No. 23-5823

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RAOUL D. SCHONEMANN*
Counsel of Record
THEA J. POSEL
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 East Dean Keeton Street
Austin, Texas 78722
(512) 232-9391
rschonemann@law.utexas.edu
Counsel for Petitioner

CAPITAL CASE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal

State

Constitutional Provisions

Statutes

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This petition presents a straightforward question: whether due process and the heightened reliability requirement of the Eighth Amendment are violated when the State relied on expert testimony to establish a capital defendant's "future dangerousness" that the expert himself now disavows as erroneous.

Even though an affirmative determination of a defendant's "future dangerousness" is a "death-eligibility requirement" under Texas law,[1] the Texas Court of Criminal Appeals ("CCA") declared that Gonzales' claim that the future dangerousness determination in his case was predicated on materially unreliable evidence was unreviewable in postconviction proceedings.

The State's presentation of Dr. Gripon's opinion and testimony, offered to prove that Petitioner would be a future danger "wherever he goes,"[2] led to a death "sentence founded at least in part upon misinformation of constitutional magnitude." *United States v. Tucker*, 404 U.S. 443, 447 (1972). Because the court below held that this claim "is not properly reevaluated on habeas," and no other mechanism exists by which to address this claim which by its nature cannot be raised until the

---

[1] *See 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."); *see also 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)).

[2] *State v. Ramiro Felix Gonzales*, No. 04-02-9091-CR, Reporter's Record Vol. 41 at 94 (trial record).

trial evidence "has been revealed to be materially inaccurate," Petitioner now asks for "a full and fair opportunity to litigate" his constitutional claim. *Wright v. West*, 505 U.S. 274, 293 (1992). Jurisdiction is proper, and this Court's intervention is warranted.

ARGUMENT

I. There is No Procedural Bar to This Court's Review.

The State argues that review of Petitioner's claim is barred, claiming that the CCA dismissed "the majority of the claim" under Texas's "abuse of the writ" doctrine—i.e., that the claim should have been raised in a prior state habeas application.[3] BIO 16, 19 (asserting that the CCA "dismissed the parts of Gonzales's false evidence claim challenging Dr. Gripon's conclusions regarding future danger and antisocial personality disorder" as an "abuse of the writ."). *See* BIO 19. But because

[3] The Texas "abuse of the writ" doctrine colloquially refers to Tex. Code Crim. Pro. art. 11.071 §5, the provision of the capital postconviction statute that generally bars the CCA from considering a second application for a writ of habeas corpus unless certain threshold conditions are met. The "abuse of the writ" doctrine is essentially a *timeliness* rule, requiring petitioners to raise all available claims in their initial application for writ of habeas corpus and barring claims that were or should have been raised in a prior application. *See* Tex. Code Crim. Pro. art. 11.071 §5(a)(1); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir.2008) (explaining the abuse of the writ rule and why it is an adequate and independent state ground in the context of dismissal of subsequent applications).

the State does not accurately characterize the determination of the lower court, this Court's intervention is not only appropriate but warranted.

A. The Texas Court of Criminal Appeals refused to review Petitioner's claim because it maintained the claim was not "properly" reviewable in postconviction proceedings, not because it was procedurally barred.

In its order granting a stay of Petitioner's then-scheduled execution and authorizing further review on "a portion of Claim 1," the CCA wrote:

> In [Claim 1], Applicant asserts that the State's trial expert, Dr. Edward Gripon, gave false testimony at trial because he has now reevaluated Applicant 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 Applicant's first claim is such a reevaluation, the trial court shall not review it.*[4]

Ex parte Gonzales, WR-70,969-03, 2022 WL 2678866 at *1 (Tex. Crim. App. Jul. 11, 2022) (not designated for publication).

[4] To the extent that the CCA construed Petitioner's claim as an attempt to "reevaluate" the determination of future dangerousness, it misapprehended the nature of the claim. Petitioner's claim is that the State's presentation of expert testimony to obtain a death sentence that is now disavowed by the expert himself violates the Eighth Amendment 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 v. Mississippi*, 486 U.S. at 590. To be clear, Petitioner did not seek to re-litigate the future dangerousness issue because of a *new* diagnosis; rather, Petitioner contended that Dr. Gripon's *original* opinion and diagnosis was incorrect, and therefore the jury's determination necessarily rested at least in part on demonstrably materially inaccurate evidence. *See Johnson*, 486 U.S. 578, 590 (1988). Both the CCA and the State in opposition to certiorari misconstrue this claim.

The CCA's determination that the claim "is not properly reevaluated on habeas" is plainly not an assertion that it should have been raised in a previous habeas application but instead a declaration that it is not a cognizable claim in habeas proceedings at all. In Texas, a "'a disposition is related to the merits if it decides the merits *or makes a determination that the merits of the applicant's claims can never be decided.*'" *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004) (quoting *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997)). A finding that an issue is not cognizable is "a determination that the merits of the [issue] can never be decided," i.e., on the merits. *Grigsby*, 137 S.W.3d at 674.

Thus, the State misconstrues the order of the lower court, the decision below constitutes a determination on the merits, and this Court has jurisdiction to review the question presented in Gonzales' petition.

B. At a minimum, the CCA did not clearly purport to dismiss Gonzales' claim under the state law "abuse of the writ" doctrine, and therefore no adequate and independent state ground bars this Court's review.

To preclude this Court's review, a state-law ground of decision must be both "adequate" to support the judgment and "independent" of federal law. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The question

whether a state-court decision is supported by an adequate and independent state-law ground is itself "a matter of federal law." *Johnson v. Lee*, 578 U.S. 605, 608 (2016) (per curiam).

The decision below does not rest on an adequate or independent state-law ground. The State's contention that "[a]t bottom, the CCA dismissed the parts of Petitioner'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," BIO at 19, again misrepresents the CCA's July 2022 order. Far from relying on an adequate and independent state ground to support its judgment, the state court in one conclusory sentence refused to address the claim at all. And this Court "will not assume that a state court decision rests on adequate and independent state grounds when ... the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (finding lower court's decision "cryptic" at best where the decision "contain[ed] no clear express indication that 'separate, adequate, and independent' state-law grounds were the basis for the court's judgment.").

Petitioner raised three claims in his state habeas application that were the subject of the court's order.[5] The CCA's reference to "[t]he remaining claims"[6] thus logically refers to claims two and three. At best, the order is "cryptic"—plainly, it does not dismiss Petitioner's first claim, in whole or in part, under the abuse of the writ doctrine. And the CCA's declaration that Eighth Amendment claims like Petitioner's "are not properly reevaluated on habeas" neither cites to nor invokes any state (or federal) law whatsoever. Without a "clear or express indication" that the CCA's decision that the Eighth Amendment claim was not cognizable, or "not properly reevaluated on habeas," rested on a separate, adequate, and independent state-law ground, this Court has jurisdiction to review the constitutional question presented here.[7]

---

[5] Petitioner also raised a false testimony claim based on a newly sworn affidavit by a jailhouse witness recanting his punishment phase testimony (Claim 2) and a claim that evolving standards of decency should bar his execution for a crime committed when he was a teenager (Claim 3).

[6] *Ex parte Gonzales*, WR-70,969-03, 2022 WL 2678866 at *1 ("[T]he determination of future dangerousness is made at the time of trial and is not properly reevaluated on habeas…. The remaining *claims* do not meet the requirements of Article 11.071 § 5(a) and should not be reviewed.") (emphasis added).

[7] While the Texas court remanded "a portion of Claim 1" for evidentiary development, the trial court took no additional evidence, simply adopting the State's proposed findings of facts and conclusions of law denying relief on the narrow factual issue. The CCA's June 26, 2023, order adopted the trial court's recommendation that relief be denied and dismissed the remainder of the issues with no further statements or

II. Petitioner's "False Evidence Claim" is Squarely Rooted in This Court's Eighth and Fourteenth Amendment Precedents and Is Not Barred by Non-Retroactivity Principles.

In opposition, the State argues that neither a death sentence predicated on materially unreliable evidence nor the refusal of the CCA to acknowledge Petitioner's claim as a cognizable basis for postconviction review raises a federal question. BIO 23-25. But the State mischaracterizes Petitioner's claim as "effectively one of state law," when in fact the claim was explicitly based on this Court's Eighth and Fourteenth Amendment precedents. To the extent Petitioner relied on Texas cases in his pleading, those cases purported to apply and construe this Court's constitutional precedents, not Texas law. Thus, the State's contention that Gonzales "failed to present a federal issue, or one passed upon or properly pressed in state court," BIO 23, is untrue.

---

reference to the Eighth Amendment *Johnson* claim. *Ex parte Gonzales*, WR-70,969-03, 2023 WL 4003783 (Tex. Crim. App. Jun. 26, 2023).

A. Petitioner's claim was explicitly pled as an Eighth and Fourteenth Amendment claim based on this Court's precedents, and thus presents a "federal issue" for review.

Petitioner's claim in the proceeding below clearly alleged that the State's use of false and materially inaccurate testimony at the penalty phase of his trial violated the Eighth and Fourteenth Amendments:

> THE STATE VIOLATED THE EIGHTH AMENDMENT AND DUE PROCESS BY PRESENTING FALSE AND MATERIALLY INACCURATE EXPERT TESTIMONY—NOW DISAVOWED BY THE EXPERT HIMSELF—AT PUNISHMENT

Pet. at 14.

And Petitioner's legal argument was rooted explicitly in this Court's Eighth and Fourteenth Amendment precedents, primarily this Court's decision in *Johnson v. Mississippi*, 486 U.S. 578 (1988). In *Johnson*, this Court held that the Eighth Amendment requires a new sentencing proceeding when evidence relied on by the jury to sentence the defendant to death was "materially inaccurate," even if the facts demonstrating that the trial evidence was inaccurate did not emerge until after sentencing. *Johnson*, 486 U.S. at 590.[8] Petitioner contended that these Eighth

[8] Petitioner also pointed to cases such as *United States v. Tucker*, 404 U.S. 443, 447 (1972) (vacating sentence based on "assumptions" concerning a defendant's criminal

Amendment and Fourteenth Amendment due process principles applied with equal force to Dr. Gripon's trial testimony about future dangerousness, which he has now substantially disavowed.

While Petitioner also discussed and relied on Texas decisional law applying and construing this Court's constitutional precedents,[9] doing so did not convert his claim into a "state-law" one.

B. Petitioner's claim is not barred from review by non-retroactivity principles.

The State also contends that Petitioner's claim is barred from review by the non-retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). BIO 25. This is not so for two reasons.

First, in *Danforth v. Minnesota*, 552 U.S. 264 (2008), this Court recognized that the *Teague* rule, which generally proscribes the

---

record which were subsequently revealed to be "materially untrue") and *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (vacating sentence "founded at least in part upon misinformation of constitutional magnitude") in support of his claim for relief. As the Court said in *Townsend*, "Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." 334 U.S. at 741. Petitioner maintains that these principles are equally applicable to Dr. Gripon's testimony.

[9] *See*, *e.g.*, *Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010) (citing *Johnson v. Mississippi* for the proposition that "a death sentence based on materially inaccurate evidence violates the Eighth Amendment"); *Ex parte Chavez*, 371 S.W.3d 200, 208 (Tex. Crim. App. 2012) (due process violation does not require perjury by a State's witness, but instead "it is in sufficient that the testimony was 'false'").

retroactive application of new constitutional rules of criminal procedure to cases on *federal* habeas review, does *not* prohibit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" under *Teague*.

Because Petitioner raised the claim in state, not federal, proceedings, *Teague* does not bar review. In fact, the Texas postconviction statute explicitly recognizes that a court may grant relief on a claim presented in a subsequent habeas application if the claim rests on a "previously unavailable legal basis." *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021) (construing Tex. Code Crim. Proc. art. 11.071, § 5). Thus, *Teague* does not bar review of Petitioner's claim in Texas state collateral proceedings, nor would it necessarily do so in other states.

Second, like the claim in *Johnson*, Petitioner's claim, by its nature, can only be raised for the first time in collateral review proceedings because it is premised on a "*post-trial development* that cast[s] doubt on the reliability of evidence that played a critical role in the sentencing decision."[10] Petitioner submits that *Teague*'s non-retroactivity rule

[10] *See Florida v. Burr*, 496 U.S. 914, 918-19 (1990) (Stevens, J., dissenting) (describing the rule of *Johnson v. Mississippi* as a claim predicated on "a *post-trial development*

cannot be applied to bar collateral review of a federal constitutional claim that, by its nature, can only be raised in collateral review proceedings.[11]

III. The Record Below Demonstrates That Dr. Gripon's Trial Opinion and Testimony Were Materially Inaccurate.

Despite the State's lengthy recitation of the trial evidence, the record below contains additional evidence supporting the fact that Dr. Gripon's opinion of future dangerousness and trial testimony were materially inaccurate. Expert psychologist Dr. Kathryn Porterfield, who evaluated Mr. Gonzales in 2021, found that "[s]ince his incarceration, Ramiro has demonstrated remarkable improvements in his functioning across multiple domains. For instance, Ramiro's capacity to build relationships and have positive contact with others has been especially notable." App. F[12] at 24. He expresses a "profound remorse and regret for his crimes." *Id.* Dr. Porterfield described Gonzales as "pleasant and

---

that cast[s] doubt on the reliability of evidence that played a critical role in the sentencing decision").

[11] *See Teague*, 489 U.S. at 338 (Brennan, J., dissenting) (observing that "[s]ometimes a claim which, if successful, would create a new rule not appropriate for retroactive application on collateral review is better presented by a habeas case than by one on direct review. In fact, sometimes the claim is *only* presented on collateral review.") (emphasis supplied).

[12] Dr. Porterfield's report is Exhibit E to the state habeas application and is appended here for ease.

enthusiastic when speaking about the positive relationships in his present life and his gratitude for these people, as well as for his faith." *Id.* at 16-17.

Dr. Porterfield first collected and recited Ramiro's traumatic life history evidence in excruciating detail, drawing clinical parallels between observations of abused children and Petitioner's prior inability to regulate and understand his emotions. By 2021, Petitioner "did not avoid the stark reality of his actions, but directly addressed the inalterable consequences of taking a life, saying that his actions had created needless and undeserved suffering for Bridget and inconsolable pain for others. This kind of remorse and taking responsibility for his actions suggests a maturity that clearly was not yet developed in Ramiro at the time he was evaluated by Drs. Milam and Gripon." App. 1 at 24.

In short, "[i]n the years since his incarceration, there has also been evidence of [Petitioner]'s maturation and psychological resilience, in particular his deep and genuine religious faith, sincere remorse, and meaningful attachments to positive, prosocial individuals. [Petitioner]'s current functioning indicates improvement in many of his psychological

and behavioral difficulties and potential for further rehabilitation and growth." *Id.* at 25.

The evaluation and opinion of Dr. Porterfield supports Dr. Gripon's observation that Gonzales has "grown and matured both emotionally and intellectually." Pet. App. D at 8. Dr. Gripon noted that, "[w]ith the passage of time and significant maturity, [Petitioner] is now a significantly different person both mentally and emotionally." *Id.* at 12. Petitioner "has developed significant insight into his earlier behaviors" and "expressed remorse for taking the life" of Bridget Townsend. *Id.* at 6. Indeed, as Dr. Porterfield predicted, with the full clinical picture before him, Dr. Gripon in 2022 not only "re-evaluate[d]" Ramiro but also "reassess[ed] [his] prior determination," finding that Ramiro "does not pose a threat of future danger to society." *Id.* at 12.

The State's suggestion that Petitioner has "abandoned his challenge to Dr. Gripon's trial testimony concerning the impact of drugs on Gonzales's behavior," BIO at 17, n. 8, exemplifies the State's misunderstanding of the question before this Court—not solely because the record shows that Dr. Gripon in fact concluded that Petitioner's "history of criminal behavior is obviously associated with his severe drug

addiction/dependency that began when he was a teenager" and "his behavior was significantly affected by his self-medication in the form of drug use and resulting drug-seeing behavior." Pet. App. D at 9. Petitioner does not challenge piecemeal lines of testimony; instead he asks this Court to determine whether state courts may refuse entirely to provide a forum in which to challenge a death sentence premised on a prediction of future dangerousness required by state law now *disclaimed by its original sponsor*. In this scenario, this Court's intervention is warranted.

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,

/s/ Raoul D. Schonemann
Raoul D. Schonemann
Thea J. Posel
Capital Punishment Clinic
University of Texas School of Law
727 East Dean Keeton Street
Austin, Texas 78705
512-232-9391
rschonemann@law.utexas.edu
tposel@law.utexas.edu