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# Reducing the Dangers of Future Dangerousness Testimony: Applying the Federal Rules of Evidence to Capital Sentencing

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**REDUCING THE DANGERS OF FUTURE DANGEROUSNESS  
TESTIMONY: APPLYING THE FEDERAL RULES OF  
EVIDENCE TO CAPITAL SENTENCING**

Jaymes Fairfax-Columbo & David DeMatteo\*

**ABSTRACT**

The United States Supreme Court has long held that the death penalty cannot be imposed arbitrarily, and that during sentencing in capital cases, jurors must be provided with guidelines to assist them in narrowing down the class of individuals for whom the death penalty is appropriate. Typically, this is accomplished through the presentation of aggravating and mitigating evidence. One aggravating factor is a capital offender’s future dangerousness, or the likelihood that the individual will engage in violent institutional misconduct while in prison. Future dangerousness may be assessed using a variety of measures; Hare’s Psychopathy Checklist-Revised (PCL-R), a measure of personality traits associated with psychopathy, is one such measure that informs future dangerousness testimony. However, research suggests that the predictive validity of the PCL-R regarding violent institutional misconduct is weak-to-moderate, and that presentation of such evidence can prejudice jurors such that they will be more likely to assign the death penalty than they would in the absence of such evidence. These findings are concerning, particularly considering the severe social costs and individual rights deprivations associated with the death penalty. This Article will trace the history of Supreme Court capital sentencing decisions, examine the scientific literature regarding the predictive validity and bias potential for PCL-R evidence in capital sentencing, and argue that, in light of this weak literature base and the deleterious impact that misguided capital sentencing can have, applying the Federal Rules of Evidence to capital sentencing contexts may present an effective solution for keeping specious future dangerousness evidence out of the courtroom.

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INTRODUCTION

At first glance, Jack Kevorkian and James Grigson share some superficial similarities.<sup>1</sup> Both are males; both have one-syllable first names that begin with the letter J; both grew up in the Great Depression/World War II era.<sup>2</sup> Probing a little deeper, both would go on to become medical doctors—Kevorkian a pathologist and Grigson a psychiatrist.<sup>3</sup> Further, both Kevorkian and Grigson led controversial careers that sparked criticism from their governing bodies—Kevorkian from the American Medical Association and Grigson from the American Psychiatric Association.<sup>4</sup> But dig just a little deeper, and one will uncover a startling truth—both assisted in the deaths of over 100 people and both aptly earned the nickname “Dr. Death.”<sup>5</sup>

Although Kevorkian was infamous for his actions and views regarding medically assisted suicide and was certainly more widely known than Grigson, Grigson arguably had a greater impact on his “victims.” Kevorkian, a pathologist who had developed a lethal cocktail of drugs consisting of thiopental and potassium chloride, was responsible

<sup>1</sup> Dr. Jack Kevorkian was a medical doctor renowned for his views regarding euthanasia and his willingness to assist terminally ill patients in ending their lives. Keith Schneider, *Dr. Jack Kevorkian Dies at 83; A Doctor Who Helped End Lives*, N.Y. TIMES (June 3, 2011), [http://www.nytimes.com/2011/06/04/us/04kevorkian.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/06/04/us/04kevorkian.html?pagewanted=all&_r=0) [https://perma.cc/J2RF-YYYN]. Dr. James Grigson was a Texas psychiatrist known for testifying on behalf of the prosecution during the sentencing phases of capital murder cases, always testifying that the defendant was a “sociopath” who represented a danger to society. *They Call Him Dr. Death*, TIME, June 1, 1981, at 64, 64.

<sup>2</sup> See sources cited *supra* note 1.

<sup>3</sup> Schneider, *supra* note 1; Jade Walker, *Jim Grigson*, BLOG DEATH (June 16, 2004), <http://www.blogofdeath.com/2004/06/16/jim-grigson/> [https://perma.cc/XM9L-35WH].

<sup>4</sup> Schneider, *supra* note 1; Mike Tolson, *Effect of “Dr. Death” and His Testimony Lingers*, HOUS. CHRON. (June 17, 2004, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Effect-of-Dr-Death-and-his-testimony-lingers-1960299.php> [https://perma.cc/V8QL-RCCP].

<sup>5</sup> Schneider, *supra* note 1; *They Call Him Dr. Death*, *supra* note 1, at 64; Tolson, *supra* note 4.

for the deaths of roughly 130 individuals, all of whom thought they were terminally ill and had expressed a desire to die.<sup>6</sup> In contrast, Grigson was responsible for testifying in 167 capital murder trials, helping to garner death verdicts in a majority of them and testifying in over 100 of those cases that the defendant, if released, was one hundred percent certain to kill again.<sup>7</sup> None of those defendants expressed a desire to die.

Kevorkian and Grigson also shared another unfortunate similarity—they were not always correct in their judgments. According to a 2000 study in which medical examiner and autopsy findings for euthanized Kevorkian patients were reviewed, only about twenty-five percent of patients that Kevorkian euthanized were actually terminally ill.<sup>8</sup> Though a metric for Grigson's errors is not as readily established, there is one salient example of Grigson's errors: Randall Dale Adams. Adams was convicted of the murder of Dallas police officer Robert Wood in 1977.<sup>9</sup> At trial, the State produced testimony from its principal witness, David Harris, who claimed that he had picked up Adams, who was hitchhiking on November 27, 1976.<sup>10</sup> He asserted that he and Adams had spent the day driving around, drinking beer, and smoking marijuana, finally settling in to a drive-in movie come nighttime.<sup>11</sup> Upon leaving the movie, Harris claimed that he and Adams were stopped by a cop car, and that when the officer approached, Adams reached under the front seat of the car, retrieved a pistol, and shot the officer several times, killing him.<sup>12</sup>

At the sentencing phase of the trial, Grigson testified that, regarding Adams's future dangerousness, he "would place [him] at the very extreme, worse or severe end of the scale," and that "[t]here is nothing in the world today that is going to change this man; we don't have anything."<sup>13</sup> Under Texas law (both in 1977 and now), to impose a sentence of death, one of the findings a jury must make is that beyond a reasonable doubt there is a probability that the defendant, if allowed to

<sup>6</sup> Schneider, *supra* note 1. Thiopental is a sedative; potassium chloride stops the heart. *Id.*

<sup>7</sup> *Texas 'Dr. Death' Retires After 167 Capital Case Trials*, WASH. TIMES (Dec. 20, 2003), <http://www.washingtontimes.com/news/2003/dec/20/20031220-113219-5189r/?page=all> [<https://perma.cc/P65H-3JEW>].

<sup>8</sup> Lori A. Roscoe et al., *Dr. Jack Kevorkian and Cases of Euthanasia in Oakland County, Michigan, 1990–1998*, 343 NEW ENG. J. MED. 1735, 1736 (2000). Though only twenty-five percent of Kevorkian patients were likely terminally ill, seventy-two percent had experienced a recent health decline that likely triggered the desire to die. *Id.*

<sup>9</sup> *Adams v. State*, 577 S.W.2d 717, 719 (Tex. Crim. App. 1979) (en banc), *rev'd in part*, 448 U.S. 38 (1980); Douglas Martin, *Randall Adams, 61, Dies; Freed with Help of Film*, N.Y. TIMES (June 25, 2011), <http://www.nytimes.com/2011/06/26/us/26adams.html> [<https://perma.cc/ET3A-CC2U>].

<sup>10</sup> *Adams*, 577 S.W.2d at 719.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> TEX. DEF. SERV., DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 24 (2004) (citing Statement of Facts at 1410, *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979) (No. 60,037)); *see also Adams*, 577 S.W.2d at 731.

live, would commit future acts of violence that constitute a threat to society.<sup>14</sup> Armed with Grigson's opinion testimony, the jury voted to impose the death penalty on Adams.<sup>15</sup> The problem? Adams was *innocent*.<sup>16</sup>

Adams's journey to exoneration is chronicled in director Errol Morris's 1988 documentary, *The Thin Blue Line*.<sup>17</sup> Morris originally intended to document Grigson, the man he knew as "Dr. Death," but in interviewing Adams, who proclaimed his innocence, Morris's curiosity was piqued.<sup>18</sup> Upon looking into Adams's case, Morris found that the District Attorney's Office had "withheld exculpatory evidence from the defense" and "manipulated key witnesses."<sup>19</sup> Shortly after the film's release, David Harris, the prosecution's chief witness, recanted his trial testimony in court, admitting that he had indeed been the one who killed Officer Wood.<sup>20</sup> Twelve years after his conviction, Randall Dale Adams was freed; despite Grigson's expert opinion and testimony, Adams was considered a consummate inmate with a record devoid of violent behavior or disciplinary infractions.<sup>21</sup>

How could such a heinous misapplication of justice occur? How could "Dr. Death" have been so off-base in his prediction? One likely culprit was Grigson's evaluation practices—he would often reach his "100% certain[ ]" opinions on future dangerousness without examining the defendant in person,<sup>22</sup> and, in Adams's case, he met with Adams for only fifteen minutes, pacing him through a series of mindless tasks and asking a few questions about Adams's family and background before reaching his opinion that Adams was a dangerous sociopath.<sup>23</sup> But another likely and more significant culprit is the fact that psychologists and psychiatrists are simply poor at predicting future dangerousness, at least in capital contexts. This Article will seek to shed some light on this issue. Part I will trace some of the relevant Supreme Court decisions regarding capital sentencing procedure and examine Supreme Court doctrine regarding capital sentencing decisions. Part II will consider problems with future dangerousness testimony, both from empirical and penological perspectives. Finally, Part III will suggest a solution for limiting the impact of specious future dangerousness testimony

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<sup>14</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (a)(2)(b)–(c) (West 2013); Michael L. Radelet, *Randall Dale Adams: Filmmaker Helped Free Innocent Man*, NW. PRITZKER SCH. L.: BLUHM LEGAL CLINIC CTR. ON WRONGFUL CONVICTIONS (June 26, 2011), <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/tx/randall-dale-adams.html> [https://perma.cc/3RC5-3LAK].

<sup>15</sup> Radelet, *supra* note 14.

<sup>16</sup> *Id.*

<sup>17</sup> THE THIN BLUE LINE (Miramax Films 1988).

<sup>18</sup> *The First Innocent Man*, BADLAW. (June 27, 2011), <http://badlawyernyc.blogspot.com/2011/06/first-innocent-man.html> [https://perma.cc/PJ9K-6A3E].

<sup>19</sup> *Id.*

<sup>20</sup> Radelet, *supra* note 14.

<sup>21</sup> TEX. DEF. SERV., *supra* note 13, at 25.

<sup>22</sup> *Id.* at 17 (footnote omitted).

<sup>23</sup> Bennett L. Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process?*, 9 PACE L. REV. 275, 296, 310 (1989).

in capital contexts in the form of applying the Federal Rules of Evidence, specifically Rules 401, 402, 403, 702, and 703, to capital sentencing proceedings involving the presentation of future dangerousness evidence. A commonly used measure offered to demonstrate risk of future dangerousness, Hare's PCL-R, is offered as an example of how these rules might be applied.

### I. DEATH AND THE SUPREME COURT

Capital sentencing is the process by which homicide offenders are sentenced to death. Contemporarily, capital sentencing arises as the second phase of a bifurcated death penalty trial, with the first phase focused on determining a defendant's culpability and the second phase focused on deciding an appropriate punishment.<sup>24</sup> Because death represents a severe and permanent liberty deprivation, the Supreme Court has placed many constitutional restrictions on the administration of the death penalty. Some of those restrictions regard the class of individuals eligible to receive the death penalty. As of 2016, the Court has ruled that the following classes of individuals are ineligible for the death penalty: (1) individuals who are incompetent to be executed;<sup>25</sup> (2) the intellectually disabled;<sup>26</sup> (3) juveniles;<sup>27</sup> and (4) offenders

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<sup>24</sup> Elizabeth S. Vartkessian, *What One Hand Giveth, the Other Taketh Away: How Future Dangerousness Corrupts Guilt Verdicts and Produces Premature Punishment Decisions in Capital Cases*, 32 PACE L. REV. 447, 447 (2012).

<sup>25</sup> See *Ford v. Wainwright*, 477 U.S. 399, 401 (1986). Ford was convicted of murder in Florida in 1974 and sentenced to death; while awaiting death, his mental health deteriorated, with Ford experiencing symptoms resembling Schizophrenia, Paranoid Subtype, with a potential for suicide. *Id.* at 401–03. The Court held that executing incompetent individuals was barbaric and did not serve any legitimate penological interests and thus constituted a violation of the Eighth Amendment. *Id.* at 401, 409–10; see also *Panetti v. Quarterman*, 551 U.S. 930, 954–61 (2007) (holding that capital offenders cannot be executed if they do not understand the reason why they are being executed).

<sup>26</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In 1996, Daryl Atkins and William Jones kidnapped, robbed, and killed a military airman; Atkins, who had an IQ of 59, was convicted of the murder and sentenced to death. *Id.* at 307–09, 338. The Court held that a national consensus had emerged against executing the intellectually disabled, and that executing these individuals served no legitimate penological interests and therefore constituted cruel and unusual punishment under the Eighth Amendment. *Id.* at 316, 321. The Court left it to the individual states to define mental retardation. *Id.* at 317. However, the Court subsequently held in *Hall v. Florida* that basing a determination of intellectual disability solely on IQ scores without allowing for the presentation of other evidence indicating deficits in adaptive functioning for individuals scoring between 70–75 was unconstitutional, as a score of 70 fell within the standard error of measurement. 134 S. Ct. 1986, 1996, 1998–2001 (2014). Note that the Supreme Court recently heard oral argument in the case of *Moore v. Texas*, a case examining whether it is unconstitutional to rely on outdated medical standards in determining intellectual disability for *Atkins* purposes. See generally Transcript of Oral Argument, *Moore v. Texas*, No. 15-797 (argued Nov. 29, 2016). A decision is expected in coming months. For the opinion of the Texas Court of Criminal Appeals indicating it not necessary to use current medical standards see *Ex parte Moore*, 470 S.W.3d 481 (Tex. Crim. App. 2015), cert. granted sub nom. *Moore v. Texas*, 136 S. Ct. 2407 (2016).

<sup>27</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005). *Roper* involved the case of Christopher

who have committed crimes other than homicide.<sup>28</sup> Other restrictions are procedural and will be covered in detail below.

The Court's first marquee opinion regarding capital sentencing procedure was *Furman v. Georgia*.<sup>29</sup> *Furman* was an amalgamation of three cases, one involving murder in Georgia, and two involving rape, one each in Georgia and Texas.<sup>30</sup> The Court reached a 5–4 per curiam opinion, indicating that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”<sup>31</sup> The Court declined to provide specific reasoning for the holding; however, Justices Stewart, White, and Douglas all indicated that they felt the imposition of the death penalty in these cases was arbitrary, and Justice Stewart went as far as to say:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection

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Simmons, who with an accomplice burglarized the victim's home and threw her off a bridge, killing her. *Id.* at 556–57. Simmons was convicted and sentenced to death. *Id.* at 556. Simmons was seventeen at the time the murder was committed. *Id.* The Court held that executing minors ran counter to “evolving standards of decency” and therefore violated the Eighth Amendment. *Id.* at 561, 578 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

<sup>28</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 446–47, *modified*, 129 S. Ct. 1 (2008). Patrick Kennedy was convicted and sentenced to death for the rape of his stepdaughter, then eight years old. *Id.* at 412–13. At the time, Louisiana law allowed for the imposition of the death penalty for the rape of a child under twelve years of age. *Id.* at 413. The Court found that there is a national consensus against imposing the death penalty for child rape, and held that death was a disproportionate punishment for crimes that did not involve death. *Id.* at 426, 434, 446–47. In earlier cases decided under the proportionality principle, the Court held that death was not a proportionate punishment for the rape of an adult, *Coker v. Georgia*, 433 U.S. 584, 598, 600 (1977) (plurality opinion), or for felony murder when the defendant did not intend to, attempt to, or actually kill the victim, *Enmund v. Florida*, 458 U.S. 782, 797 (1982), *abrogated by Tison v. Arizona*, 481 U.S. 137 (1987). However, following *Enmund*, the Court held that an offender could be executed for felony murder if he or she was a key player in the underlying felony and displayed reckless indifference toward human life. *Tison v. Arizona*, 481 U.S. 137, 158 (1987). Also note that the Supreme Court has yet to render an opinion regarding whether individuals may still be sentenced to death for crimes against the State, such as treason, espionage, or being the “kingpin” in a drug trafficking operation, though the offenses may not involve death. *See, e.g.*, 18 U.S.C. §§ 794, 2381, 3591(b) (2012).

<sup>29</sup> 408 U.S. 238 (1972) (per curiam).

<sup>30</sup> *Id.* at 239.

<sup>31</sup> *Id.* at 239–40.



of these few to be sentenced to die, it is the constitutionally impermissible basis of race.<sup>32</sup>

This opinion led to over 600 death row inmates having their sentences commuted;<sup>33</sup> additionally, thirty-five states reconsidered their death penalty statutes and passed new legislation.<sup>34</sup>

The Court subsequently considered procedural issues in capital sentencing in *Gregg v. Georgia*.<sup>35</sup> In *Gregg*, defendant Tony Gregg and an accomplice were picked up by two men while hitchhiking before proceeding to rob and murder them.<sup>36</sup> Georgia law provided for bifurcated proceedings; in the sentencing phase, either the judge or the jury was to hear any additional evidence of extenuating, mitigating, or aggravating circumstances and factors in preparation for rendering their decisions, as well as punishment arguments by both sides.<sup>37</sup> Additionally, the State was limited to presenting only aggravating factors that had been made known to the defendant ahead of trial.<sup>38</sup> The statute also indicated that a sentence of death could only be imposed when one of ten aggravating circumstances delineated in the law was found beyond a reasonable doubt, and procedures existed for expedited direct review by the Supreme Court of Georgia regarding the appropriateness of a death sentence.<sup>39</sup> The Court held that such a sentencing procedure was constitutional, as the Georgia scheme addressed the issue of arbitrariness by outlining objective criteria that needed to be met to impose the death penalty and providing for the consideration of the “particularized nature of the crime and the particularized characteristics of the individual defendant.”<sup>40</sup> These guidelines effectively channeled the jury’s discretion, preventing a jury from “wantonly and

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<sup>32</sup> *Id.* at 309–10 (Stewart, J., concurring) (footnotes omitted).

<sup>33</sup> James W. Marquart & Jonathan R. Sorensen, *Institutional and Postrelease Behavior of Furman-Commuted Inmates in Texas*, 26 CRIMINOLOGY 677, 677 (1988).

<sup>34</sup> John Anthony Dukes, Sr., *The Effect of Furman v. Georgia on State Death Penalty Legislation* 52 (2008) (unpublished PhD dissertation, University of South Carolina), <http://gradworks.umi.com/33/39/3339058.html> [<https://perma.cc/V3VV-3V64>]. *Furman* is also recognized as the precipitant for states’ adoptions of bifurcated capital trials; before *Furman*, most states carried out single proceedings in which guilt and punishment were determined concurrently. Vartkessian, *supra* note 24, at 447.

<sup>35</sup> 428 U.S. 153 (1976) (plurality opinion).

<sup>36</sup> *Id.* at 158–59.

<sup>37</sup> *Id.* at 163–64.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 164–66.

<sup>40</sup> *Id.* at 206–07. In two other cases decided with *Gregg*, *Woodson v. North Carolina* and *Roberts v. Louisiana*, the Court held that North Carolina’s and Louisiana’s death penalty statutes were unconstitutional because they established a range of crimes for which the death penalty was to be mandatorily imposed, thus taking away the element of discretion in sentencing. *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 329–31, 335–36 (1976) (plurality opinion).

freakishly impos[ing] the death sentence[.]”<sup>41</sup> Armed with guidelines with which to tailor their statutes, state executions increased drastically post-*Gregg*.<sup>42</sup>

The Court next tackled several cases involving issues regarding what information was allowed to be considered at sentencing. In *Lockett v. Ohio*,<sup>43</sup> defendant Lockett was charged with aggravated murder;<sup>44</sup> at the time, Ohio law required judges to mandatorily impose the death penalty unless one or more of the following mitigating circumstances were met by a preponderance of the evidence: (1) the victim had prompted the offense, (2) the defendant would not have committed the offense if not coerced, provoked, or under duress, or (3) the offense was the result of psychosis or mental deficiency on the part of the defendant.<sup>45</sup> The Court held that it was unconstitutional to limit the range of mitigating factors in such a way, and that the sentencer must not be precluded from considering any and all mitigating factors that may be relevant.<sup>46</sup>

The Court followed this up in *Beck v. Alabama*,<sup>47</sup> a case in which defendant Beck had been convicted of robbery with an intentional killing and sentenced to death; Beck’s partner had intentionally killed the victim while the duo was committing a robbery.<sup>48</sup> Under Alabama law, the felony murder doctrine was insufficient to prove intent to kill, meaning that intent, a key element of the crime of which Beck was convicted, could not be established.<sup>49</sup> However, under Alabama’s death penalty statute, felony murder was a lesser included offense of the crime of robbery with an intentional killing, and judges were specifically prohibited from instructing a jury of this lesser included offense; this effectively limited a jury’s options to either convicting a defendant of the capital offense or acquitting him.<sup>50</sup> The Court held the prohibition to be unconstitutional under a theory that to bar consideration of the lesser included offense risked an unwarranted conviction, which would not be in accordance with precedent establishing that a death sentence not be applied based on “caprice or emotion.”<sup>51</sup>

Next was *Ring v. Arizona*.<sup>52</sup> In *Ring*, Ring and some accomplices robbed an armored car in Arizona in 1994; Ring was convicted of first-degree murder in accordance

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<sup>41</sup> *Gregg*, 428 U.S. at 206–07.

<sup>42</sup> H. Naci Mocan & R. Kaj Gittings, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 457 (2003).

<sup>43</sup> 438 U.S. 586 (1978).

<sup>44</sup> *Id.* at 589.

<sup>45</sup> *Id.* at 593–94.

<sup>46</sup> *Id.* at 608. *Tennard v. Dretke* expanded upon *Ring v. Arizona*, providing that it is unconstitutional to restrict presentation of mitigating evidence to a jury in capital cases. *Tennard v. Dretke*, 542 U.S. 274, 285 (2004); *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding that “[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment”).

<sup>47</sup> 447 U.S. 625 (1980).

<sup>48</sup> *Id.* at 627, 630.

<sup>49</sup> *Id.* at 627–28.

<sup>50</sup> *Id.* at 628–29.

<sup>51</sup> *Id.* at 637–38 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

<sup>52</sup> 536 U.S. 584 (2002).

with the felony murder rule and sentenced to death.<sup>53</sup> At the time, Arizona law dictated that sentencing hearings be held in front of a judge alone, who was to determine the presence of aggravating and mitigating circumstances and then render a sentencing decision.<sup>54</sup> Extending the holding in *Apprendi v. New Jersey*<sup>55</sup> to capital sentencing contexts, the Court held that the Sixth Amendment precluded judges from finding the aggravating circumstances necessary to sentence a defendant to death, reserving that right expressly for a jury.<sup>56</sup>

The most recent significant development in the Court's capital sentencing procedure jurisprudence came in *Hurst v. Florida*.<sup>57</sup> *Hurst* involved the case of Timothy Lee Hurst, convicted of first-degree murder in the state of Florida for murdering a co-worker.<sup>58</sup> At the time of his conviction, Florida employed a sentencing scheme in which a jury determined a capital offender's guilt and could make a sentencing recommendation, but a judge was tasked with determining the existence of aggravating circumstances and imposing the ultimate penalty.<sup>59</sup> The Court held such a sentencing procedure to be unconstitutional, stating that, "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."<sup>60</sup>

Viewed collectively, these cases indicate the Court's intention to place death judgments solely in the hands of a jury of the defendant's peers. These opinions also indicate the Court's desire to provide at least some minimal level of protection for capital offenders who do not fit any of the exclusion criteria previously outlined<sup>61</sup> by requiring states to provide guidelines for the imposition of the death penalty to help juries avoid making arbitrary death sentence decisions. To do this, states have "bifurcated capital jury trials" to create separate trial and sentencing phases, generated non-exhaustive lists of statutory mitigating circumstances, and adopted statutory aggravating factors

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<sup>53</sup> *Id.* at 589–92, 595.

<sup>54</sup> *Id.* at 592–93.

<sup>55</sup> 530 U.S. 466 (2000). In *Apprendi*, the Court held that the Sixth Amendment proscribed judges from modifying a criminal sentence based on aggravating factors found by the judges themselves as opposed to the jury. *Id.* at 476.

<sup>56</sup> *Ring*, 536 U.S. at 609. Following *Ring*, several cases touched on procedural issues, though less integral issues than in the cases outlined above. The Court's holding in *Oregon v. Guzek* allowed states to limit the presentation of exculpatory evidence to trial, meaning that states could prevent a defendant's presentation of new exculpatory evidence during the sentencing phase. 546 U.S. 517, 519 (2006). Additionally, in *Kansas v. Marsh*, the Court held that a defendant could be sentenced to death even when aggravating and mitigating factors offset each other. 548 U.S. 163, 165–66 (2006).

<sup>57</sup> 136 S. Ct. 616 (2016).

<sup>58</sup> *Id.* at 619–20.

<sup>59</sup> *Id.* at 620.

<sup>60</sup> *Id.* at 619.

<sup>61</sup> See *supra* notes 25–28 and accompanying text.

that need to be found for a jury to impose a sentence of death.<sup>62</sup> One aggravating factor outlined by some states is a defendant's future dangerousness.<sup>63</sup>

## II. FUTURE DANGEROUSNESS

In capital sentencing contexts, future dangerousness is the probability that an individual, absent a penalty of death, will engage in future violent behavior either in prison or upon release from custody, and hence constitute a danger to others.<sup>64</sup> Future dangerousness evidence is typically offered via expert testimony from psychologists and psychiatrists.<sup>65</sup>

### A. Legal Foundation

The legal foundation of future dangerousness testimony was set by the 1983 Supreme Court case *Barefoot v. Estelle*.<sup>66</sup> In *Barefoot*, Thomas Barefoot was convicted of the murder of a police officer in Texas.<sup>67</sup> Under Texas law, a defendant could be sentenced to death if the jury found that the homicide was committed intentionally and deliberately and that there was a probability that the defendant would commit future acts of criminal violence that would render him a perpetual threat to the community.<sup>68</sup> The State offered two psychiatrists, one the aforementioned "Dr. Death," James Grigson, who testified that Barefoot "would probably commit further acts of violence

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<sup>62</sup> Alexander Bunin, *When Trial and Punishment Intersect: New Defects in the Death Penalty*, 26 W. NEW ENG. L. REV. 233, 244–45 (2004).

<sup>63</sup> See Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL., PUB. POL'Y, & L. 267, 267 n.1 (2001). Currently, six states consider future dangerousness in their capital sentencing statutes, with two requiring a finding of probability of future dangerousness for the death penalty to be imposed. Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-Making*, 29 LAW & PSYCHOL. REV. 63, 64 n.5 (2005). These states are Idaho, Oklahoma, Oregon, Texas, Virginia, and Wyoming. *Id.* (citing IDAHO CODE § 19-2515(9)(h) (2004); OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 2004); OR. REV. STAT. § 163.150 (1)(b)(B) (2003); TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West 2004); VA. CODE ANN. § 19.2-264.2(1) (2004); WYO. STAT. ANN. § 6-2-102(h)(xi) (2003)). Aside from proving a statutory aggravating circumstance, evidence of future dangerousness might be used as evidence of a non-statutory aggravating factor that the jury can consider in their decision-making, or in rebuttal to a defendant's assertion that he/she is not a future danger. Dorland & Krauss, *supra*, at 64–65 & nn.12–13.

<sup>64</sup> Matt DeLisi & Ed A. Munoz, *Future Dangerousness Revisited*, 14 CRIM. JUST. POL'Y REV. 287, 287–88 (2003).

<sup>65</sup> Krauss & Sales, *supra* note 63, at 267.

<sup>66</sup> 463 U.S. 880 (1983), *superseded by statute*, Pub. L. No. 104-132, 110 Stat. 1217, as recognized in *Slack v. McDaniel*, 529 U.S. 473 (2000).

<sup>67</sup> *Id.* at 883.

<sup>68</sup> *Id.* at 883–84 (citing TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1981)).

and represent a continuing threat to society.”<sup>69</sup> Fueled by this testimony, the jury sentenced Barefoot to die.<sup>70</sup>

On appeal, Barefoot offered three arguments. First, he argued that his punishment was unconstitutional because it was based on the testimony of psychiatrists, who “individually and as a class, are not competent to predict future dangerousness. Hence, their predictions are so likely to produce erroneous sentences that their use violated the Eighth and Fourteenth Amendments.”<sup>71</sup> Second, he contended “psychiatrists should not be permitted to testify about future dangerousness in response to hypothetical questions and without having examined the defendant personally.”<sup>72</sup> Third, Barefoot suggested that, under “the particular circumstances of this case, the testimony of [Grigson and the other psychiatrist] was so unreliable that [his] sentence should be set aside.”<sup>73</sup>

Regarding the first argument, the Court likened banning psychiatrists from testifying on future dangerousness to “disinvent[ing] the wheel,” paid deference to its decisions in *Jurek v. Texas*<sup>74</sup> and *Estelle v. Smith*,<sup>75</sup> indicated that it was the job of the jury to decide how much weight to accord to future dangerousness testimony, and suggested that jurors were capable of realizing the shortcomings of future dangerousness testimony.<sup>76</sup> Addressing the second argument, the Court indicated that evidence is commonly admitted for the purposes of helping the “factfinder do its assigned job” and noted that hypothetical questions are common in examinations of expert witnesses.<sup>77</sup> Considering the third contention, the Court deferred to the opinions of the Texas courts, which found that, though the hypothetical questions reflected details of the case at bar, there was “[no] constitutional infirmity in the application of the Texas Rules of Evidence in this particular case.”<sup>78</sup>

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<sup>69</sup> *Id.* at 884.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 884–85, 896. The American Psychiatric Association agreed with Barefoot, submitting an amicus brief which asserted that future violence testimony should not be admissible because psychiatric knowledge was not yet advanced enough to make accurate long-term dangerousness predictions. Lisa M. Dennis, *Constitutionality, Accuracy, Admissibility: Assessing Expert Predictions of Future Violence in Capital Sentencing Proceedings*, 10 VA. J. SOC. POL’Y & L. 292, 298 (2002) (citing Brief of Amici Curiae American Psychiatric Association at 8–9, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080)).

<sup>72</sup> *Barefoot*, 463 U.S. at 896.

<sup>73</sup> *Id.*

<sup>74</sup> 428 U.S. 262 (1976).

<sup>75</sup> 451 U.S. 454 (1981).

<sup>76</sup> *Barefoot*, 463 U.S. at 896–98. *Jurek v. Texas* declared that it was permissible to consider the likelihood of a defendant’s committing future crimes as a death penalty criterion. 428 U.S. at 269, 276. *Estelle v. Smith* indicated that there was “no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness[.]” 451 U.S. at 473.

<sup>77</sup> *Barefoot*, 463 U.S. at 903.

<sup>78</sup> *Id.* at 904–05.

Practically, *Barefoot* represented a major loss for capital defendants.<sup>79</sup> However, capital defendants would be granted a reprieve following the Court's decision in the 1994 case *Simmons v. South Carolina*.<sup>80</sup> Simmons was convicted of the murder of an elderly woman in 1990; due to his guilty plea to charges of burglary and sexual assault the week before his trial and a South Carolina statute declaring individuals convicted of violent offenses subsequent to their original violent offense ineligible for parole, Simmons would spend the rest of his life in prison with no possibility of parole if not sentenced to death.<sup>81</sup> At sentencing, the prosecution argued that Simmons's future dangerousness was an aggravating factor for the jury to consider in imposing death.<sup>82</sup> Simmons, armed with studies to back him up, suggested that the jury might not understand that life imprisonment, at least in his case, did not allow opportunity for parole, and asked for the judge to instruct the jury accordingly.<sup>83</sup> Essentially, this would limit the context in which future dangerousness could be considered to violence conducted in prison as opposed to in both prison and the community.<sup>84</sup>

The prosecution opposed such an instruction, the trial court declined to provide one, and Simmons was sentenced to death.<sup>85</sup> The Supreme Court held that it violated Simmons's due process rights for the trial court not to issue such an instruction.<sup>86</sup> The practical impact of this decision was an undercutting of the prosecution's arguments regarding future dangerousness in cases involving death versus life without parole, as the only relevant inquiry was the defendant's likelihood of violence in an institutional setting.<sup>87</sup> Realistically, *Simmons* represented only a small victory for defendants in capital cases—future dangerousness testimony still led to an increasing number of executions and inconsistent standards for the admission of evidence to mitigate future dangerousness.<sup>88</sup>

### *B. Problems with Future Dangerousness Testimony*

Though he lost his case, Barefoot was right to be concerned about the ability of psychologists and psychiatrists to predict future dangerousness—the empirical evidence base suggesting that clinicians can accurately predict future dangerousness in capital cases is quite thin. However, in addition to and in conjunction with empirical concerns, future dangerousness testimony may present penological concerns in that the accepted rationales for punishment, utilitarianism and retributivism, might be undermined. Each of these issues will be expanded upon in turn.

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<sup>79</sup> Dennis, *supra* note 71, at 298–99.

<sup>80</sup> 512 U.S. 154 (1994).

<sup>81</sup> *Id.* at 156–57.

<sup>82</sup> *Id.* at 157.

<sup>83</sup> *Id.* at 158–59.

<sup>84</sup> *Id.* at 163–64.

<sup>85</sup> *Id.* at 159–60.

<sup>86</sup> *Id.* at 171.

<sup>87</sup> Dennis, *supra* note 71, at 300.

<sup>88</sup> *Id.*

## 1. Poor Empirical Evidence

Research suggests two things regarding institutional violence: (1) capital offenders sentenced to death do not engage in institutional misconduct at rates higher than capital offenders sentenced to life in prison, and (2) the field of psychology is poor at predicting future dangerousness in institutional settings. Regarding the former, the research suggests both: (1) that the base rate of institutional violence in death row offenders is low, and (2) death row offenders may actually be *less violent* than non-capital offenders or the general prison population.<sup>89</sup> In assessing violence risk of any kind, base rates are an integral data point to consider—in fact, when considering an individual's risk of violence, “the most accurate probability is the base rate of violence in the corresponding group to which the individual belongs.”<sup>90</sup> Adjusting a violence risk estimate from a group's base rate introduces error in violence risk prediction, rendering the prediction less valuable and likely less accurate.<sup>91</sup> In capital contexts, multiple studies suggest that rates of serious institutional violence among capital offenders is quite low; therefore, the likelihood that any particular capital offender will pose a serious risk of institutional violence should be correspondingly low.

For example, for fifteen years, James Marquart and Jonathan Sorensen followed 558 former death row offenders who had their sentences commuted by *Furman*.<sup>92</sup> The researchers found that only approximately 30% of the sample committed institutional infractions generally during that period, and that only six murders and fifty-nine serious acts of violence were reported.<sup>93</sup> Further, of these sixty-five serious violent infractions, more than half were committed by a small pocket of the sample (7.4%).<sup>94</sup> Summed up by the researchers, “[i]n short, most of the *Furman* inmates were not violent menaces to the institutional order. As a group, they were not a disproportionate threat to guards and other inmates.”<sup>95</sup> Another study in 1994 by

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<sup>89</sup> See John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to “Disinvent the Wheel?”*, 29 LAW & HUM. BEHAV. 55, 58–59 (2005) (discussing a study that compared “former death row inmates who had their sentences commuted or reversed” with a group of “capital murderers sentenced to life imprisonment,” both of which were compared to a general prison population and inmates of “a single high-security prison”).

<sup>90</sup> MARK D. CUNNINGHAM, EVALUATION FOR CAPITAL SENTENCING 68–69 (2010). A base rate is “a statistic used to describe the percentage of a population that demonstrates some characteristic” and is defined as the “frequency or likelihood of an event occurring without intervention.” Teresa L. Davenport, *Base Rate*, in ENCYCLOPEDIA OF CHILD BEHAVIOR AND DEVELOPMENT 209, 209 (Sam Goldstein & Jack A. Naglieri eds., 2011).

<sup>91</sup> CUNNINGHAM, *supra* note 90, at 69.

<sup>92</sup> See generally James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5 (1989).

<sup>93</sup> *Id.* at 20–21.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 20.

Marquart and colleagues produced similar results.<sup>96</sup> Following a total of 421 Texas death row inmates for the fifteen-year period between 1974–1988, the researchers found that only sixty-three violent acts were committed; again, a small pocket of offenders (10%) accounted for the majority of these acts.<sup>97</sup> A 2009 study of eighty capital offenders in Arizona who had received a transfer from death row supports these previous findings; only 3.8% of former capital offenders committed an assault resulting in great bodily harm and only 1.3% engaged in an assault leading to death.<sup>98</sup>

Considering the base rate of institutional violence in death row offenders compared to life offenders or the general prison population, research also suggests that the base rate of institutional violence may be lower for the former group than for the latter two groups.<sup>99</sup> For example, a 1989 study by Marquart, Ekland-Olson, and Sorensen compared a sample of 107 life offenders to a sample of ninety-two former death row inmates to the general Texas prison population.<sup>100</sup> Results from the study indicated that the former death row inmates committed acts of institutional violence at one-tenth the rate of life offenders.<sup>101</sup> Perhaps more shockingly, the former death row offenders committed acts of institutional violence at one-fifth the rate of the general prison population.<sup>102</sup>

Regarding the field of psychology's ability to predict future dangerousness in institutional settings, base rates of inmate assaults are low to begin with; as a result, the studies that seek to identify predictive factors of inmate violence necessarily need to "expand[] the definitions of inmate 'aggression' to include misconduct ranging from verbal belligerence, to threats, to self-injury, [and] to property damage[.]"<sup>103</sup> Such conduct may be considered deviant, but it is not generally considered to be violent in such a way as to pose perpetual danger for "actual interpersonal harm."<sup>104</sup>

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<sup>96</sup> See JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990*, at 179 (1994).

<sup>97</sup> *Id.*

<sup>98</sup> See Jon R. Sorensen & Mark D. Cunningham, *Once a Killer, Always a Killer? Prison Misconduct of Former Death-Sentenced Inmates in Arizona*, 37 J. PSYCHIATRY & L. 237, 253–54 (2009). For a summary of other studies indicating that the base rate of serious institutional violence among capital offenders is low, see CUNNINGHAM, *supra* note 90, at 72–75.

<sup>99</sup> See generally James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449 (1989) (conducting a study comparing ninety-two former death row inmates to those originally sentenced to life imprisonment).

<sup>100</sup> Edens et al., *supra* note 89, at 58, 59 (citing Marquart et al., *supra* note 99).

<sup>101</sup> *Id.* at 59.

<sup>102</sup> *Id.* For a summary of other studies indicating that the rate of serious institutional violence of capital offenders sentenced to death is equivalent to or lower than rates for life offenders or offenders in general, see CUNNINGHAM, *supra* note 90, at 73–74.

<sup>103</sup> Mark D. Cunningham et al., *Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence*, 32 LAW & HUM. BEHAV. 46, 49 (2008).

<sup>104</sup> *Id.*



Additionally, even using this expanded definition of “aggression,” studies still fail to show that psychological measures that assess personality characteristics, disorders, and violence risk in the community are reliable in helping to predict prison misconduct in capital offenders.<sup>105</sup>

## 2. Penological Concerns: Principles of Punishment

In addition to a research base that suggests that future dangerousness testimony is not helpful in predicting institutional misconduct, future dangerousness testimony may run counter to accepted principles of punishment. In the United States, punishment is justified under rationales of utilitarianism and retributivism.<sup>106</sup> The central premise to utilitarianism is that punishment should serve the public good by deterring, isolating, and rehabilitating offenders.<sup>107</sup> Retributivism’s foundation is morality, and it dictates that offenders should be punished commensurately for the harm they have caused.<sup>108</sup> Given the poor research base for the predictive ability of psychologists and psychiatrists to predict institutional violence, it would seem that future dangerousness testimony at capital sentencing would not map onto either of these two principles of punishment.

Regarding utilitarianism, imposition of the death penalty based on future dangerousness testimony does not fit with the goals of deterrence, isolation, or rehabilitation. Considering deterrence, given that the rates of institutional violence among capital offenders sentenced to death may actually be *lower* than the rates for capital offenders sentenced to life in prison or the general prison population,<sup>109</sup> it may be the case that there is *less* to deter for death row inmates. Concerning isolation, the capital offenders in jurisdictions where life means life are equally isolated from society at large regardless of whether they are on death row or in the general prison population; additionally, given the evidence suggesting that offenders on death row pose no violence risk above that of the general prison population, an additional level of isolation is unnecessary.<sup>110</sup> Regarding rehabilitation, in jurisdictions where life means life, capital offenders will not be paroled into the community, and given the

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<sup>105</sup> *Id.* Common measures of personality include the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) and the Personality Assessment Inventory (PAI). *See id.* Common measures of violence risk in the community include the PCL-R; the Violence Risk Assessment Guide (VRAG); the Historical, Clinical, Risk Management-20 (HCR-20); and the Level of Service/Case Management Inventory (LSI). *See id.*

<sup>106</sup> Albin Eser, *The Nature and Rationale of Punishment*, 28 CARDOZO L. REV. 2427, 2428–29 (2007).

<sup>107</sup> *Id.* at 2429.

<sup>108</sup> *Id.*

<sup>109</sup> *See supra* Section II.B.1.

<sup>110</sup> This proposition seems especially so given the research suggesting that solitary confinement while on death row can cause numerous deleterious physical and mental health consequences. *See* AM. CIVIL LIBERTIES UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 6–7 (2013).

low rates of institutional violence among death row offenders, there is no threat presented above and beyond the concerns posed by general offenders to rehabilitate.

Considering retributivism, a core tenet of retributivism is fairness—individuals are supposed to receive punishment commensurate to their crimes.<sup>111</sup> Although it is arguable that other aggravating circumstances may call for a greater punishment to be commensurate with the offense committed, it seems fundamentally unfair to sentence an offender to a greater punishment based on a future dangerousness determination that has little empirical backing. Additionally, given the research suggesting that death row offenders may engage in institutional violence at a lower rate than general population offenders,<sup>112</sup> it would also seem unfair to sentence them to a greater punishment based on a propensity that does not exist.

### III. A POTENTIAL SOLUTION: APPLYING THE FEDERAL RULES OF EVIDENCE TO CAPITAL SENTENCING WHEN QUESTIONS OF FUTURE DANGEROUSNESS ARE AT ISSUE

Given concerns about the reliability of future dangerousness predictions and the difficulty reconciling a sentence of death imposed due to a determination of future dangerousness when the scientific evidence does not support it, some solution is needed. The Federal Rules of Evidence (FRE) do not apply during sentencing,<sup>113</sup> and a majority of the states have adopted the FRE and their inapplicability at sentencing.<sup>114</sup> Because of this, one potential solution to the problems associated with future dangerousness testimony may be to apply FRE 401, 402, 403, 702, and 703 to capital sentencing. FRE 401 and 402 provide for the inclusion of relevant evidence and the exclusion of irrelevant evidence.<sup>115</sup> FRE 403 provides for the exclusion of relevant evidence that is substantially more prejudicial, misleading, confusing, dilatory, procrastinatory, or needlessly cumulative than probative.<sup>116</sup> FRE 702 provides that experts may offer opinion or other testimony provided that their testimony is “based

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<sup>111</sup> Eser, *supra* note 106, at 2434.

<sup>112</sup> See *supra* Section II.B.1.

<sup>113</sup> FED. R. EVID. 1101(d)(3); Bunin, *supra* note 62, at 236.

<sup>114</sup> Kenneth W. Graham, Jr., *State Adaptation of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293, 293 (1990). However, some states, such as Louisiana, have expressly applied evidentiary rules to capital sentencing proceedings. See, e.g., LA. CODE CRIM. PROC. ANN. art. 905.2 (2012).

<sup>115</sup> FED. R. EVID. 401–402. The full text of Rule 401 is: “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” FED. R. EVID. 401. FRE 402 generally holds that all relevant evidence is admissible, and irrelevant evidence is not admissible. FED. R. EVID. 402.

<sup>116</sup> FED. R. EVID. 403. The full text for the rule is: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” *Id.*

on sufficient facts or data,” and “the testimony is the product of reliable principles and methods.”<sup>117</sup> Finally, FRE 703 allows for experts to testify based on otherwise inadmissible evidence, as long as experts in that field would normally rely on such evidence in the formulation of their opinions, and the evidence’s probative value substantially outweighs the risk of prejudicing the jury.<sup>118</sup> In short, all five rules provide barriers that evidence needs to overcome for future dangerousness evidence to be admissible. The rest of Part III will demonstrate how FRE 401, 402, 403, 702, and 703 can be applied to keep future dangerousness testimony from being considered by a factfinder, using Hare’s PCL-R as a case example.

#### *A. Hare’s Psychopathy Checklist-Revised*

“Psychopathy is a clinical construct” defined by a cluster of “interpersonal, affective, and lifestyle characteristics.”<sup>119</sup> Distinguishing characteristics of psychopathy include: arrogance, callousness, dominance orientation, superficiality, manipulativeness, grandiosity, being quick to anger, inability to form strong emotional bonds with others, an absence of feelings of guilt or anxiety, irresponsibility, ignoring/violating social mores and conventions, and impulsive behavior.<sup>120</sup> Psychopathy is strongly correlated with criminal and antisocial behavior, and though psychopaths

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<sup>117</sup> FED. R. EVID. 702. The full text for the rule is:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

*Id.*

<sup>118</sup> FED. R. EVID. 703. The full text for the rule is:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

*Id.* Future dangerousness testimony is almost always based on hearsay, as it is based on verbal statements by the defendant or written records that are offered for the truth of the matter asserted, namely that the data and facts considered indicate that an individual will be dangerous in the future. See FED. R. EVID. 801(c).

<sup>119</sup> Robert D. Hare, *Psychopathy as a Risk Factor for Violence*, 70 PSYCHIATRIC Q. 181, 183 (1999) (internal citations omitted).

<sup>120</sup> *Id.*

make up only about 1% of the general population, they are disproportionately represented in the criminal justice system.<sup>121</sup> Psychopathy is also closely associated with both general and violent recidivism,<sup>122</sup> with approximately 77% of psychopaths recidivating violently, compared to about 21% of non-psychopaths.<sup>123</sup> For these reasons, courts often look to psychopathy as a risk factor for general and violent recidivism among offenders.<sup>124</sup>

Hare's PCL-R is a twenty-item measure designed to assess psychopathic personality characteristics in correctional and forensic psychiatric populations.<sup>125</sup> It is administered in semistructured interview format and includes a review of collateral records.<sup>126</sup> The PCL-R items load on two factors, one representing the "interpersonal or affective features (Factor 1) of psychopathy" and the other "the behavioral features (Factor 2) of psychopathy."<sup>127</sup> Items are scored on a "0–2" scale, with "0" indicating that the item does not apply to the person, "1" indicating that the item may apply to the person, and "2" indicating that the item does apply to the person.<sup>128</sup>

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<sup>121</sup> *Id.* at 186.

<sup>122</sup> James F. Hemphill et al., *Psychopathy and Recidivism: A Review*, 3 LEGAL & CRIMINOLOGICAL PSYCHOL. 139, 148–49 (1998). Research indicates that individuals high in psychopathy are three times more likely to recidivate generally than individuals low in psychopathy, and between three and five times more likely to recidivate violently. *Id.* at 148–51.

<sup>123</sup> Grant T. Harris et al., *Psychopathy and Violent Recidivism*, 15 LAW & HUM. BEHAV. 625, 632 (1991).

<sup>124</sup> Hare, *supra* note 119, at 187.

<sup>125</sup> David DeMatteo & John F. Edens, *The Role and Relevance of the Psychopathy Checklist—Revised in Court: A Case Law Survey of U.S. Courts (1991–2004)*, 12 PSYCHOL. PUB. POL'Y & L. 214, 216 (2006).

<sup>126</sup> *Id.* Semistructured interviews are commonly used in qualitative research and are interviews which have a "flexible and fluid structure," in contrast with structured interviews which "contain a structured sequence of questions to be asked in the same way of all interviewees." Jennifer Mason, *Semistructured Interview*, in 3 THE SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS 1020, 1020 (Michael S. Lewis-Beck et al. eds., 2004). Semistructured interviews are organized around topics or themes, and are designed to be flexible so as to allow the interview to be "shaped by the interviewee's own understandings as well as the researcher's interests" and so that "unexpected themes can emerge." *Id.* Collateral records are often used to determine the veracity of interview content as well as to supplement it. *See* Karen C. Kalmbach & Phillip M. Lyons, *Ethical Issues in Conducting Forensic Evaluations*, 2 APPLIED PSYCHOL. CRIM. JUST. 261, 261, 266, 281 (2006). Collateral records may include "police or criminal history reports, institutional records, personal correspondence, victim statements, medical records . . . employment records," etc. *Id.* at 281.

<sup>127</sup> DeMatteo & Edens, *supra* note 125. Examples of Factor 1 traits include "superficial charm and callousness," and examples of Factor 2 traits include "irresponsibility and poor behavioral control." *Id.* (citations omitted). The current version of the PCL-R also splits Factor 1 and Factor 2 into four subfactors: interpersonal and affective for Factor 1 and impulsive lifestyle and antisocial behavior for Factor 2. *Id.*

<sup>128</sup> KENT A. KIEHL, THE PSYCHOPATH WHISPERER: THE SCIENCE OF THOSE WITHOUT CONSCIENCE 51 (2014). Scores of "1" and "2" are distinguished by the pervasiveness of the characteristic across an individual's life domains. Individuals who show the characteristic

This scoring system yields a potential total score of forty, with scores of thirty and above indicative that a person is a psychopath.<sup>129</sup> However, while scores of thirty have traditionally been used as the cutoff point for designating an individual as a “psychopath,” research suggests that psychopathy is perhaps best viewed as being along a continuum as opposed to as a discrete taxon.<sup>130</sup>

Research has established the PCL-R to be a strong predictor of violence, with some researchers going as far as to characterize its predictive ability as “unparalleled” and “unprecedented,”<sup>131</sup> and to refer to it as “the gold standard in the assessment of psychopathy among incarcerated offenders.”<sup>132</sup> The PCL-R has long been used to assist in determining future violence risk as an aggravating factor in capital sentencing,<sup>133</sup> and its use for such a purpose has increased in recent years.<sup>134</sup> This is alarming given that the research regarding PCL-R performance at distinguishing between psychopathic and non-psychopathic inmates in terms of institutional violence is mixed. Although no established metric exists to determine the probative value and

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in only some life domains are scored as “1,” while individuals who exhibit the trait in all or nearly all aspects of life are scored as “2.” *Id.* For items for which not enough information is present to make a valid judgment, these items can be omitted and the final score prorated. *Id.* at 69. For examples of how the PCL-R might be scored, see generally *id.* at 52–77 (scoring the PCL-R for two notable presidential assassins, John Wilkes-Booth and Charles Guiteau, categorizing the latter as a psychopath based on a prorated score of 37.5, and not the former based on his prorated score of 8.4, despite both committing the same offense).

<sup>129</sup> DeMatteo & Edens, *supra* note 125, at 216.

<sup>130</sup> See generally John F. Edens et al., *Psychopathic, Not Psychopath: Taxometric Evidence for the Dimensional Structure of Psychopathy*, 115 J. ABNORMAL PSYCHOL. 131 (2006); Jean-Pierre Guay et al., *A Taxometric Analysis of the Latent Structure of Psychopathy: Evidence for Dimensionality*, 116 J. ABNORMAL PSYCHOL. 701 (2007); Glenn D. Walters et al., *The Latent Structure of Psychopathy: A Taxometric Investigation of the Psychopathy Checklist—Revised in a Heterogeneous Sample of Male Prison Inmates*, 14 ASSESSMENT 270 (2007).

<sup>131</sup> Hare, *supra* note 119, at 187 (quoting Randall T. Salekin et al., *A Review and Meta-Analysis of the Psychopathy Checklist and Psychopathy Checklist—Revised: Predictive Validity of Dangerousness*, 3 CLINICAL PSYCHOL. 203, 211 (1996)).

<sup>132</sup> Dennis E. Reidy et al., *Psychopathy and Aggression: Examining the Role of Psychopathy Factors in Predicting Laboratory Aggression Under Hostile and Instrumental Conditions*, 41 J. RES. PERSONALITY 1244, 1245 (2007).

<sup>133</sup> Tiffany Walsh & Zach Walsh, *The Evidentiary Introduction of Psychopathy Checklist—Revised Assessed Psychopathy in U.S. Courts: Extent and Appropriateness*, 30 LAW & HUM. BEHAV. 493, 498–99 (2006).

<sup>134</sup> David DeMatteo et al., *Investigating the Role of the Psychopathy Checklist—Revised in United States Case Law*, 20 PSYCHOL. PUB. POL’Y & L. 96, 97–98, 100 (2014). From 1991 to 2004, only four cases reported use of the PCL-R in capital sentencing; from 2005–2012, that number increased to eleven. DeMatteo & Edens, *supra* note 125, at 219; DeMatteo et al., *supra*, at 99–100. As these case law reviews included only cases reported in the LexisNexis electronic legal database, which mainly contains appellate cases, these numbers are an underestimate of the number of capital cases that use the PCL-R in sentencing. See DeMatteo & Edens, *supra* note 125, at 216; DeMatteo et al., *supra*, at 97, 99, 104–05.

prejudicial impact of PCL-R-based future dangerousness testimony, research regarding the predictive ability of the PCL-R for institutional misconduct, and regarding the labeling effects on juries when a defendant is labeled as a psychopath can help to quantify the probative value and prejudicial impact of the PCL-R in capital sentencing. The following two sections will evaluate the probative value and prejudicial impact of the PCL-R in capital contexts.

*B. Probative Value: Predictive Ability of the PCL-R in Capital Sentencing Contexts*

Regarding future dangerousness, due to the extremely low likelihood that an individual sentenced to life in prison will ever reenter the community, the primary outcome of interest in capital contexts is a capital offender's risk of violence behind prison walls.<sup>135</sup> Several meta-analyses have explored the predictive ability of the PCL-R regarding institutional violence.<sup>136</sup> A 2003 meta-analysis by Glenn Walters explored the predictive ability of PCL/PCL-R factor scores in predicting institutional infractions, finding that Factor 1 was a weak but significant predictor of institutional violence while Factor 2 was a weak-to-moderate (and significant) predictor; however, both factors were stronger predictors of institutional misconduct as a whole as opposed to institutional violence specifically.<sup>137</sup>

Laura Guy and colleagues found in a 2005 meta-analysis that PCL-R total scores were a weak and nonsignificant<sup>138</sup> predictor of physical violence in prison, a moderate but nonsignificant predictor of verbal and destructive (towards property) aggression, and a moderate and significant predictor of general aggression.<sup>139</sup> The Factor 1 score was found to be a weak and nonsignificant predictor of both physical violence and

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<sup>135</sup> John F. Edens et al., *No Sympathy for the Devil: Attributing Psychopathic Traits to Capital Murderers Also Predicts Support for Executing Them*, 4 PERSONALITY DISORDERS 175, 176 (2013) (citing Mark D. Cunningham, *Dangerousness and Death: A Nexus in Search of Science and Reason*, 61 AM. PSYCHOLOGIST 828 (2006)).

<sup>136</sup> Merriam-Webster's online dictionary defines a meta-analysis as "a quantitative statistical analysis of several separate but similar experiments or studies in order to test the pooled data for statistical significance." *Meta-Analysis*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/meta-analysis> [<https://perma.cc/A627-C37W>].

<sup>137</sup> Glenn D. Walters, *Predicting Institutional Adjustment and Recidivism with the Psychopathy Checklist Factor Scores: A Meta-Analysis*, 27 LAW & HUM. BEHAV. 541, 545–50 (2003).

<sup>138</sup> Statistical significance for correlational studies indicates a certain level of confidence (for psychology, usually ninety-five percent confidence) that the existence of a relationship between variables is not due to chance. See *Interpretation of Correlation*, STAT. CONCEPTS & ANALYTICS EXPLAINED (Apr. 2010), <http://statisticalconcepts.blogspot.com/2010/04/interpretation-of-correlation.html> [<https://perma.cc/Y6DK-M7JZ>]; see also Laura S. Guy et al., *Does Psychology Predict Institutional Misconduct Among Adults? A Meta-Analytic Investigation*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1056, 1058–61 (2005).

<sup>139</sup> Guy et al., *supra* note 138, at 1059–61. General aggression was "broadly defined" and encompassed a host of different aggressive actions, "from obscene gestures to assaults resulting in injury." *Id.* at 1058.

general aggression, but a weak-to-moderate (though nonsignificant) predictor of verbal/destructive aggression.<sup>140</sup> The Factor 2 score was found to be a nonsignificant predictor for all three types of aggression, serving as a weak predictor of physical violence, a weak-to-moderate predictor of general aggression, and a weak-to-moderate predictor of verbal/destructive aggression.<sup>141</sup> Additionally, though PCL-R total and factor scores were somewhat useful predictors of institutional aggression, they tended to be better predictors of overall institutional misconduct (containing aggressive and nonaggressive misconduct) than institutional aggression by itself.<sup>142</sup>

A 2008 meta-analysis by Anne-Marie Leistico and colleagues yielded stronger findings than the Guy study.<sup>143</sup> Results suggested that PCL-R total and factor scores generated moderate to large effect sizes<sup>144</sup> regarding general institutional infractions, as well as nonviolent versus violent institutional misconduct.<sup>145</sup>

### *C. Prejudicial Impact: Labeling and Its Impact on Mock Jurors*

A handful of studies have explored the impact on the jury of either designating defendants as a psychopath or attributing psychopathic traits to them. In a 2004 study, Edens and colleagues presented a sample of undergraduate students with a case summary of a homicide offense and a summary of an expert's testimony from the case.<sup>146</sup> The researchers manipulated the expert's testimony such that the expert diagnosed the defendant with psychopathy, psychosis, or nothing, as well as the defendant's risk for future violence (either low or high).<sup>147</sup> Results indicated that defendants given a diagnosis were judged to be more dangerous than defendants with no diagnosis; additionally, results suggested that participants' perceptions of dangerousness stemmed mainly from the diagnostic label given to the defendant, not from the information provided on likelihood of future dangerousness.<sup>148</sup>

Edens and colleagues conducted a subsequent study in 2005, repeating the same procedure from the previous study but this time providing clear instructions to the

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<sup>140</sup> *Id.* at 1059–61.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See generally Anne-Marie R. Leistico et al., *A Large-Scale Meta-Analysis Relating the Hare Measures of Psychopathy to Antisocial Conduct*, 32 LAW & HUM. BEHAV. 28 (2008).

<sup>144</sup> Effect size indicates the magnitude or strength of the relationship between variables, with larger effect size values indicating a greater magnitude of the relationship. See KELLY MATHESON, STATISTICAL VERSUS PRACTICAL SIGNIFICANCE 1–4 (2008). It is often used to distinguish between statistical and practical significance (whether a relationship is large enough in magnitude to be of value). See *id.*

<sup>145</sup> See Leistico et al., *supra* note 143, at 33.

<sup>146</sup> John F. Edens et al., *Effects of Psychopathy and Violence Risk Testimony on Mock Juror Perceptions of Dangerousness in a Capital Murder Trial*, 10 PSYCHOL. CRIME & L. 393, 397–98 (2004).

<sup>147</sup> *Id.* at 398.

<sup>148</sup> *Id.* at 403.

mock jurors that the defendant should be sentenced to death only in the event that no mitigating factors were found and the prosecution had proved beyond a reasonable doubt that the defendant's risk of future dangerousness would make him a perpetual threat to society.<sup>149</sup> Results largely reflected those of the previous study; however, they also indicated that mock jurors were significantly more likely to sentence a psychopathic defendant to death as opposed to a psychotic defendant or a defendant with no diagnosis.<sup>150</sup>

Next, Jennifer Cox and colleagues conducted a study in which they presented mock jurors with four vignettes that described the trial phase of a capital case; the vignettes varied according to whether the expert witness had labeled the defendant a psychopath and whether the level of risk of future danger the defendant posed was high or low.<sup>151</sup> They found no significant difference between vignettes with the defendant labeled a psychopath versus not labeled a psychopath on death decisions or predictions of future violence; however, there was a significant difference between the high and low danger risk vignettes in terms of mock jurors' perceptions of whether the defendant would commit murder or another violent crime if not given the death penalty.<sup>152</sup>

Finally, Edens and colleagues conducted another study in which data were aggregated from the two aforementioned studies in addition to an unpublished master's thesis, to investigate the ability of the subcomponents of psychopathy and individual items on the PCL-R to predict mock jurors' attitudes towards the death penalty.<sup>153</sup> Results indicated a significant difference in mock jurors' perceptions of the death penalty when defendants had PCL-R total scores below twenty versus above twenty, and when Factor 1 scores were below versus above eight, such that mock jurors were more likely to support death for defendants in the higher score brackets.<sup>154</sup> However, when Factor 1 scores were held constant, the predictive ability of PCL-R total scores was no longer significant, suggesting that support for the death penalty was driven primarily by Factor 1 scores.<sup>155</sup>

#### *D. Admissibility Under FRE 401, 402, 403, 702, and 703*

As previously suggested, FRE 401, 402, 403, 702, and 703 can be viewed as providing increasing levels of protection against specious evidence. FRE 401 and 402 prevents a jury from hearing irrelevant evidence, or evidence that is immaterial

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<sup>149</sup> John F. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23 BEHAV. SCI. & L. 603, 609–13 (2005).

<sup>150</sup> *Id.* at 613–18.

<sup>151</sup> Jennifer Cox et al., *The Effect of the Psychopathy Checklist—Revised in Capital Cases: Mock Jurors' Responses to the Label of Psychopathy*, 28 BEHAV. SCI. & L. 878, 882–84 (2010).

<sup>152</sup> *Id.* at 884–85.

<sup>153</sup> Edens et al., *supra* note 135, at 177–78.

<sup>154</sup> *Id.* at 178.

<sup>155</sup> *Id.* at 178–80.



and fails to make a particular fact more or less likely.<sup>156</sup> If evidence is deemed to be relevant, FRE 403 may prevent a jury from hearing it if its risk of prejudicing the jury against the defendant substantially outweighs the evidence's probative value.<sup>157</sup> FRE 702 prevents experts from testifying as to evidence that is not "based on sufficient facts or data" or that is not "the product of reliable principles and methods."<sup>158</sup> Finally, FRE 703 prevents expert witnesses from disclosing the bases of their opinions when that evidence would be otherwise inadmissible (such as hearsay, which scores on risk assessment measure qualify as), unless the probative value of that evidence substantially outweighs any risk it presents of prejudicing the jury.<sup>159</sup>

Concerning FRE 401 and 402, PCL-R-based future dangerousness evidence should be deemed inadmissible if PCL-R scores are immaterial to institutional violence or if PCL-R scores fail to predict institutional violence.<sup>160</sup> The extant literature indicates that the ability of the PCL-R to reliably predict institutional violence is nonexistent at worst and quite poor at best.<sup>161</sup> The accumulated weight of the evidence leaves the PCL-R's ability to predict institutional violence unclear, indicating that the probative value of the PCL-R in determining future dangerousness for capital offenders is slight, if indeed it is probative at all. As such, FRE 401 and 402 challenges to the PCL-R in determinations of future dangerousness for capital offenders may be warranted. Indeed, such challenges would not be unprecedented; a survey of PCL-R use in United States courts revealed some precedent for the PCL-R successfully being challenged on the basis of relevance.<sup>162</sup>

Considering FRE 403, PCL-R-based future dangerousness evidence should be deemed inadmissible if the prejudice that labeling an individual a "psychopath" causes the jury substantially outweighs the PCL-R's probative value in determining future dangerousness via institutional violence.<sup>163</sup> As indicated above and in Section III.B, the probative value of the PCL-R in determining future dangerousness via institutional violence is minimal, if probative value exists at all.<sup>164</sup> However, the weight of the evidence suggests that there is a psychopathy labeling effect in capital contexts, such that individuals labeled as "psychopaths" are perceived to be at a greater risk of future dangerousness by mock jurors and are significantly more likely to receive a death sentence than capital offenders who are not labeled as "psychopaths."<sup>165</sup> As such, PCL-R evidence presented for the purpose of demonstrating future dangerousness in

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<sup>156</sup> FED. R. EVID. 401–402.

<sup>157</sup> FED. R. EVID. 403.

<sup>158</sup> FED. R. EVID. 702.

<sup>159</sup> FED. R. EVID. 703.

<sup>160</sup> See FED. R. EVID. 401–402.

<sup>161</sup> See *supra* Section III.B.

<sup>162</sup> See DeMatteo & Edens, *supra* note 125, at 219; DeMatteo et al., *supra* note 134, at 100, 104.

<sup>163</sup> See FED. R. EVID. 403.

<sup>164</sup> See *supra* Section III.B.

<sup>165</sup> See *supra* Section III.C.

capital contexts is ripe for a FRE 403 challenge. Again, such a challenge would not be unprecedented; a survey of PCL-R use in United States courts indicates that the PCL-R has been successfully challenged on FRE 403 grounds in some jurisdictions.<sup>166</sup>

Relating to FRE 702, an expert witness should not be allowed to testify as to PCL-R-based future dangerousness evidence if such evidence is not “based on sufficient facts or data” or is not “the product of reliable principles and methods.”<sup>167</sup> Due to the PCL-R’s nonexistent or weak ability to predict institutional violence,<sup>168</sup> it is arguable that an opinion of future dangerousness in capital contexts based largely on PCL-R score and psychopathy label is not “based on sufficient facts or data.”<sup>169</sup>

Additionally, it is quite likely that PCL-R-based future dangerousness evidence is not “the product of reliable principles and methods.”<sup>170</sup> First, the weight of the evidence demonstrates that the ability of the PCL-R to predict institutional violence is suspect.<sup>171</sup> Second, in light of recent evidence suggesting an impact of adversarial allegiance on PCL-R score, the use of the PCL-R in United States courts is debatable to begin with.<sup>172</sup> In recent years, leading experts in the field of forensic psychology have questioned the use of the PCL-R in forensic contexts due to its poor interrater reliability;<sup>173</sup> the accumulated research strongly suggests that the adversarial allegiance of an evaluator impacts an evaluatee’s score on the PCL-R.<sup>174</sup> Evaluations by evaluators hired by the prosecution tend to produce higher PCL-R scores; in contrast, evaluations by evaluators hired by the defense tend to produce lower PCL-R scores.<sup>175</sup>

Third, best ethical practices in psychology and forensic psychology specifically indicate that psychologists should not utilize measures “whose validity and reliability

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<sup>166</sup> DeMatteo & Edens, *supra* note 125, at 219; DeMatteo et al., *supra* note 134, at 104.

<sup>167</sup> FED. R. EVID. 702.

<sup>168</sup> *See supra* Section III.B.

<sup>169</sup> *See* FED. R. EVID. 702.

<sup>170</sup> *See id.*

<sup>171</sup> *See supra* Section III.B.

<sup>172</sup> *See generally* Daniel C. Murrie et al., *Are Forensic Experts Biased by the Side that Retained Them?*, 24 PSYCHOL. SCI. 1889 (2013) [hereinafter Murrie et al., *Are Forensic Experts Biased*] (finding that when rating the same offenders, evaluators who believed they were hired by the prosecution assigned higher PCL-R scores to the offender than did evaluators who believed they were hired by the defense); Daniel C. Murrie et al., *Does Interrater (Dis)agreement on Psychopathy Checklist Scores in Sexually Violent Predator Trials Suggest Partisan Allegiance in Forensic Evaluations?*, 32 LAW & HUM. BEHAV. 352 (2008) [hereinafter Murrie et al., *Interrater (Dis)agreement*] (finding that when evaluators scored the PCL-R in sex offender civil commitment contexts, score differences varied more than the PCL-R’s measurement error would suggest and tended to be in the direction of the evaluator’s adversarial allegiance).

<sup>173</sup> *See* Murrie et al., *Are Forensic Experts Biased*, *supra* note 172, at 1896; Murrie et al., *Interrater (Dis)agreement*, *supra* note 172, at 358.

<sup>174</sup> Murrie et al., *Are Forensic Experts Biased*, *supra* note 172, at 1893–95; Murrie et al., *Interrater (Dis)agreement*, *supra* note 172, at 358–59.

<sup>175</sup> *See* Murrie et al., *Are Forensic Experts Biased*, *supra* note 172, at 1893; Murrie et al., *Interrater (Dis)agreement*, *supra* note 172, at 355–56.

have [not] been established for use with members of the population tested.”<sup>176</sup> Although the PCL-R’s validity and reliability have been demonstrated in terms of community members and offenders more *generally*, its validity and reliability have not been established with capital offender populations *specifically*.<sup>177</sup> In light of the PCL-R’s relative inability to predict institutional violence, the impact of adversarial allegiance on PCL-R score, and the fact that the PCL-R’s reliability has not been demonstrated in capital populations, the presentation of PCL-R-based future dangerousness evidence is likely not “the product of reliable principles and methods.”<sup>178</sup> Therefore, PCL-R-based future dangerousness is ripe for a challenge on FRE 702 grounds.

Lastly, regarding FRE 703, experts should not be allowed to use PCL-R scores and the “psychopathy” label as the basis for their opinion that an individual is a future danger unless the probative value of the PCL-R in predicting institutional violence “*substantially* outweighs” the prejudicial impact that a “psychopathy” label can have on a jury.<sup>179</sup> This can be viewed as a reverse FRE 403 analysis. It has been previously established that the ability of the PCL-R to predict institutional violence is suspect at best, rendering its probative value questionable.<sup>180</sup> In contrast, the existence of a psychopathy labeling effect in capital contexts is well-established.<sup>181</sup> Therefore, it is exceedingly unlikely that the PCL-R and a psychopathy label could be viewed as being *substantially* more probative than prejudicial, making PCL-R-based future dangerousness evidence ripe for a challenge on FRE 703 grounds.<sup>182</sup> Under FRE 703, experts should be allowed to render an opinion as to whether a capital offender will be a future danger behind prison walls; however, that expert should not

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<sup>176</sup> AM. PSYCHOLOGICAL ASS’N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 12 (2010), <http://www.apa.org/ethics/code/principles.pdf> [<https://perma.cc/R8QM-922J>] [hereinafter EPPCC]. The term “reliability” refers to the ability of an instrument to produce “the same results each time it is used in the same setting with the same type of subjects.” Gail M. Sullivan, Editorial, *A Primer on the Validity of Assessment Instruments*, 3 J. GRADUATE MED. EDUC. 119, 119 (2011). The term “validity” refers to “how well [an] assessment tool actually measures the underlying outcome of interest.” *Id.* Two ethical codes govern the conduct of forensic psychologists: the EPPCC and the Specialty Guidelines for Forensic Psychology (SGFP). EPPCC, *supra*; Am. Psychological Ass’n, *Specialty Guidelines for Forensic Psychology*, 68 AM. PSYCHOL. 7 (2013) [hereinafter SGFP]. Standard 9.02(b) of the EPPCC instructs that “[p]sychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation.” EPPCC, *supra*, at 12. Standard 10.02 of the SGFP instructs that “[f]orensic practitioners use assessment instruments whose validity and reliability have been established for use with members of the population assessed.” SGFP, *supra*, at 15.

<sup>177</sup> See CUNNINGHAM, *supra* note 90, at 67; Edens et al., *supra* note 89, at 67.

<sup>178</sup> FED. R. EVID. 702.

<sup>179</sup> FED. R. EVID. 703 (emphasis added).

<sup>180</sup> See *supra* Section III.B.

<sup>181</sup> See *supra* Section III.C.

<sup>182</sup> See FED. R. EVID. 703.

be allowed to reveal to a jury that his/her opinion is based on perceiving the offender to be a psychopath.

### CONCLUSION

The United States has long held that the death penalty cannot be issued arbitrarily, and it has generated a number of holdings regarding capital sentencing procedures designed to give at least minimal protections to capital offenders who do not fit into classes of individuals excluded from the death penalty.<sup>183</sup> As a response to these holdings, states have sought to provide juries with objective criteria to assist them in making death sentence decisions by outlining the sentencing phase of capital trials, providing nonexhaustive lists of mitigating factors, and providing statutory aggravating factors of which one or more is required to be found to impose the death penalty.<sup>184</sup> One such aggravating factor that states ask juries to consider is a defendant's future dangerousness, or the likelihood that he or she will engage in violent institutional misconduct.<sup>185</sup>

Future dangerousness may be proven via expert testimony from psychologists or psychiatrists; unfortunately, however, the current state of the psychological and psychiatric research does not support an ability to accurately predict institutional violence among death row offenders.<sup>186</sup> As such, its consideration by the jury poses penological issues because evidentiary rules typically do not apply during sentencing.<sup>187</sup> One potential solution to keep unreliable future dangerousness testimony out of capital sentencing is to apply the FRE, particularly FRE 401, 402, 403, 702, and 703, to the sentencing phase of capital trials.<sup>188</sup> This solution was demonstrated through application of a case example in the form of the PCL-R, a measure commonly relied upon to inform future dangerousness testimony.<sup>189</sup> Given the mixed empirical evidence regarding the predictive validity and labeling effects of the PCL-R in capital contexts, there is a chance that PCL-R-based future dangerousness testimony would be barred under FRE 401, 402, and 403, and it is likely that it would be barred under FRE 702 and 703.<sup>190</sup> Given this case example, applying the FRE to capital sentencing may be a promising solution to diminishing the impact that specious future dangerousness testimony may have on jurors.

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<sup>183</sup> See *supra* Part I.

<sup>184</sup> See *supra* notes 62–63 and accompanying text.

<sup>185</sup> See *supra* note 63 and accompanying text; Part II.

<sup>186</sup> See *supra* Section II.B.

<sup>187</sup> See *supra* notes 113–14 and accompanying text.

<sup>188</sup> See *supra* Part III.

<sup>189</sup> See *supra* Section III.A.

<sup>190</sup> See *supra* Section III.D.