No. _____

IN THE

Supreme Court of the United States

RAMIRO FELIX GONZALES,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Criminal Appeals of Texas

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Before a defendant may be sentenced to death in Texas, a unanimous jury must find beyond a reasonable doubt that "there is a probability that [he] will commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Pro. 37.071 §1(b)(1).

Petitioner Ramiro Gonzales was 18 years and 71 days old when he committed the offense for which he was sentenced to die. At trial, the State presented expert psychiatric testimony to establish Petitioner's future dangerousness. The expert's opinion relied on an erroneous diagnosis of antisocial personality disorder and falsely inflated recidivism rates. The expert now acknowledges that his trial diagnosis and testimony were wrong, that the statistical evidence he put before the jury was false, and that Petitioner in fact "does not pose a threat of future danger to society."

An otherwise constitutionally sound death sentence may violate the Eighth and Fourteenth Amendments if based in part on "materially inaccurate" evidence. *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988). Notwithstanding, the Texas Court of Criminal Appeals categorically refuses to address *Johnson* error pertaining to evidence introduced by the State and relating to Texas's future dangerousness special issue because that jury finding "is made at the time of trial and is not properly reevaluated on habeas."

This case presents the following questions:

> Where a State conditions a death sentence on a jury's unanimous finding beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society,"
>
> (1) Does the recantation by the State's expert witness of his trial testimony as to the defendant's "future dangerousness" give rise to a cognizable constitutional claim under the Eighth and Fourteenth Amendments that the defendant's death sentence is insufficiently reliable to be allowed to stand?
>
> (2) If such a recantation raises either a cognizable Eighth or Fourteenth Amendment claim, does a state court err in refusing to entertain them based on its own misunderstanding of the claim being advanced?

PARTIES TO THE PROCEEDINGS BELOW

Ramiro Felix Gonzales, petitioner here, was the habeas applicant below.

The State of Texas, respondent here, was the respondent below.

LIST OF RELATED DECISIONS

Texas Criminal Proceedings

State v. Gonzales, Cause No. 04-02-09091-CR (38th Dist. Ct. Medina Co., Tex.) (state trial court proceeding)

Ex parte Gonzales, No. WR-70,969-03 (Tex. Crim. App. July 11, 2022) (unpublished) (state post-conviction habeas corpus proceeding)

Ex parte Gonzales, No. WR-70,969-03 (Tex. Crim. App. June 30, 2023) (unpublished) (state post-conviction habeas corpus proceeding)

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PETITION FOR A WRIT OF CERTIORARI

Ramiro Felix Gonzales respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas (TCCA) in his case.

OPINIONS AND ORDERS BELOW

The TCCA's decisions denying and dismissing Petitioner's post-conviction habeas application are unpublished and reprinted in full in the Appendix at pages 1a–9a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The TCCA entered its judgment denying state postconviction habeas corpus relief on June 30, 2023. On August 30, 2023, Justice Alito extended the time to file this petition until October 12, 2023. This petition is timely pursuant to Supreme Court Rules 13.3 and 30.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, provides:

> No State shall … deprive any person of life, liberty, or property without due process of law....

The Texas statute that governs capital trial and sentencing procedure, Tex. Code. Crim. Pro. art. 37.071, is reproduced due to its length in Appendix C.

INTRODUCTION

Petitioner Ramiro Gonzales was just 71 days past his eighteenth birthday in 2001 when he committed the offense for which he was sentenced to die. At his 2006 trial, the prosecution urged Petitioner's jury to find a probability of future dangerousness based on an erroneous diagnosis of antisocial personality disorder, evidence of demonstrably false recidivism rates, and a history of impulsive acts by a traumatized and immature teenager.

But since then, the State's psychiatric expert, Dr. Edward Gripon, has effectively recanted his trial testimony in every material respect. Dr. Gripon now acknowledges that his trial testimony that Petitioner has antisocial personality disorder, which effectively dictated a future of violent misbehavior, was erroneous. Moreover, it is now widely recognized that the recidivism rates to which Dr. Gripon had testified at trial—"in the eighty percentile or higher"—were not merely false, but "a demonstrable urban legend."[1] Indeed, Dr. Gripon himself now recognizes that Petitioner "does not pose a threat of future danger to society."

Petitioner alleged in the state post-conviction proceedings below that the State's presentation of expert testimony to obtain a death sentence that is now disavowed and repudiated by the expert himself violates the Eighth Amendment

[1] Tamara Lave, *Inevitable Recidivism—The Origin and Centrality of an Urban Legend.* 34 INT.'L J. L. & PSYCH. 185, 194 (2011).

requirement of heightened reliability in capital sentencing proceedings, because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Johnson*, 486 U.S. at 590. Petitioner maintained that while *Johnson* was concerned with evidence of a subsequently invalidated prior conviction, its rationale applies to other contexts where evidence admitted at the penalty phase of a capital trial was later revealed to be materially inaccurate.

The Texas Court of Criminal Appeals refused to consider or review Petitioner's claim. Misconstruing Petitioner's claim to be a challenge to the jury's determination of future dangerousness itself instead of to the veracity of Dr. Gripon's testimony offered in support of that determination at trial, the Court stated:

> In this claim, [Petitioner] asserts that the State's trial expert, Dr. Edward Gripon, gave false testimony at trial because he has now reevaluated [Petitioner] and determined that he is not a future danger. But the determination of future dangerousness is made at the time of trial and is not properly reevaluated on habeas. To the extent [Petitioner's] first claim is such a reevaluation, the trial court shall not review it.

Appendix A at 3a (TCCA order dated June 11, 2022).

This Court has recognized that, even after a constitutionally valid death sentence has been imposed in a procedurally fair trial, new evidence may become available which demonstrates that the information underlying the death sentence was "materially inaccurate." *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988). In such cases, the death sentence violates the Eighth and Fourteenth Amendments.

Petitioner's death sentence—predicated on a future dangerousness determination shaped by a misdiagnosis, false statistics, and entirely invented

aggravating evidence—is a violation of the Eighth and Fourteenth Amendments to the United States Constitution and cannot stand.

STATEMENT OF THE CASE

A. Evidence at trial

On October 7, 2002, Petitioner Ramiro Gonzales, then 19 years old, confessed to the kidnapping, rape, and murder of Bridget Townsend, who had been missing for more than eighteen months, and led authorities to her remains on the Middle Verde Ranch in rural Medina County, Texas. *See* Reporter's Record (hereinafter, "RR") Vol. 35 at 61, 74. At the guilt-innocence phase of his 2006 trial, the defense did not contest Petitioner's guilt. RR Vol. 37 at 118. After hearing his confession and testimony from law enforcement officers, the jury convicted Petitioner of capital murder. RR Vol. 38 at 54.

At the penalty phase, the State introduced evidence from several jailers to testify about incidents that occurred while Petitioner was awaiting trial. RR Vol. 39 at 14-149, RR Vol. 40 at 3-49. A victim of another kidnapping and sexual assault for which Petitioner had previously accepted responsibility also testified about her ordeal. RR Vol. 40 at 74-81.

To conclude its penalty presentation, the State presented extensive expert testimony by psychiatrist Dr. Edward Gripon. RR Vol. 41 at 50-122. Dr. Gripon told the jury that Petitioner "certainly" and "clearly" had antisocial personality disorder, *Id*. at 70, 92, which he described as the psychiatric diagnosis for individuals who were formerly referred to as "psychopaths" and "sociopaths." *Id*. at 68-69. He told the jurors that people with antisocial personality disorder, like Petitioner, "have a lack of social

conscience, with no life plan and little remorse," and "that's just the way they are." *Id*. at 69.

Dr. Gripon also offered testimony about recidivism rates for sex offenders that is now widely recognized within the psychiatric community, as well as by Dr. Gripon himself, as false and without any empirical support.[2] Thus, Dr. Gripon testified that persons who commit sexual assault "have an extremely high rate of … recidivism." RR Vol. 41 at 84; *see also id.* at 86 (sexual assault "frequently" is "not something that … a person does one time and then quits. There is a very high incidence of continued reoffending in those cases."). Specifically, Dr. Gripon asserted that the recidivism rate for sexual assault offenders was "above the fifty-one percentile," *id*. at 75, and that "lots of data" supported a recidivism rate "in the eighty percentile or better." *Id*. at 88. Dr. Gripon added that "sexual assault has the highest continuum of recidivism" when looking at "types of significant, aggressive, violent behavior." *Id.* at 87. In response to the prosecutor's question about what type of offender presents "the worst prognosis for recovery," Dr. Gripon responded that "people who have sexual related offenses have the most difficulty with treatment, and they have an extremely high rate of recurrence." *Id.* at 87-88.

Ultimately, Dr. Gripon told the jury Petitioner "would pose a risk to continue to commit threats or acts of violence" "wherever he goes," even in a carceral setting. RR Vol. 41 at 66, 94. The State rested its case after eliciting Dr. Gripon's testimony. *Id.* at 122.

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[2] *See infra*, n. 11.

In closing argument, the State relied heavily on Dr. Gripon's testimony to assert that Petitioner would present a continuing threat of future dangerousness:

> Best evidence of dangerousness? Past behavior. Dr. Gripon told you that. He's the psychiatrist. He's the one that came in here, not with an agenda; to tell you the true facts. And he said in all his many, many years of practice that is the best predictor of future dangerousness is your past behavior…. And Dr. Gripon looked at everything and says, yes, he will.

RR Vol. 43 at 54-55. Dr. Gripon's assessment that the offense had a "psychosexual sadistic component" allowed the State to argue that Petitioner simply made the choice "to continue on with evil" because "what he did to Bridget … made him hungry for it. It made him want more." *Id.* at 68. Petitioner simply "liked the feeling of degrading and over-powering and humiliating people and forcing them to do unthinkable things, and the sheer pleasure of it." *Id.* at 68-69. In its rebuttal closing argument, the State again repeatedly invoked Dr. Gripon's testimony to urge the jury to return answers to the special issue questions that would require a death sentence:

> This man is the worst of the worst. He's a sexual predator and a murderer and he'll never stop, and the reason we know that, there's three things I want to hit you with, and then I'm done.
>
> Dr. Gripon told you that. [Dr. Gripon] talked about several factors that were significant to him: the escalating violence that he saw in a very short time frame; the wanton disregard for human life; his morbid fascination with death and dead bodies; the sadistic, following Bridget Townsend's murder, going back to the scene. [Dr. Gripon] said it's hard to stop this behavior because it's pleasurable to him.
>
> […] He's a sexual predator who has the highest recidivism rate, the hardest to treat, with the absolutely worst prognosis of any other kind of offender. He denies he offended, which makes it even worse because if you don't take responsibility for your actions, it's almost impossible to treat you. And he won't. To this day, he won't take responsibility for what he did to Babo Teich.

> […] And the last thing [Dr. Gripon] said is people have told him during [the] course of his career that killing someone the second time is easier than the first time. And [Dr. Gripon] said much easier. He's not going to be stopped on his own; someone will have to stop him.

Id. at 69-70.

During penalty phase deliberations, the jury sent out several notes that indicate that the jurors were deliberating over issues related to Petitioner's propensity for future dangerousness. For example, the jury sent a note asking whether the sentences for Petitioner's prior guilty plea case would be served concurrently or consecutively with whatever sentence they returned in the capital case. As the trial court commented: "They want to know what's going to happen. Obviously, they're looking at a life sentence; otherwise, why would they care?" RR Vol. 43 at 75. Jurors also asked whether Petitioner would ever obtain trustee privileges while incarcerated. *Id.* at 76.

On September 6, 2006, the jury returned an affirmative answer to Special Issue Number One, finding that "there is a probability that the Defendant would commit criminal acts of violence that constitute a continuing threat to society," and a negative answer to Special Issue Number Two, finding that there was not "a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." RR 43 at 77; CR at 1033-34. Petitioner was sentenced to death.

B. Direct review

On June 17, 2009, a divided Texas Court of Criminal Appeals affirmed the conviction and sentence. *Gonzales v. State*, 2009 WL 1684699 (Tex. Crim. App. June

17, 2009) (not designated for publication), *cert. denied*, *Gonzales v. Texas,* 559 U.S. 942 (2010).

C. Prior state and federal post-conviction review

Petitioner thereafter sought post-conviction habeas corpus relief in state and federal court. *See Ex parte Gonzales*, 2012 WL 2424176 (Tex. Crim. App. June 27, 2012) (not designated for publication). Due to grossly deficient representation by counsel appointed to represent him in his initial state post-conviction habeas corpus proceedings, prior post-conviction review in both state and federal court was abbreviated and superficial. *See Gonzales v. Stephens*, 606 Fed.Appx. 767 (5th Cir. 2015), *cert. denied by Gonzales v. Stephens,* 577 U.S. 1032 (2015).

Just a few months after federal proceedings concluded in May 2020, the trial court signed an order scheduling Petitioner for execution on April 20, 2021. That date was subsequently modified to November 17, 2021, and then to July 13, 2022.

On June 30, 2022, Petitioner filed a subsequent application for writ of habeas corpus in state court raising a constitutional claim that the State violated the Eighth Amendment and Due Process protections by presenting false and materially inaccurate expert testimony on the issue of future dangerousness.

On July 11, 2022, the Texas Court of Criminal Appeals entered an order authorizing further proceedings on a discrete part of his claim that the State presented false and materially unreliable testimony by Dr. Gripon at the penalty phase. Appendix A at 3a. Specifically, the Court of Criminal Appeals found that Petitioner had made "at least a prima face showing" that Dr. Gripon's trial testimony about sex offender recidivism rates was false and that this testimony "could have

affected the jury's answer to the future dangerousness question at punishment." *Id*. However, with respect to the remaining allegations related to Dr. Gripon's trial testimony, the Court of Criminal Appeals asserted that "the determination of future dangerousness is made at the time of trial and is not properly reevaluated on habeas;" accordingly, "[t]o the extent Applicant's first claim is such a reevaluation, the trial court shall not review it." *Id.*

On remand, without holding a hearing or taking any additional evidence, a visiting judge signed the State's proposed findings of fact and conclusions of law in their entirety and recommended summary denial of relief. On June 14, 2023, the Texas Court of Criminal Appeals adopted the lower court's recommendation and denied relief.

This petition follows.

REASONS FOR GRANTING THE PETITION

Petitioner Ramiro Gonzales was sentenced to death by a jury that was allowed to consider evidence and testimony by the State's "future dangerousness" expert that the expert himself has repudiated as materially erroneous. In *Johnson v. Mississippi* this Court recognized that the Eighth Amendment's requirement of heightened reliability in capital sentencing is violated when "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988). While the Court's decision in *Johnson* concerned evidence of a subsequently invalidated prior conviction, the rationale of this rule logically extends to cases in which the State's expert himself attests to the inaccuracy of his trial testimony and diagnosis related to a capital defendant's "future dangerousness"—a determination that is a legal prerequisite to a death sentence in Texas.[3]

Yet the Texas Court of Criminal Appeals refused to recognize a cognizable constitutional claim under these circumstances. *Ex parte Gonzales*, No. WR-70,969-03, at 3 (Tex. Crim. App. June 30, 2023). Instead, the Texas Court of Criminal Appeals simply asserted, with no reference to the false testimony claim, that

[3] *See Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) ("A Texas court can sentence a defendant to death only if the prosecution convinces the jury, beyond a reasonable doubt, that 'there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.") (quoting Tex. Code Proc. Ann., Art. 37.071(b)(2)); *see also Mosley v. State*, 983 S.W.2d 249, 263 n.18 (Tex. Crim. App. 1998) ("Th[e] [death-]eligibility requirement is satisfied in Texas by aggravating factors contained within the elements of the offense, the future dangerousness special issue, and sometimes, other 'non-*Penry*' special issues. Without findings on those particular aggravating factors, a death sentence cannot be imposed.").

Petitioner was seeking to have the future dangerousness finding itself "reevaluated on habeas," which the court deemed "not proper[]." *Ex parte Gonzales*, No. WR-70,969-03, at 3 (Tex. Crim. App. June 30, 2023).

This Court should grant certiorari to affirm that the Eighth Amendment rule in *Johnson* extends to any case in which a sentencing jury was allowed to consider evidence offered in support of a death-eligibility determination, like Dr. Gripon's testimony, that has been revealed to be materially inaccurate.

I. This Court Should Make Clear That a State Expert's Recantation of His Own Trial Testimony on the "Crucial" Issue of Future Dangerousness Presents a Cognizable Constitutional Claim for Post-Conviction Review.

Since this Court allowed the resumption of capital punishment by the states, it has mandated that capital trial proceedings must be reviewed with a heightened level of scrutiny because, in contrast to any other sentencing decision juries are called upon to make, "death is different." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Therefore, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* In practice, the requirement of heightened reliability in the determination of a death sentence has led this Court to require "a correspondingly greater degree of scrutiny in the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998–99 (1983). On this principle, this Court has remanded cases to state courts when they have initially refused to review petitioners' claims of unconstitutional trial court proceedings.

A. Under *Johnson v. Mississippi,* the Eighth Amendment is violated where a jury is allowed to consider materially inaccurate evidence of an invalid prior conviction in support of a death eligibility determination.

In *Johnson v. Mississippi*, this Court held that a death sentence is invalid if the jury relies upon evidence of a prior conviction that has been subsequently invalidated. 486 U.S. 578, 590 (1988). The Eighth Amendment promise of heightened reliability in the determination that death is the appropriate punishment mandates that where a jury has been allowed to consider "materially inaccurate" evidence, the resulting death sentence must be reversed. *Id.* at 585, 590. Under *Johnson*, there is no reason to presume that heightened reliability *only* applies to materially inaccurate evidence in the form of an invalidated prior conviction.

In *Johnson*, the petitioner was convicted of murder and sentenced to death on the basis of three aggravating circumstances, one of which was that he had "previously been convicted of a felony involving the use or threat of violence to the person of another." 486 U.S. at 581. Johnson had been convicted of a felony in New York nineteen years earlier. *Id.* at 580. During closing argument, the prosecutor repeatedly referred to this prior conviction as a reason to sentence Johnson to death. *Id.* at 581. After Johnson was sentenced to death, his attorneys successfully challenged to the prior conviction, which was then vacated by the New York Court of Appeals. *Id.* at 582. Noting both the "special 'need for reliability in the determination that death is the appropriate punishment" and the "possibility that the jury's belief that petitioner had been convicted of a prior felony would be "decisive" in the "choice between a life sentence and a death sentence," this Court vacated the death sentence

and remanded for resentencing. *Id*. at 586 (quoting *Gardner v. Florida*, 430 U.S. 349, 359 (1977) (plurality opinion). Even though there was "no question that the prior conviction was valid at the time of Johnson's sentencing,"[4] this Court held that Johnson's death sentence was inconsistent with the Eighth Amendment's prohibition against cruel and unusual punishment because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id*. at 590.

B. While reviewing courts consistently apply *Johnson* in factually similar cases concerning invalidated prior conviction evidence, lower courts are in need of guidance to clarify that the rule of *Johnson* applies to other types of materially inaccurate evidence.

Since *Johnson*, state and lower federal courts have disagreed about whether *Johnson* applies to challenges to evidence presented in capital sentencing proceedings other than prior convictions. In *Hernandez v. Johnson*, the Fifth Circuit noted that most cases have "relied upon *Johnson* to determine whether evidence of a criminal conviction or conduct may be properly admitted at sentencing." 213 F.3d 243, 252 (5th Cir. 2000).

Yet other state and federal courts have recognized the applicability of the *Johnson* rule to other types of unreliable evidence. For example, in *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001), the petitioner contended that the State violated the Eighth Amendment under *Johnson* by presenting factually inaccurate testimony by a prison warden about the deterrent value of a death sentence at the penalty phase of a capital trial. *Id*. at 1030, 1032. While the Eighth Circuit rejected the petitioner's claim that the warden's testimony was "demonstrably false," it did

[4] *Herrera v. Collins*, 506 U.S. 390, 432 (1993) (Blackmun, J., dissenting).

not conclude that *Johnson* solely applies to invalidated prior convictions. *Id*. at 1032. Similarly, in *Allen v. United States*, 2011 WL 13182909 (E.D. Mo. Aug. 29, 2011), the petitioner contended that a report issued by the National Academy of Sciences (NAS) after he was convicted demonstrated that ballistics and fingerprint evidence used against him at trial were unreliable, in violation of his Fifth and Eighth Amendment rights. While the district court concluded that the NAS report failed to establish "that the conclusions of the experts in this case were wrong," the court assessed the claim under *Johnson* and did not contend that *Johnson* was limited to evidence of prior convictions. *Id*. at *3. And, in *Hernandez, supra*, the Fifth Circuit noted that while the petitioner's claim did "not parallel the situation addressed in *Johnson* nor the vast majority of cases that have relied upon *Johnson*" and "[i]nstead of a materially inaccurate criminal conviction, [concerned] purportedly materially inaccurate testimony," the court proceeded to analyze the claim under *Johnson* "[n]otwithstanding the difference." *Hernandez*, 213 F.3d at 252, 253-54.

In two relatively recent cases, the Fifth Circuit has rejected challenges to the accuracy of a Texas *jury's determination of future dangerousness* under *Johnson*, *see Buntion v. Lumpkin*, 982 F.3d 945 (5th Cir. 2020), but Petitioner's claim is different. Unlike *Buntion*, Petitioner does not challenge the factual accuracy of the jury's determination in light of his good behavior in prison. *Cf. Buntion*, 982 F. 3d at 950-51 (rejecting petitioner's claim that "his behavior in prison disproves the jury's dangerousness prediction as a matter of fact" and noting explicitly that the petitioner there did "not challenge the sufficiency of the *evidence* supporting the jury's

probabilistic assessment.")(emphasis supplied);[5] *Johnson v. Lumpkin*, 74 F.4th 334 (5th Cir. 2023) ("*Johnson II*") (same). Instead, this case concerns evidence and testimony introduced by the State *in support of* the jury's determination that was materially inaccurate *at the time it was presented* yet only revealed to be so post-trial.

It is clear that Petitioner's death sentence, made legally permissible only by the jury's determination of future dangerousness, "is predicated, in part," on false statistics, an invalid diagnosis, and expert opinion "that [are] not valid now, and [were] not valid when [they were offered]." *Johnson*, 486 U.S. at 585 n.6. Unlike *Buntion* and *Johnson II*, the materially inaccurate evidence is the very evidence on which the jury's "probabilistic determination" rested. *Cf. Buntion*, 982 F.3d at 951 (noting petitioner specifically "does not challenge … the evidence supporting the jury's probabilistic assessment.").

This case thus presents a logical application of the *Johnson* rule—that the Eighth Amendment cannot tolerate a death verdict where "the jury was allowed to consider evidence that has been revealed to be materially inaccurate" in support of an eligibility determination. *Johnson*, 486 U.S. at 590.

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[5] In fact, the Fifth Circuit in *Buntion* specifically contrasted the claim that a jury determination of future dangerousness could be rendered factually inaccurate by later behavior in prison against the situation present in both *Johnson* and in this case:

> Buntion does not challenge the sufficiency of the evidence supporting the jury's probabilistic assessment. *Cf. Johnson*, 486 U.S. at 585 n.6, 108 S.Ct. 1981 ("[I]t is clear on the record before us that petitioner's death sentence is now predicated ... on a ... judgment *that is not valid now, and was not valid when it was entered* ....").

982 F.3d at 951 (emphasis supplied).

C. This Court should make clear that the rule of *Johnson* applies whenever a post-trial development casts doubt on the reliability of evidence that the State presented to prove a fact necessary to establish the defendant's eligibility, as a matter of law, to be sentenced to death.

Since 1976, this Court has crafted a set of constitutional rules that govern the imposition of the death penalty against defendants, evincing concern with both the reliability of proceedings and ultimate determinations that the punishment is appropriate. But these rules are not limited to their specific facts; instead, Eighth Amendment standards share "key justifications" that require reviewing courts to "look beyond" a specific set of facts to the "downstream consequence" that offends the Constitution. *Madison v. Alabama*, 586 U.S. ___,139 S.Ct. 718, 729 (2019). For example, in the context of execution competency, the Eighth Amendment requires that a petitioner comprehend the fact of his execution and the reasons therefore,[6] but the "standard has no interest in establishing any precise cause" of incompetency—indeed, the rule is clear that specific causes "are all the same under *Panetti* as long as they produce the requisite lack of comprehension." *Id.* at 728.

Where this Court's opinions announcing and refining these Constitutional rules may refer to a certain set of facts or circumstances presented, such "references are no more than a predictable byproduct of the [] cases' facts." *Madison*, 139 S.Ct. at 728. The key justifications *Johnson* offered for the Eighth Amendment rule apply with equal force to materially inaccurate expert testimony and evidence offered in

[6] *See Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007).

support of a defendant's future dangerousness that introduces erroneous diagnoses and false statistical evidence to a sentencing jury. And the downstream consequence—a death sentence infected with materially inaccurate testimony—is the same.[7] When a judgment, as here, is based so significantly on false statistical evidence and flawed expert testimony that it undermines the fundamental fairness of the proceedings, the basic principles of heightened reliability and due process are violated.

But the Texas court here refused to recognize a cognizable claim, let alone to properly apply *Johnson*. This Court should summarily vacate the judgment below, and remand this case for further proceedings consistent with *Johnson*'s rule, which properly applies whenever materially inaccurate evidence *of any kind* is used to support an aggravating circumstance or legal prerequisite for death eligibility, regardless of the idiosyncratic structure of the Texas sentencing scheme. In the alternative, should this Court believe the application of *Johnson* in such circumstances is insufficiently clear, the petition should be granted to clarify the scope *Johnson*'s rule.

[7] *See Florida v. Burr*, 496 U.S. 914, 918-19 (1990) (Stevens, J., dissenting) (explaining that the "paramount importance of reliability in the determination that death is the appropriate punishment" was implicated in *Johnson* "by a post-trial development that cast doubt on the reliability of evidence that played a critical role in the sentencing decision. *Johnson* made clear, what was apparent before, … that a death sentence cannot stand when it is based on evidence that is materially inaccurate") (citations omitted).

D. This case demands this Court's intervention to clarify the scope of the Eighth Amendment rule announced in *Johnson*.

Under Texas law, a determination of "future dangerousness" is a necessary element of death-eligibility because, as the Texas Court of Criminal Appeals has recognized, unless the jury makes an affirmative finding of future dangerousness "a death sentence cannot be imposed."[8]

This case thus presents an unconstitutional procedural deficiency begging this Court's attention: Petitioner has shown that the penalty phase testimony of Dr. Gripon was materially inaccurate in numerous ways,[9] but the Texas Court of Criminal Appeals refused to allow review—not on procedural grounds, but by instead declaring that Petitioner did not present a cognizable constitutional claim for relief. But the heightened reliability doctrine mandates greater scrutiny of evidence on which the determination of future dangerousness is based, particularly when such evidence or testimony is acknowledged to be false. The refusal of the state court to allow review of this evidence falls short of the "greater scrutiny" this Court has required in capital cases. *California v. Ramos*, 463 U.S. at 998–999. And the key justifications for *Johnson*'s rule—concern with the reliability of death sentences and the evidence on which eligibility determinations are based—call for application of that constitutional rule here.

Dr. Gripon, the only expert witness who testified that Petitioner would pose a risk of future dangerousness, introduced evidence to the jury that he now

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[8] *See supra* n. 5.

[9] *See infra* n. 10, 11, 13.

acknowledges was erroneous. According to Dr. Gripon, Petitioner does not in fact have antisocial personality disorder, and his trial testimony to the contrary was in error.[10] But the jury was allowed to consider Dr. Gripon's testimony and opinion, supported by a false diagnosis and inflated statistics which greatly overexaggerated[11] the true threat of recidivism posed by Petitioner. While Dr. Gripon told the jury that sexual offenses were on "the highest continuum of recidivism" and that "lots of data"

[10] Because antisocial personality disorder is an immutable condition and only gets "worse" over time, it necessarily follows that Petitioner *never* had antisocial personality disorder. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION ("DSM-V") (2013), at 645 ("A personality disorder is an *enduring* pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is *pervasive and inflexible*, has an onset in adolescence or early adulthood, is *stable over time*, and leads to distress or impairment.") (emphasis supplied); *see also* American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION ("DSM-IV") (1994).

To be clear, Petitioner does not simply argue that the future dangerousness determination should now be reviewed because Dr. Gripon's recent assessment rebuts the finding of future dangerousness at trial. *Cf. Evans v. Muncy*, 498 U.S. 927, 927-31 (1990) (Marshall, J., dissenting). Instead, in this case, Dr. Gripon's *original* medical diagnosis and his testimony introducing false statistics suggesting an astronomical rate of recidivism were materially false and misled the jury about the prospects that Petitioner would constitute a danger to others.

[11] A recent longitudinal study conducted by the Bureau of Justice Statistics found overall recidivism rates for sexual offenses to be 7.7%. Mariel Alper & Matthew R. Durose, *Recidivism of sex offenders released from state prison: A 9-year follow-up (2005-14),* BUREAU OF JUSTICE STATISTICS (2019), p. 5. And a prior meta-study comparing 20 different data sets with follow-up periods between 6 months and 31.5 years found the rate across all 20 studies to be 18.5%. R. Karl Hanson, et al. *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCH., PUB. POL., & L. 46, 50 (2017). Not a single published study supports a rate of sexual recidivism anywhere near 51%, let alone above 80%.

out there suggested a recidivism rate of "eighty percent[] or higher,"[12] these assertions have been soundly debunked by scientific research.[13]

In the context of a capital sentencing scheme, like Texas, where jurors must find that a defendant is likely to be a danger in the future as a prerequisite for a death sentence, such evidence is undoubtedly material.

The scientific community now recognizes the gross inaccuracy of the statistical evidence presented at trial, and Dr. Gripon himself has recanted not only this aspect of his testimony but also his opinion that Petitioner would present a danger "wherever he goes" *and* his diagnosis of antisocial personality disorder. This false evidence alone—cloaked in a veneer of expert and statistical validity now entirely rebuked by its sponsor—gave the jury a sufficient basis to answer special issue number one in the affirmative. On such a record, a reviewing court cannot be confident in the reliability of the future dangerousness determination.[14]

Without the testimony of Dr. Gripon—and the false diagnosis of antisocial personality disorder, the false evidence that statistics indicated a recidivism rate of

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[12] RR Vol. 41 at 87, 88.

[13] Ira Mark Ellman & Tara Ellman, "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Offender Recidivism Rates*, 30 CONST. COMM. 495, 498 (2015) (footnotes and citations omitted); David Feige, *When Junk Science About Sex Offenders Infects the Supreme Court*, ("*Junk Science*"), THE NEW YORK TIMES (Sept. 12, 2017), at https://www.nytimes.com/2017/09/12/opinion/when-junk-science-about-sex-offenders-infects-the-supreme-court.html (describing Professor Ellman's work tracing the "80%" myth from Freeman-Longo's unsupported *Psychology Today* article through a Department of Justice manual cited in turn by Solicitor General Ted Olson's brief in *McKune v. Lile*).

[14] *See Hernandez v. Johnson*, 213 F.3d 243, 253 (5th Cir. 2000) (acknowledging that neither this Court nor the Fifth Circuit "has defined 'materially' in the context of an Eighth Amendment violation under *Johnson*" but applying the materiality standard of *Kyles v. Whitley*, 514 U.S. 419 (1995) and requiring a "reasonable probability of a different result").

"eighty percent or higher"[15] for defendants like Petitioner, and the false assertion that Petitioner would present a danger "wherever he goes"—a reasonable jury could conclude that Petitioner, just eighteen years and 71 days old at the time of the offense for which he was sentenced to die, would be sufficiently incapacitated in prison. But there exists a reasonable probability that the jury was swayed by Dr. Gripon's assurance that Petitioner would be a threat "wherever he goes," including in a prison setting,[16] in answering special issue number one in the affirmative.

The evidence at issue in this case is materially inaccurate, and the downstream consequence of its admission is the same as that which this Court found intolerable in *Johnson*—the jury that sentenced Petitioner to death was allowed to consider materially inaccurate information when making the death-eligibility determination of future dangerousness. This Court should grant certiorari to clarify that the key justifications of *Johnson* apply whenever materially inaccurate information is introduced by the State in support of a death eligibility finding.

[15] RR Vol. 41 at 88.

[16] *Id.* at 94.

CONCLUSION

For the foregoing reasons, this Could should summarily vacate the judgment below and remand for analysis of Petitioner's *Johnson* claim consistent with the Eighth Amendment. Alternatively, the petition for writ of certiorari should be granted.

Respectfully submitted,

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