No. 18-5546

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Did the Fifth Circuit and Texas Court of Criminal Appeals unreasonably apply Supreme Court precedent in finding that *Barefoot v. Estelle*, 463 U.S. 880 (1993), foreclosed Eighth Amendment challenges to the admission of unreliable future-dangerousness expert testimony at the punishment phase of trial?

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BRIEF IN OPPOSITION

Petitioner Billie Wayne Coble was properly convicted and sentenced to death for the murders of his wife's father, mother, and brother. At Coble's resentencing hearing in 2008, State's witness Dr. Richard E. Coons was qualified as an expert on future dangerousness and testified that there was a probability that Coble would commit acts of violence in the future. On direct appeal, Coble challenged the admission of Coons's testimony, arguing that the testimony should have been excluded under both Texas Rules of Evidence and the Eighth Amendment. The Texas Court of Criminal Appeals (CCA) found that Coons's testimony was not admissible under Texas evidentiary rules because it was insufficiently reliable, but the error was harmless. The CCA also found that Eighth Amendment challenges to the admission of unreliable expert testimony were foreclosed by *Barefoot*.

The lower federal courts found that the CCA reasonably denied Coble's claim. Coble now petitions this Court for a writ of certiorari from the Fifth Circuit's denial of habeas relief, complaining primarily that both the Fifth Circuit and the CCA were unreasonable to conclude that

the admission of Coons's testimony was not a violation of the Eighth Amendment. But Coble fails to identify any compelling reasons for this Court to review the decision of the court below. Notably, neither the CCA nor the Fifth Circuit erred in finding that such evidence of future dangerousness was constitutionally permissible under *Barefoot*. Thus, this Court should deny Coble's petition.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (TCCA) summarized the facts of the triple homicide as follows:

> Karen Vicha was [Coble]'s third wife. They were married in July 1988 and lived in a house down the road from her brother and across the street from her parents. [Coble] was almost forty years old. The marriage quickly disintegrated, and, after a year, Karen told [Coble] to move out. She wanted a divorce. [Coble] attempted to talk her out of this decision and would randomly call her and show up at her work place.
>
> [Coble] then kidnapped Karen as a further effort to dissuade her from divorcing him. He hid in the trunk of her car while she was at a bar one evening with a girlfriend. When Karen started to drive home, [Coble] folded down the back seat and "popped out of the trunk with a knife." He jumped over the console, halfway into the front seat, and stuck the knife against Karen's ribs. He told her to keep driving until they came to a field. Karen stopped the car, and [Coble] said that if he [sic] couldn't have her, then no one else could. He pulled out a roll of black electrical tape, but Karen kept talking, and, after about two hours, she convinced him that she would

reconsider the divorce issue. He let her go, and she called her brother, Bobby, who was a police officer. Bobby told Karen to report the kidnapping.

After he arrested [Coble] for kidnapping Karen, Officer James Head looked in his patrol-car mirror and saw [Coble] staring at him with a look that "made the hair on the back of [his] head stand up." He got "the heebie-jeebies." [Coble] muttered something like "They're going to be sorry." Officer Head called Karen's brother, Bobby, and warned him about [Coble]. When [Coble] was released on bail for the kidnapping charge, Bobby got Karen a German shepherd for protection. A few days later, [Coble] told Karen, "oh, I see you—you've got a dog now. . . [T]hat's a big mean dog you've got." Shortly thereafter, Karen found the dog lying dead in front of her house.

Nine days after he had kidnapped Karen, [Coble] went to her house in the early afternoon. As Karen's three daughters each came home from school along with Bobby's son, [Coble] handcuffed them, tied up their feet, and taped their mouths closed. Karen's oldest daughter testified that she heard [Coble] cut the telephone lines. Then he left to ambush and shoot Karen's father, mother and brother Bobby as each of them came home.

[Coble] returned to Karen's house after the triple killings and waited for his wife to come home from work. He told the children, "I wish I had blown you away like I intended to." When Karen arrived, [Coble] came out of one of the bedrooms with a gun. [Coble] said, "Karen, I've killed your momma and your daddy and your brother, and they are all dead, and nobody is going to come help you now." She didn't believe him, so [Coble] showed her Bobby's gun lying on the kitchen table and pulled the curtains so she could see her father's truck parked behind the house. He showed her $1,000 in cash that he had taken from her mother. [Coble] told Karen that she was lucky that he hadn't molested her daughters, and he told her to kiss them good-bye. She did. He made her put on

> handcuffs. Karen talked [Coble] into leaving the house and taking her with him. He said he was going to take her away for a few weeks and torture her.
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> As [Coble] drove, Karen tried to escape by freeing one hand from the handcuffs and grabbing at the steering wheel, making the car swerve into a ditch. She grabbed one of [Coble]'s guns, pointed it at his stomach, and pulled the trigger, but nothing happened. Then Karen and [Coble] fought over the gun, with [Coble] repeatedly pulling the trigger, but still the gun did not fire. [Coble] pistol-whipped Karen until she couldn't see for all of the blood on her face. A woman passerby started shouting at [Coble], "[W]hat are you trying to do to that woman," so [Coble] drove the car out of the ditch as Karen lay in the passenger seat. He shouted at her that if she got blood on his clothes, he would kill her. But he was also rubbing her between her legs as he drove. He told her that his reputation was ruined because she had had him arrested and his name was in the papers.
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> He drove to a deserted field in Bosque County where he threatened to rape her. After dark, he drove out of the field, but they passed a sheriff's patrol car which turned around to follow them. [Coble] grabbed a knife and started stabbing Karen's chin, forehead, and nose, as he was driving. [Coble] said that he did not want to die in prison, so he "floored it" and rammed into a parked car. After the crash, [Coble] turned to Karen and said, "I guess now you'll get a new car." Both [Coble] and Karen were injured in the crash. Officers had to cut the car door open to get Karen out. [Coble] was found with Karen's father's watch and wallet, as well as .37 and .38 caliber revolvers.

Pet'r App. E, at 1–3 (footnotes omitted); *Coble v. State*, 330 S.W.3d 253, 261–63 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 3030 (2011).

II. Facts and Procedural History Related to Dr. Coons's Testimony

Coble was originally convicted and sentenced to death in April 1990 for the murders of his brother-in-law, Bobby Vicha, his mother-in-law, Zelda Vicha, and his father-in-law, Robert John Vicha. Although his conviction and sentence were both upheld on direct appeal to the CCA, ROA.3470–93,[1] Coble's death sentence was eventually overturned by the Fifth Circuit during federal habeas corpus proceedings. *Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007).[2] Accordingly, Coble was granted a new punishment hearing in September 2008, wherein he was again sentenced to death. ROA.7922–23.

At Coble's resentencing trial, the State presented testimony from psychiatrist Dr. Richard E. Coons on the issue of future dangerousness.

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[1] "ROA" refers to the record on appeal filed in the United States Court of Appeals for the Fifth Circuit. It includes the pleadings, orders, and other documents filed with the district court clerk, and the state-court record for Coble's capital murder trial and direct appeal.

[2] Specifically, the Fifth Circuit found a reasonable likelihood that the special issues submitted to Coble's jury at the punishment phase of trial prevented the jury from giving "meaningful consideration and effect" to Coble's evidence of mental illness and troubled background. *Id.* at 446–48 (citing *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007)).

The Fifth Circuit summarized the testimony related to future dangerousness as follows:

> At the retrial, Coble objected to Coons's testimony and requested a *Daubert*[3] hearing. At the hearing, Coons testified that, in forming an opinion about future dangerousness, his methodology consisted of looking at the person's history of violence, attitude about violence, the offense conduct, the personality and general behavior of the person, the quality of their conscience, whether they show remorse, and where the person will be located within the prison system. He admitted that he had never published his methodology in an academic journal and that he had not read any of the scholarly articles and treatises provided by the State on the prediction of future dangerousness. Following the *Daubert* hearing, the trial court held that Coons qualified as an expert; that the subject matter of his testimony was appropriate for experts; and that his testimony would assist the jury in deciding the case.
>
> In response to a lengthy hypothetical question that tracked the evidence against Coble, Coons testified that there was a probability that Coble would commit acts of violence in the future. The defense cross-examined Coons about his methodology. During his cross-examination, Coons acknowledged that Coble did not have a single disciplinary report during his eighteen years on death row but theorized that death row inmates stay on good behavior while their appeals and collateral proceedings are pending.
>
> The defense presented the testimony of 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. He detailed multiple factors that

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[3] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

point to Coble having a positive adjustment to prison and a reduced likelihood of serious violence in prison.[4] Cunningham did not identify any factors that would put Coble at an increased risk of violence. Cunningham's opinion was that there is a "very, very low probability" that Coble would commit serious violence if confined for life in prison. He testified that his opinion is based on peer-reviewed scientific methodology.

Cunningham stated that, in contrast to his methodology, Coons's methodology for predicting violence in prison is notoriously unreliable and entirely speculative. He testified that the major psychological associations considered Coons's subjective risk-assessment method unreliable and inconsistent with the standard of practice. Cunningham stated that there was a 94.8 percent error rate in the accuracy of predictions of future dangerousness and only a 1.4 percent error rate in the accuracy of predictions of improbability of future dangerousness.

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[4] Cunningham testified that the risk of violence is high for inmates in their early twenties and falls steadily as they get older—Coble was nearly sixty years old at the time of the retrial in 2008. Cunningham noted that Coble had no disciplinary record during the nineteen years he had been in prison, and there was no evidence that Coble had committed any acts of violence in prison; he explained that the longer an inmate remains compliant and without violent incidents the less likely it is that he will engage in violence in the future. According to Cunningham, inmates who have earned a high school diploma or a GED, like Coble has, have lower rates of violence in prison. Cunningham further testified that individuals like Coble, who have had long-term employment in the community, are the best adapted in prison and contribute to the order and stability of the prison setting. And Cunningham noted that Coble had maintained contact with friends and relatives while in prison and explained that inmates who continue to have links with the community tend to have better adjustments in prison and are less likely to present a risk of violence.

Pet'r App. A, at 2–3; *Coble v. Davis*, 728 F. App'x 297, 299–300 (5th Cir. Apr. 3, 2018) (unpublished).

III. Course of State and Federal Proceedings After Resentencing

As noted above, Coble was again sentenced to death in 2008. ROA.7922–23. On direct appeal of his new sentence, Coble challenged the admission of Coons's testimony on two primary grounds: 1) that it was inadmissible under Texas Rule of Evidence 702; and 2) that it was unconstitutionally unreliable under the heightened reliability standard of the Eighth Amendment. ROA.5890–909. The CCA held that Coons's testimony was not admissible under Rule 702 because it was insufficiently reliable. Pet'r App. E, at 8. The CCA found, however, that the error in admitting Coons's testimony was harmless. *Id*. at 23. The CCA also rejected Coble's claim that Coons's testimony failed to meet the heightened reliability requirement of the Eighth Amendment based on this Court's decision in *Barefoot*. *Id*. at 8. The TCCA thus affirmed Coble's sentence. *Id*. at 1.

On state habeas, Coble raised the same two claims and added a third—that the admission of Coons's testimony was unfairly prejudicial under Texas Rule of Evidence 403. ROA.4530–56, 4564–96. The CCA

procedurally barred all three claims, holding that the new Rule 403 claim should have been raised on direct appeal, and the remaining two claims—including the constitutional portion of the claim—had already been raised and rejected on direct appeal. Pet'r App. F, at 2 (citing *Ex parte Banks*, 769 S.W.2d 539, 539 (Tex. Crim. App. 1989) (finding that "[t]he Great Writ should not be used to litigate matters which should have been raised on direct appeal.") and *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984) ("We need not address applicant's second contention inasmuch as the same issue was raised and addressed by the Fourth Court of Appeals on applicant's direct appeal.")). The CCA therefore denied Coble state habeas relief. Pet'r App. F, at 2.

Coble then filed a federal habeas petition raising the same three Coons-related claims. ROA.344–445. The district court denied relief on each of the allegations, finding that: Coble's Rule 403 claim was procedurally defaulted; the CCA's decision that Coons's testimony was constitutionally permissible under *Barefoot* was reasonable; both claims under the Texas Rules of Evidence failed to state cognizable federal habeas claims; and any error in the admission of the testimony was

harmless. Pet'r App. D, at 9, 14–15; ROA.1987, 1999–2002. The court also denied Coble a Certificate of Appealability (COA). ROA.2014.

Coble then sought a COA from the Fifth Circuit on seven claims. *See* Pet'r App. C, at 1; *Coble v. Davis*, 682 F. App'x 261, 273 (5th Cir. 2017) (unpublished). The Fifth Circuit denied COA on five claims and granted COA on the remaining two, including the claim that the admission of Coons's testimony violated Coble's constitutional rights. Pet'r App. C, at 10. After supplemental briefing, Judge Dennis, writing for the panel, affirmed the district court's opinion, holding that Coble failed to present a cognizable Eighth Amendment claim with respect to his Coons claim. Pet'r App. A, at 4. This petition follows.

REASONS FOR DENYING THE WRIT

I. Coble Provides No Compelling Reason to Expend Limited Judicial Resources on This Case.

The question Coble presents for review is unworthy of the Court's attention. Coble has failed to provide a single "compelling reason" to grant review. Indeed, no conflict among the circuits has been supplied, no important issue proposed, nor has a similar pending case been identified to justify this Court's discretionary review. Coble contends that the state court unreasonably rejected his claim when it found that

Coons's testimony was constitutionally permissible under *Barefoot*. Coble does not contend that the state court incorrectly identified the appropriate legal standard regarding the admissibility of unreliable expert testimony in capital cases. Rather, he contends that the lower courts correctly identified the standard of review, as explained in *Barefoot*, but then misapplied it to the circumstances of his case in finding that *Barefoot* foreclosed such claims. This is, at best, simply a request for error correction, and this Court's limited resources would be better spent elsewhere. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law."); *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring) (questioning why certiorari was granted when the opinion decided "no novel or undecided question of federal law" and merely "recanvasse[d] the same material already canvassed by the Court of Appeals").

Even more importantly, this case is a poor vehicle to address the question on which Coble seeks review. First, both the CCA and the Fifth Circuit correctly interpreted *Barefoot* to state that a petitioner cannot challenge the admissibility of expert testimony at the punishment phase

of a death penalty trial on Eighth Amendment grounds. Second, even if this Court were to agree with Coble that *Barefoot* does not foreclose such claims, there is an independent basis for denying federal habeas relief—any error was harmless. *See* Section III, below. Accordingly, Coble cannot secure meaningful relief on his claim. Respondent therefore respectfully suggests that certiorari be denied.

II. The Lower Courts' Straightforward Application of *Barefoot* Does Not Warrant Review.

Coble primarily complains that the Fifth Circuit and CCA incorrectly applied *Barefoot* when they found that the admission of unreliable expert testimony cannot be challenged on Eighth Amendment grounds. Petition for Writ of Certiorari (Cert.pet.) at 15–32. But Coble cannot point to any clearly established Supreme Court precedent that requires a different result; indeed, there is none. Coble merely disagrees with the lower courts' conclusions and asks this Court to correct what he believes to be error. But the lower courts did not err, and Coble's request does not warrant review.

A. Standard of review

The state court applied clearly established federal precedent and adjudicated Coble's claim on the merits. As such, the claim was subject

to review under 28 U.S.C. § 2254(d). *See Harrington v. Richter*, 562 U.S. 86, 98–99 (2011). This section as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), "imposes a highly deferential standard of review for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt," *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (per curiam) (quoting *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam)), and such review "is limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 563, 181 (2011).

As a predicate to federal habeas relief, Coble was required to show that the state-court decision was (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States under § 2254(d)(1); or (2) that it resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding under § 2254(d)(2). As to any state-court fact findings, Coble carried "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. The CCA reasonably applied Supreme Court precedent in determining that Coble's claim was foreclosed by *Barefoot*.

Coble alleges that, in holding that his claim is foreclosed by Supreme Court precedent, both the CCA and the Fifth Circuit unreasonably interpreted *Barefoot* to stand for the proposition that "a type of evidence widely held to be significantly unreliable" was somehow "made invulnerable to challenge despite subsequent legal developments." Cert.pet.18. Coble argues that the primary issue in *Barefoot* was whether psychiatric testimony on future dangerousness was categorically unreliable, which Coble admits was rejected by this Court. Cert.pet.16. Coble does not purport to challenge that holding. Cert.pet.17. Rather, Coble alleges that the admission of Coons's unreliable testimony *in this case* violated the Eighth Amendment, a claim which he alleges *Barefoot* did not categorically immunize from constitutional scrutiny. Cert.pet.18–20.

Coble is correct to say that this Court in *Barefoot* refused to impose a constitutional rule categorically prohibiting psychiatric predictions of future dangerousness at capital sentencing proceedings. 463 U.S. at 899. Indeed, in finding that there is no per se constitutional problem with such

evidence, this Court first rejected the notion that "no psychiatrist's testimony may be presented with respect to a defendant's future dangerousness," particularly given that the "likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for imposing the death penalty." *Id*. Instead, this Court found that the jury should be presented with *all* relevant information: "[R]elevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross examination and contrary evidence by the opposing party." *Id*. at 897–98. This Court was thus unconvinced by Barefoot's first argument that either the Eighth or Fourteenth Amendments barred "an entire category of expert testimony." *Id*. at 899; *see also Estelle v. Smith*, 451 U.S. 454, 473 (1981) (same view rejected by Court, stating that it was in "no sense disapproving the use of psychiatric testimony bearing on future dangerousness").

The Court was similarly unconvinced that either Amendment should serve as a per se bar to psychiatric testimony on future dangerousness that was not based on a personal examination of the defendant and was given in response to hypothetical questions. *Barefoot*, 463 U.S. at 903. "Expert testimony, whether in the form of an opinion

based on hypothetical questions or otherwise, is commonly admitted as evidence where it might help the factfinder do its assigned job." *Id*. The Court thus "rejected petitioner's constitutional arguments against the use of hypothetical questions," as they "perceive[d] no constitutional barrier to applying the ordinary rules of evidence governing the use of expert testimony." *Id*. at 904.

Only after rejecting any contention that such testimony could serve as per se Eighth or Fourteenth Amendment problems did the Court then address Barefoot's argument that, even if hypotheticals are *generally* permitted, the use of them *in his case* violated his due process rights. *Id*. In analyzing whether Barefoot's *due process* rights were violated, the Court looked to the state court's finding that there was "no fault with the mode of examining the two psychiatrists under *Texas law*." *Id*. (emphasis added). The Court thus found that the "claims of misuse of the hypothetical questions . . . were rejected by the Texas courts, and 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." *Id*. at 904–05 (emphasis added). By so holding, the Court did not leave open the door to Eighth Amendment challenges in a

particular case; it merely noted that Texas appropriately considered the admissibility of the testimony under *Texas evidentiary law* and agreed with the lower courts that there was no "constitutional infirmity" in doing so. Thus, Coble misunderstands the Court's holding with respect to whether the "door is left open" to Eighth Amendment challenges to the reliability of the evidence in a particular case. *See* Cert.pet.16–18. And to read *Barefoot* as Coble suggests would be to create a new rule of constitutional law barred by the non-retroactivity principle announced in *Teague v. Lane*, 489 U.S. 288 (1989).[5]

As such, the CCA was entirely reasonable to find that Coble's claim—that Coons's future dangerousness testimony was unconstitutionally unreliable under the Eighth Amendment—is

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[5] Coble points to this Court's opinion in *Buck v. Davis*, 137 S. Ct. 759 (2017), as an example of an instance where the Supreme Court "struck down" unreliable expert testimony regarding future dangerousness. *See* Cert.pet.20. Coble specifically contends that the Court in *Buck* recognized that 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." *Id*. But such a contention misrepresents the Court's holding. In *Buck*, the Court addressed only the issue of whether trial counsel was ineffective for presenting an expert who testified, in part, that, in his opinion, Buck's race disproportionately predisposed him to violent conduct. *Buck*, 137 S. Ct. at 775. Holding that trial counsel was ineffective, the Court did not in any way address the reliability of that expert or the admissibility of his testimony under *Barefoot* or the Eighth Amendment. *See id*. at 775–77. Thus, *Buck* is wholly inapposite to Coble's instant claim.

foreclosed given that, in the only clearly established precedent concerning expert future-dangerousness testimony, this Court explicitly declined to create such a constitutional prohibition. *See* Pet'r App. E, at 8; *see also United States v. Scheffer*, 523 U.S. 303, 334 (1998) (Stevens, J., dissenting) ("There is no legal requirement that expert testimony must satisfy a particular degree of reliability to be admissible. Expert testimony about a defendant's 'future dangerousness' to determine his eligibility for the death penalty, even if wrong 'most of the time,' is routinely admitted."). The Fifth Circuit was similarly reasonable in finding that Coble failed to present a cognizable Eighth Amendment claim. *See* Pet'r App. A, at 4. Coble therefore cannot meet his burden under AEDPA. 28 U.S.C. § 2254(d)

Coble attempts to demonstrate that the CCA's and Fifth Circuit's rejection of his claim was unreasonable by extending this Court's general jurisprudence on the heightened reliability standard of the Eighth Amendment to encompass the admissibility of evidence. *See* Cert.pet.18–26. The Director does not dispute that the Eighth Amendment requires a heightened reliability standard in death penalty proceedings. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative

difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."). But the Director does dispute that this general jurisprudence provides a constitutional right regarding the admissibility of evidence where *Barefoot* explicitly did not.

Indeed, as noted by the Fifth Circuit, Pet'r App. A, at 4, this Court's heightened-reliability jurisprudence has historically referred not to particular evidentiary considerations, but to the *structure* of a sentencing scheme that guards against arbitrariness in both the eligibility and selection phases of death penalty proceedings; in other words, heightened reliability is required as to process, not substance. *See, e.g.*, *Lockett*, 438 U.S. at 604 (holding that the Eighth Amendment requires that the sentencer not be precluded from considering any mitigating factor proffered as a basis for a sentence less than death); *Buchanan v. Angelone*, 522 U.S. 269, 275–76 (1998) (stressing "the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Because of that qualitative difference [between death and other sentences], there is a corresponding difference in the need for reliability

in the determination that death is the appropriate punishment in a specific case."); *accord United States v. Fields*, 483 F.3d 313, 337 (5th Cir. 2007) ("[T]he salient point is that the particular reliability concern that distinguishes capital sentencing from ordinary sentencing under the Eighth Amendment is not evidentiary reliability."). Coble cites no cases where any court, much less this Court, has found that the admission of unreliable evidence violated the Eighth Amendment.[6]

That is not to say, however, that, as Coble suggests, *see* Cert.pet.18–19, the admission of unreliable evidence is *never* subject to constitutional scrutiny; such scrutiny would simply not be under the rubric of the *Eighth Amendment*. *See Romano v. Oklahoma*, 512 U.S. 1, 11–12 (1994) ("Petitioner's argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. We have not so in the past, however, and we will not do so today."); *Kansas v. Carr*, 136 S. Ct. 633, 644 (2016) ("[T]he Eighth Amendment is inapposite when each defendant's claim is,

[6] To be sure, extending the heightened reliability standard to encompass evidentiary reliability would also be barred by *Teague*. 489 U.S. at 288.

at bottom, that the jury considered evidence that would not have been admitted in a severed proceeding[.]").

Instead, as correctly noted by the Fifth Circuit, Pet'r App. A, at 4, and as entirely consistent with *Barefoot*, a constitutional claim challenging the admission of unreliable evidence may be cognizable under the Due Process Clause of the Fourteenth Amendment when such evidence "'is so extremely unfair that its admission violates fundamental conceptions of justice.'" *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012); *see also Romano*, 512 U.S. at 12 ("The relevant question in this case, therefore, is whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process."); *Carr*, 136 S. Ct. at 644 (holding that it is "not the role of the Eighth Amendment to establish" federal evidentiary rules governing the admissibility of evidence in a capital proceeding, but rather it is "the Due Process Clause that wards off the introduction of 'unduly prejudicial' evidence that would 'rende[r] the trial fundamentally unfair'").

That is, where the Eighth Amendment is concerned with the *process* of selecting the death penalty, the Fifth Amendment is concerned with the *substance* of the evidence upon which the jury ultimately relies to the extent that evidence is fundamentally unfair. However, Coble does not now argue, and did not argue in any of the courts below, that his due process rights were violated by the admission of Coons's testimony. And his failure to do so does not mean that the Eighth Amendment presents him with an avenue to do what this Court has explicitly foreclosed. Coble merely disagrees with this Court's clear precedent. Such a disagreement does not warrant review.

C. *Daubert* does not modify *Barefoot*.

Coble finally attempts to demonstrate that the CCA was unreasonable to find his Eighth Amendment claim foreclosed by *Barefoot* because the "legal landscape regarding the admissibility of expert testimony has substantially changed in the thirty-five years since *Barefoot*," as shown by this Court's decision in *Daubert*. Cert.pet.26–32. But this Court in *Daubert* did not expressly overrule its decision in *Barefoot*. And *Daubert* has no application in a state court trial because, as Coble admits, *see* Cert.pet.26 n.20, it is an interpretation of Rule 702

of the *Federal* Rules of Evidence. *See Daubert*, 509 U.S. at 589 ("The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify."). It certainly does not purport to at all address the admissibility of evidence under the Eighth Amendment, and Coble cites to no clearly established Supreme Court precedent that even remotely suggests that *Barefoot* did not survive *Daubert*. He instead cites to a concurring Fifth Circuit opinion, an Arizona Supreme Court case, several law review articles, and state evidentiary rules that track *Daubert* to support his argument that *Barefoot's* Eighth Amendment jurisprudence has been modified. *See* Cert.pet.28–30 (citing *Flores v. Johnson*, 210 F.3d 456, 458–70 (5th Cir. 2000) (Garza, J., concurring) and *Logerquist v. McVey*, 1 P.3d 113, 127 (Ariz. 2000)). But such support is wholly insufficient under AEDPA to demonstrate that the CCA unreasonably applied clear Supreme Court precedent, 28 U.S.C. § 2254(d), and this Court should not grant further review of this claim.

III. Review is Not Warranted Because Coble Cannot Secure Meaningful Relief on His Claim.

Even if this Court were to agree that Coble's Eighth Amendment claim is not foreclosed from federal habeas review under the principles

enumerated in *Barefoot*, Coble still cannot secure meaningful relief because any error in admitting Coons's testimony was harmless. In order to be entitled to federal habeas relief, the error must have had "substantial and injurious effect or influence in determining the jury's verdict." *Fry v. Pliler*, 551 U.S. 112, 120 (2007)[7] (citing *Brecht v. Abrahamson,* 507 U.S. 619, 637–38 (1993)). Under this standard, Coble is not entitled to relief absent a showing that the error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)).

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[7] Coble argues that, where no adjudication of a claim occurred in the state court, harmless error review does not apply. *See* Cert.pet.33 n.27. But, as indicated previously in Reasons for Denying the Writ II.B, the CCA adjudicated Coble's claim when it found that his Eighth Amendment challenge was foreclosed by *Barefoot*. *See* Pet'r App. E, at 8. The CCA also adjudicated Coble's claims that Coons's testimony violated the Texas Rules of Evidence, and it was in addressing *that* claim that the CCA explicitly reviewed the admission of Coons's testimony under the harmless standard enumerated in *Kotteakos v. United States*, 328 U.S. 750 (1946). *See* Pet'r App. E, at 17. In any event, whether the *Brecht* harmless error standard applies in this case does not turn on whether the state court itself conducted such review. *See Fry*, 551 U.S. at 117. Indeed, this Court made clear in *Fry* that *Brecht* applies in all § 2254 cases, whether or not a state appellate court recognized the error and reviewed it for harmlessness. *Id.* at 121; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) ("[A] prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA.").

Here, Coble argues that the state court unreasonably determined the facts in light of the evidence presented when it found that any error was harmless. *See* Cert.pet.33–39 (citing 28 U.S.C. § 2254(d)(2)). But Coble fails to show that Coons's testimony had a "substantial and injurious effect" on the jury's determination that he posed a future danger. Indeed, the reasons relied upon by the state court in finding any error harmless under state law are equally appropriate in the instant analysis, and because the state court applied essentially the same legal standard, its factual findings should be entitled to deference under 28 U.S.C. § 2254(e)(1). Pet'r App. E, at 17–23; *Schriro v. Landrigan*, 550 U.S. 465, 473–74 (2007); c*f. Reed v. Stephens*, 739 F.3d 753, 768 (5th Cir. 2014) (deferring to the TCCA's findings of facts on an actual innocence question under state law in finding that petitioner failed to prove actual innocence under federal law); *Sharpe v. Bell*, 593 F.3d 372, 379 (4th Cir. 2010) ("Where a state court looks at the same body of relevant evidence and applies essentially the same legal standard to that evidence that the federal court does . . . Section 2254(e)(1) requires that the state court's findings of fact not be casually cast aside.").

Specifically, and most importantly, there was extensive evidence presented at the punishment phase supporting a finding of future dangerousness aside from the psychological testimony. *See* Statement of the Case, Section I, *supra*; Pet'r App. E, at 18 ("[T]here was ample evidence that there was a probability that [Coble] would commit future acts of violence quite apart from Dr. Coons's testimony."). Namely, in addition to the facts of the offense, numerous witnesses testified to Coble's lengthy history of brutalizing and molesting women long before he married Karen Vicha, most of them young girls and family members. *See, e.g.*, ROA.11015–21, 11120–36, 11780–82, 12649–63. Thus, any error committed by the trial court was rendered harmless by the overwhelming evidence of Coble's potential for future danger.

And, consistent with the Supreme Court's rationale in *Barefoot*, it is unclear whether Coons's testimony had any effect at all on the jury, given the strong cross-examination conducted and the contradicting testimony presented by trial counsel. *See* Pet'r App. E, at 22–23 (holding that "Dr. Coons's testimony was effectively rebutted and refuted by Dr. Cunningham . . . who noted that Dr. Coons and his methodology had been criticized by both the American and Texas Psychological Associations");

ROA.11901–36 (defense counsel's cross-examination of Coons), 12351–535 (testimony from defense expert Dr. Cunningham); *see Barefoot*, 463 U.S. at 898 (". . . [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 fact finder, who would have the benefit of cross examination and contrary evidence by the opposing party."). Dr. Cunningham characterized Coons's methodology of predicting future dangerousness as essentially equivalent to "reading tea leaves" and suggested that it was no more reliable than blind second guessing. ROA.12529. Dr. Cunningham also brought to the jury's attention that major psychological associations had specifically identified Coons's methodology as "unreliable and inconsistent with the standard of practice." ROA.12530.

Lastly, Coons's testimony was only a small part of the State's case during the punishment phase, and, as found by the TCCA, it was barely mentioned during the State's closing argument. ROA.12733–34, 12779, 12784; Pet'r App. E, at 23 ("The State barely mentioned Dr. Coons during closing argument and did not emphasize him or his opinions."). Further, the same basic psychiatric evidence of Coble's propensity for violence was

admitted, without objection, through the report and testimony of Dr. Hodges, who evaluated Coble in 1964 and found that he displayed an extreme hostility toward women along with poor self-control. Pet'r App. E, at 22; ROA.11683–84. Thus, Dr. Hodges's findings effectively supported Coons's conclusion that Coble would continue to constitute a danger to society, and Coble cannot show that Coons's testimony resulted in "actual prejudice."

Given the overwhelming evidence presented at the punishment phase of trial, the fact that defense counsel effectively attacked Coons's methodology both on cross examination and through the opposing testimony of Dr. Cunningham, and that Coons's opinion on the matter was essentially cumulative of another, objective medical source, Coble cannot show Coons's testimony had a substantial effect on the jury. As a result, it is clear that the admission of Coons's testimony had no prejudicial effect on the jury's ultimate verdict, and review in this Court would not provide Coble with any meaningful relief.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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