No. _____

In the Supreme Court of the United States

BILLIE WAYNE COBLE,
Petitioner,
v.
LORIE DAVIS , Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

In *Barefoot v. Estelle,* 463 U.S. 880 (1983), this Court held that the Constitution did not require the categorical exclusion of all expert testimony regarding future dangerousness in a capital case. Yet the Fifth Circuit and the Texas Court of Criminal Appeals interpreted *Barefoot* to bar Mr. Coble's claim that the unreliable testimony of a purported expert on "future dangerousness" violated his federal constitutional rights despite the state court's holding that the testimony was erroneously admitted under the Texas Rules of Evidence.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579, 593-94 (1993) this Court held that expert testimony must be based on "scientifically valid" methodologies and reasoning. Yet the Fifth Circuit held that the *Daubert* standard for reliable evidence does not apply to capital sentencing hearings.

This case therefore presents the following questions:

1. Have the United States Court of Appeals for the Fifth Circuit and the Texas Court of Criminal Appeals improperly applied *Barefoot v. Estelle* to categorically foreclose any claim that the admission of unreliable expert testimony in a particular case violates the Constitution?

2. Did the Fifth Circuit improperly hold that expert evidence in sentencing hearings in capital trials is exempt from the normal reliability standards of *Daubert* and that the Eighth Amendment reliability requirement does not apply to such testimony?

Petitioner Billie Wayne Coble respectfully petitions this Court to review the judgment of the Fifth Circuit Court of Appeals.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Billie Wayne Coble, was the Petitioner before the United States District Court for the Western District of Texas, as well as the Applicant and Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Coble is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("the Director"). The Director and her predecessors were the Respondents before the United States District Court for the Western District of Texas, as well as the Respondent and Appellee before the United States Court of Appeals for the Fifth Circuit.

Mr. Coble asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR WRIT OF CERTIORARI

Billie Wayne Coble respectfully petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On April 3, 2018, the United States Court of Appeals for the Fifth Circuit issued an Opinion denying relief on the question of whether Coble's constitutional rights were violated by the unreliable "junk science" testimony of Dr. Coons (the issue presented herein) and the irrelevant, false, and perjured testimony of A. P. Merillat. This Opinion, reported as *Coble v. Davis*, 728 F. App'x 297 (5th Cir. 2018) is attached as Appendix A. The docket entry of the denial of a petition for panel rehearing on May 15, 2018 is attached as Appendix B. The opinion of the Fifth Circuit granting a certificate of

appealability ("COA") on these two claims, *Coble v. Davis*, 682 F. App'x 261 (5th Cir. 2017), is attached as Appendix C. The unpublished decision of the federal district court Mr. Coble sought to appeal, *Coble v. Stephens*, 2015 WL 5737707 (W.D. Tex., Sept. 30, 2015), denying Mr. Coble's petition for writ of habeas corpus and a COA, is attached as Appendix D. The opinion of the Texas Court of Criminal Appeals ("TCCA") denying Mr. Coble's direct appeal, *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010) is attached as Appendix E. The unpublished opinion of the Texas Court of Criminal Appeals denying Mr. Coble's state habeas application, *Ex parte Coble*, No. WR-39,707-03 (Tex. Crim. App. Feb. 8, 2012) is attached as Appendix F.

STATEMENT OF JURISDICTION

The federal district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 & 2254. Under 28 U.S.C. § 2253, the Fifth Circuit Court of Appeals had jurisdiction over uncertified issues presented in the "Application for a Certificate of Appealability." This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1) over all issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 & 2253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented implicate the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

The questions also implicate the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which precludes the infliction of "cruel and unusual punishments..." U.S. CONST. amend. VIII.

This case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

This case also involves TEX. CODE CRIM. PROC. art. 37.0711, Section 3(b), which states that "the court shall submit the following [] issue[] to the jury...(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

STATEMENT OF THE CASE

A. Procedural History.

Petitioner Billie Wayne Coble is currently unlawfully incarcerated by the Texas Department of Criminal Justice, Institutional Division, on death row at the Polunsky Unit

in Livingston, Texas. Mr. Coble was convicted and sentenced to death in Waco, Texas in 1990 for the August 29, 1989 murders of his brother-in-law John Robert Vicha, his father-in-law Robert John Vicha, and his mother-in-law Zelda Vicha. [USCA5.2476].[1] His conviction and sentence were affirmed on appeal by the TCCA. *Coble v. State,* 871 S.W.2d 192 (Tex. Crim. App. 1993). Coble's initial state habeas petition was denied in 1999. *Ex parte Billie Wayne Coble*, No. 39,707-01 (Tex. Crim. App. 1999) (*per curiam*).

Coble filed his initial federal habeas petition in the district court and relief was denied. The Fifth Circuit Court of Appeals ultimately reversed and granted relief on the issue of the mitigation instruction, and ordered a new penalty phase trial. *Coble v. Quarterman,* 496 F.3d 430 (5th Cir. 2007).

The penalty re-trial was held in Waco, Texas in 2008 and Coble was again sentenced to death. [USCA5.719-720; 29 RR 186-187 (USCA5.12796-97)].[2]

The TCCA denied Coble's direct appeal. *Coble v. State,* 330 S.W.3d 253 (Tex. Crim. App. 2011) (Appendix E). Coble timely filed his state post-conviction application on June 3, 2010. [USCA5.4354-4772]. An evidentiary hearing was held on February 11, 2011 [USCA5.4095-4342], but only on the claims the State had requested.[3] After the hearing, the trial court adopted verbatim the State's proposed findings of fact and conclusions of law [USCA5.1128-37] and the TCCA, in turn, also adopted those findings

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[1] The federal Record on Appeal in the Fifth Circuit Court of Appeals is referred to herein as "USCA5.[page]."

[2] "RR" refers to the Reporter's Record, Coble's trial transcript, with the volume number preceding the page number.

[3] Those grounds did not include the claim under consideration here, although Coble requested a hearing on it. [USCA5.4107].

verbatim and denied Coble's application. *Ex parte Billie Wayne Coble,* WR-39,707-03 (Tex. Crim. App. Feb. 8, 2012). [USCA5.21-22] (Appendix F).

Coble then filed his federal habeas petition in the Western District of Texas, Waco Division, Judge Walter S. Smith presiding. [USCA5.98-699]. The petition was denied, without a requested evidentiary hearing. *Coble v. Stephens,* 2015 WL 5737707 (W.D. Tex. Sept. 30, 2015). [USCA5.1966-2014] (Appendix D). Coble's notice of appeal was timely filed on October 28, 2015. [USCA5.2016-2018].

On appeal in the Fifth Circuit, on March 16, 2017 that Court granted a COA on Claims Five and Six of Mr. Coble's application, whether his constitutional rights were violated by the unreliable "junk" science testimony of Dr. Coons, the issue presented herein, and the irrelevant, false, and perjured testimony of A. P. Merillat. *Coble v. Davis*, 682 F. App'x 261, 274, 282 (5th Cir. 2017) (Appendix C). After oral argument, on April 3, 2018 the Fifth Circuit denied these claims in an unpublished opinion. *Coble v. Davis*, 728 F. App'x 297 (5th Cir. 2018) (Appendix A). On May 15, 2018, the Fifth Circuit denied Mr. Coble's petition for panel rehearing. *Coble v. Davis*, No. 15-70037 (5th Cir. May 15, 2018) (Appendix B).

B. Trial proceedings.

Billie Coble is a Vietnam Marine Corps combat veteran who served his country honorably, contributed much to his community, and had absolutely no criminal record prior to his 1990 trial. He also had no prison disciplinary record during the eighteen years

leading up to his penalty phase re-trial, but was nevertheless re-sentenced to death in 2008 for the 1989 murder of his in-laws.

At Coble's 2008 penalty phase re-trial, the defense presented uncontroverted evidence that Coble had not received a single disciplinary notice or infraction in eighteen years on Texas' death row.[4] For approximately the first nine years of his sentence, Coble was housed in the Ellis I Unit where he participated in work programs and organized sports tournaments for the inmates in order to boost morale and help to keep them out of trouble. 25 RR 65, 95-96.[5] He served as a mentor for the younger inmates. 25 RR 70, 86-87. Coble also assisted illiterate and intellectually disabled prisoners by helping them read and write letters to their friends and family members. 25 RR 71, 150-53. He helped one death row inmate learn English. 25 RR 150.

Coble got along well with the guards, both men and women. 25 RR 89-90. His peaceful behavior, good spirits, and helpful nature continued after death row was moved to the more restrictive Polunsky Unit in Livingston, Texas. 25 RR 102. As the TCCA observed in reviewing this evidence, "[t]here is no denying [Coble's] impressive history of nonviolence in prison." *Coble v. State*, 330 S.W.3d at 269.

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[4] The defense also introduced evidence of Coble's difficult childhood and young adult years. His father died before Coble was born and his mother suffered incapacitating mental illness, for which she was hospitalized and received shock therapy. 26 RR 22-29. Coble's mother was unable at times to recognize her children, who were placed in a State home. 26 RR 28-29. At age 17, Coble enlisted in the Marines and was deployed to Vietnam. 26 RR 35-37. He was in active duty there as a machine-gunner, and was injured while in the line of duty. 26 RR 39. After his honorable discharge, he returned home and changed from a man who always laughed and smiled to a distant shell of his former self. 25 RR 25, 26 RR 37-38.

[5] According to other death row inmates, Coble was "well-liked by everyone," always "even-keeled," and had a good and "peaceful" reputation. 25 RR 60-61, 86-87.

Dr. Richard E. Coons, an Austin psychiatrist who had incorrectly predicted in 1990 that Coble would commit criminal acts of violence, was again called as a witness at the 2008 re-trial. At the *in camera Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) hearing to establish the scientific reliability of his testimony, Dr. Coons testified that in making predictions of "future dangerousness," "the best predictor of the future is the past" [USCA5.11817, 11831, 11835], despite Coble's 18-year violence-free incarceration prior to the re-trial. Dr. Coons admitted that the prosecution had not provided him with any evidence of violent acts in those years, yet this made absolutely no difference to his predictions. [USCA5.11935-36].

In forming his opinion, Dr. Coons stated he completely relied on information furnished to him by the district attorney [USCA5.11822-24], but this information was incomplete and obsolete, as it was current only up to September 22, 1989, almost 20 years prior to his testimony in 2008. [USCA5.11823].[6] The lengthy hypothetical upon which Coons based his opinion of future dangerousness [USCA5.11882-89] included no time-frame whatsoever, as if it made no difference whether the events described occurred recently or decades ago.

Dr. Coons admitted that his methodology could not be traced to a particular textbook or professional journal [USCA5.11827-28], nor could he cite even one authority or article that supported it. [USCA5.11849]. Coons was not aware of any studies in psychiatric journals regarding the accuracy or error rates of long-range predictions of

[6] Dr. Coons stated that his opinions depended on the underlying information upon which they were based. [USCA5.11918].

future violence. [USCA5.11859-61]. When read a list of prominent articles about future dangerousness predictions, he admitted he had not read any of them, although this was his field of purported expertise. [USCA5.11867-68]. Coons had never gone back to check prison records of those he had testified against to see if his predictions were accurate, and consequently had no idea of his own accuracy rate. [USCA5.11865-67]. Despite these multiple shortcomings, the trial court qualified Dr. Coons as an expert. [USCA5.11870]. The defense objected to his testimony on Eighth Amendment constitutional grounds, but was overruled. [USCA5.11872].

In front of the jury, Dr. Coons claimed that he could form an opinion as to the probability of future dangerousness by examining the person's history of violence; the "instant offense;"[7] the defendant's personality; and whether they "treat people nicely." [USCA5.11878-80]. The prosecutor read Dr. Coons a lengthy hypothetical that purported to track the facts of Coble's case [USCA5.11882-89], and based on that, Dr. Coons predicted that Coble would be a future danger. [USCA5.11889].

Dr. Coons testified that his predictive "scheme" looked at Coble's history of violence which "has escalated from minor things to multiple homicide." [USCA5.11891].[8] Various speculative hypotheses were then given: that Coble killed his wife's family out of revenge and to control and punish her [USCA5.11891]; that Coble

[7] As to this factor, Dr. Coons admitted to an entirely subjective standard: "the premeditated carrying out of a plan is a lot different in my mind than just some hip-shooting kind of a panicky deal." [USCA5.11879].

[8] Of course, "escalating violence" in the context of a capital murder would apply in all cases, as *any* prior violence would be less serious than a capital crime.

showed a need for control [USCA5.11892]; that Coble had no conscience [*Id.*]; and that Coble's allegedly "evil grin" at his ex-wife at an evidentiary hearing showed "a truly defective conscience." [USCA5.11893].

Without any statistical backing, Dr. Coons said that everyone on death row was "on appeal" so they would be on better behavior [USCA5.11894, 11923] than those in general population who "threaten people, fight and so forth." [USCA5.11895]. He dismissed any "aging out" factor, opining that old people can also be violent. [USCA5.11896]. Without citing any authority, Dr. Coons testified that a personality becomes "pretty well fixed by the early 20's." [USCA5.11899]. Without attributing a source, he claimed to have "plenty of information about what goes on in...the penitentiary...that none of the [prison] officials ever know about..." [USCA5.11897] and to know about "plenty of violence ...that nobody ever hears about" except, apparently, Dr. Coons himself. [USCA5.11898].[9]

Dr. Coons cited Coble's "attitude toward violence," the nature of the offense, the personality of the individual, his conscience, and the society he will be in, all based on Dr. Coons' subjective evaluation of these factors. [USCA5.11901-03]. He also admitted

[9] This echoed the testimony of State's witness A.P. Merillat, who also claimed to be in possession of prison violence information unknown to everyone except himself. One of these instances, a sensational and lurid account of prison violence at the Telford Unit, was shown to be a perjured fabrication. [USCA5.460-469]. The Fifth Circuit dismissed this claim, holding that "[a]s previously explained, this court has held that the Eighth Amendment does not affect the admissibility of evidence vel non...Coble provides no other support for his proposition that the State's unknowing presentation of materially inaccurate evidence violates a defendant's constitutional rights." *Coble*, 728 F. App'x at 302.

that his methodology had not been published in any textbooks or scholarly journals. [USCA5.11910].

According to Dr. Coons, death row would always be less dangerous than a life sentence [USCA5.11921] because the probability of violence is always greater in general population [USCA5.11923] based on what he termed "experience and all that." [USCA5.11925]. Dr. Coons admitted that his opinion was the same as the incorrect one he gave eighteen years previously at Coble's first trial in 1990. [USCA5.11927].

Dr. Coons was the centerpiece of the State's case for future dangerousness and he testified at length for over sixty-five pages of transcript. [USCA5.11873-11939]. Dr. Coons was mentioned four times in the prosecutor's final argument,[10] contrary to the TCCA's erroneous holding that he was mentioned "very briefly." *Coble,* 330 S.W.3d at 285-86.

C. Opinions of the courts below.

i. On direct appeal.

All parts of this claim were brought on direct appeal as Points of Error Three, Four, and Five. [USCA5.5890-5909].[11] The TCCA held as follows:

> In points of error three and four, appellant contends that Dr. Richard Coons's expert testimony concerning future dangerousness was not

[10] *See* USCA5.12733-34, prosecutor's argument referring to Dr. Coons's methods as "just common sense"; USCA5.12779-80, "Now, he [Cunningham] likes to talk, like, Dr. Coons, he was an absolute idiot"; USCA5.12784; USCA5.12785, again arguing [incorrectly] that Dr. Coons used the same methodology that Dr. Hodges, a psychiatrist who had examined Coble as a teenager when he was placed in the State home, used forty-four years previously.

[11] And as Claims 7(a), (b) and (c) on state habeas [USCA5.4530-56, 4564-96] and in the district court. [USCA5.344-445].

> admissible under Rule 702 because it was insufficiently reliable. We agree. In point of error five, appellant asserts that this type of evidence fails to meet the heightened reliability requirement of the Eighth Amendment, but the United States Supreme Court, in *Barefoot v. Estelle*, [463 U.S. 880, 103 S. Ct. 3383, 77 L.Ed.2d 1090 (1983)] rejected this argument, and we are required to follow binding precedent from that court on federal constitutional issues.
> *Coble,* 330 S.W.3d 253, 270 (Tex. Crim. App. 2010) (Appendix E).

Hence, the holding on Points of Error Three and Four was based on a rule of evidence, and, as to those points, as the TCCA subsequently pointed out, "the holding in *Coble* does not give rise to a claim that is cognizable on habeas corpus." *Ex parte Ramey,* 382 S.W.3d 396, 397 (Tex. Crim. App. 2012). However, Point of Error Five on direct appeal, rejected by the TCCA, was based on federal constitutional Eighth Amendment grounds, and hence is cognizable on state and federal habeas.

As to the merits, on direct appeal the TCCA strongly criticized Dr. Coons' testimony, noting that he had provided no scientific, psychiatric, or psychological research or studies to support his "idiosyncratic" methodology for predicting whether someone would commit future acts of violence. *Coble*, 330 S.W.3d at 277. The TCCA found that the admission of Coons' testimony was error, although harmless. *Id.* at 287. It also dismissed Coble's argument in Point of Error Five on the basis of this Court's *Barefoot* decision, holding it was "required to follow binding precedent from [this] court on federal constitutional issues." *Id.* at 270.

ii. On state habeas.

Claim 7(a) in state habeas [USCA5.4530-56, 4564-86] corresponded to parts of Point of Error Five on appeal, but it depended on extra-record evidence that was not and could not be presented on appeal. (*E.g.,* Exhibit 9 [USCA5.4890-4904], Exhibit 13 [USCA5.4915-4949], Exhibits 16- 18 [USCA5.4967-5011]). The TCCA denied all parts of Claim 7, holding it to be procedurally barred, citing *Ex parte Banks,* 769 S.W.2d 539 (Tex. Crim. App. 1989). *Ex parte Coble*, No. WR-39,707-03 (Tex. Crim. App. Feb. 8, 2012) (*per curiam*). [USCA5.22]. (Appendix F).

To the extent this holding was based on the failure to raise a constitutional issue under the holding of *Ex parte Banks*, this was an unreasonable determination of the law and the facts under both 28 U.S.C. § 2254(d)(1) and d(2), as the state habeas claim clearly raised the constitutionality of Coons' testimony. This was not simply a trial error claim, a violation of TEX. R. EVID. 702, at least as to Claims 7(a) and 7(c).

The TCCA's unexplained denial of the habeas claim was at least partly based on its verbatim adoption of the State's similarly unexplained averment, in its proposed findings and conclusions, that "[t]his matter has been raised and rejected on direct appeal." [USCA5.1074]. That was flat wrong, contrary to both the facts and clearly established law, and objectively unreasonable. The vast majority of the arguments as to Claims 7(a) and 7(c) had never been raised on direct appeal, nor could they have been, as they were based on extra-record evidence.[12] Thus, the TCCA's holding that this claim on

[12] It is black-letter law in Texas that "the most basic characteristic of the appellate record is that it is limited to matters before the trial court. An appellate court may not consider such extra-

state habeas was "procedurally barred" was clearly an unreasonable determination of the facts *and* the law under both 2254(d)(1) and d(2).

iii. The district court's holding.

The federal district court's holdings on this claim [USCA5.2000-02], as with virtually all of Coble's claims, were sparse and did not deal in any depth with Coble's contentions and evidence. As to Claim 7(a) [USCA5.344-435], the bulk of Claim 7, the district court held, as to those 90 pages of pleading in the federal petition,

> Petitioner presents nothing to indicate that the state court's opinion was either contrary to, or involved an unreasonable application of, clearly established Federal law. He presents nothing to establish that *Barefoot* does not remain viable in light of *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993)]. Even if there were some basis for Petitioner's claims in this regard, he would still not be entitled to habeas relief absent a showing that the error resulted in actual prejudice....Petitioner has failed to make such a showing, particularly in light of the extensive and detailed cross-examination to which Dr. Coons was subjected and the contradicting testimony given by Petitioner's expert, Dr. Cunningham. Additionally, Dr. Coons' testimony was only a small portion of the State's case regarding future dangerousness. There was more than sufficient evidence for the jury to ascertain that Petitioner would be a continuing danger.
> *Coble v. Stephens*, 2015 WL 5737707 (W.D. Tex. Sept. 30, 2015) at *18 [USCA5.2001-2002].[13] (Appendix D).

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record materials as affidavits attached to appellate briefs." Dix, George E., *Criminal Practice and Procedure (Texas Practice Series)*, West, 3rd. ed. 2011, Sec. 55:48 ("Appellate Record") at p. 116 (emphasis added). *See, e.g., Hartman v. State,* 198 S.W.3d 829, 842-43 (Tex. App.–Corpus Christi 2006, pet. stricken)(manual attached to appellate brief not considered because it was not in the record). *See also Trevino v. Thaler,* 133 S. Ct. 1911, 1919 (2013), where the Supreme Court concluded that Texas does not afford a meaningful review of an extra-record claim in proceedings prior to the initial collateral review.

[13] The district court also held, as to claims based on the Texas Rules of Evidence, Claims 7(b) [USCA5.435-438] and 7(c) [USCA5.439-445] that Coble "fails to identify a constitutionally cognizable claim for which federal habeas relief may be granted." [USCA5.2001]. Those claims were not raised in the Fifth Circuit nor here.

This too was an unreasonable determination under both 2254(d)(1) and d(2).

iv. The Fifth Circuit holding.

After granting a COA on this issue, *Coble v. Davis*, 682 F. App'x 261 (5th Cir. 2017) (Appendix C), the claim was denied by the Fifth Circuit without deciding whether the TCCA actually adjudicated this claim and, therefore, whether the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") applied. *Coble*, 728 F. App'x 297, 301 (5th Cir. 2018 (Appendix A). That Court upheld the TCCA's holding that Barefoot foreclosed the argument and held that the Eighth Amendment did not apply:

> *Barefoot* foreclosed a categorical challenge to psychological future-dangerousness evidence." *Id.* It then added that the Eighth Amendment reliability requirement did not apply to such testimony as "'[w]here the [Supreme] Court discusses the need for reliability in the Eighth Amendment context, it is not talking about the appropriate sources for information introduced at sentencing or even, more generally, about the reliability of evidence.' *United States v. Fields*, 483 F.3d 313, 336 (5th Cir. 2007). Instead, '[r]eliable death sentences, under the Eighth Amendment, are those that result from a sentencing scheme that guards against arbitrariness by streamlining discretion at the eligibility stage, and then allows for the exercise of wide-ranging discretion at the selection stage.' *Id.*
> *Coble*, 728 F. App'x at 301.

This holding, that capital sentencing hearings are somehow exempt from Eighth Amendment reliability requirements and the *Daubert* standards for the admission of expert testimony, is in issue here.

REASONS FOR GRANTING CERTIORARI

THE FIFTH CIRCUIT AND THE STATE COURTS HAVE MISAPPLIED *BAREFOOT V. ESTELLE* IN HOLDING THAT IT PRECLUDED RELIEF AND ERRED IN HOLDING THAT THE EIGHTH AMENDMENT DOES NOT APPLY TO THE RELIABILITY OF THE EVIDENCE AT CAPITAL SENTENCING HEARINGS.

The Fifth Circuit and the TCCA concluded that *Barefoot v. Estelle,* 463 U.S. 880 (1983) foreclosed further review of the claim that Dr. Coons' manifestly unscientific testimony was erroneously admitted in violation of Coble's federal constitutional rights under the Eighth Amendment. Those courts also concluded that the reliability criteria for admission of evidence, set by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), do not apply to capital sentencing hearings.[14] This Court should grant certiorari to correct these errors, to bring capital sentencing hearings in line with the growing consensus that for evidence to be admissible it must be reliable, and determine that these holdings were "contrary to" or an "unreasonable application" of clearly established federal law. 28 U.S.C. § 2254(d)(1).

A. The State courts and the Fifth Circuit misapplied *Barefoot.*

As shown above, both the TCCA (*Coble,* 330 S.W.3d at 270), the district court [USCA5.2000-2001] and the Fifth Circuit, *Coble*, 728 F. App'x at 301, assumed that *Barefoot* categorically barred any consideration of this claim. However, Barefoot's argument in this Court thirty-five years ago had three contentions:

[14] *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) ("*Daubert* requires the trial court to assure itself that the experience-based expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.")

First, "that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community." *Barefoot*, 463 U.S. at 896. The *Barefoot* court acknowledged that mental health professionals had expressed doubt about the accuracy of such predictions, but declined to categorically bar such testimony. *Id.* at 901-03.

Second, as to testimony "about future dangerousness in response to hypothetical questions and without having examined the defendant personally," *Id.* at 897, noting that such testimony "is commonly admitted as evidence where it might help the factfinder do its assigned job," *Id.* at 903, this Court saw no constitutional barrier to the use of such testimony. *Id.* at 904.

Barefoot's third contention was that in "the particular circumstances of this case, the testimony of the psychiatrists was so unreliable that the sentence should be set aside." *Id.* at 896. This Court held that "neither the District Court nor the Court of Appeals found any constitutional infirmity in the application of the Texas Rules of Evidence *in this particular case*. We agree." *Id.* at 905 (emphasis added).

Thus, the primary issue in *Barefoot* was whether psychiatrists can *ever* testify competently about future dangerousness, not whether a particular expert's testimony was constitutionally unreliable. *Id.* at 884-85. This Court rejected that primary argument, holding that so long as future dangerousness is an acceptable aggravator at the penalty stage, expert as well as lay testimony may be admissible on the issue. This Court

believed that the jury should have all relevant information in making the sentencing determination, including expert testimony. *Id.* at 897 (quoting *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976)). Coble is not challenging that holding. His concern is not the reliability of mental health experts in general, but that of Dr. Coons and his specific idiosyncratic methodology, and whether the admission of his testimony *in this case* violated the Eighth Amendment amid the growing consensus among the states that the *Daubert* standard is the proper criteria.

Barefoot discussed different issues in different circumstances thirty-five years ago.[15] This Court ruled on the basis of the testimony in the *Barefoot* case itself, and that holding cannot reasonably be held to have created a universal constitutional rule. Because expert testimony may be relevant to the jury's decision does not necessarily mean that evidence of that type is always reliable, a distinction recognized by *Barefoot*, where this Court specifically considered the issue of the reliability of the evidence in that particular case.

The TCCA and the Fifth Circuit were both mistaken in their assumption that "the United States Supreme Court, in *Barefoot v. Estelle*, rejected this argument and we are required to follow binding precedent from that court on federal constitutional issues," *Coble*, 330 S.W.3d at 270, and "*Barefoot* foreclosed a categorical challenge to

[15] The same Dr. Coons, mis-identified as "Dr. Richard Koons" in the opinion, *Barefoot*, 463 U.S. at 925 n.7, testified similarly in the federal habeas hearing in *Barefoot* and has continued making these unscientific predictions virtually to this day, without any attempt on his part to substantiate his methodology. The TCCA's opinion in this case, *Coble,* 330 S.W.3d at 270, was the first recognition by the courts that his future dangerousness predictions were too unreliable to be allowed in a capital trial.

psychological future-dangerousness evidence," *Coble*, 728 F. App'x at 301, which Coble did not challenge, at least categorically. The Fifth Circuit also added that the Eighth Amendment reliability requirement did not apply to such testimony as "'[w]here the [Supreme] Court discusses the need for reliability in the Eighth Amendment context, it is not talking about the appropriate sources for information introduced at sentencing or even, more generally, about the reliability of evidence." *Id.* Neither court specified which of Barefoot's three arguments it had considered. Coble claimed that "this type of evidence fails to meet the heightened reliability requirement of the Eighth Amendment," *Coble,* 330 S.W.3d at 270, and he did so using arguments not raised in *Barefoot*.

The Fifth Circuit's, the district court's, and the TCCA's conclusions were that a type of evidence widely held to be significantly unreliable,[16] had somehow, because of *Barefoot*, been made invulnerable to challenge despite subsequent legal developments, or the many flaws in that evidence discussed in the TCCA's own opinion. *Barefoot* itself did not purport to hold this, and such a conclusion is unreasonable under 28 U.S.C. § 2254(d)(1).

As to the relevant question here, whether Dr. Coons' testimony violated the heightened reliability required in capital cases, *Barefoot* offers scant guidance. This Court adopted language asserting the ability of fact-finders to screen reliable from unreliable evidence of future dangerousness, *Barefoot,* 463 U.S. at 898-99, under the

[16] In this case the TCCA actually agreed this evidence was insufficiently reliable to pass muster under the Texas Rules of Evidence.

"rules of evidence generally extant at the federal and state levels." *Id.*[17] Yet under the Texas Rules of Evidence, Dr. Coons' testimony was indeed later held to be unreliable and its admission to be error. *Coble,* 330 S.W.3d at 270

Barefoot addressed the argument that psychiatric testimony regarding future dangerousness is categorically unreliable. *Id.* at 899-901. However, *Barefoot* left the door open to such a challenge, stating that "[w]e are unconvinced, however, *at least as of now*, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness..." *Id.* at 900 (emphasis added).

Barefoot did not shield psychiatric predictions of future dangerousness from constitutional scrutiny in perpetuity, but simply held that *Barefoot* was not the right case at the right time. To the extent that the Fifth Circuit and the TCCA may have been applying *Barefoot* at all, they did so unreasonably because *Barefoot*'s actual holdings have no application to this issue in Coble's case.

If *Barefoot* completely barred constitutional challenges to the admission of psychiatric testimony, then no constitutional protection would prohibit the introduction of profoundly unreliable expert testimony at the sentencing phase. *See*, *e.g.*, *General Electric Co. v. Joiner*, 522 U.S. 136, 153 n.6 (1997) (Stevens, J., concurring) (using as an example of "junk science" a phrenologist who would testify that future dangerousness was linked to the shape of a defendant's skull).

[17] As shown in the next section, the rules of evidence have substantially changed since *Barefoot*.

Indeed, this Court recently struck down unreliable "expert" opinion regarding future dangerousness based on the defendant's race. *Buck v. Davis,* 137 S. Ct. 759, 776-777 (2017) (as to future dangerousness expert, "[r]easonable jurors might well have valued his opinion regarding the central question before them.") *See also Satterwhite v. Texas,* 486 U.S. 249, 259 (1988) (testimony from "a medical doctor specializing in psychiatry" on the question of future dangerousness may have influenced the sentencing jury); *Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004) (race an unacceptable factor for predicting future dangerousness). The absence of constitutional safeguards regarding the admissibility of expert testimony in capital trials is an invitation to the arbitrary imposition of the death penalty, as this Court has recognized in *Buck* and elsewhere.

B. It was clearly-established law at the time of Coble's trial that reliability is of critical importance at the punishment phase of a capital trial.

That this matter was brought in federal habeas is no bar to Coble's claim, as it was clearly-established law at the time of his 2008 penalty-phase re-trial that reliability is crucial in capital sentencing procedures. Coble meets the standard that the judgment of the state and federal courts was contrary to clearly-established law of this Court under 28 U.S.C. § 2254(d)(1).

Contrary to the Fifth Circuit's holding that the Eighth Amendment requirement of reliable evidence does not apply in capital sentencing hearings, *Coble*, 728 F. App'x at 301, this Court has consistently recognized that death is a sentence which differs from all other penalties in kind rather than degree. *See Kennedy v. Louisiana*, 554 U.S. 407, 420

(2008); *Satterwhite v. Texas*, 486 U.S. 249, 262, (1988) (capital punishment is "qualitatively different from all other sanctions"); *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988)("Under the Eighth Amendment, the death penalty has been treated differently from all other punishments.") While the Eighth Amendment allows the death penalty as an appropriate response to egregious crimes, the procedures by which it is imposed and reviewed are strictly regulated.

The penalty phase in capital trials has been treated with particular care by this Court. *Monge v. California*, 524 U.S. 721, 731-32 (1998) (heightened procedural protections accorded capital defendants). Penalty phase decisions must "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Reliability is of paramount importance to avoiding the arbitrariness that would violate the Eighth Amendment. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *Spaziano v. Florida,* 468 U.S. 447, 456 (1984) ("We reaffirm our commitment to the demands of relaibility in decisions involving death," quoted in *Coble*, 728 F. App'x at 301); *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ("we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding"); *accord Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

Sentencing procedures for capital crimes must be created and enforced in a way that ensures "that the punishment will [not] be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, J.) and "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Id.* at 190. Likewise, a sentence based on "materially inaccurate" information violates the Eighth Amendment's heightened reliability requirement. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988)("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case."); *Oregon v. Guzek*, 546 U.S. 517, 525 (2006) ("The Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'") (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1976). *See also Flores v. Johnson*, 210 F.3d 456, 469-70 (5th Cir. 2000) (Garza, J., concurring specially) ("[W]hat separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes.")

Thus, in *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985), this Court relied upon the Eighth Amendment's demand for heightened reliability to invalidate the defendant's death sentence because the prosecutor's argument misled the jury regarding their responsibility for the death sentence. *Id.* at 329 ("Accordingly, many of the limits that this Court has placed on the imposition of capital punishment [under the Eighth Amendment]

are rooted in a concern that the sentencing process should facilitate the responsible and *reliable* exercise of sentencing discretion.) (emphasis added). Similarly, in *Johnson*, this Court found an Eighth Amendment violation when the defendant's death sentence was based in part on a reversed conviction, and the jury was permitted to make its determination from "materially inaccurate" evidence. *Johnson*, 486 U.S. at 584-86.

Both the defendant and the State have substantial interests in ensuring that criminal trials are accurate and reliable. *See United States v. Scheffer*, 523 U.S. 303, 309 (1998)(polygraph evidence insufficiently reliable); *Ake v. Oklahoma*, 470 U.S. 68, 78-79 (1985) (both the State and the defendant have an "almost uniquely compelling" interest in the accuracy of criminal proceedings); *Redmen v. State,* 828 P.2d 395, 400 (Nev. 1992) (holding that the admission of psychiatric expert testimony was constitutional error because it was "highly unreliable").

Penalty phase procedures must not only be accurate and reliable, they must also be consistent with "evolving standards of decency." *See Kennedy*, 554 U.S. at 419-20; *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion); *Estelle v. Gamble,* 429 U.S. 97, 102 (1976); *Graham v. Florida*, 560 U.S. 48, 58 (2010). Although this standard is well-accepted as a substantive limit on the power of the state to punish, *see, e.g., Roper v. Simmons*, 543 U.S. 551, 560-61 (2005), *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002), it has also functioned as a procedural limitation on capital sentencing procedures. *See Gardner*, 430 U.S. at 357 (opinion of Stevens, J.); *see also Gregg*, 428 U.S. at 171-173

(opinion of Stewart, J.); *Woodson v. North Carolina*, 428 U.S. 280, 289-93, 305 (1976) (plurality op.) (noting need for heightened reliability in death penalty proceedings).

The need for reliability and accuracy in expert testimony is profound when the testimony concerns future dangerousness in a capital case. A jury's assessment of future dangerousness can be affected by many arbitrary factors. *See Satterwhite v. Texas,* 486 U.S. 249, 259 (1988) (testimony from "a medical doctor specializing in psychiatry" on the question of future dangerousness may have influenced the sentencing jury); *Deck v. Missouri*, 544 U.S. 622, 632-33 (2005) (shackling defendant during penalty phase would "almost inevitably" be taken by the jury to present a future danger); *Riggins v. Nevada*, 504 U.S. 127, 143-44 (1992); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1976); *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982)(O'Connor, J., concurring); *Buck v. Davis,* 137 S. Ct. at 776-777. This Court's concern about the accuracy of juries' assessments of future dangerousness has influenced its decisions about the substantive protections of the Eighth Amendment. *See Atkins,* 536 U.S. at 321.

The critical role of expert witnesses in establishing future dangerousness is well understood. Psychiatric testimony on future dangerousness is compelling because of the qualifications of psychiatrists, the "powerful content" of their testimony, and the "significant weight" that the prosecution may place on the expert's testimony. *See Satterwhite*, 486 U.S. at 259-60; *Ake,* 470 U.S. at 79-80.[18] The psychiatrist's role is particularly important because of the difficulty lay jurors have in rationally and accurately

[18] The TCCA in Coble's case also noted the "highly persuasive value" of expert testimony. *See Coble*, 330 S.W.3d at 274 n. 45, 281 n. 77.

evaluating a defendant's mental condition.[19] It defies logic for the Constitution to require that a defendant have reasonable access to expert psychiatric assistance while simultaneously permitting the State to introduce unreliable testimony by a psychiatrist, as in this case.

Evolving standards of decency, accuracy, and reliability all play a role in determining the constitutional procedural standards that govern the penalty phase of a capital trial. In this framework, evidentiary rules that improve accuracy or reliability are unobjectionable. *See*, *e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (States have power "to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability.") In contrast, when state evidentiary rules fail to promote fairness and reliability, they are suspect. For example, this Court in *Scheffer*, 523 U.S. at 316-17, disallowed the admissibility of polygraph tests, on grounds of reliability, with rules that had been struck down because they hindered and circumscribed the reliability of the evidence in *Rock v. Arkansas*, 483 U.S. 44 (1987) (rule that excluded hypnotically-refreshed testimony) and *Washington v. Texas*, 388 U.S. 14 (1967) (rule that excluded testimony from co-defendants).

Dr. Coons' testimony served no legitimate State interests and undermined constitutionally significant interests in reliability and accuracy. The TCCA recognized this in holding that the admission of his testimony was error under Texas evidentiary law. *Coble*, 330 S.W.3d at 287. And given that Dr. Coons was the State's major witness and

[19] Here the jury asked for the "psychiatric evaluations" when they were deliberating. [USCA5.4912-4913].

that his testimony was stressed by the State in final argument, its holding that this was harmless error was an unreasonable determination of the facts under 2254(d)(2).

C. The evolving consensus favors the exclusion of unreliable expert testimony.

The legal landscape regarding the admissibility of expert testimony has substantially changed in the thirty-five years since *Barefoot*, as a result of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). One of the foundations on which this Court rested its decision in *Barefoot* was the then-prevailing norm, that:

> [T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.
> 463 U.S. at 898.

Whereas *Barefoot* had entrusted the "adversary process ... to sort out the reliable from the unreliable evidence," relying on the jury as a "constitutionally competent" factfinder, 463 U.S. at 880 n. 6, 900, *Daubert* imposes on the judge a "gatekeeping" role in assessing the admissibility of expert testimony. *Daubert*, 509 U.S. at 597; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (*Daubert* requires the trial court to assure itself that the experience-based expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.").[20]

The expert's testimony must be reliable, and must actually assist the trier of fact. *Daubert,* 509 U.S. at 590-91. This Court offered a non-exhaustive list of factors to help

[20] Even though the Federal Rules of Evidence do not apply in State sentencing proceedings, reliability is essential both to the Federal Rules and capital jurisprudence, something that "cannot be mere coincidence," as one judge of the Fifth Circuit has observed. *Flores*, 210 F.3d at 464 (E. Garza, J., concurring specially).

determine whether an expert's testimony is reliable, including whether the theory can be tested,[21] whether it has been subject to peer review and publication, whether it has an acceptable rate of error and whether it had gained general acceptance in the relevant scientific community.[22] No single factor is dispositive of the question of reliability. *Id.* at 593. This Court also noted that "the 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 591-92.

Current evidentiary standards, combined with this Court's continuing heightened level of reliability standard, make it an inescapable conclusion that the Eighth Amendment prohibits the introduction of unreliable expert testimony such as Dr. Coons' regarding future dangerousness.[23]

Daubert is based on reliability. As *Daubert* reasoned, an expert's opinion must be reliable, because unlike lay witnesses, experts are "permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation."

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[21] Philosopher Karl Popper's well-known criteria of "falsifiability" is similar to testability: "the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability," *Daubert,* 509 U.S. at 593, *citing* Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (5th ed. 1989) at 37. Dr. Coons' testimony would fail this criteria.

[22] As Judge Garza observed, "it appears that the use of psychiatric evidence to predict a murderer's 'future dangerousness' fails all five *Daubert* factors." *Flores,* 210 F.3d at 464.

[23] This Court has also identified similar reliability concerns based on the Due Process Clause. In *Payne v. Tennessee*, 501 U.S. 808 (1991), this Court recognized that the Due Process Clause serves as protection against the admission of unduly prejudicial victim impact evidence. *See id.* at 825 ("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."). Due process was the foundation for the rule in *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994), that a capital defendant is entitled to introduce evidence regarding parole ineligibility when the State has raised future dangerousness to avoid misleading the jury, and the rule in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), that a capital defendant must be afforded the opportunity to deny or explain information used against him in capital sentencing hearings.

Daubert, 509 U.S. at 592. Expert testimony must be based on "scientifically valid" methodologies and reasoning. *Id.* at 593-94 (describing factors that may guide reliability determinations). Where legal disputes are of "great consequence," as in capital cases, the need for gatekeeping is even more pressing. *Id.* at 597; *see also Kumho Tire Co.,* 526 U.S. at 152 (*Daubert*'s objective is to secure reliable and relevant testimony).

Numerous commentators have found tension between the modern rules of evidence exemplified by *Daubert* and its progeny, and the optimistic assessment of juror capabilities reflected in *Barefoot*.[24] *See also Flores*, 210 F.3d at 458-70 (Garza, J. specially concurring) (noting that *Daubert* may have undermined *Barefoot*). Indeed, Arizona's Supreme Court has concluded that it is "impossible" to reconcile *Daubert* with *Barefoot*. *Logerquist v. McVey*, 1 P.3d 113, 127 (Ariz. 2000).[25] These commentators observe that *Barefoot*'s reliance on now out-of-date evidentiary principles is inconsistent with the current approach to admission of expert scientific evidence. *See, e.g*, Erica Beecher-Monas & Edgar Garcia-Ril, *The Law and the Brain: Judging Scientific Evidence of Intent,* 1 J. APP. PRAC. & PROCESS 243, 274 (1999) ("The point is not that *Daubert* overrules *Barefoot*. It does not. Rather, the point is that the conceptual underpinnings of *Daubert* are anathema to the result in *Barefoot.*"); David J. Faigman, *The Evidentiary*

[24] *See* USCA5.415 for an exhaustive list.

[25] The Fifth Circuit, in *United States v. Fields*, 483 F.3d 313, 341-46 (5th Cir. 2007), which also concerned the prediction of future dangerousness by Dr. Coons, held that *Daubert* was inapplicable to a capital sentencing proceeding conducted pursuant to the Federal Death Penalty Act, 18 U.S.C. § 3593. However, given the record made here concerning Dr. Coons' deficiencies, it cannot seriously be argued that the jury benefitted in any legitimate sense from hearing Dr. Coons' opinion, which was the rationale for the holding in *Fields* sanctioning his testimony.

Status of Social Science Under Daubert: Is It "Scientific," "Technical," or "Other" Knowledge,? 1 PSYCHOL. PUB. POL'Y & L. 960, 967 n.32 (1995) ("*Barefoot* is inconsistent with *Daubert*."); Paul C. Giannelli, *Daubert: Interpreting the Federal Rules of Evidence*, 15 CARDOZO L. REV. 1999, 2021 (1994) ("*Barefoot* is inconsistent with *Daubert*...*Daubert* required a higher standard of admissibility for money damages than *Barefoot* required for the death penalty."); John H. Mansfield, *Scientific Evidence Under Daubert*, 28 ST. MARY'S L.J 1, 37 (1996) ("If *Barefoot* does not necessarily conflict with *Daubert*, it certainly is in tension with it."); Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. PITT. L. REV. 321, 338 (1999) ("Notwithstanding the fact that *Barefoot* and *Daubert* can stand together as a matter of law, it may be fair to say that they cannot co-exist as a matter of common sense.")

However, *Barefoot* does not squarely hold that the reliability of expert testimony is constitutionally irrelevant. *Barefoot* rejected a categorical bar to such testimony, but implicitly suggested that developments in evidentiary standards might alter the constitutional background, while holding that the evidence in that particular case did not create any constitutional infirmity. *Barefoot,* 463 U.S. at 899-901.

This Court has traditionally looked to the actions of state and federal legislatures as the best indication of evolving standards of decency. *See Roper*, 543 U.S. at 564-66, *Atkins*, 563 U.S. at 314-15. Post-*Barefoot,* by mid-2003, roughly twenty-seven states had adopted a test consistent with *Daubert*. *See* Bernstein & Jackson, *supra*, 44 JURIMETRICS

J. at 355-56. By 2010, roughly the time that Coble's case became final on appeal, thirty of the fifty states had "adopted or applied the *Daubert* standard to determine whether to admit a witness to testify as an expert in a given field." Mark R. Nash, *Are We There Yet? Gatekeepers, Daubert and an Analysis of State v. White*, 61 S.C.L. Rev. 897, 897 n. 6 (2010).

In *Roper v. Simmons*, 543 U.S. 551, 564 (2003)(outlawing the death penalty for youths under age 18), this Court noted that at the time of its decision thirty states prohibited the death penalty for juveniles, and regarded that "objective indicia of consensus" as giving it "essential instruction" in its decision. 543 U.S. at 563-4. Likewise, in *Atkins,* 436 U.S. at 313-16, this Court identified thirty states as having prohibited the death penalty for those with intellectual disabilities. On both occasions this Court affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society." *See also Thompson v. Oklahoma,* 487 U.S. 815 (1988) (evolving standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime).

Similarly, the increasing consensus among the states, as well as in the federal courts, is that scientific or technical evidence must be screened with significant care by the trial court as "gatekeeper" and that its reliability must be established by its proponent. *See* David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351, 355-56 (2004). Notably, there is no articulable State interest in introducing unreliable expert testimony. *See Scheffer*, 523 U.S. at 316-17. Indeed, the

fact that so many states already prohibit such unreliable expert testimony suggests both the lack of legitimate interest and the lack of burden imposed by such standards. *See also, Ake*, 470 U.S. at 79-80 (holding that indigent defendants are entitled to assistance from State in securing expert psychiatric testimony, in part because more than 38 states already provided such assistance).

The admission of unreliable expert testimony undermines accuracy and reliability because it contributes to arbitrary death verdicts. In addition, it is inconsistent with evolving standards of decency because, since *Daubert*, there has been an increasing trend towards subjecting expert testimony to threshold reliability determinations prior to its admission.

Highlighting the need to carefully police the quality of future dangerousness evidence is the likelihood that a juror's assessment of such danger will be biased towards the State's evidence. Jurors, asked to determine whether an individual who committed at least one murder will act violently again, are understandably likely to err on the side of caution and defer to an "expert" opinion, which would minimize their responsibility for an erroneous determination, even when its reliability is questioned by another "expert." *See* Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L. J. 275, 312-15 (2006) (summarizing data); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1469-70 & n.113 (1997).

It does not help that expert opinions regarding future danger are notoriously inaccurate. 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); Slobogin, *supra*, 56 EMORY L. J. at 290-93 (discussing difficulty in evaluating validity of expert testimony on future dangerousness); *Flores,* 210 F.3d at 464 (Judge Garza noting that the error rate is at least 50%). Thus, although States are permitted to assess future danger in dispensing the death penalty, *Jurek v. Texas*, 428 U.S. 262, 274-276 (1976), the complexity of these determinations necessitates ample procedural protections.

If unreliable expert testimony is not permitted in civil damages cases or drunk driving cases, it should not be allowed when a jury is considering the possibility of a death sentence. *Barefoot* cannot stand for the proposition that all psychiatric expert testimony is admissible, without any threshold showing of minimal reliability. It cannot be that the Constitution imposes no limitations on the quality or validity of psychiatric expert testimony in deciding the critical question of whether a defendant lives or dies.

Because the rulings of both the TCCA and the Fifth Circuit in this case are unsupported by *Barefoot*, are in tension with developed jurisprudence regarding both capital punishment and expert witnesses, and are inconsistent with other constitutional principles, they are unreasonable holdings under 2254(d)(1).

D. The State and district court holdings were also objectively unreasonable under §2254(d)(2) as prejudice has been shown and this was not harmless error.[26]

In addition to the 2254(d)(1) analysis, the TCCA's (*Coble,* 330 S.W.3d at 287), and the district court's [USCA5.2001-2002] findings that the admission of Dr. Coons' testimony did not prejudice Coble and was harmless error were unreasonable determination of the facts under §2254(d)(2). The five factors emphasized by the TCCA in holding the error harmless were:

1) "There was ample other evidence supporting a finding that there was a probability that appellant would commit future acts of violence." *Coble,* 330 S.W.3d at 286.[27] This holding was based on Dr. Hodges' 1964 evaluation, a 1967 military medical report which noted Coble's "lifelong maladjustment," and his jealous violent rage when he thought that his fiancée was having an affair with someone else, "although neither Dr. Hodges nor the military doctor specifically opined on whether there was a probability in 2008 that appellant would commit acts of future violence..." *Coble* at 281-282.

However, Dr. Hodges' evaluation was a full forty-four years old at the time of the trial and the1967 military report was forty-one years old. To hold that an evaluation of a now sixty-year-old person made when they were fifteen and eighteen years old is "ample" or "more than sufficient" evidence of future dangerousness is simply absurd. One's personality is simply not well-formed at the age of fifteen or eighteen. *Roper v. Simmons,*

[26] If there was no adjudication of either the direct appeal claim or the state habeas claim in the TCCA, harmless error review does not apply. *Fry v. Pliler*, 551 U.S. 112 (2007).

[27] Similar to the holding of the district court: "more than sufficient evidence..." of Coble committing future violent acts. [USCA5.2002].

543 U.S. at 570 ("the character of a juvenile is not as well formed as an adult. The personality traits of juveniles are more transitory, less fixed.") The State's reliance on these obsolete reports says more about the *absence* of any serious past violence than it does about a sixty-year old's propensity for violence going forward. Coble's ex-wives testified to his periodic rages and mistreatment, but that alleged behavior was well over twenty years prior to the re-trial. It was entirely situational, as defense witness Dr. Mark Cunningham pointed out, and could not reoccur in prison.[28] *Buck*, 137 S. Ct. at 776 ("no such romantic relationships [in prison] would be likely to arise. A jury could conclude that those changes would minimize the prospect of future dangerousness.")

Likewise, the State used newspaper photos of female athletes and aspiring Olympic hopefuls, culled from many such innocuous clippings in Coble's cell, in order to show an alleged interest "in young, athletic, scantily clad women." *Coble*, 330 S.W.3d at 267. In actuality, they showed Coble's interest in youth sports programs, an interest that pre-dated his arrest. [USCA5:695].

The State searched for evidence of violence in the nineteen years prior to his trial, found nothing, and was reduced to pointing to alleged "evil glances" and newspaper photos. In actuality, Coble was a 60-year-old in poor health, with a history of heart attacks, under treatment for high blood pressure, hypertension, high cholesterol

[28] "The defense presented Dr. Mark Cunningham, a forensic psychologist, nationally recognized for his research concerning factors that predict violence in prison and his research in capital sentencing. Cunningham opined that Coble was in the group least likely to commit acts of violence in the future." *Coble*, 728 F. App'x at 300.

[USCA5.11990-91], with a record of perfect adjustment and good deeds in prison, hardly a high physical risk to others in that setting.[29]

2) "The same basic psychiatric evidence of appellant's character for violence was admissible and admitted, without objection, through...the reports by Dr. Hodges and the military doctor years before appellant committed these murders." *Coble,* 330 S.W.3d at 286. However, this makes little sense as the errors committed by Dr. Coons were also committed by Dr. Hodges, and the prosecutor repeatedly argued that their methods were similar. [USCA5.12733, 12784-85]. Dr. Hodges also admitted that his evaluation and methods were, like Dr. Coons's, somewhat subjective. [USCA5.11735-39, 11746]. Hodges' testimony and the military report were even more objectionable than Dr. Coons' as they were much older and even more unreliable.

3) The TCCA held that

> Dr. Coons' opinion was not particularly powerful, certain or strong; his opinion came after an extremely long and convoluted hypothetical and was simply that 'there is a probability that appellant would be a continuing threat to society by committing criminal acts of violence.'
> *Coble,* 330 S.W.3d at 286.

[29] Coble "was well-liked by everyone; he was always even-tempered and had the ability to 'talk sense' into some of the more violent inmates...[he] organized a sports league...helped inmates write letters and would read them their letters from family members...he was always helpful and upbeat...would take people 'under his wing' and help the 'agitated' ones...was like a trustee, and would often walk around with female officers...was generous and gave commissary items to other inmates...helped mentally-retarded inmates and was known for his respect for the law and God." *Coble,* 330 S.W.3d at 265.

However, there was much more to Dr. Coons' testimony than a one-line opinion after a "convoluted" hypothetical. Contrary to the TCCA's holding, Dr. Coons testified at length as to his reasons for his opinion.

a. Coons said his "scheme" looked at the history of violence, "[i]t has escalated from minor things to multiple homicide" [USCA5.11889, 11891] and that Coble killed his wife's family out of revenge and to control and punish her. [USCA5.11891].

b. Coons said Dr. Hodges' report showed criminal activity when Coble was young [USCA5.11891] and that Coble showed a need for control over his spouses. [USCA5.11892].

c. Coons also opined that Coble had no conscience and considered it a bad sign that Coble allegedly made "an evil grin" at his ex-wife which showed "a truly defective conscience." [USCA5.11892-93].

d. Coons testified that everyone on death row was "on appeal" so that they were on better behavior. [USCA5.11894, 11923] and that people in general population "threaten people, fight and so forth." [USCA5.11895]. This information, without statistics, was the "basis of his opinion." [USCA5.11894].

e. Regarding the "aging out" factor, a key part of Dr. Cunningham's testimony, that as people age they become less violent, Coons opined without citing any statistics that prisoners have access to deadly weapons.[USCA5.11896].[30]

[30] As *Roper* held, "[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with amturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of behavior that persist into adulthood." *Roper v. Simmons*, 543 U.S. at 570, quoting Steinberg & Scott, *Less Guilty by*

f. Coons claimed to have "plenty of information about what goes on in...the penitentiary...that none of the officials ever know about..." and "plenty of violence ...that nobody ever hears about." [USCA5.11897-98].[31] This vague and unsubstantiated testimony was allowed, over objection, as "a basis for the opinion." [USCA5.11898].

g. Although Coble had no incarcerations prior to 1989, Dr. Coons testified that a personality becomes "pretty well fixed by the early 20's" [USCA5.11899]; and "this is a very active, aggressive, uh, act for a 40 year old." [USCA5.11900] and Coble's aggression was a "character flaw" that he will "continue to carry with him." [USCA5.11900-01].

This extensive testimony belies the TCCA's holding that Dr. Coons' opinion was just a short statement in response to a "convoluted" hypothetical and contrary to the district court's holding that it was "only a small portion of the State's case regarding future dangerousness." [USCA5.2001-2002].

4) The TCCA held that Coons' testimony was effectively "rebutted and refuted" by Dr. Mark Cunningham, *Coble,* 330 S.W.3d at 282-283, 286-287, as did the district court. [USCA5.2001]. However, the death verdict shows that Dr. Cunningham's testimony did not effectively rebut Dr. Coons. Moreover, the prosecutor repeatedly attacked Dr. Cunningham's testimony in his final argument by telling the jury that

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Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

[31] This echoed the testimony of State's witness A.P. Merillat, who also claimed to be in possession of prison violence information that no one else knew about, including the prison officials.

Cunningham was not impartial;[32] distorting his testimony;[33] using faulty reasoning (the argument from rarity error) and spurious appeals to "common sense;[34] and belittling Dr. Cunningham and urging the jury to ignore his statistical data.[35]

5) The TCCA found that "the prosecution did not rely heavily upon Dr. Coons' testimony during its closing arguments" *Coble,* 330 S.W.3d at 283, and "[t]he State barely mentioned Dr. Coons during closing argument and did not emphasize him or his opinions." *Id.* at 287. The TCCA explained that "[d]uring his final argument, the prosecutor mentioned Dr. Coons very briefly by reminding the jury that another psychiatrist, Dr. Hodges, had talked to appellant back in 1964..." *Coble,* 330 S.W.3d at 285-286.

However, as shown above, a large part of the prosecutor's argument was devoted to attacking Dr. Cunningham's testimony in an attempt to bolster that of Dr. Coons. Additionally, Coons was mentioned four times in the prosecutor's final argument,

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[32] "[H]e wasn't an independent-just-the-facts witness." [USCA5.12735].

[33] "They would like to say statistically...there is no human being in the prison system that is actually a danger, according to their statistics." [USCA5.12778].

[34] The *argument from rarity fallacy* occurs when an explanation for an observed event is said to be unlikely because the prior probability of that explanation is low. "...out of 157,000 inmates, their proof was only 2 to 3 per cent were violent. That means that 97 per cent don't need to be there...what is the risk factor of three people being murdered on the same afternoon by their son-in-law? Even in his testimony, statistically Bill Coble couldn't have committed the crimes. Statistically, those three people that we have seen and heard about are still alive, statistically speaking....[Coons' testimony is] remarkably commonsensical. It's the same thing I look at, you look at every day to determine what future behavior somebody is going to be. You look at their history of violence." [USCA5.12778-80].

[35] "They want to tell you that, okay, because we have a statistician who comes in and looks at part of the data that supports his belief and...you notice all of his little Power Point presentation slides up there, quoted himself, cited himself as the authority for his own information. I'm not saying he's not a smart man. But...you can't use insurance statistics for an individual assessment of somebody's behavior in the future. So don't fall for that." [USCA5.12785-86].

contrary to the TCCA's holding that he was mentioned only once: [USCA5.12733] (referring to Coons's methods as "just common sense"); [USCA5.12779] ("Now, he [Cunningham] likes to talk, like, Dr. Coons, he was an absolute idiot"); [USCA5.12784-85] (twice repeating that Coons used the same methodology that Dr. Hodges used forty-four years previously). Prejudice is also shown because the jury asked to see the "psychiatric evaluations" when they were deliberating. [USCA5.4912-4913]. Thus, we know that the jury was influenced by Dr. Coons' (and Dr. Hodges') improperly-admitted opinions.

In short, the TCCA's finding of "harmless error" was an objectively unreasonable determination of the facts under §2254(d)(2). When a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under §2254 unless the harmlessness determination itself was unreasonable. *Mitchell v. Esparza,* 540 U.S. 12, 18 (2003)(*per curiam*). Coble has abundantly shown it to be unreasonable here.

CONCLUSION

Death penalty jurisprudence has involved with the intention of narrowing down the class of people executed to those who are truly deserving, by mandating reliable procedures and carefully scrutiny of what testimony may be admitted in order to decide who will live and who will die. In the 21st Century, the death penalty should therefore have advanced beyond the point where "[m]en feared witches and burnt women."

Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). Ironically, Thomas Barefoot's final words, reported on Respondent's own website, included the "hope that one day we can look back on the evil that we're doing right now like the witches we burned at the stake."[36]

Leaving aside moral arguments concerning the death penalty, the current law demands more reliable evidence than that used to sentence Mr. Coble to death.

For the foregoing reasons, the Court should grant the petition for writ of certiorari to consider the important question presented by this petition, which merits review.

Respectfully Submitted,

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August 7, 2018.

[36] *https://www.tdcj.state.tx.us/death_row/dr_info/barefootthomaslast.html* (last accessed August 5, 2018)