WR-70,969-03
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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THIS IS A CAPITAL CASE

IN THE 454TH DISTRICT COURT
MEDINA COUNTY, TEXAS

AND

THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

Ex parte	§	**Trial No. 04-02-09091-CR**
	§	
RAMIRO FELIX GONZALES,	§	**Writ No. WR-70,969-03**
	§	
Applicant	§	**Scheduled Execution:**
	§	*June 26, 2024*

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

Michael Gross
Texas Bar No. 08534480
Gross and Esparza, PLLC
1524 N. Alamo St.
San Antonio, Texas 78215
lawofcmg@gmail.com
(210) 354-1919

Raoul Schonemann
Texas Bar No. 00786233
Thea Posel
Texas Bar No. 24102369
University of Texas School of Law
727 East Dean Keeton St.
Austin, Texas 78705-3224
rschonemann@law.utexas.edu
tposel@law.utexas.edu
(512) 232-9391

COUNSEL FOR RAMIRO FELIX GONZALES

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INTRODUCTION

Applicant Ramiro Gonzales respectfully suggests that this Court exercise its authority under Texas Rule of Appellate Procedure 79.2(d) to reconsider, on its own motion, its dismissal of his claim presented in his Second Subsequent Application for a Writ of Habeas Corpus[1] that the Eighth Amendment bars the execution of a person who was a "late adolescent" (age 18-20) at the time of the offense. This Court refused to consider the merits of the claim on the ground that it failed to satisfy the requirements of Article 11.071, § 5, and dismissed it as an "abuse of the writ."

This Court's reconsideration of that claim is appropriate for two reasons:

First, the factual basis for Mr. Gonzales's claim—principally, a nationwide study of capital sentencing of youthful offenders in the 14-year period between 2005 and 2018 that was published in the Texas Law Review in April 2020[2]—was plainly "not available" to Mr. Gonzales at the

[1] *Ex parte Ramiro Felix Gonzales*, No. WR-70,969-03.

[2] John H. Blume, Hannah L. Freedman, Lindsey S. Vann & Amelia Courtney Hritz, D*eath by Numbers: Why Evolving Standards Compel Extending Roper's Categorical*

time that his prior state habeas application was filed in 2010, because it had not been published until a decade later. Moreover, even if Mr. Gonzales could have attempted to undertake a similar empirical study in 2010, he only would have been able to compile a small fraction of the *Death by Numbers* sentencing data—at most, the sentencing data in the five years between 2005 and 2010—which would not have been sufficient to establish the factual basis for the Eighth Amendment claim alleged in Mr. Gonzales's 2022 subsequent habeas application.[3]

Second, there have been several significant developments in just the past two years, since Mr. Gonzales raised the claim and this Court refused to consider it, that warrant this Court's reconsideration of that

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Ban Against Executing Juveniles from Eighteen to Twenty-One, 98 Tex. L. Rev. 921 (2020) (hereinafter, "*Death by Numbers*").

[3] In addition to the *Death by Numbers* study, Mr. Gonzales also relied on resolutions passed by two major professional organizations—the American Bar Association's House of Delegates in February 2018 and by the American Psychological Association in May 2022—calling on states to ban the imposition of the death penalty on persons who committed their offenses under the age of 21. *See In re Ramiro Gonzales*, Subsequent Application for Writ of Habeas Corpus, WR-70,969-03, at 85-87. The Supreme Court has considered opinion of leading professional organizations as relevant to an assessment of whether the Eighth Amendment bars imposition of the death penalty on a particular class of defendants. *See*, *e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (examining the positions of leading professional organizations in support of a ban on executing persons with intellectual disability). Of course, these facts were also "unavailable" to Mr. Gonzales at the time that his prior habeas application was filed in 2010.

decision. Specifically, the Supreme Courts of three sister states—Washington, Michigan, and Massachusetts—have extended existing protections against imposition of *life without parole* ("LWOP") sentences for juveniles under the age of 18 to include individuals between the ages of 18 and 20 at the time of the crime. In other words, all three states have imposed categorical protections against severe and irrevocable sentences to persons who were teenagers at the time of their offenses. These decisions provide further evidence establishing that a national consensus exists against imposing the death penalty—an even harsher sentence than LWOP—on the "emerging adult" (the 18- to 20-year-old) class.

These recent decisions warrant reopening of the prior application to address the Eighth Amendment claim in light of the objective indicia indicating a national consensus against severe and irrevocable sentences for persons who were teenagers at the time of their crimes. Furthermore, given the development of scholarship and a robust body of scientific evidence in the intervening period supporting a consensus against the imposition of the death penalty against those individuals under age 21 at the time of the crime, Mr. Gonzales respectfully suggests that this Court exercise its discretion to reconsider its prior denial of claims raised in his

2022 application and, in light of these intervening developments, re-open the -03 application and grant relief.

FOUR SIGNIFICANT DEVELOPMENTS SINCE 2022 WARRANT RECONSIDERATION OF MR. GONZALES'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE THERE EXISTS A NATIONAL CONSENSUS THAT THE DEATH PENALTY IS AN EXCESSIVE PUNISHMENT FOR OFFENDERS YOUNGER THAN 21 YEARS OLD AT THE TIME OF THE OFFENSE.

A. Summary of the Claim for Relief.

In 2005, the Supreme Court held in *Roper v. Simmons*[4] that states may not impose the death penalty on a defendant younger than 18 at the time of the offense. The Court found that developmental, psychological, and behavioral differences between youths and adults were so significant that young defendants could not be subject to execution because "juvenile offenders cannot with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 569.

In his 2022 application, Mr. Gonzales contended that in the nearly two decades since *Roper*, a national consensus has clearly emerged

[4] 543 U.S. 551 (2005).

against imposing the death penalty on defendants under age 21. Specifically, Mr. Gonzales pointed to "three very recent developments"—all previously unavailable to him at the time that his prior state habeas application was filed in 2010—to support the emergence of the national consensus against imposing the death penalty upon offenders under the age of 21:

1. An **April 2020** Texas Law Review article describing a comprehensive nationwide study of all death sentences and executions imposed in the United States since *Roper*,[5] concluding that "*there is a national consensus against executing people under [age] twenty-one* … [and] new developments in neuroscience have made clear: people under twenty-one have brains that look and behave like the brains of younger teenagers, not like adult brains." *Id*. at 921 (emphasis supplied).

2. A **February 2018** resolution adopted by the American Bar Association's ("ABA") House of Delegates calling on all death-penalty jurisdictions to prohibit capital punishment for any individual 21 years old or younger at the time of the offense,[6] citing the "evolution of both the scientific and legal understanding surround young criminal defendants and broader changes to the death penalty landscape" and concluding that "offenders up to and

[5] Blume et. al, *supra* n. 2.

[6] *See* American Bar Association House of Delegates Recommendation 111, *Late Adolescent Death Penalty Resolution*, (adopted Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2018_my_111.pdf. The resolution states "[t]hat the American Bar Association, without taking a position supporting or opposing the death penalty, urges each jurisdiction that imposes capital punishment to prohibit the imposition of a death sentence on or execution of any individual who was 21 years old or younger at the time of the offense." *Id*. at 1.

including age 21" should be categorically exempt from receiving the death penalty. *Id*. at 14.

3. A **May 2022** call for public comment by the American Psychological Association, the leading scientific and professional organization in the field of psychology, on a proposed resolution calling on "the courts and the state and federal legislative bodies of the United States to ban the application of death as a criminal penalty where the offense is alleged to have been committed by a person under 21."

2022 Subsequent Application for Writ of Habeas Corpus at 85-87.

As the Supreme Court has made clear, "[t]he Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall v. Florida*, 572 U.S. 701, 708 (2014) (quoting *Weems v. United States,* 217 U.S. 349, 378 (1910)). To enforce the Eighth Amendment's protections, the Court "looks to the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Because the evolving standards of decency are reflected in contemporary practices, the Court considers "objective indicia of consensus"—here, "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice"—when

determining whether a punishment offends the Eighth Amendment. *Roper*, 543 U.S. at 567.

The *Roper* decision itself abrogated the prior rule of *Stanford v. Kentucky*, in which the Court declined to find that the execution of individuals under the age of eighteen was constitutionally intolerable. *Stanford v. Kentucky*, 492 U.S. 361 (1989). Acknowledging this jurisprudential evolution, which reflected a change in both scientific understanding and sentencing practices, the *Roper* Court noted that "to the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, it suffices to note that *those indicia have changed*." 543 U.S. at 574. And now, in the nearly two decades since *Roper*, the objective indicia have once again shifted; a national consensus has clearly emerged against imposing the death penalty on defendants under age 21. In fact, "if anything, a much deeper and more extensive database now exists that both buttresses the *Roper* Court's culpability and deterrence analyses and supports extending the age-based exclusion to the older group."[7]

[7] Craig Haney, Frank Baumgartner, and Karen Steele, *Roper and Race: the Nature and Effects of Death Penalty Exclusions for Juveniles and the "Late Adolescent Class"*

B. Four Significant Developments Since 2022 Call for This Court to Reconsider Mr. Gonzales's Claim That the Constitution Bars the Execution of a Person Who Was a Teenager at the Time of his Offense.

Since the filing of Mr. Gonzales's -03 application on June 30, 2022, there have been **at least four significant developments** that provide further evidence of a national consensus against executing people under twenty-one, which warrant reconsideration of the claim raised in 2022:

First, in **August 2022**, the American Psychological Association passed the proposed resolution "on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known As the Late Adolescent Class,"[8] which concludes, *inter alia*, that "there is no neuroscientific bright line regarding brain development that indicates the brains of 18- to 20-year-olds differ in any substantive way from those of 17-year-olds" and "a review of the scientific literature … indicates that death as a penalty for the late adolescent class *is typically based on unreliable determinations of members' current culpability status and even more*

(hereinafter, "*Roper and Race*"), 8 J Ped. Neuropsych. 168–177, 170 (2022), https://doi.org/10.1007/s40817-022-00134-0.

[8] American Psychological Association, *APA Resolution on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known As the Late Adolescent Class* (adopted Aug. 3, 2022), https://www.apa.org/about/policy/resolution-death-penalty.pdf.

unreliable predictions of their future potential." *Id.* at 1, 3 (emphasis supplied).

Second, in **December 2022**, the Journal of Pediatric Neuropsychology published an article called "*Roper* and Race: the Nature and Effects of Death Penalty Exclusions for Juveniles and the 'Late Adolescent Class.'"[9] This article cites "recent scientific evidence suggesting that *Roper*'s logic can and should be extended to 18- to 20-year-olds—members of what has been termed the 'late adolescent class,'" and emphasizes that "the differences between members of the late adolescent class and adults with respect to these capacities are at least as 'marked and well understood' … as those that distinguished adults from the group of juveniles excluded under *Roper*." *Roper and Race* at 168, 171.

Third, in **January 2024**, the Supreme Court of Massachusetts held that, according to contemporary standards of decency, the imposition of sentences of life in prison without possibility of parole on "emerging adults" ages 18 to 20 was unconstitutional, making Massachusetts the first state in the country to categorically ban LWOP

[9] Haney, Baumgartner, and Steele, *supra* n. 7.

sentences for people under 21 years old. *Commonwealth v. Mattis*, 493 Mass. 216 (Mass. 2024). Discussing and applying the United States Supreme Court's decisions in *Roper*, *Graham v. Florida,*[10] and *Miller v. Alabama*,[11] the Massachusetts court cited both contemporary standards of decency and a "scientific record" that "strongly supports the contention that emerging adults have the same core neurological characteristics as juveniles have … [scientists] know significantly more about the structure and function of the brains of eighteen through twenty year olds than they did twenty years ago." 493 Mass. at 225. The Massachusetts Supreme Court credited the lower court's "four core factual findings" based on the "detailed record" establishing that youth 18 to 20 years old:

> (1) have a lack of impulse control similar to sixteen- and seventeen-year-olds in emotionally arousing situations;
>
> (2) are more prone to risk taking in pursuit of rewards than those under eighteen years and those over twenty-one years of age;
>
> (3) are more susceptible to peer influence than individuals over twenty-one years of age; and

[10] *Graham v. Florida*, 560 U.S. 48 (2010) (Eighth Amendment prohibits imposition of life without parole sentence on individuals under 18 who did not commit homicide).

[11] *Miller v. Alabama*, 567 U.S. 460 (2012) (mandatory life without parole for individuals under the age of eighteen violates Eighth Amendment, regardless of crime of conviction).

(4) have a greater capacity for change than older individuals due to the plasticity of their brains.

493 Mass. at 225; *see also Roper*, 543 U.S. at 569-70 (describing "three general differences" between juvenile offenders and adults which "render suspect any conclusion that a juvenile falls among the worst offenders"—lack of maturity, vulnerability to peer pressure, and "more transitory, less fixed" personality traits).

Furthermore, in assessing contemporary standards of decency, the Massachusetts Supreme Court noted that in the past three years, the high courts of both Washington and Michigan have prohibited *mandatory life without parole* as a sentence for youthful offenders. *See In Matter of the Personal Restraint of Monschke*, 482 P.3d 276 (Wash. 2021) (considering evolving standards of decency, updated brain science, and precedent and concluding that mandatory sentences of life without parole for those under 21 at the time of the crime violate the Washington Constitution); *People v. Parks*, 987 N.W.2d 161 (Mich. 2022) (because "the Eighth Amendment dictates that youth matters in sentencing," and because brain science has demonstrated that eighteen-year-olds possess the same attributes of youth as do juveniles, mandatory life without

parole for eighteen-year-olds violates the Michigan Constitution). The decisions of these state courts to ban a *lesser* penalty—mandatory life without parole—for this age group based on the same rationales of *Roper* are further "objective indicia of consensus" against imposition of the death penalty against the "emerging adult" age group. *See Roper*, 543 U.S. at 567.

Fourth, sentencing data covering the period since the filing of the 2022 application establish an even greater degree of consensus than was apparent at the filing of Mr. Gonzales's last application. Between January 1, 2022 and June 1, 2024, 55 individuals have been sentenced to death in the United States.[12] Of those 55, only *one* was under age 20 at the time of the offense: Marco Perez, sentenced to death in Alabama in

[12] *See* Death Penalty Information Center, 2022 Death Sentences by Name, Race, and County, available at https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-year/2022-death-sentences-by-name-race-and-county (reporting 21 death sentences nationwide in 2022); 2023 Death Sentences by Name, Race, and County, available at https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-year/2023-death-sentences-by-name-race-and-county (reporting 21 death sentences nationwide in 2023); https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-by-year/2024-death-sentences-by-name-race-and-county (reporting 13 death sentences nationwide in 2024).

February 2024, was 19 years old at the time of the offense.[13] Not a single person age 18—like Mr. Gonzales—at the time of the offense has been sentenced to death, nationwide, since at least 2018.[14]

In sum, sentencing practices confirming what the *Roper* Court described as "infrequency of [] use," state legislative enactments and judicial decisions, and the "much deeper and more extensive [scientific] database now exist[ing]" all "buttress[] the *Roper* Court's culpability and deterrence analyses and support[] extending the age-based exclusion to the older group." *Roper and Race* at 170.

[13] Warren Kulo, "Marco Perez sentenced to death for killing Mobile police officer Sean Tuder," Alabama.com (Feb. 9, 2024) available at https://www.al.com/news/2024/02/marco-perez-sentenced-to-death-for-killing-mobile-police-officer-sean-tuder.html (noting that Perez is the youngest person on death row in Alabama by six years, i.e., the only death row inmate under the age of 30).

[14] The Death Penalty Information Center's annual "Death Sentences by Name, Race, and County" only indicate age-at-time-of-offense beginning in 2018. *See* Death Penalty Information Center, *Recent Death Sentences by Name, Race, County, and Year*, available at https://deathpenaltyinfo.org/facts-and-research/sentencing-data.

C. This Court Should Reconsider its Disposition of Mr. Gonzales's Claim that the Eighth Amendment Bars his Execution on Its Own Motion, Re-open the Application, and Grant Relief.

This Court, "on its own initiative, may reconsider a prior denial of habeas corpus relief." *Ex parte Moussazadeh*, 361 S.W. 3d 684, 687 (Tex. Crim. App. 2012) (citing Tex. R. App. Pro. 79.2(d)). Reconsideration is certainly an "unusual" measure that this Court understandably does not take lightly. *Ex parte Moreno*, 245 S.W.3d 419, 420, 428 (Tex. Crim. App. 2008). But circumstances warranting reconsideration of a previously raised claim "if there is a compelling reason to believe that [the disposition] may not have been 'correct' on original submission." *Id.* at 428. Similarly, this Court has reconsidered, on its own motion, disposition of previously raised claims in light of new authority. *See*, *e.g.*, *Ex parte Robertson*, 603 S.W.3d 427 (Tex. Crim. App. 2020). Given the recent developments strengthening the basis for Mr. Gonzales's *Roper* claim pled in the 2022 application and further establishing the "consistency of direction of change," *Roper*, 543 U.S. at 566, this Court should re-open the prior proceedings and grant relief on Mr. Gonzales's *Roper* claim (Claim III) raised in 2022.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Ramiro Felix Gonzales respectfully requests that this Court:

1. Enter an order re-opening Mr. Gonzales's -03 application;
2. Grant relief from Mr. Gonzales's unconstitutional sentence of death;
3. In the alternative, remand to the trial court for further factfinding;
4. Grant any other relief which law and justice require in this matter.

Respectfully submitted,

Michael C. Gross
State Bar No. 08534480
Garza & Esparza, P.L.L.C.
1524 N. Alamo Street
San Antonio, Texas 78215
lawofcmg@gmail.com
(210) 354-1919 phone
(210) 354-1920 fax

/s/ Raoul D. Schonemann
Raoul D. Schonemann
Texas Bar No. 00786233
Thea J. Posel
Texas Bar No. 24102369
University of Texas School of Law
Capital Punishment Clinic
727 East Dean Keeton St.
Austin, Texas 78705-3224
(512) 232-1475
rschonemann@law.utexas.edu
tposel@law.utexas.edu

Attorneys for Ramiro Felix Gonzales

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 13th day of June, 2024.

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

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Thea Posel on behalf of Thea Posel
Bar No. 24102369
tposel@law.utexas.edu
Envelope ID: 88765216
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Associated Case Party: state

Name	BarNumber	Email	TimestampSubmitted	Status
Edward Shaughnessy		shaughnessy727@gmail.com	6/13/2024 11:10:31 AM	SENT
Mark Haby		mark.haby@medinacountytexas.org	6/13/2024 11:10:31 AM	SENT
Matthew Ottoway		Matthew.Ottoway@oag.texas.gov	6/13/2024 11:10:31 AM	SENT

Associated Case Party: RamiroFelixGonzales

Name	BarNumber	Email	TimestampSubmitted	Status
Michael Gross		lawofcmg@gmail.com	6/13/2024 11:10:31 AM	SENT
Raoul Schonemann		rschonemann@law.utexas.edu	6/13/2024 11:10:31 AM	SENT