No. 07-6395

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**IN THE SUPREME COURT OF THE UNITED STATES**
**October Term, 2006**

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**SHERMAN LAMONT FIELDS,**
*Petitioner,*

-v-

**UNITED STATES OF AMERICA,**
*Respondent.*

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

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# 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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## SUMMARY OF ARGUMENT IN REPLY

The Government does not forcefully dispute that a conflict exists among courts around the Nation concerning the applicability of confrontation rights at capital sentencing. *See, e.g*, BIO at 16. Nevertheless, the Government opposes review on two grounds. First, it argues that the conflict among the lower courts is not sufficiently well developed to warrant this Court's intervention. *See* Brief for the United States in Opposition ("BIO") at 18-19. Second, it urges that Mr. Fields' case is in any event an "inadequate vehicle" for the Court's review of the questions presented. *Id.* at 19. As we explain below, the Government is mistaken on both counts. First, we show that the record refutes the Government's assertions that Mr. Fields' case is not an appropriate vehicle for resolution of these important issues. Then, we briefly address the scope of the conflict over confrontation rights at capital

sentencing, and why it merits the Court's attention now, in this case. Finally, we add a comment about the Government's response to the other questions presented by Mr. Fields' Petition.[1]

1. **The Court of Appeals expressly and correctly rejected the Government's claim that Mr. Fields' constitutional challenges were unpreserved, finding that Mr. Fields "preserved this purely legal claim of error at sentencing," and that review accordingly was "*de novo*." *United States v. Fields*, 483 F.3d 313, 324 (5th Cir. 2007).**

In the proceedings below, the Government tried and failed to persuade the Court of Appeals that Mr. Fields had not properly preserved his constitutional challenges for review. *See infra*. The Government gamely renews that argument here, as the linchpin of its claim that Mr. Fields' case would be an "inadequate vehicle" for the Court's review of the questions presented. *See* BIO at 19 (insisting that Mr. Fields "failed to object in the district court to some of the [testimonial] hearsay evidence that he now complains was unconstitutionally admitted against him," and thus that he "would have to establish ... plain error" to prevail in this Court). The record, however, demonstrates that the Court of Appeals correctly concluded that the constitutional issues were properly preserved for review, making Mr. Fields' case an appropriate vehicle for this Court to examine and resolve them.

In the Court of Appeals, the Government argued that Mr. Fields failed to "object on Confrontation Clause grounds" to the testimony of witnesses Warren, Merrilat, and Stone, or to Exhibits G100, G104, G106, G107, and G112-112D. *See* Government's Brief in the Court

[1] Where this Reply does not specifically address the contentions in the Government's BIO, Mr. Fields stands on the factual and legal arguments advanced in his Petition.

of Appeals ("GB") at 24. The Government conceded that Mr. Fields' counsel, in objecting to Ex. G102, "mentioned a 'Sixth Amendment running objection ... with regard to these types of documents.'" *Id.*; *see also* ROA 19:2261. Nevertheless, the Government asserted that Mr. Fields' counsel had made "no prior mention of any request for a running Confrontation Clause objection to any particular type of evidence," and thus that their objections were insufficient to preserve "challenges to the testimony and exhibits ... admitted without specific Confrontation Clause objection." *Id.* (Emphasis added).

The Government was mistaken in that assertion. In his reply brief in the Court of Appeals, Mr. Fields pointed out that the colloquy surrounding the Government's offer of Exhibit G102 was not the first time defense counsel had invoked a Sixth Amendment running objection. Mr. Fields' counsel voiced that objection earlier, when the Government called Killeen police officer Daniel Tichenor to testify – based on witness reports – that Mr. Fields had been involved in an armed robbery. ROA 19:2182-85; *see also Fields*, 483 F.3d at 380 (Benavides, J., dissenting) (noting in passing that Tichenor was allowed to testify about those events "despite Fields's objection that he should be allowed to confront the witnesses themselves"). Mr. Fields' counsel explained at length to the trial court that Mr. Fields was being prejudiced by the Government's presentation of testimonial hearsay through Officer Tichenor that defense counsel could not meaningfully test by cross-examination. ROA 19:2182-85. Defense counsel's constitutional objections were overruled. *Id.*[2] As

[2] Defense counsel cited the Sixth, Eighth, and Fourteenth Amendments in objecting to the admission of this testimonial hearsay. ROA 19:2185.

questioning resumed, the court granted Mr. Fields' counsel a "running objection" to subsequent evidence on the same grounds. ROA 19:2186. Thus, Mr. Fields' counsel had no need to *reassert* those constitutional objections when the prosecution later offered exhibits G100 or G104, or the testimony of witnesses Warren, Tichenor, Merrilat, or Stone, as his continuing Sixth Amendment objection to all such evidence had been made and overruled.[3]

Thus, the Court of Appeals correctly concluded that Mr. Fields' constitutional challenges to the admission of testimonial hearsay from Government witnesses at the penalty hearing were properly preserved and that *de novo* review, rather than plain error review, was

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[3] The district court's grant of a "running objection" was nothing unusual. Courts routinely endorse "continuing" or "running" objections as a means for preserving error in the admission of evidence under Fed. R. Evid. 103. *See, e.g., Tyler v. Union Oil Co. of California*, 304 F.3d 379, 392 (5th Cir. 2002) (finding various objections to statistical evidence from an expert witness "adequately preserved" where "the district court granted a running objection to [the expert's] testimony"); *United States v. Carpenter*, 494 F.3d 13, 19 (1st Cir. 2007) (where counsel requested a "running objection in line with [his earlier objection]," and the court responded that counsel was "covered under Rule 103," challenge to subsequent testimony was properly preserved); *United States v. Tyler*, 281 F.3d 84, 99 (3rd Cir. 2002) (where trial court granted defense counsel a "continuing objection" to prosecutor's closing argument, appellate court would "review statements by the prosecutor for error, not plain error"). *United States v. Lee*, 274 F.3d 485, 493-94 (8th Cir. 2001) (where defense counsel "raised a continuing objection" to certain cross-examination, and "the government did not contest that ruling at the time," district court did not abuse its discretion in finding error was properly preserved); *United States v. Meserve*, 271 F.3d 314, 324-25 (1st Cir. 2001) (defense counsel's "continuing objection" to Government's line of questioning adequately apprised trial court of the basis of his complaint and preserved claim of error for appellate review); *United States v. Crawford*, 239 F.3d 1086, 1091 (9th Cir. 2001) ("an explicit continuing objection" will preserve error in the admission of evidence); *United States v. Sanchez-Hernandez*, ___ F.3d___, 2007 WL 3261513 (5th Cir. 2007) at *4 (where trial court granted defense counsel a "running objection" during the testimony of one government agent, and subsequent agents' testimony "presented substantially the same type of information and opinions" as the first agent's, court of appeals concluded that "the district court gave defense counsel a continuing objection to this line of questions propounded to all three agents and at a minimum defense counsel was entitled to interpret the ruling in this way," such that the court of appeals would review for harmless error rather than plain error) (citations omitted).

required. *Fields*, 483 F.3d at 324. Mr. Fields' claims were properly preserved at trial, making his case an ideal vehicle for this Court to review their merits.

**2. The Government's perfunctory claim that the confrontation violations in Mr. Fields' sentencing hearing were "harmless" cannot be squared with the extensive record evidence pointing to the opposite conclusion.**

The Government also asserts that Mr. Fields' case is a poor vehicle for the Court's resolution of the questions presented because the admission of the challenged testimonial hearsay was harmless. BIO at 20. That characterization cannot be justified on this record, which shows that jurors viewed the penalty decision as a close one. Indeed, just *one* of the several categories of improperly admitted testimonial hearsay – a police detective's testimony alleging that Mr. Fields took part in shooting a man named Ladon King – would, standing alone, require reversal of Mr. Fields' death sentence on direct review, as Judge Benavides explained in his dissenting opinion below:[4]

> [Detective] January's testimony was significant evidence. It was the only evidence showing that Fields participated in the King shooting. The Government discussed the incident at closing as part of its contention that Fields previously had "participated in attempted murders and other serious acts of violence," ... alleged as a nonstatutory aggravating factor: "You also heard that [Fields] was released in July of 2000 ... and after that in approximately September he and [an accomplice] shot at Ladon King." After listing several other incidents (some of which also were proven with unconfronted testimony), the Government stated: "Those are the other attempted murders and other serious acts of violence, some of them, you heard the evidence on many, but those are the ones I want you to think about."

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[4] Since the panel majority below found that Mr. Fields had no confrontation rights that were violated by the admission of any of the Government's testimonial hearsay, it did not (even, *e.g.*, as an alternative holding) address the question of harm.

In addition, the Government used the King shooting [to rebut] the defense's case for impaired capacity. ... As an example [of Fields' capacity for self-control], the Government pointed to the King shooting, stating that Fields "chose ... to go to an apartment complex with kids and people and have a shoot-out with another drug dealer." More broadly, the Government's case that Fields had a track record of serious violence was central to its case at sentencing. Fields's participation in the attack January described provided substantial support for that theme.

The record indicates that the jury considered its sentencing decision to be a difficult one. After deliberating for six hours, the jurors sent the district court a note inquiring what sentence would be imposed if they could not agree. Later, the jury sent another note stating flatly, "We cannot come to a unanimous agreement." Only after the court instructed the jury to continue deliberating did it return a death verdict.

Courts often have been unwilling to find error harmless where the record, as in this case, affirmatively shows that the jurors struggled with their verdict. "The fact that a jury initially was deadlocked and reached a verdict only after receiving an *Allen* charge may support an inference that the case was close." *United States v. Jean-Baptiste,* 166 F.3d 102, 109 (2d Cir.1999); *see also Powell v. Collins,* 332 F.3d 376 (6th Cir.2003) (finding prejudice in part because, "at one point in its sentencing deliberations, the jury informed the court that it was 'at a stalemate' and could not agree whether to impose a death sentence"); *United States v. Varoudakis,* 233 F.3d 113, 127 (1st Cir.2000) (jurors' note stating that they were "at an impasse" in their deliberations "reveal[ed] uncertainty about [the defendant's] guilt" and "weigh[ed] against a finding of harmless error"); *Medina v. Barnes,* 71 F.3d 363, 369 (10th Cir.1995) (holding that the jurors' statement "at one point during their deliberations ... that they might be unable to reach a unanimous verdict" was a circumstance suggesting error was prejudicial). Reluctance to find harmless error despite a jury note indicating an impasse is especially appropriate here, on direct review, where the Government's burden of proof is at its apex.

There are other indications that the sentencing issue was close. The jurors *unanimously* found a number of substantial mitigating factors, including that Fields (1) suffered physical abuse during his formative years, (2) suffered emotional abuse during his formative years, (3) suffered from parental neglect during his formative years, (4) was exposed to the violent deaths of family members, loved ones, and friends during his formative years, (5) lived

> most of his life without having a significant father figure, (6) is the product of an impoverished background which impaired or hampered his integration into the social and economic mainstream of society, and (7) spent significant periods of his life in solitary confinement.
>
> Some jurors found other significant mitigating factors. Eleven jurors found, for example, that Fields's behavioral problems may decrease over time .... Two jurors found that Fields committed his crime "under unusual and substantial duress." One found that Fields had recently responded well to a structured environment and likely would adapt to prison life if he were sentenced to life imprisonment.
>
> The Government ... points to nontestimonial sentencing evidence showing that Fields was involved in numerous other violent and criminal incidents beyond the King shooting. While some of [those] incidents are significant, they do not eliminate reasonable doubts that the erroneously admitted testimony repeatedly stressed by the government regarding the King shooting tipped the scales for at least one of the jurors, thereby enabling a death sentence.
>
> The Government's proof of Fields's involvement in the King shooting ... may have added significant weight to the death side of the scale. ... Given that the Government emphasized the King shooting at closing, that the jury struggled to reach a verdict, and that it found significant mitigating factors, the testimonial hearsay related by January was not harmless.

*United States v. Fields*, 483 F.3d 313, 378-80 (5th Cir. 2007) (Benavides, J., dissenting from Part II-A-I and dissenting, in part, from the judgment).

Contrary to the Government's claim, the confrontation violations in Mr. Fields' sentencing hearing were *manifestly* harmful, making his case an ideal vehicle for the Court's consideration of the questions presented.

**3. The Government's assertion that the acknowledged split of authority among courts around the Nation regarding the existence of confrontation rights in capital sentencing is not "sufficiently developed ... to warrant this Court's review at this time," BIO at 18-19, ignores the urgent need for this Court's guidance that is immanent in the words of courts, litigants, and academic commentators.**

The Government cannot seriously dispute that courts across the country have reached different conclusions regarding whether and to what extent a death sentence may constitutionally be based on testimonial hearsay evidence presented by the prosecution. *See* BIO at 16 (conceding that a number of state high courts "have applied the Confrontation Clause to state-court capital sentencing proceedings ..."). Although the Government criticizes some of those decisions as "unreasoned," *id.* at 18, it cannot deny that some States (*e.g.*, Texas and Florida) have concluded that the federal constitution gives capital defendants confrontation rights at the penalty phase, while others have not. *See* BIO at 17 (citing *Russeau v. State*, 171 S.W.3d 871, 880-881 (Tex. Crim. App. 2005), and *Rodgers v. State*, 948 So.2d 655, 663 (Fla. 2006)). Even if Texas and Florida were not among the most active death-penalty States, that conflict would warrant this Court's attention. *See* Sup. Ct. R. 10 (certiorari review may be appropriate where "a United States court of appeals ... has decided an important federal question in a way that conflicts with a decision by a state court of last resort ....").

Moreover, the Government fails accurately to characterize *Proffitt v. Wainwright*, 685 F.2d 1227, 1251-1255 (11th Cir. 1982), and thus misses *Proffitt*'s import with regard to the

scope of the conflict Mr. Fields asks the Court to resolve. The Government describes *Proffitt* as holding that "capital defendants in Florida have a right to confrontation during Florida's somewhat unusual sentencing phase ...." BIO at 17. Nothing about the outcome in *Proffitt*, however, turns on any "unusual" aspect of Florida capital sentencing procedure. Instead, the decision rests squarely on the Eleventh Circuit's view of "the constitutional requirements governing capital sentencing" generally. *Proffitt*, 685 F.2d at 1253. As the Eleventh Circuit found, this Court's "emphasis in *Gardner* [*v. Florida,* 430 U.S. 349 (1977)] 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." *Id.* at 1255. Indeed, the actual hearsay testimony challenged in *Proffitt* was offered to rebut mitigating evidence introduced by the defendant. *Id.* at 1250, 1255. Since that scenario could arise anywhere in the country, the Eleventh Circuit's reasoning cannot fairly be said to turn on Florida's "somewhat unusual sentencing phase." With the Eleventh Circuit taking this view and the Fifth and Seventh Circuits having taken the opposite stance, *see* Petition at 17-19, the conflict is both significant and ripe for this Court's resolution. *See* Sup. Ct. R. 10 (certiorari review may be appropriate where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter....").

The Government asserts that this Court "has never called into question the core holding of *Williams* [*v. New York*, 337 U.S. 241 (1949)]." *See* BIO at 14. The accuracy of that statement, of course, depends on what one characterizes as *Williams*' "core holding."

Whatever that "core holding" may be, it has to be reconcilable with *Gardner*, which – as the Eleventh Circuit recognized in *Proffitt*, and Judge Benavides maintained in his dissenting opinion below – "cast[s] doubt on" a broad and unqualified endorsement of *Williams*. *See Fields*, 483 F.3d at 374-75 (Benavides, J., dissenting). At a minimum, absent this Court's intervention, courts faced with the issue of the right of confrontation at capital sentencing will continue to be forced to "straddle the *Williams/Gardner* tightrope." Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 409 (2007). This Court should take the opportunity in this case to clarify how and whether *Williams*' "core holding" has been modified by, *e.g.*, *Gardner*; *Specht v. Patterson*, 386 U.S. 605 (1967) (*see* Petition at 23); and *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process guarantees right to confront adverse witnesses at parole revocation hearing). *See White, supra*, at 402-15 (arguing that post-*Williams* cases like *Specht*, *Morrissey*, and *Gardner* support extending confrontation rights to the sentencing phase of capital cases).

Scholarly commentary also suggests that the questions presented in this case are important and ripe for consideration. For example, Professor Richard D. Friedman of Michigan Law School, in *Crawford, Davis, and Way Beyond*, 15 J.L. & POL'Y 553 (2007), identified whether and to what extent "the Confrontation Clause appl[ies] to the sentencing phase of a capital case" as one of the "very important and controversial issues" about the reach and impact of the *Crawford* revolution that this Court will need to resolve. *Id.* at 572,

577.[5] Elsewhere, Professor Friedman, again describing the question whether "the confrontation right appl[ies] at the sentencing phase in a capital case" as "a very interesting issue," surmised that even if the Confrontation Clause by its own terms did not apply to capital sentencing, due process or "heightened reliability" or some comparable rationale might require the same result: "[I]t seems to me that if the Confrontation Clause itself doesn't apply throughout [a capital sentencing proceeding], some confrontation principle probably should." Friedman, *Crawford and Davis: A Personal Reflection*, 19 REGENT U. L. REV. 303, 312-13 (2007). Reviewing the issue from a historical perspective, John G. Douglass has recently argued that "the whole of the Sixth Amendment applies to the whole of a capital case." *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1972 (2005)); *see also, e.g.*, Benjamin C. McMurray, *Challenging Untested Facts at Sentencing: The Applicability of Crawford at Sentencing After Booker*, 37 MCGEORGE L. REV. 589, 625 (2006) (citing and agreeing with Douglass that confrontation rights should apply at capital sentencing proceedings).

These comments by scholars serve simply to bolster the point made by the cases cited in Mr. Fields' Petition: that there is a genuine and widespread conflict *right now* over the issue of whether a capital defendant should have the right to confront and cross-examine

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[5] Professor Friedman , a nationally respected expert on evidence, is no stranger to the Court. He long advocated in his scholarly writings the "testimonial" approach ultimately adopted in *Crawford*. *See Crawford*, 541 U.S. at 61 (citing Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L. J. 1011 (1998)). He also successfully argued a post-*Crawford* confrontation case, *Hammon v. Indiana*, No. 05-5705, before this Court. Professor Friedman's view that the question presented by Mr. Fields' petition is an important and recurring one deserves due consideration by the Court in weighing whether to grant certiorari.

adverse witnesses at the penalty phase. The conflict is sufficient to demonstrate a need for guidance that calls on this Court to take up and resolve the question in this case.[6]

**4. The rule Mr. Fields seeks regarding psychiatric testimony – that before admitting expert testimony on future dangerousness under 18 U.S.C. § 3593(c), a court should require the proponent to satisfy some *Daubert*-like reliability test regarding the accuracy of the proffered expert's technique – is not foreclosed by *Barefoot v. Estelle*, 463 U.S. 880 (1983), and is already being applied by a number of federal district courts.**

The Government begins its response to Mr. Fields' third issue – which challenges the admissibility of "junk science" presented as expert opinion predicting future dangerousness – by observing that the court below "correctly concluded that *Daubert* is not strictly applicable in the penalty phase of a federal capital trial." BIO at 27. Contrary to the Government's implication, Mr. Fields has never argued that *Daubert* is "strictly applicable" to a penalty hearing under the FDPA. *See, e.g.*, Appellant's Opening Brief in the Court of Appeals at 59 (conceding that "[*Daubert*'s] test may not apply by its own terms under the FDPA ..."). Instead, Mr. Fields has taken the position that *some kind* of threshold reliability inquiry should precede a decision by the trial court to admit purportedly "scientific" expert opinion, in order to safeguard the ultimate reliability of the jury's sentencing verdict. As Mr. Fields acknowledged in his Petition and in the court below, such an inquiry need not track *Daubert*

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[6] The State of Texas, too, believes that the conflict among the lower courts on these confrontation issues has reached the point of requiring this Court's intervention. *See* Petition for Writ of Certiorari, *Texas v. Russeau*, No. 05-856, 2006 WL 1168776 at *6-7 (arguing that this Court should grant review because "the lower courts continue to hand down conflicting decisions on the question of ... whether the Confrontation Clause applies at the sentencing phase" of a capital case like Russeau's).

in every particular. *See* Petition at 33 and n. 41 (*Daubert*'s test is flexible, and the specific factors identified in *Daubert* neither necessarily nor exclusively apply to all experts or in every case) (citation and internal quotation marks omitted). As we explain below, nothing about Mr. Fields' position is "foreclosed by the reasoning of *Barefoot*," BIO at 28, and his view is already shared by a number of federal trial courts to have faced the issue.

First, the rule Mr. Fields seeks is not foreclosed by *Barefoot*. *Barefoot* addressed whether the *Constitution* prohibited expert testimony on future dangerousness in a capital sentencing hearing. *Barefoot,* 463 U.S. at 899 n. 6 ("The question before us is whether the Constitution forbids exposing the jury or judge in a state criminal trial to the opinions of psychiatrists about an issue that Justice Blackmun's dissent concedes the factfinders themselves are constitutionally competent to decide."). In identifying the question presented in *Barefoot,* the majority explicitly distinguished cases cited by the dissent because those decisions were "decisions of federal evidence law" rather than "constitutional decisions." *Id.* *Barefoot* thus did not decide, and could not have decided, the admissibility of expert testimony on future dangerousness under federal evidentiary law. In particular, it did not address whether expert testimony would be admissible under the FDPA balancing test established by 18 U.S.C. § 3593(c). *See* Thomas Regnier, *Barefoot in Quicksand: The Future of "Future Dangerousness" Predictions in Death Penalty Sentencing in the World of Daubert and Kumho,* 37 AKRON L.REV. 469, 488 (2004) (noting potential application of Federal Rule of Evidence 403 to expert testimony on future dangerousness); *see also, e.g.,*

*United States v. Sampson*, 335 F.Supp.2d 166 (D. Mass. 2004) (agreeing that *Barefoot* would not foreclose a holding that purported expert testimony regarding a defendant's likely future dangerousness is so unreliable that § 3593(c) bars its admission at a sentencing hearing under the FDPA).

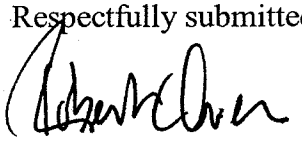
Finally, the Government claims that reading § 3593(c) to impose such a reliability requirement is "unsound." BIO at 27. But, as Mr. Fields pointed out in his Petition, a number of federal district courts have adopted this same commonsense view and are now granting *Daubert* hearings prior to admitting such expert testimony regarding a capital defendant's "future dangerousness." *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;" *United States v. Rodriguez*, 2006 WL 435581 (D.N.D. 2006) (unpublished) at *1-2 (same). The court in *Rodriguez* correctly observed that the FDPA's "underlying principles of reliability and relevance are the basis of the inquiry under Rule 702" governed by *Daubert.* Accordingly, the *Daubert* factors provide an appropriate basis for "evaluat[ing] the expert's testimony under the 18 U.S.C. § 3593(c) standard." *Id.* If the practice thoughtfully adopted by these district courts is, in fact, "unsound," then this Court should grant review here and say so, so that the taxpayer dollars presently being spent on such hearings can be expended more wisely.

## 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. In the alternative, if the

Court grants plenary review in another case to decide any of the issues presented by Mr. Fields' Petition, 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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