No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

SHERMAN LAMONT FIELDS,
Petitioner,

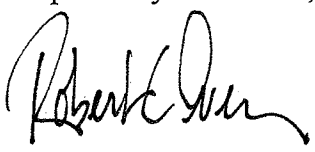
-v-

UNITED STATES OF AMERICA,
Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner SHERMAN LAMONT FIELDS, by counsel, respectfully asks leave to file the accompanying Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner proceeded *in forma pauperis* in federal district court and on appeal, with counsel in both proceedings appointed under 18 U.S.C. § 3005 and 21 U.S.C. § 848(q)(4)(A)(ii). *See* Sup. Ct. R. 39.

Respectfully submitted,



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PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE.

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QUESTIONS PRESENTED

CAPITAL CASE

At the penalty phase of Petitioner's bifurcated federal capital trial, the Government offered testimonial hearsay, through both live witnesses and documents, to prove non-statutory aggravating circumstances (prior violence and future dangerousness). The Government also offered as an expert a psychiatrist whose idiosyncratic theory and technique for predicting future dangerousness, *inter alia*, had not been tested, had an unknown error rate, and had not been assessed in any published studies. Finally, the court refused to instruct the jury that it had to make the required finding that aggravating circumstances collectively outweighed mitigating circumstances, *see* 18 U.S.C. § 3593(e), beyond a reasonable doubt. The following questions are presented:

1. Did the Court of Appeals err in holding – over dissent and contrary to the reasoning of, *e.g.*, *Rodgers v. State*, 948 So.2d 655, 663 (Fla. 2007) – that the Sixth Amendment right to confront adverse witnesses, as elaborated in *Crawford v. Washington*, 541 U.S. 36 (2004), does not bar the use of testimonial hearsay to prove a "non-statutory" aggravating circumstance in a capital sentencing hearing?

2. Did the Court of Appeals err in holding – contrary to, *e.g.*, *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982) – that the minimal procedural requirements imposed on death penalty sentencing hearings by the Eighth Amendment, as exemplified by *Gardner v. Florida*, 430 U.S. 349 (1977), do not bar the use of testimonial hearsay to prove a "non-statutory" aggravating circumstance in a capital sentencing hearing?

3. Did the Court of Appeals err in holding, contrary to the decisions of three state supreme courts, that the jury's statutorily required finding that aggravation outweighed mitigation was not the type of finding that, under *Ring v. Arizona*, 536 U.S. 584 (2002), and its progeny, must be made beyond a reasonable doubt?

4. Did the Court of Appeals err in holding that a District Court considering under 18 U.S.C. § 3593(c) whether to admit proffered "expert" testimony at the penalty phase of a federal capital trial need not conduct any sort of preliminary reliability inquiry analogous to the one established by this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999)?

5. In light of the current state of scientific knowledge regarding psychiatric predictions of future dangerousness, should the Court reconsider *Barefoot v. Estelle*, 463 U.S. 880 (1983), which declined to limit the prosecution's presentation of such evidence in support of a death sentence?

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner SHERMAN LAMONT FIELDS ("Mr. Fields") respectfully asks this Court to grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction and death sentence on direct appeal.

OPINIONS BELOW

The Fifth Circuit's published opinion, *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007), is attached as Appendix A, and its unpublished order denying rehearing *en banc* as Appendix B.

JURISDICTION

The Fifth Circuit entered judgment on March 29, 2007, and extended Mr. Fields' time for seeking rehearing to May 11, 2007. Mr. Fields' petition for rehearing *en banc* was filed May 10 and denied June 6. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment right to due process, the Sixth Amendment rights to trial by jury and to confront adverse witnesses, the Eighth Amendment guarantee against cruel and unusual punishments, and various provisions of the Federal Death Penalty Act ("FDPA"), 18 U.S.C. §§ 3591 *et seq*. Appendix C contains the text of each.

STATEMENT OF THE CASE

A. Procedural History

In May 2003, Mr. Fields was indicted in the Western District of Texas on charges of escape, carjacking, and various firearms offenses, during one of which he was alleged to have killed his girlfriend Suncerey Coleman.[1] ROA 1:98-113.[2] The Government thereafter gave notice of its intent to seek a death sentence. ROA 1:146. A jury convicted Mr. Fields on all counts in January 2004.

At the penalty phase, the jury answered "yes" to each of the four intent factors under 18 U.S.C. § 3591(a)(2). ROA 2:510. Jurors found two statutory aggravating factors that were essentially undisputed (that Mr. Fields committed the murder after escaping from custody and had a

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[1] The superseding indictment charged Mr. Fields and codefendant Garrett with conspiracy to escape, in violation of 18 U.S.C. §§ 371, 751, and 1791 (Count One); escape from custody and aiding and abetting escape, in violation of 18 U.S.C. § 751(a) and § 2 (Count Two); and using and carrying a firearm during and in relation to a crime of violence (escape), causing death, in violation of 18 U.S.C. § 924(c)(1) and (j) and § 2 (Count Three). Mr. Fields was charged alone in Counts Four (carjacking, in violation of 18 U.S.C. § 2119); Five (using and carrying a firearm during and in relation to a crime of violence (carjacking), in violation of 18 U.S.C. § 924(c)(1)(A)(ii)); Six (felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) and 924(c)(2)), and Seven (using and carrying a firearm during and in relation to a crime of violence (escape), in violation of 18 U.S.C. § 924(c)(1)). Garrett was charged alone in Count Eight.

[2] Citations to the Record on Appeal in the court below take the form "ROA[Vol.]:[Page]." Government exhibits are cited "G[number];" Defense exhibits are cited "D[number]."

prior conviction for a violent crime involving a firearm),[3] and three non-statutory aggravating factors.[4] ROA 2:512, 514-15.

With respect to mitigating factors, the jurors unanimously found that Mr. Fields during his formative years suffered physical abuse, emotional abuse, and parental neglect; that he was exposed in his youth to the violent deaths of family members, loved ones, and friends; that he is the product of an impoverished background that impaired his integration into the social and economic mainstream of society; that he lived most of his life without a significant father figure; and that his mother had a history of criminal behavior and incarceration. *See* ROA 2:516-18. Substantial majorities of jurors also found additional mitigating circumstances.[5]

After deliberating more than six hours at penalty, jurors asked what sentence would be imposed if they could not unanimously agree. ROA 2:476, 478, 506, 21:2546-47. After being instructed that Mr. Fields in that event would not receive a death sentence, the jury almost

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[3] *See* 18 U.S.C. §§ 3592(c)(1), (2). Though the Government alleged that Mr. Fields "committed the offense after substantial planning and premeditation to cause the death of the victim," *see* 18 U.S.C. § 3592(c)(9), the jury did not make that finding. ROA 2:512.

[4] The jury found (1) that Fields "caused injury, harm, and loss to Suncerey Coleman, her family and children, and her friends as demonstrated by the victim's personal characteristics as an individual, including the fact that she was a new mother to a prematurely born infant, and the impact of her death upon her family, children, and friends," ROA 2:514; (2) that prior to the murder, Fields had "participated in attempted murders and other serious acts of violence," *id.*; and (3) that Fields was likely "a continuing and serious threat to the lives and safety of others, including, but not limited to, inmates and correctional officers [in] institutional correctional settings...." ROA 2:515.

[5] Eleven jurors found that Mr. Fields' behavioral problems may decrease over time; eleven found that a death sentence would cause emotional injury, harm and loss to Mr. Fields' family; nine found that Mr. Fields could be of some productive value in prison; seven found that Mr. Fields grew up in an atmosphere of violence and fear, which misshaped his perception as to the acceptability or necessity of violence; two found that Mr. Fields was under unusual and substantial duress at the time of the crime; two found that Mr. Fields has the love and support of other members of his family; and one found that Mr. Fields had recently responded well to a structured environment and would likely adapt to prison life if sentenced to life imprisonment. ROA 2:516-18.

immediately sent out another note confirming that unanimous agreement was impossible. ROA 2:506-07, 21:2547. Only after the court – over objection – ordered the jurors to keep deliberating did they ultimately return a death verdict on Count Three.

Mr. Fields appealed, the Court of Appeals affirmed, and this Petition follows.

B. Facts Material to Consideration of the Questions Presented

1. Overview

Because this Petition raises only issues related to the penalty phase, a brief summary of the guilt-phase evidence will suffice. The Government's theory was that Mr. Fields, motivated by possessiveness and jealousy, killed his sometime-girlfriend Suncerey Coleman after escaping from federal custody. According to the Government, Mr. Fields escaped, convinced Ms. Coleman to come away with him, drove her to a remote location, and shot her to death there. *See Fields*, 483 F.3d at 323-24.

2. Facts material to challenge to testimonial hearsay at the penalty phase

Most of the Government's case at the penalty phase focused on establishing the non-statutory aggravating circumstances of Mr. Fields' past violence and future dangerousness. To that end, the Government offered, and the court admitted over defense objection, numerous testimonial hearsay statements of declarants that Mr. Fields never had an opportunity to cross-examine. The statements included allegations contained in law enforcement documents concerning Mr. Fields, including juvenile records and adult jail and prison records.[6] Most of the witnesses through whose testimony the contents of these documents were introduced had no personal knowledge whatsoever about Mr.

[6] Mr. Fields included each of the referenced documents in his Record Excerpts in the court below. The trial exhibits in their entirety are part of the Record on Appeal but are not numbered in sequence with the rest of the Record on Appeal.

Fields. The hearsay statements in the documents were highly prejudicial.[7]

The Government also was permitted to introduce hearsay statements, over defense objection, through its live witnesses. For example, the Government called policeman Robert Fuller and questioned him regarding a report written by another officer. That report contained statements from witnesses to a drive-by shooting in which several people were wounded; the witnesses accused Mr. Fields of having been the shooter. *See* ROA 19:2149-50.

Another policeman, Daniel Tichenor, was permitted to testify that Mr. Fields had committed an armed robbery, based solely on a report containing statements from alleged victims of that crime. ROA 19:2182. Officer Tichenor's testimony described what these witnesses allegedly had told him during his investigation. ROA 19:2186. In addition, Officer Tichenor recounted numerous hearsay statements made to him accusing Mr. Fields of being involved in dealing drugs. ROA 19:2186-87.[8]

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[7] For example, a juvenile probation officer led the jury through the contents of Mr. Fields' juvenile records; the records contained statements alleging, *inter alia*, that Mr. Fields as a juvenile had a "Dr. Jekyl [sic] and Mr. Hyde personality," was "quick-tempered" and "totally out of control," was involved in a fistfight and a burglary, evaded the police and had to be "physically restrained" by officers when taken into custody, and was "purely manipulative" rather than genuinely in need of psychiatric help. *See* G103; ROA 19:2067-79. Other witnesses similarly introduced and reviewed the contents of Mr. Fields' Texas prison records. *See* G104; ROA 19:2195, 2225. Those records contained accusations that Mr. Fields had repeatedly cursed at officers, threatened in profane terms to physically assault them, and threatened to assault other inmates. Another witness described the contents of still other incident reports, these from the Federal Medical Center in Fort Worth, alleging that Mr. Fields committed verbal and physical assaults, threats, and other misconduct (*e.g.*, possession of a homemade weapon) while incarcerated there. *See* G102, ROA 19:2262. Yet another prosecution witness presented Mr. Fields' records from the local jail, which contained more hearsay statements by various jail officers accusing Mr. Fields of having threatened to escape and having made vulgar, profane and threatening statements to jail staff, including a warning that he might "cut one of these [guards'] throats." *See* G100; ROA 19:2301-10.

[8] Defense counsel vigorously objected during Officer Tichenor's testimony that permitting a police officer "just to testify to what he was told" by "drug dealers" with "criminal records" would give their stories an underserved patina of credibility that he could not challenge through cross-examination. ROA 19:2183-85. The trial court's response ("It's not my problem") suggests a failure to appreciate how allowing such testimony injects unreliability into the sentencing proceeding.

Police detective Steve January testified about investigating the shooting of Ladon King. ROA 19:2282. January described how King identified Mr. Fields as the man who had shot him, and also recounted King's claim that the shooting had taken place in an open courtyard amid residential buildings, full of activity and passerby – including women and children – who were endangered by Mr. Fields' reckless action. ROA 19:2288-89.[9]

The defense then presented an extensive case in mitigation, which established that Mr. Fields came from an exceptionally troubled background. Mr. Fields was raised by his single mother in a housing project where he was continuously exposed to violence (both inside and outside the home), weapons, drugs and alcoholism. From the time his mother was jailed for shooting her abusive boyfriend, Mr. Fields displayed serious behavioral problems that involved him in both the juvenile justice and mental health systems. *See generally* ROA 20:2393-2431. His friends and relatives described Mr. Fields as deeply wounded by these losses and hardships in his life. ROA 2432-72.[10] Jurors also heard evidence that Mr. Fields was intelligent and, despite serious problems in the past, had the potential to adjust successfully to a structured environment. ROA 20:2473-87; *see also* ROA 20:2375-2388.

Jurors returned a death verdict only after lengthy deliberations during which they once pronounced themselves deadlocked as to the appropriate sentence. ROA 2:507-08.

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[9] The Government also presented testimony from Mr. Fields' ex-wife that he had mistreated her when they were married, ROA 19:2202-15; from psychiatrist Richard Coons that Mr. Fields would be a danger in the future, ROA 20:2340-61; and from two victim impact witnesses, ROA 20:2362-70.

[10] As noted *supra*, the jurors unanimously or by substantial majorities found these mitigating circumstances to be true.

3. Facts material to Sixth Amendment right to jury trial claim

The trial court refused to instruct the jurors at the penalty phase that the Government was required to prove beyond a reasonable doubt that the aggravating factor(s) outweighed the mitigating factor(s) so as to justify a death sentence. ROA 2:477. The defense objected; the objection was overruled. *Id.* The court thereafter charged the jurors that they had to decide whether any aggravating factor or factors "sufficiently outweigh[ed]" all the mitigating factors found to exist, but assigned no burden or standard of proof respecting that determination. *See* ROA 2:492-93.

4. Facts material to challenge to psychiatric junk science

At the punishment phase, the Government called forensic psychiatrist Richard Coons, M.D. ROA 20:2315. The defense moved to voir dire Dr. Coons in order to make "a *Daubert* challenge." *Id.*[11] Outside the jury's presence, Dr. Coons testified that:

- He was "not sure" whether his theory of predicting future dangerousness could be tested (and later conceded that it could not be tested "in one case"), *id.* at 2325;
- He was not aware of "any specific study" supporting the accuracy of such predictions "in terms of empirical data," *id.* at 2319-20;
- He did not know the "number of studies that have indicated that the prediction of future dangerousness is not reliable," *id.* at 2320;
- Despite having "read a lot of things about future dangerousness," he could not identify a single scientific journal article supporting the reliability of such predictions, *id.* at 2320, 2332;
- He could not show any studies that "have approved of [his] particular technique or theory" for predicting dangerousness, *id.* at 2330;

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[11] The Court permitted the examination, although it apparently expected the "hearing" to be extremely brief; as it excused the jurors, the Court advised them that trial should resume in "ten or fifteen minutes." *Id.* at 2317.

- He "tend[ed] to be right" in his predictions of future dangerousness, according to "[his] own assessment of [his] predictions," *id.* at 2326, but that he had never "published in any way or any regard a follow-up study [of] the people [he] declared to be ... dangerous individuals," *id.* at 2327-28;

- He has subsequently interviewed "one or two" of the people he predicted would be dangerous, but has never "done a formal study," *id.* at 2328;

- He had testified perhaps fifty times that individuals would be dangerous in the future, but had never followed up to see whether his predictions in those cases turned out to be correct, *id.* at 2326-27;

- "[N]one of [his] findings" in this case "ha[d] been subjected to peer review," *id.* at 2324, and he could not confirm that his "theory or technique [was] subject to any kind of peer review," *id.* at 2330;

- He could not identify "the potential rate of error [in his] theory or technique in arriving at an opinion about future dangerousness," *id.* at 2331;

- There are no "standard psychiatric or medical procedures" used in determining future dangerousness, *id.* at 2332;

- His own "technique" for determining dangerousness "depends on the circumstances," *id.* at 2321;

- He generally obtains the information underlying his predictions from "whatever data I have;" in this case, he had "a box full" of documents, apparently concerning Fields' prior criminal history and the facts of the present offense, *id.* at 2321-22;

- Although some of those individuals whom he had predicted would be dangerous had not "act[ed] up" in prison, he believed that was because those individuals are on death row and thus "on their best behavior pending appeal;" his prediction pertained only to "if they were in general population under a life sentence," *id.* at 2327;

- He had never examined Mr. Fields, *id.* at 2332;

- Psychiatry isn't like physics; there is no "known set mathematical formulas" governing human behavior, *id.* at 2333;

- He relies on "experience and training," which is what "makes a psychiatrist good in his profession," *id.* at 2334;

- "Predicting the future is always uncertain," *id.* at 2336;

- "Because human behavior is so complex and the – and the aspects of a society or culture, the effects that it [sic] has on a person is also so complex and at times random, it is difficult to see how things will happen," *id.* at 2336;

- Sometimes experts are wrong in their predictions, just as a "football expert" can be "wrong on one particular game," *id.* at 2336.[12]

After the trial court overruled defense counsel's objections, Dr. Coons testified before the jury. ROA 20:2337-39, 2340, 2340-2361. After Dr. Coons detailed his qualifications, the prosecutor read a lengthy hypothetical tracking the facts of the crime and Mr. Fields' background and criminal history, ROA 20:2346-2350, and asked whether "this individual would constitute a continuing and serious threat to the lives and safety of others, including inmates and correctional officers in an institutional correctional setting." ROA 20:2350. Dr. Coons responded in the affirmative.[13]

C. How The Issues Were Raised And Decided Below[14]

1. Challenge to the admission of testimonial hearsay at the penalty phase

At the penalty phase, the defense repeatedly objected to the admission of hearsay statements against Mr. Fields, citing both the Sixth and Eighth Amendments. *See, e.g.*, ROA 19:2067-70, 2148,

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[12] Cross-examined before the jury, Dr. Coons acknowledged these same deficits in his "theory and technique." *See, e.g.*, ROA 20:2354-55 (no studies validating his method); *id.* at 2356 (no peer review; unknown error rate).

[13] Dr. Coons elaborated, emphasizing that the person in the hypothetical would have the "attitude [that] violence [is] okay." ROA 20:2351. Indeed, Dr. Coons stated, "repeated use of weapons to rob people, shoot at people, attempted murder, murder, violence is okay with that person's personality and mind." *Id.* He further stated that the person would have "long-term personality and behavior patterns" consistent with this attitude. *Id.* Dr. Coons then added that "[W]e know that [this person] doesn't have a conscience." *Id.* Asked about the undisputed evidence that Mr. Fields "in the last four months ... [had been] a model prisoner," Dr. Coons responded that Mr. Fields must have "got[ten] the word ... that he needs to act a little better pending his trial." ROA 20:2352. He repeated for emphasis his opinion that it was "significantly more likely than not that he will be [a] danger to other people, other inmates and correctional officers and medical personnel and so forth." ROA 20:2352-53.

[14] Mr. Fields omits parallel citations to this Court's case authority, both from his own citations and from citations throughout this petition that quote passages from court decisions. All emphasis is original unless otherwise indicated.

2185, 2262, 2265, 2285. The Court of Appeals held that Mr. Fields had properly preserved these constitutional challenges. *Fields*, 483 F.3d at 324 (undertaking *de novo* review because "Fields preserved this purely legal claim at sentencing").

On the merits, the panel majority squarely concluded that the Confrontation Clause does not apply at the penalty phase of a bifurcated capital trial. The majority rested this decision primarily on what it understood as the continuing vitality of *Williams v. New York*, 337 U.S 241 (1949), which it noted "has never been overruled." *Fields*, 483 F.3d at 327. *Williams* drew a bright-line distinction between guilt and sentencing proceedings, expressly holding that at sentencing, even in a capital case, a defendant has no right to confront the witnesses against him. *Id.* The majority also reasoned that this Court has distinguished the "eligibility" decision in capital sentencing (determining whether a defendant legally *may* be sentenced to death) from the "selection" decision (determining whether a particular defendant *shall* be put to death). According to the majority, this Court has approved treating those judgments differently with respect to the overarching goal of reliability: "the particular reliability concern that distinguishes capital sentencing ... is not evidentiary reliability," but ensuring a process that both "streamlin[es] discretion at the eligibility stage [and] allows ... wide-ranging discretion at the selection phase." *Id.* at 337, 336. In the panel majority's view, *Williams* and *Gardner v. Florida*, 430 U.S. 349 (1977), give the defendant at the selection phase only the right to "rebut or explain the information against him," and *Crawford v. Washington*, 541 U.S. 36 (2004), "does not suggest that confrontation is the only mechanism through which the reliability of testimony can be assessed." *Id.* at 337. The majority concluded that the procedural framework of the Federal Death Penalty Act (FDPA) provides adequate safeguards "to protect defendants [at the selection

phase] from being sentenced on the basis of "misinformation of a constitutional magnitude," *id.* at 337, and that neither the Confrontation Clause nor due process requires more.[15]

Judge Benavides, who otherwise joined the panel opinion, dissented at length on this ground. He argued that the majority had been led astray by its "undue emphasis" on the "artificial distinction between eligibility and selection factors at capital sentencing," an Eighth Amendment principle out of place in the context of a challenge based on the right to confront adverse witnesses. *Fields*, 483 F.3d at 363 (dissent). Further, Judge Benavides asserted, the majority erred in finding *Williams* controlling because such a view fails to take proper account of how extensively this Court has lately "reconceptualized" the two key areas of Sixth Amendment concern implicated by Mr. Fields' case – the right to confront witnesses (in *Crawford* and its progeny) and the structure of criminal sentencing itself (in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny). *Id.* at 363, 366-67. Considering these recent developments in light of the text, history, and structure of both the Sixth Amendment and the FDPA, Judge Benavides concluded that where, as a *practical* matter, the jury "cannot ... hand down a death sentence without finding certain facts," the constitution demands that "testimony as to those facts ... be tested through confrontation." *Id.* at 368.

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[15] Because the panel majority concluded that nothing in the constitution barred the admission of the challenged hearsay statements to prove non-statutory aggravating circumstances, it did not decide whether the hearsay statements were in fact testimonial. *See Fields*, 483 F.3d at 326 n. 7. Judge Benavides found that the testimony of Government witnesses January and Tichenor was unquestionably testimonial, *see id.* at 376 (dissent), and since he concluded that that testimony was sufficiently prejudicial to require reversal of Mr. Fields' death sentence, *id.* at 380 (dissent), did not address whether the rest of the challenged hearsay was testimonial. Due to space constraints, this Petition focuses primarily on the hearsay statements highlighted in Judge Benavides' dissent. Mr. Fields maintains, however, that the many other hearsay statements contained in the documents reviewed for the jury by the Government's witnesses were testimonial within the meaning of *Crawford*, and likewise violated his rights to confrontation and due process. *See id.* at 380 n.22.

2. Challenge to the trial court's refusal to require jurors to find beyond a reasonable doubt that the aggravating factors collectively outweighed the mitigating factors

As noted *supra*, the defense objected to the Court's refusal to instruct the jurors at penalty that they were required to determine whether the Government had proven beyond a reasonable doubt that aggravating circumstances outweighed mitigating circumstances. On appeal, Mr. Fields argued that under *Ring v. Arizona*, 536 U.S. 584 (2002) and related authorities, any finding that aggravating factors outweigh mitigating factors in a prosecution under the Federal Death Penalty Act – being, under the terms of that statutory scheme, "necessary to impose the maximum [punishment]" – must be made beyond a reasonable doubt.

The Court of Appeals rejected this claim on two bases. First, it held that because the Constitution itself does not require any "weighing" of aggravating and mitigating factors, and hence does not require that any such "weighing" be performed by the jury (versus, *e.g.*, the trial judge), the "proof beyond a reasonable doubt" standard that the Sixth Amendment imposes on jury findings was not implicated. *Fields*, 483 F.3d at 345-46 (citing this Court's pre-*Ring* decisions in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion) (no Sixth Amendment right to jury sentencing) and *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990) (appellate court may weigh sentencing factors)). Second, it emphasized that the jury's decision with respect to this "weighing" is not governed by "the *Apprendi/Ring* rule" because it is not a fact-finding at all, but a subjective moral judgment representing essentially the jury's conclusion about what sentence is appropriate. *Fields*, 483 F.3d at 346.

3. Challenge to admissibility of prosecution's psychiatric junk science predicting Mr. Fields' "future dangerousness"

The defense objected to the trial court's decision to permit Dr. Coons to testify as an expert, alleging violations of due process, the Eighth Amendment, and 18 U.S.C. § 3593(c). ROA 20:2338.

The Court of Appeals found no error. It conceded that "the question as to whether some quasi-*Daubert* inquiry[16] is required to satisfy the FDPA" was not "entirely answer[ed]" by the statutory inapplicability of the Rules of Evidence under Section 3593(c), and pronounced itself "somewhat sympathetic to [Mr. Fields'] argument." *Fields*, 483 F.3d at 342. Nevertheless, it ultimately concluded that nothing "even implicit[] in the text, history or logic of the FDPA" supported any requirement that the trial court act as a "gatekeeper" regarding allegedly scientific evidence offered in a capital sentencing hearing. *Id.* Accordingly, the Court of Appeals concluded, the trial court in a federal capital case has no duty to conduct any *Daubert*-like inquiry as part of assessing whether to admit the testimony of a purported scientific expert under Section 3593(c). *Id.* It noted that Mr. Fields' constitutional challenges to Dr. Coons' purportedly scientific prediction of "future dangerousness" were foreclosed by *Barefoot v. Estelle*, 463 U.S. 330 (1983). *Id.* at 345.

[16] *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

REASONS THE COURT SHOULD GRANT REVIEW

I. The Court should grant review to decide whether, in light of recent developments in the Court's view of the protections provided by the Confrontation Clause of the Sixth Amendment and the post-*Furman* emphasis on reliable procedures in death penalty cases generally, *Williams v. New York*, 337 U.S. 241 (1949) should continue to be read as giving blanket permission to admit testimonial hearsay in capital sentencing hearings.

The panel majority, as noted *supra*, ultimately concluded that this Court's 1949 decision in *Williams v. New York* was "relevant, persuasive, and ultimately fatal to [Mr. Fields'] Confrontation Clause challenge." *Fields*, 483 F.3d at 338. Judge Benavides' dissent raises the serious question, deserving of this Court's review, whether *Williams* – "a due process case decided nearly sixty years ago that has been repeatedly limited by subsequent cases" – can bear such weight any longer in the capital sentencing context. *See Fields*, 483 F.3d at 364.[17]

There are many strong arguments for reconsidering and limiting *Williams*' reach. First, as Judge Benavides correctly observed, when *Williams* was decided this Court had yet to hold that the Confrontation Clause even applied to the States. *Fields*, 483 F.3d at 364 (dissent); *see, e.g.*, *State v. McGill*, 140 P.3d 930, 948 (Ariz. 2006) (Hurwitz, J., concurring in part and dissenting in part) (*Williams* was not, and "could not have been," a Confrontation Clause case). Second, *Gardner v.*

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[17] Other jurists have similarly questioned whether *Williams* should be uncritically endorsed in this context. *See Summers v. State*, 148 P.3d 778, 785 (Nev. 2006) (Rose, C.J., joined by Maupin and Douglas, JJ., concurring in part and dissenting in part) ("The United States Supreme Court has not addressed this precise issue [of the application of *Crawford* to capital sentencing] but has given very clear indications that *Williams v. New York* is no longer viable") (footnote omitted). The Nevada Supreme Court majority, like the panel majority in Mr. Fields' case, had "emphasize[d] that the Supreme Court has not overruled *Williams*." *Id.* at 786. The Justices who dissented on this issue, however, criticized such "rigid adherence to *Williams* given the undeniable evolution of the [U.S. Supreme] Court's jurisprudence on this matter over the succeeding decades ...." *Id.*

Florida, 430 U.S. 349 (1977), confirms that *Williams* has less sweeping application under the Court's post-*Furman* capital sentencing jurisprudence – indeed, the Eleventh Circuit has extended the Confrontation Clause to capital sentencing based on precisely this reading of *Gardner*. *See infra*.

Most important, it is impossible to assess the continuing precedential force of *Williams*, at least with respect to capital cases, outside the context of this Court's ongoing reevaluation of Sixth Amendment doctrine in recent years. In light of those new opinions, the panel majority's unqualified endorsement of *Williams* as applying to death penalty sentencing proceedings arguably rests on "two antiquated premises that have since been rejected by [this] Court." *See Fields*, 483 F.3d at 365 (dissent). The first was that "the Confrontation Clause is just a constitutional rule against hearsay, inextricable from the rules of evidence;" and the second was that the determination of guilt and punishment in a capital trial are "fundamentally different procedures that give rise to entirely different evidentiary concerns." *See id.* (footnote omitted) (citing Michael S. Pardo, *Confrontation Clause Implications of Constitutional Sentencing Options*, 18 FED. SENT. RR. 230 (April 2006)).

Crawford "explicitly rejected the former premise, holding that the Confrontation Clause was not dependent on 'the vagaries of the rules of evidence.'" *Fields*, 483 F.3d at 365 (dissent) (citing *Crawford*, 541 U.S. at 61). Thus, even if *Williams* permits relaxing "evidentiary rules" at sentencing in order to broaden the information available to the sentencer, that "says nothing about the content of the Confrontation Clause," because "[t]he Confrontation Clause and the rules of evidence offer entirely separate protections." *Id.* Accordingly, the panel majority's "concerns about depriving the sentencing authority of a broad range of evidence [by undermining *Williams*] are misplaced, since extending the Confrontation Clause to [capital] sentencing does not preclude the relaxation of the

rules of evidence" because "*testimonial* evidence ... alone implicates the Confrontation Clause." Fields, 483 F.3d at 366(dissent) (emphasis added).[18]

The panel majority's uncritical embrace of *Williams* is also open to serious question given the second "antiquated premise" underlying that 1949 decision: "the notion that capital sentencing proceedings are fundamentally different from trials." *Fields*, 483 F.3d at 365 (dissent). When *Williams* arose, capital sentencing was "characterized by informal procedures and extraordinary discretion," and this Court's holding rested on the premise that that there was no "constitutional distinction" between capital sentencing and ordinary sentencing. *Fields*, 483 F.3d at 366 (dissent); *see also Williams*, 337 U.S. at 252. As the dissenting opinion below demonstrates in detail, "[t]hese premises no longer hold true," especially in the context of the FDPA, a statute that imposes "complicated and rigorous factfinding requirements" that distinguish it from both present-day non-capital sentencing and from the 1940's-era New York capital sentencing practices at issue in *Williams*. *See Fields*, 483 F.3d at 365-69 (dissent).

In particular, Judge Benavides powerfully challenged the panel majority's implicit view that even if Confrontation Clause protections apply to "eligibility factors," no such rights were implicated here because the testimonial hearsay was relevant only to "selection factors" the Government alleged against Mr. Fields. *See Fields*, 483 F.3d at 367-68 (dissent); *cf.* 483 F.3d at 325-26 (majority). Such a distinction ignores the fact that, under the FDPA, "a jury that finds a defendant death eligible 'has not found all the facts which the law makes essential to the punishment,'" because it must *also* ascertain the presence of any mitigating factors and then must consider *both* the statutory *and non-*

[18] *See also Fields*, 483 F.3d at 365 (dissent) (*Williams* would continue to govern the introduction of non-testimonial hearsay at capital sentencing).

statutory aggravating factors collectively in deciding whether they outweigh the factors in mitigation. *Fields*, 483 F.3d at 368 (dissent) (internal quotation marks omitted) (quoting *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004)). Because the jury's consideration of non-statutory aggravating factors may *in fact* be determinative of the ultimate sentence, its decisions about such non-statutory aggravating factors are "constitutionally significant factfinding[s] to which the Confrontation Clause must attach." *Id.*

In sum, this case warrants plenary review because the validity of the panel majority's conclusion affirming Mr. Fields' death sentence depends on the continued precedential force of *one case – Williams* – and there is a legitimate question whether *Williams* can bear that weight in these circumstances. Particularly given post-*Furman* developments in the Eighth Amendment regulation of capital sentencing proceedings and this Court's ongoing revolution in Sixth Amendment jurisprudence, the Court should grant *certiorari* to answer that question "no."

II. The Court should grant review to resolve the growing conflict among lower courts around the Nation regarding whether and to what extent the Confrontation Clause applies in a capital sentencing hearing.

Courts around the country have taken a number of different and irreconcilable approaches with respect to whether the Confrontation Clause applies in capital sentencing hearings. Some have concluded flatly that the Confrontation Clause has no applicability in such proceedings, regardless of the nature of the finding concerning which the prosecution offered the challenged hearsay testimony. *See, e.g., Szabo v. Walls,* 313 F.3d 392, 392 (7th Cir. 2002) (the Confrontation Clause does not apply to sentencing, "even when that sentence is the death penalty"); *Summers v. State*, 148 P.3d 778, 779

(Nev. 2006) (Crawford does not apply to the penalty phase of a capital trial).[19]

Other courts have concluded that *Crawford* applies to the penalty phase in capital cases, but only as to evidence offered to prove findings that function under the Eighth Amendment to render the defendant "death-eligible." *See, e.g., Russeau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005) (applying *Crawford* to evidence offered to prove statutory "future dangerousness" factor);[20] *State v. Bell*, 603 S.E.2d 93, 115-16 (N.C. 2004) (*Crawford* applies as to evidence offered to prove statutory aggravating factor); *United States v. Jordan*, 357 F.Supp.2d 880 (E.D. Va. 2005) (*Crawford* applies only to "eligibility" determination); *United States v. Johnson,* 378 F.Supp.2d 1051, 1059-62 (N.D. Iowa 2005) (same); *United States v. Bodkins,* 2005 WL 1118158, at *4-5 (W.D. Va. 2005) (unpublished) (same).[21]

Still other decisions, applying Confrontation Clause protections to findings and determinations *other* than "eligibility" factors, conflict directly with the views of the Fifth Circuit in this case. For example, the Eleventh Circuit has squarely held that "the constitutional right to cross-

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[19] *See also Johnson v. State*, 148 P.3d 767, 773 (Nev. 2006) ("[T]he right to confrontation does not apply to evidence admitted in a capital penalty hearing;" court's earlier decision in *Summers* "applies to the entirety of a capital penalty hearing"); *Thomas v. State*, 148 P.3d 727, 733-34 (Nev. 2006) (rejecting argument that *Crawford* and the Confrontation Clause apply "at the selection phase").

[20] Nothing in the *Russeau* opinion actually imposes such a limitation on the applicability of *Crawford* at a capital sentencing hearing. Because the testimonial hearsay challenged in *Russeau* was offered to prove the statutory "future dangerousness" factor, however – in the absence of which Texas law bars a death sentence, *see* Tex Code Crim. Proc. art. 37.071, Sec. 2(g) – we include *Russeau* in this category.

[21] Arizona appears to take the same view. Considering the application of *Crawford* to capital sentencing proceedings in *State v. McGill*, 140 P.3d 930 (Ariz. 2006), the Arizona Supreme Court held that it previously had "distinguished between hearsay used to *establish an aggravating factor,* to which the Confrontation Clause applies, and hearsay used to *rebut mitigation,* to which the Confrontation Clause does not apply." *Id.* at 942 (citation omitted). *McGill* relied primarily on *Williams* as justifying the latter restriction "because (1) the penalty phase is not a criminal prosecution, (2) historical practices support [using] out-of-court statements in sentencing, and (3) the sentencing body requires complete information ...." 140 P.3d at 941.

examine witnesses applies to capital sentencing hearings." *Proffitt v. Wainwright,* 685 F.2d 1227, 1254-55 (11th Cir.1982).[22] It reasoned as follows:

> The constitutional requirements governing capital sentencing ... have undergone substantial evolution in the wake of *Furman v. Georgia*. The thrust of *Furman* and its progeny is that the risk of arbitrary imposition of the death penalty inherent in sentencing determinations made without substantive and procedural standards conflicts with the eighth amendment prohibition on cruel and unusual punishment. Because the death penalty, unlike other punishments, is permanent and irrevocable, the procedures by which the decision to impose a capital sentence is made bring into play constitutional limitations not present in other sentencing decisions. ... The view, once prevalent, that the procedural requirements applicable to capital sentencing are no more rigorous than those governing noncapital sentencing decisions, *see, e.g., McGautha v. California*, 402 U.S. at 217; *Williams v. New York*, 337 U.S. at 251-52, is no longer valid. *Gardner v. Florida*, 430 U.S. at 357-58. ... The holding in *Gardner*, narrowly viewed, simply prohibits the use of "secret information"; the Court did not in that case address the scope of the capital defendant's procedural rights in attempting to rebut information that has openly been presented to the sentencing tribunal. In reaching its decision in *Gardner*, however, the Court emphasized the unacceptability of the "risk that some information accepted in confidence may be erroneous, or may be misinterpreted, by the ... sentencing judge." *Id.* at 359. Moreover, the Court expressly recognized the importance of participation by counsel and adversarial debate to eliciting the truth and "evaluating the relevance and significance of aggravating and mitigating" evidence. *Id.* at 360. The Supreme Court's emphasis in *Gardner* and other capital sentencing cases on the reliability of the factfinding underlying the decision whether to impose the death penalty convinces us that the right to cross-examine adverse witnesses applies to capital sentencing hearings.

Proffitt, 685 F.2d at 1253-55.[23]

At least one federal district court, in a thoughtful, well-considered published opinion, has

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[22] *See also United States v. Brown*, 441 F.3d 1330, 1361 (11th Cir. 2006) (acknowledging *Proffitt* as controlling precedent applying the Confrontation Clause to the penalty phase in a state capital case); *United States v. Cantellano,* 430 F.3d 1142, 1146 (11th Cir.2005) ("[W]e have recognized a right to cross-examination in the context of *capital* sentencing," citing *Proffitt*).

[23] The testimonial hearsay at issue in *Proffitt* was not offered to establish a statutory aggravating circumstance (*i.e.*, an "eligibility" factor). Instead, the challenged testimonial hearsay was a report written by a prosecution mental health expert, which contained the expert's opinion that Proffitt did not, in fact, suffer from mental impairment that might constitute a mitigating circumstance. *See Profitt*, 685 F.2d at 1250, 1255.

reached the same conclusion as the Eleventh Circuit in *Proffitt*. *United States v. Mills*, 446 F. Supp. 2d 1115, 1135 (C.D. Cal. 2006) (finding that *Crawford*'s Confrontation Clause "protections apply to any proof of any aggravating factor [*i.e.*, whether statutory or non-statutory] during the penalty phase of a capital proceeding under the FDPA").[24]

The Florida Supreme Court, too – both before and since *Crawford* – has applied the Sixth Amendment right of confrontation at capital sentencing, and in doing so has not limited its application to "eligibility" factors:

> We start with the uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial. *See Donaldson v. State,* 722 So.2d 177, 186 (Fla.1998) (quoting *Engle v. State,* 438 So.2d 803, 813-14 (Fla.1983)). As we stated in *Engle:*
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> > The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge.

Rodriguez v. State, 753 So.2d 29, 43 (Fla. 2000); *see also, e.g., Rodgers v. State*, 948 So.2d 655, 663 (Fla. 2007) ("[A] defendant's rights under the Confrontation Clause apply to the guilt phase, the penalty phase, and sentencing," citing *Rodriguez*); *id.* at 665 (finding penalty-phase *Crawford* error, but finding it harmless).[25] In *Rodiguez*, the hearsay testimony at issue was offered in rebuttal of mitigation, rather in support of an "eligibility" factor. *See Rodriguez*, 753 So.2d at 43 (police officer

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[24] In *United States v. Sablan*, Criminal Case No. 00-CR-00531-WYD (D. Colo., February 26, 2007) (unpublished), the District of Colorado likewise concluded after a careful analysis that *Crawford*'s protections must extend to all aggravating factors, both statutory and non-statutory. *See* Appendix D.

[25] As the citations to *Donaldson* and *Engle* make clear, Florida has consistently applied the Confrontation Clause to capital sentencing since long before *Crawford*. *See also, e.g., Way v. State,* 760 So.2d 903, 917 (Fla. 2000) ("[T]he confrontation clause applies to [capital] sentencing proceedings"); *Holland v. State,* 773 So.2d 1065, 1074 (Fla. 2000) (same); *Thompson v. State,* 619 So.2d 261, 265 (Fla. 1993) (same).

testified to statements by a jailhouse informant who claimed Rodriguez confided in him that he (Rodriguez) was not really mentally ill); *see also, e.g.*, *Franklin v. State*, ___So.2d___, 2007 WL 1774414 (Fla. 2007) at *9 (finding that *Crawford* should have prohibited testimonial hearsay from police detective who recounted, at the penalty phase, a physician's statements about the injuries suffered by the victim of a prior violent crime by the defendant, but that the error was harmless because the testimony was cumulative of the victim's own testimony).

As these cases demonstrate, the Eleventh Circuit and the Florida Supreme Court give capital defendants broad Confrontation Clause rights at the punishment phase. Standing alone, the conflict on this score between these courts and the Court of Appeals below warrants plenary review by this Court, given the regularity with which the State of Florida pursues capital prosecutions.[26] The conflict is exacerbated by the existence of other state court decisions prior to *Crawford* extending Confrontation Clause rights to capital sentencing. *See Ball v. State*, 699 A.2d 1170, 1190 (Md. 1997) (Confrontation Clause "extends to the sentencing phase of a capital trial and applies to [live,] victim impact witnesses as well as factual witnesses"); *Commonwealth v. Green*, 581 A.2d 544, 564 (Pa. 1990) (vacating death sentence and remanding for resentencing because defendant could not cross-examine state's rebuttal witness during mitigation).

Further demonstrating the range of reasoned disagreement on this issue, some of the courts other than the Fifth Circuit that have rejected the application of *Crawford* at capital sentencing altogether, or which have limited it to "eligibility" factors, have not done so unanimously. *See, e.g, Summers*, 148 P.3d at 787-88 (Rose, C.J., joined by Maupin and Douglas, JJ., dissenting in relevant

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[26] Florida currently has the Nation's second largest death row, with 384 condemned inmates. *See* http://www.dc.state.fl.us/activeinmates/deathrowroster.asp (last visited September 1, 2007).

part) (where sentencing hearing is not structured to separate "eligibility" decision from "selection" decision, *Crawford* must apply to both aspects of the sentencing determination because of the immense "practical difficulties" that would otherwise arise); *McGill*, 140 P.3d at 946-50 (Hurwitz, J., dissenting in relevant part) (arguing that "the Confrontation Clause of the Sixth Amendment applies to the penalty phase of a capital sentencing proceeding" and that "testimonial hearsay cannot be used to impose a death sentence," and basing that conclusion primarily on the judgment that "the Framers at the time the Sixth Amendment was adopted in 1791" would not have "expected that 'testimonial' hearsay could be used by a jury to determine whether a murder defendant should live or die").[27]

Thus, a substantial number of reasonable jurists around the Nation appear to share Judge Benavides' view that "the value of confrontation is never more vivid than when the state puts a defendant to death based on testimony he had no opportunity to challenge." *Fields*, 483 F.3d at 362-63 (dissent). The fact that these courts and judges have reached such starkly different conclusions about whether and to what extent *Crawford* should extend to the penalty phase of a capital trial suggests the urgent importance of this Court's resolving that question.[28]

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[27] Similarly, a justice of the Tennessee Supreme Court argued recently that "*Crawford* establishes the guidelines for Confrontation Clause analysis, [and] the Confrontation Clause applies to capital sentencing proceedings." *State v. Stephenson*, 195 S.W.3d 574, 607-609 (Tenn. 2006) (Birch, J., concurring in part and dissenting in part). The majority opinion had strongly suggested that the Confrontation Clause would not apply to capital sentencing in any event, but rejected Stephenson's claim because he had previously had an opportunity to confront the challenged testimony. *Id.* at 590-91.

[28] In addition to the courts that have addressed the question, others have acknowledged that the issue remains unsettled. *See, e.g., United States v. Johnson*, ___F.3d___, 2007 WL 2163002 (8th Cir. 2007) at *17 n.23 (noting dispute over "whether the Confrontation Clause was applicable to [the] selection phase" of the penalty proceeding, but not reaching the issue because the challenged statements were non-testimonial); *United States v. Higgs*, 353 F.3d 281, 324 (4th Cir.2003) (acknowledging Eleventh Circuit's decision in *Proffitt* but calling it "far from clear" whether the Confrontation Clause applies to a capital sentencing proceeding")

Finally, this Court's own decisions provide support for the proposition that the Confrontation Clause should apply at a capital sentencing hearing. As the dissenting opinion correctly observed, the Court's reasoning in *Barefoot v. Estelle*, 463 U.S. 880, 902-03 (1983) plainly contemplates the existence of confrontation rights at capital sentencing. *Barefoot* upheld the admission of demonstrably unreliable evidence against due process attack on the ground that the defendant would have "the benefit of cross-examination" to expose the flaws in such testimony. *Fields*, 483 F.3d at 376 (dissent) (citing *Barefoot*, 463 U.S. at 898-99). In *Specht v. Patterson*, 386 U.S. 605 (1967), the Court held that a convicted non-capital defendant who faced an enhanced sentence for his crime, contingent on proof of additional facts in a separate proceeding, was entitled to procedural protections in that hearing as a matter of due process. Moreover, it pronounced itself in agreement with the view that such protections necessarily "includ[e] the right to confront and cross-examine the [adverse] witnesses."[29] *Id.* at 610 (citation omitted). Later, in *Bullington v. Missouri*, 451 U.S. 430, 446 (1981), the Court observed that the type of sentencing hearing at issue in *Specht* was "similar to that required by Missouri in a capital case," *i.e.*, a trial-type hearing characterized by additional fact-findings beyond those necessary to convict. These opinions likewise suggest that Mr. Fields' Confrontation Clause claim is a substantial one that deserves this Court's plenary consideration.

III. The Court should grant review because the issue presented is a recurring and important one to the administration of the federal death penalty.

Mr. Fields' case presents a recurring and important question with respect to the administration of the federal death penalty. That fact, too, weighs in favor of this Court's granting

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[29] The panel majority below dismissed *Specht* as "not applicable to this case" solely because "the evidence Fields challenges relates only to nonstatutory aggravating factors." *Fields*, 483 F.3d at 327 n.9.

review.

First, as the Court is no doubt aware, the pace of federal capital prosecutions is steadily accelerating. *See, e.g.*, Marcia Coyle, *Federal Death Penalty Stalls*, NAT'L L. J. (April 30, 2007) ("There is no question that the Bush administration has been more aggressive than prior administrations in pursuing federal death sentences. And there is no question that the federal death row has been growing because of that effort even as state death rows decline").[30]

In addition to the fact that the raw number of prosecutions under the FDPA is swelling, in such prosecutions the Government invariably pleads non-statutory aggravating circumstances as an important aspect of its case for death. *See, e.g.*, *United States v. Agofsky*, 458 F.3d 369, 371 (5th Cir. 2006) ("several statutory and non-statutory aggravating factors" alleged); *United States v. Bourgeois*, 423 F.3d 501, 506 (5th Cir. 2005) (3 statutory and 2 non-statutory aggravators alleged); *United States v. LeCroy*, 441 F.3d 914, 929 (11th Cir. 2006) (2 statutory aggravators and 2 non-statutory aggravators alleged); *United States v. Purkey*, 428 F.3d 738, 746 (11th Cir. 2006) (6 statutory aggravators and 4 non-statutory aggravators alleged). Indeed, they sometimes outnumber the statutory aggravating circumstances presented to the jury. *Brown*, 441 F.3d at 1365-68 (2 statutory and 5 non-statutory aggravators alleged); *United States v. Stitt*, 250 F.3d 878, 898 (4th Cir. 2001) (Government alleged 46 non-statutory aggravating circumstances, of which the jury found 40).

But even more significant is the fact that one of those non-statutory aggravators is invariably the defendant's alleged "future dangerousness." That factor has been alleged in every single FDPA

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[30] *See also, e.g.*, Patricia Zapor, *Campaign '04: Kerry, Bush At Near-Opposite Extremes on Death Penalty*, Catholic News Service (September 3, 2004) (noting that the current Administration has "expanded use of the death penalty," including "encourag[ing] federal prosecutors to evaluate more crimes for possible capital prosecution under federal laws," especially in States without capital punishment).

prosecution of which undersigned counsel is aware.[31] Indeed, it appears to be the Government's reflexive practice to allege future dangerousness as a non-statutory aggravating circumstance in *every FDPA prosecution*. Thus, if the Fifth Circuit's constricted view of the Confrontation Clause prevails elsewhere, in *every* federal capital prosecution there will be a risk that the defendant will be barred from cross-examining evidence that goes directly to one of the Government's most potent arguments for a death verdict.[32]

These circumstances make the correct resolution of the question presented here – whether testimonial hearsay may be freely offered to prove "non-statutory" aggravating factors like "future dangerousness" at sentencing – a vital one for the administration of the federal death penalty.[33] That

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[31] To name but a few cases, "future dangerousness" was alleged in *Brown*, *LeCroy*, and *Bourgeois*, *supra*, as well as in *United States v. Webster*, 412 F.3d 308 (5th Cir. 2005); *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004); *United States v. Higgs*, 353 F.3d 281 (4th Cir. 2003); *United States v. Ortiz*, 315 F.3d 873 (8th Cir. 2002); *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002); *United States v. Jones*, 287 F.3d 325 (5th Cir. 2002); *United States v. Paul*, 217 F.3d 989 (8th Cir. 2000); *United States v. Barnette*, 211 F.3d 802 (4th Cir. 2000); *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999); and *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995). There are at least eight pending FPDA prosecutions in which the Government has alleged "future dangerousness." *See United States v. O'Reilly*, 2007 WL 2420830 (E.D. Mich. 2007); *United States v. Solomon*, 2007 WL 1878030 (W.D. Pa. 2007); *United States v. Taveras*, 488 F.Supp.2d 246 (E.D.N.Y. 2007); *United States v. Henderson*, 485 F.Supp.2d 831 (S.D. Ohio 2007); *United States v. Caro*, 483 F.Supp.2d 513 (W.D. Va. 2007); *United States v. James*, 2007 WL 914242 (E.D.N.Y. 2007); *United States v. Diaz*, 2007 WL 656831 (N.D. Cal. 2007); *United States v. Baskerville*, 2007 WL 150439 (D. N.J. 2007).

[32] Post-trial juror interviews by the Capital Jury Project, a multi-state research effort funded by the National Science Foundation, provide strong support for the view that "[f]uture dangerousness is highly aggravating." Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559 (Oct. 1998). Nearly 60% of jurors reported that they were more likely to vote for death if they found the defendant "might be a danger to society in the future." *Id.* These results "comport with prior studies that emphasize the pervasive role future dangerousness plays in and on the minds of capital sentencing jurors." *Id.* at 1560 (footnote with citations omitted).

[33] In state prosecutions, too, the question of future dangerousness is "frequently emphasize[d]" in the State's "evidence and argument at the sentencing phase," even if the statutory framework does not identify it as an aggravating circumstance. *Simmons v. South Carolina*, 512 U.S. 154, 162-63 (1994); *see, e.g.*, *Capano v. State*, 781 A.2d 556, 676 (Del. 2001) (prosecution presented evidence of future dangerousness as non-statutory aggravator); *Woldt v. People*, 64 P.3d 256, 262 (Colo. 2003) (court found future dangerousness as non-statutory aggravator).

is precisely the sort of question that deserves authoritative resolution by this Court.[34]

IV. The Court should defer disposition of Mr. Fields' Petition if it elects to resolve the same or related issues in another case, or if it chooses to review first the application of the Confrontation Clause to "eligibility" factors in capital sentencing proceedings.

Given the frequency with which courts around the country are considering and deciding issues related to the application of the Confrontation Clause to capital sentencing hearings, *see supra*, the Court will likely have other candidates from which to choose if it agrees that those issues deserves plenary review. For the reasons set out above, Mr. Fields' case is an ideal vehicle for considering the questions presented. If the Court grants review in another case or cases to consider the same or related issues, however, Mr. Fields respectfully asks that the Court defer disposing of his Petition until it resolves those questions.[35] Even if the Court decides it should first address the application of *Crawford* in a case involving testimonial hearsay offered to prove *statutory* aggravating factors alone, it should hold Mr. Fields' Petition pending any such decision. A decision extending *Crawford* to that context notwithstanding *Williams* would plainly have a potential impact on the merit, or at least the cert-worthiness, of the Confrontation Clause issues presented by this Petition, even though they relate solely to "non-statutory" aggravating factors.

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[34] One additional fact makes Mr. Fields' case an appropriate vehicle for the Court's consideration of this question; namely, the claimed constitutional violation is plainly harmful. *See Fields*, 483 F.3d at 380 (dissent). Thus, the outcome of the case plainly turns directly on whether the Confrontation Clause or some other constitutional provision is found to preclude the prosecution's reliance on testimonial hearsay at sentencing.

[35] For example, pending before the Court is a petition for certiorari in *Thomas v. Nevada,* No. 06-10347 (docketed March 29, 2007), presenting the question "Whether jail disciplinary records admitted during the selection phase of a bifurcated capital penalty hearing constitute testimonial hearsay pursuant to *Crawford v. Washington.*" If the Court grants review in *Thomas*, it should "hold" Mr. Fields' Petition pending the outcome in *Thomas*, or grant review in both *Thomas* and the present case and consolidate the two for decision. Likewise, a petition for review has been filed in *Johnson v. Nevada*, No. 06-10345 (docketed March 29, 2007), which may raise similar *Crawford* issues warranting a "hold" or a grant in the present case.

V. This Court should grant review to decide whether, if a capital sentencing statute makes the jury's power to impose death contingent on a finding that aggravating factors outweigh mitigating factors, that finding must be made beyond a reasonable doubt.

Under the Federal Death Penalty Act, the jury may not recommend a death sentence unless it finds that the aggravating factors proved by the Government outweigh the mitigating factors proved by the defendant. 18 U.S.C. § 3593(e).[36] In *Ring v. Arizona*, 536 U.S. 584 (2002) and subsequent cases, this Court has held that a legislature's choice to make a particular finding the predicate of an increased maximum sentence triggers certain procedural requirements as a matter of federal constitutional law, regardless of how the statutory scheme itself characterizes that finding. The question presented by Mr. Fields' case is whether a finding that aggravating factors outweigh mitigating factors – a determination not itself mandated by the Constitution, but required under many state death penalty statutes as well as in federal prosecutions under the FDPA before a death sentence may be imposed – is that type of finding (*i.e.*, one "necessary to impose the maximum [punishment]," *see Harris v. United States*, 536 U.S. 545, 566 (2002)) – and thus subject to the constitutional requirement of proof beyond a reasonable doubt.

Since *Ring*, courts around the country have sharply divided over the correct answer to this important and recurring question in capital cases. Taking one side in this dispute are Missouri, Colorado, and Nevada. All have squarely held that where state law requires a finding that aggravating factors outweigh mitigating factors before the sentencer may proceed to consider whether to impose death, the "gateway" function played by such a finding triggers the requirements

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[36] Although this determination is a prerequisite to a death sentence under the FDPA, the jury is not obliged to impose death even if it finds that aggravation outweighs mitigation, and juries are routinely so instructed.

of *Ring*. *Whitfield v. State*, 107 S.W.2d 253, 259 (Mo. 2003); *Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003); *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002).[37]

Other courts, state and federal, have reached the opposite conclusion – typically by focusing on the perceived *nature* of the determination, rather than its *function* as a necessary step in the sentencing process before death may be imposed. *See, e.g., United States v. Sampson*, 486 F.3d 13, 31-32 (1st Cir. 2007) (weighing determination is not a finding of fact); *See United States v. Barrett*, ___ F.3d___, 2007 WL 2122059 (10th Cir. 2007) at *26 (same, citing *Fields*). The high courts in Indiana, Alabama, and California, for example, have reasoned that a finding that aggravation outweighs mitigation "is not a factual determination [but a] moral or legal judgment" resting on "a theoretically limitless set of facts" and therefore "not susceptible to any quantum of proof." *Ex Parte Waldrop,* 859 So.2d 1181, 1189 (Ala. 2002); *Ritchie v. State*, 809 N.E.2d 258, 264-68 (Ind. 2004) (citing and quoting *Waldrop*); *People v. Demetrulias*, 137 P.3d 229, 256-57 (Cal. 2006) (such an assessment is "inherently normative, not factual, and, hence, not susceptible to a burden of proof quantification") (citation and internal quotation marks omitted); *People v. Bell*, 151 P.3d 292 (Cal. 2007) (same).

Other States – *e.g.*, Oklahoma, New Mexico, Delaware, and Maryland – understand the Sixth Amendment right to jury trial announced in *Ring* to be limited by the Eighth Amendment concept of

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[37] At least one academic commentator has agreed with these State courts that a jury's assessment of whether aggravation outweighs mitigation, if such a finding is a prerequisite to a death sentence, should be treated as a factual finding governed by *Ring*. *See* B. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing,* 54 ALA. L.REV. 1091, 1129 n. 214 (2003); *see also id.* at 1126-1127 (pointing out that "[a]ll of the features of the aggravation finding that the *Ring* Court regarded as significant [in concluding that it triggered the protections of the Sixth Amendment] are equally true of the two other components of [Arizona's] tripartite sentencing determination," including a weighing of the relative substance of aggravating and mitigating circumstances).

"death-eligibility." According to this view, because a capital defendant is "death-eligible" once the jury has found beyond a reasonable doubt the existence of one statutory aggravating factor, other necessary determinations that may precede the ultimate sentencing decision – even if they are necessary prerequisites under state law – need not be made beyond a reasonable doubt. *See, e.g.*, *Torres v. State*, 58 P.3d 214, 216 (Okla. Crim. App. 2002) (it is the finding of a statutory aggravating circumstance that "authorizes" jurors to impose death); *Mitchell v. State*, 136 P.3d 671, 704 (Okla. Crim. App. 2006) (citing *Torres*); *Ortiz v. State*, 869 A.2d 285, 305 (Del. 2005) (although a defendant may not be sentenced to death "without [a] finding that the aggravating factors outweigh the mitigating factors, it is not that determination that increases the maximum punishment. Rather, the maximum punishment is increased by the [jury's unanimous] finding [beyond a reasonable doubt] of the statutory aggravator") (alterations in original) (quoting *Brice v. State*, 815 A.2d 314, 322 (Del. 2003); *State v. Fry*, 126 P.3d 516, 531-36 (N.M. 2005).

Evans v. State, 886 A.2d 562 (Md. 2005), usefully illustrates this conflict among the State high courts, as the justices in *Evans* divided 4-3 over whether *Ring* requires that a jury finding that aggravation outweighs mitigation be made beyond a reasonable doubt. The *Evans* majority invoked its earlier decision in *Oken v. State*, 835 A.2d 1105, 1151-52 (Md. 2003), which took the position that *Ring*'s Sixth Amendment protections apply only until the Eighth Amendment "eligibility" threshold is crossed. *Evans*, 886 A.2d at 577 (citing *Oken*). The *Evans* dissenters, by contrast, focused on the fact that under the Maryland statute "the increase in punishment from life imprisonment to the death penalty is contingent on the factual finding that the aggravators outweigh the mitigators;" accordingly, that finding exposes the defendant "to an increased potential range of

punishment beyond that for a conviction for first degree murder" and is covered by *Ring*.[38]

In Mr. Fields' view, the Supreme Courts of Missouri, Nevada, and Colorado have the better argument. If a State chooses to condition the jury's power to recommend a death sentence on a prerequisite finding that aggravation outweighs mitigation, that finding operates to increase the potential maximum sentence, regardless of whether one labels that determination a "finding of fact" or a "normative judgment." *Cf. Booker v. United States*, 543 U.S. 220, 232 (2005) (Sixth Amendment protections apply to "any particular fact that the law makes essential to [the defendant's] punishment"). Section 3593(e) makes the jury's determination that aggravating factors outweigh mitigating factors "essential to" imposing a death sentence under the FPDA. *Ring*'s emphasis on function, rather than form, leads to the conclusion that this finding was required to be made by the jury *beyond a reasonable doubt* before a death sentence was legally available. *Cf. Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) ("the relevant 'statutory maximum' [for purposes of *Ring*] is not the maximum sentence a [jury] may impose after finding additional facts, but the maximum [it] may impose *without* any additional findings").

Regardless of whether the Court ultimately agrees with Mr. Fields about the merits of this Sixth Amendment challenge, it is fair to say that the lower courts are divided over whether *Ring* applies to such determinations.[39] Given this clear dispute among courts of last resort concerning a

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[38] Moreover, as the *Evans* dissenters point out, the use of the word "find" in this context (which is common to many capital sentencing schemes) itself "suggests the determination of an observable fact." *Evans*, 886 A.2d at 487 (dissenting opinion) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 852 (1961) (defining "finding" as "the result of a judicial or quasi-judicial examination or inquiry esp[ecially] into matters of fact as embodied in the verdict of a jury or decision of a court, referee, or administrative body").

[39] Indeed, the *Evans* dissenters are so strongly convinced that their view of how *Ring* applies in this context is correct that they have continued to assert it in subsequent cases, notwithstanding *Evans*. *See Abeokuto v. State*, 893 A.2d 1018, 1067 (Md. 2006) (Raker, J., joined by Bell, C.J., and Greene, J., dissenting).

recurring issue of significant importance to the administration of the death penalty, the Court should grant review and, by resolving the question presented, provide clear guidance for the implementation of its Sixth Amendment decisions in this area.

VI. The Court should grant review to decide whether a federal trial court assessing whether to admit scientific testimony at the sentencing phase of a federal capital prosecution under 18 U.S.C. 3593(c) must conduct a preliminary inquiry to ensure that such evidence meets at least the minimal standards of reliability that would apply in a routine civil case.

This case presents the Court with an opportunity to provide needed guidance to federal trial judges about the admission of expert opinion testimony at the penalty phase in prosecutions under the Federal Death Penalty Act. The question is whether 18 U.S.C. § 3593(c) imposes on trial courts in such cases a duty – analogous but not identical to the one imposed in proceedings governed by the Rules of Evidence by, *e.g.*, *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) – to admit as *scientific expert opinion* only evidence that is shown by its proponent to be scientifically reliable.[40] The Court should take this case to answer that question "yes."

Section 3593(c) provides that the Federal Rules of Evidence do not apply in death penalty sentencing proceedings under the FPDA. *See* Appendix C. It further states, however, that information may be excluded "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *Id.* The question that deserves this Court's consideration is whether a trial judge applying Section 3593(c) in the context of proffered *expert* testimony should be

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[40] Notably, the trial court in Mr. Fields' case appears not to have understood that it is the *proponent* of expert testimony who must show that the expert's findings and conclusions are scientifically reliable. *See* ROA 20:2332-33 (upbraiding defense counsel for "springing" a *Daubert* inquiry on the prosecution's expert).

required to conduct some kind of quasi-*Daubert* reliability review.

Because the Rules of Evidence do not apply of their own force in sentencing hearings under the FDPA, Section 3593(c) plays the role in federal capital sentencing hearings that Fed. R. Evid. 403 performs at the guilt phase – *i.e.*, it limits the admissibility of evidence whose slight probative value is outweighed by the risk that it will undermine the jury's reasoned consideration of the case. As a number of courts have recognized, Section 3593(c) actually gives courts *more* leeway to exclude evidence than does Rule 403. *See, e.g., United States v. Taveras,* 488 F.Supp.2d 246, 250 (E.D.N.Y. 2007); *Sampson v. United States*, 335 F. Supp. 2d 166, 177 (D. Mass 2004); *United States v. Frank*, 8 F. Supp. 2d 253, 268 (S.D.N.Y. 1998).

Daubert recognized that the "powerful" and potentially "misleading" status of expert witnesses implicates the reliability concerns of Rule 403:

> ... Rule 403 permits the exclusion of relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .' Judge Weinstein has explained: 'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, *the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.*'

Daubert, 509 U.S. at 595 (emphasis added). Just as those concerns are implicated by Rule 403 in the context of experts at the *guilt* phase, they are implicated at the penalty phase by § 3593(c) – since that provision "stands in" for Rule 403 in sentencing hearings under the Federal Death Penalty Act.

Thus, we submit, a judge "weighing possible prejudice" under § 3593(c) is likewise obliged to "exercise[] more control" over experts, and the best method for responsibly exercising that control – *i.e.*, for carefully examining the probative value of testimony and evidence offered to the fact-finding as "science" – is a flexible multi-factor analysis like the one described in *Daubert.* For that reason, at least

one federal trial court has formally adopted the concept of *Daubert*'s "gatekeeper" as the standard that informs application of § 3593(c):

> Although Section 3593 expressly suspends the formal rules of evidence at the sentencing hearing, it does not suspend all sense of order. Explicit in the Section's recitation of what may be admitted – as is the case throughout the FDPA – is a role for the district court as a gate-keeper, as well as the requirement that all information presented be relevant.

Frank, 8 F. Supp. 2d at 268; *see also Sampson*, 335 F. Supp. 2d at 229 (describing trial judge's "gatekeeper" role under § 3593(c)).

The Court should grant review in this case to hold that a trial court deciding whether to admit proffered expert testimony at the sentencing phase of a federal capital trial should incorporate a review of the *Daubert* factors or their functional equivalent into its analysis as an indispensable part of exercising its discretion under 18 U.S.C. § 3593(c). Under such a rule, trial courts would retain the latitude to admit evidence bearing appropriate indicia of reliability. *Cf. Kumho Tire*, 526 U.S. at 141 (*Daubert*'s test is flexible, and the specific factors identified in *Daubert* "neither necessarily nor exclusively appl[y] to all experts or in every case"). But such a practice would guarantee that evidence presented to the jury as representing "scientific" expertise would, in fact, deserve that label.

This Court in *Daubert* and its progeny has recognized essentially that if the theory underlying purportedly "scientific" testimony cannot be tested, is not subject to peer review, contains a high or unknown rate of error, and does not enjoy widespread acceptance, then the testimony lacks sufficient probative value to warrant consideration by the jury.[41] *Some* such method for assessing the reliability

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[41] As noted, the *Daubert* factors include whether the expert's theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether there is a high known or potential rate of error; whether there are standards controlling the technique's operations; and whether the theory or technique enjoys general acceptance within a relevant scientific or expert community. *See Kumho Tire*, 526 U.S. at 149-50 (citation omitted). These factors are not a mandatory "checklist," but trial courts should consider them "where they

of proffered "scientific" testimony is essential, because although a trial court has some latitude in determining *how* to evaluate the reliability of expert testimony, it has no discretion as to *whether* to evaluate reliability. *See Kumho Tire*, 526 U.S. at 159, (Scalia, J., concurring) (trial court may not "abandon the gatekeeping function"). Moreover, conducting such an analysis is the most straightforward way to safeguard the reliability of the proceeding as independently required by the Eighth Amendment. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985).

Some federal trial courts are now routinely conducting a preliminary reliability inquiry, like the one called for in *Daubert*, before permitting testimony proffered as "scientific expertise" to go before a capital sentencing jury. *See, e.g., United States v. Taveras*, 2006 WL 1875339 (E.D.N.Y. 2006) (unpublished) at *22-23 (granting "[d]efendant's motion for a *Daubert* hearing on the government's expert evidence of future dangerousness," without articulating the basis for its determination that *Daubert* applies at penalty notwithstanding Section 3593(c); *United States v. Rodriguez*, 2006 WL 435581 (D.N.D. 2006) (unpublished) at *1-2 (granting defense motion for "a *Daubert* hearing to determine the reliability of the expert testimony the United States plans to offer in support of the future dangerousness non-statutory aggravating factor"). The court in *Rodriguez* further noted that the FDPA's "underlying principles of reliability and relevance are the basis of the inquiry under Rule 702" governed by *Daubert*, and accordingly expressed its intention to rely on *Daubert* in "evaluat[ing] the

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are reasonable measures of the reliability of expert testimony." *Id.* at 152. Dr. Coons' testimony failed on all counts; the Government did not establish that any of the *Daubert* factors supported a finding that Dr. Coons' method was scientifically valid and reliable. Nor did the Government identify or direct the trial court's attention to any *other* basis (*i.e.*, other than the *Daubert* factors) for finding Dr. Coons' theories and techniques sufficiently scientifically reliable to stake the jury's life or death decision on them. The record as a whole shows that Dr. Coons' conclusions were "connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

expert's testimony under the 18 U.S.C. § 3593(c) standard." This Court should grant review to consider whether Section 3593(c) mandates that sensible practice everywhere.[42]

VII. The Court should grant review to reconsider its holding in *Barefoot v. Estelle*, 463 U.S. 880 (1983) in light of the now widespread scientific consensus that impressionistic psychiatric predictions of "future dangerousness," particularly when based solely on hypothetical questions about the defendant, are insufficiently reliable to serve as a basis for imposing a death sentence.

Almost twenty-five years ago, this Court dismissed an Eighth Amendment challenge to psychiatric testimony – based on a hypothetical rather than an examination of the defendant – predicting that the defendant would pose a continuing threat of violence. *Barefoot v. Estelle*, 463 U.S. 880, 883 (1983). However, the Court at least suggested that subsequent events might warrant reconsideration. *Id.* at 901 (Court was "unconvinced, *at least as of now*," that such evidence should be excluded *per se* on Eighth Amendment grounds) (emphasis added).

Events have proven *Barefoot*'s optimism wrong. As one Judge on the court below has observed, "[T]he scientific community virtually unanimously agrees that psychiatric testimony [predicting dangerousness] is, to put it bluntly, unreliable and unscientific." *Flores v. Johnson*, 210 F.3d 456, 463 (5th Cir. 2000) (Garza, J., concurring). *See also, e.g.*, Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-Daubert World*, 24 CARDOZO L.REV. 1845, 1845-46 (2003) ("Even the most scientific predictions based on thorough examination, diagnosis of mental symptoms, past patterns of behavior, and probabilistic assessment are

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[42] Mr. Fields notes that there can be little question that Dr. Coons' testimony was harmful. Though offered in the Government's case-in-chief at punishment, his strong and unqualified opinion that Mr. Fields had "no conscience" tended to rebut mitigating evidence that otherwise could have persuaded a reasonable juror that Mr. Fields had "turned a corner" and would be a non-violent prisoner if spared execution. This was a close case on punishment, and Dr. Coons' improperly admitted testimony likely influenced the outcome.

wrong nearly as often as they are right," and "predictions ... based solely on hypotheticals [are] wrong twice as often as they are right."); Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 362-363 (2003) (clinicians are "no better than lay people" at such predictions); Texas Defender Service, DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 34 (2004) (expert predictions of future violence in prison by Texas capital defendants were wrong 95% of the time).

The Court should grant review to revisit *Barefoot* in the light of judicial experience and evolving knowledge in the relevant scientific community.[43]

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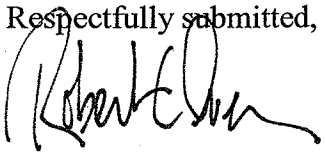
[43] At a minimum, the Court should consider whether the kind of impressionistic prediction made by Dr. Coons in *this* case should be precluded. There now exist published, peer-reviewed, and verifiable methodologies for predicting future dangerousness that, although still imperfect, have a measurable error rate and have been proven significantly more reliable than Dr. Coons' "educated guess" method. *See, e.g.*, Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 276 (2006) (concluding that "[e]xpert prediction testimony based on empirically derived probability assessments usually should be admissible, whether proffered by the government or the defense, but clinical prediction testimony, which is still the predominant method of proving dangerousness, should be excluded unless the defense uses it in its case-in-chief" because the latter is unacceptably unreliable); John F. Edens, *et al.*, *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?,"* 29 L. HUM. BEHAV. 55, 65-76 (Feb. 2005) (analyzing and testing numerous methodologies and making recommendations for each). Recent studies support actuarial methods as one of the most accurate predictors of violence and certainly superior to clinical judgment alone. *See* Jonathan R. Sorensen and Rocky L. Pilgrim, *An Actuarial Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY, 1251, 1257 (2000) (citing David J. Cooke, *The Development of the Prison Behavior Rating Scale*, 25 CRIM. JUST. & BEHAV. 482 (1998) and Kevin S. Douglas & Christopher D. Webster, *The HCR-20 Violence Risk Assessment Scheme: Concurrent Validity in a Sample of Incarcerated Offenders*, 26 CRIM. JUST. & BEHAV. 3 (1999)); *see also* Daniel A. Krauss and Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL. AND L. 267, 279 (June 2001). Significantly, research also has shown that the severity of the immediate crime and a past history of violence in the community – precisely the factors considered by Dr. Coons – are *not* reliable predictors of prison-based violence. *See, e.g.*, Daniel A. Krauss and Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL. AND L. 267, 279 (June 2001).

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Fields respectfully prays that this Court grant *certiorari* to give plenary review to the Fifth Circuit's judgment affirming his conviction and death sentence. In the alternative, if the Court grants plenary review in another case to decide whether and/or to what extent the admissibility of testimonial hearsay in a capital sentencing hearing is limited by the Confrontation Clause or due process, or to examine whether a jury finding that aggravating factors outweigh mitigating factors must be made beyond a reasonable doubt, Mr. Fields respectfully asks that the Court defer disposing of his Petition until those issues are resolved, or grant such other relief as the ends of justice may require.

Respectfully submitted,



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