No. 23-5823

IN THE
Supreme Court of the United States

RAMIRO FELIX GONZALES,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

MATTHEW OTTOWAY
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
matthew.ottoway@oag.texas.gov

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Court possesses jurisdiction to consider the false evidence claim raised here.

2. Whether the Court should grant a writ of certiorari for a false evidence claim that has no federal-law footing, was presented in a procedurally improper manner, is barred by nonretroactivity principles, and is otherwise without merit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules & Regulations

Other Authorities

BRIEF IN OPPOSITION

Respondent, the State of Texas, respectfully submits this brief in opposition to the petition for writ of certiorari filed by Ramiro Felix Gonzales.

STATEMENT OF THE CASE

I. Evidence at Gonzales's Trial

"The facts surrounding Gonzales's underlying crime are not in dispute." *Gonzales v. Stephens*, 606 F. App'x 767, 768 (5th Cir. 2015). Gonzales wanted cocaine, so he went to his drug dealer's home to steal it. *Id.* The drug dealer wasn't there, but Bridget Townsend was. *Id.* Gonzales tied her up and brought her to the ranch where he lived. *Id.* He grabbed a hunting rifle, marched her into a remote clearing, and chambered a bullet. *Id.* As he was loading the rifle, Townsend desperately pleaded with Gonzales to spare her life, offering drugs, money, or sex in exchange. *Id.* He unloaded the rifle, marched Townsend back to the truck, and raped her. *Id.* She then got dressed and Gonzales walked her back into the clearing and shot her. *Id.* Gonzales confessed. *Id.* He was found guilty of capital murder. *Id.*

II. State's Punishment Evidence

"During the punishment phase, the prosecution called various witnesses in an effort to show that Gonzales did not feel remorse for his crime, had a history of bad conduct, did not suffer from mental illnesses, and would likely continue to be violent in prison." *Id.* at 768–69. This included, most prominently, "a woman whom Gonzales had abducted at knifepoint, brutally raped, and locked in a closet on the same ranch where he had earlier killed Townsend." *Id.* at 769. Also called was "Dr. Edward Gripon, a forensic psychiatrist, who testified that there was a serious risk Gonzales would continue to commit acts of violence in the prison setting." *Id.* Dr. Gripon, however, "acknowledged that predictions of future dangerousness were highly controversial and that the American Psychiatric Association had taken the position that such predictions are unscientific and unreliable." *Id.* Nevertheless, Dr. Gripon "maintained that forensic psychiatrists as a whole believed that they were qualified to make such predictions." *Id.*

III. Gonzales's Punishment Evidence

The defense focused "primarily on Gonzales's family history and upbringing." *Id.* "Various witnesses testified that Gonzales was effectively abandoned by his mother and was left on a large ranch to be

raised by his material grandparents." *Id.* However, Gonzales's grandparents "often provided inadequate or no supervision throughout his childhood." *Id.* "Several of Gonzales's relatives testified that Gonzales's mother frequently drank alcohol, huffed spray paint, and abused drugs throughout her pregnancy." *Id.* In addition, she "twice attempted to abort Gonzales." *Id.* Other witnesses "also detailed the physical and sexual abuse that Gonzales suffered throughout his childhood, including being kicked by his mother's boyfriend, being sexually abused by an older male cousin, and having a sexual relationship with an eighteen-year-old woman when he was twelve or fourteen years old." *Id.*

On top of that, Gonzales "called Dr. Daneen Milam, a neuropsychologist and sex offender treatment provider, to testify as to Gonzales's mental health." *Id.* After examining Gonzales for ten hours, reviewing "literally stacks of records" and interviews conducted by his mitigation specialist, and speaking with several of Gonzales's relatives, Dr. Milam "found no evidence of brain damage, 'none whatsoever.'" *Id.* Gonzales's brain and IQ were within normal limits despite his mother's substance abuse. *Id.* However, because Gonzales "'basically raised

himself,'" he had "the emotional maturity of someone who is thirteen or fourteen years old." *Id*.

Dr. Milam admitted that "some of the tests she attempted to conduct on Gonzales were invalid because he clearly tried to come across as mentally ill." *Id*. "[W]hile Gonzales exhibited some schizotypal and antisocial personality features, his primary diagnoses was 'reactive attachment disorder.'" *Id*. Dr. Milam described that the "disorder is due entirely to environmental factors wherein a young child was not able to form a stable, emotional bond with any adult and leads to being immature, insecure, solitary, and manipulative later in life." *Id*. She also opined that "Gonzales was probably in the top 10% of emotionally damaged children and now likely could be diagnosed with antisocial personality disorder, but stated that Gonzales was not mentally ill, had a normal IQ, and was not [intellectually disabled]." *Id*. at 770. The jury answered the special issues in a way requiring imposition of a death sentence. *Id*.

IV. Gonzales's Postconviction Litigation

Gonzales's conviction and sentence were upheld on direct appeal by the Court of Criminal Appeals (CCA). *Gonzales v. State*, No. AP-75,540,

2009 WL 1684699 (Tex. Crim. App. June 17, 2009). This Court then denied him a writ of certiorari. *Gonzales v. Texas*, 130 S. Ct. 1504 (2010). Gonzales sought state habeas relief, but that too was denied by the CCA. *Ex parte Gonzales*, No. WR-70,969-01, 2009 WL 3042409 (Tex. Crim. App. Sept. 23, 2009).[1]

Gonzales then turned to federal court, filing a petition for writ of habeas corpus. ROA(Habeas).50–326.[2] He obtained a stay of the proceeding and filed a first subsequent application in state court. The CCA dismissed it as abusive. *Ex parte Gonzales*, Nos. WR-70,969-01, WR-70,969-02, 2012 WL 340407 (Tex. Crim. App. Feb. 1, 2012). Gonzales returned to federal court and filed an amended petition. ROA(Habeas).404–517. It was thereafter denied, along with a certificate of appealability (COA). ROA(Habeas).618–710. Gonzales sought a COA from the United States Court of Appeals for the Fifth Circuit, but his request was declined. *Gonzales v. Stephens*, 606 F. App'x 767 (5th Cir.

---

[1] On grounds not pertinent here, Gonzales's initial state habeas proceeding was reopened by the CCA, *Ex parte Gonzales*, Nos. WR-70,969-01, WR-70,969-02, 2012 WL 340407 (Tex. Crim. App. Feb. 1, 2012), but relief was denied once again, *Ex parte Gonzales*, No. WR-70,969-01, 2012 WL 2424176 (Tex. Crim. App. June 27, 2012).

[2] "ROA(Habeas)" refers to the record on appeal for Gonzales's federal habeas proceeding.

2015). And then this Court again denied him a writ of certiorari. *Gonzales v. Stephens*, 136 S. Ct. 586 (2015).

Gonzales was thereafter set for execution. Order Setting Execution Date, *State v. Gonzales*, No. 04-029091-CR (38th Dist. Ct., Medina County, Tex. Apr. 6, 2016).[3] In response, Gonzales, along with other Texas death-sentenced inmates with scheduled executions, challenged Texas's use of compounded pentobarbital in its lethal injection protocol. ROA(Lethal Injection).1–49.[4] The section 1983 suit was dismissed for failing to state a claim, ROA(Lethal Injection).367–79, a stay was denied by the Fifth Circuit, *Wood v. Collier*, 836 F.3d 534 (5th Cir. 2016), and the suit dismissal was eventually affirmed by that court too, *Wood v. Collier*, 678 F. App'x 248 (5th Cir. 2017). During the pendency of this litigation, Gonzales's execution date was withdrawn. Order, *State v. Gonzales*, No. 04-029091-CR (38th Dist. Ct., Medina County, Tex. Sept. 30, 2016).

---

[3] The execution date was later modified. Amended Order Setting Execution Date, *State v. Gonzales*, No. 04-029091-CR (38th Dist. Ct., Medina County, Tex. July 13, 2016).

[4] "ROA(Lethal Injection)" refers to the record on appeal for Gonzales's federal civil rights suit challenging Texas's method of execution.

After that litigation ended, Gonzales moved for relief from final judgment in his federal habeas case, under Rule of Civil Procedure 60(b), claiming that the denial of expert funding was untenable after this Court's decision in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). ROA(Rule 60(b)).745–90.[5] The district court denied postjudgment relief, ROA(Rule60(b)).848–57, and the Fifth Circuit declined to issue a COA, *Gonzales v. Davis*, 788 F. App'x 250 (5th Cir. 2019). Yet again, this Court declined to issue a writ of certiorari. *Gonzales v. Davis*, 140 S. Ct. 2771 (2020).

Gonzales's execution was again set. Order Setting Execution Date, *State v. Gonzales*, No. 04-029091-CR (454th Dist. Ct., Medina County, Tex. Sept. 14, 2020).[6] In response, he filed suit requesting certain religious accommodations in the execution chamber. Complaint Pursuant to 42 U.S.C. § 1983, *Gonzales v. Collier*, No. 4:21-CV-828 (S.D. Tex. Mar. 21, 2021), ECF No. 1. His requests would have been accommodated, so

---

[5] "ROA(Rule 60(b))" refers to the record on appeal for Gonzales's postjudgment litigation in his federal habeas proceeding.

[6] Gonzales's execution date was twice modified. Execution Order, *State v. Gonzales*, No. 04-029091-CR (454th Dist. Ct., Medina County, Tex. Oct. 20, 2021); Order Modifying and Setting Execution Date, *State v. Gonzales*, No. 04-029091-CR (454th Dist. Ct., Medina County, Tex. Apr. 6, 2021).

the suit was dismissed without prejudice as moot. Order of Dismissal, ECF No. 104.

Less than two weeks before his then-execution date, Gonzales filed a second subsequent state habeas application. Subsequent Application for Writ of Habeas Corpus Pursuant to Tex. Code Crim. Proc. Art. 11.071, *Ex parte Gonzales*, No. 04-029091-CR (454th Dist. Ct., Medina County, Tex. June 30, 2022) [hereinafter "Sub. Appl."]. He raised three claims therein: "that (1) the State presented at the punishment phase of [Gonzales's] trial false and materially inaccurate expert testimony; (2) the State presented at punishment false testimony from a jail inmate; and (3) [Gonzales's] death sentence violates the Eighth Amendment because there exists a national consensus that the death penalty is excessive punishment for offenders less than twenty-one years old at the time of the crime." *Ex parte Gonzales*, No. WR-70,969-03, 2022 WL 26788866, at *1 (Tex. Crim. App. July 11, 2022).

The CCA stayed Gonzales's execution and remanded a very narrow portion of his first claim to the trial court for resolution—whether "testimony of recidivism rates [Dr.] Gripon gave at trial were false and [whether] th[is] false testimony could have affected the jury's answer to

the future dangerousness question at punishment." *Id*. The other claims, the CCA held, did not "meet the requirements of Article 11.071 § 5(a)" of the Texas Code of Criminal Procedure and would "not be reviewed." *Id*.

After reviewing the narrow portion of claim one, the trial court issued "findings of fact, conclusions of law, and recommendation to deny habeas relief," the bulk of which the CCA adopted as their own. *Ex parte Gonzales*, No. WR-70,969-03, 2023 WL 4003783, at *1 (Tex. Crim. June 14, 2023). The CCA also conducted its own review of the authorized false evidence claim, concluding that Gonzales failed to show "that [Dr.] Gripon gave demonstrably false testimony regarding sex offender recidivism rates" and that, "given the strength of the State's future dangerousness case," there was not "a reasonable likelihood that [Dr.] Gripon's challenged testimony affected the jury's answer to that punishment phase special issue." *Id*. at *2. Accordingly, the CCA denied the remanded portion of claim one and dismissed "the remaining allegations in his [second] subsequent application as an abuse of the writ." *Id*.

Gonzales now seeks a writ of certiorari off this decision. Pet. Writ Cert. 1–22. The writ should not be granted for the reasons that follow.

REASONS FOR DENYING THE WRIT

I. The Court Lacks Jurisdiction to Review the Vast Bulk of Gonzales's False Evidence Claim.

The Court of Criminal Appeals dismissed most of Gonzales's false evidence claim as an abuse of the writ, a codified state law ground, independent of federal law and adequate to sustain the judgment. Accordingly, the Court does not have jurisdiction to consider those issues.

A. Detailed litigation history of the false evidence claim

In his subsequent state habeas application, Gonzales challenged Dr. Gripon's trial testimony as false in four ways: (1) arguing that Dr. Gripon's antisocial personality disorder diagnosis of Gonzales was incorrect; (2) claiming that Dr. Gripon's sex offender recidivism statistics were wrong; (3) asserting that Dr. Gripon's testimony that Gonzales's drug addiction did not have a "significant impact" on Gonzales was mistaken; and (4) alleging that Dr. Gripon's testimony that Gonzales presented a threat "wherever he goes" was erroneous. Sub. Appl. 24–39.

To ostensibly support his four-part claim, Gonzales submitted an unsworn, unverified letter purporting to be from Dr. Gripon, the State's psychiatry expert at trial. Sub. Appl. Ex. D, at 1–12. If authentic and accurate, Dr. Gripon said that he was contacted in mid-2021 to review

new evidence "regarding . . . Gonzales's legal history, re-evaluate him, and reassess [his] prior determination as well as his current mental status." *Id*. at 1. To that end, Dr. Gripon reviewed a significant amount of material that did not exist at the time of trial and conducted a face-to-face evaluation of Gonzales on September 20, 2021. *Id*. at 2–8. Dr. Gripon then made "[c]onclusions based on [his] current evaluation," namely, disavowing an eighty percent sex offender recidivism rate he mentioned at trial and concluding, "[a]t the current time," that Gonzales did "not pose a threat of future danger to society." *Id*. at 11–12. Not present in the conclusional section of this letter: a retraction of Dr. Gripon's statements at trial that Gonzales had antisocial personality disorder or that his drug abuse did not have a "significant impact" on Gonzales. *Id*. at 9–12.

Because this was a subsequent application, and those are generally barred under state law, *see* Tex. Code Crim. Proc. art. 11.071 § 5(a), Gonzales had to convince the CCA that it should hear the merits of his four-part false evidence claim. To do this, Gonzales relied largely on new scholarly articles concerning sex offender recidivism, and news reporting on those articles. Sub. Appl. 55–57. To a lesser extent, Gonzales noted that Dr. Gripon considered evidence generated after his last state habeas

application. *Id*. at 57–58. Taken together, he asserted, the false evidence claim was factually unavailable at the time of his previous state habeas applications. *Id*. at 58.

In determining whether the merits of the subsequent application could be heard, the CCA summarized the quadripartite false evidence claim as "the State presented[,] at the punishment phase of [Gonzales's] trial[,] false and materially inaccurate expert testimony." *Ex parte Gonzales*, 2022 WL 2678866, at *1. In noting that only a portion of that claim would be authorized for merits adjudication, the part about potentially false statistics, the CCA noted that, "[*t*]*o the extent* [Gonzales's] first claim is such a [future dangerousness] reevaluation, the trial court shall not review it" because "future dangerousness is made at the time of trial and is not properly reevaluated on habeas." *Id*. (emphasis added). It then remanded the false statistics subpart to the trial court for merits resolution. *Id*.

After Gonzales lost in the trial court and the case was returned to the CCA, that court noted that only the false statistics subpart "met Article 11.071 § 5(a)(1)'s factual-unavailability exception to the prohibition against subsequent writ applications," and reiterated that all

other "claims did not meet Article 11.071 § 5(a)'s requirements." *Ex parte Gonzales*, 2023 WL 4003783, at *1. Then, after adopting most of the trial court's findings, and independently reviewing and denying the false statistics subpart, the CCA dismissed "the remaining allegations . . . as an abuse of the writ." *Id.* at *2.

B. This Court's jurisdiction and adequate and independent state law grounds

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). The state law ground barring federal review may be "substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

To be adequate, a state law ground must be "'firmly established and regularly followed.'" *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). Discretion does not deprive a state law ground of its adequacy for a "discretionary rule can be 'firmly established' and 'regularly followed' even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but

not others." *Beard v. Kindler*, 558 U.S. 53, 60–61 (2009). Ultimately, situations where a state law ground is found inadequate are but a "small category of cases." *Kemna*, 534 U.S. at 381.

A state law ground is "independent of federal law [when it] do[es] not depend upon a federal constitutional ruling on the merits." *Stewart v. Smith*, 536 U.S. 856, 860 (2002). There is no presumption of federal law consideration. *Coleman*, 501 U.S. at 735. To find federal dependence, the state court's decision must "fairly appear to rest primarily on federal law, or to be interwoven with the federal law." *Id*. Where there is no "clear indication that a state court rested its decision on federal law, a federal court's task will not be difficult." *Id*. at 739–40.

Texas, like Congress, has imposed significant restrictions[7] on subsequent habeas applications. *Compare* Tex. Code Crim. Proc. art. 11.071 § 5, *with* 28 U.S.C. § 2244(b). A Texas court may not reach the merits of a claim in a subsequent application "*except* in exceptional circumstances." *Ex parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002). The applicant bears the burden of providing "sufficient specific

[7] Texas's codification of these restrictions is sometimes referred to as the "abuse-of-the-writ" bar or "section 5" bar in capital cases. *See, e.g.*, *Rocha v. Thaler*, 626 F.3d 815, 831 (5th Cir. 2010).

facts establishing," Tex. Code Crim. Proc. art. 11.071 § 5(a), one of these "exceptional circumstances," *Ex parte Kerr*, 64 S.W.3d at 418.

First, an applicant can prove either factual or legal unavailability of a claim. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1). This requires proof of unavailability in *all* prior state habeas applications. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007) ("[T]he factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications."). A claim is legally unavailable when its legal basis "was not recognized or could not have been reasonably formulated from a final decision of the [this Court], a court of appeals of the United States, or a court of appellate jurisdiction of this state," Tex. Code Crim. Proc. art. 11.071 § 5(d), and factually unavailable when its factual basis "was not ascertainable through the exercise of reasonable diligence," Tex. Code Crim. Proc. art. 11.071 § 5(e).

Second, an applicant can prove that "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." Tex. Code Crim. Proc. art. 11.071 § 5(a)(2). This requires an applicant to "make a threshold, prima facie showing of innocence by a preponderance of the evidence." *Ex parte*

Reed, 271 S.W.3d 698, 733 (Tex. Crim. App. 2008) (citation omitted). A "claim" of this sort is also known as a "*Schlup*-type claim," *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002), because Section 5(a)(2) "was enacted in response to" *Schlup v. Delo*, 513 U.S. 298 (1995), *Ex parte Reed*, 271 S.W.3d at 733.

Third, an applicant can prove that, "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the [S]tate's favor one or more of the special issues." Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). Section 5(a)(3), "more or less, [codifies] the doctrine found in *Sawyer v. Whitley*, 505 U.S. 333 (1992)." *Ex parte Blue*, 230 S.W.3d 151, 160 (Tex. Crim. App. 2007).

C. The CCA's abuse-of-the-writ finding is an adequate and independent state law ground preventing the Court from exercising jurisdiction over the majority of Gonzales's false evidence claim.

Before this Court, Gonzales appears to renew three parts of his false evidence claim: (1) "the statistical evidence presented at trial" concerning sex offender recidivism rates; (2) Dr. Gripon's "opinion that [Gonzales] would present a danger 'wherever he goes,'" and (3) Dr. Gripon's "diagnosis of [Gonzales having] antisocial personality disorder."

Pet. Writ Cert. 20.[8] The latter two parts, however, were barred in state court as abusing the writ. *Ex parte Gonzales*, 2023 WL 4003783, at *1. If such an abusiveness finding is adequate and independent, then the Court lacks jurisdiction to consider the future danger and antisocial personality subparts of Gonzales's false testimony claim. It undoubtedly is.

As to adequacy, Gonzales doesn't address it, or the abuse-of-the-writ bar at all, and for good reason—the Fifth Circuit "has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an . . . adequate state ground for the purpose of imposing a [federal] procedural bar." *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008); *cf. Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45–46 (2017) (noting that this Court generally defers to a court of appeals's interpretation of their respective states' laws). With no contest from Gonzales on this point, and a long line of cases upholding the abuse-of-the-writ bar's adequacy, the matter is not up for debate, and the remaining question is independence.

[8] Gonzales seems to have abandoned his challenge to Dr. Gripon's trial testimony concerning the impact of drugs on Gonzales's behavior and that will not be further discussed.

There too, Gonzales makes no argument and there can be none. That's because "[n]o application or interpretation of federal law is required to determine whether a claim has, or could have, been presented in a previous habeas application." *Hughes*, 530 F.3d at 342. Availability is simply a matter of timing, not federal law. And it's clear that availability was the basis of the CCA's dismissal for two reasons. First, Gonzales argued only unavailability for his false evidence claim, Sub. Appl. 55–59, so the CCA had no reason to consider the remaining abuse-of-the-writ exceptions. Second, the CCA explicitly noted that the false statistics subpart of the claim met the "factual-unavailability exception," *Gonzales*, 2023 WL 4003783, at *1, but that the other allegations did not. This is likely because Gonzales didn't present evidence that Dr. Gripon was retracting or changing his prior future dangerousness assessment, or his earlier antisocial personality diagnosis, both of which were context-dependent opinions made at the time of trial. In other words, Gonzales failed to put forth *evidence* of factual unavailability regarding these contentions, unlike what he did for the false statistics subpart. Thus, the CCA's dismissal was independent of federal law.

At bottom, the CCA dismissed the parts of Gonzales's false evidence claim challenging Dr. Gripon's conclusions regarding future danger and antisocial personality disorder, and those dismissals are adequate and independent to sustain the lower court's judgment. *See Kunkle v. Texas*, 125 S. Ct. 2898, 2898 (2004) (Stevens, J., concurring) ("I am now satisfied that the Texas court's determination was independently based on a determination of state law, *see* Tex. Code Crim. Proc. art. 11.071 § 5 [], and therefore that we cannot grant petitioner his requested relief."). Thus, jurisdiction is lacking, *see, e.g.*, *Foster*, 578 U.S. at 497, over the primary issue Gonzales asks the Court to take up, *see* Pet. Writ Cert. ii ("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[?]"). Accordingly, Gonzales's petition should be dismissed for want of jurisdiction.

II. Gonzales Provides No Compelling Reason for Further Review and Presents a Poor Vehicle for Deciding the Question Presented.

The Court requires those seeking a writ of certiorari to provide "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ." Sup. Ct. R. 14.1(h). Gonzales attempts to comply

by arguing that "courts are in need of guidance to clarify that the rule of *Johnson* [*v. Mississippi*, 486 U.S. 578 (1988)] applies to other types of materially inaccurate evidence." Pet. Writ Cert. 13. Guidance certainly isn't a traditional reason for granting certiorari review, *see* Sup. Ct. R. 10(a)–(c), nor is it a compelling one when Gonzales's argument is closely scrutinized.

Initially, the CCA had no reason to determine whether *Johnson* applied to this case because the CCA has created its own false testimony jurisprudence, purporting to be constitutionally rooted in due process, and applied it here (albeit, only to the false statistics portion of the claim). *Ex parte Gonzales*, 2023 WL 4003783, at *2 (citing *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015)). Gonzales, in fact, seized upon the favorable state of *Texas* law in advancing his false evidence claim. Sub. Appl. 2 ("This Court, like the Supreme 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.'"). So much so that he argued such law provided an escape from the abuse-of-the-writ bar. Sub. Appl. 57–58 ("Because

Texas law now recognizes a due process violation under these circumstances and did not at the time of the filing of . . . Gonzales's last habeas application, the legal basis for this claim is also 'newly available' under the meaning of section 5."). And then the bulk of Gonzales's briefing dealt with this law, and when applying the law to the facts, only this law. *See* Sub. Appl. 45–55; *e.g., id.* at 45 ("Inaccurate evidence is material where there is at least a reasonable likelihood that the false testimony affected the judgment of the jury at punishment."). Comparatively, Gonzales's briefing of *Johnson* was more academic, not an application of law to facts. *See* Sub. Appl. 41–45. Indeed, when applying law to facts, *Johnson* is not cited once in Gonzales's state court briefing. *See* Sub. Appl. 45–55. Thus, given the state of Texas law, and the way Gonzales briefed his false evidence claim, the issue Gonzales believes needs clarification may not have even been passed upon by the CCA. This is not a "refus[al] to recognize a cognizable claim, let alone to properly apply *Johnson*," Pet. Writ Cert. 17, but a fair reading by the CCA of what claim Gonzales advanced and requested relief upon. The ambiguity created by Gonzales's briefing in the court below counsels against addressing his questions presented.

Next, he fails to demonstrate any real need for guidance concerning *Johnson*'s scope. To justify that need, Gonzales relies upon a twenty-four-year-old Fifth Circuit case to purportedly demonstrate that most courts apply *Johnson* to only invalidated-conviction situations. Pet. Writ Cert. 13 (citing *Hernandez v. Johnson*, 213 F.3d 243, 252 (5th Cir. 2000)). He contrasts that case with a twenty-three-year-old Eighth Circuit case where *Johnson* was applied outside of the invalidated-conviction context. *Id.* (citing *Amrine v. Bowersox*, 238 F.3d 1023, 1030, 1032 (8th Cir. 2001)). Two things are apparent from this feeble attempt to justify the Court's intervention. One, given the age of these circuit cases, *Johnson*'s reach is hardly an oft-repeated, important issue. And two, Gonzales fails to prove a circuit conflict requiring guidance—the Fifth Circuit case merely summarized the state of the law surrounding *Johnson* and did not confine it to only invalidated convictions, and the Eighth Circuit case simply falls outside another court's summarization of the law, not its decision. Indeed, the Fifth Circuit case Gonzales relies upon applied *Johnson* outside the context of an invalidated-conviction situation. *See Hernandez*, 213 F.3d at 252–54 (reviewing testimony from the State's forensic psychiatrist and medical examiner for purposes of falsity). Gonzales

relies upon a strawman, and an aged one at that, to request the Court's guidance. There is no need for it, especially since Gonzales got more favorable review than justified under the Constitution and since there's no real conflict presented.

III. Gonzales's False Evidence Claim Fails to Raise a Federal Issue and Is Barred by Anti-retroactivity Principles.

As mentioned earlier, Gonzales raises a three-part (of what used to be a four-part) false evidence claim: (1) "the statistical evidence presented at trial" concerning sex offender recidivism rates; (2) Dr. Gripon's "opinion that [Gonzales] would present a danger 'wherever he goes,'" and (3) Dr. Gripon's "diagnosis of [Gonzales having] antisocial personality disorder." Pet. Writ Cert. 20. The Court has jurisdiction to hear only the first part of the claim, but it shouldn't reach the merits because Gonzales fails to raise a constitutional issue and the claim is barred by antiretroactivity principles.

A. Gonzales fails to present a federal issue, or one passed upon or properly pressed in state court.

As discussed earlier, the CCA interprets due process as potentially providing relief for the unknowing presentation of false testimony. *See, e.g.*, *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011) ("This Court allows applicants to prevail on due-process claims when the

State has unknowingly used false testimony."). Gonzales primarily relied upon this law in state court, and that was the claim partly adjudicated by the CCA. This Court, however, has "never held that [false testimony violated the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of its falsity], and [it is] unlikely ever to do so." *Cash v. Maxwell*, 132 S. Ct. 611, 615 (2012) (Scalia, J., dissenting); *see Pierre v. Vannoy*, 891 F.3d 224, 227 (5th Cir. 2018) ("[N]o Supreme Court case holds specifically that [State] knowledge is *not* required." (second alteration in original)).

This Court's jurisdiction over the states' high courts requires that a federal issue be decided. 28 U.S.C. § 1257(a). An unknowing use of false testimony claim is not a federal issue because this Court does not recognize it as such, so it is effectively one of state law and thus not properly before this Court. But even if it were a matter of federal law, the claim was not passed upon by the CCA or adequately pressed in that court. *See Adams v. Robertson*, 520 U.S. 83, 87 (1997) (per curiam). This is because, as discussed above, the claim was mostly not addressed on the merits, so it was not passed upon by the CCA. *See supra* Argument I. And neither was the claim properly raised because it was presented for the

first time in a procedurally improper way—a second subsequent application. As such, even if federal law jurisdiction exists, "prudential" concerns compel denial of certiorari review. *Adams*, 520 U.S. at 90.

B. Gonzales's unknowing use of false testimony claim is barred by nonretroactivity principles.

Habeas is not an appropriate avenue for the recognition of new constitutional rules of criminal procedure. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). Such rules do not apply to convictions final before the new rule was announced. *Id.* This facilitates federal- and state-court comity by "validat[ing] reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKeller*, 494 U.S. 407, 414 (1990).

"The *Teague* inquiry is conducted in three steps. First, the date on which the [petitioner's] conviction became final is determined." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Second, a reviewing court must determine whether the rule or proposed rule is new. *Id.* "[A] case announces a new rule,' *Teague* explained, 'when it breaks new ground or imposes a new obligation' on the government." *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quoting *Teague*, 489 U.S. at 301)). "To put it

differently, . . . if the result was not dictated by precedent existing at the time the [petitioner's] conviction became final," the rule is new. *Teague*, 489 U.S. at 301. "And a holding is not so dictated . . . unless it would have been 'apparent to all reasonable jurists.'" *Chaidez*, 568 U.S. at 347 (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527–28 (1997)). Third, "the *Teague* analysis requires the court to determine whether the rule nonetheless falls within" the sole exception "to the *Teague* doctrine." *O'Dell*, 521 U.S at 157; *see Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021) (eliminating the "watershed exception"). That limitation is for rules that would place primary conduct beyond the government's power to proscribe or a class of persons beyond its power to punish in certain ways. *See Graham v. Collins*, 506 U.S. 461, 477 (1993).

Gonzales's conviction became final on February 22, 2010, when his request for a writ of certiorari was denied. *See Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and . . . a timely filed petition [for writ of certiorari] has been finally denied.").

The next question is whether Gonzales is asking for a new rule. He undoubtedly is—that due process prohibits the use of false testimony even when unknowingly presented, or that *Johnson* goes beyond the facts of that case, i.e., subsequently overturned convictions. As to the former, that was not the rule at the time Gonzales's conviction became final, and it's not the rule today. *See Cash*, 132 S. Ct. at 615; *Pierre*, 891 F.3d at 227. As to the latter, his request for expansion of the rule concedes the issue. Accordingly, Gonzales's proposed rules are new ones.

The final question is whether Gonzales's new rules are substantive. Clearly they are not. Gonzales is not suggesting that capital murder is beyond a state's ability to criminalize, nor is he arguing inclusion within a class exempt from a death sentence. Because of that, *Teague* and its progeny bar relief. And thus, either because Gonzales fails to raise a constitutional claim, or if he does, one made retroactive to his case, the Court should decline to issue a writ of certiorari.

IV. Assuming Jurisdiction, Assuming a Constitutional Claim, and Assuming Retroactivity Thereof, the Decision Below Was Correct.

A false testimony claim, at least one recognized by this Court, requires three showings: (1) that the challenged testimony was false;

(2) that the challenged testimony was material; and (3) that the prosecution knew, or should have known, that the challenged testimony was false. *Giglio v. United States*, 405 U.S. 150, 153–54 (1972). Gonzales fails to make these showings concerning Dr. Gripon.

A. Sex offender recidivism rates

Dr. Gripon testified that sexual assault "has a high degree of reoccurrence or recidivism," and that "[i]t's above the fifty-one percentile." 41.RR.75. He explained that, "if a person starts sexually assaulting individuals, then they will generally continue that until they are stopped in some way or in some matter." 41.RR.76. Expounding, he stated that "there is lots of data out there about the person who commits forcible rape and the likelihood that they will continue that. The percentages are way up in the eighty percentile or better." 41.RR.88.

Gonzales tried to prove Dr. Gripon's statements regarding recidivism false by using recent studies. But the "statistics" therein "are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977). Acknowledging that

axiom, a recent Department of Justice paper noted that "recidivism of sex offenders is difficult to measure. The surreptitious nature of sex crimes, the fact that few sexual offenses are reported to authorities, and the variation in the ways researchers calculate recidivism rates all contribute to the problem."[9] Roger Przybylski, *Recidivism of Adult Sexual Offenders*, Sex Offender Mgmt. Assessment & Plan. Initiative (U.S. Dep't of Just., Off. of Sex Offender Sentencing, Monitoring, Apprehending, Registering, & Tracking), July 2015, at 1. And comparing older studies, including ones that existed at the time of Gonzales's trial, "to offenders who engage in rape behavior today is problematic because . . . sex offender treatment and management practices were far different then they are today." *Id*. at 2.

The point is, Gonzales attempted to prove falsity by suggesting that there is an objective truth about sex offender recidivism, and that Dr. Gripon did not relay that information to the jury. But the issue is far, far more nuanced, including that Dr. Gripon was relying on data compiled

---

[9] While there is difficulty in determining sex offender recidivism, "there is widespread recognition that the officially recorded recidivism rates of sexual offenders are a diluted measure of reoffending." *Recidivism of Adult Sexual Offenders* at 2.

at or before the time of trial and that studies, and sex offenders, come in infinite varieties. Accordingly, Gonzales failed to prove that Dr. Gripon's testimony was false at the time of trial or today.[10]

And that is why the CCA found that Gonzales had "not shown by a preponderance of the evidence that [Dr.] Gripon gave demonstrably false testimony regarding sex offender recidivism rates." *Ex parte Gonzales*, 2023 WL 4003783, at *2. Undergirding that conclusion were discrete factfindings, including that "[d]etermining the objective truth about recidivism rates is impossible" because of "[t]he surreptitious nature of sex crimes, the fact that few sexual offenses are reported to authorities, and the variation in the ways researchers calculate recidivism rates." FF67.[11] Also that "[t]here is widespread recognition that the officially recorded recidivism rates of sexual offenders are a diluted measure of reoffending." FF68. And that, "[c]omparing older studies, including ones

---

[10] Even if Gonzales could prove the falsity of the percentages cited by Dr. Gripon, he fails to prove that recidivism amongst sex offenders isn't "high." That is a subjective and relative determination, not capable of being proven false. For example, a study notable for its 25-year follow up period of sex offenders "found a sexual recidivism rate of 39 percent and recidivism rate for any charge of 74 percent." *Recidivism of Adult Sexual Offenders* at 2–3. The State of Texas considers that shockingly high.

[11] "FF" refers to the finding of fact made by the trial court and adopted by the CCA in the proceeding below, followed by the number assigned by that court.

that existed at the time of [Gonzales's] trial, 'to offenders who engage in rape behavior today is problematic because . . . sex offender treatment and management practices were far different then they are today." FF69. Gonzales doesn't engage with any of these findings or challenge them as clearly erroneous. Without such a challenge, there's little reason to consider whether false testimony can affect a death sentence because, as it stands today, Gonzales failed to prove falsity.

In terms of this Court's false testimony jurisprudence, Gonzales also failed to show that the State had knowledge of any supposed falsity, nor can he by pointing to recent studies. And, in any event, Gonzales failed to prove materiality. The State's punishment case was overwhelming. Gonzales *thrice* confessed to kidnapping and murdering Townsend. First, he admitted to law enforcement the version of events described above—Gonzales was looking for drugs, kidnapped Townsend while ransacking her house looking to score, took her to secluded area and raped her, then shot and killed her while she begged for her mother. 44.RR.SX.8. He then confessed to a TV news reporter, confirming the kidnapping and killing and begging. 35.RR.39–55. Finally, he confessed to a jailer that he murdered Townsend, raped her, and returned to view

her corpse at least once. 37.RR.105–07. "A confession is like no other evidence. Indeed, 'the defendant's confession is probably the most probative and damaging evidence that can be admitted against him.'" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)); *see also id.* at 313 (Kennedy, J., concurring) ("If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence."). And here, the power of the confession is amplified triply.

Further, shortly after Townsend's murder, Gonzales stalked a teenage girl. 40.RR.50–59. When the girl's mother confronted Gonzales, he said that she couldn't keep him away from the girl and that he would kill the mother. 40.RR.57, 60–62. Shortly after that, Gonzales kidnapped and repeatedly raped Florence "Babo" Teich at knifepoint. 40.RR.71–84. She was able to escape, bound and naked and locked in a closet, after Gonzales left the cabin for a short period. 40.RR.85–97. When authorities

went to the cabin, they spotted Gonzales in Teich's truck, and he led them on a 35- to 45-minute chase before crashing into a tree. 40.RR.127–42.

Gonzales displayed little to no remorse for these offenses. He told a reporter that he "didn't feel any different at all" after confessing to Townsend's murder. 40.RR.152. He told a fellow inmate that he did not regret murdering Townsend and that he'd do it again because he enjoyed it. 39.RR.188–89. A jailer observed that he didn't see Gonzales express remorse over the offense either. 39.RR.103. Regarding Teich, despite judicially confessing to kidnapping and raping her, Gonzales told a reporter that their encounter was consensual and that Teich had made up the accusations. 40.RR.142–46.

There's more. Gonzales had convictions for felony theft, forgery, and burglary of a habitation, and received convictions for aggravated kidnapping and sexual assault for the abduction and rape of Teich. 39.RR.13–14; 40.RR.118–21. Incarcerated, he threatened the life of two jailers. 39.RR.19–22, 93. He was found with contraband numerous times, including a wooden "shank" and a razor blade. 39.RR.38, 52, 91; 40.RR.6–8. He started a fire in the jail, causing a partial evacuation. 39.RR.34, 75. He stole another inmate's medication and beat another over a dispute

about a TV show. 39.RR.168–77; 40.RR.36–37. He told a fellow inmate how he'd escape from jail and kill any jailer he did not like. 39.RR.189–91. In a recorded phone call, Gonzales well summarized his status incarcerated, "They know I'm a threat to [the general jail] population." 40.RR.38.

He also had a morbid fascination with death and decay. He told one jailer that he would kill animals simply to watch them decay, and he noted that a human body decays faster than an animal. 39.RR.16–18. He told a mental health professional that he was obsessed with dead bodies. 39.RR.135–41. And he filled out a jail "sick call slip," saying that he "went back almost every day to see [Townsend's] body rot away. It's something I like doing. All my life I lived on a ranch and I would kill all kinds of animals just to see the corpse rot away. After seeing the human body rot away, well, that little bitch won't get out of my head." 39.RR.31.

Even if *all* of Dr. Gripon's testimony were removed from the evidentiary mix, Gonzales fails to prove materiality given the punishment case against him. *See Strickler v. Greene*, 527 U.S. 263, 295 (1999) ("With respect to the jury's discretionary decision to impose the death penalty, it is true that [the eyewitness] described petitioner as a

violent, aggressive person, but that portrayal surely was not as damaging as either the evidence that he spent the evening of the murder dancing and drinking . . . or the powerful message conveyed by the 69-ound rock that was part of the record before the jury."). But given the jurisdictional restrictions here, the Court could only consider a part of Dr. Gripon's testimony as false—the part concerning recidivism statistics. As so limited, the CCA concluded, "given the strength of the State's future dangerousness case, [Gonzales] . . . failed to show a reasonable likelihood that [Dr.] Gripon's challenged testimony affected the jury's answer to that punishment phase special issue," *Ex parte Gonzales*, 2023 WL 4003783, at *2, a conclusion that Gonzales barely acknowledges or challenges. But given the above, an entirely correct decision. As such, his petition should be denied.

B. Antisocial personality disorder diagnosis

Had the CCA considered the antisocial personality subpart of the false testimony claim, it would have undoubtedly failed. Dr. Gripon testified that, "based upon the[] records" he reviewed at the time of trial, "there is an antisocial personality disorder present here." 41.RR.70. Sixteen years later, Dr. Gripon maybe sent a letter to Gonzales's current

counsel (not sworn or otherwise authenticated). Sub. Appl. Ex. D. Despite reviewing his testimony at trial, *id.* at 9–10, and making "conclusions based on current evaluation," *id.* at 10–12, Dr. Gripon did not say that his testimony at trial concerning antisocial personality disorder was wrong, *see id.* at 1–12. Rather, Gonzales makes that inference because Dr. Gripon makes no current diagnosis, *id.* at 8, but antisocial personality disorder is permanent, Sub. Appl. 25–26. Ergo, Dr. Gripon must have been wrong. That is a logical fallacy, not proof of falsity.

For one, there is no explanation about why Dr. Gripon did not make a present diagnosis. It could be because that wasn't asked of him. It could be because he didn't think he had sufficient records to do so. Or it could be because he didn't think that antisocial personality disorder can be diagnosed in the highly controlled confines of death row. Indeed, at trial, Dr. Gripon testified that determining future dangerousness in such a setting is "not possible to do . . . because of the uniqueness of that setting." 41.RR.108. For another, while Dr. Gripon testified that a "person [with antisocial personality disorder] acts that way because that's the way they are," 41.RR.70, he did not testify that it was *symptomatically* permanent. Rather, he testified that, given Gonzales's

history, effective treatment was a longshot. 41.RR.85. Gonzales manufactures a categorical in an attempt to prove it false. It is a strawman and it doesn't work.

In any event, in terms of this Court's established falsity jurisprudence, he can't prove that the State knew of the falsity, nor does he even attempt to make this showing. Indeed, Dr. Gripon's opinions are based on "new" information presented to him by Gonzales's current attorneys.[12] Sub. Appl. D, at 2. Some of that information did not exist at the time of trial, including prison records generated after his trial.[13] *Id.* As such, Gonzales cannot make the showing necessary to prove that the State knowingly violated the Constitution.

Finally, Gonzales fails to prove materiality. His own expert at trial, Dr. Milam, testified that Gonzales "has antisocial personality features," but that "his primary diagnosis is a reactive attachment disorder." 42.RR.28. Prosecutors then went over the diagnostic criteria of antisocial personality disorder with Dr. Milam, 42.RR.79–84, and she agreed that

---

[12] At trial, Gonzales made it clear that Dr. Gripon obtained his information from the State and from an interview with Gonzales. 41.RR.99.

[13] Gonzales may be to blame for whatever inaccuracy existed. Indeed, his own expert testified that Gonzales exaggerated symptoms with her. 42.RR.51.

Gonzales "met all seven of the criteria and had evidence of a conduct disorder while he was a young teen, 42.RR.84. Thus, Dr. Milam agreed that "you could diagnosis [Gonzales] with antisocial personality disorder today." 42.RR.85. Whatever effect Dr. Gripon's testimony had regarding antisocial personality disorder, it pales in comparison, and is cumulative of, Gonzales's own expert's testimony that he had it. *See Turner v. United States*, 582 U.S. 313, 314 (2017) ("With respect to the undisclosed impeachment evidence, the record shows that it was largely cumulative of impeachment evidence petitioners already had and used at trial."). In no way can Gonzales demonstrate materiality on this record and the petition should be denied.

C. Future Dangerousness

Again, although this subpart of the false evidence claim is jurisdictionally barred, it would have been denied had it been considered by the CCA. At trial, Dr. Gripon opined that Gonzales "would pose a risk to continue to continue to commit threats or acts of violence." 41.RR.66. He considered Gonzales a threat in the "free world" and in a "prison setting." 41.RR.92, 94.

Once again, Gonzales tries to prove falsity by wrenching testimony out of context. When Dr. Gripon opined that Gonzales was a threat in a "prison setting," it was a generalized discussion of prison, not specific to death row. 41.RR.94. Indeed, just a few lines after rendering that opinion, Dr. Gripon stated, "[p]articularly non-death row inmates have substantial contact with females, both guards and employees." 41.RR.95. And later, on cross-examination, Dr. Gripon testified that determining future dangerousness on death row is "not possible to do . . . because of the uniqueness of that setting." 41.RR.108. That is likely because of the "unique" security utilized for death row inmates, giving them almost no opportunity to behave violently. But that is not the question that Texas jurors are asked, just whether they are generally a future danger. Gonzales therefore fails to prove falsity.

Regardless, Gonzales fails to prove knowledge or materiality. As to the former, Dr. Gripon provided his new future dangerousness opinion some sixteen years after trial, quixotically while Gonzales was confined on death row, a locale Dr. Gripon had previously said precluded such an analysis, so the State could not have knowingly presented the contrary at that time. And, as explained above, even if Dr. Gripon's testimony were

wiped from the punishment slate, it would not have mattered. Accordingly, Gonzales fails to show entitlement to a petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Gonzales's petition for writ of certiorari should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

MATTHEW OTTOWAY
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2170
matthew.ottoway@oag.texas.gov

Counsel for Respondent