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

When a state conditions a capital defendant's eligibility to be sentenced to death on a jury's determination of "future dangerousness," can the state refuse to recognize challenges to the accuracy of the jury's determination as cognizable grounds for post-conviction review?

Does it violate the protections of the Eighth and Fourteenth Amendments to the United States Constitution to execute an individual who does not meet the eligibility criteria for a sentence of death under state law?

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)

Gonzales v. State, No. AP-75,540, 2009 WL 1684699 (Tex. Crim. App. June 17, 2009) (unpublished) (direct review)

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 July 11, 2022) (unpublished) (state post-conviction habeas corpus proceeding)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 June 30, 2023) (unpublished) (state post-conviction habeas corpus proceeding)

Ex parte Gonzales, No. WR-70,969-04 (Tex. Crim. App. June 24, 2024) (unpublished) (state post-conviction habeas corpus proceeding)

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases

Federal

Constitutional Provisions

Statutes

Rules

Other Authorities

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 Texas Court of Criminal Appeals's decisions denying and dismissing Petitioner's post-conviction habeas application are unpublished and reprinted in full in the Appendix. Pet. App. 005a–008a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Texas Court of Criminal Appeals entered its judgment denying state postconviction habeas corpus relief on June 24, 2024. 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 as Appendix C. Pet. App. 008a-011a.

INTRODUCTION

> "The execution of prisoners based on predictions of violence that are shown to be wrong is unjust and threatens the rule of law. Such executions are unjust because the predicate for execution no longer holds true. If predictions purportedly made 'beyond a reasonable doubt' and with human life on the line cannot be trusted, citizens may conclude that the criminal justice system is unreliable and unfair. They may understand that some prediction error is inevitable, but condemn the state for failing to correct it once it has become, in the words of Justice Marshall, 'unmistakably clear.' It would not be unreasonable for citizens to see this omission—however unintentional it may be—as a reflection of indifference to the value of human life, particularly the lives of the poor and underprivileged who end up on death row."[1]

Petitioner Ramiro Felix Gonzales was sentenced to death in 2006 after a jury predicted that, even if incarcerated, he would "commit criminal acts of violence" that "would constitute a continuing threat to society." But that prediction has not come to pass.

In the 18 years that Mr. Gonzales has been on death row, he has committed no criminal acts of violence and, indeed, no criminal acts whatsoever. He has earnestly devoted himself to self-improvement, contemplation, and prayer, and has grown into a mature, peaceful, kind, loving, and deeply religious adult. He acknowledges his responsibility for his crimes and has sought to atone for them and to seek redemption through his actions. Mr. Gonzales does not "pose a continuing threat" to prison society; to the contrary, he has been selected for a leadership role in Texas's groundbreaking faith-based programming on death row. Corrections officers, prison chaplains, and fellow inmates alike attest to his maturity, integrity, and thoughtfulness, as do psychologists, lay people, faith leaders. Even the State's

[1] Marah Stith McLeod, *The Death Penalty as Incapacitation*, 104 Va. L. Rev. 1123, 1161 (2018).

forensic psychiatrist, who testified at trial that Mr. Gonzales has antisocial personality disorder and would pose a risk of violence "wherever he goes," has now recanted that trial testimony and changed his opinion—something he has never done before in a death penalty case.

Texas law requires a jury finding beyond a reasonable doubt that "there is a probability that [a capital] defendant would commit criminal acts of violence that would constitute a continuing threat to society" before a defendant is eligible for the death penalty. *Satterwhite v. Texas*, 486 U.S. 249, 250 (1988) (a probability of future dangerousness "must be found before a death sentence may be imposed under Texas law."); *Mosley v. State*, 983 S.W.2d 249, 263 n.18 (Tex. Crim. App. 1998) (the constitutional "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.").

Because there is no longer any risk, let alone a "probability," that Mr. Gonzales would commit any "criminal act of violence that would constitute a continuing threat to society"—a requisite finding for death-eligibility under Texas law—he is ineligible for execution under state law. But Texas refuses to provide an avenue to review Mr. Gonzales's claim.

The state court's refusal to recognize or address Mr. Gonzales's constitutional claim of eligibility for the death penalty violates procedural due process and requires this Court's intervention.

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 him 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 to which Petitioner had previously pled guilty 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.

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

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[2] *See* Pet. App. 023a (report of Dr. Edward Gripon).

> 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 potential 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 answers to the two "special issue" questions in the Texas capital sentencing statute[3] mandating that Petitioner be sentenced to death. RR 43 at 77; CR at 1033-34. Petitioner was sentenced to death.

B. 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 appointed counsel in initial state post-conviction habeas corpus proceedings, review

[3] *See* Tex. Code Crim. Pro. art. 37.071 § (2) (b)(1) (requiring the jury to determine unanimously and 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."); *id*. at § (2)(e)(1) (if the jury returned an affirmative finding to the first special issue question, requiring the jury to determine "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed").

in both state and federal court was abbreviated and superficial. *See Gonzales v. Stephens*, 606 F. App'x 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 by Dr. Gripon on the issue of future dangerousness.

On July 11, 2022, the Texas Court of Criminal Appeals entered an order staying the scheduled execution and 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 all of the remaining allegations related to Dr. Gripon's trial testimony—that Dr. Gripon has renounced his trial testimony that Petitioner is a sociopath and would present a danger to others even if incarcerated—the Court of Criminal Appeals held 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 conducting 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.

On June 18, 2024, Petitioner filed a subsequent habeas application in the Court of Criminal Appeals alleging two grounds for relief:

> (1) The Eighth and Fourteenth Amendments to the United States Constitution Forbid the Execution of Mr. Gonzales Because He Does Not Pose a Risk of Danger to Others and, Thus, Is Not Death-Eligible as a Matter of Law.
>
> (2) The Eighth and Fourteenth Amendments Are Violated Where a State Conditions Eligibility for a Death Sentence on a "Prediction" of Future Dangerousness at Trial and Fails to Provide Any Meaningful Review of its Accuracy in Post-Conviction Proceedings.

On June 24, the Texas Court of Criminal Appeals entered an order finding that the claims did not meet the requirements of Article 11.071 § 5(a) and "dismiss[ing] the application as an abuse of the writ without reviewing the merits of the claims raised." *Ex parte Ramiro Felix Gonzales*, No. WR-70,969-04 (Tex. Crim. App. June 24, 2024).

This petition follows.

REASONS FOR GRANTING THE WRIT

Alone among states that retain the death penalty, Texas conditions a defendant's *eligibility* to be sentenced to death on a jury's determination that the defendant will present a danger to others, even if incarcerated.[4] Unless the jury affirmatively determines, 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," the defendant is not *eligible*, as a matter of law, to be sentenced to death.

The Texas Court of Criminal Appeals has recognized that even when a jury makes an affirmative finding of "future dangerousness," and purports to do so "beyond a reasonable doubt," the jury's determination may in fact be erroneous.[5] Indeed, the Court of Criminal Appeals has said that a jury's determination of "future dangerousness is, in essence, an issue of prediction" whose accuracy cannot be

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[4] *See Mosley v. State*, 983 S.W.2d 249, 263 n.18 (Tex. Crim. App. 1998) (the constitutional "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."); *Satterwhite v. Texas*, 486 U.S. 249, 250 (1988) (a probability of future dangerousness "must be found before a death sentence may be imposed under Texas law."). While several other states include future dangerousness as a relevant sentencing factor, Texas is the only current death penalty state that requires a determination of future dangerousness as a *condition* of death-eligibility.

[5] Petitioner uses the word "error" in this context to refer to "the situation in which the fact-finder at sentencing determined that the offender would likely commit future violence (thus meeting a requirement for execution), but a later evaluation based on more probative accumulation of evidence shows that he is not likely to commit future violence (and therefore does not meet the requirement of execution)." Marah Stith McLeod, *The Death Penalty as Incapacitation*, 104 Va. L. Rev. 1123, 1161 n.178 (2018).

determined "right or wrong at the time of trial" but "may be shown as accurate or inaccurate only by subsequent events."[6]

Despite its recognition that the jury's "determination" at trial is "in essence, an issue of prediction," and that the accuracy of that "prediction" can only be "shown as accurate or inaccurate … by subsequent events," the Texas Court of Criminal Appeals steadfastly refuses to recognize a post-conviction challenge to the validity of the jury's determination of "future dangerousness" as a cognizable post-conviction claim for relief, even though "future dangerousness" is a condition of death-eligibility in Texas.[7]

In the proceedings below, Petitioner alleged facts showing that the jury's prediction of future dangerousness was not only *based on* inaccurate evidence presented to the jury but has been revealed to be "inaccurate" in light of "subsequent events," specifically, the fact that Petitioner has not committed a single act that could be construed as a criminal act of violence since his 2006 sentence and that contemporary expert evaluations of Petitioner, including that of the State's expert at trial, have consistently concluded that he presents no danger to anyone. Yet the Texas courts refuse to recognize this as a cognizable claim for post-conviction review.

Petitioner contends that it is fundamentally inconsistent with the Eighth and Fourteenth Amendments for a state to predicate a death sentence on a "prediction"

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[6] *McGinn v. State*, 961 S.W.2d 161, 168 (Tex. Crim. App. 1998).

[7] *Ex parte Gonzales*, No. WR-70,969-03, 2022 WL 2678866 at *1 (Tex. Crim. App. July 11, 2022) (a "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.") (emphasis supplied).

made by the sentencer whose "accuracy or inaccuracy" cannot be assessed at the time of trial but then refuse to provide any review of the accuracy of that "prediction" in post-conviction proceedings. Because Texas has chosen to make "future dangerousness" a condition of death-eligibility, newly discovered or previously unavailable evidence establishing a death-sentenced prisoner's *non-dangerousness* bears on the validity of the sentence. In cases where a death-sentenced prisoner can establish by probative, compelling evidence that he will not present a danger to others, a necessary precondition for a legal death sentence in Texas is no longer present.

I. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE THAT THAT A DEMONSTRABLY ERRONEOUS DEATH-ELIGIBILITY DETERMINATION DOES NOT EVADE JUDICIAL REVIEW.

This Court has repeatedly said that under the Eighth Amendment the "qualitative difference of death from all other punishments requires a *correspondingly greater degree of scrutiny* of the capital sentencing determination." *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (quoting *California v. Ramos*, 463 U.S. 992, 998–99 (1983) (emphasis supplied). To allow a potentially erroneous "prediction" of future dangerousness—an absolute precondition for death eligibility in Texas—to go unreviewed and uncorrected is plainly inconsistent with that constitutional requirement.

A. Because the Texas Legislature has made an affirmative finding of "future dangerousness" a prerequisite for death eligibility as a matter of law, a capital defendant who can demonstrate that the jury's determination was erroneous is ineligible to be executed.

This Court has sought to make the application of the death penalty less arbitrary by restricting its use to those defendants who are "the worst of the worst." *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).[8] To that end, the Eighth Amendment requires that a state capital sentencing scheme "genuinely narrow the class of persons eligible for the death penalty and [] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *see Gregg v. Georgia*, 428 U.S. 153 (1976). This Court has referred to factual determinations that perform this requisite narrowing function as "eligibility" factors, while the ultimate discretionary decision of whether a particular defendant is sentenced to death is the "selection" decision. *See Tuilaepa v. California*, 512 U.S. 967, 971 (1994).

The constitutional purpose of eligibility factors is two-fold. First, eligibility factors serve to "genuinely narrow the class of persons eligible for the death penalty," thereby confining the class of persons eligible for the death penalty to a narrow subclass for which there is a special justification for "the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[9] Second,

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[8] *See also Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution") (internal quotation marks omitted); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (citing *Roper*, *supra*).

[9] *Zant*, 462 U.S. at 877.

eligibility factors "make rationally reviewable the process for imposing a sentence of death."[10]

The Texas Legislature has provided a two-step process for determining a defendant's *eligibility* for a sentence of death. *See* Tex. Code Crim. Pro. art. 37.071. To be "eligible" for a death sentence in Texas, a defendant must be convicted of capital murder *and* the jury must make an affirmative determination of "future dangerousness" at the penalty phase. *Id.*

As a constitutional matter, the future dangerousness special issue question functions as an aggravating circumstance establishing a capital defendant's "eligibility" to be sentenced to death in Texas.[11] Even if a Texas defendant is convicted of the offense of capital murder, he is not eligible for a death sentence unless the jury *also* returns a unanimous affirmative finding on the future dangerousness issue at the penalty phase.[12] If that affirmative determination is made, the jury *then* proceeds to the selection decision, considering whether there may yet be sufficient mitigating

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[10] *Tuilaepa*, 512 U.S. at 973 ("Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant so as to 'make rationally reviewable the process for imposing a sentence of death.'" (quoting *Arave v. Creech*, 507 U.S. 463, 471 (1993)).

[11] *Tuilaepa*, 512 U.S. at 972 (explaining that an eligibility aggravating factor "may be contained in the definition of the crime or in a separate sentencing factor (*or in both*)") (emphasis supplied). By comparison, the second special issue question—whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment"—functions as the "selection decision" in the Texas capital sentencing process. *Id*. (defining the "selection decision" as "where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence").

[12] Tex. Code Crim. Pro. art. 37.071 § (2) (b)(1) (requiring the jury to determine unanimously and 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."); *id*. at § (2)(g) (mandating that if the jury "returns a negative finding on … or is unable to answer" the future dangerousness issue "the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole.").

circumstances to warrant a sentence of life without parole.[13] Indeed, both this Court and the Texas Court of Criminal Appeals have recognized that the future dangerousness determination functions as part of the constitutional "eligibility requirement."[14]

These two requirements together—a conviction of capital murder *and* an affirmative determination of continuing dangerousness—reflect a legislative determination that the death penalty in Texas is reserved for defendants who have not only committed a serious crime but who *also* will continue to present a danger to others, even if incarcerated. As the Court of Criminal Appeals has explained, the future dangerousness special issue is designed "to further narrow the class of death-eligible offenders to less than all those who have been found guilty of [capital murder]" by restricting the death-eligible class of capital defendants to only those who also pose a "continuing threat to society."[15]

Thus, a defendant who can persuasively demonstrate that he is not a "continuing threat to society" is not in the "narrow class" of defendants for whom Texas law reserves the death penalty.

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[13] Tex. Code Crim. Pro. art. 37.071 § (2) (e)(1) (*if* the jury returns an affirmative finding to the future dangerousness special issue, it must then determine whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.").

[14] *Mosley*, 983 S.W.2d at 263 n.18 (Tex. Crim. App. 1998) (the constitutional "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."); *Satterwhite*, 486 U.S. at 250 (a probability of future dangerousness thus "must be found before a death sentence may be imposed under Texas law.").

[15] *Smith v. State*, 779 S.W.2d 417, 420 (Tex. Crim. App. 1989).

B. Empirical studies consistently confirm that there is a high rate of error in jury "predictions" of future dangerousness in Texas.

As the Texas Court of Criminal Appeals has acknowledged, a jury's determination of a capital defendant's future dangerousness at the time of trial is really "in essence, an issue of prediction," the accuracy of which can only be "shown as accurate or inaccurate … by subsequent events."[16] In fact, peer-reviewed empirical studies of the behavior of former death-sentenced prisoners in general population over lengthy periods of time have consistently shown high error rates in jury predictions of future dangerousness.

The most extensive of these studies reviewed the accuracy of three decades (1989–2008) of Texas jury predictions of future violence through retrospective review of the disciplinary records of former death row inmates in Texas.[17] All of the inmates in the study had been sentenced to death after their juries had affirmatively answered the "future dangerousness" special issue question at trial, had subsequently obtained relief from their death sentences, and were resentenced to life imprisonment. The 111 inmates in the study averaged 9.9 years on death row prior to relief, and 8.4 years in prison afterwards, so the "average 'at risk' period of time was lengthy, allowing innumerable situations and opportunities to respond with serious violence."[18] The researchers found that the prevalence of serious assault

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[16] *McGinn*, 961 S.W.2d at 168.

[17] Mark D. Cunningham, Jon R. Sorenson, Mark P. Vigen, and S.O. Woods, *Life and Death in the Lone Star State: Three Decades of Violence Predictions by Capital Juries* (hereinafter "*Life and Death in the Lone Star State*"), 29 Behav. Sci. Law 1 (2011).

[18] *Id*. at 16.

among the former death row inmates was low, both on death row and in the general prison population, and that the rate of error in the prediction of future dangerousness was high. As the researchers concluded:

> Consistent with prior research on the prison behavior of capital offenders …, only a small minority of the former death-sentenced inmates engaged in serious assaultive conduct on death row (3.6%) or in prison post-relief (4.5%). None of these assaults resulted in life-threatening injuries. No prison homicides were committed by the former death-sentenced inmates….
>
> The low rates of assault and the rarity of serious assaults are rather remarkable findings for a group that had been predicted by capital juries to be sufficiently likely to be violent in the future so as to warrant a preventative intervention of death.[19]

The statistical findings of this study are nearly identical to two previous studies of former Texas death row inmates who subsequently obtained relief from their death sentences and were resentenced to life imprisonment. In 2005, a study of 48 former Texas death row inmates—all of whom had been sentenced to death under the "future dangerousness" special issue, had their death sentences subsequently overturned and were resentenced to life imprisonment, and then averaged 15.5 years in the general prison population—found that only 5% of these offenders were cited for serious assaults.[20] A third study of 90 former Texas death-row inmates, all of whom were sentenced to death based on a prediction of "future dangerousness" at trial but had their sentences subsequently reversed, found that only 5% of these

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[19] *Life and Death in the Lone Star State, supra* n.17. at 16-17.

[20] John F. Edens, Jacqueline K. Buffington-Vollum, Andrea Keilen, Phillip Roskamp, and Christine Anthony, *Predictions of future dangerousness in capital murder trials: Is it time to "disinvent the wheel"?*, 29 Law Hum. Behav. 55 (2005).

violence-predicted capital offenders committed a serious assault after their transfer to the general prison population.[21]

Summarizing the conclusions of these studies, the researchers of the 2011 study said:

> Contrary to the predictions of their capital juries, the offenders in these two studies demonstrated a low prevalence of post-conviction prison violence. *Error rates for the violence predictions of Texas capital juries based on death row tenures ranged from 70% of cases if contemplating an assault, to 90–95% of cases if predicting a homicide*.[22]

As Justice Souter said in *Kansas v. Marsh*: "[T]he same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness."[23] These empirical studies demonstrate that the risk of error in "predictions of future dangerousness" at trial is substantial, and that the defendants are being sentenced to death who do not meet the criteria for death-eligibility established by Texas law.

C. Procedural due process is violated where a state fails to provide post-conviction review of a jury's determination of "future dangerousness."

This Court has long recognized that the Fourteenth Amendment Due Process Clause encompasses "a guarantee of fair procedure" or procedural due process. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or

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[21] James W. Marquart and Jon R. Sorenson, *Institutional and post release behavior of Furman-commuted inmates in Texas*, 26 Criminology 677 (1988); James W. Marquart, Sheldon Ekland-Olson, and Jon R. Sorenson, *Gazing into the crystal ball: Can jurors accurately predict dangerousness in capital cases?*, 23 Law & Soc. Rev. 449 (1989).

[22] *Life and Death in the Lone Star State, supra* n.17, at 3 (emphasis supplied).

[23] 548 U.S. at 210-11 (Souter, J., dissenting).

property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Id.* In other words, procedural due process rules "protect persons not from the deprivation, but from the mistaken or *unjustified* deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis supplied).

In determining what procedural process is due, this Court weighs several factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

In the death penalty context, the private interest at stake is of the highest order—the State of Texas seeks to deprive Petitioner of his life. And where state law currently provides *no* avenue by which the death eligibility determination—the jury's prediction that Petitioner would commit future criminal acts of violence—is later reviewed for accuracy, the value of a procedural safeguard, i.e. a hearing on the accuracy of the eligibility determination, is great. Without review of the accuracy of the jury's eligibility determination, Petitioner—who poses no risk or threat of violence to anyone—will be unjustifiably deprived of his life by the State of Texas.

Finally, the government has no valid interest in executing someone constitutionally ineligible for death. Although the Court of Criminal Appeals has recognized that the jury's determination of "future dangerousness is, in essence, an

issue of prediction;" the accuracy of the jury's finding cannot be determined "right or wrong at the time of trial" but "may be shown as accurate or inaccurate only by subsequent events." *McGinn*, 961 S.W.2d at 168. And yet, in this case and in others, the Texas courts insist that "the determination of future dangerousness is made at the time of trial and is not properly reevaluated on habeas." *Ex parte Gonzales*, No. WR-70,969-03, 2022 WL 2678866 at *1 (Tex. Crim. App. Jul. 11, 2022) (not designated for publication). But the State's interest in executing its *valid* judgments and sentences would not be frustrated by simply providing for an avenue for review of the jury's determination in light of the intervening two decades of proof to the contrary.

Texas, like every death-penalty state in the union, has established statutory procedures for collateral review of capital convictions and death sentences. *See* Tex. Code Crim. Pro. art. 11.071 §1 ("establish[ing] the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death."). Texas law includes procedures that govern for identification and resolution of disputed issues of material fact, *see* Tex. Code Crim. Pro. art. 11.071 §9(a), and offer trial courts sitting in post-conviction numerous mechanisms for fact-finding including "affidavits, depositions, interrogatories, and [holding] evidentiary hearings" *Id.* These mechanisms are more than adequate to resolve a death-sentenced inmate's claims that the jury's eligibility finding "can be shown … inaccurate by subsequent events." *McGinn*, 961 S.W.3d at 168; *Johnson v. Mississippi*, 486 U.S. 578 (1988) (death sentence based on information later revealed to be inaccurate is unconstitutional). Because such a claim "seeks relief from a judgment imposing a

penalty of death, Tex. Code Crim. Pro. art. 11.071 §1, one could assume that state review of claims like Mr. Gonzales's are not only possible but proper under § 11.071. But Texas courts have held, in this case and others, that "the determination of future dangerousness is made at the time of trial and is not properly reevaluated on habeas." *Ex parte Gonzales*, No. WR-70,969-03, 2022 WL 2678866 at *1. Thus, the state courts are closed to him. The failure to provide available procedural safeguards and the intolerable risk of erroneous deprivation of *life* by the state without such safeguards should weigh heavily in this Court's analysis. Texas's refusal to entertain claims that the death-eligibility determination was inaccurate and inmates are no longer eligible for a sentence of death violates procedural due process and warrants this Court's intervention.

"[T]he protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced." *Herrera v. Collins*, 506 U.S. 390, 430, 432 (1993) (Blackmun, J., dissenting, joined by Stevens, J., and Souter, J.); *Johnson v. Mississippi*, 486 U.S. 578 (1988); *see also Ford v. Wainwright*, 477 U.S. 399 (1986)). In order to satisfy the requirements of the Eighth Amendment, Texas courts cannot categorically refuse to review challenges to the accuracy of the jury's prediction of future dangerousness, which is an absolute condition of death-eligibility in Texas.

It is fundamentally arbitrary for a State to condition a death sentence on a "prediction" of future conduct that is never subsequently assessed for accuracy. *Cf. Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) (reminding that "this Court has repeatedly emphasized that meaningful appellate review of death sentences

promotes reliability and consistency"). And "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Texas, by conditioning death-eligibility on a prediction of future conduct[24] that is never reviewed for accuracy even in the face of evidence conclusively proving the inaccuracy of that prediction, has shirked its constitutional responsibility.

In permitting Texas to condition death eligibility on such a finding almost fifty years ago, this Court observed that because "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system" and it was a permissible element of the Texas statute. *Jurek v. Texas*, 428 U.S. 262, 275 (1976). Decisions regarding "bail, for instance, must often turn on a judge's prediction of the defendant's future conduct." *Id.* Similar predictions "must be made by parole authorities." *Id.* at 276. But a salient difference distinguishes these permissible predictions from the jury's prediction on which a death sentence is conditioned in Texas: a mechanism for meaningful review.

In the bail context, Texas provides statutory avenues for judicial review and potential relief, including reduction of bail amount and revisiting the determination that custody in lieu of bail is warranted. *See, e.g.*, Tex. Code Crim. Pro. art. 11.24

[24] In the *civil* commitment context, remarkably, the Texas Supreme Court long ago "declined to adopt the criminal law standard of 'beyond a reasonable doubt' [for the requisite finding that a potential ward would be a future danger] *primarily because it questioned whether the State could prove by that exacting standard that a particular person would or would not be dangerous in the future.*" *Addington v. Texas*, 441 U.S. 418, 420 (1979) (abrogating *State v. Turner*, 556 S.W.2d 563 (Tex. 1977) (preponderance of the evidence was the proper standard for civil commitment)).

(providing a person is entitled to habeas corpus relief if committed to custody for failing to enter bond "if it be stated in the application that there was no sufficient cause for requiring bail or that the bail required is excessive."); Tex. R. App. Pro. 31 *et seq*. (provisions governing "Appeals in Habeas Corpus, *Bail*, and Extradition Proceedings in Criminal Cases") (emphasis supplied). And in the parole context, state law *requires* that one denied release be reconsidered. Tex. Gov. Code § 508.141(g), "Authority to Consider and Order Release on Parole" (mandating that the Board "shall adopt" policies that "must require the Board to reconsider [prisoners for] release").

But in the context of the death penalty, where a finding of future dangerousness is required to render a capital defendant death-eligible, Texas law provides only for a legal sufficiency review on direct appeal *based on the trial record* and offers no meaningful review of the prediction itself or the veracity of the evidence underlying it. This lack of review is constitutionally intolerable particularly where, as here, the question of whether the future dangerousness prediction was accurate becomes ripe for evaluation. Dr. Gripon has said that this case is the *only* one in which he has issued a new report in a death penalty case finding that the defendant does not in fact pose a danger in the future. Were the jury to hear this testimony from the forensic psychiatrist sponsored by the State—that Petitioner does *not* have antisocial personality disorder and does *not* pose a risk of violence, instead of the damaging and ultimately inaccurate testimony described *supra*—no reasonable juror would have answered the future dangerousness question in the affirmative.

Death, "in its finality," is constitutionally different than all other punishments. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Because there is a "qualitative difference" between a sentence of death and all other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* Yet Texas has not only chosen to condition the eligibility determination on "an issue of prediction" but has insulated that prediction from review for accuracy, despite providing for legal mechanism for review of other, *less final*, predictions elsewhere in the criminal justice system. *Cf. Jurek*, 428 U.S. at 275–76. To withstand constitutional scrutiny, Texas must provide a mechanism by which such predictions may be reviewed before an execution is carried out on the basis of such a determination.

II. NO ADEQUATE AND INDEPENDENT STATE GROUND BARS REVIEW OF THE MERITS OF THIS CLAIM.

This Court may consider an issue of federal law on direct review from a judgment of a state court if that judgment does not rest 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. *Harris v. Reed*, 489 U.S. 255, 260 (1989); *see also Herb v. Pitcairn*, 324 U.S. 117 (1945) (stating that the prohibition on reviewing judgments of state courts that rest on "adequate and independent state grounds" rests in part on limits to this Court's jurisdiction). The question of when and how compliance with state procedural rules can preclude this Court from considering a federal question is itself a federal question. *Johnson*, 486 U.S. at 587; *Henry v. Mississippi*, 379 U.S. 443, 447 (1965).

The Texas state habeas statute provides that "a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts" establishing one of three exceptions to the general "abuse-of-the-writ" rule, including:

> […] (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial [under the applicable capital sentencing statute].

Tex. Code Crim. Pro. art. 11.071, § 5 (a)(3).

The Court of Criminal Appeals has interpreted the § 5 (a)(3) gateway as functionally analogous to the federal "fundamental miscarriage of justice" exception to the general bar against subsequent habeas corpus applications, and "[i]n the context of capital-punishment proceedings, fundamental miscarriage of justice means 'actual innocence of the death penalty.'" *Id.* Innocence of the death penalty includes "constitutional error that affects the habeas petitioner's eligibility for the death penalty under state law." *Id.* at 161. Punishment claims brought in a subsequent habeas application that implicate constitutional concerns about a capital defendant's eligibility to be sentenced to death, such as Petitioner's, are properly reviewable under § 5 (a)(3).

While the other statutory exceptions to the abuse-of-the-writ rule may under certain circumstances be considered independent of the merits of any related federal issues, the explicit language of § 5(a)(3)—"but for a violation of the United States Constitution"—means that the constitutional question and the threshold determination are fundamentally intertwined. In other words, a TCCA determination

that the claims "do not meet the requirements" of § 5 (a)(3) necessarily passes on the merits of the alleged constitutional violation, and therefore does not preclude this Court from granting review.

In the proceedings below, Petitioner contended that both his substantive challenge to the jury's "future dangerousness" determination and the state courts' refusal to recognize a cognizable ground for post-conviction review met this exception. Petitioner alleged facts in this application showing both that the jury's prediction of future dangerousness was *based on* inaccurate evidence and itself has been shown to be "inaccurate" in light of "subsequent events." Specifically, Petitioner has not committed a single act that could be construed as a criminal act of violence since his 2006 sentence, contemporary expert evaluations of Petitioner—including that of the State's expert at trial—have consistently concluded that Petitioner presents no danger to anyone, and all who know him today speak to his character for *non*-violence. While a lack of institutional disciplinary record *alone* may not support a constitutional ineligibility claim, the additional evidence brought forth by Petitioner, especially the changed opinion of the State's own expert at trial, should.

Because the eligibility determination is one of constitutional dimension, inextricably intertwined with the § 5 (a)(3) determination, this Court is not precluded from granting certiorari to review the merits of the claim. Petitioner respectfully requests that this Court do so.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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