No. 23-7792

IN THE

Supreme Court of the United States

In re
RAMIRO FELIX GONZALES,
Petitioner

On Appeal from the Texas Court of Criminal Appeals

REPLY IN SUPPORT OF PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

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CAPITAL CASE

QUESTIONS PRESENTED

The Court should grant the concurrently filed petition for certiorari, vacate the decision of the Court of Criminal Appeals ("TCCA"), and remand for further proceedings on the Eighth and Fourteenth Amendment claims raised therein. *See Andrus v. Texas*, 590 U.S. 806 (1998). If that petition is denied, however, Mr. Gonzales respectfully requests that the exercise its extraordinary writ jurisdiction and review the merits of this case.

The questions presented are:

(1) Does it violate 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?

(2) 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal

State

Constitutional Provisions

Statutes

Rules

Other Authorities

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Petitioner pled below, and in his original petition filed in this Court, that "[b]ecause there is no longer any risk, let alone a 'probability,' that Petitioner 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 and the Eighth and Fourteenth Amendments." And "[t]he *state court's refusal* to recognize or address Petitioner's constitutional claim of eligibility for the death penalty violates procedural due process and requires this Court's intervention." Original Petition for Habeas Corpus at 5.

In its Brief in Opposition ("BIO"), Texas repeatedly mischaracterizes position as merely "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." BIO at

15. In so doing, Respondent misses both the legal and factual bases for Petitioner's claims.

Petitioner of course relies peaceful behavior since he's been on death row, but he also raised—in state court and before this Court—evidence of a complete transformation of *character*,[1] including the evaluations of several experts; one of whom was *the State's own trial expert on the question of future dangerousness*, Dr. Edward Gripon, who disclaimed his trial testimony, opinion, and diagnosis and today opines that Mr. Gonzales "**does not** pose a threat of future danger to society." Pet. App. 024a; Original Writ App. 7, 11–15 (summarizing Dr. Gripon's change of opinion and prison correctional staff and chaplaincy's recognition of Petitioner's transformation of character). Far from simply being "well-behaved on death row," Petitioner has not only refuted and disproven the jury's prediction through subsequent events,[2] but the State's evidence at trial has been substantially undercut by the recantation and changed opinion of their own expert witness. Original Writ App. at 7 ("The extraordinary circumstances of not only his postconviction rehabilitation but also the changed opinion of the State's "future dangerousness" expert warrant this Court's intervention in this case."). But the BIO wholly fails to mention, let alone engage with, this additional evidence.

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[1] A capital sentencing "jury's duty [is] to assess [a defendant's] present character for future dangerousness," *Coble v. State*, 330 S.W.3d 253, 269–70 (Tex. Crim. App. 2010).

[2] *McGinn v. State*, 961 S.W.2d 161, 168 (1998) (jury predictions of future dangerousness cannot be determined "right or wrong at the time of trial" but "may be shown as accurate or inaccurate only by subsequent events.").

Despite Petitioner's evidence negating his constitutional eligibility for the death penalty, Texas courts provide no remedy, and the federal courts are similarly closed. Absent the Court's intervention, the State of Texas will carry out an illegal and invalid execution. These extraordinary circumstances warrant a stay of execution and the exercise of the Court's extraordinary writ jurisdiction.

I. THE "NORMAL COLLATERAL REVIEW PROCESS" IS INADEQUATE AND DOES NOT PROVIDE A FORUM FOR PETITIONER'S CLAIM.

This is a crucial and recurring constitutional problem, but no state or federal remedy exists unless this Court exercises its extraordinary jurisdiction under the All Writs Act, 28 U.S.C. § 1651. Contrary to the State's contention, Petitioner did not "deliberately bypass … district court remedies" or choose not to file a successive federal habeas application "because he'd lose." BIO at 10–11. Federal habeas review is precluded by 28 U.S.C. § 2244(b) unless a petitioner relies on a new retroactive rule of constitutional law[3] or demonstrates innocence "of the underlying offense." § 2244 (b)(2)(B).

The State's accusations of deliberate bypass cite to a decision of this Court refusing to consider a method of execution challenge brought by a petitioner in his *fifth* federal habeas petition without a showing of cause for failure to raise the issue

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[3] *Teague v. Lane*, 489 U.S. 288 (1989), precludes retractive application of most newly established rules of criminal procedure. But Petitioner's claims seek the application and enforcement of established Eighth Amendment principles. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983) (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."); *Johnson v. Mississippi*, 486 U.S. 578 (1988) (death sentence based on information later revealed to be inaccurate is unconstitutional).

sooner. BIO at 11 (citing *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)). But, importantly here, Petitioner has not deliberately bypassed any available remedy, he has explained why his claim has only recently ripened, and he presented his claims to the Texas Court of Criminal Appeals before raising them in this Court.

Because Texas refuses to recognize his Eighth Amendment claim, or *any* challenge to the accuracy of the future dangerousness eligibility determination in collateral review proceedings,[4] the state courts offer no remedy. And because the state courts do not recognize these claims, they would be "technically exhausted yet procedurally defaulted," BIO at 13, in any federal posture. And the procedural due process violation did not fully occur *until* the state courts refused to provide any review of the underlying constitutional claim. In sum, as Petitioner explained in his Original Writ Application, Original Writ App. 8–9, his claims are not ripe for review in initial habeas corpus proceedings and not procedurally viable in successive federal habeas proceedings. 28 U.S.C. § 2244 (b).

Finally, to the extent that the State relies on federal habeas corpus cases requiring that petitioners show "cause and prejudice" for claims defaulted by state court procedural rules, *see* BIO at 12–14, the doctrine does not bar relief here. As an initial matter, Petitioner does not present a federal habeas corpus application through the "normal collateral review process," as the State complains. But more

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[4] *Ex parte Gonzales*, No. WR-77,969-03 (Tex. Crim. App. Jul. 11, 2022) ("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.").

importantly, as the State concedes, a fundamental miscarriage of justice may also invoke federal habeas jurisdiction. BIO at 13–14 ("Concerning miscarriage of justice, Gonzales would likely—and could only, given his concession of guilt—rely on actual innocence of the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333, 346–47 (1992).")

As Petitioner has made clear, his claim implicates "innocence of the death penalty." *See* Original Writ App. 7–17. And the State's mere assertion that "there isn't" a miscarriage of justice, BIO at 14, is hardly dispositive. That determination rests with this Court; Petitioner submits he has made a sufficient showing that his claim, and his evidence, negates "th[e] element[] that render a defendant eligible for the death penalty" under Texas law. Original Writ. App. at 7 (citing *Sawyer v. Whitley*, 505 U.S. 333, 347 (1992)); *see also Johnson v. Mississippi*, 486 U.S. 578 (1988) (death sentence based on information later revealed to be inaccurate is unconstitutional).

To allow his execution to go forward without any judicial review of his constitutional claim—amounting to innocence of the death penalty—would constitute a fundamental miscarriage of justice. This Court should exercise its jurisdiction to review it.

II. EXCEPTIONAL CIRCUMSTANCES WARRANT THIS COURT'S INTERVENTION.

When the State's own psychiatric expert on the issue of "future dangerousness" disclaims his trial opinion and testimony after reevaluating a defendant following years of rehabilitation and exemplary behavior, *and* subsequent events demonstrate the utter inaccuracy of the condition precedent for death eligibility, Original Writ

App. at 11–17, meaningful review of the constitutionality of the underlying death sentence is required.

The State attempts to resist settled precedent that Texas's future dangerousness determination is a death eligibility determination. While the State insists that "the prediction of future danger is a probabilistic endeavor, not an objective truth to be proven categorically false," BIO at 28, Texas has required the jury to make that prediction *beyond a reasonable doubt*. Tex. Code Crim. Pro. art. 37.071 §(b)(1). That a finding beyond a reasonable doubt is required to render a capital defendant in Texas eligible for the death penalty begs a forum for reviewing the accuracy or inaccuracy of such a "prediction," which can only be determined by subsequent events. And neither the State's citations to lower federal court decisions[5] nor its attempts to liken the Texas statute to Kansas's scheme, BIO at 18–19, can recast the settled recognition by both Texas and *this* Court that the future dangerousness determination is an eligibility factor in Texas. *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.").

[5] The State's brief cites a decision of the Western District of Texas and the Fifth Circuit, neither of which are binding on this Court nor on Texas's interpretation of its own state law. BIO at 18.

The State's complaints that Petitioner "fails to demonstrate how there are exceptional circumstances present," citing to Supreme Court Rule 10, BIO at 15, are inapposite. Rule 10, and the State's related complaints, concern reasons this Court might consider granting *certiorari* in a given case. Sup. Ct. R. 10. While Petitioner has separately petitioned this Court for a writ of certiorari, the rule governing extraordinary writs and the requested jurisdiction here is entirely different. Sup. Ct. R. 20.

The State also contends that the "breadth" of any impact is undermined because Texas is the only state that requires a finding of future dangerousness as a condition of death eligibility. BIO at 15. But in the past this Court has not refrained from considering—and indeed, has repeatedly intervened to address—constitutionally problematic aspects of Texas's death penalty statute or caselaw simply because of its idiosyncratic nature. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Moore v. Texas*, 581 U.S. 1 (2017).

Not all individuals incarcerated for many years will be able to disprove the eligibility determination with such persuasive force; even fewer still will be able to offer the opinion of the State's own trial expert that they do *not* pose a threat of future violence. As Dr. Gripon himself told a reporter, he has *never before* issued a report changing his opinion in a death penalty case; Petitioner "is the exception, not the

rule."[6] Because Petitioner can do both, his case is truly extraordinary. Without this Court's intervention, the constitutional eligibility issue Petitioner *actually* raised[7], here and below, would otherwise evade judicial review of any kind. Exercise of this Court's extraordinary writ power in these circumstances is therefore warranted.

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[6] Maurice Chammah, "This Doctor Helped Send Ramiro Gonzales to Death Row. Now He's Changed His Mind," *The Marshall Project* (Jul. 12, 2022), available at https://www.themarshallproject.org/2022/07/11/this-doctor-helped-send-ramiro-gonzales-to-death-row-now-he-s-changed-his-mind.

[7] The State's lengthy recitation of the trial evidence on which the jury based their prediction, BIO at 21-25, supports only their assertion that there is "undoubtedly sufficient evidence to uphold the finding of future dangerousness," a claim Petitioner has not raised.

CONCLUSION

For the foregoing reasons, this Could should exercise its original jurisdiction, vacate the judgment of the Texas Court of Criminal Appeals and remand for further proceedings on Petitioner's death ineligibility claim consistent with the Eighth and Fourteenth Amendments. Alternatively, the petition for writ of certiorari should be granted.

Respectfully submitted,

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