No. 10-1271

IN THE

# Supreme Court of the United States

BILLIE WAYNE COBLE,

*Petitioner,*

*v.*

STATE OF TEXAS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

## BRIEF FOR CAPACITY FOR JUSTICE, DISABILITY RIGHTS TEXAS, TEXAS APPLESEED, AND THE NATIONAL ALLIANCE ON MENTAL ILLNESS OF TEXAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DEBRA J. MCCOMAS,
*Counsel of Record*
JENNIFER BUTLER WELLS
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
(214) 651-5000
Debbie.McComas@haynesboone.com

*Attorneys for Amici Curiae Capacity for Justice, Disability Rights Texas, Texas Appleseed, and The National Alliance on Mental Illness of Texas*

May 18, 2011

236085

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## TABLE OF CONTENTS

*Table of Contents*

## TABLE OF CITED AUTHORITIES

**STATE CASES**

*Cited Authorities*

*Page*

*Page*

## INTERESTS OF *AMICI CURIAE*[1]

Capacity for Justice ("C4J") is a Texas non-profit corporation, founded in 1995, with a mission to increase the objectivity and validity of psycho-legal elements in juvenile and criminal forensic evaluations. C4J's work focuses on respondents and defendants with mental illnesses, intellectual disabilities, or concurrent mental and substance use disorders. C4J conducts research and training and compiles a registry of professionals whose credentials are consistent with the Texas statutory requirements for evaluating incompetency to stand trial and the insanity defense.

Disability Rights Texas (formerly known as Advocacy Incorporated) ("DRTx") provides legal protection and advocacy for Texans with disabilities. DRTx's attorneys provide direct legal assistance to people with disabilities as well as protecting the rights of individuals and groups with disabilities through the courts and the justice system. DRTx also advocates for laws and public policies that protect and advance the rights of people with disabilities.

Texas Appleseed ("Appleseed") is a non-profit organization that advocates for equal justice for persons with mental illnesses or intellectual disabilities.

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have each been given at least 10 days notice of amici's intention to file this brief and have consented to such filing. Those consents are being lodged herewith.

Appleseed has developed widely used resources for attorneys and judges and has provided training and technical assistance to counties creating new programs aimed at decriminalizing the symptoms of mental illness and intellectual disability by diverting offenders away from the criminal justice system and into community-based treatment. Appleseed recognizes that requiring compliance with long-recognized standards for scientific reliability in the testimony of expert mental health witnesses is imperative to assuring equal justice.

The National Alliance on Mental Illness of Texas ("NAMI Texas") is a not-for-profit membership organization that is a state affiliate of the National Alliance on Mental Illness. The mission of NAMI Texas is to improve the lives of all persons affected by serious mental illness by providing support, education, and advocacy through a grassroots network.

*Amici* file this brief in support of Petitioner Billie Wayne Coble to highlight the significance to Texans with mental disabilities and the Texas mental health community of this Court's review of the extent to which a mental health professional can reliably testify to a defendant's future dangerousness in a capital case.

## SUMMARY OF THE ARGUMENT

*Amici* urge the Court to grant the Petitioner's writ of certiorari to address the significant legal and constitutional errors in *Coble v. Texas*, 330 S.W.3d 253 (Tex. Crim. App. 2010). Specifically, review by this Court is necessary to address the Texas Court of Criminal Appeals's overreaching and unconstitutional extension of this Court's precedent in *Barefoot v. Estelle*,[2] regarding testimony and evidence related to Texas's "probability of future violence" element in capital punishment cases.

In *Coble*, the Texas Court of Criminal Appeals (the "CCA") recognized the significant influence a licensed medical expert, such as a psychiatrist, may have on jurors and found that the State's so-called expert predictions about Mr. Coble's future dangerousness were unreliable under the rules of evidence. Yet, the Texas court presumed the testimony was constitutional under this Court's precedent in *Barefoot*[3] without regard to subsequent precedent governing expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[4] and its progeny. Finding no constitutional-level harm from admission of the improper testimony, the Texas court affirmed Mr. Coble's death sentence notwithstanding the acknowledged error.

Review is necessary to harmonize this Court's prior precedent in *Barefoot* with the standards established in *Daubert*. The failure to address this constitutional issue

2. 463 U.S. 880 (1983).

3. *Id.*

4. 509 U.S. 579 (1993).

will result in the continued use of unreliable, unscientific methods for determining future dangerousness in Texas capital punishment cases. Further, beyond the capital punishment context, the Texas court's ruling in *Coble* creates confusion about what standards govern mental health expert testimony. Amici thus urge this Court to grant the Petitioner's writ of certiorari to address Texas's extension of *Barefoot*, to harmonize *Barefoot* with this Court's subsequent holding in *Daubert*, and to affirm the need for reliable mental health testimony in capital punishment cases involving the question of future dangerousness.

## ARGUMENT

### A. The unreliable testimony on future dangerousness proffered in *Coble* is a recurring event.

#### 1. The testimony offered by the State in *Coble* to support future dangerousness is unreliable.

In September 2008, after the Fifth Circuit vacated Mr. Coble's death sentence, the trial court held a capital resentencing hearing.[5] At the hearing, the defense presented uncontroverted evidence that Mr. Coble had not received a single disciplinary notice in nearly twenty years on Texas's death row.

In addition, the defense called a forensic psychologist, Dr. Mark Cunningham, who has studied and published extensively in the field of violence risk assessment. He testified that Mr. Coble had a low probability of committing

5. *Coble*, 330 S.W.3d at 261.

a future act of serious violence based on a statistical risk assessment approach that utilizes actuarial data about violence in prison.[6] Dr. Cunningham's methodology is documented in a number of published, peer-reviewed periodicals and he explained that using this approach, he has been able to calculate an error rate of less than two percent for all cases in which he has testified.[7]

In contrast, the State's case-in-chief primarily consisted of lay witness testimony and a report prepared in 1964 by a psychiatrist who had evaluated Mr. Coble when he was fifteen years old. To satisfy the element of future dangerousness required to sentence a defendant to death under Texas law, the State did not rely on any verifiable scientific methods that could accurately predict such dangerousness. Instead, the State presented the opinion of psychiatrist Dr. Richard Coons.[8]

Dr. Coons is no stranger to capital murder trials. According to his own testimony, he has evaluated future dangerousness in 150 capital cases and testified in 50 of those cases.[9] By his own admission, Dr. Coons's conclusions are based on a non-peer-reviewed system that relies heavily upon his own gut instincts.[10] His conclusions do not derive from a textbook and are not found in any particular journal. He cannot identify any

6. 27 RR 95-123, 125-30, 204-05.

7. 27 RR 122, 189.

8. 24 RR 9, 11, 202.

9. 24 RR 204, 206.

10. 24 RR 208-09.

studies supporting his methodology.[11] He does not consider a standardized list of factors, nor is his methodology shared by forensic psychiatrists across the board.[12] In fact, he specifically refers to past behavior as the best predictor of the future, but agrees that psychiatrists might disagree about whether past conduct would predict future conduct.[13] He also is not aware of any studies on the accuracy or error rates of long-term predictions of future violence.[14] Dr. Coons has not obtained any records to determine whether his prior testimony was accurate. Nor does he know what his accuracy rate is.[15]

Dr. Coons interviewed Mr. Coble before testifying in his 1990 trial, but he since lost his interview notes.[16] At the resentencing hearing, the prosecution asked Dr. Coons a long, hypothetical question, spanning nine pages of the transcript, and based on 57 assumptions.[17] At the end of the hypothetical, the prosecutor asked whether Dr. Coons could "make a determination as to whether … there is a probability that the defendant would commit acts of violence that would constitute a continuing threat to society?"[18] Dr. Coons responded, "[t]here is a probability

11. 24 RR 156-57, 188-89, 196-97.

12. 24 RR 157.

13. 24 RR 160-61.

14. 24 RR 188-89.

15. 24 RR 195-96.

16. 24 RR 210-11.

17. 24 RR 211-19.

18. 24 RR 211-19.

he would do that."[19] He reached his opinion based on the facts of the crime, Mr. Coble's "attitude about violence," and Mr. Coble's "weak" and "defective" conscience.[20] Discounting the evidence of Mr. Coble's consistently good behavior while incarcerated, Dr. Coons repeatedly testified about his personal belief, not founded in any research or studies, that all death row inmates "mind their behavior" because they have pending appeals and have an incentive to avoid developing a bad record in the event of a retrial.[21]

The prosecution argued in both its opening and closing arguments that the jury should credit Dr. Coons's conclusion – that Mr. Coble has no conscience and no regard for human beings and thus is likely to commit future criminal acts of violence – because "it's just common sense."[22] Despite Mr. Coble's two decades of exemplary behavior since he was first incarcerated, the State argued that Mr. Coble is a "dangerous person," and that "if he is the same person today, as the evidence shows he is, then he is absolutely dangerous."[23]

The CCA ruled that the prosecution did not prove the scientific reliability of Dr. Coons's method for predicting

---

19. 24 RR 219.

20. 24 RR 219-23.

21. 24 RR 209-10, 223-24.

22. 29 RR 124; *see also*, 29 RR 170 (describing Dr. Coons's approach as "remarkably commonsensical").

23. 29 RR 122.

future dangerousness.[24] The court noted there was no proof that the factors relied on by Dr. Coons were accepted by the forensic psychiatric community, and that the method used by Dr. Coons had never been empirically validated or verified as accurate.[25] Yet, despite the almost universal recognition of the harmful impact of unscientific, unverifiable, and unreliable expert testimony in non-capital cases, the CCA found the admission of Dr. Coons's erroneous testimony harmless and allowed Mr. Coble's death sentence to stand.

### 2. The unreliable so-called expert testimony proffered by Dr. Coons in Mr. Coble's sentencing hearing is not an isolated occurrence.

There is no established protocol on how to assess future dangerousness in Texas death penalty cases. However, in many such cases, sometimes without even meeting the defendant, a psychiatrist or psychologist called by the state testifies that a defendant will constitute a continuing threat to society based solely on a hypothetical fact pattern presented by the prosecutor. The hypothetical question incorporates the facts of the specific crime for which the defendant has been convicted as well as his previous crimes, and invariably omits any positive information. These hypothetical fact patterns are routinely admitted despite being "simply subjective testimony without any scientific validity."[26] There is no

---

24. *Coble*, 330 S.W.3d at 279-80.

25. *Id.* at 278-79.

26. *Flores v. Johnson*, 210 F.3d 456, 458 (5th Cir. 2000) (Garza, J., specially concurring).

consistent methodology applied or required for these analyses and "standards controlling the operation of the technique are nonexistent."[27] The testimony is virtually the same in every case. Indeed, the State tends to use the same few witnesses in every case, including Dr. Coons, who has testified consistently for the State for decades.

For instance, Dr. Coons testified in the capital murder trial of David Lee Powell. In that case, he told the jury that Mr. Powell would commit further "criminal acts of violence that would constitute a continuing threat to society." Mr. Powell was sentenced to death.[28] Some additional examples of Dr. Coons's testimony on future dangerousness are listed below. In these examples, Dr. Coons concludes that the defendant would pose a continuing threat to society based primarily on the defendant's offense and prior history. Seldom does he interview the defendant and he typically dismisses a defendant's good conduct since incarceration as irrelevant to his analysis.

- *Allen v. State*[29] (future dangerousness prediction based on nature of present offense, history of

27. *Id.* at 465.

28. Mr. Powell's death sentence was overturned by this Court in *Powell v. Texas*, 492 U.S. 680 (1989) after this Court found that neither Powell nor his attorney was notified that Powell would be examined by Dr. Coons on the issue of his future dangerousness to society, in violation of his Sixth Amendment Rights. He was tried again and Dr. Coons testified again at the retrial. Again he testified that Mr. Powell was a danger to society, and Mr. Powell was sentenced to death once more.

29. 2006 Tex. Crim. App. LEXIS 2545, at *17-19 (Tex. Crim. App. June 28, 2006).

violence, and un-interviewed defendant's lack of remorse).

- *Lagrone v. Cockrell*[30] (future dangerousness prediction based on State's hypothetical questions that copied defendant's circumstances as found in the case file).

- *United States v. Fields*[31] (future dangerousness prediction based on hypothetical, using facts that copied the defendant's circumstances, including the facts of the crime and defendant's background and criminal history).

- *Alba v. State*[32] (future dangerousness prediction based on thirteen-page hypothetical based on the facts of defendant's case).

- *Ramey v. State*[33] (future dangerousness prediction based on examination of statements, offense reports, pictures, and educational records).

- *Rivas v. Thaler*[34] (future dangerousness prediction based on defendant's history).

---

30. 2002 U.S. Dist. LEXIS 10877, at *62-63 (N.D. Tex. June 17, 2002).

31. 483 F.3d 313, 341 (5th Cir. 2007).

32. 905 S.W.2d 581, 588 (Tex. Crim. App. 1995).

33. 2009 Tex. Crim. App. Unpub. LEXIS 124, at *45 (Tex. Crim. App. Feb. 11, 2009).

34. 2010 U.S. Dist. LEXIS 30304, at *9 (N.D. Tex. Jan. 22, 2010).

- *Soria v. State*[35] (future dangerousness based on hypothetical tracking the facts of the case).

Time and again, without any real knowledge of the defendant, and no scientific data or peer-approved methodology, Dr. Coons has testified based largely on the violent nature of the alleged crime and his own gut instinct that the defendant will pose a future danger.[36]

### 3. Other experts purport to predict future dangerousness using gut instinct rather than reliable data with negative consequences for the accused and the State.

Dr. Coons is not the only psychiatrist in Texas utilizing unreliable methods in capital cases. Indeed, preceding Dr. Coons, Dr. James Grigson – who achieved notoriety as "Dr. Death" for his unambiguous guarantees of future dangerousness – was expelled from the American Psychiatric Association (APA) because he consistently testified as to a defendant's future dangerousness based on categorical predictions without examining the defendant.[37] By 1991, Grigson claimed to have testified

35. 933 S.W.2d 46, 50 (Tex. Crim. App. 1996).

36. *See also Espada v. State*, 2008 Tex. Crim. App. Unpub. LEXIS 806 (Tex. Crim. App. Nov. 5, 2008) (future dangerousness prediction based on defendant's history, personality, physical abilities, and lack of remorse).

37. Bruce Vincent, "Dr. Death:" *The Once Ubiquitous James Grigson Now Finds Little Demand for his Testimony in Texas Capital Murder Sentencings*, Tex. Lawyer, Dec. 4, 1995, at 4.

for the prosecution in 136 capital cases in Texas.[38] One Texas judge noted:

> It seems to me that when Dr. Grigson testifies at the punishment stage of a capital murder trial he appears to the average lay juror, and the uninformed juror, to be the second coming of the Almighty.…When Dr. Grigson speaks to a lay jury…the defendant should stop what he is then doing and commence writing out his last will and testament – because he will in all probability soon be ordered by the trial judge to suffer a premature death.[39]

Notwithstanding the APA's censure of Dr. Grigson's predictions, Dr. Coons, along with many other experts testifying on behalf of the State, continue to make consistent predictions of future dangerousness without concrete data to support their instincts. These "experts" include psychiatrists Dr. John Holbrook, Dr. Edward Gripon, Dr. Clay Griffith,[40] and psychologist Dr. Walter Quijano.

---

38. *Clark v. State*, 881 S.W.2d 682, 695 (Tex. Crim. App. 1994).

39. *Bennett v. State,* 766 S.W.2d 227, 232 (Tex. Crim. App. 1989) (Teague, J., dissenting).

40. Dr. Griffith has examined over 8,000 people charged with criminal offenses and has testified in 100 to 150 capital murder trials in Texas and other states. *Flores*, 210 F.3d at 462 (Garza, J., specially concurring).

In response to the question regarding future dangerousness, a search of cases in which there are published opinions reveals that Dr. Griffith has testified "yes" on 22 occasions and "no" on zero occasions.[41] Judge Emilio Garza of the Fifth Circuit has described Dr. Griffith's opinions as "simply subjective testimony without any scientific validity by one who holds a medical degree."[42] Dr. Quijano utilized a number of unreliable factors to determine future dangerousness, including testifying that minority races, notably Hispanics, are more likely to engage in crime,[43] and noting that poor people are more "risky than non-poor people."[44]

None of these so-called experts use reliable peer-approved scientific methods to support their conclusions. Yet, this type of testimony is used over and over by the prosecution to push for the death penalty.

---

41. *Id.* at 462 n.7.

42. *Id.* at 458.

43. *Saldano v. State*, 70 S.W.3d 873, 884-85 (Tex. Crim. App. 2002).

44. Texas Defender Service, *Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness*, at 33 (2004) (citing Testimony of Dr. Walter Quijano, Statement of Facts, Vol. 70 at 855, *Garcia v. State*, 919 S.W.2d 370 (Tex. Crim. App. 1994)).

## B. Although Dr. Coons's "methodology" is unreliable, there are scientific methods that offer reliable means of predicting future dangerousness.

### 1. Studies show clinical judgment predictions of future dangerousness of the kind utilized by Dr. Coons are not accurate.

Studies have shown that predictions that a defendant will be dangerous in the future based on ad hoc, substantive clinical judgment analyses such as those used by Dr. Coons are highly inaccurate.[45] For example, one study states that predictions of future dangerousness made by these state-paid witnesses have not been proven to be true in ***95% of the cases***.[46]

In some instances, it has been later proven that the defendant was actually innocent of the crime alleged.[47] In one case, after only a brief interview with the Defendant, Dr. Grigson testified:

---

45. The dissent in *Barefoot* notes that the majority of the Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. *Barefoot*, 463 U.S. at 916 (Blackmun, J., dissenting).

46. *Deadly Speculation*, *supra* note 44, at 23.

47. *Id.* at 24-27. Coons, for example, testified that Michael Blair would be a future danger. Blair was later exonerated by DNA evidence. *See* 24 RR 244-45; *see also* Death Penalty Information Center, *Texas DNA Exoneration of Death Row Inmate Michael Blair Brings Innocence Total to 130*, *available at* http://www.deathpenaltyinfo.org/texas-dna-exoneration-death-row-inmate-michael-blair-brings-innocence-total-130.

> I would place Mr. Adams at the very extreme, worst or severe end of the scale. You can't get beyond that.…There is nothing in the world today that is going to change this man....[48]

Adams was later freed after the real killer confessed to the crime. Adams spent more than twelve years in prison before being exonerated.[49] In yet another case, Kerry Max Cook spent twenty years on death row before being freed after DNA evidence implicated someone else.[50] Mr. Cook has committed no violent acts since his exoneration.[51]

In these cases, even actual innocence did not prevent the state's "experts" from testifying to the jury that the defendants would be a future danger to society.

### 2. More accurate and reliable scientific methods for measuring future dangerousness exist.

Research conducted during the 1980s initially failed to find reliable ways to predict a criminal defendant's future dangerousness.[52] More recently, however,

---

48. *Id.* at 24-25 (citing Statement of Facts at 1410, *Adams v. State*, 577 S.W.2d 717 (Tex. Crim. App. 1979)).

49. *Id.* at 25.

50. *Id.* at 25; *see also* Northwestern University School of Law Center on Wrongful Convictions, *Kerry Max Cook*, *available at* http://www.law.northwestern.edu/wrongfulconvictions/exonerations/txCookSummary.html; *Cook v. State*, 821 S.W.2d 600, 602 (Tex. Crim. App. 1991).

51. *Deadly Speculation*, *supra* note 44, at 26.

52. *See, e.g.,* John Monahan, U.S. Dep't of Health & Hum.

application of rigorous scientific methods has yielded more accurate results. There is now a substantial amount of scientific analysis regarding the ability of mental health professionals to predict the likelihood that a specific individual will commit future acts of violence.

Some of the verifiable methods being used to predict future violence include actuarial methods (identifying predictor variables and assigning a risk factor to the existence of such variables) and personality inventories (focusing on a list of personality variables in classifying a defendant's potential future conduct).[53] Recent studies support actuarial methods as one of the most, but not the only, accurate predictors of violence and certainly superior to individual judgment alone.[54]

---

Servs., *The Clinical Prediction of Violent Behavior* 47-49 (1981) (finding an approximately 66% error rate in predictions of future dangerousness by mental health professionals); *see also* Mark D. Cunningham, *Dangerousness and Death: A Nexus in Search of Science and Reason*, Am. Psychologist 831 (November 2006) ("[T]he field was still in its infancy in 1981 when *Estelle v. Smith* was decided and in 1983 when *Barefoot v. Estelle* was handed down. Neither the critical importance of base rate data (*i.e.*, the frequency of violence in a given population in a particular context) nor the limitations of personality-based inferences had been well articulated.").

53. *See generally* John F. Edens, et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?,"* 29 L. Hum. Behav. 55, 65-76 (Feb. 2005) (analyzing and testing numerous methodologies and making recommendations).

54. *See* Jonathan R. Sorensen and Rocky L. Pilgrim, *An Actuarial Assessment of Violence Posed by Capital Murder Defendants*, 90 J. Crim. L. & Criminology 1251, 1257 (2000)

These more reliable, scientifically supported, and peer-tested methodologies for predicting future dangerousness have shown several things about clinical judgments. First, predictions of future dangerousness not based on a scientific methodology are inherently unreliable.[55] Clinical assessments are routinely criticized for ignoring the relatively low base rate of violent behavior in the relevant population subgroup, employing stereotypes and prejudices to reach predictions, and lack of error rates.[56]

Second, the likelihood of a criminal defendant committing murder once imprisoned is extremely remote – only about .2%.[57] Clinical predictions of future violence uniformly fail to take into account this low base rate of future violent behavior for permanently incarcerated individuals.[58]

---

(citation omitted); *see also* Daniel A. Krauss and Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 Psych. Pub. Pol. & L. 267, 279, 281 (June 2001); Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 Wash. & Lee L. Rev. 353, 363 (Spring 2003).

55. *See* Edens, *Predictions of Future Dangerousness, supra* note 53, at 64.

56. *See* Beecher-Monas, *The Epistemology of Prediction, supra* note 54, at 362-63.

57. *See, e.g.,* Sorensen, *An Actuarial Assessment of Violence*, *supra* note 54, at 1256 (in study of Texas inmates convicted of murder, assessing overall likelihood of inmate-on-inmate homicide of only .2%); *see also* Edens, *Predictions of Future Dangerousness*, *supra* note 53, at 59.

58. *See* Beecher-Monas, *The Epistemology of Prediction*, *supra* note 54, at 362 ("Ignoring base rates is a particular problem

Third, several studies have analyzed violence by inmates convicted of capital murder, both on and off death row.[59] Specifically, the actuarial studies were tested by comparing the predictions to reports of actual violence within the prison population and more specifically within the population of convicted murderers.[60] Significantly, such studies reflect that rates of violence by former death-row inmates who were spared execution by commutation, retrial, or plea (but who remain incarcerated) are consistently low.[61]

Fourth, studies have shown that the severity of the immediate crime and a past history of violence – primary factors considered by Dr. Coons and others like him – are not reliable predictors of prison-based violence.[62] The prosecution's mental health professionals are criticized for viewing "an individual's past or present violent acts as stable character traits and not as environmentally caused

---

in predicting violence when the base rate of violent behavior is low overall and varies among different population subgroups.").

59. *See, e.g.,* Edens, *Predictions of Future Dangerousness, supra* note 53, at 59, 64 (summarizing multiple studies).

60. *See* Sorensen, *An Actuarial Assessment of Violence*, *supra* note 54, at 1261-62.

61. *See* Edens, *Predictions of Future Dangerousness, supra* note 53, at 61-64.

62. *See, e.g.,* Krauss, *The Effects of Clinical and Scientific Expert Testimony*, *supra* note 54, at 279; *see also* Mark D. Cunningham, *Dangerousness and Death*, *supra* note 52, at 832 ("The reliability of a past pattern…approach , however, rests on two critically important elements: sufficient behavior to form a pattern and similarity to the context of prediction.").

events, leading them to incorrectly predict future acts of violence on the basis of violent disposition."[63] These witnesses for the State also tend to base predictions of future violence on stereotypes that ignore base rates of violence – "calculations of how common violent behavior is within a specific population" – which causes them to grossly overestimate "the likelihood that a specific individual will commit future violent acts."[64] As the literature consistently shows, the State's purported experts like Dr. Coons place undue emphasis on the crime itself – an act that is necessarily heinous – and consistently "ignore evidence that disconfirms their initial opinion."[65]

More reliable methodologies for determining future dangerousness, only a few of which are discussed above, now exist. Such methodologies not only provide reliability in predictions, but they also emphasize the lack of reliability in the type of clinical testimony proffered by Dr. Coons.

### 3. Texas's prediction of future dangerousness standard is an anomaly.

Texas is one of only two death penalty states that allows highly speculative evidence of future dangerousness to play a critical role in life and death decisions made by juries.[66]

---

63. *Id.*

64. *Id.* at 280.

65. *Id.*

66. *Deadly Speculation*, *supra* note 44, at xv. Seven other states allow juries to consider future dangerousness in a limited

Additionally, while predicting danger from specific individuals is clearly a commonplace practice, for example in the context of civil commitments, these short-term predictions, repeatedly reviewed on their merits, are very different from the one-time, un-reconsidered prediction that takes place in a capital case. In Sexually Violent Predator commitments, for example, the commitment continues only "until the person's behavior abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence"[67] and is reviewed every two years.[68] Texas has established safeguards in these non-capital cases to ensure that evaluations of an individual's propensity for future violence are accurate. If these safeguards are employed in non-capital cases, similar or more strenuous safeguards should be used where a life is at stake.[69]

### C. Expert testimony on future dangerousness should be weighed against tested, peer-reviewed methodologies and should not be allowed unless proved reliable under at least the *Daubert* standard; admission of unreliable testimony cannot be harmless in capital murder cases.

Texas defendants in capital cases are currently held hostage by a misinterpretation of this Court's prior holdings. The CCA in *Coble* cited this Court's opinion in *Barefoot v. Estelle*, claiming that it prohibits excluding

---

way. The remaining 29 death penalty states do not allow future dangerousness evidence at all. *Id.*

67. Tex. Health & Safety Code § 841.081.

68. *Id.* at § 841.102(1).

69. *See Barefoot*, 463 U.S. at 913-14 (Marshall, J., dissenting).

any expert testimony regarding future dangerousness no matter how unreliable.[70] That is simply not accurate. *Barefoot* holds only that psychiatric testimony is not *per se* unconstitutional,[71] and that the Court was, "*at least as of now*," unconvinced that the jury could not distinguish the reliable from the unreliable itself.[72] However, ten years later this Court became "convinced" and ruled that a trial judge must ensure that all scientific testimony is reliable.[73] Numerous states, including Texas, have established a similar *Daubert* "gate-keeping" role for the trial court.[74]

As a result, the admission of unreliable, unscientifically verifiable so-called "expert" testimony is routinely found to be prejudicial and harmful error under the rules of evidence.[75] Such unreliable junk science predicting future

---

70. *See Coble*, 330 S.W.3d at 270 (citing *Barefoot v. Estelle*, 463 U.S. 880 (1983)).

71. *Barefoot*, 463 U.S. at 899 n.6.

72. *Id.* at 901 (emphasis added).

73. *Daubert,* 509 U.S. at 589.

74. *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

75. *See, e.g., Weisgram v. Marley Co.*, 169 F.3d 514, 518 (8th Cir. 1999) *aff'd,* 528 U.S. 440 (2000) (district court erred in admitting unreliable expert testimony; error was not harmless as it had "substantial influence on the jury's verdict"); *Sexton v. State*, 93 S.W.3d 96, 101 (Tex. Crim. App. 2002) (state failed to produce evidence that a "toolmark" examination technique used to match bullets to the weapon that fired them was reliable); *Hernandez v. State*, 55 S.W.3d 701, 705-06 (Tex. App.—Corpus Christi 2001), *aff'd*, 116 S.W.3d 26 (Tex. Crim. App. 2003) (trial court's judgment reversed because the State failed to establish that expert's testimony regarding urinalysis test satisfied *Kelly* factors).

dangerousness in capital murder cases – a situation affecting not only rules of evidence but also a defendant's right against cruel and unusual punishment under the Eighth Amendment – should be afforded at least the same, if not a heightened, level of scrutiny. The need for heightened reliability in capital sentencing should require that expert testimony on future dangerousness meet the minimum standards set forth in *Daubert*. The CCA's dismissal of Dr. Coons's erroneous and unreliable predictions of future dangerousness as harmless without regard to the standards established in *Daubert* violates the Constitution and requires review by this Court.

**1. The *Daubert* standard.**

In *Daubert*, this Court identified five non-exclusive factors to assist the trial court in determining whether an expert's testimony is reliable. Those factors are: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been submitted to peer review and publication; (3) the error rate of its application; (4) the existence of standards controlling the operation of the technique; and (5) the general level of acceptance of the technique within the relevant scientific community.[76] If the trial judge, when examining these factors, determines that the method or technique being used by the expert is unreliable, the expert testimony should not be admitted.[77]

---

76. *Daubert*, 509 U.S at 593-94.

77. *Id.* at 589. Texas has adopted a similar factor test for expert testimony in criminal cases. *See Kelly*, 824 S.W.2d at 573. The CCA has also declared that "soft" sciences could be held to less rigorous standards. *Nenno v. State*, 970 S.W.2d 549, 561 (Tex.

Indeed, in numerous contexts, from criminal to civil, courts routinely find admission of unreliable, unverifiable so-called expert testimony harmful and reverse and remand.[78] There is no basis to employ a lesser standard in capital murder cases. Indeed, the Constitution mandates a heightened standard.

### 2. Unreliable expert testimony does not survive constitutional scrutiny.

In finding the erroneous admission of Dr. Coons's testimony harmless, the CCA found that "the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons's methodology for predicting future dangerousness,"[79] but rejected Coble's argument that such unreliable testimony failed to meet the heightened reliability requirement of the Eighth Amendment because "the United States Supreme Court, in *Barefoot v. Estelle*, rejected this argument."[80] In reaching this conclusion, the Texas court applied a lesser standard of scrutiny in the context of a capital murder case – a case that necessarily implicates the Eighth Amendment – than applies in ordinary, everyday civil actions. This Court's precedent does not support such a result.

---

Crim. App. 1998). Nonetheless, in such cases, the court must still determine that (1) the field of expertise is a legitimate one; (2) the subject matter of the expert's testimony is within the scope of that field; and (3) the expert's testimony properly relies upon and/or utilizes the principles involved in the field. *Id.*

78. *See supra* note 75.

79. *Id.* at 279.

80. *Id.* at 270.

Indeed, in *Barefoot*, this Court held only that psychiatric testimony predicting a criminal defendant's future dangerousness is not *per se* unconstitutional.[81] It did not hold that psychiatrists and other mental health professionals are free to make random, biased, unreliable, and unverifiable predictions of future dangerousness based on nothing more than gut instinct. In fact, the Court acknowledged the existence of studies indicating that predictions of future dangerousness were often inaccurate and unreliable.[82] This Court's subsequent holdings in *Daubert* and its progeny dictate that such testimony violates the rules of evidence and thus should not be admitted.[83]

Since this Court's decision in *Barefoot*, judges and scholars have recognized that juries give expert testimony much more weight than they do lay testimony.[84] Studies have shown that the title "Doctor" strongly sways

---

81. *Barefoot*, 463 U.S. at 899 n.6.

82. *Id.* at 901 n.7.

83. *See supra* note 75.

84. *See Daubert*, 509 U.S. at 595 (quoting J. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)) ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it"). In fact, jurors may erroneously assume that such gatekeeping has occurred regarding the scientific findings presented to them, and, therefore, accord the associated expert testimony undeserved credibility. Mark D. Cunningham, et al., *Capital Jury Decision-Making, The Limitations of Predictions of Future Violence*, Psychol., Pub. Policy, & L. 230 (2009) (citations omitted).

jurors' opinions.[85] The CCA notes that lay persons "show an inordinate amount of deference to members of the medical profession."[86] This Court recognized the undue prejudice assigned to the erroneous testimony of a so-called "expert" in *Daubert*.[87] And cases since *Daubert* have consistently found the admission of such testimony as reversible error.[88]

At a minimum, Dr. Coons's testimony would be reversible error under the *Daubert* standard. But here, there is a more important, constitutional consideration that should tip the balance in favor of finding reversible error in the face of such unreliable so-called expert testimony, even if such testimony would be allowed in other circumstances. Here, Mr. Coble is being tried for capital murder, subject to the death penalty. He enjoys a constitutional right against cruel and unusual punishment under the Eighth Amendment.

Specifically, the Eighth Amendment provides a "need for reliability in the determination that death is the appropriate punishment in a specific case."[89] This Court has held repeatedly that the Eighth Amendment affords a criminal defendant a "correspondingly greater degree

---

85. *Deadly Speculation*, *supra* note 44, at 12 (citing Stanley Milgram, *Obedience to Authority: An Experimental View* (1983).

86. *Sanne v. State*, 609 S.W.2d 762, 778 (Tex. Crim. App. 1980) (Phillips, J., dissenting).

87. 509 U.S. 579, 589 (1993).

88. *See supra* note 75.

89. *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976).

of scrutiny of the capital sentencing determination."[90] Evidence that undermines "the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death" is not admissible.[91] Applying this reasoning, this Court has found reversible error in *Gardner v. Florida* when the trial court based a death sentence on a presentence investigation report that was not disclosed to the defendant,[92] and in *Caldwell v. Mississippi*, when the prosecution erroneously told the jury that that the appropriateness of the death sentence rested not with them but with the appellate court that would later review the case.[93] There is no basis to hold erroneous expert testimony in a capital murder trial to a lesser standard. On the contrary, for the reasons articulated in *Gardner* and *Caldwell*, it violates the Eighth Amendment to do so.

---

90. *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985); *see also Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) ("[This] Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake").

91. *Deck v. Missouri*, 544 U.S. 622, 633 (2005).

92. 430 U.S. 349 (1977).

93. 472 U.S 320 (1985).

## CONCLUSION

The Texas court erred in finding the admission of Dr. Coons's erroneous and prejudicial testimony to be harmless without regard to the standards established in *Daubert* or the Texas equivalent. This error undermines the integrity of the testimony of mental health professionals and creates confusion as to the standards necessary to establish a probability of future dangerousness in Texas death penalty cases. Admission of such testimony without regard to the heightened scrutiny afforded capital murder defendants under the Eighth Amendment of the Constitution requires review by this Court. Accordingly, *Amici* urge this Court to grant Mr. Coble's petition for writ of certiorari.

Respectfully submitted,

Debra J. McComas,
*Counsel of Record*
Jennifer Butler Wells
Haynes and Boone, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
(214) 651-5000
Debbie.McComas@
haynesboone.com

*Attorneys for Amici Curiae Capacity for Justice, Disability Rights Texas, Texas Appleseed, and The National Alliance on Mental Illness of Texas*

May 18, 2011