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 COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR EVIDENCE AND CRIMINAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are scholars who teach and write about criminal law, criminal procedure, and evidence.[1] We file this brief to address the relationship between rules of admissibility for psychiatric testimony and Eighth Amendment standards for procedure in capital trials. The decision by the Texas Court of Criminal Appeals paid little attention to this relationship, but in so doing it ignored much of this Court's important capital punishment jurisprudence. *Amici* write to emphasize that the Eighth Amendment's emphasis on reliability and accuracy in capital trials has ramifications for the admissibility of expert testimony.

Our scholarly interest in this issue arises from teaching and writing in a variety of related fields, including criminal law, criminal procedure, evidence, and constitutional law. Erica Beecher-Monas is a Professor of Law at Wayne State University Law School where she teaches Evidence. David Bruck is a Clinical Professor of Law at Washington and Lee University School of Law where he directs the Virginia Capital Case Clearinghouse, which provides training and litigation assistance to court-appointed Virginia attorneys representing capitally-charged

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

clients before and at trial. Deborah Denno is the Arthur A. McGivney Professor of Law at Fordham University School of Law where she teaches Criminal Law and advanced criminal law seminars. George E. Dix holds the George R. Killam, Jr. Chair of Criminal Law at the University of Texas School of Law where he teaches Criminal Law and Criminal Procedure. Paul C. Giannelli is the Albert J. Weatherhead III and Richard W. Weatherhead Professor of Law at the Case Western Reserve University School of Law where he teaches Evidence. Alexander A. Reinert is an Associate Professor of Law at the Benjamin N. Cardozo School of Law, where he teaches Criminal Law and Constitutional Law. Brian D. Shannon is the Charles Thornton Professor of Law at the Texas Tech University School of Law, where he teaches Criminal Law and Law and Psychiatry. Christopher Slobogin holds the Milton Underwood Chair in Law at Vanderbilt University Law School, where he is the Director of the Criminal Justice Program and teaches Criminal Law, Criminal Procedure, and Evidence.

SUMMARY OF ARGUMENT

In one conclusory and unelaborated sentence, the Texas Court of Criminal Appeals (CCA) below opined that the Constitution permits the State to introduce scientifically unreliable testimony from a psychiatric expert as to a defendant's future dangerousness at the sentencing phase of a capital trial. Pet. App. at 22a. Apparently reading this Court's opinion in *Barefoot v. Estelle*, 463 U.S. 880 (1983), as authorizing the admission of all expert

testimony without any threshold showing of minimal reliability, the CCA found that the Constitution imposes no limitations on the quality or validity of psychiatric expert testimony that can be presented to a jury deciding the critical question of whether a defendant lives or dies. Pet. App. at 22a. Because the CCA's decision is unsupported by *Barefoot*, in tension with developed jurisprudence regarding both capital punishment and expert witnesses, inconsistent with other constitutional principles, and could work serious mischief in capital proceedings, *amici curiae* respectfully urge this Court to grant the petition for writ of certiorari.

The import of the CCA's decision cannot be understated. Under the logic of the opinion, no constitutional principle prohibits the introduction of profoundly unreliable expert testimony at the sentencing phase. If otherwise permitted by local rules of evidence, for instance, a State could ask a jury to base its sentencing decision on the opinion of a psychic who testifies that his crystal ball revealed that the defendant will commit another crime in the future, or a palm reader who testifies that the defendant's life will end with violence to others. Just like the testimony at issue in this case, there would be no "objective source material" regarding these experts' methodologies, they would be "idiosyncratic," they would lack "empirical[] validat[ion]," and there would be no evidence that the methodologies used were accurate. Pet. App. 38a-44a.

These hypotheticals seem outlandish because they are, particularly given modern rules of evidence regarding the admissibility of expert testimony as shaped by cases such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But the critical question raised by this case is whether the Constitution itself imposes any requirement that expert evidence used to condemn a defendant to death meet minimum standards of scientific reliability. And reality is not that far removed from the outlandish hypotheticals raised above. Dr. Coons might be a licensed psychiatrist, but the CCA concluded that his testimony and methodology did not meet basic gatekeeping thresholds of scientific reliability. Dr. Coons uses a "personal methodology" to evaluate future dangerousness – a methodology which is not supported by any published literature or studies. Pet. App. at 24a-26a. The CCA found that this methodology is "idiosyncratic" and that Dr. Coons was not familiar with relevant empirical literature regarding evaluations of future dangerousness. Pet. App. at 38a-40a. Moreover, Dr. Coons had lost his interview notes from a 1990 interview with petitioner and performed no further assessment of petitioner even after he had been nonviolent for eighteen years while on death row. Pet. App. at 43a. Accordingly, the CCA found that the State failed to show that his testimony met minimum standards of scientific reliability. *Id.*

Despite finding that the trial court abused its discretion in admitting this evidence, the CCA affirmed petitioner's sentence of death after using a harmless error standard of review for non-

constitutional error. *Compare id.* at 45a n.73 *with Chapman v. California*, 386 U.S. 18, 22-24 (1967) (articulating harmless error standard for constitutional error). In other words, the CCA found that the Constitution poses no barrier to the introduction of unreliable scientific testimony at the penalty phase of a capital trial. If testimony like Dr. Coons' is viewed as constitutionally unobjectionable, however, it leaves open the door to other types of unreliable quackery. *See*, *e.g.*, *General Electric Co. v. Joiner*, 522 U.S. 136, 153 n.6 (1997) (Stevens, J., concurring) (using as an example of "junk science" a phrenologist who would testify that future dangerousness was linked to the shape of a defendant's skull). Indeed, some experts have offered opinions regarding future dangerousness based in part on the defendant's race. *See Saldano v. Cockrell*, 267 F. Supp. 2d 635, 642 (E.D. Tex. 2003), *aff'd in part and dismissed on other grounds sub. nom. Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004) (holding that reliance on defendant's race as part of future dangerousness evaluation violated the Equal Protection Clause). These examples make clear that the absence of constitutional safeguards regarding the admissibility of expert testimony in capital trials is an invitation to the arbitrary imposition of the death penalty.

For several reasons, *amici* urge the Court to grant certiorari and clarify that the Constitution imposes limitations on the introduction of expert testimony that are at least as protective as those imposed by *Daubert* and its progeny. First, as we elaborate below, this Court has always emphasized

the need for accuracy and reliability in the practices and procedures of capital trials. Permitting expert testimony to be heard by the jury at the sentencing phase without meeting minimum standards of reliability undermines these interests without vindicating any important State interest. Second, permitting unreliable expert testimony contradicts evolving standards regarding the admissibility of expert testimony in other federal and state proceedings, as reflected in current rules of evidence. Finally, nothing in *Barefoot* suggests that the Constitution provides *carte blanche* for the introduction of scientifically unreliable expert testimony at the penalty phase. At most, *Barefoot* can be read to permit States to introduce *some* testimony regarding future dangerousness. Indeed, *Barefoot* anticipated that constitutional limitations on admissibility could change as modern rules of evidence evolve.

ARGUMENT

I. Fundamental Principles of Capital Punishment Jurisprudence Establish the Critical Importance of Reliability at the Punishment Phase

While permitted by the Constitution, this Court has consistently recognized that death is a sentence which differs from all other penalties in kind rather than degree. *See Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to

decency and restraint."); *Satterwhite v. Texas*, 486 U.S. 249, 262, (1988) (capital punishment is "qualitatively different from all other sanctions."); *Accord Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (opinion of Stewart, J.). Accordingly, while the Eighth Amendment allows the death penalty as an appropriate response to especially egregious crimes, it also strictly regulates the procedures by which death sentences are imposed and reviewed. The penalty phase in capital trials has been treated with particular care by this Court. *Monge v. California*, 524 U.S. 721, 731-32 (1998). The decisions in the penalty phase must "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

Reliability is of paramount importance to avoiding the arbitrariness that would violate the Eighth Amendment. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *accord Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). Sentencing procedures for capital crimes must be created and enforced in a way that ensures "that the punishment will [not] be inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 189 (opinion of Stewart, J.).

To ensure that death sentences are reliable and free from arbitrariness, this Court has required procedures calibrated to narrow the category of offenders subjected to capital punishment. First the

State must "provide a meaningful basis for distinguishing the few cases in which the [death] penalty is imposed from the many cases in which it is not." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (citations and internal quotation marks omitted); *see also Kennedy*, 554 U.S. at 420; *Kansas v. Marsh*, 548 U.S. 163, 174-80 (2006) (reviewing Kansas' capital sentencing system). Second, the State must permit defendants to present any available evidence which might convince a jury that the defendant, no matter how severe his offense or reprehensible his past, should not be put to death. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 304 (1987); *cf. Penry v. Lynaugh*, 492 U.S. 302, 322-26 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002) (finding that instructions prevented jury from giving effect to defendant's mitigating evidence). At base, capital sentencing procedures must ensure that jurors consider every offender as an individual. *See Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007) (jury must decide whether "death is an appropriate punishment for that individual in light of his personal history and characteristics."); *Accord Penry*, 492 U.S. 302 at 317; *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Lockett*, 438 U.S. at 605.

Each of these procedural requirements for the penalty phase is informed by the overlapping and substantial interest of both the defendant and the State in ensuring that capital trials are accurate and reliable. S*ee United States v. Scheffer*, 523 U.S. 303,

309 (1998) (State and Federal Governments "unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial"); *Ake v. Oklahoma*, 470 U.S. 68, 78-79 (1985) (both the State and the defendant have an "almost uniquely compelling" interest in the accuracy of criminal proceedings); *Flores v. Johnson*, 210 F.3d 456, 469-70 (5th Cir. 2000) (E. Garza, J., concurring specially) ("[W]hat separates the executioner from the murderer is the legal process by which the state ascertains and condemns those guilty of heinous crimes.").

Related to the need that penalty phase procedures ensure accurate and reliable deliberations, these procedures must also be consistent with "evolving standards of decency." *See Kennedy*, 554 U.S. at 419-20; *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion). Although this standard is well-accepted as a substantive limit on the power of the state to punish, *see, e.g., Roper v. Simmons*, 543 U.S. 551, 560-61 (2005), *Atkins*, 536 U.S. at 311-12, it has functioned as a procedural limitation on capital sentencing procedures as well. *See Gardner*, 430 U.S. at 357 (opinion of Stevens, J.); *see also Gregg*, 428 U.S. at 171-173 (opinion of Stewart, J.); *Woodson v. North Carolina*, 428 U.S. 280, 289-93 (1976) (plurality op.) (reviewing history of mandatory death penalty statutes to determine whether mandatory capital punishment was consistent with the Eighth Amendment).

This Court's treatment of the appropriate role for victim impact statements reflects how evolving

evidentiary standards can play a role in the constitutionality of particular sentences of death. *See Booth v. Maryland*, 482 U.S. 496, 502 (1987), *overruled on other grounds*, *Payne v. Tennessee*, 501 U.S. 808 (1991). In *Booth*, this Court found that the introduction of victim impact statements in capital trials violated the Eighth Amendment. 482 U.S. 496 (1987). Although the Court in *Payne* later overruled a portion of *Booth*, at least one kind of victim impact statement found inadmissible in *Booth* continues to be barred after *Payne*: family members' opinions about the defendant, the crime, and the appropriate sentence. *Payne*, 501 U.S. at 830 n.2; *id.* at 835 n.1 (Souter, J., concurring). In explaining the shift from *Booth* to *Payne*, Justice O'Connor, joined by Justices White and Kennedy, suggested that in some cases, "strong societal consensus" will emerge that bar the introduction of particular kinds of evidence at capital trials. 501 U.S. at 808 (finding there was no such consensus with regard to victim impact statements).

Evolving standards of decency, accuracy, and reliability thus all play a role in determining the constitutional procedural standards that govern the penalty phase of a capital trial. In this framework, *amici* recognize that evidentiary rules that themselves improve accuracy or reliability are unobjectionable. *See*, *e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (States have power "to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability"). This is simply consistent with the well-established principle that a State's evidentiary rules should meet important State interests, particularly

when intruding on a "significant interest of the accused." *See Scheffer*, 523 U.S. at 309 (holding that defendant's right to present relevant evidence was not undermined by rule precluding admissibility of polygraph test). In contrast, when state evidentiary rules fail to serve the interests of fairness and reliability, those rules are suspect. For example, this Court in *Scheffer*, 523 U.S. at 316-17, contrasted the admissibility of polygraph tests with rules that had been struck down in *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Washington v. Texas*, 388 U.S. 14 (1967). What differed in those cases was a combination of an intrusion on the right of a defendant and a lack of legitimate interests for the State in maintaining the rule. Thus, in *Rock*, the Court held that a state rule barring the introduction of testimony that had been "hypnotically refreshed" violated a defendant's right to testify in her own defense. 483 U.S. at 56-57. And in *Washington*, the Court reversed on Sixth Amendment grounds a conviction where the State of Texas "could advance no legitimate interests in support" of the rule of evidence which prohibited codefendants or accomplices from testifying for one another. 388 U.S. at 22-23.

In short, rules that are unconstitutionally arbitrary are those that permit the introduction of unreliable evidence or exclude important evidence offered by the defense without serving any legitimate interest. *See Holmes v. South Carolina*, 547 U.S. 319, 325 (2006). Local rules of evidence which intrude on a constitutional right also are prohibited. *Burgett v. Texas*, 389 U.S. 109, 114-15

(1967) (holding that evidentiary presumption was unconstitutional because it intruded on right to counsel). As discussed below, permitting the introduction of unreliable expert testimony at the penalty phase of a capital trial serves no legitimate interests and undermines constitutionally significant interests in reliability and accuracy.

II. The Admission of Unreliable Expert Testimony Regarding Future Dangerousness Violates the Eighth Amendment

The admission of unreliable expert testimony threatens essential aspects of a constitutional death penalty regime. It undermines accuracy and reliability because it contributes to arbitrary verdicts of death. It is inconsistent with evolving standards of decency because, since *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), there has been an increasing trend towards subjecting expert testimony to threshold reliability determinations prior to its admission before a jury. See David E. Bernstein & Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351, 355-56 (2004).

The need for reliability and accuracy in expert testimony is profound when the subject of the testimony is future dangerousness in a capital case. A jury's assessment of future dangerousness can be affected by many arbitrary factors, highlighting the need to pay special attention to the evidence that is put before the jury regarding this aggravating factor. *See Deck v. Missouri*, 544 U.S. 622, 632-33 (2005)

(holding that shackling defendant during penalty phase violates due process because of "acute need" for reliability and possibility that an offender who appears shackled at the penalty phase "almost inevitably" would be taken by the jury to present a future danger); *Riggins v. Nevada*, 504 U.S. 127, 143-44 (1992) (Kennedy, J., concurring in the judgment) (finding that forcible administration of antipsychotic medication to capital defendant at penalty phase violated rights to due process in part because of effect of defendant's appearance on jury's assessment of future dangerousness). The Court's concern about the accuracy of juries' assessments of future dangerousness has even influenced its decisions about the substantive protections of the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (expressing concern about subjecting persons with mental retardation to the death penalty because, retardation could be a mitigating factor but also "enhance[s] the likelihood that the aggravating factor of future dangerousness will be found by the jury").

The critical role of expert witnesses in establishing future dangerousness is also well understood by this Court. Psychiatric testimony on future dangerousness is compelling because of the qualifications of psychiatrists, the "powerful content" of their testimony, and the "significant weight" that the prosecution may place on the witness's testimony. *See Satterwhite*, 486 U.S. at 259-60 (holding that testimony may not be introduced from expert who interviewed defendant in violation of Sixth Amendment right to counsel). Moreover,

indigent defendants are entitled to the assistance of the State in securing expert testimony when the defendant's mental state is "seriously in question" because psychiatric testimony plays a "pivotal role" in criminal proceedings. *See Ake*, 470 U.S. at 79-80. The role of a psychiatrist is particularly important because of the difficulty lay jurors have in rationally and accurately evaluating a defendant's mental condition. *Id.* at 80-81 (providing psychatiric experts to defendants will "enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* at 81. It defies logic and intuition for the Constitution to require, for the sake of accuracy, that a defendant have reasonable access to expert psychiatric assistance while simultaneously permitting the State to introduce unreliable testimony by a psychiatrist as in this case.

Highlighting the need to carefully police the quality of evidence that is presented to a jury regarding future dangerousness is the likelihood that a jurors' assessment of future danger will be biased towards the State's evidence. Jurors, asked to determine whether an individual who committed at least one murder will act violently again, are understandably likely to defer to an "expert" determination which will eliminate the consequences of an incorrect determination, even if its reliability is questioned by another "expert." *See* Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L. J. 275, 312-15 (2006) (summarizing data); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the*

Impulse to Condemn to Death, 49 STAN. L. REV. 1447, 1469-70 & n.113 (1997).

It does not help that expert opinions regarding future danger are notoriously inaccurate. Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post-*Daubert *World*, 24 CARDOZO L. REV. 1845, 1845-46 (2003); Slobogin, *supra*, 56 Emory L. J. at 290-93 (discussing difficulty in evaluating validity of expert testimony on future dangerousness). In part this is because psychiatrists and psychologists have less information than they realize and because they are just as likely as lay people to come to conclusions based on stereotype and bias. Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 362-363 (2003).

Thus, although States are permitted to take future danger into account in dispensing the death penalty, *Jurek v. Texas*, 428 U.S. 262, 274-276 (1976), the complexity of such determinations necessitates ample procedural protections be provided to a defendant.[2] At a minimum, this Court's consistent focus on reliability at the penalty stage leaves little doubt that the admission of unreliable expert testimony regarding future dangerousness at the penalty phase undermines

[2] In *Jurek*, the Supreme Court had no occasion to decide what procedures are necessary to ensure that juries have the proper information presented to resolve the future dangerousness inquiry, because it found that Texas supplied all of the necessary procedures at the time. 428 U.S. at 276.

both the defendant's and the State's interest in avoiding arbitrariness in capital punishment.

The need for reliability and the importance of expert testimony regarding future dangerousness on their own would be enough to conclude that the Eighth Amendment prohibits the introduction of unreliable expert testimony regarding future dangerousness at the penalty phase. In addition, however, current evidentiary standards extant in the federal system as well as the several States make such a conclusion inescapable.

This Court has traditionally looked to the actions of state and Federal legislatures as the best indication of evolving standards of decency. *See Roper*, 543 U.S. at 564-66, *Atkins*, 563 U.S. at 314-15. Since the announcement of *Barefoot*, there has been a significant development in the area of expert testimony and its admissibility: *Daubert* and its progeny. Simply put, after *Daubert*, it is no longer the case that in federal court issues of reliability are placed in the hands of the jury. Rather, *Daubert* squarely places reliability determinations as a threshold matter in the hands of the trial court. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (referring to "gatekeeping obligation" created by *Daubert*); *Daubert*, 509 U.S. at 597 (referring to "gatekeeping role" of judge).[3]

[3] Even though the Federal Rules of Evidence do not apply in State sentencing proceedings, as one judge on the Fifth Circuit has observed, reliability is essential both to the Federal Rules and capital jurisprudence, something that "cannot be

Daubert interpreted Federal Rule of Evidence 702, which does not on its face govern the penalty phase of state cases such as this one.[4] *See Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (states may adopt their own rules of evidence "so long as they do not violate the Federal Constitution"). But the logic of *Daubert* is based on what is fundamental and essential to preventing the arbitrary imposition of capital punishment: reliability. As *Daubert* reasoned, an expert's opinion must be reliable, because unlike lay witnesses, experts are "permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert*, 509 U.S. at 592. As one moves farther away from the requirement of first-hand knowledge, a sufficient indicia of reliability at common law, expert testimony must find its reliability elsewhere. *Id.* Thus, expert testimony must be based on "scientifically valid" methodologies and reasoning. *Id.* at 593-94 (describing five factors that guide reliability determinations). Where legal disputes are of "great consequence," as in capital cases, the need for gatekeeping is even more pressing. *Id.* at 597; *see also Kumho Tire Co.,* 526 U.S. at 152 (1999) (*Daubert*'s objective is to secure reliable and relevant testimony).

Daubert's admissibility requirements regarding expert testimony have been adopted by

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mere coincidence." *Flores*, 210 F.3d at 464 (E. Garza, J., concurring specially).

[4] Texas is one of the many states that has applied *Daubert* to state rules of evidence. *See* Pet. App. at 27a-30a.

numerous state courts since the announcement of *Barefoot*. *See* Bernstein & Jackson, *supra*, 44 JURIMETRICS J. at 355-56 (observing that by mid-2003, roughly twenty-seven states had adopted a test consistent with *Daubert*). Taken together, at least thirty-three states have adopted *Daubert* or some other reliability-based admissibility test for expert scientific testimony. *See* Paul C. Giannelli and E. J. Imwinkelried, SCIENTIFIC EVIDENCE (4th ed., 2007) §§ 1.14-1.15 (listing twenty eight states that have adopted *Daubert*, and five states that have adopted a variant of a reliability-based test). Along with the reliability-based reasons discussed above for preserving some gatekeeping role for judges prior to the admission of expert testimony, this trend is sufficient to show an evolving standard in favor of such evidentiary standards. In *Roper*, for instance this Court found sufficient evidence of a consensus against execution of juvenile offenders based on the absolute number of states that prohibited such executions – 30 including the 12 that had abandoned the death penalty altogether – and the "trend" in prohibiting such execution – the five states that over fifteen years had moved from permitting such executions to prohibiting them. *See Roper*, 543 U.S. at 565-67; *see also Atkins*, 536 U.S. at 313-15.

Moreover, there is no articulable State interest in introducing unreliable expert testimony. *See Scheffer*, 523 U.S. at 316-17. Indeed, the fact that so many states already prohibit such unreliable expert testimony suggests both the lack of legitimate interest and the lack of burden imposed by making clear the constitutional standards for admissibility

at the penalty phase. *Cf. Ake*, 470 U.S. at 79-80 (holding that indigent defendants are entitled to assistance from State in securing expert psychiatric testimony in part because more than 40 states already provided such assistance). If unreliable expert testimony is considered to be of no value to civil juries in damages cases, it should not be permitted when a jury is considering the possibility of a death sentence in a capital case.

III. *Barefoot* Does Not Compel The Result Reached By The Texas Court of Criminal Appeals

Contrary to the CCA's holding, nothing in *Barefoot* undermines the constitutional requirement that expert testimony on future dangerousness be reliable. A close examination of the decision lays bare the failings of the lower court's analysis. The central issue presented in *Barefoot* was whether psychiatrists can *ever* testify competently about future dangerousness, not whether a particular expert's testimony was constitutionally unreliable. 463 U.S. at 884-85 (summarizing petitioner's arguments on appeal as concerning whether the predictions of psychiatrists "are so likely to produce erroneous sentences that their use violated the Eighth and Fourteenth Amendments"); *id.* at 896 ("First, it is urged that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future and so represent a danger to the community."). The

Court clearly rejected this argument, making the logical point that so long as future dangerousness, properly defined, is an acceptable aggravator at the penalty stage, lay as well as expert testimony may be admissible on the issue.

As to the question that is relevant in the instant case, the Court's decision in *Barefoot* offers scant guidance. Granted, the Court adopted language pointing to the ability of fact-finders to screen reliable from unreliable evidence of future dangerousness, *id.* at 898-99, but such language was specifically cabined by the "rules of evidence generally extant at the federal and state levels." *Id.* As discussed above, the extant rules of evidence have changed substantially since the announcement of *Barefoot*, an eventuality that would seem to be anticipated by this Court

Overall, the *Barefoot* Court was much more focused on addressing the thrust of the petitioner's argument that as a categorical matter psychiatric testimony regarding future dangerousness is always unreliable. *Id.* at 899 ("We are no more convinced now that the view of the APA should be converted into a constitutional rule barring an entire category of expert testimony."); *id.* at 900 ("Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials."); *id.* at 901 ("We are unaware of and have been cited to no case, federal or state, that has adopted the categorical views of the Association.").

Yet even so, *Barefoot* left the door open to such a challenge, stating that "[w]e are unconvinced, however, *at least as of now*, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case." *Id.* at 900 (emphasis supplied).

These conflicting aspects of *Barefoot*, as well as the developments in admissibility of exerpt testimony occasioned by *Daubert*, have contributed to significant confusion, an independent reason for granting certiorari in the instant case. Numerous commentators have found tension between the modern rules of evidence exemplified by *Daubert* and its progeny and the optimistic assessment of juror capabilities reflected by *Barefoot*. See, e.g., Erica Beecher-Monas & Edgar Garcia-Rill, *The Law & The Brain: Judging Scientific Evidence of Intent*, 1 J. APP. PRAC. & PROCESS 243, 222 (1999) ("In light of *Daubert*'s emphasis on acceptable error rates . . . *Barefoot*'s decision is highly questionable."); Michael H. Gottesman, *From* Barefoot *to* Daubert *to* Joiner*: Triple Play or Double Error*, 40 ARIZ. L. REV. 753, 755 (1998) ("*Daubert* cannot be squared with *Barefoot*."); Randy Otto, *On the Ability of Mental Health Professionals to "Predict Dangerousness": A Commentary on Interpretations of the "Dangerousness" Literature*, 18 LAW & PSYCHOL. REVW. 43, 64 & n. 65 (1994); Paul C. Giannelli, "Junk Science": The Criminal Cases, 84 J.Crim. L. and Criminology 105, 112 (1993). More troubling,

the relationship between *Barefoot* and *Daubert* and its progeny has been a source of great confusion in lower courts. *See Flores*,,210 F.3d at 458-70 (E. M. Garza, J. specially concurring) (noting that the Supreme Court's decision in *Daubert* may have undermined *Barefoot*); *United States v. Sampson*, 335 F.Supp.2d 166, 220-21 (D. Mass. 2004) (stating that there is a "serious question" as to whether the Supreme Court would, in a post-*Daubert* world, continue to hold that a jury may impose the death penalty based on its prediction of a defendant's future dangerousness). Indeed, Arizona's Supreme Court has concluded that it is "impossible" to reconcile *Daubert* with *Barefoot*. *See Logerquist v. McVey*, 1 P.3d 113, 127 (Ariz. 2000).

Other courts have recognized the criticism of *Barefoot* in light of *Daubert*, but have considered themselves to be without power to undermine *Barefoot*, either because of the nature of habeas review or because of the need to await this Court's action in overruling or limiting *Barefoot*. *See Cook v. Cockrell*, 2002 WL 495455 (5th Cir. 2002) (unpub. op.) (declining to "undercut *Barefoot* because AEDPA permits habeas relief only for violations of "clearly established" federal law); *Tigner v. Cockrell*, 264 F.3d 521, 526-27 (5th Cir. 2001) ("We decline Tigner's invitation to undercut *Barefoot*, because to do so on collateral review would constitute a new rule in violation of *Teague*'s non-retroactivity principle."); *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1177, 1183 (D. Colo. 2006) (declining to revisit *Barefoot* because the Supreme Court must reinterpret its own binding precedent).

Finally, some courts have simply chosen to leave *Barefoot* undisturbed, despite the advent of *Daubert*. *See Johnson v. Cockrell*, 306 F.3d 249, 255 (5th Cir. 2002) (rejecting contention that *Daubert* and its progeny altered the admissibility of future dangerousness testimony); *Little v. Johnson*, 162 F.3d 855, 862-63 (5th Cir. 1998) (rejecting, on the strength of *Barefoot*, a challenge to similar testimony). Indeed, some lower courts have interpreted *Barefoot* to mean that future dangerousness testimony is always admissible, regardless of how unreliable it is. *Billips v. Commonwealth*, 630 S.E.2d 340, 352 & n.3 (Va. Ct. App. 2006), *rev'd on other grounds* 652 S.E.2d 99 (Va. 2007) (holding that *Barefoot* survived *Daubert* and that juries have the ability to distinguish between reliable and unreliable evidence).[5]

This confusion is unfortunate, given the fact that *Barefoot* does not squarely hold that reliability of expert testimony is constitutionally irrelevant. To the contrary, as explained above, the *Barefoot* Court expressly rejected a categorical bar to the admission of such testimony, but implicitly suggested that developments in evidentiary standards might alter the constitutional background. In light of the constitutional commitment to reliability and accuracy in capital sentencing proceedings and

[5] In reversing the Court of Appeals, the Supreme Court of Virginia did not address the constitutional question, instead holding that the scientific evidence in question was unreliable under state law and that the error in its admission was not harmless. 652 S.E.2d at 101-02.

subsequent developments in evidence law, this Court should take this opportunity to clarify the meaning of *Barefoot*. This Court can readily and narrowly hold that the constitution requires some indicia of reliability prior to the admission of expert testimony on future dangerousness without running afoul of *Barefoot* in at least two ways. First, and most narrowly, *Barefoot* simply did not address the issue of whether the Constitution permits the introduction of unreliable expert testimony on future dangerousness at the penalty phase. Second, even to the extent that it might have done so, the context of evidentiary standards has changed. No longer do the vast majority of courts leave it to jurors to assess reliability of expert testimony. The trend has moved sharply in the direction of leaving threshold reliability determinations to the court, precisely because of the recognition that jurors are ill-equipped to make such determinations. Thus, "evolving standards of decency" call for a different answer to the question that was at most implicitly answered in *Barefoot*: now nearly thirty years later, legislatures generally recognize the need to have a gate-keeper make threshold determinations of reliability prior to the introduction of important and highly complex expert testimony regarding the life or death of the defendant.

Recognizing this principle would be consistent with the many ways in which this Court has ensured the integrity of a capital trial. Thus, it is unconstitutional to base the death penalty on an aggravating factor for which insufficient evidence has been presented at the sentencing phase. *See*

Sochor v. Florida, 504 U.S. 527, 539-40 (1992) (finding constitutional error when trial judge weighed "coldness" factor when there was insufficient evidence to support a finding that murder was committed in a cold, calculated, and premeditated manner). *Amici* maintain that the State has as little interest in imposing a death sentence based on unreliable expert testimony as it has imposing death based on no evidence at all.

Finally, this case presents an excellent vehicle for answering this question. Unlike some of the cases discussed above, this case is on direct review, permitting this Court to announce and apply a constitutional rule without the complications of habeas review. Second, because the CCA unambiguously found that the State had failed to demonstrate the reliability of the psychiatric testimony admitted by the trial court, this Court can focus directly on the relevant constitutional question.

CONCLUSION

For the reasons set forth above and in the petition, *amici curiae* respectfully urge the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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