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Psychiatric Prediction of Future Dangerousness

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Erinrose Lavin

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I. Introduction

Capital punishment is the most final and permanent punishment a defendant can endure. Due to its irreversible nature, the Supreme Court, in a series of cases established a rigid standard of proof required for the court to prove and the jury to consider in sentencing a defendant to death. In most states that practice capital punishment, the jury must find that the defendant is more likely than not to commit crimes in the future, that he is capable of future dangerousness.

The foremost way to establish this proof is by means of expert witnesses, psychiatrists who evaluate the defendant and testify based on their observations. Expert testimony in capital cases is presented and considered during sentencing, and thus, is not held to the standard of reliability and accuracy laid out in Daubert v. Merrell Dow Pharmaceuticals, Inc. Although Daubert does not procedurally apply, there still is some question as to why these unreliable experts are allowed to hold one's fate in their hands despite their high level of unreliability.

This paper will examine the answer to this question. Additionally, it will provide why expert testimony in capital cases should be held to the high standard of Daubert for reliability and accuracy, and further, even if Daubert principles were applied to this expert testimony, it would fail the Daubert test for its lack of scientific validity in its testifiability, rate of error, and general acceptance.

II. Capital Punishment and Psychiatric Prediction of Future Dangerousness

In 1972, in Furman v. Georgia, the United States Supreme Court determined that it was unconstitutional to administer the death penalty upon the sole, unguided discretion of juries.¹ The Court reasoned that this discretion led to arbitrary and capricious results, violating Eighth Amendment's prohibition of cruel and unusual punishment.² As a result, states had to reform their death penalty statutes to come into compliance with this new standard.³ While some states decided to follow the Model Penal Code and enact a statute that required juries to balance mitigating and aggravating factors during sentencing, other states required juries to consider future dangerousness when considering whether to sentence a Defendant to death. In order for juries to determine whether the Defendant poses a future threat and consequently should be sentenced to death, Courts often require experts to analyze the defendant and testify as to their findings.⁴

In a leading case on future dangerousness, the Supreme Court in Barefoot v. Estelle upheld expert testimony even where the majority stated that there was no supporting scientific evidence.⁵ At trial, two experts testified that the Defendant "would probably commit further acts of violence and represent a continuing threat to society."⁶ They posed hypothetical questions about the crime and defendant's conduct during trial.⁷ They based their prediction and subsequent testimony on these answers, rather than on a personal, individual examination of the defendant.⁸ Despite the fact that an amicus brief by the American Psychiatric Association

¹ Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

² Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

³ Ibid.

⁴ Erica Beecher-Monas & Edgar Garcia-Rill, Ph.D., Danger at the Edge of Chaos: Predicting Violent Behavior in A Post-Daubert World, 24 Cardozo L. Rev. 1845 (2003).

⁵ Barefoot v. Estelle, 463 U.S. 880, 883 (1983).

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

explaining no one can predict with any degree of reliability that an individual will commit crimes in the future was before the court, the Court allowed the experts' testimony.⁹ The Court reasoned that the testimony complied with the state's rules of evidence and there was no proof that psychiatrists were wrong all of the time regarding future dangerousness, but only wrong more often than not.¹⁰ In its decision, the Court concluded that although these psychiatric predictions of future dangerousness may be "generally so unreliable that it should be ignored," this argument could be made on cross-examination.¹¹ The unreliability of expert determinations of future dangerousness was an issue for the jury to consider, not an issue affecting admissibility of the testimony.¹²

In Daubert v. Merrell Dow Pharmaceuticals, Inc.,¹³ the loose standard in Barefoot v. Estelle for expert testimony became more stringent. This change in standard has been attributed to the fact that the author of Daubert, Justice Blackmun, is the same who dissented in Barefoot.¹⁴

III. Daubert and The Federal Rules of Evidence

Prior to 1993, expert testimony was admissible if it was "sufficiently established to have gained general acceptance in the particular field to which it belongs."¹⁵ However, in 1993, the court in Daubert v. Merrell Dow Pharmaceuticals, Inc. explained that Rule 702 for expert witnesses also requires scientific validity.¹⁶ As such, their findings and conclusions must be based on evidentiary relevance and reliability.¹⁷ The court laid out factors for the trial judge to consider when determining the admissibility of expert testimony, including whether the theory or

⁹ Ibid.

¹⁰ Ibid at 901.

¹¹ Ibid at 898.

¹² Ibid.

¹³ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

¹⁴ Flores v. Johnson, 210 F.3d 456, 465 (5th Cir. 2000).

¹⁵ Frye v. United States, 292 F. 1013, D.C. 1923

¹⁶ Daubert, 509 U.S. 579 at 594.

¹⁷ Ibid.

technique has been tested, whether it has been subject to peer review and publication, whether the rate of error is known, and whether it is generally accepted within the scientific community.¹⁸ The prior “standard of relevance and reliability in the context of scientific testimony now requires scientific validity.”¹⁹ In a later case, Kumho Tire v. Carmichael,²⁰ the Court expanded Daubert to cover specialized expertise, even if it does not rest specifically on scientific knowledge.²¹ Since Daubert and Kumho Tire, psychiatric testimony regarding predicting future dangerousness has been met with much controversy.

IV. Approaches to Predicting Danger

The accuracy and reliability of expert’s testimony in capital cases rests on the way in which these experts receive the information they evaluate and later testify to. These two approaches are actuarial assessments and clinical predictions.²² While actuarial assessments meet the Daubert standard most of the time, the latter fails to entirely. Actuarial assessments consist of the psychiatrist expert comparing characteristics of the defendant to a group of people who share similar characteristics that can be attributed to a risk of violence.²³ During testimony, the expert makes general statements about this group prone to violence, explaining the defendant shares similar characteristics and it is up to the jury to draw inferences regarding the defendant on trial.²⁴

¹⁸ Flores, 210 F.3d 456 at 465

¹⁹ Danger at the Edge of Chaos: Predicting Violent Behavior in A Post-Daubert World, 24 Cardozo L. Rev. 1845 citing Paul C. Gianelli, Daubert: Interpreting the Federal Rules of Evidence, 15 Cordozo L. Rev. 1999, 2001-03 (1994).

²⁰ Kumho Tire, 526 U.S. 137 (1999).

²¹ Ibid.

²² Alexander Scherr, Daubert & Danger: The "Fit" of Expert Predictions in Civil Commitments, 55 Hastings L.J. 1, 15 (2003).

²³ Ibid.

²⁴ Ibid.

On the other hand, many experts use clinical predictions to evaluate the defendant and present their findings and conclusions to the jury.²⁵ This is the majority approach to evaluating future dangerousness.²⁶ In clinical predictions, experts review the information they have about the defendant and predict whether or not the defendant poses a risk of danger in the future based upon those findings.²⁷ Rather than allowing the jury to draw their own inferences regarding the defendant's predisposition for future violence, experts who use clinical predictions conclude by themselves the likeliness of future violence, presenting their decision to the jury.²⁸ These critics draw conclusions and predict future dangerousness solely on the facts of the underlying crime coupled with the defendant's conduct during the trial.²⁹ It is this kind of evaluation that critics discredit. This method is unreliable and leads to erroneous death sentences for one-time or non-violent offenders.

V. Admission of Expert Testimony in Capital Cases: Juror Perception

Daubert does not expressly apply to psychiatrists' expert testimony of future dangerousness in sentencing hearings because Daubert concerns the application of evidentiary rules and not constitutional rights.³⁰ However, despite the evidentiary hurdles expert testimony in capital cases has cleared, the question remains as to why these experts are allowed.

In Barefoot v. Estelle, the court reasoned that expert testimony should not be completely banned from capital cases because they believe that the adversary process can "be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness,

²⁵ Ibid.

²⁶ Alexander Scherr, Daubert & Danger: The "Fit" of Expert Predictions in Civil Commitments, 55 *Hastings L.J.* 1, 15 (2003)

²⁷ Ibid.

²⁸ Ibid.

²⁹ Danger at the Edge of Chaos: Predicting Violent Behavior in A Post-Daubert World, 24 *Cardozo L. Rev.* 1845, 5 (2003).

³⁰ Krauss, D, & Sales, B 2001, The effects of clinical and scientific expert testimony on juror decision making in capital sentencing, *Psychology, Public Policy, And Law*, 7, 2, pp. 267-310, 271 PsycARTICLES, EBSCOhost, viewed 13 March 2014.

particularly when the convicted felon has the opportunity to present his own side of the case.”³¹ They believe that fact finders are able to distinguish the reliable information from the unreliable evidence and consider only that which is reliable in their determination.³²

Despite the lack of applicability of the Daubert decision on the admissibility of expert testimony in capital cases because of the constitutional issues, and not evidentiary rules, many courts hold that Daubert would need not apply in these situation even if it was an evidentiary issue because of juror perception.³³ These courts have concluded that jurors are able to distinguish between the clinical opinions provided by experts in capital cases and evidence that is based on science, and consequently, give clinical opinions less weight.³⁴ They believe that jurors are able to parse through a psychiatrist’s testimony, consider the fact that the findings and testimony are not based on scientific proof, and make a decision of their own volition.³⁵

VI. Expert Testimony in Predicting Future Dangerousness in a Post-Daubert World

Those courts that do not agree with jurors rely solely on the evidence and draw their own conclusions without considering the expert testimony, argue that Daubert should apply to capital cases. The Court in Flores v. Johnson, explained that juries give weight to the fact that a doctor with a medical degree is testifying regarding a defendant’s future dangerous, persuading them more often than not.³⁶ “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,

³¹ Barefoot at 901.

³² Ibid.

³³ Krauss, D, & Sales, B 2001, 'The effects of clinical and scientific expert testimony on juror decision making in capital sentencing', *Psychology, Public Policy, And Law*, 7, 2, pp. 267-310, 271 PsycARTICLES, EBSCOhost,

³⁴ Ibid.

³⁵ Danger at the Edge of Chaos: Predicting Violent Behavior in A Post-Daubert World, 24 Cardozo L. Rev. 1845 (2003).

³⁶ Flores v. Johnson, 210 F.3d 456, 466 (5th Cir. 2000).

equates with death itself.”³⁷ These psychiatrists approach the stand, list their education and credentials, and inform the jury that it is within their medical opinion that the defendant is more likely than not to be of future dangerousness.³⁸ Of course juries give weight to the testimony, and do not think their lay opinion is superior to the doctor testifying before them.

Due to the fact that juries weigh expert testimony than the courts lead on, it is argued that Daubert’s principle of reliability should, in some capacity, be met in trials concerning capital punishment.³⁹ Some state courts have taken a modified approach to the scientific evidence standard, applying some, but not all of the Daubert standards.⁴⁰ In assessing reliability for expert testimony in the form of clinical opinions, this intermediate Daubert approach takes into account: “(a) whether the field of expertise is a legitimate one, (b) whether the subject matter of the expert’s testimony is within the scope of that field, and (c) whether the expert’s testimony properly relies on and/or uses the principles involved in the field.”⁴¹ This set of standards focuses more on the general acceptance of the future predictions by experts, rather than the scientific evidence required by Daubert.

Even though some courts have implemented a modified Daubert standard, critics of expert testimony regarding future dangerousness in capital cases contend that the entirety of the Daubert standard of reliability and accuracy should be applied and required. The resulting verdict is so definite and permanent, it requires the Daubert standard of reliability and accuracy, rather solely acceptance in the field. Any unreliable and false testimony regarding the future dangerousness of a Defendant by an expert may result in the erroneous death of a Defendant. As

³⁷ Barefoot, 463 U.S. at 916, 103 S.Ct. at 3407.

³⁸ Id at 1001.

³⁹ Eugenia T. La Fontaine, A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional, 44 B.C. L. Rev. 207, 226 (2002).

⁴⁰ The effects of clinical and scientific expert testimony on juror decision making in capital sentencing at 271.

⁴¹ Ibid at 272, *citing* Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998).

such, Daubert principles of reliable and accuracy are of utmost important in the context of death penalty sentencing hearings.

However, even if Daubert standards were to apply, there is an argument that expert testimony in capital cases regarding a defendant's future dangerous would not meet these standards, resulting in the exclusion of the testimony.⁴² This argument is rooted in the idea that expert testimony predicting the future dangerousness of a defendant does not meet the requirement for scientific validity of reliability.⁴³

VII. Daubert in Future Dangerousness Testimony

Although there's an argument for requiring Daubert principles to expert testimony in capital cases, it is believed that even if Daubert were to apply, this expert testimony regarding future dangerousness would not be admissible.⁴⁴ Psychiatrists' methods for evaluating defendants on death row and predicting the occurrence of future dangerousness is not rooted in the scientific evidence and reliability Daubert calls for.

A. Whether the theory or hypothesis is falsifiable or testable and has been tested

In Daubert, the court explained that determining whether a theory can be tested is critical in finding whether a theory consists of scientific knowledge.⁴⁵ Although decided before Daubert, both the majority and dissenters in Barefoot v. Estelle pointed out the weaknesses in psychiatric testimony of future dangerousness. Later, Justice Blackmun, dissenting in Barefoot, would come to write the majority opinion in Daubert creating standards and filling in the gaps the majority in Barefoot left open.

⁴² Danger at the Edge of Chaos: Predicting Violent Behavior in A Post-Daubert World, 24 Cardozo L. Rev. 1845, 5 (2003).

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993).

In capital cases, psychiatric testimony is based on hypothetical questions posed, not on an actual, individualized examination of the defendant.⁴⁶ Through the use of these hypothetical questions, psychiatrists base their predictions on “psychiatric categories and intuitive clinical judgments not susceptible to cross-examination and rebuttal.”⁴⁷ In his dissent, Blackmun supports his position by quoting, “[i]n general, mental health professional...are more likely to be wrong than right when they predict legally relevant behavior. When predicting violence, dangerousness, and suicide, they are far more likely to be wrong than right.”⁴⁸

B. Whether the evidence has been subject to peer review

In its decision, the court in Daubert, explained that “[But] submission to the scrutiny of the scientific community is a component of ‘good science’ in part because it increases the likelihood that substantive flaws in methodology will be detected.”⁴⁹

The American Psychiatric Association (“APA”) has condemned future dangerousness predictions as inaccurate and unreliable.⁵⁰ The APA concluded that a lay person is just as capable as psychiatrists in predicting future dangerousness of defendants.⁵¹ Moreover, they suggest that a layman with the same resources, specifically statistics, may predict future dangerousness more reliably than a psychiatrist.⁵² In support of this contention, they explain that training is not

⁴⁶ Barefoot at 887.

⁴⁷ Flores v. Johnson, 210 F.3d 456, 464 (5th Cir. 2000) (citing Barefoot, 463 U.S. at 932, 103 S.Ct. at 3414-15 (Blackmun, J., dissenting) (citing Dix, Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations, 19 Am.Crim. L. Rev. 1, 16 (1981)).

⁴⁸ Barefoot at 1002, citing Morse, Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law, 51 S.Cal.L.Rev. 527, 600 (1978).

⁴⁹ Ibid.

⁵⁰ Barefoot at 1002.

⁵¹ Ibid.

⁵² Ibid.

relevant in predicting future dangerousness and with what little training they do have, psychiatrists “consistently err on the side of overpredicting violence.”⁵³

C. Whether there is a known or potential error rate for the evidence, and

Third, the court in Daubert considered that the rate of error and the existence of standards controlling the operation was necessary to having a scientific basis.⁵⁴ The APA’s amicus brief before the court in Barefoot stated that psychiatrists are wrong two out of three times when predicting future dangerousness of defendants.⁵⁵ Studies have been conducted to determine the potential rate of error for predicting future dangerousness. Many studies that have been conducted concern inmates who have been commuted from death row sentences, and now serve life imprisonment, or those defendants committed to psychiatric wards and prisons due to the future dangerousness they present. The standard for latter case is the same as that of capital cases and thus, a correlation can be made between these studies and capital cases. However, a majority of the studies are not in the capital punishment context because in those cases, experts have successfully provided proofs to lead the jury to convict the defendant have led to the death of these defendants, providing them the inability to neither recidivate nor refrain from violence.

One study conducted by attorneys, Bruce J. Ennis, former legal director of the American Civil Liberties Union, and Thomas R. Litwack, professor at John Jay College of Criminal Justice found testimony of future dangerousness to be inaccurate. In this study, 969 prisoner-patients, who had been found mentally ill or capable of future dangerousness were detained in maximum security hospitals.⁵⁶ They were later released or transferred to civil hospitals. On or about one year later, the 702 who remained were found to be of no special problem to hospital staff. Only 7

⁵³ Ibid.

⁵⁴ Daubert, 509 U.S. 579 at 594.

⁵⁵ Barefoot at 1002.

⁵⁶ Bruce J. Ennis & Thomas R. Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal. L. Rev. 693 (1974).

of the 969 inmates were found to be so dangerous that they required recommitment to a prison hospital.⁵⁷

In another study, mental health professionals and psychiatrists conducted an “unusually thorough clinical examinations” of individuals convicted of “serious assaultive crimes.”⁵⁸ Out of forty-nine patients predicted to be dangerous by the mental health teams, but who were ultimately released after a court hearing, sixty-five percent were not found to have committed a violent crime within five years of release to the community. Two-thirds of those released despite predictions of dangerousness by the professional team did not exhibit violent or dangerous behavior.⁵⁹

These studies reflect the conclusion made by the APA, *supra*, that psychiatrists testifying to a defendant’s future dangerousness in capital cases are only correct one of three times.

D. Whether the technique or method is generally accepted within the field

- VIII. Recommendation
- IX. Conclusion

⁵⁷ Id.

⁵⁸ Id.

⁵⁹ Id.

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