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

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REPLY BRIEF OF PETITIONER

CAPITAL CASE

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Respondent's Brief In Opposition ("BIO") is based on assertions regarding the record, Petitioner's arguments, and the law that do not withstand scrutiny. Respondent argues that this matter involves only "error correction" unworthy of this Court's attention; that the Fifth Circuit Court of Appeals and the Texas Court of Criminal Appeals ("TCCA") applied *Barefoot v. Estelle*, 463 U.S. 880 (1983) in a straightforward and reasonable manner; and that any error was harmless. These arguments are all unavailing.

I. This Issue Is Worthy Of The Court's Attention. (BIO at 10-12).

Initially, in Section I, Respondent seeks to characterize this case as involving only "error correction" not worthy of this Court's attention. (BIO at 10-12). Yet this is at variance with their argument in Section II, where they acknowledge Coble's argument that *Barefoot* "refused to impose a constitutional rule categorically prohibiting psychiatric predictions of future dangerousness at capital sentencing proceedings." (BIO at 14-15). Respondents agree with Coble that this Court rejected such a categorical bar and "then address[ed] Barefoot's argument that, even if hypotheticals are *generally* permitted, the use of them *in his case* violated his due process rights." (BIO at 16) (emphasis in original). Since both parties agree that such a categorical bar was rejected in *Barefoot*, and that case involved only Mr. Barefoot's specifics, then the only possible challenge to *Barefoot* would be a case-specific challenge such as Mr. Coble presents here. However, as shown in the petition and herein, the issue of expert predictions of future dangerousness has important ramifications far beyond this particular matter.

Even Respondent's own summary of the testimony of Dr. Coons by the Texas Court of Criminal Appeals ("TCCA") makes clear that intervention by this Court is long overdue.[1] Dr. Coons "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." (BIO at 6, citing *Coble v. Davis*, 728 F. App'x 297, 299-300 (5th Cir. 2018). Dr. Coons also "acknowledged

[1] Respondent's summary of the facts of the homicide (BIO at 2-4) is irrelevant here, as this matter concerns Mr. Coble's penalty phase re-trial in 2008.

that Coble did not have a single disciplinary report during his eighteen years on death row[2] but theorized that death row inmates stay on good behavior while their appeals and collateral proceedings are pending." (*Id.*)[3] And defense expert Dr. Mark Cunningham, a nationally-recognized expert in the field of future-dangerousness assessment, testified based on "peer-reviewed scientific methodology" that "Coons' methodology for predicting violence in prison is notoriously unreliable and entirely speculative," and "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." (*Id.* at 7).

This case presents an excellent vehicle for this Court to examine the continued wide-spread use of unreliable psychiatric testimony such as presented by Dr. Coons in states such as Texas,[4] especially since his testimony *in this case* was held to have been

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[2] Nor has Mr. Coble had any disciplinary actions in the ten years since his 2008 penalty phase re-trial, for a total of twenty-eight violence-free years.

[3] One could question the State's interest in presenting a witness who tells the jury that 18 years of good behavior actually counts for nothing, which would serve to nullify the alleged incentives for such behavior.

[4] Notably, Respondent has not challenged either the generally-accepted view that such testimony is widely viewed as unreliable, or the TCCA's holding that Dr. Coons' testimony *in this case* was unreliable. *See, e.g., Flores v. Johnson,* 210 F.3d 456, 464–65 (5th Cir.2000) (Garza, J., concurring) ("The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific. It is as true today as it was in 1983 that '[n]either the Court nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right.' ... On the basis of any evidence thus far presented to a court, it appears that the use of psychiatric evidence to predict a murderer's 'future dangerousness' fails all five *Daubert* factors.... Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals

received in error and found unreliable by the TCCA. *Coble v. State*, 330 S.W.3d 253, 279-280 (Tex. Crim. App. 2010) (Pet. App'x E). Additionally, Dr. Coons was flat wrong when he predicted that Coble would be violent in 1990 at his first trial, and then wrong again when he once again predicted it in 2008 at his re-trial. This Court could hardly have a better vehicle to examine this practice and the continuing viability of *Barefoot* in light of the developments of the past thirty-five years since it was handed down in 1983.

II. Respondent's Argument That The TCCA Reasonably Applied *Barefoot*. (BIO at 12-23).

Respondent argues that the TCCA reasonably applied this Court's precedent in *Barefoot* because (1) Coble's claim is foreclosed by *Barefoot* (BIO at 14-22) and (2) because *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) does not modify *Barefoot*. (BIO at 22-23).

Respondent agrees that *Barefoot* "refused to impose a constitutional rule categorically prohibiting psychiatric predictions of future dangerousness at capital sentencing proceedings." (BIO at 14). Coble does not request or rely on a categorical constitutional ban on such testimony, nor is his argument "foreclosed" because no precedent of this Court "suggests that *Barefoot* did not survive *Daubert*." (BIO at 23). The TCCA *in this case* found that the admission of Dr. Coons's testimony was inadmissible, erroneous and unreliable, the trial court abused its discretion by admitting it, and that Dr. Coons' methodology was unsound. *Coble v. State,*330 S.W.3d 253, 270-287 (Tex. Crim. App. 2011).

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who routinely testify to, and profit from, predictions of dangerousness.").

Although the error was found to be harmless under TEX. R. EVID. 702, *Id.* at 280-287,[5] a basic long-standing principle of this Court's jurisprudence is that penalty phase evidence must be reliable. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 358 (1977) (penalty phase must "be, and appear to be, based on reason rather than caprice or emotion"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985)("the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion"); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986)("In capital proceedings generally...fact-finding procedures aspire to a heightened standard of reliability").

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. 463 U.S. at 884-85. Coble's argument does not contest the competence 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. *Barefoot* was discussing different issues in different circumstances. Coble does not rely on a categorical ban or modification of *Barefoot* in light of *Daubert*, and reliability has already been found lacking in this case by the TCCA.

In this case, the TCCA found that

[5] This "harmless error" finding, the lynchpin of the TCCA's rejection of Coble's claim, has been shown to be erroneous in many respects, both in his petition (at 33-39) and herein.

Dr. Coons knows of no book or article that discusses these factors or their overlap. He is not aware of any studies in psychiatric journals regarding the accuracy of long-term predictions into future violence in capital murder prosecutions or of any error rates concerning such predictions. Nor is he aware of any psychiatric studies which support the making of these predictions. Dr. Coons has never gone back and obtained records to try to check the accuracy of the "future dangerousness" predictions he has made in the past. He cannot tell what his accuracy rate is. On redirect, the prosecutor asked Dr. Coons to read from a legal brief containing the names and titles of some articles on future dangerousness that had been filed in a different case, but Dr. Coons was not familiar with any of those articles.
Coble at 272.

The TCCA also found:

From this record, we cannot tell what principles of forensic psychiatry Dr. Coons might have relied upon because he cited no books, articles, journals, or even other forensic psychiatrists who practice in this area. There is no objective source material in this record to substantiate Dr. Coons's methodology as one that is appropriate in the practice of forensic psychiatry. He asserted that his testimony properly relied upon and utilized the principles involved in the field of psychiatry, but this is simply the *ipse dixit* of the witness. Dr. Coons agreed that his methodology is idiosyncratic and one that he has developed and used on his own for the past twenty to thirty years. Although there is a significant body of literature concerning the empirical accuracy of clinical predictions versus actuarial and risk assessment predictions, Dr. Coons did not cite or rely upon any of these studies and was unfamiliar with the journal articles given to him by the prosecution.
Id at 277-278.

Additionally, the TCCA further found that

Dr. Coons stated that he relies upon a specific set of factors: history of violence, attitude toward violence, the crime itself, personality and general behavior, conscience, and where the person will be (i.e., the free community, prison, or death row). These factors sound like common-sense ones that the jury would consider on its own, but are they ones that the forensic psychiatric community accepts as valid? Have these factors been empirically validated as appropriate ones by forensic psychiatrists? And have the predictions based upon those factors been verified as accurate over time? Some of Dr. Coons's factors have great intuitive appeal to jurors and

> judges, but are they actually accurate predictors of future behavior? Dr. Coons forthrightly stated that "he does it his way" with his own methodology and has never gone back to see whether his prior predictions of future dangerousness have, in fact, been accurate. Although he had interviewed appellant before the first trial in 1990, Dr. Coons had lost his notes of that interview in a flood and apparently had no independent memory of that interview. He relied entirely upon the documentary materials given to him by the prosecution, including his 1989 report. Dr. Coons, therefore, did not perform any psychiatric assessment of appellant after his eighteen years of nonviolent behavior on death row, nor did he refer to any psychological testing that might have occurred in that time frame.
> *Id.* at 278-279.

This litany of unreliability and *ad hoc*, off-the-cuff unscientific guesswork cannot and should not be the basis for a death sentence. This Court in *Daubert* articulated a test based on reliability for the admissibility of expert testimony in federal civil cases and voiced this Court's concern for reliability in expert testimony. Despite the fact that the *Daubert* holding of reliability was in the context of a federal civil case, its standard of reliability should be a model in capital cases. This Court has determined that because a death sentence is extremely severe and final, there is a heightened need for reliability in the evidence presented at capital sentencing hearings. Since this Court now requires that expert testimony in civil cases survive a particular determination of reliability in order to assess admissibility, it follows that in the far more serious context of a capital sentencing hearing, psychiatric expert testimony should have to meet this Court's *Daubert* standard.

This Court in *Daubert* outlined five non-exclusive factors to assist trial judges in determining the reliability, and hence admissibility of scientific evidence: Those factors are:

(1) whether the theory has been tested,
(2) whether the theory has been subjected to peer review and publication,
(3) the known or potential rate of error
(4) the existence of standards controlling the operation of the technique, and
(5) the degree to which the theory has been generally accepted by the scientific community.

Daubert, 509 U.S. at 593-94. In the concurring opinion in *Flores, supra*, Judge Garza pointed out that

> it appears that the use of psychiatric evidence to predict a murderer's "future dangerousness" fails all five *Daubert* factors. First, "testing" of these theories has never truly been done, as "such predictions often rest ... on psychiatric categories and intuitive clinical judgments not susceptible to cross- examination and rebuttal." *Barefoot*, 463 U.S. at 932, 103 S.Ct. at 3414-15 (Blackmun, J., dissenting)... *see also* APA Br. at 17 ("Because most psychiatrists do not believe that they possess the expertise to make long-term predictions of dangerousness, they cannot dispute the conclusions of the few who do."). Second, as is clear from a review of the literature in the field, peer review of individual predictions is rare, and peer review of making such predictions in general has been uniformly negative. *See, e.g.*, Grant Morris, *Defining Dangerousness: Risking a Dangerousness Definition*, 10 J. CONTEMP. LEGAL ISSUES 61, 85-86 (1999) (citing studies) ("More than twenty years ago, Alan Stone acknowledged that psychiatrists cannot predict whether a person will engage in dangerous behavior with a certainty, or beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. As to clinically-based predictions of dangerousness, the passage of time has not altered the accuracy of Stone's judgment."). Third, the rate of error, at a minimum, is fifty percent, meaning such predictions are wrong at least half of the time... Fourth, standards controlling the operation of the technique are nonexistent. See APA Br. at 13 (noting that "the professional literature demonstrate[s] no reliable criteria for psychiatric predictions of long-term future behavior"). Overall, the theory that scientific reliability underlies predictions of future dangerousness has been uniformly rejected by the scientific community absent those individuals who routinely testify to, and profit from, predictions of dangerousness.
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> *Flores,* 210 F.3d at 463-64 (Garza, J., concurring).

It is clear that expert predictions of future dangerousness such as Dr. Coons gave here fail each of the *Daubert* factors which test the reliability of such testimony.

III. Respondent's Argument Regarding A *Teague* Bar. (BIO at 17, 20).

Respondent argues that if this Court were to agree with Mr. Coble's arguments regarding *Barefoot,* it would create a new rule of law and thus violate *Teague v. Lane,* 489 U.S. 288 (1989). (BIO at 17, 20.) However, no "new rule" is being argued here, only the application of this Court's precedent requiring reliability in the capital sentencing process, under *Gardner, Lockett, Caldwell* and *Ford, supra*.

Coble's argument does not depend on a new constitutional rule, only a holding that in the specific circumstances of this case, Coons' testimony injected an unacceptable level of unreliability into the State's punishment phase presentation. Alternatively, a broader interpretation would be an analogy to this Court's decision in *Penry v. Lynaugh,* 492 U.S. 302 (1989), where it was held that the Texas statute, as it had come to be applied, was unconstitutional, and this Court's saying so was not "new." Even if it is held to be a "new rule," *Teague* would still not apply as the claim would qualify under the second *Teague* exception, for rules "implicit in the concept of ordered liberty," *Teague, supra,* 489 U.S. at 313, as reliability is the lynchpin of Eighth Amendment jurisprudence.

Additionally, it is certainly implicit in this Court's death penalty jurisprudence that a defendant not be sentenced to death on the basis of fundamentally unreliable and misleading "junk science." Opinions such as Dr. Coons' in Coble's case have been held to be unethical and akin to quackery. In this very case, the TCCA has held that Coons'

testimony was unreliable. The hallmarks of cases which meet this *Teague* exception are those that implicate the reliability and fundamental fairness of adjudications, and can be described as "fundamental" or "watershed" rules.[6] Because this claim relies upon long-standing constitutional doctrine developed before Coble's conviction became final, the relief Coble seeks would not require this Court to apply a new rule in a retroactive manner. *See, e.g. Gardner, Lockett, Caldwell, Ford,* cited *supra.*

IV. Respondent's Argument That Any Error In Admitting The Testimony Was Harmless. (BIO at 23-28).

Respondent argues (BIO at 23-28) that any error was harmless because Coble cannot show that Coons' testimony had a "substantial and injurious effect" or that he suffered "actual prejudice" under *Fry v. Pliler,* 551 U.S. 112 (2007) and *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). Respondent (and the district court [USCA5.2001])[7] arrived at that conclusion by simply repeating the TCCA's holding, without any discussion of the flaws of that opinion. These holdings are not entitled to any "deference" under 28 U.S.C. § 2254(e)(1) because they are flat wrong and incorrect and "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." 28 U.S.C. § 2254(d)(2). Coble has addressed this in his petition (at 33-39), yet Respondent has completely failed to respond to those points. To reprise:

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[6] *See, e.g., O'Dell v. Netherland,* 117 S. Ct. 1969, 1978 (1997)*; Graham v. Collins,* 506 U.S. 461, 478 (1993).

[7] "USCA5" refers to the Record on Appeal in the Fifth Circuit Court of Appeals.

(1) Respondent alleges "extensive evidence presented at the punishment phase supporting a finding of future dangerousness aside from the psychological testimony." (BIO at 26). Respondent points to testimony of Coble "brutalizing and molesting young women" (*id.*), yet some of those witnesses never came forward prior to Coble's first trial, this alleged behavior was well over twenty years prior to the re-trial, and it was situational, and could not recur in prison, Coble's only possible destination.

More importantly, this characterization, taken verbatim from the TCCA's opinion on appeal (*Coble v. State,* 330 S.W.3d at 261-265 (Tex. Crim. App. 2011)), is replete with factual errors and omissions. For instance, regarding the incident when Coble allegedly "raped his cousin who was about fifteen" [USCA5.1971], the actual testimony was that "I still probably will never ever remember exactly what happened...I don't know anything about it" [USCA5.11782]; and it was not mentioned at Coble's first trial. [USCA5.11790]. The TCCA held that Coble "molested [the witness Ms. Wooley's] younger sister and punched her on the mouth, 'busting' her lip," [USCA5.1791] but the testimony was that the alleged "molestation," 35 years prior to the trial, amounted to Coble tickling her "outside of [her] clothing" [USCA5.10939] and touching her outside her bathing suit while swimming [USCA5.10941-42; 10958-59; 10967]; these incidents were not reported at the time. [USCA5.10942]. Regarding the "busted lip" [USCA5.10946], at the time Ms. Wooley gave a statement that "it happened so quick, I couldn't say for sure it was an intentional act." [USCA5.10952-53]. Wooley also used to work in the Waco Police Department [USCA5.10950], had not seen Coble in 23 years

[USCA5.10964], and admitted she had not told anyone of these alleged incidents until after Coble had been convicted. [USCA5.10966]. Coble's "molestation" of a baby-sitter [USCA5.1971] occurred in 1973, 35 years prior to the trial [USCA5.10974, 10979]; the witness told no one at the time, continued to baby-sit for the Cobles, had no contact with Coble in the prior 35 years [USCA5.10980-81; 10984], and had an extensive history of felony drug-offense incarcerations. [USCA5.10975]. As for the testimony of Coble's ex-wives, none of them had any contact with him for almost twenty years prior to his re-trial.

(2) Respondent alleges that "the strong cross-examination conducted" and "the contradicting testimony presented by trial counsel" (BIO at 26) show there was no prejudice. The initial allegation is flatly contradicted by trial counsel Alex Calhoun's sworn affidavit [USCA5.871-873] and his testimony at the evidentiary hearing. Mr. Calhoun, whose responsibility it was "to cross-examine the psychiatrists and State's experts, including Dr. Coons," states that "[w]ith respect to Dr. Coons, I believe he bettered me on cross-examination and as my cross-examination floundered, I decided to discontinue my questioning." [USCA5.872, Affidavit of Alexander Lee Calhoun]. At the evidentiary hearing, Calhoun again admitted that Dr. Coons "got the better of him" on cross examination [USCA5.4291-4292, 4310] and actually admitted he was ineffective as "the jurors obviously went back to what Dr. Coons thought about future danger." [USCA5.4314]. In his affidavit and at the hearing, Mr. Calhoun also admitted that he failed to impeach Dr. Coons on a similar case where he opined the defendant would not be a future danger. [USCA5.872-873; 4292]. Trial counsel himself has admitted his cross-

examination of Dr. Coons was far from being "strong." The trial transcript bears out Calhoun's assessment of his own performance.

(3) Again echoing the state court [USCA5.2001-02] and the court below, Respondent claims that "Dr. 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." (BIO at 27). But Dr. Coons was actually 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] as the State's major punishment phase witness. Dr. Coons was mentioned four times in the prosecutor's final argument,[8] contrary to Respondent's claim that he was "barely mentioned" (BIO at 27), and contrary to the TCCA's erroneous holding that he was mentioned "very briefly" and only in connection with Dr. Hodges. *Coble,* 330 S.W.3d at 285-86.

(4) Respondent argues that Coons's testimony was harmless because "the same basic psychiatric evidence...was admitted, without objection, through the report and testimony of Dr. Hodges who evaluated Coble in 1964..." (BIO at 28). Dr. Hodges' report was hardly "the same basic evidence" It was made a full forty-four years prior to Coble's re-trial [USCA5.11681], when Coble was a 15-year-old minor. [USCA5.11682]. Dr. Hodges himself admitted that Coble, Hodges' methodology, and the bases for his conclusions had vastly changed since 1964. [USCA5.11685-11686; 11697-11698; 11753;

[8] *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 used forty-four years previously.

11756]. For instance, if he were doing the report today, Dr. Hodges admitted he would change the diagnosis of "sociopath" to "conduct disorder," a very significant moderation. [USCA5.11697]. Dr. Hodges also admitted that there have been many changes in the field of psychiatry since the 1964 evaluation. [USCA5.11688]. Respondent's contentions that Dr. Coons' testimony was "the same basic psychiatric evidence" (BIO at 27) or "essentially cumulative" of that of Dr. Hodges do not withstand scrutiny,[9] as Dr. Hodges himself admitted his findings were different from Dr. Coons' testimony. Additionally, holding that an evaluation of a 15-year-old is "the same basic psychiatric evidence" as that of the defendant at age 60 is basically absurd.

(5) Respondent's claim (and the TCCA's holding) of "ample" (BIO at 26) and "overwhelming evidence [of future dangerousness] presented at the punishment phase of the trial" (BIO at 28), does not comport with Coble's arrest-free record prior to the murders, his perfect prison record of adjustment, and his good deeds in prison during the eighteen years since his first trial, and his twenty-eight year discipline-free record. As a "a sixty-year old man with a heart condition," *Coble,* 330 S.W.3d at 269-70, at the time of his 2008 trial, he was hardly a high risk of future danger to others.[10]

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[9] Respondent's argument that Dr. Hodges's testimony was basically the same as Dr. Coons', while erroneous, is double-edged. Just as the TCCA in *Coble* held that Dr. Coons' testimony was unreliable and erroneously received, so too Dr. Hodges's testimony would suffer from the same defects if it was the same as Coons', thus doubling the errors and making the TCCA's finding of "harmless error" even more unsupportable.

[10] "Medical evidence showed that appellant has a history of heart disease, including a heart attack in 2004. He takes medications for high blood pressure and high cholesterol." *Coble*, 330 S.W.3d at 266 n.12.

V. Conclusion.

For the foregoing reasons, and for those discussed in the petition, the Court should grant Mr. Coble's petition for writ of certiorari to consider the important questions presented, which merit review.

Respectfully Submitted,

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