No. 23-7791 & 23A1146

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
and Application for Stay of Execution

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over claims that were disposed of on an adequate and independent state law ground.

2. Whether a writ of certiorari is warranted for a fact dependent Eighth Amendment claim, dismissed on state law grounds as abusive and with no evidentiary development, predicated on a legal basis never recognized by the Court, and contrary to the Court's precedent?

3. Whether the Court should grant a writ of certiorari for an undeveloped claim, not adequately pressed or passed upon by the state court and dismissed as abusive on state law grounds, constitutionalizing collateral review for the first time ever?

4. Should this Court utilize its equitable discretion to stay of execution?

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BRIEF IN OPPOSITION

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

STATEMENT OF THE CASE

I. Facts at the 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 marched her into a remote clearing, grabbed a hunting rifle, and chambered a bullet. *Id*. As he was doing this, Townsend offered Gonzales drugs, money, or sex to spare her life. *Id*. He unloaded the rifle, raped Townsend, and then 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 Case

"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 maternal 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 tacks of records" and interviews conducted by Gonzales's 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 use 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 Texas 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. He obtained a stay of the proceeding and filed a subsequent application in state court. The CCA dismissed the subsequent application 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. 2015). And this Court again denied Gonzales a writ of certiorari. *Gonzales v. Stephens*, 136 S. Ct. 586 (2015).

Gonzales was then set for execution. Order Setting Execution Date, *State v. Gonzales*, No. 04-029091-CR (38th Dist. Ct., Medina County, Tex.

[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).

Apr. 6, 2016).[2] 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. 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 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).

After that litigation ended, Gonzales moved for relief from the final judgment, under Federal Rule of Civil Procedure 60(b), in his federal habeas case, claiming that the denial of expert funding was untenable after *Ayestas v. Davis*, 138 S. Ct. 1080 (2018). ROA(Rule 60(b)).745–90. 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.

[2] 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).

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).[3] 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. Defendants agreed to those requests, and continue to agree to them, so the suit was dismissed without prejudice as moot. Order of Dismissal, ECF No. 104.

Additionally, less than two weeks before his then-scheduled 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). The CCA stayed Applicant's execution, remanded a very narrow portion of his first claim to the trial court for resolution, *Ex parte Gonzales*, No. WR-70,969-

[3] 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).

03, 2022 WL 2678866, at *1 (Tex. Crim. App. July 11, 2022), and later denied the remanded issue and dismissed the remaining claims as abusive, *Ex parte Gonzales*, No. WR-70,969-03, 2023 WL 4003783, at *1–2 (Tex. Crim. June 14, 2023). For the fourth time, this Court denied him a writ of certiorari. *Gonzales v. Texas*, 1144 S. Ct. 828 (2024).

Once more, Gonzales's execution was set, this time for June 26, 2024. Execution Order, *State v. Gonzales*, No. 04-029091-CR (454th Dist. Ct., Medina County, Tex. Feb. 22, 2024).[4] About a week before this date, Gonzales filed his third subsequent, fourth overall, 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 18, 2024)[5] [hereinafter

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[4] Gonzales's current execution date was originally set by order of February 16, 2024, Execution Order, *State v. Gonzales*, No. 04-029091-CR (454th Dist. Ct., Medina County, Tex. Feb. 16, 2024), but a superseding order issued on February 22, 2024, to ensure service was effectuated within the two-business-day requirement, Tex. Code Crim. Proc. art 43.141(b-1).

[5] In addition to filing his fourth overall habeas application shortly before his execution date, Gonzales "suggested" that the CCA reopen his second and third overall habeas proceedings. Suggestion to Reconsider, On the Court's Own Motion, Its Prior Disposition of Applicant's Claim That the Eighth Amendment Bars the Execution of Late Adolescents (Age 18–20) at The Time of the Offense, *Ex parte Gonzales*, No. WR-70,969-03 (Tex. Crim. App. June 13, 2024); Suggestion to Reconsider, on the Court's Own Motion, Dismissal of Applicant's First Subsequent Application for Writ of Habeas Corpus, *Ex parte Gonzales*, No. WR-70,969-02 (Tex. Crim. App. June 17, 2024). Both "suggestions" were denied by the CCA on June 24, 2024, without written order.

"Sub. Appl."]. The application was forwarded to the CCA, and it was dismissed as abusive. *Ex parte Gonzales*, No. WR-70,969-04, 2024 WL 3106310, at *1 (Tex. Crim. App. June 24, 2024). Gonzales now seeks a writ of certiorari off this decision and a stay of execution. Pet. Writ Cert. 1–28; Appl. Stay 1–2. He doesn't deserve either.

REASONS FOR DENYING THE WRIT

I. The Court Below Dismissed Gonzales's Claims on an Adequate and Independent State Law Ground Depriving the Court of Jurisdiction.

Gonzales seeks review of two claims: (1) that his good behavior on death row proves he is not dangerous, thus making his death sentence cruel and unusual; and (2) that a death penalty scheme utilizing future dangerousness violates due process when an affirmative finding cannot be reviewed postconviction. Pet. Writ Cert. 13–25. Despite the CCA's explicit statement that it was not "reviewing the merits" of these claims, Gonzales argues that it did sub silentio, meaning the Court can reach them too. *Id.* at 25–27. But he's wrong, and the CCA's dismissal on a state law ground bars the Court from exercising jurisdiction.

"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, 885 (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 so find, 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[6] 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 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

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

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, 151 (Tex. Crim. App. 2007).

In state court, Gonzales accepted the burden of proving an exception to the abuse-of-the-writ bar. *See* Sub. Appl. 26–38, 47–49. He argued that his Eighth Amendment claim wasn't factually available and that he's actually innocent of the death penalty, also the exception he attempted to utilize for his due process claim. *Id*. The CCA did not agree with Gonzales's assertions, finding that he "failed to show that he satisfies the requirements of Article 11.071 § 5," so it dismissed "the application as an abuse of the writ without reviewing the merits of the claims raised." *Ex parte Gonzales*, 2024 WL 3106310, at *1.

Before this Court, Gonzales does not challenge the adequacy of Section 5, and that is with 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 (2017) (noting that this Court generally defers to a court of appeals's interpretation of their respective

states' laws). The only question, then, is whether Section 5 is independent of federal law.

Gonzales argues federal-law dependence because, he claims, Section 5(a)(3) intertwines the "constitutional question and the threshold determination[.]" Pet. Writ Cert. 26. Gonzales cites not a single case suggesting that the CCA always, or ever, considers the merits of a constitutional claim when an applicant simply mentions actual innocence of the death penalty. The face of the order here demonstrates otherwise, making explicit that the CCA was not reviewing the merits of Gonzales's claims. Speculation about sub silentio federal law consideration cannot overcome this express statement. *See Coleman*, 501 U.S. at 735. Indeed, even if the Court were faced with an unexplained decision, its review for federal law independence would "not be difficult," *id.* at 740, and it is even less difficult given the CCA's clarity here.

To be sure, the Fifth Circuit has recognized that an applicant trying to overcome Section 5 via the *Sawyer* analogue does not mean the CCA reached the merits of his or her claim. *See Rocha*, 626 F.3d at 839 ("A claim that a prisoner is actually innocent of the death penalty is legally distinct from a claim that a prisoner's trial counsel was constitutionally

ineffective at sentencing. When the CCA rejects the former, it does not simultaneously decide the merits of the latter."); *see also Moore v. Texas*, 122 S. Ct. 2350, 2353 (2002) (Scalia, dissenting) ("The [CCA] was not required to pass on any federal question in deciding whether 'clear and convincing evidence' showed that '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.'" (quoting Tex. Code Crim. Proc. art. 11.071 § 5(a)(3))). In other words, the CCA did not have to first determine that Gonzales's constitutional claim failed before it then found that he did not prove actual innocence of the death penalty.

On top of the CCA's express statement that it was not reaching the merits of Gonzales's claims, the procedural history of this case puts it beyond peradventure that no federal constitutional law was decided. When Gonzales filed his second subsequent, third overall, application for writ of habeas corpus, the CCA authorized a portion of a false testimony claim for merits review. *Ex parte Gonzales*, 2022 WL 2678866, at *1. At the same time, it found his claim that no one younger than twenty-one at the time of the offense could be executed was barred as abusive. *Id*. So,

when the CCA decides to reach the merits of a claim—and when it doesn't—it says so plainly, even if the claim advocates for categorical ineligibility of the death penalty. The absence of federal law consideration could not be any more explicit.

This is especially true since it's far from clear that Gonzales's claims even qualify for Section 5(a)(3) consideration. *Sawyer*, upon which Section 5(a)(3) is based, focuses on eligibility for a death sentence, not discretion in imposing one. *See Ex parte Blue*, 230 S.W.3d at 160 ("[The Court] has expressly rejected the argument that a constitutional error that impacts only the jury's discretion whether to impose a death sentence upon a defendant who is unquestionably eligible for it under state law can be considered sufficiently fundamental as to excuse the failure to raise it timely in prior state and federal proceedings."). While Gonzales tried hard to turn future danger into an eligibility requirement, *see* Sub. Appl. 31–32, the "future dangerousness special issue plays no role . . . in the constitutionally mandated narrowing or 'eligibility' function." *Johnson v. Lumpkin*, 593 F. Supp. 3d 468, 496–97 (N.D. Tex. 2022). Rather, "the constitutionally mandated narrowing function, i.e., the process of making the 'eligibility decision' . . . [occurs] at the guilt-

innocence phase of a [Texas] capital trial by virtue of the manner with which Texas defines the offense of capital murder[.]" *Id*. at 497. So, while it makes sense that categorical ineligibility, like intellectual disability, falls within Section 5(a)(3)'s ambit, the "normative" question of future danger, *Coble v. State*, 330 S.W.3d 253, 267 (Tex. Crim. App. 2010), like the "normative" question of mitigation, *Devoe v. State*, 354 S.W.3d 457, 468 (Tex. Crim. App. 2011), arguably lies outside that exception, *see Sawyer*, 505 U.S. at 347 (actual innocence of the death penalty "focus[es] on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error").

Ultimately, the abuse-of-the-writ bar—a state-law ground clearly and unambiguously applied by the CCA—prohibits this Court from exercising jurisdiction over any of the claims for which Gonzales now seeks review. *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."). Accordingly, his petition should be denied.

II. Gonzales Provides No Compelling Reason for Further Review.

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) (emphasis added). The Court would be hard pressed to discover any such reason in Gonzales's petition, let alone amplification thereof. Indeed, Gonzales makes no allegation of circuit or state-court-of-last-resort conflict. *See* Sup. Ct. R. 10(a)–(b). He focuses on the importance of the issues to him but does not explain why they are important to the judiciary or citizenry at large. Indeed, his argument undermines any broad impact because, as he notes, Texas is "[a]lone among states" to use future danger in its death penalty sentencing scheme. Pet. Writ Cert. at 11. Accordingly, Gonzales fails to prove a compelling reason to reach the questions he presents.

Left with no true ground for review in his briefing, the only reasonable conclusion is that Gonzales seeks mere error correction. But that is hardly a good reason to expend the Court's limited resources. *See* Sup. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error

consists of . . . the misapplication of a properly stated rule of law."). And such a request is especially problematic here because the court below did not reach the merits of his claims and the Court is one "of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Even worse yet, Gonzales's claims are heavily fact dependent, and because there was no evidentiary development in the lower court, this Court would have "to review evidence and discuss specific facts" for Gonzales to garner relief, something the Court "do[es] not" do. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Ultimately, this case presents an exceptionally poor vehicle for reaching the merits of Gonzales's claims and his petition should be denied on this basis alone.

III. Gonzales's Eighth Amendment Claim Is Barred by Nonretroactivity Principles and Is Otherwise Without Merit.

Gonzales argues that there's an Eighth Amendment violation because he's been well-behaved on death row, making the jury's prediction of future danger wrong. Pet. Writ Cert. 13–19. The claim fails for numerous reasons.

A. Gonzales's Eighth Amendment 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*, 593 U.S. 255, 271–72 (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."). He clearly advocates for a new rule—that a Texas inmate sentenced to death can later prove the future dangerousness finding was wrong. That was not the rule at the time of Gonzales's conviction, and it's not the rule today. Accordingly, Gonzales's proposed rule is a new one. Finally, his proposed rule is not

substantive. Gonzales is not suggesting that capital murder is beyond a state's ability to criminalize, nor is he arguing that he is part of a class exempt from a death sentence (so far as this claim is concerned), just that he can later dispute the correctness of the jury's future dangerousness finding. Because Gonzales's claim fails to overcome all three prongs of *Teague*, nonretroactivity principles bar relief. *See Johnson v. Lumpkin*, 74 F.4th 334, 340 (5th Cir. 2023) ("[I]t is not debatable that the argument [concerning falsity of the future dangerousness prediction] is barred by *Teague*'s non-retroactivity doctrine.")

B. Even assuming the Court could reach the merits of Gonzales's Eighth Amendment claim, it is without merit.

Summed up, Gonzales's first argument is this: Texas has a two-part eligibility determination for death sentences and, if later evidence undercuts the second part, future dangerousness, he is entitled to relief under the Eighth Amendment. Pet. Writ Cert. 13–19.

The first failing of Gonzales's argument is its legal premise. As discussed above, the constitutional narrowing function occurs in the guilt-innocence phase of a Texas trial because of how Texas defines capital murder. *See Sonnier v. Quarterman*, 476 F.3d 349, 364–67 (5th

Cir. 2007); *Johnson*, 593 F. Supp. 3d at 496–97. Texas's narrowing scheme functions like the one upheld by the Court in *Kansas v. Marsh*, 548 U.S. 163 (2006).

In upholding Kansas's narrowing scheme, i.e., eligibility phase of a capital sentencing scheme, the Court noted,

> Kansas' procedure narrows the universe of death-eligible defendants consistent with Eighth Amendment requirements. Under Kansas law, imposition of the death penalty is an option only after a defendant is convicted of capital murder, which requires that one or more specific elements beyond intentional premeditated murder be found. Once convicted of capital murder, a defendant becomes eligible for the death penalty only if the State seeks a separate sentencing hearing, and proves beyond a reasonable doubt the existence of one or more statutorily enumerated aggravating circumstances.

Marsh, 548 U.S. at 175–76 (citations omitted). The Texas scheme "bears some striking similarities to the Kansas scheme[.]" *Sonnier*, 746 F.3d at 365. "First, under both Texas and Kansas law, the death penalty is only an option for those defendants convicted of the crime of *capital* murder." *Id.* "Second, under both the Texas and Kansas schemes, once a defendant is convicted of capital murder, he becomes eligible for the death penalty only if the State seeks a separate sentencing hearing." *Id.* at 366. And third, "under both state schemes, the government must prove beyond a

reasonable doubt the existence of one or more statutorily enumerated aggravating circumstances." *Id*.

Contrary to Gonzales's argument, just because Kansas had to prove "aggravating circumstances" at punishment to obtain a death sentence did not change the fact that the eligibility determination was made during the guilt-innocence phase. *See Marsh*, 548 U.S. at 176. The same holds true in Texas. *See Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) ("It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as *Texas* and Louisiana have done, so that the jury finding of guilt responds to this concern[.]" (emphasis added)). And as such, the legal underpinning of Gonzales's argument falls away.

The second failing of Gonzales's argument is that he treats future danger as binary—something to categorically disprove—rather than the probabilistic prediction it is. And use of this probabilistic, predictive question has been upheld by this Court, repeatedly. *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983) ("If the likelihood of a defendant committing further crimes is a constitutionally acceptable criterion for

imposing the death penalty, which it is[.]"), *superseded on other grounds by statute*, 28 U.S.C. § 2253(c)(2). That Gonzales has allegedly behaved well on death row does not make the probabilistic determination incorrect because, at the very least, the question isn't limited to the confines of death row. *See, e.g.*, *Coble*, 330 S.W.3d at 268 ("The [future dangerousness] special issue focuses upon the character for violence of the particular individual, not merely the quantity or quality of the institutional constraints put on that person."). Indeed, even Dr. Gripon, whom Gonzales now heavily relies upon, testified that determining future dangerousness on death row is "not possible to do . . . because of the uniqueness of that setting." 41.RR.108. And because the decision is "essentially a normative one," *Coble*, 330 S.W.3d at 268, Gonzales cannot prove it categorically false simply because he has more evidence he thinks is relevant to the question.

And the third failing of Gonzales's argument is that, even considering his supposedly peaceful, postconviction behavior, there's undoubtedly sufficient evidence to uphold the finding of future dangerousness. Gonzales *thrice* confessed to kidnapping and murdering Townsend. First, he admitted to law enforcement that he was seeking

drugs, kidnapped Townsend while ransacking her house, looking to score, took her to a 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. Such evidence "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 threatened to kill her. 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, despite being bound and naked and locked in a closet, after Gonzales left the cabin for a short period, and the jury could've reasonably believed she was his next murder victim but for her getaway. 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. In a jail setting, presumably less secure than death row and indicative of how he might've behaved in general population, 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 a jury could somehow consider events that had not happened yet, i.e., Gonzales's behavior on death row, the jury could still have rationally believed Gonzales would be a danger in the future. As such, Gonzales has shown that the probabilistic prediction by the jury was false.

IV. Gonzales's Due Process Claim Was Not Passed Upon or Adequately Pressed, Is Barred by Nonretroactivity Principles, and Is Otherwise Without Merit.

In what Gonzales now calls a due process claim, he argues that use of future dangerousness is constitutionally impermissible unless, at some unspecified point after conviction, a state permits an accuracy review of the affirmative finding. Pet. Writ Cert. 19–25.

A. Gonzales's due process claim was not passed upon or properly pressed in state court.

In state court, Gonzales exclusively discussed his second claim in terms of the Eighth Amendment. *See* Sub Appl. 39–47; *see also id.* at 48 ("Without the opportunity at meaningful review of the death-eligibility determination . . . the application of the Texas death penalty statute to . . . Gonzales violates the Eighth Amendment."). Nary a whit of due

process was discussed. *See* Sub Appl. 39–47. And this is how the CCA viewed the claim too. *See Gonzales*, 2024 WL 3106310, at *1 ("the Eighth and Fourteenth Amendments[7] are violated where a State conditions death-eligibility on a prediction of future dangerousness, but fails to thereafter provide post-conviction review of the accuracy of that prediction").

This Court's jurisdiction over the states' high courts requires that a federal issue be decided. 28 U.S.C. § 1257(a). Thus, a petitioner must adequately press a federal claim in state court or have the matter passed upon by it. *See Adams v. Robertson*, 520 U.S. 83, 87 (1997) (per curiam). As discussed above, the claim—under any legal theory—was 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 *third* subsequent application. And, even then, Gonzales only raised the claim as an Eighth Amendment violation, not as a due process one, at best twice

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[7] Gonzales twice mentioned the "Fourteenth Amendment" in his briefing on the second claim, both times in headings, but provided no discussion about how the Fourteenth Amendment's protections applied to the claim. Sub. Appl. 39, 40. Rather, there was only bare mention of the Fourteenth Amendment, likely for the purpose of incorporating the Eighth Amendment's protections to Texas, *see, e.g., Furman v. Georgia*, 408 U.S. 238, 239 (1972), not substantive discussion.

referencing the Fourteenth Amendment. *See* Sub Appl. 39–47. But "[a] generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights[.]" *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988). As such, the Court lacks jurisdiction over the claim, or if it does possess jurisdiction, "prudential" concerns compel denial of certiorari review. *Adams*, 520 U.S. at 90.

B. Gonzales's due process claim is barred by nonretroactivity principles.

As mentioned above, nonretroactivity principles bar merits review unless a petitioner can satisfy a tripartite test. *See supra* Argument III(A). Applying that test to Gonzales's due process claim demonstrates that relief cannot be granted.

One, Gonzales's conviction became final on February 22, 2010. *See Caspari*, 510 U.S. at 390. Two, at that time and now, there has never been a rule constitutionalizing state postconviction review of the future dangerousness special issue, so the rule he requests is undoubtedly new. Third, the rule he now proposes is not substantive, but entirely procedural—unspecified, later *review* of the jury's finding of future danger. Accordingly, because Gonzales fails to meet the retroactivity

requirements of *Teague*, his due process claim is barred. *See Garza v. Thaler*, 909 F. Supp.2d 578, 687 (W.D. Tex. 2012) ("Because no federal court has ever declared the Texas capital sentencing scheme's future dangerousness special issue inherently unconstitutionally unreliable, adoption of the rule advocated by petitioner in his final claim herein is a 'new rule' of constitutional criminal procedure which is foreclosed by the principle announced in *Teague v. Lane*.").

C. Even assuming the Court could reach the merits of Gonzales's due process claim, it is without merit.

Gonzales claims that, because he has new evidence of nonviolent behavior, due process prevents his execution without further review of the jury's finding of future dangerousness for accuracy. Pet. Writ Cert. 19–25.

Like his Eighth Amendment claim, this one too is predicated on erroneous beliefs about Texas's death penalty sentencing scheme—that death penalty eligibility occurs during the sentencing phase of trial and that a prediction of future dangerousness can be proven categorically false with later evidence. As discussed above, those beliefs are incorrect. *See supra* Argument III(B). And thus, this claim also has no legal footing.

Further, Gonzales is wrong that there's no postconviction review of future dangerousness. The jury's prediction of future danger can be reviewed, if raised, for legal sufficiency on direct appeal. *See, e.g.*, *Coble*, 330 S.W.3d at 265–70. And then that decision can be reviewed in federal habeas. *See, e.g.*, *Miller v. Johnson*, 200 F.3d 274, 287–88 (5th Cir. 2000) ("Indeed, the state court's conclusion that the evidence was sufficient to support an affirmative finding regarding Miller's future dangerousness did not result in a decision that was contrary to, or involve an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States."). As such, Texas does provide some review of the jury's future dangerousness finding pursuant to a constitutional standard of review.

But that's not good enough for Gonzales and what he really wants is the creation of a new process, or maybe a new claim, via due process. *See, e.g.*, Pet. Writ Cert. at 23 ("[A] mechanism for meaningful review."). But the former is problematic because Gonzales provides no details regarding the new process, e.g., when an inmate becomes eligible for such review, what court must perform the review, etcetera, and because this Court hasn't constitutionalized the state habeas process. *See United*

States v. MacCollom, 426 U.S. 317, 323 (1976) (plurality op.) ("The Due Process Clause of the Fifth Amendment . . . certainly does not establish any right to collaterally attack a final judgment of conviction."). And the latter is problematic because the prediction of future danger is a probabilistic endeavor, not an objective truth to be proven categorically false, and because in trying to prove falsity, Gonzales implicitly seeks creation of an unknowing-use-of-false-testimony claim that this Court is "unlikely ever to" recognize. *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)).

In any event, and as explained above, even if Gonzales's assertion of peaceful behavior on death row is true, the evidence of future danger presented at trial is sufficient to sustain his sentence. *See supra* Argument III(B). Namely, a rational jury could disbelieve Gonzales's sincerity, instead believing that death row's security measures keep him in check rather than a true change of heart given his depraved crimes, his lack of contemporaneous remorse, and his behavior in a lower security setting of a jail. *See supra* Argument III(B). As such, even if this claim

existed, Gonzales fails to prove falsity of the jury's prediction of probable future danger.

V. Gonzales Does Not Deserve a Stay of Execution.

A. The Stay Standard

A stay of execution is an equitable remedy and "[i]t is not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). A "party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). In utilizing that discretion, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). "The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be better than negligible." *Id*. The first factor is met, in this context, by showing "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a

majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). If the "applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435. "These factors merge when the [State] is the opposing party" and "courts must be mindful that the [State's] role as the respondent in every . . . proceeding does not make the public interest in each individual one negligible." *Id.*

"Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence" and courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Thus, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Indeed, "[t]he federal courts can and should protect States from dilatory or speculative suits." *Id.* at 585.

B. Gonzales Fails to Show Likely Success on the Merits.

As explained above, Gonzales cannot demonstrate entitlement to relief on any of his claims. Without belaboring the point, the Court lacks jurisdiction because the CCA relied on an adequate and independent state law ground to dismiss Gonzales's claims, the claims were not addressed on the merits and one wasn't appropriately raised in the court below, both are barred by nonretroactivity principles, and none are meritorious assuming the claims exist. *See supra* Arguments I–IV. At the least, the issues addressed above demonstrate that it is not likely that four members of the Court would grant a writ of certiorari and that five would likely grant relief. As such, this factor strongly favors denial of a stay of execution.

C. Gonzales Fails to Prove Irreparable Injury.

"The facts surrounding Gonzales's underlying crime are not in dispute." *Gonzales*, 606 F. App'x at 768. There is no question Gonzales committed the crime that sent him to death row. His decade-plus of litigation has not demonstrated constitutional error at trial, error in his postconviction proceedings, or in the method of his execution. *See supra* Statement of the Case I–IV. The claims presented in his petition do nothing to undermine these prior determinations. Thus, Gonzales has

received the process he was due, his punishment is just, and his execution will be constitutional. Consequently, Gonzales fails to demonstrate any injury, let alone an irreparable one.

D. The Equities Favor the State.

As noted above, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Gonzales psychologically tortured Townsend before her death, driving her bound to a remote ranch, marching her to a clearing, and then racking a rifle while she waited for death. *See supra* Argument III(B). Begging for her life provided Townsend a temporary reprieve, but that led to her rape and murder nonetheless. *Id*. His next victim, Teich, was relatively lucky—Gonzales only kidnapped and raped her but was not able to finish what he started with Townsend. *Id*. Weak claims that this Court cannot or should not address do not justify delaying Gonzales's execution any longer. *See Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.").

E. Gonzales Has Failed to Exercise Due Diligence.

As also noted above, "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the

merits without requiring entry of a stay.'" *Hill*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650). Gonzales has been execution eligible since late 2015. Since then, he has repeatedly engaged in meritless litigation to stall his execution. The first, a method of execution challenge, was dismissed as failing to state a claim. *See supra* Statement of the Case IV. The second, a motion for relief from final judgment, failed to even garner a COA. *Id*. The third, Gonzales's third overall habeas application filed about two weeks before a prior execution date, was mostly dismissed as abusive, and the one partial claim heard on the merits was denied on all prongs. *Ex parte Gonzales*, 2023 WL 4003783, at *2. The fourth and fifth were Gonzales's two suggestions to reopen prior state habeas proceedings, one closed for more than a decade and the other for a year, both filed about a week before his execution date. *See supra* Statement of the Case IV. The sixth is his fourth overall state habeas application, also filed about a week before his execution date, and dismissed entirely as abusive. *See Ex parte Gonzales*, 2024 WL 3106310, at *1. From that proceeding, Gonzales now presents claims that, with diligence, "could have been brought [long] ago" and "[t]here is no good reason for this abusive delay," *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S.

653, 654 (1992) (per curiam). Accordingly, a stay of execution should be denied.

CONCLUSION

For the foregoing reasons, Gonzales's petition for writ of certiorari and his application for stay of execution should be denied.

Respectfully submitted,

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