CASE NO. 23-5421 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

BRENT BREWER,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
Respondent.

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

Execution Scheduled for November 9, 2023

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

ARGUMENT

I. Contradictory State and Federal Court Rulings Demonstrate a Claim's Debatability for the Issuance of a COA.

Trial counsel for Brent Brewer failed to object to the admission of the unreliable and false "expert" testimony of Dr. Richard Coons concerning Mr. Brewer's alleged future dangerousness. The Texas Court of Criminal Appeals (TCCA), on direct appeal, held that counsel failed to preserve this meritorious issue for review. A311–16. The state habeas court, in an opinion adopted by the TCCA, A194–95, recognized that counsel performed deficiently in this respect under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), but opined that this failure did not prejudice the outcome of Mr. Brewer's sentencing trial. A201, 203–04, 270. The Fifth Circuit below, in declining to issue a COA, did not defer to the state court's resolution of this claim, instead rejecting the claim by finding that reasonable jurists could not debate that counsel "fail[ed] to make what at that time would have been a futile objection to the introduction of Dr. Coons's testimony." A9. Whether a federal court must defer to a state court's affirmative finding of deficient performance under *Strickland*, particularly at the COA stage, is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rul 10(c).

The State's arguments to the contrary are misleading and misplaced. First, the State contends that "the state habeas court never found trial counsel was deficient for failing to object." BIO at 6; *see also id.* ("Nowhere in the findings and

conclusion does the state court actually find trial counsel deficient for failing to object"). This is demonstrably wrong.

The state habeas court held, "*Most* of trial counsels' decisions and actions in Claim One (A) were based on reasonable and plausible trial strategy in light of all the circumstances." A270 (emphasis added). This logically means that *at least one* of trial counsel's actions was unreasonable. The state habeas court then specified counsel's unreasonable action in the next sentence of its conclusions of law: "Although *trial counsel failed to preserve error in regards to the admission of Dr. Coons' testimony*, his actions did not prejudice the outcome of the re-sentencing trial." *Id.* (emphasis added). This is plainly a finding that counsel performed deficiently, but that this deficiency did not prejudice Mr. Brewer.

The state habeas court's findings of fact earlier in its opinion support this conclusion of law:

> The Court finds, pursuant to the November 23, 2011 unpublished opinion of the Court of Criminal Appeals, trial counsel [ ] *failed to lodge a timely and specific objection regarding the admission of Dr. Coons' testimony* about future dangerousness at the re-sentencing trial. Thus, this issue was not preserved for appellate review.

A201 (emphasis added).

The State does not once reference much less rebut these clear state court findings and conclusions in its Brief in Opposition.

Instead, the State argues that "the Fifth Circuit's ruling that an objection would have been futile at the time of trial" is supported by the state habeas court's opinion since it mentions that the decision in *Coble v. State*, 330 S.W.3d 253 (Tex.

Crim. App. 2010), was not issued until after Mr. Brewer's resentencing trial. BIO at 6. While it is true that *Coble* was released after Mr. Brewer's trial but before his direct appeal was decided, this does not establish that an objection to the admission of Dr. Coons's testimony would have been futile or that "trial counsel cannot be faulted for lacking clairvoyance," BIO at 7. Regardless of *Coble*, trial counsel tried to challenge Dr. Coons's testimony, but failed to do so in a way that preserved the error for appellate review, by filing a motion in limine rather than a motion to exclude evidence, failing to articulate an objection to Dr. Coons's testimony after a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and then only finally lodging a non-specific objection to Dr. Coons's testimony *after* it was complete, which the TCCA found untimely. A312–16.

Consequently, regardless of *Coble*, it is apparent that trial counsel recognized the impropriety of Dr. Coons's testimony but simply failed to challenge it in a timely and competent manner to preserve the error for appellate review under Texas state law. This was deficient performance. Even the State acknowledged in its briefing on direct appeal that if counsel had properly objected, the error would have been preserved for review. Brief for the State of Texas, *Brewer v. Texas*, No. AP-76,378, 2011 WL 5295103, at *55 (Sept. 12, 2011) ("Although the State concedes that under the recent *Coble* case (if appropriate objections had been made at trial) the trial judge would have abused his discretion by admitting Dr. Coons' testimony into evidence at the new sentencing trial, the State submits that issue five was not properly preserved for appellate review.").

The State reverts to a paradox to explain how counsel performed adequately despite failing to preserve this error for direct appeal: "Thus, although objecting to the admissibility of Dr Coons's testimony may not have been futile in the sense it could have led to a finding of error on appeal, it was futile under the law at the time of the trial so counsel was not deficient for failing to object." BIO at 7. But even this statement ignores counsel's ineffectual attempts to object—counsel was entirely aware of the speciousness of Dr. Coons's testimony and recognized the merit of challenging its admission but failed to do so properly. This is quintessential deficient performance.

The State's last argument—that, at any rate, both the state and the federal courts agreed that Mr. Brewer was not prejudiced by counsel's deficient performance—misrepresents the Fifth Circuit's opinion. The court below did not analyze whether Mr. Brewer was prejudiced by counsel's failure to object to the admission of Dr. Coons's testimony. The State cites generally to the Fifth Circuit's recitation of the state court and district court opinions but does not point to any language where the Fifth Circuit specifically reviewed and agreed with the state court's finding that Mr. Brewer was not prejudiced by counsel's deficient performance. A9–10. Even if the Fifth Circuit's opinion can be read to contain such a ruling on prejudice, this ruling was a tautology based on the mistaken view that objecting to Dr. Coons's testimony would have been "futile." A9 ("Reasonable jurists could not debate the district court's conclusion that the state courts did not act unreasonably in holding that trial counsel were not ineffective for failing to make

what at that time would have been a futile objection to the introduction of Dr. Coons's testimony."). The circuit court merely recited the conclusory notion that "futile" objections do not change the outcome of trial. But, as explained above and in Mr. Brewer's petition, Pet. 18–19, trial counsel's objection here would not have been futile.

The State's argument also ignores the procedural posture of this case. The Fifth Circuit should not have made such a merits determination at the COA stage, but instead only determined whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation omitted). The state court's finding of deficient performance on this issue, alongside the fact that one state court appellate judge would have granted relief, as detailed below, is more than enough to establish that this issue is adequate to deserve full merits briefing at the Fifth Circuit. The State cites to *Slack*, 529 U.S. at 484, to argue that a COA is never warranted when the state and federal courts agree on the *Strickland* prejudice prong. But *Slack* says no such thing.

Mr. Brewer does not "rel[y] on a false premise," BIO at 8, and the Fifth Circuit has again ignored this Court's guidance and failed to issue a COA in a capital case with substantial constitutional claims that are deserving of full briefing and consideration before the court of appeals. This Court should grant certiorari to decide the novel and undecided question of federal law of whether a federal court

must defer to a state court's affirmative finding of deficient performance under *Strickland* when deciding to issue a COA.

II. Divided State Court Rulings Demonstrate a Claim's Debatability for the Issuance of a COA.

Certiorari should also be granted to resolve the important question, and the related circuit split, regarding whether the issuance of a COA should be presumptive in cases where a state habeas court was divided on the merits of a claim. Justice Sotomayor, joined by Justices Kagan and Jackson, has recently recognized this very point. *See Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553–54 (2023) (Sotomayor, J., dissenting from denial of application for stay and certiorari); *see also Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., dissenting from denial of certiorari). The State's arguments in response offer no persuasive reason why certiorari should not be granted.

The State first notes that the dissenting state court judge "merely indicated she would have granted habeas relief," and argues that, "[b]ecause of Judge Johnson's unexplained and ambiguous decision," a COA should not issue. BIO at 9, 10. Judge Johnson's dissent is not ambiguous—she would have *granted* habeas relief, an extraordinary remedy. Such habeas relief is rarely granted, and Judge Johnson's "mere" indication that she would have granted relief by itself establishes that Mr. Brewer's entitlement to relief was debatable among jurists of reason.

The State claims that Mr. Brewer offers only "self-serving speculation" that Judge Johnson would have granted relief on trial counsel's failure to object to the admissibility of Dr. Coons's testimony. BIO at 10. The strongest issue in Mr.

Brewer's case has long been evident: the TCCA found that trial counsel failed to properly preserve an objection to the admission of Dr. Coons's testimony on direct appeal; counsel's ineffectiveness in this regard was raised as the first issue in Mr. Brewer's state habeas writ; the state habeas court granted evidentiary development for only this claim and then found that counsel performed deficiently; and this claim was the first raised in Mr. Brewer's habeas petition in district court and application for a COA at the Fifth Circuit. The Fifth Circuit certainly did not have to "divine a judge's reasoning" to "find [this] claim debatable when there is no explanation for a dissent." BIO at 11. The claim is worthy of a COA.

The State's argument that Judge Johnson's dissent may have been concerned with counsel's failure to object to A.P. Merillat's false testimony is itself a speculative aside. Importantly, Judge Johnson did not suggest the matter should be remanded for a hearing on counsel's reasons for not objecting to Merillat's testimony, but that would have been the next step if she thought the Merillat issue had merit. By contrast, the claim at issue here had already been addressed at a hearing and thus was ripe for a ruling that the writ should be granted.

Even the *Velez* opinion cited by the State where Judge Johnson granted relief because of Merillat's false testimony suggests she would be more concerned with Dr. Coons's testimony in this case. There, Judge Johnson found Merillat's testimony harmful because "[t]he state presented no psychiatric evidence that appellant presents a future danger, nor did it attempt to rebut the defense's psychiatric evidence that appellant would not be a danger in the future." *Velez v. State*, No. AP–

76,051, 2012 WL 2130890, at *33 (Tex. Crim. App. June 13, 2012). That is not the case here, where Dr. Coons's testimony was central to the State's evidence of future dangerousness.

Finally, the State invokes the Fifth Circuit's recitation of AEDPA's deferential standard of review, BIO at 12, to argue that a COA was properly denied. Tellingly, the Fifth Circuit's reference to this standard cites to cases from this Court involving *merits* determinations. A7–8 (citing *Renico v. Lett*, 559 U.S. 766, 773 (2010), and *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).[1] And its conclusory and erroneous prejudice ruling here shows that it made such a merits determination, but without first obtaining jurisdiction to do so. The threshold inquiry of whether to issue a COA does not require a habeas petitioner first to overcome the barrier to relief of 28 U.S.C. § 2254(d). *Cf. Miller-El v. Dretke*, 537 U.S. 322, 327 (2003) (holding the Fifth Circuit should have issued a COA on a constitutional claim), *with Miller-El v. Dretke*, 545 U.S. 231, 235 (2005) (granting habeas relief on the merits under 28 U.S.C. § 2254(d)(2) for the same claim). But for the reasons stated in his Petition, *see* Pet. 18–19, Petitioner can show that the state court unreasonably found that Dr. Coons's testimony did not prejudice the outcome of sentencing.

Although it may be true that every state and federal judge so far except Judge Johnson has concluded merits relief is not warranted, Mr. Brewer is not

[1] The Fifth Circuit noted this "standard requires that state-court decisions 'be given the benefit of the doubt,'" A7 (quoting *Renico*, 559 U.S. at 773), but then, as detailed above, failed to defer to the state court's finding of *Strickland* prejudice.

asking for such relief at this point. He asks only for the opportunity to present the merits of this claim in full briefing to the Fifth Circuit. In declining to issue a COA, the Fifth Circuit has once again flouted repeated guidance from this Court and improperly denied him this opportunity. The State, presuming this Court's indifference, scheduled Mr. Brewer's execution to occur prior to this Court even having an opportunity to review the Fifth Circuit's denial of a COA. Mr. Brewer is entitled to a COA and full briefing, and this Court should affirm this right.

CONCLUSION

For these reasons and those stated in his petition for a writ of certiorari, this Court should grant Mr. Brewer's petition and place this case on its merits docket. Alternatively, this Court should grant certiorari, vacate the decision below, and remand this case with instructions to grant a certificate of appealability.

Respectfully submitted,

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