



DEADLY SPECULATION

*Misleading Texas Capital Juries with
False Predictions of Future Dangerousness*

TEXAS DEFENDER SERVICE

Houston and Austin, Texas

Acknowledgements

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Texas Defender Service: Who We Are

Texas Defender Service (TDS) is a nonprofit organization established in 1995 by experienced Texas death penalty attorneys. There are four aspects of our work, all of which aim to improve the quality of representation provided to persons facing a capital sentence and to expose the stark inadequacies of the capital punishment system. These four components are: (a) direct representation, (b) consulting, training, case-tracking, and policy reform at the post-conviction level, (c) consulting, training, and policy reform focused at the trial level, and (d) systemic research and report publication.

Direct Representation of Death-Sentenced Prisoners

Attorneys at TDS represent a limited number of prisoners on Texas's Death Row in their post-conviction proceedings, primarily in federal court, and strive to serve as a benchmark for quality of representation of death-sentenced inmates. TDS seeks to litigate cases that have a broad impact on the administration of capital punishment in Texas. Recently, TDS successfully litigated the question of whether death-sentenced prisoners have the right to appeal the denial of access to DNA testing, and defeated the State's restrictive reading of the scope of the appeal. TDS represents several inmates who received stays of execution from the U.S. Supreme Court because of potential mental retardation. In 2002, TDS co-counseled a civil rights lawsuit on behalf of three death row prisoners against the Texas Court of Criminal Appeals, arguing that the court violated their right of access to courts by appointing incompetent post-conviction counsel. In 2003, the U.S. Supreme Court remanded the case of Thomas Miller-El and ordered the Texas courts to address overwhelming evidence of a pattern and practice of racial discrimination in the selection of juries in Dallas County.

Consulting, Training, and Case-Tracking

Founded in 1999, the Post-Conviction Consulting and Tracking Project serves several critical purposes. First, the project has developed, and maintains, a system to track Texas capital cases to ensure that all death row prisoners have

counsel. Such tracking verifies that no prisoner on Texas's Death Row loses his right to appeal based on an attorney's failure to file a timely motion seeking appointment in federal court. At least two prisoners were executed without any federal review of their cases prior to the implementation of TDS's tracking project. Second, the project identifies issues and cases appropriate for impact litigation. Third, TDS develops sample pleadings and brief banks to be distributed both on request and through a national Web site. Fourth, TDS recruits, consults, and provides training for *pro bono* and appointed attorneys representing prisoners on Texas's Death Row. And fifth, TDS identifies cases of system failure or attorney abandonment, and intervenes when possible.

Capital Trial Project

The Trial Project was inaugurated in May of 2000. The goal of the project is to provide resources and assistance to capital trial lawyers, with a particular emphasis on the early stages of capital litigation and the crucial role of thorough investigation, preparation, and litigation of a case for mitigation, or a sentence less than death. The impact of the project is steadily growing. In 2002, life sentences were returned in sixteen cases in which the Trial Project was involved. This is more than double the seven life sentences obtained in the first year of the project.

The Trial Project helps lawyers by recruiting mitigation specialists to work on the case, identifying and preparing expert witnesses, consulting extensively with trial counsel (including extensive brainstorming sessions), researching and writing on evidentiary matters, and producing case-specific pleadings. The Trial Project targets the most difficult cases, such as multiple murders, black defendant-white victim cases, and rape-murder cases. The number of successful outcomes in these death penalty cases is unusual and may be fairly attributed to the assistance provided by the Trial Project.

In addition, the Trial Project is collecting and providing the data needed to initiate reforms of the system by which indigent capital defendants are tried and sentenced to death. In 2001, the Texas Legislature passed the Fair Defense Act, which requires Texas counties to reform the manner in which they provide legal services to indigent defendants in criminal proceedings. The Trial Project, in conjunction with other organizations, is assisting with the mandated reporting on compliance with the Act across the state. The Trial Project is also challenging the inequities resulting from the extremely varied responses to the Act; some counties have instituted reforms while others have failed to make any meaningful improvements.

Foreword, by David Bruck

Parade Magazine recently featured the story of Ray Krone, an Arizona man sent to death row for a rape and murder that DNA evidence eventually proved he didn't commit. Cases like Krone's are making many Americans re-think their support for the death penalty, and may help bring about long-overdue reforms in the criminal justice system.

On the surface, the case of Gerald Mason is the exact opposite of Ray Krone's. Mason is the 69-year-old Columbia man who pleaded guilty on Monday [March 24, 2003] to having murdered two California police officers nearly 46 years ago as he fled from the scene of a kidnapping and rape.

As with Ray Krone, society guessed wrong about Gerald Mason. Mr. Krone was really a law-abiding citizen whom everyone wrongly believed to be a rapist and murderer; Gerald Mason has now turned out to be a rapist and murderer whom everyone wrongly believed to be a law-abiding citizen.

But while these men's stories could hardly be more different, they contain the same warning.

After Mason admitted his guilt in a California courtroom Monday, prosecutor Craig Richman pointed out that if Mason had been arrested in 1957, instead of 45 years later, he'd probably have been executed. That hasn't changed. In South Carolina today, a 24-year-old ex-con like Mason with a prior record for burglary who kills two police officers after raping a 15-year-old girl is just about certain to end up on death row.

The law requires the jury to consider the defendant, not just his crime, before deciding whether to impose the death penalty.

But when the crime is as bad as Gerald Mason's was, "considering" the defendant usually doesn't take long. The prosecutor assures the jury that the killer's crimes tell us everything we need to know about him: His criminal behavior has been getting steadily worse; he's incurably vicious; not even life in prison without parole is punishment enough; there's nothing to be done but get rid of him.

It's a simple line of reasoning, and a lot of juries in South Carolina have agreed with it: We've executed 28 people in the past 18 years, and 60 more wait their turn on death row.

But in the case of Gerald F. Mason, the prosecutor never got to make that speech, because Mr. Mason got away.

And then?

What happened next didn't follow the script. He didn't kill again.

He didn't commit any more crimes. Instead, he did what fewer and fewer people nowadays seem to think possible. He changed.

Gerald Mason came back to South Carolina, got a job, married, raised a family, started several businesses, paid his taxes, became a grandfather, and went out of his way to help his neighbors and his community. When a fingerprint check finally snared him earlier this year, more than 45 years after the crime, no one who knew him could believe it: The Gerald Mason that his family, neighbors, and friends all knew was a good, caring, generous man, not a rapist or a cop killer.

The truth turns out to be that he was both. Or, to be more precise, he was first one and then the other.

Of course, it would still have been better if Mason had been caught back in 1957. The families of those two murdered officers should not have had to endure the added anguish that must have come from thinking that the killer had gotten away with it.

But we should stop to reflect that if Gerald Mason had been executed in the 1950s (as he surely would have been if he'd been caught back then), no one would ever have encountered his capacity for good.

So it is with the people we condemn to death today. It's fashionable nowadays to think that a person's worst act tells us everything about who he is and will always be. But it's not true.

The mistakes that have sent innocent people like Ray Krone to death row are shocking, and it's good that Americans are becoming less complacent about the death penalty as such mistakes come to light.

But we also make mistakes when we judge the guilty to be beyond redemption or change.

The story of Ray Krone, who spent years on death row for a crime he didn't commit, should remind us of the fallibility of human judgment, and make us pause before we take away what we can't restore.

And so should the story of Gerald Mason.

*Mr. Bruck is an attorney in Columbia, South Carolina.
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Preface

More than seven years ago, the American Bar Association (ABA), a group of approximately half a million lawyers from various fields of practice, called for a nationwide moratorium on the death penalty while issues of fundamental fairness were researched and reformed.¹ Despite a recitation by the ABA of numerous factors present in state capital punishment schemes that inject arbitrary elements into the application of the death penalty, few states have heeded the warning.

U.S. Supreme Court justices, state and federal lawmakers, prosecutors from all levels of service, and state court judges have all echoed concerns similar to those voiced by the ABA, and called upon states to ensure the integrity of systems meting out capital punishment.² Still, many states execute inmates with disregard for these admonitions.

Recently, however, caution has prevailed in two death penalty states. Responding to persuasive evidence of racial disparities in capital sentencing, the

¹ ABA Section of Individual Rights and Responsibilities, *ABA House of Delegates Approves Call for Halt in U.S. Executions Until Death Penalty Fairness Assured*, Report with Recommendations No. 107 (Feb. 3 1997), available at <http://www.abanet.org/irr/rec107.htm>.

² See U.S. Supreme Court Justice Sandra Day O'Connor, Address to Nebraska State Bar Association (Oct. 18, 2001), in John Fulwider, *O'Connor Lectures Lawyers, Recollects for Students in Lincoln*, NEB. STATE PAPER, Oct. 18, 2001, available at http://nebraska.statepaper.com/vnews/display.v/ART/2001/10/18/3bcf6460c1279?in_archive=1. See also Charles Lane, *O'Connor Expresses Death Penalty Doubt: Justice Says Innocent May Be Killed*, WASH. POST, July 4, 2001, at A1 (quoting O'Connor's July 2, 2001, speech to the Minnesota Women Lawyers association in which she singled out Texas for opprobrium and stated that "serious questions are being raised" about the death penalty, and "the system may well be allowing some innocent defendants to be executed").

U.S. Supreme Court Justice Ruth Bader Ginsburg, criticizing the quality of representation provided to indigent capital defendants, has voiced support for a moratorium on the death penalty. See Anne Gearan, *Ginsburg Backs Ending Death Penalty*, ASSOC. PRESS ONLINE, Apr. 9, 2001, available at 2001 WL 18926346. Former prosecutor and Arizona Court of Appeals Judge Rudolph J. Gerber conceded that capital punishment "sweeps some innocent defendants in its wide nets . . ." O. Ricardo Pimental, *Tough, Speedy Justice Often is Neither*, ARIZ. REPUBLIC, Oct 11, 2001. U.S. Senators Russ Feingold (D-Wis.) and Jon Corzine (D-N.J.), in calling for a review of the death penalty, wrote that the state capital punishment systems "[are] so riddled with errors that for every eight persons executed in the modern death penalty era, one person on death row has been found innocent." Russ Feingold & Jon Corzine, Editorial, *Halt Executions across the Nation*, BALTIMORE SUN, May 16, 2002, at 19A.

state of Maryland declared a moratorium on executions in 2002.³ Similarly, in 2003, then-Illinois Governor George Ryan converted all death sentences to sentences of life in prison without parole, finding capital punishment in Illinois to be “arbitrary, capricious, and therefore, immoral.”⁴ In support of this conclusion, Ryan listed problems in lawyer competency, trial procedures, sentencing unfairness, appellate process deficiencies, and the Illinois Legislature’s “spectacular failure” to enact reform measures.⁵

Although its system contains the same endemic defects, Texas has not yet followed the lead of Maryland and Illinois. In our 2000 report, *A State of Denial: Texas Justice and the Death Penalty*,⁶ we documented egregious problems in the administration of Texas’s death penalty—problems that remain largely unaddressed. Our 2002 report, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals*,⁷ focused on the systematic insufficiencies in the post-conviction stage of appellate review and revealed holes in the safety net preventing wrongful executions. This report examines a flaw in the capital sentencing hearing: the future dangerousness inquiry.

Senior Texas State District Judge C.C. “Kit” Cooke told a statewide legal seminar in July of 2001 that his experiences as a judge have changed his mind about the death penalty: “people are realizing there are deficiencies in the system. . . . We always think we’ve got the right person, but the system is not infallible.” Anthony Spangler, *Judge Expresses Concerns about Fairness of Death Penalty*, FORT WORTH STAR-TELEGRAM, July 24, 2001, at 4. Oklahoma Governor Frank Keating (R) proposed raising the burden of proof in death penalty cases to a “moral certainty,” explaining that such a standard, which requires jurors to go deeper in their deliberations than the current “beyond a reasonable doubt” standard, is “I think not only appropriate, I think it is essential” to prevent the mistaken execution of an innocent person. Cheyenne Hopkins, *Keating Proposes Death Penalty Standard*, DAILY OKLAHOMAN, June 23, 2001, at 4A. Former Bexar County District Attorney Sam Millsap, Jr., who prosecuted several death penalty cases, spoke out in favor of a moratorium: “The system in Texas is broken. . . . Until it is fixed and we are satisfied that only the guilty can be put to death, there should be no more executions in Texas.” Dave McNeely, *Moratorium on the Death Penalty? This Idea’s Close*, AUSTIN AM.-STATESMAN, Feb. 22, 2001, at B1. Virginia legislator Frank D. Hargrove, Sr. (R), who early in his legislative career had sought to reintroduce public hangings, sponsored a bill to abolish Virginia’s death penalty. Matthew Dolan, *Death Penalty Wrong, Former Advocate Says: Hanover Delegate Now Seeks Colleagues’ Help in Ridding Virginia of Capital Punishment*, VIRGINIAN-PILOT, Jan. 31, 2001, at B7 (referring to the unenacted 2001 H.B. 1827, though Hargrove sponsored another such bill in the 2002 session, H.B. 224). On April 29, 2003, the Travis County, Texas Commissioners Court passed a resolution calling for a moratorium on the death penalty. Steven Kreytak, *Travis Asks Lawmakers to Postpone Executions*, AUSTIN AM.-STATESMAN, Apr. 30, 2003, at B1. County Judge Sam Bischoe said a moratorium is “the right thing to do.” *Id.* Houston Mayor Lee Brown, a former police chief, called for a nationwide moratorium and stated: “Until you can convince me there is no disparity, racially or economically, I am a proponent of life without parole.” Roma Khanna, Kim Cobb & Rachel Graves, *Black Mayors Back Execution Moratorium*, HOUS. CHRON., Apr. 26, 2003.

³ Lori Montgomery, *Maryland Suspends Death Penalty; Glendening Awaits Report on Racial Bias in Murder Prosecutions*, WASH. POST, May 10, 2002, at A1. The moratorium was lifted January 22, 2003, after incoming Governor Robert Ehrlich took office. *Maryland Execution Moratorium Ends*, BALTIMORE ASSOC. PRESS, Jan. 22, 2003.

⁴ Maurice Possley & Steve Mills, *Clemency for All; Ryan Commutes 164 Death Sentences to Life in Prison Without Parole: ‘There Is No Honorable Way to Kill,’ He Says*, CHI. TRIB., Jan. 12, 2003, at C1.

⁵ *Excerpts from Ryan’s Speech*, CHI. TRIB., Jan. 12, 2003, at C16.

⁶ Available at <http://www.texasdefender.org/publications.htm>.

⁷ Available at <http://www.texasdefender.org/publications.htm>.

Capital trials in Texas consist of a two-part process. First, the jury decides the guilt or innocence of the defendant. Upon a finding of guilt, the jury determines an appropriate sentence. The death penalty is intended for the worst of the worst:⁸ offenders without any redeemable qualities, any chance for rehabilitation, or any hope that they can coexist with other human beings without causing harm. Texas requires juries to determine whether capital defendants will “pose a continuing threat to society.”⁹ In effect, juries must decide the defendant’s fate by predicting the likelihood of recidivism in society or in prison.

This report concludes, however, that basing capital sentencing decisions on predictions of future dangerousness is unjustifiable—and not only because a system that so allots punishment in effect punishes defendants for offenses they may or may not commit, thus violating the fundamental legal principle that the accused is innocent until proven guilty. Texas’s criminal justice system is far removed from the precision depicted in Hollywood’s “Minority Report.”¹⁰ Available predictive methods are severely limited in their capacity to distinguish persons who will recidivate from those who will not.

Particularly troubling is the Texas prosecutors’ use of state-paid expert witnesses employed to convince juries of a defendant’s “future dangerousness.” As the defendant’s fate—and the prosecutor’s success—hinges primarily on this question, the apparently infallible testimony of state-commissioned expert witnesses is a deceptive but reassuring hook on which a jury can hang its hat.

Testing the predictive reliability of expert testimony in Texas capital trials on questions of future dangerousness, Texas Defender Service conducted original research on these “expert” predictions to determine if inmates sentenced to death did indeed pose a future danger in their communities—i.e., prisons. In doing so, we gathered disciplinary records from the Texas Department of Corrections and identified inmates who had engaged in violent behavior. We found that state-sponsored experts are much more likely to be wrong than right in their predictions of dangerousness.

Basing outcomes of the most solemn proceedings in American law on specious reasoning and conjecture threatens the integrity of the entire judicial system. Our adversarial process of justice rests on the assumption that the fight between opponents is fair. Nowhere is this more necessary than in the capital punishment context. When a death row inmate’s last appeal is denied and lethal injection becomes imminent we, as the citizens of this state, must be confident that the State of Texas provided the condemned fair process. The statistics in this study reveal that the Texas capital sentencing scheme, as presently practiced, delivers far less.

⁸ Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976).

⁹ TEX. CRIM. PROC. CODE ANN. art. 37.071§ (2)(b)(1) (Vernon 2001).

¹⁰ 20th Century Fox 2002.

Predictions of future dangerousness are not integral to the existence of capital punishment. In fact, Texas is one of only three states in the nation that allows highly speculative, often inaccurate evidence on the possibility of future bad acts to play a crucial role in life and death decisions made by juries. Twenty-nine of the 38 death penalty states do not allow for consideration of future dangerousness at all in their capital sentencing procedures. Six other states allow speculative future dangerousness evidence to play a limited role in the sentencing decision. As the experience of other death penalty states illustrates, it is possible for Texas to amend its death penalty statute to provide for fairer, more accurate sentencing decisions.

Deadly Speculation: An Executive Summary

There is increased recognition that the death penalty in Texas is plagued with failures and mistakes. This study—the most comprehensive review of the accuracy of prosecution-hired experts on future dangerousness—reveals a highly flawed component of the Texas sentencing process and calls into question the validity and fairness of many Texas death sentences.

We reviewed 155 cases in which prosecutors used experts to predict a defendant's future dangerousness. These experts were wrong 95% of the time.

Texas is the undisputed leader in executions among the thirty-eight states with death penalty statutes. Since reintroduction of the death penalty in 1976, Texas has been responsible for more than 35% of all executions in the United States and is responsible for one-half of the executions thus far in 2004.

This study shows a serious flaw in the Texas sentencing statute—the mechanism for determining which convicted defendants should be executed. Texas requires a jury to guess a defendant's "future dangerousness"—the likelihood that the defendant will pose a continuing threat to society.

We conducted original research to determine if inmates sentenced to death did indeed pose a danger in their communities—i.e., prisons. By reviewing published opinions and gathering information from district attorney offices, we identified 155 inmates against whom prosecutors had presented expert predictions of future dangerousness and obtained their disciplinary records from the Texas Department of Criminal Justice. Consistent with existing research regarding violence rates and future dangerousness and the Texas Department of Criminal Justice definition of "serious assault," this study defines "serious assaultive behavior" as that which results in an injury requiring more than the administration of first aid (i.e. injury requiring more than a bandage).

The main findings of this report are as follows:

§ Sixty-seven of the 155 inmates have been executed after serving an average of 12 years. Forty currently reside on death row and have been incarcerated an average of eight years. Forty-eight inmates were sentenced to death but have had their sentences reduced. These inmates, currently in less restrictive facilities or released, have served an average of nearly 22 years.

- § **Of the total 155 inmates against whom state experts testified, eight (5%) engaged in seriously assaultive behavior.** Thirty-one (20%) have no records at all reflecting disciplinary violations. The remaining 75% of inmates committed disciplinary infractions involving conduct not amounting to serious assaults.
- § **Many inmates sentenced to death based on predictions of future dangerousness have proven to be non-assaultive, compliant inmates who pose no risk to other inmates or prison guards.** This is true even among those whose sentences have been reduced and who have increased opportunity to engage in violence, possess weapons, or abuse drugs and alcohol.
- § Cases highlighted in this report include Baby Ray Bennett who was sentenced to death for a 1985 murder. After serving ten years on death row, his sentence was commuted to life. The 40-year-old Bennett is a trustee in prison. He has been disciplined for only four minor infractions, including the possession of five lottery tickets, and did not lose a single day of good-time credits in 17 years.
- § George Clark, had his capital murder sentence reduced to life in 1981 after being on death row for three years. Over the past 22 years, Clark has been disciplined once by prison officials—for hanging a clothesline across his cell. He has worked as a clerk, bookkeeper, and chaplain assistant, and had a job in the prison library.
- § Noble Mays was convicted in the 1979 murder of Jerry Lamb. Mays did not receive any disciplinary violations for assaultive behavior during his 14 years on death row. He was executed on April 6, 1995.
- § Many inmates included in this study incurred disciplinary write-ups for offenses bordering on the ridiculous, such as illegally possessing cookies or jalapeños while incarcerated. Others were punished for hanging a sheet up as a curtain in their cell, yelling an obscenity in the hallway, or refusing to shave.
- § **The use of the future dangerousness question injects impermissible racial components into the sentencing process.** The race of the juror and the race of the defendant may affect the decision the jury's determination of future dangerousness. In at least seven Texas death row cases, including that of Victor Saldaño, licensed psychologist Walter Quijano testified that being a member of a minority race makes a defendant more dangerous.
- § **Texas's failure to offer a life-without-parole sentencing option compounds the risk of erroneous sentences.** Juries hear misleading and highly inflammatory future dangerousness testimony, and are then informed that the defendant might be back on the streets. Capital juries find themselves painted into a corner.

Texas's sentencing statute, intended to accurately separate those deserving the death penalty from those who do not, has backfired. It fails to give juries meaningful—rather than merely inflammatory—information about defendants

and has led to a ballooning of the number of people sentenced to death, an expansion beyond those deserving the death penalty.

The present system pressures juries to choose death for inmates who are able to peaceably co-exist in an institutional setting with other inmates and guards, regardless of the nature of their crime. Because documented rates of recidivism among inmates convicted of murder are low, the use of the future dangerousness inquiry in every Texas death penalty case results in a high rate of “false positives.”

Beginning in the early 1980’s, researchers and professionals concluded that “*mental health professionals cannot predict dangerousness.*” Strong objections to this speculative testimony have been voiced by many, including the American Psychiatric Association, which maintains that “*the unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.*”

Despite this—and in the face of research establishing that the authority implied by the title “Doctor” unduly sways juror’s deliberations—Texas courts routinely permit this testimony even when the expert has not met the defendant at all and courts allow experts to unambiguously guarantee that a defendant will commit acts of violence in the future.

Allowing this questionable and professionally discredited testimony to play any role in the application of the death penalty—let alone allowing this evidence to be a key sentencing factor—undermines the integrity of the system and calls into question the fairness of all death sentences in this state.

The results of this study reveal that Texas would execute 155 inmates to prevent continued violence by eight. Texas allows the life or death decision to turn on evidence less reliable than the flip of a coin.

Predictions of future dangerousness are not essential to the existence of capital punishment. Texas is only one of two death penalty states that allow this highly speculative evidence to play a critical role in life and death decisions made by juries. Seven other death penalty states allow juries to consider future dangerousness in a limited way. The remaining 29 death penalty states do not allow future dangerousness evidence at all.

As the experience of other death penalty states illustrates, it is possible for Texas to amend its death penalty statute to provide for fairer, more reliable sentence decisions. One can favor the death penalty “yet still recoil at the thought that a junk science fringe of psychiatry . . . could decide who should be sent to the gallows.”



DEADLY SPECULATION

The Study

Tipping the Scales in Favor of Death with Unreliable Procedure

I. The Death Penalty in Texas

The modern death penalty era began in 1976, when the U.S. Supreme Court permitted states to resume capital punishment.¹¹ Capital punishment had been judged unconstitutional in 1972 in part because of the unbridled discretion afforded to juries in death penalty cases.¹² The U.S. Supreme Court struck down all then-existing death penalty statutes, holding that their provisions allowed for arbitrary and discriminatory results. One justice compared the process to a “lottery,”¹³ and another to being “struck by lightning.”¹⁴ A few years later, the Court reiterated the view that the death penalty should not be arbitrary, but rather reserved for the worst of all offenders who were properly convicted for the most egregious offenses.¹⁵ In so holding, the Court held that the death penalty could not be a mandatory sentence in any case or for any category of crime.¹⁶

¹¹ See, e.g., *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality) (upholding Texas’s revised death penalty statute).

¹² The five Supreme Court justices voting to invalidate all state and federal capital punishment statutes then in existence explained their reasoning in separate opinions. See *Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, J., concurring) (condemning a “system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants . . . should die or be imprisoned” and that provides “no standards’ for selecting the penalty”); *id.* at 295 (Brennan, J., concurring) (observing that juries “make the decision whether to impose a death sentence wholly unguided by standards governing that decision”); *id.* at 308 nn. 8-9, 310 (Stewart, J., concurring) (characterizing the “broad sentencing leeway” afforded juries by states’ challenged death penalty statutes as resulting in “legal systems that permit . . . [the death penalty] to be so wantonly and so freakishly imposed”); *id.* at 313 (White, J., concurring) (tracing the arbitrariness in the infliction of the death penalty to the unlimited sentencing discretion of judges and juries under the statutes at issue); *id.* at 365 (Marshall, J., concurring) (commenting that the commitment to the “untrammeled discretion of the jury the power to pronounce life or death in capital cases . . . was an open invitation to discrimination”) (internal quotation marks and citation omitted).

¹³ *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

¹⁴ *Id.* at 309.

¹⁵ *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976).

¹⁶ *Id.*

In 1973, Texas, among other states, drafted new capital punishment provisions and attempted to provide greater structure to the sentencing process by delineating factors to guide jury decision-making.¹⁷ Texas was among the first states to rewrite its death penalty law, enacting legislation the year following the Supreme Court's ruling in *Furman*.¹⁸

Texas's revised capital punishment statute provides for the death penalty upon conviction for eleven separate homicide offenses.¹⁹ These offenses include murder during the course of a burglary, robbery, or sexual assault; murder for hire; the murder of a police officer; and the murder of a child under the age of six. If a capital case goes to trial, the proceedings will be divided into two stages. In the first stage of the trial, the "guilt-innocence" phase, the jury decides whether the defendant has committed the crime charged. Should the jury deliver a guilty verdict and the prosecution seeks the death penalty, the trial proceeds to the second stage, the "sentencing" phase. At this final stage, the jury hears evidence regarding the defendant's background, character, criminal history, and mental health.²⁰ The jury then determines whether to sentence the defendant to death or life in prison.²¹ The jury may be told that "life" in prison means the defendant must serve forty years before becoming eligible for parole.²²

During the sentencing phase, the trial judge submits questions, known as "special issues," to the jury.²³ One is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."²⁴ The prosecution has the burden of proving this issue beyond a reasonable doubt and an affirmative finding to this question is a prerequisite to a sentence of death.²⁵

The "future dangerousness" issue was a hurried and last-minute addition to the death penalty statutes in the legislative session after the *Furman* ruling. This issue was not included in the original bill debated and was added by a com-

¹⁷ See Act of June 14, 1973, 63rd Leg., R.S., ch. 426, art. 3, § 1, 1973 TEX. GEN. LAWS 1122, 1125 (amended 2001) (codified as amended in TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon 2001)) (articulating sentencing procedure designed to constrain sentencing jury's discretion). See generally Michael Kuhn, Note, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410 (1973-1974) (discussing the Texas Legislature's attempts in enacting revised death penalty legislation to remedy the constitutional defects identified in *Furman*).

¹⁸ House Bill 200, the revised capital punishment statute, was passed by the Texas House of Representatives on May 10, 1973. TEX. H.R. JOUR. 3363 (1973). The Texas Senate approved an amended version on May 23, 1973. TEX. S. JOUR. 1743 (1973). After the Conference Committee resolved the differences, House Bill 200 was approved by both legislative bodies and became effective on June 14, 1973. See Act of June 14, 1973, 63rd Leg. R.S., ch. 426, arts. 1-3, 1973 Tex. Gen. Laws 1122-29 (codified as amended in scattered sections of TEX. CRIM. PROC. CODE and TEX. PENAL CODE).

¹⁹ TEX. PENAL CODE ANN. § 19.03 (Vernon 1994).

²⁰ TEX. CRIM. PROC. CODE ANN. art. 37.071§ (2)(a) (Vernon 2001).

²¹ *Id.* at 37.071(2).

²² *Id.* at 37.071(2)(e)(2)(B).

²³ *Id.* at 37.071(2)(b) & (2)(e) (enumerating special issues).

²⁴ *Id.* at 37.071(2)(b)(1).

²⁵ *Id.* at art. 37.071(2)(g).

mittee at the end of the session.²⁶ The Texas Legislature failed to study the effectiveness or advisability of the new statutes.²⁷ Former U.S. Representative Craig Washington, who was in the Texas House during the 1973 session, described the process:

Nobody sat down and thought through those things to come up with a rational way. They made up something that sounded like it would give the jury some guidance, but it really obfuscates more than it guides. You have got to remember these questions were . . . thought up on the spur of the moment in conference committee.²⁸

Texas's revised statute aimed to make the individualized assessment required by *Furman* the touchstone of the infliction of the State's ultimate punishment.²⁹ The Texas Legislature devised a sentencing procedure designed to guide the jury when differentiating between those individuals whose prior behavior and propensity for violence warranted the death penalty and those who, although guilty of capital murder, deserved a life sentence.

“They made up something that sounded like it would give the jury some guidance, but it really obfuscates more than it guides.”

— Former U.S. Representative
Craig Washington

By narrowing the pool of persons who should be sentenced to death, the Texas Legislature sought to reserve capital punishment for the worst of the worst, thereby minimizing the risk that the death penalty would be applied capriciously.³⁰ The statute as implemented, however, has backfired: the sentencing procedure fails to give juries

²⁶ As originally enacted by the House on May 10, 1973, the death penalty was mandatory for certain offenses and thus there were no special issues for the jury to consider. TEX. H.R. JOUR. 3218 (1973). The Senate version, passed less than two weeks later, contemplated an advisory role in sentencing for the jury, and listed future dangerousness as one of eight aggravating and seven mitigating factors to guide the jury's deliberations. TEX. S. JOUR. 1538-39 (1973). The decision to make future dangerousness an issue of mandatory consideration by the jury was made by the Conference Committee. Act of June 14, 1973, ch. 426, art. 3, § 1, 1973 TEX. GEN. LAWS at 1125. There was virtually no discussion of this alteration in the House and Senate versions; the debate over the statute consists largely of an address by then-Governor Dolph Briscoe to a joint legislative session urging its enactment. See TEX. H.R. JOUR. 134, 138 (1973).

²⁷ See Hugo A. Bedau, *Social Science Research in the Aftermath of Furman v. Georgia: Creating New Knowledge About Capital Punishment in the United States*, in ISSUES IN CRIMINAL JUSTICE: PLANNING AND EVALUATION 75, 82 (Marc Riedel & Duncan Chappel, eds. 1976); Welsh S. White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 45 AM. J. ORTHOPSYCHIATRY 581, 587-90 (1975).

²⁸ Kathy Walt, *Debate Over Death Penalty Is Renewed; Predicting Future Threats Raises Question of Flaws*, HOUS. CHRON., July 9, 2000, at B1 (quoting former U.S. Rep. Craig Washington).

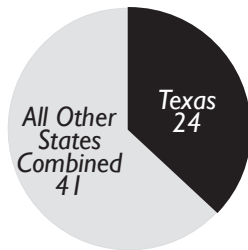
²⁹ Kuhn, *supra* note 17, at 423.

³⁰ Cf. *Zant v. Stephens*, 462 U.S. 862, 874, 877-79 (1983) (describing the constitutional function of statutory aggravating circumstances to channel the jury's discretion by circumscribing the class of persons eligible for the death penalty). The issue of arbitrariness of sentence is compounded in Texas given that there is no uniform, state-based policy for prosecutors seeking the death penalty. Elected prosecutors across the state's 254 counties are given unfettered discretion in the decision to seek the death penalty and that decision, by and large, will be left undisturbed by judicial review. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987); *Wayte v. United States*, 470 U.S. 598, 607 (1985); *United States v. Goodwin*, 457 U.S. 368, 380 (1982).

meaningful—rather than merely inflammatory—information about defendants. It has led to an obscene ballooning of the number of people sentenced to death, an expansion far beyond those deserving the death penalty.

The faulty statute has helped make Texas the undisputed leader in executions among the thirty-eight states with death penalty statutes. The number of executions in Texas dwarfs that of all other states and comprises one-third of all U.S. executions in the modern era.³¹ Texas has executed more than three times as many people as has Virginia, the state with the second-highest total.³² In 2003, Texas led the nation with twenty-four executions, nearly half of the total number of executions in the United States.³³ In 2004, Texas is thus far responsible for one-half of all executions in the United States.³⁴ Currently, more than 450 men and women reside on Texas's Death Row, with thirty to forty new death sentences being handed down each year.³⁵

Executions in 2003



The simple fact that the death penalty is available does not mean that it is warranted in every case. Some defendants should not be permitted to return to society—but that does not necessarily mean that they must be executed. What of defendants who would adjust well to the prison setting and never pose a threat to anyone while in an institutional environment?

II. Misplaced Rationale in Future Dangerousness Determinations

In Texas, “future dangerousness” essentially refers to the extent to which these individuals will engage in violent acts while incarcerated in an institutional setting for a minimum of forty years.³⁶ Thus, the institutional adjustment or ability of capital defendants to conform their behavior to a prison setting is generally the critical issue to consider when evaluating whether they actually continue to represent a threat to others.

³¹ Death Penalty Information Center, *Number of Executions by State Since 1976*, at <http://www.deathpenaltyinfo.org/dpicreg.html> (last visited March 1, 2004).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See Texas Department of Criminal Justice, *Offenders on Death Row*, at <http://www.tdcj.state.tx.us/stat/offendersondrow.htm> (last visited March 1, 2004).

³⁶ Capital defendants in 35 out of 38 death penalty jurisdictions who are not put to death will receive life-without-parole sentences. In those states that allow for life with parole, minimum sentences to be served are usually 25 years or more before conditional release. See Richard C. Dieter, *Sentencing for Life: Americans Embrace Sentencing Alternative to the Death Penalty*, Death Penalty Information Center, (Apr. 1993), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=481>.

Although most experts conclude that the death penalty has no more deterrent value than long-term imprisonment,³⁷ the rationale for allowing the issue

The use of future dangerousness as a guideline rests upon a questionable assumption. This reasoning presupposes juries are able to accurately identify the defendants who are likely to cause harm against which prison confinement is insufficient to guard.

of future dangerousness to enter the sentencing process is that the death penalty can prevent especially violent killers from killing again, limiting the risk of harm to other inmates and prison guards, as well as the public-at-large. The use of future dangerousness as a guideline rests upon a questionable assumption. This reasoning presupposes juries are able to accurately identify the defendants who are likely to cause harm against which prison confinement is insufficient to guard.

However, research reveals that *the majority of murderers do not commit acts of serious violence in prison*. Research on the post-incarceration conduct of capital defendants was summarized by Thomas Reidy and his colleagues in 2001.³⁸ Over varying follow-up

periods (ranging from two to 56 years) across several jurisdictions, the rates of assault by death row, former death row, capital murder life-without-parole, and life-with-parole inmates were relatively low.³⁹

Upon examining the records of more than 6,000 convicted murders in the Texas prison system, different researchers reported in 2000 that the overwhelming majority of murderers in prison do not have disciplinary records of serious institutional violence.⁴⁰ Using the average period of confinement, the researchers evaluated the rate of serious violent behavior over a term of forty years, the minimum number of years a defendant would serve if convicted of capital murder and sentenced to life. These calculations revealed that more than 83% of inmates would not commit acts involving serious assaultive behavior during forty years in prison.⁴¹ The projected rate of an aggravated assault upon a corrections officer was one percent and the likelihood of an inmate killing another inmate was one-fifth of one percent (00.2%).⁴²

³⁷ Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 3 (1996).

³⁸ Thomas J. Reidy, Mark D. Cunningham & Jonathan R. Sorensen, *From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana*, 28 CRIM. JUST. & BEHAV. 62-82 (2001). Research also reveals that jurors overestimate the rate of recidivism among murder-convicted inmates after their release into the community on parole. See Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1256 (2000); Allen J. Beck & Bernard E. Shipley, *U.S. Dep't of Justice, Recidivism of Prisoners Released in 1983*, at 2-6 (1989); Craig Perkins, *U.S. Dep't of Justice, National Corrections Reporting Program, 1992* at 18 (1994) (finding that the rate of recidivism among inmates convicted of murder and later released was lower than the rate for inmates released with non-murder convictions).

³⁹ Reidy, Cunningham & Sorensen, *supra* note 38.

⁴⁰ Sorensen & Pilgrim, *supra* note 38, at 1256.

⁴¹ *Id.*

⁴² *Id.*

“We would have executed nearly 600 convicts to protect us from seven. And we would have killed four innocent people in the process.”

— Professor James Marquart

The authors noted that their conclusions were consistent with previous research regarding former death row inmates who were transferred to general prison populations.⁴³ In a 1989 study, researchers James Marquart and Jon Sorenson studied 558 death row inmates whose sentences were commuted in the 1970s after the U.S. Supreme Court’s decision in *Furman* and found that in the fifteen years following the sentencing modification, only seven inmates re-offended.⁴⁴ Four of the *Furman*-commuted inmates were later found to have been actually innocent of the crimes.⁴⁵ As the author of the research noted, but for the *Furman* decision, “[w]e would have executed nearly 600 convicts to protect us from [seven]. And we would have killed four innocent people in the process.”⁴⁶

Another study tracked 92 death row inmates whose sentences were commuted pursuant to *Furman* and found that those inmates actually had a *lower* occurrence of violent infractions than other prisoners, and that only two inmates committed another murder.⁴⁷ The study compared these inmates to a group of capital murder defendants sentenced to life imprisonment because the juries had concluded that they did not pose a continuing threat to society.⁴⁸ Overall, the commuted death row inmates “were not a disproportionate threat to the institutional order, other inmates, or the custodial staff.”⁴⁹ Most death-sentenced-but-commuted inmates did not commit serious disciplinary rule infractions or spend time in solitary confinement as punishment for disruptive or assaultive behavior. The inmates—deemed too dangerous by juries to serve life prison sentences—actually had a lower rate of violence than those inmates who were sentenced to life by juries.⁵⁰

Although most inmates sentenced to longer sentences have been convicted of more violent offenses, correctional administrators agree that these inmates, including those serving murder sentences, are generally among the most docile and

⁴³ *Id.*

⁴⁴ See 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, 22-24 (1989).

⁴⁵ *Id.* at 25.

⁴⁶ Andrew H. Malcolm, *Society’s Conflict on Death Penalty Stalls Procession of the Condemned*, N.Y. TIMES, June 19, 1989, at B-10, quoting Professor James Marquart. See also Ronald Tabak, *How Empirical Studies Can Affect Positively the Politics of the Death Penalty*, 83 CORNELL L. REV. 1431 (1998); Sorenson & Pilgrim, *supra* note 38; Wendy P. Wolfson, *The Deterrent Effect of the Death Penalty Upon Prison Murder*, in THE DEATH PENALTY IN AMERICA 159, 160 (Hugo A. Bedau ed., 3d ed. 1982) (noting that the rate of homicide in prison is much lower than the rate of homicide in the free community).

⁴⁷ James W. Marquart, Sheldon Ekland-Olson, Jonathan R. Sorenson, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC’Y REV. 449, 460 (1989).

⁴⁸ *Id.*

⁴⁹ *Id.* at 464.

⁵⁰ *Id.*

trustworthy in the institution.⁵¹ Inmates serving long sentences are more invested in earning a high level of inmate privileges.⁵² Thus, these inmates have incentive to conform their behavior and, in general, they avoid behaviors that would trigger punishment. The opportunity for recreation, work outside one's cell, access to commissary items, and visitation privileges serve as powerful incentives for good behavior.⁵³ Inmates sentenced to life in prison—even the ostensibly high-risk category of capital murderers—can be controlled in the penal environment.

Even withholding the opportunity for parole does not increase the rate of prison violence. Researchers analyzed the violence rates of 323 life-without-parole inmates and 232 life-with-parole inmates during fifteen years of confinement from 1977 to 1992 in Missouri, a state with a true life-without-parole sentence.⁵⁴ The rate of assaultive behavior was virtually identical among the two groups. Nearly 80% of both groups did not have any reported incidents of assaults. Of the 20% who did receive disciplinary reports for assaultive behavior, a third of those incidents were classified as minor. The type of sentence—life with parole or life without parole—*did not* significantly impact the rate of violence in prison.⁵⁵

**The type of sentence—
life with parole or life
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Research confirms the views of prison officials—finding inmates convicted of murder to be among the most manageable class of inmates—and reveals that, generally, as inmates grow older in prison, their propensity for violent or disruptive behavior decreases.⁵⁶ One study noted “an inverse relationship between sentence length of time served and disciplinary infractions.”⁵⁷ One expert noted: “This is one of the most clearly-established principals in criminology, is that the risk of crime and violence in the community or in prison decreases steadily with age. That it peaks in the late teenage, early adult years, and then falls steadily across the life span.”⁵⁸

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* See also Beth M. Huebner, *Administrative Determinants of Inmate Violence: A Multilevel Analysis*, 31 J. CRIM. JUST. 107 (2003).

⁵⁴ Jonathan R. Sorensen & R. Wrinkle, *No Hope for Parole: Disciplinary Infractions Among Death-Sentenced and Life-Without-Parole Inmates*, 23 CRIM. JUST. & BEHAV. 542-52 (1996).

⁵⁵ *Id.*

⁵⁶ See John D. Woolridge, *Correlates of Deviant Behavior Among Inmates of U.S. Correctional Facilities*, 14 J. CRIME & JUST. 1 (1991); Kevin N. Wright, *A Study of Individual, Environmental, and Interactive Effects in Explaining Adjustment to Prison*, 8 JUST. Q. 217 (1991).

⁵⁷ Sorensen & Pilgrim, *supra* note 38. See also Terrill R. Holland & Norman Holt, *Correctional Classification and the Prediction of Institutional Adjustment*, 7 CRIM. JUST. & BEHAV. 51, 54 (1980); Frank Porporino, *Managing Violent Individuals in Correctional Setting*, 1 J. INTERPERSONAL VIOLENCE 213, 220-21 (1986).

⁵⁸ Testimony of Dr. Mark Cunningham, Statement of Facts at 132, *State v. Murphy*, (Tex. Crim. App. 2000) (No. 73,194).

Juries are instructed, and clearly perceive, that the death penalty hinges on the issue of a defendant's future dangerousness.⁵⁹ The use of this inquiry in every Texas death penalty case presupposes that juries are capable of identifying those inmates convicted of murder who are more violent or unmanageable than other inmates.

Because the documented rates of recidivism are low, the use of the future dangerousness inquiry results in a very high rate of "false positives."⁶⁰ Texas adds fuel to this fire of misinformation by urging juries to consider predictions of future dangerousness from prosecution mental health experts. The accuracy of these predictions is the focus of this study.

⁵⁹ See generally Sorensen & Pilgrim, *supra* note 38; See also Sally Constanzo & Mark Constanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 LAW & HUM. BEHAV. 151 (1994).

⁶⁰ *Id.*



The Fatal Crystal Ball: Convincing Juries of the Unpredictable

Prosecutors attempt to convince juries of a defendant's future dangerousness in myriad ways, including appealing to the jury's sense of duty to the community,⁶¹ the use of character witnesses, prior convictions, unadjudicated offenses,⁶² the facts of the crime itself,⁶³ and expert testimony. Future dangerousness is the critical issue in every Texas capital sentencing proceeding,⁶⁴ and the integrity of Texas death sentences depends on whether the evidence used to prove future dangerousness is reliable.

⁶¹ See, e.g., *Fortenberry v. State*, 579 S.W.2d 482 (Tex. Crim. App. 1979) in which the prosecutor argued to the jury: "I tell you now that unless you do observe the evidence, and base your decision, and find beyond a reasonable doubt and find the answer to be yes in this case, that upon your heads will lie the next man that's dead due to . . . [the defendant's] hands."

⁶² See Chapter Four, *infra*.

⁶³ Recent Court of Criminal Appeals (CCA) decisions have rubberstamped the jury's finding of future dangerousness based on the facts of the crime despite the U.S. Supreme Court's position that "death is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976), See, e.g., *Martinez v. State* 924 S.W.2d 693, 397 (Tex. Crim. App. 1996), in which the CCA upheld the jury's finding of future dangerousness against Martinez despite his lack of criminal record, immediate remorse, state of intoxication, and mitigating evidence.

⁶⁴ Prosecutors have acknowledged that "[b]y some accounts, the issue of future dangerousness has become the single most important factor in determining which defendants spend their life in prison and which defendants are sent to the execution chamber." Guy Goldberg & Gena Bunn, *Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty*, 5 TEX. REV. L. & POL. 49 (Fall, 2000). The authors discount concerns about future dangerousness predictions as "unwarranted."

I. The Proliferation of State-Paid Expert Speculation

“The unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.”

— American Psychiatric Association⁶⁵

In the absence of other evidence to support a jury finding of future dangerousness—as in cases in which the defendant has no prior criminal record or the crime itself does not reflect a risk of continuing violence—the State often uses “experts” to predict a defendant’s future behavior. These experts have been testifying in Texas capital murder cases for over thirty years. More and more mental health experts consider themselves adept at predicting future violence.⁶⁶ The State uses these hired witnesses because of their effectiveness in helping secure death sentences.

Mental health professionals were first called upon to predict an individual’s propensity for future violence beginning in the 1970s in the context of civil commitments. The Supreme Court had held that persons could not be involuntarily confined on the basis that they were mentally ill absent a finding that they posed a risk of harm to others or to themselves.⁶⁷ Soon after these predictions by psychologists and psychiatrists became commonplace, researchers began studying their accuracy.⁶⁸ Studies revealed that the majority of those predicted to be dangerous did not engage in any assaultive behavior and that only one of three predicted to be violent proved to be so.⁶⁹ Beginning in the early 1980s, researchers

⁶⁵ Brief of Amicus Curiae, Am. Psychiatric Ass’n, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080).

⁶⁶ Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based Upon Clinical Judgement and Scientific Research*, 4 PSYCHOL., PUB. POL’Y & L. 1226 (1998), Stephen L. Golding, *Increasing the Reliability, Validity, and Relevance of Psychological Expert Evidence: An Introduction to the Special Issue on Expert Evidence*, 16 LAW & HUM.BEHAV. 253, 255 (1992), John Monahan & Henry J. Steadman, *Crime and Mental Disorder: An Epidemiological Approach*, 4 CRIME & JUST. 145 (1983).

⁶⁷ Randy K. Otto, *On the Ability of Mental Health Professionals to “Predict Dangerousness:” A Commentary on Interpretations of the “Dangerousness” Literature*, 18 LAW & PSYCHOL. REV. 43 (1994).

⁶⁸ See generally, e.g., Henry J. Steadman & Arlene Halfon, *The Baxstrom Patients: Backgrounds and Outcomes*, 3 SEMINARS IN PSYCHIATRY 376 (1971). Summarizing the results of this research, the author of several such studies concluded: “It . . . appears that psychiatrists cannot even predict accurately enough to be more often right than they are wrong;” Joseph Cocozza & Henry Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976).

⁶⁹ *Id.*

and professionals began concluding that “[m]ental health professionals cannot predict dangerousness.”⁷⁰

Ignoring these early warning signs, and despite the fact that many states limit the use of this mental health testimony to civil commitment settings,⁷¹ Texas expanded the use of psychiatric opinion on future dangerousness to death penalty cases.

II. The Lack of Judicial Protection from Unreliable Evidence

“In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist’s words, equates with death itself. . . . In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person’s life is at stake, a requirement of greater reliability should prevail.”

— U.S. Supreme Court Justice Harry Blackmun⁷²

In the landmark 1983 case *Barefoot v. Estelle*, the U.S. Supreme Court addressed the admissibility of expert predictions of future dangerousness in capital sentencing hearings and, in permitting its introduction, assumed that jurors would be able to distinguish between testimony based on sound scientific theories and testimony based on less reliable or accurate opinions, and that the adversarial nature of the process would be sufficient to remove the taint of inaccurate expert opinions.

⁷⁰ JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981); *See generally* John Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 AM. J. PSYCHIATRY 10, (1984); Bruce J. Ennis & Thomas Litwach, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL.L. REV. 693 (1974); John Monahan et al., *Report of the American Psychological Association Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOLOGIST 1099, 1100 (1978), Charles Lidz, et al., *Sources of Disagreement Among Clinicians’ Assessments of Dangerousness in a Psychiatric Emergency Room*, 15 INT. J. LAW & PSYCH. 237 (1993), Charles Lidz, et al., *The Accuracy of Predictions of Violence to Others*, 269 J. AM. MED. ASSOC. 1007 (1993).

⁷¹ *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 356-60 (1997) (emphasizing the acceptability of expert predictions in civil contexts due to reduced due process protections and noting civil-criminal dichotomy in upholding civil commitment statute for sexual predators). *See generally* Paul H. Robinson, *Foreward: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993) (discussing judicial deference to civil commitment laws in face of due process challenges).

⁷² *Barefoot v. Estelle*, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting).

The Court declined to heed the strong objections to this speculative testimony voiced in an amicus curiae brief filed by the American Psychiatric Association (APA).⁷³ The APA insisted that psychiatrists are not qualified to make determinations of long-term future dangerousness, and still consistently urges that expert psychiatric testimony on future dangerousness be deemed inadmissible at capital sentencing hearings.

The premises relied upon by the Supreme Court in *Barefoot* have not been borne out in practice. Research has consistently established that the aura of authority emanating from the title “Doctor” unduly sways jurors’ deliberations.⁷⁴ Even when the jury is told that the expert neither examined the defendant nor formed his opinion based on access to in-depth information not available to the jury—the common practice in capital sentencing hearings—the jury shows such unreasoning deference to the expert’s prediction that it can only be the result of the expert’s cloak of respectability.⁷⁵ Indeed, as a then-judge of the Texas Court of Criminal Appeals pointed out in 1980, “[i]t is widely recognized that many lay persons show an inordinate amount of deference to members of the medical profession. Consequently, prosecutors go to great lengths to obtain psychiatric testimony on the . . . [future dangerousness issue]. They obviously believe that such testimony significantly influences a jury’s punishment deliberations.”⁷⁶

Despite the courts’ assumptions to the contrary, the adversary process, including cross-examination, is often insufficient to remove the bias generated from this unwarranted confidence in the pronouncements of ostensible experts. It is hard for a defense attorney to successfully cross-examine an expert about a personal opinion based on sparse, case-specific facts, especially when the defense

⁷³ See Brief of Amicus Curiae Am. Psychiatric Ass’n, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080).

⁷⁴ The seminal study in this line of inquiry is Stanley Milgram’s Yale study in which persons posing as scientists were able to secure compliance with their requests at a much higher rate than laypersons. See generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1983). Recent research in this area includes Daniel A. Krauss’s and Bruce D. Sales’s study, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL. & L. 267 (2001), which found that psychological expert testimony regarding the defendant’s future dangerousness in a mock trial strongly affected jurors’ decisions on sentencing. The study concluded that the U.S. Supreme Court “may have taken an incorrect view concerning the constitutionality of dangerousness predictions in *Barefoot* when they stated that ‘we are not persuaded . . . that the fact finder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.’” *Id.* at 305.

⁷⁵ *Id.* See also *White v. Estelle*, 554 F. Supp. 851, 858 (S.D. Tex. 1982) (finding that an opinion by “a witness bearing the title of ‘Doctor’” has a much greater impact on the jury, even where the jury is told that the expert never examined the defendant nor had access to in-depth information).

⁷⁶ *Sanne v. State*, 609 S.W.2d 762, 778 (Tex. Crim. App. 1980) (Phillips, J., dissenting). See also *Proffitt v. Wainwright*, 685 F.2d 1227, 1244 (Fla. Cir. Ct. 1982) (where the state’s argument “that the doctor’s testimony showed appellant was likely to kill other people in the future and was therefore a danger to society” was “likely to appeal to the emotions of the jurors”); *Bennett v. State*, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting) (“Believe me dear reader, for jury purposes, [the expert] is extremely good at persuading jurors to vote to answer the second special issue in the affirmative. . . . [He] closely resembles a combination of all those great major league baseball hitters who could almost hit home runs with their eyes closed.”).

attorney lacks expertise in this area. Thus, the impact of this questionable evidence can be directly affected by the quality of counsel.⁷⁷

Despite the APA's conclusion that psychiatrists have no special expertise in the area, Supreme Court Justice White noted: "The suggestion that no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness is somewhat like asking us to disinvent the wheel."⁷⁸ Ten years after *Barefoot*, the U.S. Supreme Court considered the admissibility of expert testimony in *Daubert v. Merrell Dow*.⁷⁹ The Supreme Court held that trial judges must act as "gate-keepers" of the evidence and must conduct a review of scientific evidence before it is presented to a jury which includes an analysis of the potential error rate for the evidence and whether the method is generally accepted within the field.⁸⁰

Although the Supreme Court upheld the admissibility of future dangerousness evidence in *Barefoot*, it has yet to reconsider the reliability of future dangerousness evidence in light of the test enumerated in *Daubert* for determining whether evidence is reliable enough for jury consideration.⁸¹ At least one judge has expressed the opinion that future dangerousness evidence appears to fail all of the *Daubert* factors: "Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals who routinely testify to, and profit from, predictions of dangerousness."⁸²

⁷⁷ An analysis of the quality of trial counsel appointed in Texas is beyond the scope of this report, see Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty* (2000), available at <http://www.texasdefender.org/publications.htm>.

⁷⁸ *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983).

⁷⁹ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

⁸⁰ See *id.* (wherein the Court sets forth factors that trial judges must consider when evaluating the admissibility of expert scientific testimony: (1) whether the theory or hypothesis is falsifiable or testable or has been tested, (2) whether the evidence has been subjected to peer review, (3) whether there is a known or potential error rate for the evidence, and (4) whether the technique or method is generally accepted within the field.). See also *Kelly v. State*, 824 S.W.2d 568, 571-73 (Tex. Crim. App. 1992); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999). See generally Krauss & Sales, *supra* note 74; J. Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743 (1999) (analyzing the admissibility of expert evidence in Texas courts and explicating the function of the trial judge in enforcing the rules of evidence). The *Daubert* test replaced the former *Frye* test, which was in effect at the time of the *Barefoot* decision. The court in *Frye* held that scientific evidence is admissible if it is "sufficiently established to have gained general acceptance in the particular field to which it belongs." *Frye v. United States*, 293 F.1013, 1014 (D.C. Cir. 1923).

⁸¹ *Kumho Tire*, 526 U.S. 137 (holding that the *Daubert* test encompasses all expert testimony—scientific expert evidence as well as expert clinical opinion testimony).

⁸² *Flores v. Johnson*, 210 F.3d 456, 465 (5th Cir. 2000) (Garza, J., specially concurring). Although the Texas rules purport to require expert testimony to be reliable and relevant, the courts have failed to conscientiously apply the admissibility requirements enumerated in *Daubert*. See *Nenno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998) (adopting only a modified *Daubert* analysis, explaining that questions of reliability are to be guided by the validity of the underlying scientific theory, the validity of the technique applying the theory and the proper application of the technique on the occasion in question). See also *Joiner v. State*, 825 S.W.2d 701 (Tex. Crim. App. 1992) (performing a reliability, relevance, and prejudice inquiry for the admission of psychiatric testimony in the penalty phase of a capital murder trial).

“Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals who routinely testify to, and profit from, predictions of dangerousness.”

— U.S. District Judge J. Garza

Although judges are supposed to screen the evidence, the reality is that the introduction of this evidence is routine and easy for the State.⁸³ An outside observer may envision that the use of expert predictions of future dangerousness in capital sentencing includes the expert making a careful judgment after a thorough review of all information available about the defendant. One may imagine that the expert meticulously creates an elaborate life history of the defendant, examines school, medical, and military records, and takes into account any mental disorders, physical ailments, and traumatic events. One might assume that the expert examines the defendant, questions him closely, observes him across a series of sessions, administers a battery of psychological tests, and scrupulously compares the results to a wide corpus of statistical data.

The reality falls far short of this idealized depiction. In many Texas cases, the psychiatrist or psychologist testifies whether a defendant will constitute a continuing threat to society based *solely* on a hypothetical fact pattern presented by the prosecutor. The hypothetical question incorporates the facts of the specific crime for which the defendant has been convicted as well as his previous crimes, and invariably omits any positive information. These hypothetical fact patterns are routinely admitted despite being “simply subjective testimony without any scientific validity.”⁸⁴ There is no consistent methodology applied or required for these analyses and “standards controlling the operation of the technique are nonexistent.”⁸⁵

⁸³ Comparison to the standard of admissibility for scientific evidence in civil cases reflects the degree to which the deck is stacked against a capital murder defendant. Research indicates that although defendants in civil cases succeed in keeping unreliable expert testimony from the jury most of the time, criminal defendants “virtually always lose their reliability challenges to government.” D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?* 64 ALB. L. REV. 99 (2000) (emphasis added). The result of subjecting civil evidence to stricter scrutiny “would be that the pocketbooks of civil defendants would be protected from plaintiff’s claims by exclusion of undependable expert testimony, but that criminal defendants would not be protected from conviction based on similarly undependable expert testimony.” *Id.* Such a result is particularly unseemly given the law’s claim that “inaccurate criminal convictions are substantially worse than inaccurate civil judgments, reflected in the different applicable standards of proof.” *Id.* (reviewing challenges to scientific evidence in civil cases and finding that in over 90% of the cases, challenges were raised regarding plaintiff-offered experts, with civil defendants prevailing two-thirds of the time).

⁸⁴ *Flores*, 210 F.3d at 459 (Garza, J., specially concurring).

⁸⁵ *Id.* at 465. See also Kenneth Dekleva, *Psychiatric Expertise in the Sentencing Phase of Capital Murder Cases*, 29 J. AM. ACAD. PSYCHOL. & L. 58, 60 (2001) (noting that “guidelines for making dangerousness predictions in forensic populations do not currently exist.”).

The expert, in many cases, never meets the defendant at all. Instead, he relies solely upon the prosecution's case file. Even when the expert does meet the defendant before testifying against him, the evaluation tends to be perfunctory—sometimes as short as twenty minutes.⁸⁶

Judges also allow unqualified witnesses to make these unreliable predictions.⁸⁷ This failure was highlighted in the case of Doyle Skillern, in which the

In Doyle Skillern's trial, the pathologist who performed the autopsy on the victim was allowed to testify about Skillern's future dangerousness.

forensic pathologist who performed the autopsy on the victim was permitted by the trial court to testify about Skillern's future dangerousness.⁸⁸ Although not a psychologist, the doctor expressed his opinion that, to a "reasonable degree of medical certainty," Skillern would constitute a continuing threat to society.⁸⁹ When the defense counsel objected that the medical examiner lacked the training and experience necessary to render such an opinion, the trial court overruled the objection and compounded the error by implying that the pathologist was qualified to make such an assessment, stating:

There is no question but . . . the jury makes the decision, but this witness is a medical doctor and I believe that the testimony shows that he has studied human behavior, had experience with it, and is giving this testimony to aid the jury, if it does.⁹⁰

When evaluated for reliability, the danger of these predictions of future dangerousness becomes clear. Yet courts routinely admit this sophistry—sanctioning the masquerade of speculation as scientific fact—and fail to perform any gate-keeping function at all.

⁸⁶ RANDALL DALE ADAMS ET AL., ADAMS V. TEXAS 64 (1991) (describing the meeting in which the state-paid expert asked Adams to draw shapes on a paper, asked him two questions, and left.).

⁸⁷ Texas courts even permit lay witnesses to speculate about a defendant's likelihood of future dangerousness. See East v. State, 702 S.W. 2d 606 (Tex. Crim. App. 1985), in which the court allowed an acquaintance of the defendant to proffer her opinion that the defendant would be a threat to society. See also Esquivel v. State, 595 S.W. 2d 516, 527 (Tex. Crim. App. 1980); Cass v. State, 676 S.W. 2d 589 (Tex. Crim. App. 1984).

⁸⁸ See Sanne v. State, 609 S.W.2d 762, 773-74 (Tex. Crim. App. 1980) (Which discussed Skillern case and acknowledged that forensic pathologist should not have been permitted to render an expert opinion on Skillern's future dangerousness, but deciding that the mistake was harmless).

⁸⁹ *Id.* at 778 (Phillips, J., dissenting).

⁹⁰ *Id.*

III. Dr. Death and Other Self-Appointed Oracles for Hire

*“Just take any man off the street, show him what [the defendant did], and most of them would say the same things I do. But I think the jurors feel a little better when a psychiatrist says it—somebody that’s supposed to know more than they know.”*⁹¹

— State Expert Dr. James Grigson

In refusing to bar such predictions from capital trials, Justice White of the Supreme Court remarked that “neither petitioner nor the [American Psychiatric] Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time.”⁹² Because predictions that a person will be dangerous in the future are wrong more often than they are right⁹³ and researchers have found clinicians no more accurate in their guesses than lay persons,⁹⁴ juries could more accurately predict dangerousness by flipping a coin than by relying on an expert’s testimony.

One researcher commented: “[Our] predictive ability is one for three—not bad for a batting average, but somewhat more problematic for imprisonment and execution.”⁹⁵ Because the conclusions drawn from ad-hoc predictions of future dangerousness are flawed, the amorphous and undefined methodologies they

⁹¹ John Bloom, *Doctor for the Prosecution*, AM. LAW. 25, 26 (Nov. 1979).

⁹² *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983).

⁹³ See Reidy et al., *supra* note 38; Charles Patrick Ewing, *Preventive Detention and Execution: The Constitutionality of Punishing Future Crimes*, 15 LAW & HUM. BEHAV. 139 (1991); Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845 (1990); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 111-17 (1984) (summarizing the results of the major studies); Brief of Amicus Curiae, Am. Psychiatric Ass’n, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 625 (1999) (noting that “[j]udging a person’s likely future dangerousness is far from foolproof”); Steven G. Gey, *Justice Scalia’s Death Penalty*, 20 FLA. ST. U. L. REV. 67, 118 (1992). Even in less recent research, the error rate for predictions was two out of three times. See JOHN MONAHAN, CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981).

⁹⁴ David Faust & Jay Ziskin, *The Expert Witness in Psychology and Psychiatry*, 241 SCI., July 1, 1988, at 31.

⁹⁵ Irene Merker Rosenberg, Yale L. Rosenberg & Bentzion S. Turin, *Return of the Stubborn and Rebellious Son: An Independent Sequel on the Prediction of Future Criminality*, 37 BRANDEIS L.J. 511, 519-21 (1998-99) (stating that “[a]lthough measures for predicting and preventing future crime are very much in vogue, a substantial body of literature suggests that prophecy of this sort is a very speculative business” and criticizing the U.S. Supreme Court for its decision in *Barefoot*, which constituted a “lack of appreciation of the inherent difficulty of the task and the consequences of using inadequate methodologies to identify the dangerous predator.”).


employment should be deemed unreliable and the evidence should therefore be inadmissible pursuant to *Daubert*.⁹⁶

The APA condemned the use of this testimony based in part on the literature revealing the inaccuracy of expert predictions of long-term potential for violence. The Association concluded: "Psychiatric testimony of future dangerousness impermissibly distorts the fact-finding process in capital cases."⁹⁷ One scholar emphasized:

In time, perhaps . . . the accuracy of predictions of dangerousness may be improved to the point of scientific acceptability. At present, however . . . [such] predictions cannot be said to be founded on a scientific basis The psychiatrist or psychologist who makes a

prediction of dangerousness [in a capital sentencing proceeding] violates his or her ethical obligation to render judgments that rest on a scientific basis.⁹⁸

As an indication of the strength of the scientific community's rejection of this speculation, the APA expelled Texas's Dr. James Grigson—nicknamed Dr. Death for his unambiguous guarantees of future dangerousness—from their ranks because he consistently testified as to a defendant's future dangerousness without examining the defendant.⁹⁹ Grigson and other state-paid witnesses have testified in capital cases and made the claim that the defendant in question will kill again, with "100% certainty."¹⁰⁰



TEXAS SOCIETY OF PSYCHIATRIC PHYSICIANS
A District Branch of the American Psychiatric Association

Personal and Confidential
Return Receipt Requested
#P 133 908 877

April 11, 1994

James P. Grigson, M.D.
709 Expressway Tower
Dallas, TX 75206

RE: TSPP Ethics Case #G-91

Dear Dr. Grigson:

Our committee has received its notification of the review of your ethics case and hearing by the national American Psychiatric Association Ethics Committee.

They have concluded the complaint was properly heard and considered. They have affirmed the sanction of:

EXPULSION

for ethical breaches of Section 1, Section 2, Annotation 3. No violation was found for Section 7.

You have 30 days to appeal this decision with the Secretary of the American Psychiatric Association, the appeal to be heard by the APA Ethics Appeals Board.

We are enclosing a copy of the TSPP Ethics Committee decision as submitted to the APA.

If no appeal is taken, or appeal does not reverse the findings on the ethics matter, a sanction at the level of expulsion results in publication of the facts of the expulsion, as mandated by APA procedures. This reporting is made in the district branch newsletter and the APA's *Psychiatric News*. There is also a press release made to local media and an informational report to the state medical licensing authority in any states where licensure is held. In addition, actions affecting membership status in professional organizations is reported to the National Practitioner Data Bank.

All external actions and reporting are stayed during the time of an appeal.

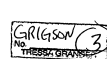
Yours truly,

George Pazdral, M.D., J.D. by DS

George Pazdral, M.D., J.D.
Chair, TSPP Ethics Committee

cc: TSPP Ethics Vice-Chair
TSPP President
APA Ethics Chair

Rec. 4-18-94



CARL GRIGSON
NO. 23
TSPP-CRIM-94-00000

401 WEST 15TH STREET, SUITE 675 • AUSTIN, TEXAS 78701
512/478-0605 • FAX 512/478-5223

- ⁹⁶ See *Gen. Elec. v. Joiner*, 522 U.S. 136, 146 (1997) (holding that "conclusions and methodology are not entirely distinct from one another" and that erroneous conclusions may indicate a faulty underlying methodology).
- ⁹⁷ Brief of Amicus Curiae, Am. Psychiatric Ass'n, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080).
- ⁹⁸ Charles P. Ewing, "Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 AM. J.L. & MED. 407, 418 (1983).
- ⁹⁹ Bruce Vincent, *Dearth of Work for "Dr. Death: The Once Ubiquitous James Grigson Now Finds Little Demand for his Testimony in Texas Capital Murder Sentencings*, TEX. LAW., Dec. 4, 1995, at 4.
- ¹⁰⁰ See, e.g., Deposition of James Grigson at 51, *State v. Moody*, (Tex. Crim. App. 1994)(No. 70,883).

Grigson, who has testified for the prosecution in many capital sentencing hearings in Texas,¹⁰¹ went so far to secure death sentences as to investigate the

“It seems to me that when Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be the second coming of the Almighty. . . . When Dr. Grigson speaks to a lay jury . . . the defendant should stop what he is then doing and commence writing out his last will and testament—because he will in all probability soon be ordered by the trial judge to suffer a premature death.”

— *Former Texas Court of Criminal Appeals Judge Marvin O. Teague*

jurors whom he was going to try to persuade. In one case, Grigson felt a juror was not going to believe his testimony and thus not sentence the defendant to death. Grigson investigated that juror’s family and background and, upon finding that the juror had a fourteen-year-old daughter, testified that the defendant was the type of man who would rape and kill a fourteen-year-old girl if given the opportunity.¹⁰² Former Texas Court of Criminal Appeals Judge Marvin O. Teague noted: “It seems to me that when Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be the second coming of the Almighty. . . . When Dr. Grigson speaks to a lay jury . . . the defendant should stop what he is then doing and commence writing out his last will and testament—because he will in all probability soon be ordered by the trial judge to suffer a premature death.”¹⁰³

Grigson continued to profess his ability to foresee the future even after he learned of his own previous incorrect predictions. In 1988, an Assistant Dallas County District Attorney informed Grigson that a number of inmates—whose violence Grigson had assured—had not engaged in assaultive behavior.¹⁰⁴ Asking that Grigson “keep this report confidential,”¹⁰⁵ the prosecutor included a report from an investigator who had tracked the behavior of inmates against whom Grigson had testified. One inmate approached “the model inmate category,” the investigator reported, while several others “caus[ed] no problems.” Many inmates in the study turned out to be successful workers who had bettered themselves through education.¹⁰⁶

¹⁰¹ In 1991, Grigson claimed to have testified for the prosecution in 136 capital cases in Texas. *Clark v. State*, 881 S.W.2d 682, 695 (Tex. Crim. App. 1994). See Texas Defender Service, *supra* note 77, at Appendix Three. Numerous cases in which Grigson testified probably remain unidentified because his name was not mentioned in appellate opinions reviewed for the study. *Id.*

¹⁰² Ron Rosenbaum, *Travels with Dr. Death*, VANITY FAIR, May 1990, at 141.

¹⁰³ *Bennett v. State*, 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting).

¹⁰⁴ Correspondence from Jeff Shaw, investigator for Texas Special Prosecutions Unit, to Dallas Assistant District Attorney, on file with author and attached as Appendix 1.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Undeterred, Grigson continued, as did many other state experts, to speculate about recidivism.¹⁰⁷ Grigson, while outlandish and notorious, is not the only “expert” upon whom the state of Texas relies to convince juries of the need to put a defendant to death. Other “killer shrinks” have followed Grigson’s lead and, in courtrooms around the state today, forecast the unknown cloaked in the aura of reliability conferred by the honorific title “Doctor.”

¹⁰⁷ *See, e.g.*, testimony of Dr. Grigson in the following cases: *People v. Orona*, (Colo. Ct. App. 1995) (No. 91CA0121); *Hernandez v. State*, (Tex. Crim. App. 1994) (No. 71,083); *Garcia v. State*, (Tex. Crim. App. 1994) (No. 71,417). Grigson’s testimony regarding the number of cases in which he had testified varied considerably from trial to trial as did his recitation of the accuracy of his predictions.

3

The Study: Overwhelmingly Inaccurate Predictions of Future Dangerousness

I. Methodology

This study relied on archival records to identify inmates in the Texas Department of Criminal Justice (TDCJ) who, since reinstatement of the death penalty: (1) were the subject of state expert testimony at trial declaring them a “continuing threat to society” and, (2) received a death sentence at the time of their trial (reflecting the jury’s unanimous verdict that they would be a future danger).¹⁰⁸ In order to identify this sample, we gathered records and searched from a number of different sources. First, we reviewed opinions published by the Texas Court of Criminal Appeals for information regarding the presence of expert testimony in the punishment phase of the trial. Although every death penalty conviction and sentence is automatically appealed to the Texas Court of Criminal Appeals, only 27% of the opinions between 1995 and 2000 were published.¹⁰⁹ Because the punishment phase expert testimony may not have been raised as an issue in every inmate’s direct appeal, this search yielded limited results.¹¹⁰

We also asked District Attorneys offices around the state to identify cases in which experts had testified for the State regarding future dangerousness. Although some district attorney’s offices complied with the request and provided lists of cases, many prosecutors either could not comply because of technological limitations, or declined to comply.¹¹¹

¹⁰⁸ Additional scientific review and analysis of this data is provided in Buffington-Vollum, J., Edens, J., Keilen, A., Roskamp, P., & Anthony, C. (accepted, pending revision). *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to ‘Disinvent the Wheel’?* (2003) LAW & HUM. BEHAV.

¹⁰⁹ See Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* (2002), available at <http://www.texasdefender.org>.

¹¹⁰ Unpublished opinions on file with author were searched to identify cases in which state experts testified regarding future dangerousness.

¹¹¹ Correspondence on file with author.

Thus, while every case we identified as having state-sponsored future dangerousness testimony is included in this study, the sample of inmates identified is likely under-inclusive. There are certainly more cases in which state-paid experts predicted future dangerousness but were not discovered because of the partial or missing documentation. However, there was no selection of cases for purposes of this study. Every case identified within the time frame of this study with the state-sponsored expert testimony is included.

We identified a total of 155 inmates by this process.¹¹² We obtained disciplinary records regarding each of them. Public information act requests sought the disclosure of any and all records regarding each inmate's disciplinary infractions.¹¹³ The requests included records spanning each inmate's incarceration for the capital murder charge. Further, we requested and obtained records alleging the commission of a crime while incarcerated. We also obtained records from the Texas Special Prosecutions Unit, the agency responsible for filing charges against and prosecuting inmates for offenses committed while in prison.

TDCJ inmates receive a 139-page Inmate Offender Handbook which details the rules by which inmates must abide while incarcerated.¹¹⁴ There are regulations for every aspect of incarceration, including meals, showers, haircuts, clothing, recreation, visitation, and commissary. There are seventeen separate rules alone regarding how an inmate is to behave at mealtime, including that an inmate cannot save a seat for another.¹¹⁵ The rulebook contains 15 pages listing regulations regarding inmate correspondence.¹¹⁶ The handbook contains hundreds of rules, the violation of which can result in a disciplinary report.

The TDCJ Disciplinary Rules and Procedures for Offenders manual contains a listing of Disciplinary Offenses encompassing 45 separate general infractions which can be committed in a variety of ways. Each can result in institutional sanctions and penalties. The numerous infractions vary in the degree to which they reflect violent or other behavior of major concern to TDCJ officials (e.g., "Assaulting an Officer," "Threatening to inflict harm on an officer," "Refusing to work," "Rule Violation," "Possession of Contraband").¹¹⁷

TDCJ classifies offenses as either major or minor depending on its severity, which in turn dictates both the procedure by which it is adjudicated and the penalty imposed. We drew the disciplinary infraction data for the present sample from the archival records provided by the TDCJ staff and this study relies on the fact that the TDCJ's disclosure of these records was accurate and complete.

¹¹² A list of inmates included in this study is available from author.

¹¹³ These records were received between June and October 2002.

¹¹⁴ Texas Department of Criminal Justice, *Offender Handbook*, Nov. 2002, available at <http://www.tdcj.state.tx.us/publications/id/offender-handbook-2003.PDF>. Inmates in this study may not have received this particular version of the handbook, but would have been subjected to rules and regulations regarding their incarceration.

¹¹⁵ *Id.* at 15.

¹¹⁶ *Id.* at 98-113.

¹¹⁷ Disciplinary Infraction List on file with author.

Consistent with existing research regarding violence rates and future dangerousness, this study defines “serious assaultive behavior” as behavior that results in an injury requiring more than the administration of first aid.¹¹⁸ Any injury requiring more than a bandage is considered “serious assaultive behavior,” including cuts requiring stitches, fractures, injuries requiring hospitalization, and injuries resulting in death. The methodology is consistent with the definition of “serious assault” used by TDCJ.¹¹⁹

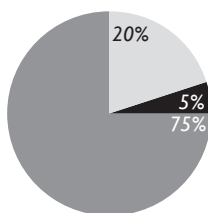
Because of the sheer number of rules in prison the violation of which could trigger a disciplinary report, many inmates in prison and in this study have incurred records. The definition of “serious assaultive behavior” identifies which inmates are able to safely co-exist with others in an institutional setting. It is consistent with the type of behavior juries sought to avoid by imposing a death sentence. Juries aim to protect society—the prison society of guards and other inmates, and the community at large—from inmates who will commit serious acts of violence or kill again.

II. Getting It Wrong: Findings and Case Studies

Of the 155 inmates identified in this study, 67 have been executed by the State of Texas. Forty inmates currently reside on Texas’s death row and 48 inmates were sentenced to death by juries but have, for a variety of reasons, had their sentences reduced to life in prison or to a term less than life in prison.

A. All Inmates in Study

Behavior of Inmates in Study



- No Disciplinary Violations
- Serious Assaultive Behavior
- Minor Disciplinary Violations

Of the total 155 inmates, eight (5%) engaged in assaultive behavior requiring treatment beyond first aid. Thirty-one of the 155 inmates (20%) have no records reflecting disciplinary violations. The remaining 75% of inmates committed disciplinary infractions involving conduct not amounting to serious assaults. None of the inmates identified in this study committed another homicide and only two inmates (1%) were prosecuted by the Texas Special Prosecution’s Unit, the agency responsible for charging and prosecuting crimes committed in prison.

The predictions of future dangerousness made by these state-paid witnesses have not proven to be true in 95% of the cases.

¹¹⁸ See Sorensen & Pilgrim, *supra* note 38; Marquart & Sorensen, *supra* note 44; Marquart et al., *supra* note 47.

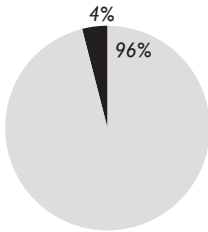
¹¹⁹ See, e.g., Texas Department of Criminal Justice, *Select Statistics April 2002*, at 29 (defining “Serious Staff Assault” as “assault on staff resulting in injury that requires treatment beyond first aid as determined by medical staff and defining “Serious Offender Assault” as “assault on an offender resulting in injury that requires treatment beyond first aid as determined by medical staff”).

B. Inmates Sentenced to Death Whose Sentences Have Been Reduced

Forty-eight of the 155 inmates identified are those who were sentenced to death based on jury predictions of their risk of recidivism and who have had their sentences commuted, reduced to life in prison, or reduced to a term less than life. One inmate was exonerated of the charges and has been released from prison. Another, though not formally exonerated by the courts, entered into a plea agreement for time served after his conviction had been reversed. Two additional inmates whose sentences were reduced have been released from prison—one on parole, another at the conclusion of his sentence. These 48 inmates have served an average of 20 years, 11 months in prison.¹²⁰

Death Row Assaults

(Inmates Sentenced to Death Whose Sentences Have Been Reduced)



■ No Serious Assault
■ Committed Serious Assault

Five of these 48 inmates (10%) had no disciplinary records while incarcerated, either during the time they spent on death row or in the less-secure facilities to which they were transferred after sentence commutation.¹²¹ Two inmates (4%) committed serious assault while incarcerated and one of those inmates was prosecuted for aggravated assault by the Special Prosecutions Unit. The remaining inmates violated rules not amounting to serious assaultive behavior.

I. Randall Dale Adams: Condemning the Innocent

“I would place Mr. Adams at the very extreme, worse or severe end of the scale. You can’t get beyond that. . . There is nothing known in the world today that is going to change this man; we don’t have anything.”

— Testimony of Dr. Grigson¹²²

Randall Dale Adams was convicted and sentenced to death for the 1976 murder of a police officer in Dallas, Texas. Adams’s only criminal record was for driving while intoxicated.¹²³ Unlike many defendants, Randall Dale Adams was innocent of the crime. Judge M.P. Duncan said of Adams’s case: “The State

¹²⁰ Records regarding the length of time these inmates spent specifically on death row before their sentences were commuted to life or less were available in 28 of the 48 cases. For those 28 cases, the average time an inmate spent on death row was seven years, nine months and the average time an inmate was incarcerated after sentence reduction was 15 years, six months. For the other 20 inmates, only the total incarceration period was available and the specific time spent on death row before commutation was not available.

¹²¹ For two of these inmates, the Texas Department of Corrections could not locate any records regarding the inmate’s disciplinary history. For the other three, records were available, but the inmate had not committed any disciplinary infractions. Correspondence on file with author.

¹²² Statement of Facts at 1410, *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979) (No. 60,037).

¹²³ *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979).

was guilty of suppressing evidence favorable to the accused, deceiving the trial court during [the] trial, and knowingly using perjured testimony.”¹²⁴ Adams was freed after the real killer confessed on tape to the crime. Adams spent more than 12 years in prison before being exonerated.¹²⁵

His actual innocence did not prevent two state-paid “experts” from announcing to the jury that after a brief interview with Adams,¹²⁶ they had concluded that Adams would certainly continue to be a threat to society. Adams had no disciplinary violations or assaultive behavior during his 12 years in prison and was considered “an ideal inmate.”¹²⁷

2. Kerry Max Cook: Compounding Injustice

“Dr. James Grigson—and other associated junk-science ‘experts’—are simply hired guns for the prosecution. They are result-oriented and say whatever the prosecution needs to meet their end result. They are no different than Miss Cleo—scamming the Courts and the public.”

— Kerry Max Cook¹²⁸

Kerry Max Cook spent 20 years on death row for the 1977 murder and rape of Linda Jo Edwards. Cook was freed after compelling evidence of his innocence was uncovered and DNA evidence implicating someone else was revealed in 1999. The jury convicted and sentenced Cook to death after a trial involving prosecutorial misconduct, including the State concealing exculpatory evidence and persuading witnesses to lie, shoddy police work, and unreliable expert evidence.¹²⁹

The State’s punishment phase evidence included the testimony of Dr. Grigson, who confidently stated: “It would not matter where he might be, whether he was free in the free world or whether he was institutionalized. He would present a real threat to people that found themselves in that same setting with him, whether it is prisoner guards or rather free people.”¹³⁰ Grigson

¹²⁴ MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE 71 (1992).

¹²⁵ See *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989). See also *Milestones*, TIME, Apr. 17, 1989 at 69; Richard L. Fricker, *Crime and Punishment in Dallas*, 75 A.B.A. J. 52 (July 1989).

¹²⁶ ADAMS ET AL., *supra* note 86.

¹²⁷ Correspondence from Jeff Shaw, investigator for Texas Special Prosecutions Unit, to Dallas Assistant District Attorney, on file with author.

¹²⁸ Letter on file with author.

¹²⁹ *Cook v. State*, 940 S.W.2d 623, 627 (Tex. Crim. App. 1996) (noting that “[p]rosecutorial and police misconduct has tainted this entire matter from the outset. . . . [T]he taint, it seems clear, persisted until the revelation of the State’s misconduct in 1992.”).

¹³⁰ *Cook v. State*, 821 S.W.2d 600, 602 (Tex. Crim. App. 1991).

ratcheted up the rhetoric: “I certainly would not mind telling you that I feel absolutely one hundred percent certain that he is and will continue to be a threat no matter where he is.”¹³¹

After the CCA reversed two prior convictions of Cook for Edwards’ murder based on prosecutorial misconduct and perjury,¹³² prosecutors and police threatened to try Cook again in 1997. Finally, they conceded the unlikelihood of conviction by allowing Cook’s release from prison in exchange for a “no contest” plea. Maintaining his innocence, but fearful of another unjustified conviction, Cook consented.¹³³

In February, 1999—more than 20 years after the murder—new DNA testing excluded Cook as the assailant and implicated another man, the victim’s married ex-lover and the original suspect in the case.¹³⁴

Vigorously protesting his innocence from the start, Cook endured 20 years on death row and once came within 11 days of execution.¹³⁵ Despite the frustrations of being an innocent man wrongly convicted, Cook avoided any major disciplinary violations during his incarceration.

Today, Kerry Max Cook lives in New York. He is a husband and the father of a young son. After his release, he studied American government and history at the college level and maintained a 4.0 grade point average. His case is featured in the play “The Exonerated,” now running in New York and in other cities. Cook is actively involved in the production of the play and speaks to audiences about his experience. He speaks on capital punishment issues around the world. Cook remains a successful, peaceful, law-abiding citizen—proving Dr. Grigson 100% wrong.

3. Others Released

Two other inmates, found to be a future danger and condemned to die by juries, have been released from prison. One inmate, James Pierson, was released in February, 1994 and is currently on parole, supervised by the Texas Department of Criminal Justice.¹³⁶ Pierson, incarcerated for almost 17 years, had no disciplinary violations while in prison. Further, public records in Texas reveal no arrests,

¹³¹ *Id.*

¹³² *Id.* at 600-01.

¹³³ *Former Death Row Convict Seeks Pardon*, FORT WORTH STAR-TELEGRAM, Sept. 13, 1999, at 6; Texas Department of Criminal Justice, *Offenders No Longer on Death Row*, at <http://www.tdcj.state.tx.us/stat/permanentout.htm>. See also Evan Moore, *Justice Under Fire: ‘Win at all Costs’ is Smith County’s Rule, Critics Claim*, HOUS. CHRON., June 11, 2000, at A1.

¹³⁴ Renae Merle, *Plea Deal Halts Man’s Fourth Trial in Slaying: Defendant Pleads No Contest in Killing, Gets Credit for Time Served on 20-year Sentence*, AUSTIN AM.-STATESMAN, Feb. 17, 1999, at A-1.

¹³⁵ See Moore, *supra* note 133.

¹³⁶ Texas Department of Criminal Justice, *supra* note 133.

charges, or prosecutions since his release in 1994 and his parole officer indicated that Pierson has not had any parole violations to her knowledge.¹³⁷

Another inmate, Charles County, was discharged from prison in January 1995 after serving nearly 16 years.¹³⁸ County did not engage in serious assaultive behavior while in prison. Public records in Texas reveal that County has not been arrested, charged with, or prosecuted for any offense since his release.¹³⁹

4. Case Studies: Less Violence Despite Increased Opportunity

In addition to the two inmates freed from death row and the two paroled inmates, 44 inmates identified in this subgroup of 48 had their sentences commuted or reduced to life in prison or a lesser prison sentence.

Prosecutors seeking the death penalty frequently rely on the testimony of “prison experts” who testify that because of fewer security precautions and the increased availability of weapons, inmates serving a life sentence will have more opportunity to commit violent acts.¹⁴⁰ What the State’s prison experts do not say is that these inmates are generally among the most manageable.¹⁴¹

So-called “prison experts”—often called in tandem with the future dangerousness expert—remind the jury that if the inmate is not sentenced to death, he will be treated as any other felony offender and may be placed in the general population, free to have unfettered contact with other inmates and prison guards. According to these experts, inmates on death row are more isolated from other inmates and have less contact with guards and staff because they are locked in their cells 23 hours a day. Inmates serving non-death sentences can be let out on furloughs, are more able to smuggle drugs into the facility, and have more access to weapons and more opportunity to use them.¹⁴² Such testimony from the prison and future dangerousness experts convinces juries that ordinary prison confinement cannot control the violent tendencies of capital sentenced inmates.

However, the “lifers” in our study, despite additional access to weapons and opportunity to engage in assaultive behavior against guards and other inmates, did not, as a rule, engage in violent behavior.

However, the “lifers” in our study, despite additional access to weapons and opportunity to engage in assaultive behavior against

¹³⁷ Texas Criminal Detail, James Willard Pierson, SID Number 01302144, *available at* <http://publicdata.com> last visited May, 2003; telephone conference with parole officer Ladreka Simmons, May 15, 2003.

¹³⁸ Texas Department of Criminal Justice, *supra* note 133.

¹³⁹ Texas Criminal Detail, Charles County, SID Number 01348436, *available at* <http://publicdata.com> last visited May, 2003.

¹⁴⁰ *See, e.g.*, Testimony of Royce Smithey, Chief Investigator for the Special Prosecutions Unit, Statement of Facts at 55-79, *State v. Brewer*, (Tex. Crim. App. 2002) (No. 73,641).

¹⁴¹ *See* Malcolm, *supra* note 46; Tabak, *supra* note 46.

¹⁴² *See, e.g.*, Testimony of Royce Smithey, Chief Investigator for the Special Prosecutions Unit, Statement of Facts at 55-79, *State v. Brewer*, (Tex. Crim. App. 2002) (No. 71,307); Testimony of Dr. Rafeal Otero, Statement of Facts at 219, *State v. Murphy*, (Tex. Crim. App. 2000) (No. 73,194).

guards and other inmates, did not, as a rule, engage in violent behavior. In fact, those who were in less restrictive facilities were less likely to engage in assaultive behavior than were those inmates serving time on death row.

Baby Ray Bennett was sentenced to death for a 1985 murder in Newton County, Texas. After serving ten years on death row, his sentence was commuted to life.¹⁴³ The 40-year-old Bennett is now a trustee at a prison in Abilene.¹⁴⁴ He has been disciplined for four minor infractions, including the possession of five lottery tickets. In the 17 years of his incarceration, he has not lost a single day of good-time credits.¹⁴⁵

In his dissenting opinion in Bennett's case, Judge Teague noted:

This is another case in which Dr. James P. Grigson, who has earned the nickname of "Dr. Death" because of the number of times he has testified on behalf of the State at the punishment stage of a capital murder trial and the number of times the jury has returned affirmative answers to the submitted special issues, testified. . . . Dr. Grigson testified at the punishment stage of applicant's trial and, as usual, was the State's star witness at that stage of the trial. My favorite Dr. Grigson answer, given the question, is the following:

Q: Well, I'm asking, do you pick those people out [who are "like cancer and should be wasted"]; I mean, is it you that is charged with that responsibility, to pick out what people in our society are like cancers that make their waste not needless?

A: Yes, sir, I have been asked to do this on numerous occasions by Courts, and I have been proved to be right in my prediction of individuals continuing to kill; and so I have been asked to do that, and it has proven to be so.¹⁴⁶

Ernest B. Smith was condemned to death in 1976. The prosecution expert testified at trial that Smith would "continue his previous behavior—that which he has done in the past. He will again do it in the future."¹⁴⁷ When asked what would happen should Smith be released into society, the expert witness testified that his behavior "[would] only get worse."¹⁴⁸ In helping the prosecution secure a death sentence against Smith, the expert emphatically proclaimed that ". . . certainly, Mr. Smith is going to go ahead and commit other similar or same

¹⁴³ Texas Department of Criminal Justice, *supra* note 133; *Bennett v. State*, 766 S.W.2d 227 (Tex. Crim. App. 1989).

¹⁴⁴ Kathy Walt, *Debate over Death Penalty is Renewed; Predicting Future Threats Raises Question of Flaws*, HOUS. CHRON., July 9, 2000, at B1.

¹⁴⁵ *Id.*

¹⁴⁶ *Bennett*, 766 S.W.2d at 231-32 (Teague, J., dissenting) (quoting Statement of Facts, Vol. XI, *Holloway v. State*, (Tex. Crim. App. 1990) (No. 68,925)).

¹⁴⁷ Statement of Facts at 2944, *State v. Smith*, (Tex. Crim. App.) (No. 49,809).

¹⁴⁸ *Id.* at 2945.

criminal acts if given the opportunity to do so.”¹⁴⁹ The expert had only met with Ernest Smith for an hour and a half before making this conclusion.¹⁵⁰

Ernest Smith resided on death row following his conviction until 1981 when his conviction was reduced and sentence converted to life. Since then, despite placement in a less-secure facility and the concomitant opportunities for violence, Smith has incurred no disciplinary infractions in more than 20 years. Texas Department of Corrections records indicate that Smith received a Bachelor’s degree from Cleary College while incarcerated, trained other inmates on computer use, and worked as a clerk in the prison with excellent work reports.¹⁵¹

George Clark, imprisoned on death row for three years, had his capital murder sentence reduced to life in 1981. Over the past 22 years, Clark has been disciplined once by prison officials. His infraction was hanging a clothesline across his cell. With no violent behavior, Clark lived in the general population for 17 of those years. He worked as a clerk, bookkeeper, assistant to the chaplain, and had a job in the prison library. A state-paid expert at his trial, after speaking with Clark for less than three hours, had convinced the jury that Clark would be a continuing threat to any society he inhabited.¹⁵²

A State expert testified: “For Jeremiah O’Pry I would say the prognosis is bleak. . . . The prognosis would be an expectation that he will cause difficult[y] for people in the future.”¹⁵³ When asked if O’Pry would have regard for the life of other persons, including inmates and guards, the expert responded, “Very little to no regard.”¹⁵⁴ Jeremiah O’Pry was sentenced to death but later had his sentence commuted to life. After serving more than 25 years in prison, he has been written up only for having dirty cell bars, wearing another inmate’s shirt, and possessing a fan.

Since having his death sentence commuted to life, Doyle Boulware has earned a Bachelor of Science Degree in Psychology and is awaiting placement in a master’s program for literature.¹⁵⁵ After hearing a state-paid expert testify at his trial that he would be a danger in the future, a jury sentenced him to death. Boulware has not received any disciplinary violations for assaultive or disruptive behavior. He has not been disciplined at all since 1988. Over 28 years his disciplinary infractions include making a false statement, failing to report to training, and being late for work. Boulware earned trustee status and has worked as a clerk in the Narcotics and Alcoholics Anonymous Office.¹⁵⁶

¹⁴⁹ *Id.* at 2947.

¹⁵⁰ *Id.* at 2807.

¹⁵¹ Correspondence from Jeff Shaw, investigator for Texas Special Prosecutions Unit, to Dallas Assistant District Attorney, on file with author and attached as Appendix One.

¹⁵² Statement of Facts at 1519, *Clark v. State*, 627 S.W.2d 693 (Tex. Crim. App. 1981).

¹⁵³ Statement of Facts at 605-06, *O’Pry v. State*, 642 S.W.2d 748 (Tex. Crim. App. 1982).

¹⁵⁴ *Id.* at 607.

¹⁵⁵ Correspondence on file with author.

¹⁵⁶ Correspondence from Jeff Shaw, investigator for Texas Special Prosecutions Unit, to Dallas Assistant District Attorney, on file with author and attached as Appendix One.

“Not all of us are hopelessly bad people, just people who did bad things out of ignorance or stupidity.”

— *Selwyn Gholson*

In the 22 years Rodriguez has spent serving a life sentence, he has been disciplined only for infractions such as stealing coffee, talking in the hallway, destroying a pillow, and “trafficking”—passing a bag of potato chips from one inmate to another.

Selwyn Gholson completed high school, earned two college degrees, and maintained a 3.66 grade-point average in school since his death sentence was commuted to life. Gholson has been sanctioned fewer than five times for minor disciplinary infractions. Testimony from two State-paid witnesses labeled him as a continuing threat to society. Twenty-eight years after being incarcerated, Gholson says he has changed his life and notes: “Not all of us are hopelessly bad people, just people who did bad things out of ignorance or stupidity.”¹⁵⁷

The jury determining Magdaleno Rodriguez’s fate was told that: “He absolutely will [kill again], regardless of whether he’s inside an institutional-type setting or whether he’s outside. No matter where he is, he will kill again.”¹⁵⁸ The expert persuaded the jury, and Rodriguez was condemned to die. The CCA later reduced his sentence to life, citing an unrelated legal error. In the 22 years Rodriguez has spent serving a life sentence, he has been disciplined only for infractions such as stealing coffee, talking in the hallway, destroying a pillow, and “trafficking”—passing a bag of potato chips from one inmate to another.

Many other inmates condemned to die based on jury predictions of future dangerousness have proven to be non-assaultive, compliant inmates who pose no risk to other inmates or prison guards—even though they are imprisoned in less secure facilities than death row and have more opportunity to attack others, possess weapons, or abuse drugs and alcohol.

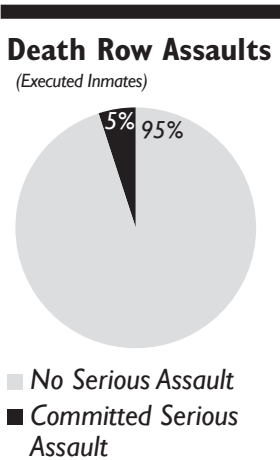
Some inmates have received disciplinary reports for offenses bordering on the ridiculous, including a report against an inmate for possessing a can of jalapeños. These non-assaultive inmates epitomize the failings of the “future dangerousness” question and reflect the arbitrary and unreliable outcome resulting from the expert predictions in the sentencing process.

¹⁵⁷ Correspondence on file with author.

¹⁵⁸ *Rodriguez v. State*, 597 S.W.2d 925 (Tex. Crim. App. 1980).

C. No Turning Back: Executed Inmates

Sixty-seven of the 155 inmates (43%) have been executed. The average length of their incarceration before execution was 11 years and ten months. Of the 67 executed, only three (5%) engaged in seriously assaultive behavior.¹⁵⁹ One of those three inmates was prosecuted for and convicted of aggravated assault.¹⁶⁰ Eleven of the 67 (17%) had no disciplinary violations at all.



Napolean Beazley was executed on May 28, 2002, for a crime committed when he was seventeen years old. Convicted of the murder of John Luttig during a car-jacking, Beazley was predicted to be a future danger and after this testimony, was sentenced to death. A successful student, star athlete, and church member with no prior arrests, Beazley admitted responsibility for his crime and expressed extreme remorse. A stream of mitigation witnesses appeared on Beazley's behalf but a state-paid expert testified that Beazley would pose a continuing threat to society. Incarcerated on

death row for over eight years before his execution, Beazley did not prove to be assaultive, combative or dangerous to other inmates or guards. He incurred only three disciplinary infractions—possessing too many bed sheets and shirts, soliciting the assistance of another to break a rule, and possession of contraband (\$40 in cash someone had sent him in the mail).

Stanley Faulder was convicted and sentenced to death for the murder of Inez Phillips in 1977.¹⁶¹ Three state-hired psychologists testified that Faulder posed a grave danger to others even behind bars.¹⁶² Without interviewing Faulder, the witnesses convinced the jury that Faulder would commit violent acts in the future. One doctor claimed that Faulder would be unable to learn from punishment.¹⁶³

One of the three predicting future dangerousness testified: “Faulder is at the very extreme of your extremely severe sociopath. He can't become any more severe except in terms of numbers. . . . There is absolutely nothing we have in medicine or psychiatry, nothing that is known in terms of rehabilitation that has ever worked. We don't have anything.”¹⁶⁴

¹⁵⁹ In one of these cases, the inmate caused a half-inch cut to an officer's finger. Records did not indicate whether treatment above first aid was required. This incident has been included in the “serious assaultive behavior” category for the sake of caution.

¹⁶⁰ In addition to this one inmate, Juan Soria assaulted a prison chaplain twenty days prior to his execution. Although disciplinary records were filed documenting the assault and the Special Prosecution's Unit investigated the incident, he was not prosecuted given his impending execution date. Records on file with author. Soria was executed on July 26, 2000. Texas Department of Criminal Justice, *Executed Offenders*, available at <http://www.tdcj.state.tx.us/stat/executedoffenders.htm>

¹⁶¹ Jim Henderson, *Albright Joins Effort to Spare Canadian's Life; Texas Inmate's Execution Scheduled for Next Week*, HOUS. CHRON., Dec. 2, 1998, at A1.

¹⁶² *Faulder v. State*, 745 S.W.2d 327, 329 (Tex. Crim. App. 1987) (No. 69,077).

¹⁶³ Statement of Facts, Vol. 5 at 884, *Faulder v. State*, 745 S.W. 2d 327 (No. 69,077).

¹⁶⁴ *Id.* at 1127-28.

Despite Faulder having no violent criminal history and no record of disciplinary problems during his incarceration prior to trial, the jury found Faulder a future danger and sentenced him to death. Faulder was received on death row in December of 1977 and resided there until his execution in June of 1999. He spent over twenty-two years on death row with no assaultive behavior. He was 61 years old when executed.

Noble Mays was convicted in the 1979 murder of Jerry Lamb. When asked where Mays would be on a scale of anti-social personalities, the State witness testified that Mays would be “at the high end of it. If you could go higher than ten, he’d be higher, but certainly, at the very end of the scale. . . . It really doesn’t make any difference in any type of setting or environment, he’s going to be the same type person.”¹⁶⁵ Mays did not receive any disciplinary violations for assaultive behavior during his 14 years on death row. He was executed on April 6, 1995.

Proponents of the future dangerousness inquiry point to Juan Soria in literature as the best “example . . . of the superior ability of a jury to correctly assess the facts and determine whether a convict constitutes a future danger.”¹⁶⁶ Twenty days from his execution, Soria assaulted a prison chaplain, cutting his arm with razor blades. However, for every Juan Soria there are 26 other inmates who have not proven violent.

The same prosecutors who cited Soria as an example of the effectiveness of the future dangerousness inquiry also singled out Aaron Fuller, who was sentenced to death for the 1989 murder of Loretta Stephens. After describing Fuller’s gruesome crime, the authors chalked up the jury’s future dangerousness determination to common sense: “The reader need only make a common-sense inquiry to see the logic of the system. Would the reader want to share a jail cell with Aaron Fuller?”¹⁶⁷ While calling the jury’s ability to see into the future “superior” with respect to the *Soria* case, the authors fail to acknowledge the jury’s inaccurate prediction in the *Fuller* case. In fact, many prisoners might have preferred to share a cell with Fuller. Fuller was executed on November 6, 1997, without having engaged in any seriously assaultive behavior. Fuller’s disciplinary records indicate he violated rules by wearing tennis shoes to work, and by possessing cigarettes and an extra shirt.

Many other executed inmates against whom state witnesses testified committed disciplinary infractions while in prison not amounting to assaultive behavior. Among the transgressions were possessing cookies, throwing a tomato, refusing to shave, and drawing a picture on a cell wall. One condemned inmate failed to turn out for work in a timely manner three times and possessed a V-neck shirt. One was disciplined once for leaving commissary goods unstored

¹⁶⁵ Statement of Facts, Vol. ___ at 62, *Mays v. State*, 726 S.W.2d 937 (Tex. Crim. App. 1986) (No. 68,824).

¹⁶⁶ Goldberg & Bunn, *supra* note 64, at 131.

¹⁶⁷ *Id.* at 132.

in his cell. Another's misbehavior was failing to get his hair cut. None of these offenses, however, posed a threat to fellow inmates or prison officials.

D. Inmates Currently on Death Row

Forty of the 155 total inmates studied currently reside on death row. The average time of their incarceration is 7.92 years. Collectively, the inmates have served more than 388 years. Three death row inmates (7%) have committed assaults requiring treatment beyond first aid.¹⁶⁸ None of these inmates has been prosecuted or convicted by the Special Prosecutions Unit for a crime committed in prison.

Death Row Assaults

(Inmates Awaiting Execution)



Gustavo Garcia was convicted of the 1990 murder of Craig Turski, which occurred during the robbery of a liquor store in Plano, Texas. Garcia was 18 years old at the time of the offense. After conviction, the State called a psychologist who told the jury that poor people are more “risky than non-poor people,”¹⁶⁹ and, after detailing the degree to which weapons and drugs were available in the prison setting, informed the jury that Garcia was “more likely than not to—to be a continuing threat to society.”¹⁷⁰ A second State expert testified that there was “more

than ample data for a mental health expert to affirmatively predict that this man will be a continuing threat of violence, whether in a prison society, in jail, or on the streets.”¹⁷¹ After more than ten years on death row, however, Garcia has not received any disciplinary violations for assaultive behavior.

Joe Lee Guy was convicted and sentenced to death for his role as the lookout in the botched robbery of a convenience store during which the owner, Larry Howell, was killed. While Guy remained outside the store, Thomas Howard and Richard Springer went inside, robbed the store, and shot the owner. Guy had no history of violent criminal behavior, so the State commissioned two experts to convince the jury of the need to impose a death sentence.

¹⁶⁸ In two of these three cases, records were unclear about the extent or existence of injuries. In one case, an inmate was investigated for aggravated assault, but no information was available regarding the extent of the injuries, if any. In the other case, the offender is alleged to have swiped at another inmate with a razor blade. Records do not indicate that contact was made or injuries sustained. These inmates have been included in the “serious assaultive behavior” category for the sake of caution.

¹⁶⁹ Testimony of Dr. Walter Quijano, Statement of Facts, Vol. 70 at 855, *Garcia v. State*, 919 S.W.2d 370 (Tex. Crim. App. 1994) (No. 71,417). Another psychologist testified that economics can contribute to violence: “There is also another stressor which is other intense stressors likely to stimulate primitive impulses for survival, and in his case there is a history of chronic money problems. He’s poor.” Statement of Facts at 218, *State v. Murphy*, (Tex. Crim. App. 2000) (No. 73,194).

¹⁷⁰ Quijano testimony, *supra* note 169, at 908.

¹⁷¹ Testimony of Dr. Jerry Landrum, Statement of Facts, Vol. 72 at 1463, *Garcia v. State*, 919 S.W.2d 370.

The prosecutor, in closing argument, invoked the special credibility of its degreed witnesses and implored the jury: “Will you do what the doctor says?”

One expert, who testified in another case that examining a defendant would be “a hindrance in comparison to [the state using] a hypothetical question” to elicit his opinion of future dangerousness,¹⁷² readily testified that Guy would continue to be a threat to society. Despite having never spoken to Guy, the doctor told the jury that the likelihood of Guy’s violent recidivism was “ninety-nine, a hundred percent.”¹⁷³ A second State-paid expert agreed with the first and emphasized that “there is a lot of violence in the penitentiary.”¹⁷⁴ The prosecutor, in closing argument, invoked the special credibility of its degreed witnesses and implored the jury: “Will you do what the doctor says?”¹⁷⁵

Guy was the only of the three participants in the crime to receive a death sentence, although Guy remained outside the store and did not shoot the owner. Guy has been on death row for over eight years. He has incurred minor disciplinary infractions six times, including refusing to shave, hanging a curtain in his cell and possessing more clothing than allowed by regulation. Guy has posed no threat of violence to other inmates or guards. Because of other issues of unfairness, in 2004, the Texas Board of Pardons and Paroles recommended to the Governor that Guy’s sentence be commuted to life in prison. The Governor has not yet acted on that recommendation.

Other predictions of future violence have proven unwarranted. Their disciplinary records consist of technical violations of prison regulations. For example, one inmate possessed cigarettes. One possessed tobacco, refused to come in quickly from recreation, and was unnecessarily noisy in his cell. Another refused to shave. Others condemned were disciplined for infractions such as possession of a playing card, banging a metal box against a toilet, refusing to shave, and having an “extreme” haircut.

III. Conclusion

This study reveals state-paid expert predictions were inaccurate 95% of the time. This error rate caused an over-inclusion of non-violent inmates among those who were condemned to death.

In imposing death sentences, juries sought to protect society—the prison society of guards and other inmates, and the community at large—from inmates

¹⁷² See *Flores v. Johnson*, 210 F.3d 456, 467 (5th Cir. 2000).

¹⁷³ Statement of Facts, Vol. 19 at 175, *Guy v. State*, (Tex. Crim. App. 1996) (No. 71,913).

¹⁷⁴ *Id.* at 196.

¹⁷⁵ *Id.* at 38.

they were assured would commit serious acts of violence or kill again. Juries did not impose a death sentence out of concern that an inmate might illegally possess cookies or jalapeños while incarcerated. They did not seek to execute inmates who they thought might hang a sheet up as a curtain in their cell, yell an obscenity in the hallway, or refuse to shave. Yet the present system pressures juries to choose death for inmates who are able to peaceably co-exist in an institutional setting with other inmates and guards, regardless of the nature of their crime.

4

A House of Cards: Dangers in Forecasting the Future

I. Questionable Use of the Past to Prove the Future

“You take what we know about him: He’s been to the penitentiary. Did he get off dope when he went to the pen for dope? No. He goes on to heroin. You take that evidence, you stick it together with [this offense] and then you ask yourself is there a probability, more than not, that if this man were allowed to reenter society he would commit criminal acts of violence? Is there any doubt in your mind whatsoever? Nobody can say for certain, but we can darn sure say there’s a probability.”¹⁷⁶

— Prosecutor’s Closing Argument

The Texas Rules of Evidence generally prohibit the introduction of character evidence¹⁷⁷ and specifically exclude “evidence of other crimes, wrongs or acts” when used “to prove the character of a person in order to show action in conformity therewith.”¹⁷⁸ At the guilt-innocence phase of the trial, this prohibition is intended to protect defendants from convictions based upon a troubled past rather than based upon the actual evidence of the pending charge. By tainting a defendant’s presumption of innocence in the eyes of the jury, bad character evidence relieves the state of its burden to prove guilt beyond a reasonable doubt.

¹⁷⁶ Grijalva v. State, 614 S.W.2d 420 (Tex. Crim. App. 1980).

¹⁷⁷ TEX. R. EVID. § 404(a).

¹⁷⁸ *Id.* at § 404(b).

During the punishment phase of a capital murder trial, however, evidence “as to any matter that the court deems relevant to sentence, including evidence of the defendant’s background or character” may be presented to prove future dangerousness.¹⁷⁹ The CCA has interpreted this statement to include evidence of the commission of unadjudicated extraneous offenses—offenses which have not been charged, tried or proven in any court¹⁸⁰—and even the details of such offenses.¹⁸¹

In cases where the gravest punishment is at stake, the Court of Criminal Appeals allows the use of the least reliable and most prejudicial evidence.

In cases where the gravest punishment is at stake, the Court of Criminal Appeals allows the use of the least reliable and most prejudicial evidence. The lenient standard of proof applicable to this bad-character evidence worsens the problem of unreliability. The CCA ostensibly requires the state to “clearly prove” the defendant committed an extraneous offense before the jury can consider it.¹⁸² However, the “clear proof” standard calls only for evidence “connecting a defendant with an alleged extraneous offense” to “ensure a minimum threshold of reliability.”¹⁸³ This barely perceptible admissibility standard lets the state put untested facts before the jury.

Whatever the “clearly proven” standard means, it falls well short of the standard required by law on questions of guilt in a criminal court: proof beyond a reasonable doubt. Consequently, despite the heightened reliability required of capital murder cases, the CCA has actually lowered the threshold of proof applicable to critical punishment-phase evidence.

Courts have even approved the introduction of facts of an offense of which a defendant had been *acquitted* at trial. In *Powell v. State*, prosecutors were allowed to introduce facts related to an attempted murder charge.¹⁸⁴ Although the facts of this alleged offense were tested by a jury that found Powell not guilty, prosecutors were allowed to ask the jury to consider those charges when deciding Powell’s fate. In *Rachel v. State*, prosecutors urged jurors to consider evidence of a previous alleged murder when deciding whether the defendant would pose a continuing threat to society.¹⁸⁵ However, a grand jury failed to indict Rachel on that charge, finding that Rachel had acted in self-defense. Prosecutors in both

¹⁷⁹ TEX. CRIM. PROC. CODE art. 37.071, § 2(a)(1) (Vernon 2001).

¹⁸⁰ *Hammett v. State*, 578 S.W.2d 699, 709 (Tex. Crim. App. 1979); *Garcia v. State*, 581 S.W.2d 168, 178-79 (Tex. Crim. App. 1979), *vacated on other grounds sub nom. Garcia v. Texas*, 453 U.S. 902 (1981); *Wilder v. State*, 583 S.W.2d 349, 361 (Tex. Crim. App. 1979), *vacated on other grounds sub nom. Wilder v. Texas*, 453 U.S. 902 (1981), *overruled on other grounds by Green v. State*, 682 S.W.2d 271, 287 (Tex. Crim. App. 1984).

¹⁸¹ *See Davis v. State*, 597 S.W.2d 358, 361 (Tex. Crim. App. 1980) (permitting details of extraneous offenses in punishment phase of capital trial). *But cf. Johnson v. State*, 650 S.W.2d 784, 792 (Tex. Crim. App. 1983) (prohibiting details of extraneous offenses in punishment phase of non-capital trial under statute then in effect).

¹⁸² *Hughes v. State*, 24 S.W.3d 833, 843 (Tex. Crim. App. 2000) (citing *Harris v. State*, 827 S.W.2d 949, 961 (Tex. Crim. App. 1991)).

¹⁸³ *Kemp v. State*, 846 S.W.2d 289, 307 (Tex. Crim. App. 1992).

¹⁸⁴ *Powell v. State*, 898 S.W.2d 821 (Tex. Crim. App. 1994)

¹⁸⁵ *Rachel v. State*, 917 S.W.2d 821 (Tex. Crim. App. 1996).

of these cases were allowed to introduce testimony and argue that these acts evidenced future dangerousness despite the results of the prior charges.

Further adding to the unreliability of evidence of prior offenses presented in capital cases, the CCA permits the introduction of uncorroborated accomplice testimony concerning offenses that the defendant allegedly committed with the witness.¹⁸⁶ In most other contexts, accomplice testimony must be corroborated because courts view such testimony with considerable skepticism.¹⁸⁷ Even the CCA has acknowledged the shortcomings of accomplice testimony:

This suspicion and fear of perjury is not without reason. Accomplices often strike bargains with the state, where the prosecuted agrees to a favorable sentencing recommendation in exchange for the accomplice's testimony against another person. . . . In addition, those accused of crimes tend to try to place the responsibility for the commission of the crime on the other participants while downplaying their own participation, often in order to avoid the consequences of criminal acts.¹⁸⁸

Because the death penalty is qualitatively different from other punishments,¹⁸⁹ "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."¹⁹⁰ Functionally, there are no standards limiting the admissibility of such evidence, regardless of how unreliable the sources. Juries therefore hear a litany of wrongful acts ostensibly committed by the defendant but never proven in a court of law as proof of his danger to society.

For example, during the punishment phase of Larry Estrada's case, Harris County prosecutors introduced testimony that Mr. Estrada committed an armed home invasion.¹⁹¹ The prosecutors offered the testimony of one of the victims, who positively identified Mr. Estrada as one of two men who: entered

¹⁸⁶ See, e.g., *Thompson v. State*, 691 S.W.2d 627, 633 (Tex. Crim. App. 1984).

¹⁸⁷ *Blake v. State*, 971 S.W.2d 451, 460 (Tex. Crim. App. 1998) (en banc) (citing *Benson v. United States*, 146 U.S. 325, 335 (1892)); see also TEX. CRIM. PROC. CODE ANN. art. 38.14 (West 2002); see generally 25 J. LEE BALDWIN ET AL., TEXAS JURISPRUDENCE CRIMINAL LAW § 3999 (3d ed. Supp. 2002).

¹⁸⁸ *Blake v. State*, 971 S.W.2d 451, 460 (Tex. Crim. App. 1998) (en banc) (citations omitted). One method of correcting the influence of unreliable evidence on questions of future dangerousness could be through the use of jury instructions, which would explain the State's obligation to prove the prior offense beyond a reasonable doubt. Instead, CCA opinions regarding jury instructions fail to adequately remedy this problem. Texas courts routinely fail to instruct jurors that for them to consider the prior conduct, the State must prove the act beyond a reasonable doubt. Without these instructions, juries are impliedly permitted to assume the truth of any uncharged prior offense. See *Tong v. State*, 25 S.W.3d 707, 711 (Tex. Crim. App. 2000) (citing *Jackson v. State*, 992 S.W.2d 469, 477 (Tex. Crim. App. 1999)). Further, courts have refused to submit to the jury special verdict forms on which the jury would indicate whether the state had proven the prior offense beyond a reasonable doubt. The CCA has upheld these refusals. See, e.g., *Prystash v. State*, 3 S.W.3d 522, 534 (Tex. Crim. App. 1999).

¹⁸⁹ *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

¹⁹⁰ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

¹⁹¹ *State v. Estrada*, No. 746585, (262 Dist. Ct., Harris County, Tex., Feb. 19, 1989).

the victim's apartment, bound the victim and his roommate, put guns to their heads, threatened to kill them, and then robbed them. The defense objected only after the jury heard the victim's entire harrowing tale of being bound and threatened with death.¹⁹² The objection was based on the fact that Mr. Estrada was in jail for another offense on the day of the robbery and could not have committed it, despite the victim's positive in-court identification (the prosecutor brought both victims to the courtroom, but one could not positively identify Mr. Estrada so he was not called to testify).¹⁹³ The judge refused to declare a mistrial but instructed the jury to disregard the testimony.¹⁹⁴ Because prosecutors are not required to prove that the defendant committed the alleged extraneous acts beyond a reasonable doubt, there is no incentive for the State to avoid this sort of negligent behavior.

Capital defendants, often poor and uneducated, are forced to defend as many charges as there are people willing to step forward and point a finger. In a best-case scenario, the ineffective jury instructions following such a prejudicial presentation simply leave the jury confused about how to treat such evidence of unproven, uncharged bad acts. That the state could use an act to punish a defendant with the penalty of death when it would fail to prove the commission of the act beyond a reasonable doubt in court reflects the trappings of a system designed to compel a death sentence, rather than determine its appropriateness.

II. Racial Bias in Future Dangerousness Guesses

*“Because of the range of discretion entrusted to a jury in a capital sentencing hearing there is a unique opportunity for racial prejudice to operate but remain undetected...a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief.”*¹⁹⁵

— U.S. Supreme Court Justice White

Justice White recognized the risk that the race of the juror and race of the defendant may affect the decision that a minority defendant will likely pose a continuing threat to society. In at least seven Texas death row cases, that risk

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Turner v. Murray*, 476 U.S. 28, 35 (1986).

became a reality when a licensed psychologist testified that being a member of a minority race makes a defendant more dangerous.

A Texas jury sentenced Victor Saldaño, a native of Argentina, to death by lethal injection in 1996. Dr. Walter Quijano, who testified about Saldaño's future dangerousness, claimed that a number of factors, including race, could be used to assess whether or not a defendant would pose a future danger to society.¹⁹⁶ Quijano cited statistics analyzing crime rates by racial subgroup.¹⁹⁷ After hearing Quijano describe Hispanics as more likely to engage in crime, the jury found Saldaño a future danger and sentenced him to death.

Saldaño appealed his conviction and death sentence to the Texas Court of Criminal Appeals, and vigorously challenged Quijano's testimony. The CCA, however, refused to even consider the claim since Saldaño's trial attorney had, incredibly, failed to object to the testimony. Rather than considering the possible influence of racial prejudice on Saldaño's sentence, the majority concluded that the error had not been preserved for review.¹⁹⁸ The court also denied his claim of ineffective assistance of counsel because his appellate lawyer failed to object.

Saldaño appealed the CCA's decision to the U.S. Supreme Court. The State of Texas admitted to the U.S. Supreme Court that Quijano's testimony had "seriously undermined the fairness, integrity or public reputation of the judicial process."¹⁹⁹ The Supreme Court sent the case back to the CCA for consideration of the State's confession of error.

On remand, the Texas Court of Criminal Appeals again refused to hear Saldaño's claim of racial bias on the grounds that the issue had not been preserved for appellate review.²⁰⁰ The CCA denied Saldaño a hearing as to whether or not the biased testimony from Quijano violated his rights. The decision tolerates racial bias in the sentencing process, and worse, advocates a lethal emphasis of form over substance.

And the problem does not end with Victor Saldaño. Quijano's testimony has also been used to condemn to death at least six other minority defendants who are currently on death row.²⁰¹ Quijano served as an expert witness on fu-

¹⁹⁶ Saldaño v. State, 70 S.W.3d 873, 884 (Tex. Crim. App. 2002).

¹⁹⁷ *Id.* at 885.

¹⁹⁸ *Id.* at 891.

¹⁹⁹ Some Texas counties did not agree with this position taken on behalf of the State of Texas by then-Attorney General John Cornyn and sought to avoid conceding this error. *See* Saldaño v. O'Connell, 322 F.3d 365 (5th Cir. 2003).

²⁰⁰ Saldaño v. State, 70 S.W.3d 873, 884 (Tex. Crim. App. 2002). In 2001, the Texas Legislature amended article 37.071 by prohibiting the state's use of race as a factor the jury can consider in capital sentencing. TEX. CRIM. PROC. CODE ANN. art. 37.071§ (2)(a)(2) (Vernon 2001).

²⁰¹ *See* testimony of Dr. Quijano, testifying that black men would be more likely to be violent in part because of race, in the following cases: State v. Blue, (Tex. Crim. App. 1996) (No. 72,106); Broxton v. State, 909 S.W.2d 912 (Tex. Crim. App. 1995) (No. 924026); State v. Buck, (Tex. Crim. App. 1999)(No. 72,810). *See also* Garcia v. State, 57 S.W.3d 436, 438-40 (Tex. Crim. App. 2001), and State v. Michael Gonzales, (Tex. Crim. App. 1998) (No. 72,317), in which Dr. Quijano testified that Hispanic men would be more violence-prone based in part on their race. In some cases Quijano's testimony was proffered by the defendant.

ture dangerousness in numerous other trials, including cases in which inmates have already been executed.²⁰²

Less obvious, unconscious racial biases infect the future dangerousness question.²⁰³ Studying jurors from seventy capital murder cases, the Capital Jury Project discovered that black and white jurors viewed future dangerousness differently.²⁰⁴ Despite jury instructions intended to ensure uniformity, jurors of different races had disparate views and concerns about a defendant's future dangerousness upon potential release back into society. The study found that white jurors thought black defendants were more dangerous than white defendants and believed that black defendants could be paroled sooner from prison than whites even when no evidence had been presented as to these points.²⁰⁵

The study found that jurors discussed two factors regarding a defendant's dangerousness—likelihood to be released into society and need to prevent defendant from killing again—more in cases with a black defendant and white victim than in cases with a white defendant and white victim.²⁰⁶ White jurors reported 43% of the time that the defendant's proclivity towards future dangerousness made them “much more likely” to vote to impose death. Only 8% of black jurors in the same cases agreed with the finding of future dangerousness.²⁰⁷

The research from the Capital Jury Project posits that differences in white and black jurors' perceptions of defendants' future dangerousness stem from divergent personal experiences, assumptions about causes of crime, and levels of trust in the criminal justice system.²⁰⁸ Regardless of the cause of the disparity, the study illustrates clearly that both the jurors' and the defendant's race have an undeniable effect on determinations of future dangerousness and sentencing decisions in capital cases.²⁰⁹

By legitimizing racial biases already held by many jurors, expert testimony increases the likelihood that jurors will inappropriately act upon those prejudices. The Court of Criminal Appeals' refusal to hear Saldaño's claim undermined the legitimacy of the Texas criminal justice system by implicitly endorsing death sentences based partly on race.

²⁰² Dr. Quijano also testified in the trials of some inmates who have been executed since 1982. James Kimberly, *Death Penalties of 6 in Jeopardy; Attorney General Gives Result of Probe into Race Testimony*, HOUS. CHRON., June 10, 2000, at A1.

²⁰³ See Kathryn Roe Eldridge, *Racial Disparities in the Capital System: Invidious or Accidental?*, 14 CAP. DEF. J. 305, 317 (2002) (concluding that the jury selection procedures ensure that “an African American is more likely to face a jury which will be more prone to sentence him to death on the future dangerousness predicated out of subconscious fears based on his race.”).

²⁰⁴ William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).

²⁰⁵ *Id.* at 222-23.

²⁰⁶ *Id.* at 224.

²⁰⁷ *Id.* at 225.

²⁰⁸ *Id.* at 264.

²⁰⁹ *Id.* at 266.

III. Painting Juries into a Corner: Absence of Life-without-Parole Option

“[T]here is an effective alternative to burning the life out of human beings in the name of public safety. That alternative is just as permanent, at least as great a deterrent and—for those who are so inclined—far less expensive than the exhaustive legal appeals required in capital cases. That alternative is life imprisonment without the possibility of parole.”

—Mario Cuomo

“You’re not going to find twelve people back-to-back on the same jury that are going to kill someone when the alternative is throwing away the key.”

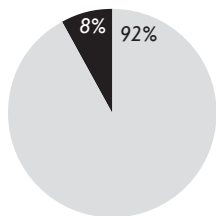
—Former Harris County District Attorney Johnny Holmes

“Allowing juries to ‘opt out’ of execution for life without parole ‘would lead to the abolition of the death penalty.’”

—Harris County District Attorney Chuck Rosenthal²¹⁰

The absence of an option for the jury to sentence capital defendants to life without the possibility of parole compounds the risk of erroneous sentences. A

Life-Without-Parole Option in Death Penalty States



■ Available
 ■ Not Available
 (Kansas, New Mexico, Texas)

jury that has just heard misleading and highly inflammatory future dangerousness testimony, and is then informed that the defendant might be back on the streets, might act on their fears and sentence the defendant to death, even though in their hearts the individual jurors doubt that the defendant is so culpable that he warrants such a punishment. But even if one doubts such a knee-jerk reaction by jurors, the fact that they can only prevent the defendant from leaving prison by sentencing him to death cannot help but color their deliberations and prejudice them toward imposing a death sentence.

²¹⁰ Mario Cuomo, Editorial, *New York State Shouldn't Kill People*, N.Y. TIMES, June 17, 1989, §1 at 23., Citizens United for Alternatives to the Death Penalty, *What Do You Really Know About the Death Penalty?*, available at http://www.cuadp.org/ev_reports/infolyer.pdf, quoting Johnny Holmes. “John B. Holmes Jr., who almost single-handedly beat back life without parole for years because, as he put it, some people just did not deserve to live. By no coincidence, Harris County leads the nation in death penalties assessed by a single jurisdiction.” Mike Tolson, “Death Penalty Reforms Sought” HOUS CHRON., Feb. 7, 2001, Michael King, *Tinkering with the Machinery of Death*, AUSTIN CHRON., Mar. 9, 2001, Vol. 20, No. 28, available at http://www.austinchronicle.com/issues/dispatch/2001-03-09/pols_capitol.html (quoting Harris County District Attorney Chuck Rosenthal).

Texas is one of only three death penalty states that fails to provide juries with the option of a life-without-parole sentence.²¹¹ The remaining thirty-five death penalty jurisdictions make this sentence available to capital juries.

Fred Baca, jury foreman in the capital murder trial of Bobby Moore, describes the role future dangerousness played in the jury's death verdict.

I can tell you that nobody in that room thought that he was going to spend his whole life in prison on a life sentence. If there had been such a thing as life without parole that would have done it for us. That would have made a huge difference to us. We would have had number two right there. [referring to special issue No. 2, future dangerousness]. . . . With a model prisoner, the assumption was that he had already served half of his sentence. It was an assumption that he would get parole. The 20 years was the thing—life without parole would have meant everything.²¹²

Opponents of the life-without-parole option argue against it knowing that its enactment would reduce the number of death sentences.²¹³ Despite the political rhetoric that people overwhelmingly support the death penalty, polling reflects that support for capital punishment drops to less than 50% when the jury has a life-without-parole option.²¹⁴

²¹¹ Only Kansas, New Mexico, and Texas do not provide juries with a life-without-parole option. Kansas has not executed an inmate since the reinstatement of the death penalty and currently has only seven inmates on its death row. New Mexico has two inmates currently on death row and has executed one inmate since 1976. See Death Penalty Information Center, *Death Row U.S.A.* (Mar. 1, 2004), available at <http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf>.

²¹² Interview with Fred Baca, foreman of the jury in *State v. Moore*, 700 S.W. 2d 193 (Tex. Crim. App. 1985) (No. 68,871), on file with author, (Feb. 16, 2001). Some studies have found that despite instructions in capital cases regarding the length of time the defendant would serve before parole eligibility, jurors often disbelieve the instructions concerning the minimum time for parole eligibility and think that defendants can be released much earlier than legally possible. See, e.g., John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always at Issue*, 86 CORNELL L. REV. 397 (2001), in which authors report that average jurors in South Carolina believed that a capital defendant serving a life sentence only remains in prison for seventeen years; Dieter, *supra* note 36 (quoting the late Judge Charles Weltner of the Georgia Supreme Court: "Everybody believes that a person sentenced to life for murder will be walking the streets in seven years.") (internal citation omitted).

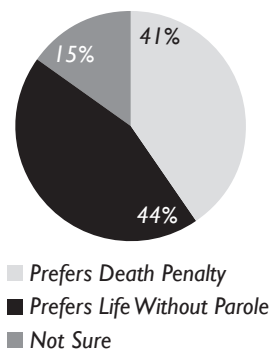
²¹³ See Tabak, *supra* note 46 (addressing the political debate in New York in which some opposed life without parole because, as they publicly acknowledged, allowing that option would weaken the death penalty). See also Elizabeth Kolbert, *As Vote on Death Penalty Nears, Cuomo Advocates Life Sentences*, N.Y. TIMES, June 19, 1989, at B10; Testimony of Jim Gibson, Assistant District Attorney, Tarrant County, before Senate Committee on Criminal Justice, Apr. 1, 2003, available at <http://www.senate.state.tx.us/75r/Senate/AVarch.htm>; Citizens United for Alternatives to the Death Penalty, *What Do You Really Know About the Death Penalty?*, available at http://www.cuadp.org/ev_reports/infoflyer.pdf (quoting former Harris County District Attorney John B. Holmes: "You're not going to find twelve people back-to-back on the same jury that are going to kill someone when the alternative is throwing away the key."); Michael King, *Tinkering with the Machinery of Death*, AUSTIN CHRON., Mar. 9, 2001, Vol. 20, No. 28, available at http://www.austinchronicle.com/issues/dispatch/2001-03-09/pols_capitol.html (quoting Harris County District Attorney Chuck Rosenthal who "expressed the prosecutors' real fears: Allowing juries to 'opt out' of execution for life without parole 'would lead to the abolition of the death penalty.'").

²¹⁴ Dieter, *supra* note 36. Life-without-parole option included restitution to the victim's family.

The presence of a life-without-parole option would not make predictions of future dangerousness any more reliable. However, by introducing future dangerousness evidence into the sentencing determination in

every case and failing to give juries the life-without-parole option, Texas gives this untrustworthy evidence the greatest potential to pervert the most profound of judicial determinations and damage the confidence that death sentences are more than merely the function of passion and prejudice.

Public Opinion on Life-Without-Parole Option



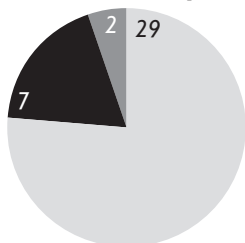
IV. Texas: Apart from the Other States

Perhaps recognizing that predictions of future dangerousness are speculative and unreliable, the majority of states do not require sentencing jurors to address future dangerousness. Of the 38 states that impose the death penalty, 29 do not consider “future dangerousness” at all in their capital sentencing procedures.²¹⁵

²¹⁵ See ALA. CODE § 13A-5-47 (West 2003); ARIZ. REV. STAT. ANN. § 13-703 (West 2003); ARK. CODE ANN. § 5-4-603 (Michie 2003); ARK. CODE ANN. § 5-4-604 (Michie 2003); CAL. PENAL CODE § 190.3 (West 2003); CONN. GEN. STAT. ANN. § 53a-46a (West 2003); DEL. CODE ANN. Tit. 11, § 4209, *amended by* 2003 Del. Laws Ch. 174 H.B. 287 (2003); FLA. STAT. ANN. § 921.141 (West 2003); GA. CODE ANN. § 17-10-30 (2003); GA. CODE ANN. § 17-10-31.1 (2003); IDAHO CODE § 19-2515 (Michie 2003); ILL. COMP. STAT. ANN. 5/9-1 (2003); IND. CODE ANN. § 35-50-2-9 (West 2003); K.S.A. § 21-4624 (2003); K.S.A. § 21-4625 (2003); KY. REV. STAT. ANN. § 532.025 (2) (Michie 2003); LA. REV. STAT. ANN. § 14:30 (West 2003); MISS. CODE ANN. § 99-19-101 (2003); MISS. CODE ANN. § 99-19-103 (2003); V.A.M.S. 565.032 (2003); MONT. CODE ANN. § 46-18-301 (2003); MONT. CODE ANN. § 46-18-303 (2003); MONT. CODE ANN. § 46-18-304 (2003); NEB. REV. STAT. ANN. § 28-105.01 (4) (Michie 2003); NEB. REV. STAT. ANN. § 29-2520 (Michie 2003); NEB. REV. STAT. ANN. § 29-2523 (Michie 2003); NEV. REV. STAT. ANN. 175.552 (Michie 2003), *amended by* 2003 Nev. Stat. Ch. 366 (A.B. 13) (2003); NEV. REV. STAT. ANN. 200.03 (Michie 2003), *amended by* 2003 Nev. Stat. Ch. 470 (A.B. 250) (2003); N.H. REV. STAT. ANN. § 630:5 (2003); N.J. STAT. ANN. § 2C: 11-3 (c) (West 2003); N.Y. CRIM. PRO. LAW § 400.27 (McKinney 2003); N.Y. PENAL LAW § 125.27 (McKinney 2003); N.C. GEN. STAT. § 15A-2000 (2003); OHIO REV. CODE ANN. § 2929.03 (West 2003); 42 PA. CONS. STAT. ANN. § 9711 (West 2003); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 2003); S.D. CODIFIED LAWS § 23A-27A-4 (Michie 2003); TENN. CODE ANN. § 39-13-204 (2003); UTAH CODE ANN. § 76-3-207 (2003).

The role of the future dangerousness question varies in the nine states that consider it. In some of those states, a jury can consider the defendant's future

Future Dangerousness as a Sentencing Factor in Death Penalty States



- Not Required
- Limited
- Required

dangerousness as an aggravating factor along with other aggravating factors in the case.²¹⁶ Other states allow a defendant to argue that the absence of future dangerousness is a mitigating factor.²¹⁷ While these nine states allow speculative future dangerousness evidence to play some role in the sentencing decision, only Texas and Oregon²¹⁸ have chosen to make jury predictions of future dangerousness a prerequisite for a sentence of death.

²¹⁶ See, e.g., OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 2002); WYO. STAT. ANN. § 6-2-102(h)(xi) (Michie 2001).

²¹⁷ COLO. REV. STAT. ANN. § 18-1.3-1201(4)(k) (West 2002); MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(vii) (2002); N.M. STAT. ANN. § 31-20A-6(G) (Michie 2001); WASH. REV. CODE § 10.95.070(8) (2002). Although these states specifically provide that lack of future dangerousness is a mitigating factor, any other state with a “catch-all” mitigating factor allows the jury to consider the lack of future dangerousness. If, after hearing the evidence, the jury believes that the defendant is likely to be a future danger, the result is that the jury cannot find the presence of that mitigating factor. Research shows that “while future dangerousness [is] highly aggravating, lack of future dangerousness is only moderately mitigating,” which in part explains the deadly consequences of this sentencing issue in Texas. See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1560 (1998).

²¹⁸ See TEX. CRIM. PROC. CODE ANN. art 37.071 § (2)(b)(1) (Vernon 2001) (conditioning death sentence on jury finding beyond a reasonable doubt that defendant constitutes a “continuing threat to society”); OR. REV. STAT. § 163.150(1)(b)(B) (2001) (providing that juries consider four special issues, among them future dangerousness). *But cf.* VA. CODE § 19.2-264.4(C) (2003 Lexis) (requiring jury finding beyond a reasonable doubt that defendant constitutes a “continuing serious threat to society” or that defendant’s conduct was “outrageously or wantonly vile, horrible, or inhuman” to impose a death sentence).

5

Conclusion: Texas Death Penalty Sentences Are Arbitrary

This study shows that it is impossible to predict the future with the accuracy and consistency required of evidence that determines whether someone lives or dies. Despite research illustrating results consistent with our findings and a formal rejection of definitive predictions of dangerousness by the American Psychiatric Association, prosecutors continue to present this evidence, courts continue to permit its introduction, and jurors continue to consider it. As a result, jurors relying on the future dangerousness evidence are handing down unwarranted death sentences.

Reliability and accuracy are the cornerstones of the American criminal justice system. In no case are these assurances more vital than in the application of the State's ultimate punishment. Allowing questionable, speculative, and professionally discredited testimony to play any role in the application of the death penalty—let alone allowing this evidence to be a key sentencing factor—undermines the integrity of the system and calls into question the fairness of all death sentences in this state. The unabashed fortune-telling of state-commissioned psychologists makes a mockery of the system.

The criminal justice system in the United States is designed to prevent “false positives”—the over-inclusion of people in the group convicted and condemned to die.²¹⁹ The spirit of our laws reflects the consensus that it is better to err on the side of caution when it comes to execution. The state's high burden of proof reflects society's judgment that, if necessary, it is preferable to allow a guilty person to go unpunished than it is to allow an innocent person to be killed by the state. Our values should also prohibit us from countenancing the execution of undeserving defendants.

The sentencing procedures in Texas have turned these deeply held values on their heads. Texas's flawed procedure leads to the execution of many individuals to protect society from the miniscule minority among them who are

²¹⁹ See Marquart et al., *supra* note 47.

genuinely likely to re-offend. The results of this study reveal that Texas would execute 155 inmates to prevent continued violence by eight.

This 95% error rate is intolerably high. The acceptable margin for error in industries engaging in potentially dangerous activities which threaten human lives is miniscule. If the brakes on an automobile failed to work 95% of the time, it would be abandoned as a dismal failure, rather than unflinchingly touted as a success because the brakes worked 5% of the time. If an alarm clock did not work 95% of the time, it would be replaced. If only five of 100 Christmas lights worked on a strand, it would be tossed. A roof covering 5% of a house would not keep out the rain. Such an astronomical error rate is indefensible where lives are held in the balance.

Why then does Texas cling to such an untrustworthy process in the most serious of cases? That the accuracy rate is “not always wrong”²²⁰ is no longer a sufficient response. One scholar, critiquing the admission of this unreliable evidence, noted: “One suspects that the Justices would not choose a neurosurgeon on such a basis, nor even a podiatrist.”²²¹ Texas allows the life or death decision to turn on evidence much less reliable than the flip of a coin.

The current sentencing process in Texas is as flawed as the arbitrary process it replaced in the 1970s. Thirty years of death sentences based on suspect and unreliable evidence should concern all who are interested in an equitable capital punishment system. One can favor the death penalty “yet still recoil at the thought that a junk science fringe of psychiatry . . . could decide who should be sent to the gallows.”²²²

²²⁰ Paul C. Giannelli, *Junk Science: The Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 105, 114 (1993).

²²¹ *Id.* Cf. Rosenberg et al., *supra* note 95, at 581-82.

²²² PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 220 (1991).



DEADLY SPECULATION

Recommended Reforms

Recommended Reforms

§ Follow the American Bar Association recommendations and the lead of other states, such as Maryland and Illinois, in calling for a moratorium on the death penalty while a commission reviews issues of fairness in the application of the death penalty and the adequacy of procedures designed to prevent the innocent or undeserving from execution.

§ Revise the sentencing procedures in Texas to allow jurors to consider the presence of articulated statutory aggravating and mitigating factors as in other death penalty jurisdictions.

§ Adopt a life-without-the-possibility-of-parole sentencing option. The judge should instruct the jury in a way that leaves no doubt as to the meaning of the life-without-parole statute.

§ Disallow witness predictions of future dangerousness.

§ Eliminate the special issue regarding future dangerousness. In the alternative, require a hearing immediately preceding an inmate's execution in which the accuracy of the jury's prediction in that particular case could be evaluated. Commute sentences to life if it is found that the jury's future dangerousness prediction was incorrect.

§ Develop clear jury instructions, so that juries understand their obligation to consider mitigating factors.

§ Create a remedy for inmates previously condemned to death based on the inaccurate and discredited speculations of state-paid expert witnesses by which inmates would be afforded a meaningful and reliable sentencing hearing.

§ Establish a statewide public defender office to ensure that defendants facing the death penalty in Texas are well represented, and train attorneys regarding the deficiencies in the state's punishment scheme, so that the evidence used to justify a death sentence is subjected to an intensive adversarial process.



DEADLY SPECULATION

Appendix

Appendix

Correspondence concerning Dr. James Grigson

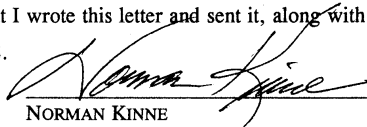
County of Dallas §
 § A F F I D A V I T
State of Texas §

I, Norman Kinne, being duly sworn, do attest that the following is true and correct to the best of my knowledge:

1. I am the First Assistant District Attorney in Dallas County and was so employed in 1988. I have prosecuted many capital murder cases. In some of these cases, I called Dr. James Grigson to testify at the punishment phase that the defendant was a future threat to society. My acquaintance with him pre-dates 1988.

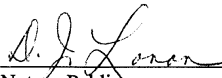
2. I was directly involved with the prosecution of *State v. William David Hovila*, and *State v. Howie Ray Robinson*.

3. I have reviewed the attached letter and report provided to me by Raoul Schonemann. I recognize this as my official letterhead and my signature closes the letter. I have no reason to dispute that I wrote this letter and sent it, along with the referenced report, to Dr. Grigson in 1988.



NORMAN KINNE

SWORN TO AND SUBSCRIBED Before Me, the undersigned authority, on this the
24th day of April, 1995.



Notary Public
State Of Texas

My Commission Expires:

04/26/97





DALLAS COUNTY
DISTRICT ATTORNEY
JOHN VANCE

July 29, 1988

Dr. James P. Grigson
6116 North Central Expressway
Dallas, Texas 75205

Dear Jim:

Enclosed please find a copy of a report made to me by Special Investigator Jeff Shaw. All of the individuals listed in this report at one time were under a sentence of death out of Dallas County. Each one of these individuals had his death sentence either commuted to a life sentence or reduced to a term of years in the Texas Department of Corrections.

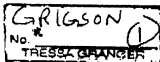
I don't know if you testified in any of these cases but felt the report might be of interest to you. Please keep this report confidential.

Sincerely,

NORMAN KINNE
FIRST ASSISTANT
DALLAS COUNTY, TEXAS

John Glenn Moody, Petitioner v.
Wayne Scott, Respondent,
Case No. 1:94-CV-041-C
Petitioner's Exhibit #12

NK/jb



Government Center

Dallas, Texas 75202

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FROM: JEFF SHAW

RE: STATUS OF INMATES WITH COMMUTED SENTENCES

DOYLE BOULWARE

Presently in the Ellis I Unit of TDC. Has only had one disciplinary report for fighting in 1984 with another inmate without a weapon.

He is a State approved trustee 3 who works as a clerk in the Narcotics and Alcoholics Anonymous Office

Causes no problems. Up for Parole Review

JESSIE RAY JONES

Also at the Ellis I Unit. No disciplinary Reports. Is an SAT 3. Has taken advantage of Education Courses.

Has worked in the Bus Repair Shop, The infirmary, and is presently in support services as a Hall Orderly. (cleans)

Causes no problems. Up for Parole Review.

WILLIAM DAVID HOVILLA

At the Eastham Unit since Aug. '87. is an SAT 3. Works as an orderly in support services. No Disciplinary Reports. Approaches the model inmate category.

Up for Parole Review march '89.

RANDALL DALE ADAMS

Also at Eastham Unit. Been there since Aug. '87. Is an SAT 3 and works as a clerk in the Garment Factory.

Lives in a Dormitory as opposed to a cellblock, indicative of minimum custody and supervision.

An ideal inmate. Parole Review Dec. '89.

MARK MILTON MOORE

Been at the Coffield Unit since '82. Is an SAT 2a which is a higher classification than A 3 as it affords him an outside Trustee Opportunity. Works as a Support Services Clerk. Only disciplinary was a minor case of refusing to obey an order in '86.

Has completed Education Programs. Parole Review Feb. '90.

STANLEY BURKS

Also at the Coffield Unit since '84. Is an SAT 2 orderly who works in the Hospital. Also has outside Trustee Privileges. Lives in a Dormitory.

Disciplinarys consist of a verbal reprimand for a minor infraction in '87.

Also had 3 cases reduced to minor grade infractions for poss. of contraband; poss. of inhalants and alcohol, and possession of a weapon. Lost privileges for a few days.

Up for Parole Review.

ANDERSON HUGHES

Been in Ramsey III Unit since Jan. '88.

Is an SAT 4 doing work as an inside maintenance man which is one of the better jobs since it requires some training.

The Ramsey Unit is a minimum Custody Unit and all inmates in this unit are the "Cream of the Crop". If any become a problem they are sent to another unit.

Parole Review 12-'88.

KENNETH DAVIS

In the Darrington Unit. He is a Maximum Custody Inmate. Darrington is the Unit that inmates are sent to when they can't make it anywhere else.

He is in administrative segregation because he is very assaultive. A real non-conformist. He is drawing no "good time". A line class 3 inmate which is the lowest inmate category.

Has had numerous disciplinarys consisting of 4-5 pages, most of which are assaulting inmates and staff personnel.

Does not work, and does nothing to help himself. "Since he is 31 years old, he should have made adjustment but has not and will never be any good to society."

JAMES PIERSON

Is in an SAT 3. Works in the Audio-Visual Repair Shop. A job he learned while there.

Has enrolled and completed college courses. Had 1 disciplinary in '82 for contraband. He is in a minimum custody facility and is no problem.

ERNEST BENJAMIN SMITH

Was transferred to the Federal Correctional Institution, Milan, Michigan in 1981 as a result of a Civil Lawsuit filed against TDC by Smith and others.

Progress reports are sent to TDC every six months about Smith. His last progress report indicates that he received an Associates Degree and a Bachelors Degree from Cleary College while incarcerated. Learned Computer Programming and trained other inmates. Was involved in the daily running of the computer at this facility. He works as a clerk in the industrys section of the facility.

During the 73 months of incarceration he has had excellent work reports and a clear conduct record.

They are about to transfer him to minimum custody areas such as Texarkana or Seagoville later.

HOWIE RAY ROBINSON

Robinson was paroled to Harris County on 9-16-87, then transferred to Dallas in Oct.'87. Talked to his Parole Officer here who stated that he was doing fine.

Is not working yet but is attending Rutledge Business College learning about Computers. Is on the President list for Academic Achievement.

He requires minimum supervision.

Was arrested for a misdemeanor theft on 4-29-88, received \$200 fine and one year probation. Apparantly this is not aggravated enough to revoke his parole.

Parole Officer considers him one of her better parolees.

