CASE NO. _____ (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

PETITION FOR A WRIT OF CERTIORARI

Shawn Nolan*
Chief, Capital Habeas Unit
Timothy Kane
Andrew Childers
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520
Shawn_Nolan@fd.org

**Counsel of Record*
Member of the Bar of the Supreme Court

QUESTIONS PRESENTED

CAPITAL CASE

The State of Texas resentenced Brent Brewer to death in 2009. To obtain this sentence, the State presented evidence from Dr. Richard Coons, a purported expert on "future dangerousness" whose methods have now been recognized as unscientific and meaningless by the Texas Court of Criminal Appeals (TCCA). On direct appeal, Mr. Brewer argued that Dr. Coons' testimony was inadmissible, but the TCCA held that trial counsel failed to properly preserve the issue.

Mr. Brewer then alleged in state habeas proceedings that his trial counsel was ineffective for failing to object to the admission of Dr. Coons' testimony. The trial court recognized that trial counsel deficiently failed to preserve the issue, but ruled that Mr. Brewer was not prejudiced by this failure under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The TCCA adopted these findings on appeal, over the dissent of one judge who would have granted Mr. Brewer's habeas petition.

Mr. Brewer sought federal habeas review but was denied relief and denied a certificate of appealability on all issues by the district court and Fifth Circuit. Contrary to the state courts' conclusions, the district court held that trial counsel did *not* perform deficiently in failing to object to Dr. Coons' testimony, and the district court did not reach the issue of prejudice. The Fifth Circuit denied a certificate of appealability on the same basis. The questions presented are:

I. Where a state court and federal court deny a habeas claim on contradictory grounds, do their conflicting rulings suggest that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), such that a certificate of appealability should issue?

II. Does a state court's divided rejection of a federal constitutional claim demonstrate that reasonable jurists would debate the claim's merits such that a certificate of appealability should issue, as three Justices of this Court and the Seventh Circuit have recognized, or may a federal court decline to issue a certificate of appealability in such circumstances, as held by the Fifth Circuit below, the Eighth Circuit, and district courts in the First and Eleventh Circuits?

STATEMENT OF RELATED PROCEEDINGS

State v. Brewer, No. 6997-A (Randall Cty. Dist. Ct.) (order setting execution date for November 9, 2023, entered June 12, 2023)

Brewer v. Lumpkin, No. 22-70006, 66 F.4th 558 (5th Cir.) (opinion denying certificate of appealability issued April 27, 2023; order denying rehearing entered May 23, 2023)

Brewer v. Director, TDCJ-CID, No. 2:15-cv-050, 2022 WL 398414 (N.D. Tex.) (order denying petition for writ of habeas entered February 8, 2022)

Ex parte Brewer, No. WR-46,587-03 (Tex. Crim. App.) (order denying subsequent application for writ of habeas corpus entered October 23, 2019)

Ex parte Brewer, No. WR-46,587-02 (Tex. Crim. App.) (order denying application for writ of habeas corpus entered September 17, 2014)

Ex parte Brewer, No. W-6997-A-2 (Randall Cty. Dist. Ct.) (findings of fact and conclusions of law recommending denial of application for writ of habeas corpus entered March 8, 2013)

Brewer v. Texas, No. AP-76,378, 2011 WL 5881612 (Tex. Crim. App.) (opinion affirming sentence of death issued November 23, 2011)

State v. Brewer, No. 6997-A (Randall Cty. Dist. Ct.) (jury verdict of sentence of death rendered August 14, 2009)

Brewer v. Quarterman, No. 05-11287, 550 U.S. 286 (U.S.S.C.) (opinion reversing the United States Court of Appeals for the Fifth Circuit issued April 25, 2007)

Brewer v. Dretke, No. 04-70034, 442 F.3d 273 (5th Cir.) (opinion reversing the United States District Court for the Northern District of Texas issued March 1, 2006)

Brewer v. Dretke, No. 2:01-cv-0112, 2004 WL 1732312 (N.D. Tex.) (opinion granting petition for writ of habeas corpus issued August 2, 2004)

Brewer v. Texas, No. 01-5145, 534 U.S. 955 (U.S.S.C.) (order denying petition for writ of certiorari entered October 9, 2001)

Ex parte Brewer, No. 46,587-01, 50 S.W.3d 492 (Tex. Crim. App. 2001) (order denying application for writ of habeas corpus entered January 31, 2001)

Ex parte Brewer, No. W-6997-A-1 (Randall Cty. Dist. Ct.) (findings of fact and conclusions of law recommending denial of application for writ of habeas corpus issued October 20, 2000)

Brewer v. Texas, No. 94-7403 (U.S.S.C.) (order denying petition for writ of certiorari entered March 24, 1995)

Brewer v. State, No. 71,307 (Tex. Crim. App.) (opinion affirming sentence of death issued June 22, 1994)

State v. Brewer, No. 6997-A (Randall Cty. Dist. Ct.) (jury verdict of sentence of death rendered June 1, 1991)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

PETITION FOR WRIT OF CERTIORARI

Petitioner Brent Brewer respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability is reported as *Brewer v. Lumpkin*, 66 F.4th 558 (5th Cir. 2023), and appears in the appendix. A3–13. The order denying panel rehearing is not reported and appears in the appendix. A1.

The order of the United States District Court for the Northern District of Texas denying the petition for habeas corpus, *Brewer v. Director, TDCJ-CID*, No. 2:15-cv-050, 2022 WL 398414 (N.D. Tex. Feb. 8, 2022), is unreported and appears in the appendix. A14–37.

JURISDICTION

The court of appeals denied Mr. Brewer's request for a certificate of appealability on April 27, 2023, and denied a petition for rehearing on May 23, 2023. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> (A) a final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT

On April 26, 1990, Petitioner Brent Ray Brewer was nineteen years old, in relapse just weeks after an involuntary commitment to a state hospital for depression, and without a roof over his head. At the hospital, he had met Kristie Nystrom. During a botched robbery, Mr. Brewer and Ms. Nystrom killed Robert Doyle Laminack. The two had asked Mr. Laminack for a ride to the Salvation Army. On the way, Mr. Laminack was stabbed in the neck with a butterfly knife and bled to death from his injuries.

A. Mr. Brewer's First Death Sentence

In 1991, a jury in Randall County, Texas, convicted Mr. Brewer of capital murder and sentenced him to death. His conviction and sentence were affirmed on

direct appeal and in state postconviction proceedings. On postconviction review, three state court judges of the Texas Court of Criminal Appeals (TCCA) dissented and would have granted relief based on trial counsel's "complete failure to investigate the applicant's mental condition in preparation for trial" and failure to consult with a mental health expert regarding Mr. Brewer's alleged future dangerousness. *Ex parte Brewer*, 50 S.W.3d 492, 492–95 (Tex. Crim. App. 2001) (per curiam) (Price, J., dissenting, joined by Johnson & Holcomb, JJ.).

In federal court, the Northern District of Texas granted relief, but the Fifth Circuit reversed. This Court then reversed the Fifth Circuit and vacated Mr. Brewer's death sentence in 2007 because of constitutional deficiencies in the jury instructions for the sentencing phase. *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007).

B. Mr. Brewer's Second Death Sentence

Mr. Brewer's resentencing took place from August 10, 2009, to August 14, 2009. The evidence at Mr. Brewer's 2009 sentencing was much like the evidence presented at the 1991 sentencing.

Most notably, the State again presented the testimony of the most discredited and notorious forensic expert in the state of Texas: Richard Coons, M.D., whose so-called methodology for assessing whether a person poses a future danger has since been deemed inadmissible in Texas because it is scientifically unreliable and inaccurate. *See Coble v. State*, 330 S.W.3d 253, 277–80 (Tex. Crim. App. 2010). In 2009, as in 1991, Dr. Coons never laid eyes on Mr. Brewer except when in court to

testify. He never conducted a forensic evaluation of Mr. Brewer and knew only the information the State provided to him about the offense. He nonetheless testified that Mr. Brewer had no conscience and was not bothered by violence, and that Mr. Brewer's long and uniformly non-violent prison record was meaningless because "a huge amount" of prison violence is not reported.

Dr. Coons was the last witness presented by the State. A317–34. He first offered a speculative basis for the jury to disbelieve the upcoming testimony of the defense expert, Dr. John Edens. A325–27. Specifically, he claimed that Dr. Edens' general opinion "that such a prediction [regarding any individual's future dangerousness in prison] can't be made within a particularly validity" was wrong because "the data that he and others who have written on the subject . . . includes only reported violence." A325. Dr. Coons then asserted, without factual support, that "in the penitentiary a huge amount of violence occurs that is never reported." *Id.* Defense counsel objected, but the State blithely responded that "he's an expert in the field, Your Honor," and the court overruled the objection. *Id.* Dr. Coons then repeatedly declared, under the guise of being an expert, that most violence in prison goes unreported. A326–27.

The State then asked Dr. Coons to state his opinion as to "the likelihood this man [Mr. Brewer] would commit criminal acts of violence in the future." A327–29. Dr. Coons stated, "There is that probability, which I believe to be more likely than not." A329. To support this expert opinion, Dr. Coons claimed that "violence is okay with him [Mr. Brewer]," "doesn't seem to bother him," and "[c]ertainly hasn't

changed his mind about what he does." *Id*. Dr. Coons also claimed that because Mr. Brewer was unemployed at the time of the murder, "he is not a law-abiding person" and "doesn't have that as his standard way of living of looking at things." A330.

Dr. Coons next evaluated whether Mr. Brewer had a conscience and concluded he did not:

> And then the next area is the conscience. Does he have a conscience. And conscience is that part of our personality that makes us feel bad if we do something wrong. Well, none of the things that he's done have seemed to stop him from doing anything else. And so conscience – we know that his conscience doesn't apply to the things that he has done here. None of that stuff has – has stopped him from – from – from doing things.

Id. Dr. Coons concluded his testimony by claiming that Mr. Brewer's recent suicide attempt was "a gesture rather than an intentional act" and "a manipulative situation." *Id.*

On cross-examination, Dr. Coons admitted he had not personally examined Mr. Brewer as part of his evaluation, and that he had no data regarding how accurate his predictions for future dangerousness were. A330, A332. On redirect, Dr. Coons claimed that, although he had not followed up on all fifty or so defendants on whom he had shared an opinion regarding future dangerousness, he "kn[ew] of people about whom I issued that opinion that have been on death row that have gotten in trouble for violent acts," and again claimed that there was no way for him to know how many violent acts all these defendants had actually committed because most of them went unreported. A333.

Mr. Brewer's lawyers presented very little evidence to counter this false expert testimony. Dr. Edens, who also did not personally evaluate Mr. Brewer, testified generally about what a proper future dangerousness evaluation should entail but offered no opinion specific to Mr. Brewer. Dist. Ct. ECF No. 125-12 at 6–21. A sheriff's deputy and a jail administrator each testified for two minutes that Mr. Brewer had not had any disciplinary issues while awaiting his resentencing in the county jail. *Id.* at 22, 30. Only Mr. Brewer's mother and sister testified in mitigation. His mother Karen's testimony, direct and cross, lasted twenty-one minutes. *Id.* at 23–27. His sister Billie Ann's lasted seven. *Id.* at 27–29. The State's bogus future dangerousness case went to the jury virtually unopposed.

Most relevant to this petition, however, trial counsel inexplicably failed to lodge a proper objection to exclude Dr. Coons from testifying altogether at Mr. Brewer's resentencing. This failure, as detailed below, underlies the questions presented in this petition.

The State relied on Dr. Coons' testimony in its closing argument: "You heard testimony from Dr. Coons, who told you in his professional opinion the Defendant is a threat. He will commit acts of violence in the future." A336. The defense urged the jury to disbelieve Dr. Coons' testimony in their own closing. A339–40.

In its rebuttal closing argument, the State leaned heavily on Dr. Coons' testimony and his unsubstantiated claim that most violence in prison goes unreported. The prosecutor touted Dr. Coons' thirty-eight-year-long "distinguished career as a psychiatrist" and his "credentials out the kazoo [sic]," claiming he was

"so recognized the governor picks him for various projects." A341. He urged that Dr. Coons "was right 19 or 18 years ago or however long it's been and he's still right today" by predicting at the first trial that Mr. Brewer would become a violent gang member – even though almost two intervening decades of Mr. Brewer's institutional records showed otherwise. *Id*. He endorsed Dr. Coons' conjecture that Mr. Brewer must have been committing violent acts in prison that went unreported: "I do know what the probability is that he's done something and I know what the probability is in the future." *Id.* The State's "distinguished, eminent expert," after all, considered "the first 19 years of [Mr. Brewer's] life" outside of prison, and it would be "incredible" to deny that the then-thirty-nine-year-old Mr. Brewer would continue his violent ways behind bars. *Id*. The prosecutor urged jurors to impose a death sentence to prevent a future catastrophe:

> [D]on't leave this courtroom today after having made a decision and pick up a newspaper or turn on a radio or television and see and hear his name and say to your self, "Oh my God, what have I done?" Because the probability, if he gets a life sentence, is that's what is going to happen.

Id.

Dr. Coons predicted in 1991 that Brent would commit acts of violence and become a gang member. Dist. Ct. ECF No. 103 at 20–21. Mr. Brewer's good conduct reflected in his institutional record had proved otherwise by 2009. In 2009, Dr. Coons nevertheless again predicted that Mr. Brewer was likely to commit violent acts in prison. Dr. Coons was again wrong, as Mr. Brewer has now lived for thirty-three years on Texas's death row without committing any act of violence.

The jury found that there was a probability that Mr. Brewer would commit criminal acts of violence that would constitute a continuing threat to society and sentenced Mr. Brewer to death.

C. Direct Appeal

On October 13, 2011, before Mr. Brewer's direct appeal was decided, the TCCA issued *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010), wherein it held that Dr. Coons' methodology for predicting future dangerousness was not scientifically reliable and his testimony is therefore inadmissible, *id.* at 279–80. The TCCA in *Coble* noted that "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." *Id.* at 277. The TCCA recognized that "[t]here 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." *Id.* Dr. Coons' flawed methodology in *Coble* was just like his methodology here:

> 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 279. In conclusion, the TCCA held that, "[b]ased upon the specific problems and omissions cited above, we conclude that the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons's methodology for predicting future dangerousness by clear and convincing evidence during the *Daubert*/*Kelly* gatekeeping hearing in this particular case." *Id.* at 279.[1] The State has not proffered Dr. Coons as an expert for predicting future dangerousness since *Coble*.

On appeal, Mr. Brewer, relying on *Coble*, argued that Dr. Coons' testimony should not have been admitted. A311–12. On November 23, 2011, the TCCA affirmed Mr. Brewer's sentence, ruling that the issue of Dr. Coons' inadmissible testimony was waived because trial counsel failed to lodge a proper objection. A311–16.

D. Initial State Habeas Proceedings

On July 20, 2012, Mr. Brewer filed an application for writ of habeas corpus under Texas Code of Criminal Procedure art. 11.071 challenging his second death

[1] The TCCA ultimately denied relief to the appellant in *Coble*, finding that, for reasons that are not present in this case, Dr. Coons' inadmissible expert testimony did not affect his substantial rights to a fair sentencing trial. First, unlike in this case, the State in *Coble* presented the testimony of a psychiatrist and military doctor who *had evaluated* the appellant, and "their psychiatric and medical assessment of appellant's character for violence [was] remarkably similar to that of Dr. Coons." 330 S.W. 3d at 281–82. The jury asked to see the reports of these two experts, but not Dr. Coons, during deliberations. *Id.* at 282. Also, unlike here, the defense offered its own expert to rebut Dr. Coons by specifically opining on appellant's low risk of future danger. *Id.* at 282–83. Finally, unlike here, the "State barely mentioned Dr. Coons during closing argument and did not emphasize him or his opinions." *Id.* at 287.

sentence. On August 20 and 21, 2013, an evidentiary hearing was held solely to address trial counsel's performance with respect to the State's presentation of Dr. Coons. The postconviction court ordered the parties to prepare findings of fact and conclusions of law. On March 13, 2014, the postconviction court adopted the State's proposed findings and conclusions without modification. A196–298.

The state postconviction court ruled that counsel performed deficiently under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for failing to object to the admission of Dr. Coons' testimony, but that this failure did not prejudice the outcome of Mr. Brewer's sentencing. A270 ("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."). Specifically, the court found that trial counsel's "strategy in regards to the [pre-trial] hearing was to prevent Dr. Coons from testifying at the re-sentencing trial by attacking his methodology," A203–04, but that 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.

E. State Habeas Appeal

The TCCA denied Mr. Brewer's habeas appeal on September 17, 2014. A194–95. The order adopted the trial court's findings of fact and conclusions of law, except for two paragraphs not relevant here. *Id.* Judge Johnson dissented and would have granted the writ. A194.

F. Federal Habeas Proceedings

Mr. Brewer filed an amended petition for writ of habeas corpus in the Northern District of Texas in 2015. On September 30, 2021, the magistrate judge entered findings, conclusions, and recommendations to deny relief. A38–193. On February 8, 2022, the district court issued an order adopting the magistrate judge's findings and conclusions and denying relief. A11–37. The district court denied a certificate of appealability. A14–37.

Mr. Brewer filed a timely notice of appeal and sought a COA from the Fifth Circuit. On April 27, 2023, the Fifth Circuit published an opinion declining to issue a COA. A3–13. The Fifth Circuit held that "[r]easonable 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." A9. The court denied Mr. Brewer's petition for rehearing on May 23, 2023. A1–2.

On June 12, 2023, prior to Mr. Brewer seeking review of the Fifth Circuit's ruling from this Court, the District Attorney for Randall County filed a motion requesting an execution date for Mr. Brewer with the Randall County District Court. That same day, the district court entered an order setting Mr. Brewer's execution for November 9, 2023.

REASONS FOR GRANTING THE WRIT

The courts of appeals take widely divergent approaches to, and reach widely divergent results in, deciding whether to issue certificates of appealability in federal habeas appeals. This case presents two objective circumstances that call out for uniform, nationwide rules for issuing a COA. First, the Court should consider whether, and ultimately hold that, a district court's resolution of a claim is debatable where it contradicts the state court's ruling on the same claim. Second, the Court should consider whether, and hold that, disagreement among state court judges on the propriety of habeas relief likewise demonstrates that a claim is debatable among jurists of reason. In both circumstances, there should be clear, uniform rules for federal courts to apply in deciding whether to issue a COA.

I. Contradictory State and Federal Court Rulings Demonstrate a Claim's Debatability.

For generations, it has been the law of the land that a federal habeas appeal is appropriate where reasonable jurists could debate whether a district court should have resolved a claim in a different manner. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893–94 (1983). But the standard is abstract and does not delineate what meets the threshold of debatability. This case presents objective indicia of debatability and thus offers an opportunity to clarify the standard.

The Fifth Circuit's resolution of this claim itself shows that the issue is debatable among, and has been resolved differently by, jurists of reason. The court held that "[r]easonable 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." A9. But no state court ever held that such an objection would have been futile. Quite the opposite, the state habeas court ruled that trial counsel "failed to lodge a timely and specific objection regarding the admission of Dr. Coons' testimony about future dangerousness," despite counsel's "strategy . . . to prevent Dr. Coons from testifying at the re-sentencing trial by attacking his methodology." A201, 203–04. Counsel's failure thus caused the issue to not be preserved for appellate review. A201.

It is thus manifest that the federal and state courts resolved this claim "in a different manner." *Slack*, 529 U.S. at 484. Their differing legal conclusions illustrate that the issue is debatable among jurists of reason. This is particularly true because, under the rubric of 28 U.S.C. § 2254(d) (AEDPA), state courts are granted "deference and latitude" that presumes their reasonableness. *Harrington v. Richter*, 562 U.S. 86, 101 (2011). The comity inherent in AEDPA's design, *see Cullen v. Pinholster*, 563 U.S. 170, 185 (2011), should be as pertinent a consideration in issuing a COA as it is in weighing relief on the merits.

Of course, within the constraints of AEDPA, a federal court can resolve a claim differently than a state court does. By its terms, however, a court cannot reach a different resolution while "limit[ing] its examination to a threshold inquiry." *Miller-El*, 537 U.S. at 327. Accordingly, the Fifth Circuit here "depart[ed] from the limited COA inquiry, without even full briefing or oral argument, and instead

opine[d] on the merits of an appeal," *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553-54 (2023) (Sotomayor, J., dissenting from denial of application for stay of execution and denial of certiorari), so that it was "'in essence deciding an appeal without jurisdiction,'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El*, 537 U.S. at 336–37). "The only question before the [Fifth] Circuit was whether reasonable jurists could debate the District Court's disposition of [Mr. Brewer's] habeas petition." *Johnson*, 143 S. Ct. at 2554 (Sotomayor, J., dissenting). As in *Johnson,* "reasonable jurists can and do have that debate," *id.*, as reflected by the federal and state courts' wholly different analyses of the claim at issue here – as well as by the Fifth Circuit's dubious assessment that counsel reasonably withheld a "futile" objection to Dr. Coons' testimony.

The Court should grant certiorari to consider whether conflicting decisions of state and federal courts in resolving the same claim provide a clear and objective circumstance demonstrating the claim's debatability and thus meeting the threshold for issuance of a COA under 28 U.S.C. § 2253(c).

II. Divided State Court Rulings Demonstrate a Claim's Debatability.

As Justice Sotomayor's recent dissent from the denial of certiorari in *Johnson*, *supra*, reflects, divided state court rulings alone can establish that an issue is debatable among jurists of reason. That objective indicator of debatability is present here as well.

The state habeas court found that trial counsel had deficiently failed to preserve an objection to Dr. Coons' testimony, but that this deficient performance

did not result in prejudice to Mr. Brewer under *Strickland*'s second prong. This issue was the first issue presented to, and addressed by, the state habeas court, and the TCCA's summary affirmance of the state habeas court's findings was issued over the dissent of Judge Johnson, who would have granted Mr. Brewer relief from his death sentence.

Each state court agreed that trial counsel should have lodged an objection to the admission of Dr. Coons' testimony. The only point left for debate was whether Mr. Brewer was prejudiced by this failure. Judge Johnson's vote to grant relief indicates that this issue is debatable among jurists of reason. Although Judge Johnson did not expressly state the basis on which she would have granted relief, this was the first issue presented in Mr. Brewer's state habeas application, the first issue addressed by the state habeas court after a limited evidentiary hearing on issues related only to Dr. Coons' testimony, and the only issue where the state courts found fault with trial counsel. Moreover, Judge Johnson joined the *Coble* majority that found Dr. Coons' testimony inadmissible in Texas courts.

Because of this disagreement among the state court judges, the Fifth Circuit should have issued a COA. To be entitled to a COA, a "prisoner need only demonstrate that 'reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., dissenting) (quoting *Slack*, 529 U.S. at 484). As Justice Sotomayor, joined by Justices Kagan and Jackson, recognized, such disagreement

among judges alone establishes the necessary debate. *Id.* After noting dissents from a state supreme court and the Eighth Circuit, Justice Sotomayor stated, "Those facts alone might be thought to indicate that reasonable minds could differ – *had differed* – on the resolution of [Johnson's] claim." *Id.* (quoting *Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., dissenting from denial of certiorari)). The Seventh Circuit has held similarly. *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) ("When a state appellate court is divided on the merits of the constitutional question, issuance of a certificate of appealability should ordinarily be routine."). Here, too, the state appellate court was divided, and a COA should have issued pursuant to Justice Sotomayor's dissents in *Johnson* and *Jordan* and the Seventh Circuit's reasoning in *Jones*.

On the other side of the issue, the Eighth Circuit and district courts in the First and Eleventh Circuits, like the Fifth Circuit here, have declined to issue COAs despite divided state appellate courts manifestly indicating debate among jurists of reason. *See Johnson v. Vandergriff*, No. 23-2664, 2023 WL 4851623, at *1–8 (8th Cir. July 29, 2023) (en banc), *cert. denied*, *Johnson v. Vandergriff*, No. 23-5244, 2023 WL 4881408, at *1 (Aug. 1, 2023); *Heon v. Maine*, 592 F. Supp. 2d 162, 167 (D. Me. 2009) ("[D]espite the dissent in [*Heon v. State*, 931 A.2d 1068 (Me. 2007),] and despite the fact that doubt should be resolved in favor of the petitioner, the Court cannot approve the certificate of appealability."); *Hannon v. Sec'y, Dep't of Corr.*, No. 8:06-cv-2200, 2008 WL 58958, at *7 (M.D. Fla. 2008) ("The Florida Supreme Court majority opinion specifically addressed this dissent and found that the dissent

lacked merit. . . . Petitioner Hannon has not established that the Florida state court decision is contrary to United States Supreme Court precedent, and because reasonable jurists would not find this Court's assessment of the constitutional claim debatable or wrong, Hannon is not entitled to a certificate of appealability on this issue.").[2]

This split of authority among the federal courts merits this Court's review. The failure to grant a COA despite disagreement within a state appellate court denies habeas petitioners full and fair appellate review of their claims. In this case, for example, a state habeas court adopted findings of fact and conclusions of law authored by the State, and Mr. Brewer has now nearly completed the entire process of both state and federal habeas review without any state or federal appellate judge writing a single word on the merits of the state habeas court's disposition of Mr. Brewer's claims.

The Fifth Circuit's failure to issue a COA is not merely an insignificant procedural hiccup in the State's rush to execute Mr. Brewer. At least twice, this Court has granted merits relief on issues where the Fifth Circuit initially failed to even issue a COA. *Buck*, 580 U.S. at 128; *Miller-El v. Dretke*, 545 U.S. 231, 235 (2005).

---

[2] Another district court in the Eleventh Circuit has issued a COA based on a Georgia state habeas court's grant of relief that was later overturned by the Georgia Supreme Court. *Lee v. Warden, Ga. Diagnostic Prison*, No. 5:10-cv-017, 2018 WL 1292313, at *5 (S.D. Ga. Mar. 20, 2019).

The issue that should have been addressed by the federal courts below is whether Mr. Brewer was prejudiced by his counsel's failure to object to the State's fraudulent expert testimony by Dr. Coons. Whether Mr. Brewer was prejudiced by trial counsel's failure is debatable among jurists of reason.

Dr. Coons was the only expert at trial to opine specifically on whether Mr. Brewer was a future danger, and he mischaracterized Mr. Brewer as lacking a conscience and as living in a prison system with massive amounts of unreported violence. The State, in its closing argument, relied heavily on the unsubstantiated opinion and claims of its "distinguished, eminent expert" whose testimony was not only used to lend the imprimatur of expert credibility to the State's case that Mr. Brewer posed a future danger, but also used to discredit the defense's own expert by repeatedly suggesting, without any evidentiary basis, that serious prison violence, both generally and specifically regarding Mr. Brewer's own behavior, simply went unreported. Dr. Coons' baseless predictions were untrue at the time of Mr. Brewer's resentencing in 2009, when Mr. Brewer had lived peacefully on death row for nineteen years except for a single suicide attempt, and are untrue now, when Mr. Brewer has lived peacefully in prison for over thirty-three years.

As this Court has recognized, "[d]eciding the key issue of [Mr. Brewer's] dangerousness involved an unusual inquiry." *Buck*, 580 U.S. at 120. "The jurors were not asked to determine a historical fact concerning [Mr. Brewer's] conduct, but to render a predictive judgment inevitably entailing a degree of speculation." *Id.* Mr. Brewer's "prior violent acts had occurred outside of prison," and "[i]f the jury did not

impose a death sentence, [Mr. Brewer] would be sentenced to life in prison," and a "jury could conclude that [related] changes would minimize the prospect of future dangerousness." *Id.* at 120–21. Dr. Coons offered allegedly scientific evidence "from an expert" to "guide an otherwise speculative inquiry." *Id.* at 121. He "took the stand as a medical expert bearing the court's imprimatur." *Id.* "Reasonable jurors might well have valued his opinion concerning the central question before them." *Id.* (citing *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)).

A state court judge would have granted relief to Mr. Brewer and vacated his sentence of death. All state courts agreed that counsel performed deficiently in failing to object to this unreliable testimony. The Fifth Circuit reached its own conclusion on the merits and held the opposite. These facts establish that the issue of whether counsel was ineffective for failing to object to the unreliable and unscientific testimony of Dr. Richard Coons is debatable among jurists of reason. The Fifth Circuit should have granted a COA and heard the issue on the merits after full briefing.

CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari and place this case on its merits docket. In the alternative, this Court should grant certiorari, vacate the decision below, and remand this case to the Fifth Circuit with instructions to grant a certificate of appealability.

Respectfully submitted,

/s/ Shawn Nolan
Shawn Nolan*
Chief, Capital Habeas Unit
Timothy Kane
Andrew Childers
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520
Shawn_Nolan@fd.org

**Counsel of Record*
Member of the Bar of the Supreme Court

Dated: August 21, 2023