–95.

96. See La Fontaine, *supra* note 22, at 240–41; Lavin, *supra* note 27, at 11–13; Regnier, *supra* note 84, at 494–95.

97. See La Fontaine, *supra* note 22, at 240–41.

98. See *id.* at 241; see also *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) (requiring evidence presented at sentencing be relevant specifically to the imposition of the sentence and not to the broader crime).

A. DAUBERT TREATS EXPERTS THE SAME, REGARDLESS OF PAST RECORDS

The *Daubert* standard would not be the best way to cure issues with expert predictions of future dangerousness because, first, *Daubert* requires an inquiry into the general field of scientific future predictions instead of looking at each case, and each expert, individually. This means that experts are not evaluated separately based on their own individual credentials, merit, and past records, but instead that the scientific methodology is evaluated in a vacuum. The *Daubert* Court was clear in that judges should focus their attention on determining the reliability of expert testimony on the principles and methods used in the field, not on the conclusions generated or the person generating them.⁹⁹ Although this makes sense in most scientific inquiries, it is problematic in the death sentencing context because capital juries have a greater tendency to accept expert testimony at face value.¹⁰⁰ Some experts are significantly more likely to predict future dangerousness, despite criticism from colleagues.¹⁰¹ Dr. Grigson testified in over 140 capital cases.¹⁰² Each time he was asked to predict future dangerousness of a capital convicted defendant, he did so in the affirmative.¹⁰³ Even in an instance where the defendant was later exonerated by DNA evidence, Grigson has maintained that his prediction of future dangerousness was correct.¹⁰⁴ Despite his expulsion from the APA and the Texas Society of Psychiatric Physicians in 1995 because of his work in the future dangerousness context, Grigson continued to testify to future dangerousness of defendants on behalf of the government.¹⁰⁵ Grigson, and others like him, illuminate why *Daubert* is not adequate to permit only reliable and credible future dangerousness predictions.¹⁰⁶ *Daubert* would fail to protect capital defendants from individuals like Dr. Grigson who may be able to present findings based on seemingly reliable methodology, but whose records show gross bias.

Despite popular opinion among academics, there is evidence to suggest that not all future dangerousness predictions are “junk science.” Specifically, clinical assessments—where a doctor is given the opportunity to meet, speak with, and assess the defendant—of future dangerousness have started to be accepted both in the clinical psychiatric community and by academics.¹⁰⁷ Likewise, it is “highly unlikely” that *Daubert* would actually serve as a barrier to prevent an expert from

99. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993).

100. *See supra* Part II.

101. *See Sites, supra* note 20, at 991–92.

102. *Id.* at 992.

103. *See Regnier, supra* note 84, at 483.

104. *See Sites, supra* note 20, at 992.

105. ROGER J.R. LEVESQUE, *THE PSYCHOLOGY AND LAW OF CRIMINAL JUSTICE PROCESSES* 505 (2006).

106. *Cf. Sites, supra* note 20, at 992 (“Though Dr. Grigson has retired, the world is likely full of similarly motivated Grigson clones that may persuade judges and juries that the future is certain to [be] better if the defendant is locked up or executed.”).

107. *See, e.g., John Monahan, Violence Risk Assessment: Scientific Validity and Evidentiary Admissibility*, 57 WASH. & LEE L. REV. 901, 917–18 (2000).

testifying as to findings of future dangerousness after a clinical assessment.¹⁰⁸ In other words, even if we accept that *Daubert* would preclude experts from testifying to hypothetical predictions of future dangerousness—a result that is by no means certain¹⁰⁹—an issue remains regarding clinical predictions. If those clinical predictions have become accepted as reliable, then theoretically they would pass muster under *Daubert*. But if Dr. Grigson performed a clinical assessment and made a prediction, it could be argued that his track record should still prevent him from testifying. *Daubert* would not stop this from happening.

The Dr. Grigson example, perhaps ironically, shows the true flaw in thinking *Daubert* is the best solution to problems of future dangerousness predictions. It does not, by law, permit a judge to weigh the reliability of the person making the prediction. It only permits the judge to weigh the reliability of the principles and methods that the person used.¹¹⁰ It is well established that normally issues of credibility and reliability of individuals are left to the jury.¹¹¹ But because death is a different kind of punishment,¹¹² and because capital juries tend to over-rely on expert testimony presented by the state,¹¹³ juries should not be given such immense discretion in capital sentencing when future dangerousness is at issue. Letting Dr. Death testify to a defendant's future dangerousness, even when based on a more reliable clinical evaluation of a defendant, would not follow the tenet of reliability that *Daubert* sought to establish in the first place.¹¹⁴

B. *DAUBERT* HAS PROVED TO BE INEFFECTIVE AT SCREENING OUT OTHER UNRELIABLE SCIENCE

The Court in *Daubert* sought to create a clearer means of excluding unreliable expert testimony. Although judges have interpreted *Daubert* differently, there seems to be a consistent understanding that the Court wanted judges to scrutinize expert testimony prior to juries hearing it.¹¹⁵ Judges have also widely recognized that so called “junk science” should be excluded.¹¹⁶

108. *Id.* at 918.

109. *Id.*

110. *Id.*

111. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993).

112. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

113. See *supra* Part II.

114. See *Daubert*, 509 U.S. at 595.

115. See *e.g.*, *Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002) (“The *Daubert* standard and Rule 702 are designed to ensure that, when expert witnesses testify in court, they adhere to the same standards of intellectual rigor that are demanded in their professional work.”); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 554 (Tex. 1995) (“It is especially important that trial judges scrutinize proffered evidence for scientific reliability when it is based upon novel scientific theories . . .”).

116. See *E.I. du Pont de Nemours*, 923 S.W.2d at 554; see also *Blasdell v. State*, 470 S.W.3d 59, 62 (Tex. Crim. App. 2015) (noting that the purpose of the reliability inquiry is to “separate the wheat from the chaff” and exclude unreliable junk science from jury consideration).

Unfortunately, *Daubert* seems to have failed at restricting “junk science” from permeating the jury box.¹¹⁷ Indeed, myriad types of forensic and other scientific evidence, if once considered the product of tried and true scientific theory, have now come to be regarded as suspect. As scientific scrutiny has progressed, the scientific community has identified unreliability in areas of forensic science previously thought to be infallible.¹¹⁸ In the context of criminal prosecutions, fingerprint identifications have been used in court since 1911,¹¹⁹ and yet this type of forensic science has come under immense scrutiny over the last two decades.¹²⁰ One empirical study performed by the International Association of Identification found that one in five fingerprint examiners made “false positive” identifications, meaning that those individuals identified an incriminating fingerprint as belonging to the wrong person.¹²¹ Convictions have been overturned based on faulty fingerprint identifications.¹²²

Similarly, other types of forensic science have proved to be objectively unreliable. The Federal Bureau of Investigation (“FBI”) commissioned a joint study with The Innocence Project, the National Association of Criminal Defense Lawyers, and the Department of Justice to examine the reliability of microscopic hair analysis.¹²³ The study found that FBI experts testified erroneously about microscopic hair comparisons in at least ninety percent of cases studied.¹²⁴

Although it is beyond the scope of this Note to address the reliability of fingerprint analysis, hair comparison analysis, or other types of now-suspect forensic science, the empirical evidence mentioned above is disturbing to say the least. Based on these studies alone, fingerprints, hair comparisons, and other similarly flawed forensics seem perfect candidates to be screened out by *Daubert*. But those practices remain alive and well in the courts of law.

117. See *Johnson v. Mead Johnson & Co.*, 754 F.3d 557, 562 (8th Cir. 2014) (“*Daubert* and Rule 702 thus greatly liberalized what had been the strict *Frye* standards for admission of expert scientific testimony.”).

118. See Edwards & Mnookin, *supra* note 77 (identifying bite mark analysis, firearms identification, footwear analysis, and microscopic hair comparisons as unreliable forms of forensic science based on a report issued by the President’s Council of Advisors on Science and Technology).

119. Andy Newman, *Fingerprinting’s Reliability Draws Growing Court Challenges*, N.Y. TIMES (Apr. 7, 2001), <http://www.nytimes.com/2001/04/07/us/fingerprinting-s-reliability-draws-growing-court-challenges.html> [https://nyti.ms/2IKb06E].

120. See *id.*

121. *Id.*

122. See, e.g., Jeff Chinn, *Fingerprint Expert’s Mistake Leads to Wrongful Conviction in Indiana*, CAL. INNOCENCE PROJECT (Oct. 18, 2012) <https://californiainnocenceproject.org/2012/10/fingerprint-experts-mistake-leads-to-wrongful-conviction-in-indiana/> [https://perma.cc/J6WB-3SAJ].

123. Paul Cates, Ivan Dominguez, Emily Pierce & Michael P. Kortan, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review*, FBI (Apr. 20, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review> [https://perma.cc/SR6D-3JRV].

124. *Id.*

In one empirically based study, researchers identified twenty-five federal claims regarding expert testimony of forensic identification practices.¹²⁵ Of the twenty-five, eight of the contested cases were challenged on *Daubert* grounds based on erroneous fingerprint identification principles and methods.¹²⁶ All eight challenges were initially dismissed.¹²⁷ Footwear comparisons have enjoyed similar acceptance in courts, despite the suspect nature of the principles and methods used to identify people using this forensic technique.¹²⁸ *Daubert* did not sufficiently guard against either of these types of seemingly unreliable evidence.

If *Daubert* cannot be trusted to keep faulty forensic science out of the jury box in contexts where the rules of evidence already apply, it seems precarious to trust it to exclude expert testimony regarding future dangerousness. *Daubert* has, without question, increased judicial focus on scientific evidence coming into the courtroom.¹²⁹ Nevertheless, despite that increased focus, *Daubert* has seemed to liberalize what types of scientific testimony the jury can hear.¹³⁰

At bottom, the answer to expert testimony regarding future dangerousness is not *Daubert*. It improperly relies upon the adversarial process instead of empowering judges to consider the quality of the expert testifying. It has failed to keep suspect forensic science out of the courtroom during the phase of the trial where the rule already applies. Given *Daubert*'s failures in such circumstances, states using future dangerousness inquiries at the sentencing phase should adopt a new rule of evidence that will simultaneously address the unreliability of particular future dangerousness determinations and give prosecutors a chance to prove that their particular expert, in their particular case, should still be allowed to testify.

V. REVERSE 403 AND FUTURE DANGEROUSNESS HYPOTHETICALS

A new rule of evidence modeled as a “reverse 403” balancing test should be adopted by states that require or permit juries to make findings of future dangerousness during the sentencing phase. Rule 403 excludes evidence that is substantially more prejudicial than probative if the prejudicial effect is also unfair to the adverse party.¹³¹ The “reverse” iteration of this rule puts a different onus on the party offering the evidence. In a reverse 403 scheme, the proponent must show that the probative value substantially outweighs any unfair prejudice to the

125. Henry F. Fradella, Lauren O'Neill & Adam Fogarty, *The Impact of Daubert on Forensic Science*, 31 PEPP. L. REV. 323, 341 (2004).

126. *Id.*

127. *Id.* However, in one of those eight cases, a district court, upon reconsideration, later determined that the fingerprint identification methodology was unreliable. *See United States v. Llera Plaza*, 179 F. Supp. 2d 492, 518 (E.D. Pa. 2002).

128. *See United States v. Allen*, 208 F. Supp. 2d 984, 986 (N.D. Ind. 2002).

129. *See* Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 226 (2006) (finding that in the first six years after *Daubert*, federal courts published thirty-six times the number of opinions on expert testimony admissibility than they had under the *Frye* test over the previous six-year period).

130. *See Johnson v. Mead Johnson & Co.*, 754 F.3d 557, 562 (8th Cir. 2014).

131. FED. R. EVID. 403.

adverse party.¹³² It is this reverse 403 scheme, not the *Daubert* test, that states should adopt to protect against unreliable expert testimony regarding future dangerousness.

A. REVERSE 403 BALANCING TESTS IN THE FEDERAL RULES OF EVIDENCE

The reverse 403 proposal is grounded in other Federal Rules of Evidence, specifically Rule 412(b) and Rule 609(b).¹³³ The underlying purposes of these rules are far removed from the death penalty, future dangerousness, or anything else this Note has discussed. But the policy considerations for adopting these rules, in particular Rule 412, help to explain why this proposal should be adopted for sentencing considerations of future dangerousness.

Rule 412 is colloquially referred to as the “Rape Shield” rule.¹³⁴ It precludes defendants in sexual assault cases from introducing evidence about a victim’s prior sexual behavior.¹³⁵ Protecting a victim seems like an important policy rationale. But on a more abstract level, the Advisory Committee noted that a balancing test like the one proposed here should be required because it protects the more vulnerable party and permits greater flexibility to accommodate evolving causes of action.¹³⁶ Both of these more abstract policy reasons parallel policy reasons applicable to death penalty defendants subjected to future dangerousness inquiries during capital sentencing.

First, death penalty defendants at the sentencing stage have already been found guilty of capital murder. Moreover, as discussed above, capital juries are more likely to trust expert testimony offered by the state against those defendants.¹³⁷ Taken together, these factors suggest that defendants are more vulnerable at sentencing than most.¹³⁸ With no rules of evidence to protect them, and with a death-qualified jury that is also more willing to accept testimony by state experts, capital defendants are more helpless than they should be.

Second, the Court has long accepted that “evolving standards of decency” must guide courts’ acceptance of the death penalty as consistent with the Eighth Amendment.¹³⁹ Rule 412 recognizes that a balancing test is required when elements of the related crime are constantly evolving.¹⁴⁰ Not only does the Court recognize that societal standards of decency constantly evolve, but it is equally

132. See FED R. EVID. 412(b)(2) (applying reverse 403 test for admitting victim’s sexual history in a sexual-misconduct case); FED. R. EVID. 609(b)(1) (applying reverse 403 test for admitting evidence of a witness’s conviction that occurred more than ten years prior).

133. FED. R. EVID. 412(b)(2); FED. R. EVID. 609(b)(1).

134. See *e.g.*, *LaJoie v. Thompson*, 217 F.3d 663, 665 (9th Cir. 2000) (referring to Oregon’s Rule 412 as a “rape shield law”).

135. See FED R. EVID. 412.

136. See FED R. EVID. 412 advisory committee’s note to 1994 amendment.

137. See *supra* Part II.

138. See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1069 (C.D. Cal. 2014) (“[The death penalty] has resulted in a system in which arbitrary factors, rather than legitimate ones like the nature of the crime or the date of the death sentence, determine whether an individual will actually be executed.”).

139. See *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring).

140. See FED R. EVID. 412 advisory committee’s note to 1994 amendment.

obvious that science itself evolves over time. In fact, future dangerousness considerations have themselves evolved over time.¹⁴¹ Because the policy rationales are similar, there is a foundation for creating a balancing test for permitting expert testimony regarding future dangerousness.

B. REVERSE 403 DEALS WITH THE DOWNFALLS OF *DAUBERT*

Two issues with *Daubert* being used as the answer to quell fears of unreliability in future dangerousness testimony were identified above.¹⁴² Neither of these issues is present if a reverse 403 balancing test is applied to expert testimony at a sentencing hearing regarding future dangerousness. First, a reverse 403 balancing test permits a judge to weigh not only the principles and methods used by the expert, but also who the expert is, what his reputation is in his field, and how egregious his past errors have been. Thus, even if Dr. Grigson used a more reliable method to assess a defendant's future dangerousness, a judge would likely exclude the testimony anyway. The prejudice at this stage of the proceeding—with the defendant in front of a death-qualified jury—is already high. But it would be Dr. Grigson himself that would make that prejudice unfair. As such, the probative value would likely not substantially outweigh unfair prejudice to the capital defendant.

Alternatively, if a different expert witness used a more reliable method to assess a defendant's future dangerousness and had also proved to be objective and fair in past assessments, then perhaps a court could find the reverse 403 test satisfied. In this context, the prejudice might still be substantial, but it is less likely to be unfair to the defendant because of the expert's track record for objective and fair assessments.

Second, *Daubert* has not proved itself to be effective at keeping out suspect forensic science.¹⁴³ But a reverse 403 balancing test would be less likely to fall victim to the same flaws, insofar as the 403 standard is less forgiving than *Daubert* has proved to be. A reverse 403 balancing test would force the state to show that the evidence is both reliable and substantially more probative than prejudicial. This creates a higher burden for the prosecutor, one that cannot be accomplished by an expert simply saying his principles and methods are reliable. And the state will have a difficult time showing a high level of probative value, given the fallibility of future dangerousness predictions.¹⁴⁴

The reverse 403 balancing test gives defendants subjected to future dangerousness considerations a fighting chance. It forces prosecutors to meet a higher burden than *Daubert* does, and it forces judges to be less amenable to suspect

141. Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 L. & HUM. BEHAV. 46, 61 (2008).

142. See *supra* Part IV.

143. See *supra* Part VI.

144. See Regnier, *supra* note 84, at 488.

testimony. Capital defendants deserve a fair and just hearing before they are sentenced to die.

CONCLUSION

While future dangerousness considerations exist, an effective stopgap must be instituted. That stopgap should not be *Daubert*. Instead, states should use the same abstract policy considerations that exist in Rule 412¹⁴⁵ to create a reverse 403 balancing test. Anytime a prosecutor wants an expert to testify that a defendant is likely to commit a violent crime in the future, that expert should be put through the ringer. That ringer is this balancing test. Because death is different,¹⁴⁶ capital defendants deserve no less.

145. See *supra* Part V.

146. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).