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THIS IS A CAPITAL CASE

IN THE 454TH DISTRICT COURT
MEDINA COUNTY, TEXAS

AND

THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

Ex parte	§	**Trial No. 04-02-09091-CR**
	§	
RAMIRO FELIX GONZALES,	§	**Writ No. _______________**
	§	
Applicant	§	**Scheduled Execution:**
	§	**June 26, 2024**

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT TO TEX. CODE CRIM. PROC. ART. 11.071

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STATEMENT REGARDING CONFINEMENT AND SENTENCE

Ramiro Felix Gonzales is being illegally confined and restrained of his liberty by the State of Texas on Death Row at the Polunsky Unit of the Texas Department of Criminal Justice ("TDCJ"), Correctional Institutions Division, in Livingston, Texas. Mr. Gonzales's confinement and sentence of death are pursuant to a judgment entered by the 38th Judicial District Court of Medina County on September 6, 2006. A copy of that judgment is attached as Exhibit A. Mr. Gonzales is scheduled to be executed on June 26, 2024. A copy of the order scheduling the execution and the warrant of execution is attached as Exhibit B.

PROCEDURAL HISTORY

On August 25, 2006, a Medina County jury found Mr. Gonzales guilty of capital murder pursuant to Tex. Penal Code Ann. § 19.03(a)(2). 38 RR 54; CR 971.[1] On September 6, the jury returned answers to the

[1] We cite the trial transcript as "[vol.] RR [page]" and the clerk's record as "[vol.] CR [page]."

statutory special issue questions requiring imposition of a death sentence. 43 RR 77; CR 1033-34.

On June 17, 2009, the Court of Criminal Appeals ("CCA") affirmed the conviction and sentence. *Gonzales v. State*, No. AP-75,540, 2009 WL 1684699 (Tex. Crim. App. June 17, 2009) (not designated for publication), *cert. denied*, *Gonzales v. Texas,* 559 U.S. 942 (2010).

On September 22, 2008, court-appointed counsel Terry McDonald filed a nine-page initial application for writ of habeas corpus on Mr. Gonzales's behalf. Without conducting an evidentiary hearing, a visiting judge signed findings of fact and conclusions of law recommending that the application be denied as "wholly frivolous." Findings of Fact and Conclusions of Law at *4, *Ex parte Gonzales,* Trial Court No. 04-02-9091-CR (38th Judicial Dist. Medina County, Tex., Oct. 24, 2008). The CCA adopted the trial court's recommendation and denied relief. *Ex parte Gonzales*, No. WR-70,969-01, 2009 WL 3042409 (Tex. Crim. App. Sept. 23, 2009) (not designated for publication).

Undersigned counsel Michael C. Gross was appointed to represent Mr. Gonzales in federal habeas proceedings. On January 31, 2011, the

federal court stayed the proceedings to allow Mr. Gonzales to return to state court to exhaust several undeveloped and unexhausted claims.

On February 23, 2011, Mr. Gonzales filed a subsequent application for writ of habeas corpus in the trial court. On February 1, 2012, the CCA dismissed the application under Art. 11.071, § 5. *Ex parte Gonzales*, No. WR-70,969–02, 2012 WL 340407 (Tex. Crim. App. Feb. 1, 2012) (not designated for publication).

On January 15, 2014, the federal district court denied Mr. Gonzales's amended petition. Memorandum Opinion and Order Denying Relief, *Gonzales v. Stephens*, No. 10-CV-165-OLG, 2014 WL 496876 (W.D. Tex. Jan. 15, 2014) (unpublished). The Fifth Circuit affirmed. *Gonzales v. Stephens*, 606 F.App'x 767 (5th Cir. 2015).[2]

On September 14, 2020, the trial court ordered that Mr. Gonzales should be executed on April 20, 2021. That date was ultimately reset to July 13, 2022.

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[2] Between 2016 and 2020, Mr. Gonzales diligently litigated issues related to lethal injection and the denial of his funding requests in federal court. *See, e.g., Gonzales v. Davis*, 788 F.App'x 250 (5th Cir. 2019) (affirming district court's denial of Rule 60(b) motion on its merits); *Gonzales v. Davis*, 140 S. Ct. 2771 (May 18, 2020) (mem.) (denying certiorari).

On June 30, 2022, Mr. Gonzales filed a subsequent application for writ of habeas corpus raising several claims, including a claim that the State violated the Eighth Amendment and Due Process protections by presenting false and materially inaccurate testimony on the issue of future dangerousness by state psychiatric expert Dr. Edward Gripon. In a May 2022 report, Dr. Gripon disclaimed his trial testimony that Mr. Gonzales has antisocial personality disorder, *see* Exhibit C (report of Dr. Edward Gripon, M.D.) at 8, noted that statistical data concerning sex offender recidivism rates to which he testified at trial was false, *id*. at 11, and opined that Mr. Gonzales "**does not** pose a threat of future danger to society." Id. at 12 (emphasis in original).

On July 11, 2022, the CCA entered an order staying the scheduled execution and authorizing further proceedings on a discrete part of the claim that the State presented materially false and unreliable testimony by Dr. Gripon at the penalty phase. *Ex parte Gonzales*, WR-70,969-03, 2022 WL 2678866 (Tex. Crim. App. July 11, 2022) (not designated for publication). Specifically, the CCA found that Mr. Gonzales 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 the remaining allegations concerning Dr. Gripon's trial testimony, the CCA ordered 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 holding a hearing or receiving any additional evidence, the trial court signed the State's proposed findings of fact and conclusions of law in their entirety, recommending denial of relief. On June 14, 2023, the CCA adopted the lower court's recommendation and denied relief. *Ex parte Gonzales*, No. WR-70,969-03, 2023 WL 4003783 (Tex. Crim. App. Jun. 14, 2023) (not designated for publication).[3]

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[3] The Motion to Remand was denied *per curiam* on June 28, 2023. *Ex parte Gonzales*, No. WR-70,969-03 (Tex. Crim. App. Jun. 28, 2023).

INTRODUCTION

Ramiro Gonzales was sentenced to death because a jury "predicted" that, even if incarcerated, he would "commit criminal acts of violence" that would constitute a continuing threat to society." That "prediction" has now been shown to be wrong "by subsequent events." [4] In the 18 years that Mr. Gonzales has been on death row, he has committed no criminal acts of violence or, indeed, no criminal acts whatsoever. Instead, 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. Correction officers, prison chaplains, and fellow inmates attest to his maturity, integrity, and thoughtfulness. 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

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[4] *See McGinn v. State*, 961 S.W.2d 961 S.W.2d 161, 168 (Tex. Crim. App. 1998) (the jury's determination of "future dangerousness is, in essence, an issue of prediction" whose accuracy cannot be determined "right or wrong at the time of trial" but "may be shown as accurate or inaccurate only by subsequent events").

society”—a requisite finding for death-eligibility under Texas law—he is ineligible for execution.

RELEVANT FACTUAL HISTORY[5]

In the eighteen years since Ramiro Gonzales was sentenced to death, his life has become a living testament to the power of rehabilitation and human capacity for growth and change. Evidence of Mr. Gonzales’s status as an authentically and completely rehabilitated offender who does not pose a risk of danger to anyone and is therefore ineligible for punishment by the death penalty falls into two main categories: (1) evidence of rehabilitation and lack of dangerousness and (2) the institutionally recognized and overwhelmingly positive influence he currently has on others as a result of his moral and spiritual transformation.

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[5] Facts related to the crimes committed by Mr. Gonzales, his trial representation and failures of state habeas counsel, and various other aspects of the case have been extensively briefed before this court in Mr. Gonzales’s prior habeas applications. Only facts relevant to the claims in the instant petition are presented here.

A. Evidence of Mr. Gonzales's Rehabilitation and Lack of Dangerousness: "People Can Grow and Change and Come to Know Themselves Better Even in Small, Dark Spaces."[6]

At trial, the State introduced evidence from jailers who spoke to Mr. Gonzales's disruptive behavior in jail and testimony of Florence Teich, the named victim in a separate sexual assault case to which Mr. Gonzales pled guilty four years before his 2006 trial. But the lynchpin of the State's evidence that Mr. Gonzales would pose a risk of future acts of criminal violence was the testimony of State psychiatrist Dr. Edward Gripon, who told the jury that Mr. Gonzales had antisocial personality disorder and would continue to present a danger to others, even if incarcerated. 41 RR 67-75.

At the penalty phase of trial, Dr. Gripon testified that sexual offenders had the highest degree of recidivism, and "[s]exual offenses are the hardest to treat," citing "lots of data" to support the "likelihood they will continue [to commit rape] way up in the eighty percentile or better."

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[6] Rachael Bedard, "On Death Row, He is Grasping at Grace," (hereinafter "*Grasping at Grace*"), *New York Times* (Dec. 9, 2022), available at https://www.nytimes.com/2022/12/09/opinion/death-penalty-texas-ramiro-gonzalez.html (describing Bedard's experience as a jail doctor and her 2022 meeting with Ramiro on death row in Texas).

Id. at 86-88. When asked about Mr. Gonzales's "potential for rehabilitation" in light of suggestions he had initially disclaimed full responsibility for the offense, Dr. Gripon placed the possibility of rehabilitation "around one or two percent." *Id.* at 94-95. Dr. Gripon ultimately opined that Mr. Gonzales "would pose a risk to continue to commit threats or acts of violence" "wherever he goes." *Id.* at 66, 94.

But today Dr. Gripon no longer stands by his trial testimony. After reviewing incarceration records[7] and spending three and a half hours with Mr. Gonzales at the Polunsky Unit in September 2021, Dr. Gripon concluded, "to a reasonable psychiatric probability" that [Mr. Gonzales] **does not** pose a threat of future danger to society." Exhibit C at 12 (emphasis in original). Dr. Gripon described Mr. Gonzales's maturation and complete rehabilitation over the past two decades. Noting that Mr. Gonzales was "barely 18 years old" at the time of Bridget Townsend's murder, Dr. Gripon observed that "[w]ith the passage of time and significant maturity," Mr. Gonzales "is now a significantly different

[7] Prison records confirm that, since being transferred to the custody of the Texas Department of Criminal Justice in 2006, Mr. Gonzales has not committed a single act of violence. Exhibit D, TDCJ prison records.

person both mentally and emotionally," having made "a very positive change for the better." Exhibit C. As Dr. Gripon himself told a reporter, he has *never before* issued a report changing his opinion in a death penalty case; Mr. Gonzales "is the exception, not the rule."[8]

Clinical psychologist Dr. Katherine Porterfield, who evaluated Mr. Gonzales to assess the effects of childhood sexual abuse and trauma on Mr. Gonzales, has reached the same conclusions as Dr. Gripon. In the report of her evaluation of Mr. Gonzales, Dr. Porterfield noted that despite his extensive childhood trauma history and years of abuse, Mr. Gonzales "received no therapeutic services or other intervention beyond criminal prosecution," and that "[t]he crimes that he committed are tragically and inextricably linked to the trauma he suffered and the lack of care provided to him." Exhibit E (Report of Dr. Katherine Porterfield, Ph. D.) at 20. Yet Dr. Porterfield's assessment also revealed that "[s]ince his incarceration, Ramiro has demonstrated remarkable improvements

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[8] 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.

in his functioning across multiple domains." *Id.* at 24. Dr. Porterfield concluded her report by noting that

> In the years since his incarceration, there has also been evidence of Ramiro's maturation and psychological resilience, in particular his deep and genuine religious faith, sincere remorse, and meaningful attachments to positive, prosocial individuals. Ramiro's current functioning indicates improvement in many of his psychological and behavioral difficulties and potential for further rehabilitation and growth.

Id.

Numerous correctional officers, including many women,[9]—have attested that, from their experience, Mr. Gonzales presents no danger to anyone in a prison setting and describe him as "consistent," "thoughtful," and "sensitive." Zykiare Best, a former correctional officer who supervised and interacted with Mr. Gonzales on a regular basis, described him as cooperative and considerate, recalling that he "always [went] out of his way to make sure that [correctional officers] check everything" during contraband searches "so we don't get into trouble.

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[9] This is particularly relevant given the government's line of cross-examination during the testimony of the defense prison classification expert, making sure the jury heard that "inmates have access to females in prison" and that both guards and other prison staff who are women "have been sexually assaulted by inmates." 42 RR 151.

He's that kind of person."[10] Karen Woodley, a correctional officer who currently works on death row and has worked closely with Mr. Gonzales for years, attests that she feels safe around him. As Ms. Woodley has explained, she has personally witnessed Mr. Gonzales's growth for herself:

> The person that I see, or I have known for the past five years, if asked if I feel safe around him, I do. Do I feel that he has grown as an individual? I feel that he has.... Do you genuinely think that a 17-year-old is in the same place as a 35-year-old, mentally? I don't believe so.[11]

After arriving on death row in 2006, Mr. Gonzales began to explore religion more seriously, studying correspondence courses through Shalom Bible College and devouring theological texts. By the time he began corresponding with Reverend Bri-anne Swan in 2014, the two were able to first connect through their faith. Over the past decade, this friendship has been rooted in Mr. Gonzales's sincere and apparent

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[10] Zykiare Best, "Ramiro's Story – Full Length," *Texas Defender Service*, available at https://youtu.be/dwRLSb53u10?si=lMqdeGVr6BmSAE-Z.

[11] Karen Woodley, "Ramiro's Story – Full Length," *Texas Defender Service*, available at https://youtu.be/dwRLSb53u10?si=lMqdeGVr6BmSAE-Z.

spiritual growth.[12] Reverend Swan, a married mother of two and head of her own Toronto congregation in the United Church of Canada, has said of Mr. Gonzales: "I had this really flawed idea that I was just going to do this nice thing and write to him, without any openness to the fact that I might be changed in the process.… You don't enter into a relationship with Ramiro without feeling profoundly moved."[13]

Perhaps one of the most illustrative examples of Mr. Gonzales's growth and rehabilitation has been his efforts to donate an organ to a person in need before his death. The idea of volunteering to be a living organ donor came to him through correspondence with a spiritual advisor who mentioned a congregant in urgent need of a kidney transplant. In what a medical reporter has called "an expression of hard-won self-knowledge and the good he has found in himself, commingled with remorse,"[14] Mr. Gonzales recognized this as an opportunity to make

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[12] David Wilson, "Ramiro Gonzales faces execution. His friendship with a Canadian minister has changed them both," *Broadview Magazine* (Dec. 9, 2022), available at https://broadview.org/ramiro-gonzales-death-row/.

[13] *Id.*

[14] Bedard, *Grasping at Grace*, *supra* n. 6.

efforts to atone for the life he has taken, and immediately and without hesitation volunteered to donate one of his own kidneys to the congregant.

After these initial efforts fell through because medical tests revealed that Mr. Gonzales and the intended recipient were not a medical "match," Mr. Gonzales volunteered to be an "altruistic donor," offering to donate to *any* person in need, particularly because his rare blood type made him an ideal donor for someone who would otherwise have great difficulty finding a match. However, the Texas Department of Criminal Justice refused to allow Mr. Gonzales to proceed with an altruistic donation, claiming it would potentially introduce an "'uncertain timeline, thereby possibly interfering with the court-ordered execution date.'"[15]

Mr. Gonzales eagerly and persistently sought to be qualified as a living organ donor and was willing to do so by expressly disavowing any expectation of or intent to seek any tangible benefit or award for doing

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[15] Dakin Andone, "A Texas death row inmate is seeking a 30-day reprieve to donate a kidney. An appeals court has issued an execution stay for a different reason," *CNN.com* (Jul. 11, 2022), available at https://www.cnn.com/2022/07/11/us/ramiro-gonzales-texas-death-row-kidney/index.html (quoting TDCJ statement to CNN).

so. Cantor Michael Zoosman, a longtime prison chaplain and spiritual advisor to Mr. Gonzales, notes that, of the many incarcerated individuals he has known, "[s]ome to be sure would attempt a maneuver like [kidney donation] to try to beat the executioner's sword. Nothing in this world would convince me that this is the case with Ramiro." Exhibit F (Letter of Cantor Michael Zoosman).[16]

B. Evidence of Mr. Gonzales's Participation in Faith-Based Programs and Positive Influence on Others on Death Row: "Ramiro Makes People's Lives Better."[17]

Through his total transformation and his deep abiding faith, Mr. Gonzales has taken on a leadership and support role both behind and beyond bars. His story and his impact on others have inspired the general public and religious leaders beyond the borders of this country.

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[16] When the July 2022 execution date was stayed by the Court of Criminal Appeals, it appeared that his desire to proceed with organ donation could finally be realized. After a medically suitable recipient was identified, the matching process was initiated in accordance with TDCJ policy, and both parties underwent months of testing. In 2023, Mr. Gonzales was informed that his request to donate had been denied by TDCJ. No further information was provided, no medical justification was asserted, and despite repeated requests by attorneys, no documentation or reason for the denial has ever been produced.

[17] Reverend Bri-anne Swan, "Ramiro's Story," *Texas Defender Service*, available at https://www.youtube.com/watch?v=RPdj08J9tX4&t=4s.

Behind the walls of Polunsky Unit, Mr. Gonzales's faith journey inspired others long before the advent of the "faith-based pods" that were introduced in 2022 under former Warden Daniel Dickerson's tenure.[18] Mr. Gonzales's ministry was well-known on death row to both guards and inmates before the institutionalization of faith-based programming on death row, and as soon as it was practicable administrators appointed Mr. Gonzales as a "peer coordinator" of a newly opened faith-based pod. His influence on others—not only fellow death row prisoners, but also correctional officers and the Texas Department of Criminal Justice's official field ministers[19] themselves—cannot be understated.

For the field ministers and fellow incarcerated men, Mr. Gonzales has often provided aid, comfort, and counsel. To his long-time spiritual advisor Rev. Bri-anne Swan, he has encouraged growth and deepening of faith.[20] To spiritual advisor and confidant Cantor Michael Zoosman, Mr.

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[18] Ken Camp, "From Death Row to Life Row," *Baptist Standard* (Aug. 10, 2022), available at https://www.baptiststandard.com/news/texas/from-death-row-to-life-row/.

[19] *Id.*

[20] Wilson, *supra* n. 12.

Gonzales has "inspired" a deeper connection to his own Jewish faith.[21] And even to those who have never met Mr. Gonzales, his story has resonated and inspired, speaking to the human capacity for growth and change.

When Mr. Gonzales was last scheduled to be executed, in July 2022, an international outpouring of support illustrated the expansiveness of his reach and the persuasiveness of his sincere conversion. In 2022, *Christianity Today* published an essay by Aaron Griffith, a professor of history at Christian Whitworth College, who—inspired by Mr. Gonzales's story—argued that Christians shouldn't kill Christians, even those condemned by the State.[22] Clearly moved by Mr. Gonzales's sincere faith, his impact on others, and his ministry behind bars, Professor Griffith wrote that Mr. Gonzales has "taken responsibility for his crimes, embraced a life of faith and prayer, earned a Bible college degree, and

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[21] Exhibit F.

[22] Aaron Griffith, "Christians Shouldn't Kill Christians—Even on Death Row," (hereinafter "*Christians Shouldn't Kill Christians*"), *Christianity Today* (Aug. 26, 2022, updated May 14, 2024), available at https://www.christianitytoday.com/ct/2022/august-web-only/death-penalty-capital-punishment-prison-ministry-christians.html?utm_source=facebook&utm_ medium=post&utm_campaign=article.

been widely praised for his generous spirit." In his essay, Professor Griffith observed that Mr. Gonzales "has lived even more fully into his Christian vocation, including being chosen as a coordinator of the prison's new faith-based program [where] he ministers to others, and his sermons are read aloud on the prison radio show." *Id.* Professor Griffith recently joined ten other Evangelical faith leaders calling for clemency for Ramiro:

> We are writing as Christians calling for you to spare the life of another Christian—Ramiro Gonzales. Ramiro has changed. Because he has changed, we believe the circumstances surrounding him should change as well.

Exhibit G (Letter from Evangelical Faith Leaders).

In his role as a peer coordinator for death row's faith-based program, Mr. Gonzales has been able to spread his ministry even further than he could through his own individual efforts. His presence and guidance are felt widely throughout the death row community; his example and advice influence not only fellow incarcerated men but also

numerous correctional officers who have observed that Mr. Gonzales "holds his faith high."[23]

In sum, there is substantial compelling evidence that Mr. Gonzales is a nonviolent, inspirational, and fully rehabilitated person who, even in the words of the State's expert on future dangerousness at trial, "**does not** pose a threat of future danger to society." Exhibit E at 12. To execute him based on a "prediction" to the contrary, now shown to be error, would fail to satisfy not only the permissible purposes of punishment but also constitutional guarantees of due process and freedom from cruel and unusual punishments.

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[23] Karen Woodley, "Ramiro's Story – Full Length," *Texas Defender Service*, available at https://www.youtube.com/watch?v=RPdj08J9tX4&t=4s.

CLAIMS FOR RELIEF

CLAIM ONE

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 TEXAS LAW.

CLAIM TWO

THE EIGHTH AMENDMENT IS 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.

CLAIM ONE

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.

The Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits Mr. Gonzales's execution because the jury's "prediction" of future dangerousness has now been shown to be wrong in light of "subsequent events."[24] 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"—an absolute precondition for "death eligibility" in Texas—he is constitutionally ineligible for execution.

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[24] *See McGinn*, 961 S.W.2d at 168 (the jury's determination of "future dangerousness is, in essence, an issue of prediction" whose accuracy cannot be determined "right or wrong at the time of trial" but "may be shown as accurate or inaccurate only by subsequent events").

A. The Texas Legislature Has Made an Affirmative Finding of "Future Dangerousness" a Prerequisite for Death Eligibility as a Matter of State Law.

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.

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, because a determination of future dangerousness is a necessary precondition for a defendant to be eligible to be sentenced to death in Texas.[25] Thus, even if a defendant is convicted of the offense of capital murder, a Texas capital defendant is not eligible for a death sentence unless the jury *also* returns

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[25] By comparison, the second special issue question—whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment the mitigation question—functions as the "selection" decision in the Texas sentencing process.

a unanimous affirmative finding on the future dangerousness issue at the penalty phase.[26] Indeed, both the Court of Criminal Appeals and the United States Supreme Court have recognized that the future dangerousness determination serves to satisfy the constitutional "eligibility requirement."[27]

B. Eighth Amendment Principles Govern State Capital Sentencing Schemes and Death Eligibility Determinations.

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

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[26] 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.").

[27] *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 thus "must be found before a death sentence may be imposed under Texas law.").

(1976). The Supreme 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 Supreme Court has explained that the 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."[28] Second, eligibility factors "make rationally reviewable the process for imposing a sentence of death."[29]

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[28] *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

[29] *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) ("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.'" *Tuilaepa*, 512 U.S. at 973 (1994) (quoting *Arave v. Creech*, 507 U.S. 463, 471 (1993)).

Further discussion of Texas's failure to provide for rational review of the future dangerousness eligibility determination is found in Claim II., *infra*.

Mr. Gonzales has alleged facts in this application showing that the jury's prediction of future dangerousness was not only *based on* inaccurate evidence but has also itself been shown to be "inaccurate" in light of "subsequent events," specifically, the fact that Mr. Gonzales 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 Mr. Gonzales (including that of the State's expert at trial) have consistently concluded that Mr. Gonzales presents no danger to anyone.

An affirmative answer to the future dangerousness special issue is a fundamental statutory eligibility requirement for the death penalty under Texas law. *Mosley*, 983 S.W.2d at 263 n.18 (the constitutional "eligibility requirement is satisfied in Texas by aggravating factors contained within the elements of the offense, the future dangerousness special issue …"). And the Eighth Amendment requires both that eligibility determinations narrow the class of defendants subjected to the death penalty and that death verdicts be rationally reviewable, or subject to meaningful appellate review. Thus, the invalidation of a requisite eligibility finding renders a capital

defendant no longer death eligible. This Court should grant review of this claim and remand to the trial court for further proceedings consistent with Art. 11.071, § 8.

C. This Claim Should be Reviewed Under Tex. Code Crim. Proc. Art. 11.071, § 5(a)(1).

Texas law allows a death-sentenced habeas applicant to be heard on the merits of a claim raised in a subsequent habeas corpus application if it is shown, *inter alia*, that

> the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

Tex. Code Crim. Proc. art. 11.071, § (5)(a)(1).

This Court has often referred to the § 5(a) determination as a "threshold," requiring that subsequent state habeas applicants "must make a prima facie showing of [the underlying claim] in his subsequent pleading, *and then, if granted leave to proceed* by this Court, must *establish in the subsequent proceedings* that he is [entitled to relief]." *Blue*, 230 S.W.3d at 163 (emphasis supplied). Mr. Gonzales can satisfy this requirement.

On June 30, 2022, undersigned counsel filed Mr. Gonzales's most recent application for writ of habeas corpus. That application contained claims challenging the evidence underlying the future dangerousness prediction specifically including Dr. Gripon's testimony that Mr. Gonzales had antisocial personality disorder and would pose a danger "wherever he goes." 41 RR 66, 94. Dr. Gripon also told the jury that "lots of data" has shown that sex offenders have the highest rates of recidivism, "way up in the eighty percent or higher," 41 RR 86-88, but that assertion was false. These claims were supported in part by Dr. Gripon's evaluation of Mr. Gonzales and retraction of his trial testimony. *See* Subsequent Application for Writ of Habeas Corpus at 14-60, *Ex parte Gonzales*, WR-70,969-03 (Jun. 30, 2022).

As described *supra*, the Court of Criminal Appeals refused to authorize all but the portion of the claim related to false sex offender recidivism rates and refused entirely to consider Dr. Gripon's recantation and present determination that Mr. Gonzales in fact "does not pose a threat of future danger to society." Exhibit F at 12. Thus, it was not until this Court refused to review the future dangerousness determination and testimony that the complete lack of a legal remedy became clear.

Further, the number of guards, chaplains, and TDCJ officials that recognize Mr. Gonzales's rehabilitation and lack of dangerousness continues to grow. Because the CCA had not yet refused to authorize Mr. Gonzales's claims that the jury's erroneous prediction was *based on* false evidence at the time, and because the full body of evidence demonstrating that the prediction has been proven untrue by subsequent events was not yet fully ripe, the factual basis for this claim was not available at the time the prior application was filed.

The factual basis for this claim is therefore "newly available" under the meaning of Article 11.071, § 5.

D. This Claim Should be Reviewed Under Tex. Code Crim. Proc. art. 11.071, § 5(a)(3).

In addition to authorization under Tex. Code. Crim. Proc. art. 11.071, § 5(a)(1), this Court should authorize this claim under art. 11.071, § 5(a)(3), which provides that a habeas corpus applicant may show, "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"—in other words, that the applicant would not have been sentenced to death. Tex. Code. Crim. Proc. art. 11.071, § 5(a)(3); *Ex parte Blue*, 230 S.W.3d 151, 160 (Tex. Crim. App.

2007). This Court 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.

Texas law recognizes claims of actual innocence based upon newly discovered evidence in state post-conviction proceedings. *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996); *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994) (because "execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution," claims of actual innocence are cognizable in capital habeas proceedings); Tex. Code. Crim. Pro. art. 11.071 § 5(a)(2) (providing for review of subsequent habeas applications upon a showing that, by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.").

In the § 5(a)(2) context, this Court has recognized that an actual innocence claim may be sufficient both to meet the § 5(a) threshold requisite of a constitutional violation which acts as a gateway to merits review of the underlying claim and as the underlying claim itself. *See Ex parte Reed*, 670 S.W.3d 689, 699-700 (Tex. Crim. App. 2023) (describing prior authorization of applicant's claim of "innocence both substantively under *Elizondo*, 947 S.W.2d at 209, and as a gateway for reaching other constitutional claims under … Section 5(a)(2)."). Here, Mr. Gonzales respectfully submits that underlying actual innocence of the death penalty should also be sufficient to satisfy the gateway § 5(a)(3) determination.

In *Elizondo*, the Court of Criminal Appeals cited the reasoning expressed by Justice Blackmun in dissent in *Herrera v. Collins*[30] as its basis, in part, for extending *Holmes* to appellants serving non-capital sentences: "Whether petitioner is viewed as challenging simply his death sentence or also his continued detention, he still is challenging the State's right to punish him." 947 S.W.2d at 205 (quoting *Herrera*, 506 U.S. at

[30] *Herrera v. Collins*, 506 U.S. 390 (1993).

433) (Blackmun, J., dissenting). But the "State's right to punish" does not hinge solely on the defendant's actual innocence of the offense. *Blue*, 230 S.W.3d at 160.

An affirmative answer to the future dangerousness special issue is a fundamental statutory eligibility requirement for the death penalty. *Mosley*, 983 S.W.2d at 263 n.18 (the constitutional "eligibility requirement is satisfied in Texas by aggravating factors contained within the elements of the offense, the future dangerousness special issue …"). And the Eighth Amendment requires both that eligibility determinations narrow the class of defendants subjected to the death penalty and that death verdicts be rationally reviewable, or subject to meaningful appellate review. Thus, the invalidation of a requisite eligibility finding that renders a capital defendant no longer death eligible should be considered as an "innocence of the death penalty" claim subject to § 5(a)(3) authorization. *Blue*, 230 S.W.3d at 161 (§ 5(a)(3) exception encompasses those "constitutional errors that affect the applicant's *eligibility* for the death penalty *under state statutory law*").

As Dr. Gripon said, this case is "the exception, not the rule." The high burden of proof on petitioners to prove their innocence of the death penalty addresses the State's finality concerns while, at the same time, facilitating justice. To authorize this claim of death-ineligibility, or innocence of the death penalty, under the § 5(a)(3) gateway would be consistent with the CCA's interpretation of similar provisions of the same statute. It would allow for review of the underlying claim of innocence of the death penalty only if an applicant could make a prima facie showing under the clear and convincing standard, an exacting test that would preserve the State's legitimate interest in finality. While the application of the § 5(a)(3) threshold to death ineligibility claims of this sort appears to be an unsettled question, Mr. Gonzales respectfully submits that straightforward application of § 5 warrants authorization.

Mr. Gonzales has alleged facts in this application showing that the jury's prediction of future dangerousness was *based on* inaccurate evidence and has itself been shown to be "inaccurate" in light of "subsequent events," specifically, the fact that Mr. Gonzales 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 Mr. Gonzales (including that of the State's expert at trial) have consistently concluded that Mr. Gonzales presents no danger to anyone.

Prosecutors relied heavily on Dr. Gripon's testimony at closing argument to convince jurors to answer the future dangerousness special issue question in the affirmative.[31] In answering the special issue question, the jury was asked, in essence, to determine whether such a young man would be capable of change or whether he would forevermore "repeat[] criminal acts" "have a lack of social conscience," follow "no life plan" and show "little remorse." 41 RR 68 (Dr. Gripon describing antisocial personality disorder). Would his behavior bear out the purported recidivism rate "in the eight[ieth] percentile or better"? *Id.* at 87-88.

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[31] The State did present additional aggravating evidence at the sentencing phase, including testimony from jailers who spoke to Mr. Gonzales's disruptive behavior, and his additional criminal convictions. But at closing argument, the State returned over and over to Dr. Gripon's testimony that Mr. Gonzales *would* present a continuing threat of future dangerousness. *E.g.* 43 RR 55 ("Dr. Gripon looked at everything and says, yes, he will [be a continuing threat].")

Jurors are particularly vulnerable to crediting expert predictions of dangerousness when they have just convicted a defendant of a death-eligible offense.[32] Having already adjudged the defendant dangerous (by finding him guilty of a serious violent crime), jurors may well "overvalue" any prediction that appears to confirm their decision.[33]

Further, as this Court has observed, studies show that jurors tend to "value medical expertise higher than other scientific expertise; thus, even when the information is identical, jurors find evidence from a doctor more persuasive than the very same testimony from a psychologist." *Coble v. State*, 330 S.W.2d 250, 281 (2010) (citing Jeff Greenberg & April Wursten, *The Psychologist and the Psychiatrist as Expert Witnesses: Perceived Credibility and Influence*, 19 PROF. PSYCH. RES. & PRAC. 373, 378 (1988));[34] *see also*, *e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 259 (1988)

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[32] *See* Erica Beecher-Monas, *Heuristics, Biases, and the Importance of Gatekeeping*, 2003 MICH. ST. L. REV. 987, 1018-19 (2003); Roger J. R. Leveque, THE PSYCHOLOGY AND LAW OF CRIMINAL JUSTICE PRACTICES 375 (2006) ("The fit between [inter alia] the expert testimony [and] the juror's preexisting views concerning the issues … determines the weight" accorded to expert testimony).

[33] *Id.* at 1018-19.

[34] *See also Velez v. State*, No. AP-76,051, 2012 WL 2130890 (Tex. Crim. App. June 13, 2012) at *32 (finding that Merillat's "extensive credentials"—"a Texas peace officer for 31 years; a criminal investigator for the special prosecution unit for 24 years;

(finding improper admission of testimony from prosecution's psychiatric expert harmful even though the prosecution's psychologist offered very similar conclusions in legally untainted testimony, reasoning that the psychiatrist's "qualifications as a medical doctor specializing in psychiatry" gave his testimony more weight); *see also id.* at 260 ("[t]he finding of future dangerousness was critical to the death sentence," "Dr. Grigson was the only psychiatrist to testify on this issue," and "the prosecution placed significant weight on his … testimony"). And here, the State invited the jury to credit Dr. Gripon and dismiss Dr. Milam on this very basis, explicitly contrasting Dr. Gripon's medical qualifications and supposed neutrality against defense psychologist Dr. Milam's opinion, insinuating she lacked credibility. *Cf.* 43 RR 54-55 ("[Dr. Gripon is] the psychiatrist. He's the one that came in here, not with an agenda; to tell you the true facts.") *with id.* at 28 ("The Defense witness, Dr. Milam, a

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qualified as a fingerprint and 'blood stain' expert; author of five books and numerous articles on prison violence in Texas; college lecturer on prison violence and classification of inmates; author of the curriculum for criminal investigations at Texas A&M University; and frequent speaker on prison violence, criminal investigations, and crime in Texas prisons"—"increased his credibility as a person knowledgeable about violence in prisons and future dangerousness").

psychologist, who I submit to you obviously checked her neutrality at the door when she came into this courtroom….").

Mr. Gonzales's evidence of rehabilitation was undeveloped at the time of his trial and sentencing almost 20 years ago. Then, the State's mental health expert, Dr. Gripon, testified that "the likelihood that [a person who commits forcible rape] will continue that … [is] way up in the eighty percentile or better," 46 RR 88, that "his potential for rehabilitation" was "around one or two percent," *id.* at 84-85, and that Mr. Gonzales would "continue [to be a threat] wherever he goes." *Id.* at 94. The State capitalized on this false testimony and retracted opinion to argue in closing that:

> 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.
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> […] 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. …

> [...] 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.

43 RR 69-70 (emphasis supplied).

Without the confident testimony from the State's expert that Mr. Gonzales *would* pose a risk of future danger, that he "certainly" had antisocial personality disorder, that sexual offenses had "the highest continuum of recidivism," and that he "[didn't] see how one could believe that [Mr. Gonzales's behavior [was] going to change in prison" and that it would "continue wherever he goes," a jury would instead be presented with not only Dr. Gripon's testimony *to the contrary* but also the numerous prison guards, faith leaders, and fellow inmates who have spoken out on his behalf, Mr. Gonzales's non-violent prison record, and other evidence of good character and non-dangerousness that has developed since trial. Mr. Gonzales's rehabilitation and demonstrated *lack* of dangerousness, *see supra*, combined with the State expert's recognition of that fact and recission of his opinion on which the State relied at trial, clearly and convincingly demonstrates that, if Mr. Gonzales were tried today for the same offense and the evidence of his life on death row over the past 18 years was introduced at the

punishment phase, he would be acquitted of the death penalty. Tex. Code Crim. Pro. art. 37.071 § 2(g).

The jury's prediction was both proven to be inaccurate by subsequent events and based at the time it was made on evidence now known to be false. Without this prediction, Mr. Gonzales would have been ineligible for a sentence to death. Now that the underlying condition for death eligibility has been proven false, Mr. Gonzales asserts that he is innocent of the death penalty under Texas law.

This Court should find that this claim meets the requirements of § 5(a)(3), authorize the claim, and remand the case for a hearing at which Mr. Gonzales may demonstrate by clear and convincing evidence his ineligibility for the death penalty because he does not pose a threat of future danger to society. In the alternative, Mr. Gonzales requests a stay of execution and full briefing and argument on this question.

CLAIM TWO

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.

The Texas Court of Criminal Appeals has previously observed that the "accuracy or inaccuracy" of a jury's prediction of future dangerousness cannot be assessed at the time of trial, but only in light of "subsequent events." *McGinn*, 961 S.W.2d at 168. Yet notwithstanding this insight, Texas law provides no opportunity for post-conviction review of the accuracy or inaccuracy of the jury's "prediction" based on "subsequent events." Indeed, in a prior ruling in Mr. Gonzales's case, the Court of Criminal Appeals asserted that 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."[35]

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

Mr. Gonzales respectfully submits that it is constitutionally impermissible for a state to rest a death sentence on a "prediction" made by the sentencer whose "accuracy or inaccuracy" *cannot* be assessed at the time of trial, yet categorically refuse to review that "prediction" at a time when its accuracy *can* be assessed, in post-conviction proceedings. The Supreme 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 to go unreviewed and uncorrected is plainly inconsistent with that constitutional requirement.

A. The Eighth and Fourteenth Amendments Require Meaningful Post-Conviction Review of a Jury's Determination of Future Dangerousness—A Condition of Death-Eligibility in Texas—Because The "Accuracy or Inaccuracy" of the Jury's Determination *Cannot* be Assessed at the Time of Trial But Only in Light of "Subsequent Events."

Newly discovered or previously unavailable evidence of a prisoner's non-dangerousness bears on the constitutionality of a Texas death

sentence. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." *Arave v. Creech*, 507 U.S. 463, 474 (1993). There can be no principled basis to distinguish those who deserve capital punishment from those who do not without meaningful and appropriate review of a condition of death-eligibility. The Eighth Amendment does not tolerate this resulting unreliability. *See Gregg*, 428 U.S. at 206 (approving Georgia's sentencing scheme and noting that "appellate review … serves as a check against the random or arbitrary imposition of the death penalty").

The only opportunity for post-trial review of a jury's "prediction" of future dangerousness provided by Texas law is the highly deferential legal sufficiency test applied on direct review. *See Coble*, 330 S.W.3d at 265. Pursuant to that test, a defendant may only challenge whether, viewing the evidence *at trial* in the light most favorable to the jury's findings, any rational trier of fact could have found beyond a reasonable doubt a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Id.*

Because legal sufficiency review is limited to the evidence before the jury, it provides no opportunity to assess the accuracy of the jury's "prediction" of future dangerousness in light of "subsequent events." *Cf. McGinn*, 961 S.W.2d at 168. Consequently, legal sufficiency review fails to provide an adequate opportunity for assessing the accuracy of the jury's prediction of future dangerousness.

"[T]he protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced." *Herrera*, 506 U.S. at 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.

Here, the jury's prediction has been shown to have been *based on* inaccurate evidence. *See* Exhibit C. Yet the Court of Criminal Appeals has refused to acknowledge or address the reality that *both* the opinion of the State's psychiatric expert on which the jury's prediction was based

and the factual basis underlying the expert's opinion have been shown to be false. *Ex parte Gonzales*, WR-70,969-03, 2023 WL 4003783 (Tex. Crim. App. June 14, 2023). And the sole judicial review of this eligibility determination—performed through the lens of the deferential legal sufficiency standard in the 2009 direct appeal—was necessarily distorted by the existence of the now-debunked State expert's opinion and testimony in the record. In this unique situation, where the evidence underlying the single statutory finding necessary to make a petitioner death-eligible has been shown to be false and the prediction itself has been proven untrue, the Constitution requires relief.

To allow for meaningful review in this scenario would not run afoul of the reasoning in *McGinn*, where the CCA declared *factual sufficiency* review "not possible" because it would "would require [the CCA] to make its own determination of whether a circumstance carried mitigating, aggravating, or no weight … [and] would substitute [its] determination of whether evidence is mitigating or aggravating for that of the jury." 961 S.W.2d at 169. This case presents no such dilemma, but the Texas courts provide no meaningful avenue for post-conviction review of the accuracy of the jury's "prediction."

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[36] that is never reviewed for accuracy even in the face of evidence conclusively proving the inaccuracy of that prediction, has shirked its constitutional responsibility.

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[36] 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)).

In permitting Texas to condition death eligibility on such a finding almost fifty years ago, the Supreme 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 (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. art. 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 Mr. Gonzales 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*, 428 U.S. at 305. 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.

B. This Claim Should be Reviewed Under Tex. Code Crim. Proc. Art. 11.071, § 5(a)(3).

This claim should be authorized under Tex. Code Crim. Pro. art 11.071 § 5 (a)(3). This exception to the subsequent writ bar is often known

colloquially as the "innocence of the death penalty" exception, though the CCA has explicitly disclaimed this direct analogy. *Ex parte White*, 506 S.W.3d 39, 48 (Tex. Crim. App. 2016) ("even though some punishment claims, including some that relate to capital punishment, may be analogous to claims of innocence, the caselaw from the Supreme Court and this Court acknowledge that such analogous punishment claims are not really about innocence."). But punishment claims that relate to capital punishment and implicate constitutional concerns, like this one, are properly subjected to § 5 (a)(3) analysis.

As described *supra*, not until the CCA rejected Mr. Gonzales's attempts to prove that a properly informed jury faced with Dr. Gripon's true opinion and diagnosis would not have answered the future dangerousness issue in the affirmative did the extent of the Texas constitutional problem become clear. Without the opportunity at meaningful review of the death-eligibility determination—which, Mr. Gonales maintains, would sufficiently undermine the prediction at trial such that the death-eligibility determination could not stand—the application of the Texas death penalty statute to Mr. Gonzales violates the Eighth Amendment. Infliction of the death penalty upon him,

purportedly authorized by a determination that has been disproven by subsequent events, would be arbitrary and capricious. Failure by the Texas courts to recognize a mechanism by which Mr. Gonzales can present his new evidence of non-dangerousness would violate the constitutional duty placed upon the state "to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428.

"A death sentence that is *dead wrong* is no less so simply because its deficiency is not uncovered until the eleventh hour." *Evans v. Muncy*, 498 U.S. 927, 931 (1990) (Marshall, J., dissenting). The eleventh hour has come, but it is not too late. Mr. Gonzales respectfully requests this Court find that the requirements of §5 (a)(3) have been met, stay the scheduled execution date and authorize further proceedings on this claim. Mr. Gonzales requests a hearing at which he can demonstrate his entitlement to a new punishment hearing at which he may present evidence proving that he did not and does not constitute a continuing threat to society.

CONCLUSION AND PRAYER FOR RELIEF

Mr. Gonzales respectfully requests that this Court authorize his claims and remand the case to the trial court for a hearing at which he might demonstrate by clear and convincing evidence his good character and the evidentiary basis for his legal claims and then, that this Court find his sentence should be vacated. Were this Court to have any hesitation about the propriety of this request or the applicability of the legal arguments raised herein, Mr. Gonzales requests that this Court enter a stay of execution and order the claims in this application be more fully briefed.

In the alternative, Mr. Gonzales requests that this Court reform his sentence to life without parole proportionate to his rehabilitated status and lack of legal prerequisite for death-eligibility and grant any such other relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Suggestion for Reconsideration was served on Mark Haby, Edward Shaughnessy, and Matthew Ottoway, counsel for the State, via the Court's electronic filing system on this 18th day of June, 2024.

/s/ *Thea J. Posel*
Thea J. Posel

CERTIFICATE OF COMPLIANCE

This pleading complies with Tex. R. App. Proc. 9.4. According to the word count function in the computer program used to prepare the document, this application contains 10,880 words, excluding the parts exempted by Tex. R. App. Pro. 9.4(i)(1). This pleading complies with the typeface requirements of Tex. R. App. Pro. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and 12-point Century Schoolbook for the footnotes.

DATED: June 18, 2024

/s/ Thea J. Posel
Thea J. Posel

STATE OF TEXAS §

COUNTY OF TRAVIS §

ATTORNEY VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Raoul Schonemann, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas.

2. I am the duly authorized attorney for Ramiro Felix Gonzales, having the authority to prepare and to verify Mr. Gonzales's Subsequent Application for Post-Conviction Writ of Habeas Corpus.

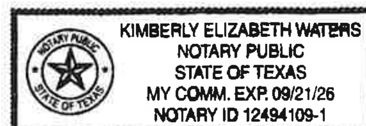
3. I have prepared and have read the foregoing Subsequent Application, and I believe all the allegations therein to be true to the best of my knowledge.

Signed under penalty of perjury:

Raoul Schonemann

SUBSCRIBED AND SWORN TO BEFORE ME on June 18, 2024.

Notary Public, State of Texas



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