No. 23-7791

IN THE

Supreme Court of the United States

RAMIRO FELIX GONZALES,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

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REASONS FOR GRANTING THE WRIT

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." Petition for Writ of Certiorari at 4.

In its Brief in Opposition ("BIO"), Texas repeatedly mischaracterizes Petitioner's 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 19. In so doing, Respondent misses both the legal and factual bases for Petitioner's claims.

Petitioner of course relies on 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.

[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).

App. 024a. 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. Pet. at 12 ("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.

Despite Petitioner's evidence negating his constitutional eligibility for the death penalty, Texas courts provide no remedy. Petitioner's case illustrates the larger Eighth Amendment problem inherent in conditioning a death sentence on a prediction that is never reviewed for accuracy in a state that has closed her doors to evidence disproving such a prediction. Absent the Court's intervention, the State of Texas will carry out an illegal and invalid execution. Petitioner respectfully requests a stay of execution and a writ of certiorari.

I. CONTRARY TO THE STATE'S ASSERTIONS, PETITIONER'S EIGHTH AMENDMENT AND DUE PROCESS CLAIMS ARE MERITORIOUS AND PRESENT COMPELLING REASONS FOR FURTHER REVIEW.

Respondent contends that because Texas is the only state that requires a finding of future dangerousness as a condition of death eligibility, the questions

[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.").

presented by Petitioner do not have sufficiently "broad impact" to be of concern "to the judiciary or citizenry at large." BIO at 18. The State is wrong for multiple reasons.

First, 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 34, Texas law requires the State to prove that "prediction" *beyond a reasonable doubt*. Tex. Code Crim. Pro. art. 37.071 § 2(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 as the Texas courts acknowledge. And neither the State's citations to lower federal court decisions[3] nor its attempts to liken the Texas statute to Kansas's scheme, BIO at 23–24, can override the settled recognition by both the Texas Court of Criminal Appeals 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.").

Second, Respondent's strained efforts to recast the future dangerousness determination as a "selection" factor instead of an "eligibility" factor are both telling

[3] BIO at 16, 22–23.

and unpersuasive. BIO at 22–25. As with any other "eligibility" aggravating factor—or, for that matter, any element of the offense—the State bears the burden of proving future dangerousness beyond a reasonable doubt. The mere fact that Texas has also incorporated aggravating factors into the definition of the offense does not, as the State seems to believe, render the future dangerousness determination superfluous; as this Court explained in *Tuilaepa*, the aggravating factors establishing a defendant's death eligibility "may be contained in the definition of the crime or in a separate sentencing factor (or both)." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (emphasis supplied). Texas has chosen "both." And it is incontestable that a jury has no discretion to sentence a capital defendant to death unless and until it answers the future dangerousness special issue question affirmatively. Respondent's brief cites a decision of the Western District of Texas and the Fifth Circuit, BIO at 16, 22–23, neither of which are binding on this Court or on Texas's interpretation of its own state law. Respondent's arguments in this respect simply betray its (unacknowledged) recognition of the significance of the fact that "future dangerousness" functions as an eligibility factor in the Texas sentencing scheme and its desire to avoid the constitutional implications of that fact.

Third, Texas is the most prolific producer of death sentences and executions in the nation in the post-*Furman* era,[4] so the issue is not, as Respondent suggests, of

[4] According to the Death Penalty Information Center, as of June 25, 2024, Texas has executed 587 people since 1976, more than a third of all executions in the nation (1,589) and nearly five times as many as the state with the second-most executions, Oklahoma (124). *See* Executions in the United States, https://deathpenaltyinfo.org/executions/executions-overview.

concern to Petitioner alone. BIO at 18. Every death sentence in Texas in the post-*Furman* era has been predicated on a "prediction" of future dangerousness, the accuracy of which, according to multiple independent empirical studies discussed in the petition for certiorari, are *wrong* in 70 to 95% cases (as demonstrated in cases of former Texas death row inmates whose death sentences have been commuted to life imprisonment). Pet. at 17–19. Because Petitioner's claim rests not only on his good behavior but also on the unique combination of State's own expert's recantation and state administrators' recognition of his non-dangerousness through its placement of Petitioner in a leadership role on death row, a small but significant subset of Texas death row inmates will be able to present similar evidence of an unconstitutional sentence. That an active death penalty state like Texas has structured and interpreted its sentencing scheme in such a way that allows for claims of invalid death sentences like Petitioner's to go uncorrected is a recurring and otherwise-insulated constitutional issue.

Fourth, the fact that Texas employs an unusual—and, indeed, uniquely problematic—capital sentencing scheme is not a reason to refrain from reviewing it, as Respondent suggests, but a reason to do so. In fact, this Court has found it necessary to repeatedly address the constitutionality of the Texas capital sentencing scheme or other problematic aspects of Texas capital sentencing, even though they were practices peculiar to Texas. *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). It should do so again here.

Finally, this case presents a good vehicle for this Court to address the constitutional infirmities presented in Petitioner's Application for a Writ of Certiorari. 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.[5] But Petitioner's case illustrates the larger Eighth Amendment problem inherent in conditioning a death sentence on a prediction that is never reviewed for accuracy in a state that has closed her doors to evidence disproving such a prediction.

While Respondent insists that the jury's prediction is "normative" and cannot be proven false, BIO at 25, Texas requires the jury to make that prediction beyond a reasonable doubt as a condition of death eligibility. *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 sometimes, other 'non-*Penry*' special issues."); *Satterwhite*, 486 U.S. at 250. Instead of wrestling with the consequences of its attempts to entirely isolate the

[5] 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.

eligibility determination from the "rational review" required by the constitution,[6] Respondent instead recites the trial evidence and argues that it was sufficient to support the jury's determination—arguing past Petitioner's actual claims entirely.

Without this Court's intervention, the constitutional eligibility issue Petitioner *actually* raised,[7] here and below, would otherwise evade judicial review of any kind and Texas will execute an unlawful sentence. A stay of execution and exercise of this Court's certiorari jurisdiction in these circumstances is therefore warranted.

II. THERE IS NO PROCEDURAL BAR TO THIS COURT'S REVIEW OF THE MERITS OF THIS CLAIM.

Respondent raises several procedural bars in opposition to Petitioner's claims. BIO 20–22, 29–32. But none of the defenses raised by Respondent bar this Court's review.

A. No adequate and independent state ground bars review of Petitioner's claims, Respondent's argument to the contrary is grounded in a misstatement of Fifth Circuit precedent.

Respondent argues that review of Petitioner's claims is barred because the Texas Court of Criminal Appeals characterized its disposition as a dismissal on state procedural grounds. BIO at 9–18. However, with respect to the Court of Criminal Appeals' dismissal of death penalty ineligibility claims, the Fifth Circuit has consistently held that "characterizing the failure to meet the threshold requirement as an abuse of the writ does not foot the ruling on an independent state ground,"

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[6] *Tuilaepa*, 512 U.S. at 973 (quoting *Arave v. Creech*, 507 U.S. 463, 471 (1993)).

[7] The State's lengthy recitation of the trial evidence on which the jury based their prediction, BIO at 25-29, supports only their assertion that "undoubtedly sufficient evidence to uphold the finding of future dangerousness," BIO at 25, a claim Petitioner has not raised.

"[t]his is a determination on the merits." *Rivera v. Quarterman*, 505 F.3d 349, 355 (5th Cir. 2007) (quoting *In re Rivera,* No. 03-41069 (5th Cir. Aug. 6, 2003)) (internal quotation marks omitted). Respondent incorrectly reaches the opposite conclusion by selectively quoting Fifth Circuit precedent.

As Petitioner explained, he pled his claim in a successive application pursuant to the exception to Texas's abuse-of-the-writ rule that permits review when the petitioner establishes "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial [under the applicable capital sentencing statute]." Tex. Code Crim. Pro. art. 11.071, § 5 (a)(3). Petitioner argued that "[b]ecause the eligibility determination is one of constitutional dimension, inextricably intertwined with the § 5 (a)(3) determination," the state court decision was not independent of federal law. Pet. at 25–27.

Respondent attempts to refute Petitioner's argument by relying on *Rocha v. Thaler*, 626 F.3d 815, 819 (5th Cir. 2010):

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

BIO at 14–15.

But Respondent's citation to *Rocha* omits a footnote—critical to the issue before this Court—attached to the quoted text: "Again, subject to the possible exception of cases in which the applicant's federal constitutional claim is itself a claim that the applicant is ineligible to receive, and therefore actually innocent of, the death penalty." *Rocha*, 626 F.3d at 819 n.8. Of course, the claim Petitioner presents here—a death-ineligibility or "innocence of the death penalty" claim—is precisely such a claim.

The Fifth Circuit rejected Rocha's attempt to extend this line of cases to ineffective assistance of counsel claims because a "claim that a prisoner is actually innocent of the death penalty is legally distinct from a claim that a prisoner's trial counsel was constitutionally ineffective at sentencing," thus "[w]hen the CCA rejects the former, it does not simultaneously decide the merits of the latter." *Rocha*, 626 F.3d at 839. But *Rocha* explicitly recognized the merger of Texas's § 5(a)(3) gateway to review with death penalty ineligibility claims:

> [A]n *Atkins* claim is a claim that the petitioner is ineligible for the death penalty. So too is a claim that the petitioner was under eighteen at the time of his crime, is insane, or has some other characteristic that the Supreme Court has held categorically justifies exemption from the death penalty. *In such cases, the inquiry into the gateway innocence claim will substantially overlap with the inquiry into the merits of the underlying constitutional claim*.

Id. at 826 (footnotes omitted) (emphasis added).

Numerous other decisions of the Fifth Circuit, support Petitioner's argument that no procedural bar attaches to the TCCA's dismissal of death penalty ineligibility claims pursuant to Tex. Code Crim. Pro. art. 11.071, § 5 (a)(3). *See*, *e.g., Garcia v.*

Stephens, 757 F.3d 220, 225 (5th Cir. 2014) ("Although the TCCA dismissed Garcia's second habeas application as an abuse of the writ, this court has held that in the *Atkins* [*v. Virginia*[8]] context, Texas courts have imported an antecedent showing of 'sufficient specific facts' to merit further review, rendering dismissal of such claims [as abuses of the writ] a decision on the merits.... Thus, a decision that an *Atkins* petition does not make a prima facie showing—and is, therefore, an abuse of the writ—is not an independent state law ground."); *Ladd v. Stephens*, 748 F.3d 637, 641 n.10 (5th Cir. 2014) (same).

Respondent urges this Court to defer to the Fifth Circuit's decisions delineating when the TCCA's § 5(a)(3)-based dismissal is in fact dependent on federal law. BIO at 13–14. Those decisions confirm there is no independent state-law bar to this Court's review of Petitioner's claims.

B. The pending case of *Glossip v. Oklahoma* bears directly on procedural arguments raised by Respondent in opposition and, to that extent, this Court should stay the execution and hold resolution of Petitioner's claims for *Glossip*.

Should this Court entertain any doubt about its jurisdiction to reach Petitioner's claims, it should stay his execution and hold its decision until the resolution of *Glossip* v. *Oklahoma*, No. 22-7466. In *Glossip*, the Court directed the parties to brief and argue, in addition to the questions presented, the issue of "[w]hether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and

[8] 536 U.S. 304 (2002).

independent state-law ground for the judgment." *Glossip v. Oklahoma*, 144 S. Ct. 691 (2024) (Mem.).

Glossip and his amici, like Petitioner, argue that review of a state court decision is not barred when the state court rule merges with the federal question because the judgment is not independent of federal law. *See Glossip* v. *Oklahoma*, No. 22-7466, Brief for Petitioner at 39–43. As is the case here, Glossip argues that the Oklahoma court's opinion is "no different from the state-court opinions in *Ake*[9] and *Foster*[10] [b]ecause the court's 'resolution of the state procedural law question depend[ed] on [its] federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law.'" *Id.* at 43 (quoting *Ake*, 470 U.S. at 75); *see also id.* Brief of Federal Courts Scholars as Amici Curiae In Support Of Petitioner at 21 ("In determining whether Mr. Glossip's *Brady* claim is procedurally barred, [the state court] necessarily decided the materiality question that is at the heart of *Brady*.").

Respondent concedes, as it must, that the procedural rule at issue here—Section 5(a)(3)— "more or less, [codifies] the doctrine found in *Sawyer v. Whitley*, 505 U.S. 333 (1992)." BIO at 12–13 (quoting *Ex parte Blue*, 230 S.W.3d 151, 151 (Tex. Crim. App. 2007)); *id.* at 14 (describing the Texas's procedural rule as "the *Sawyer* analogue"); *id.* at 16 (*Sawyer*, upon which Section 5(a)(3) is based, focuses on

[9] *Ake v. Oklahoma*, 470 U.S. 68 (1985).

[10] *Foster v. Chatman*, 578 U.S. 488 (2016).

eligibility for a death sentence). Thus, the Court's adjudication of the independence question in *Glossip* will bear directly on this case.

If this Court is considering the validity of Respondent's arguments that § 5 (a)(3) constitutes an adequate state law ground independent of the merits of the federal constitutional claims, it should stay the execution and hold this case for resolution of the similar issue in *Glossip*.

C. Petitioner's claims are not barred from review by non-retroactivity principles.

Respondent also contends that Petitioner's claims are barred from review by the non-retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). BIO 20–22. This is not so for several reasons.

First, *Teague* is a rule of federal habeas procedure and thus does not apply here. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), this Court recognized that the *Teague* rule, which generally proscribes the retroactive application of new constitutional rules of criminal procedure to cases on *federal* habeas review, does *not* prohibit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" under *Teague*.

Because Petitioner raised the claims in state, not federal, proceedings, *Teague* does not bar review. In fact, the Texas postconviction statute explicitly recognizes that a court may grant relief on a claim presented in a subsequent habeas application if the claim rests on a "previously unavailable legal basis." *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021) (construing Tex. Code Crim. Proc. art. 11.071,

§ 5). Thus, *Teague* does not bar review of Petitioner's claims in Texas state collateral proceedings, nor would it necessarily do so in other states.

Second, Petitioner's death-ineligibility claim, by its nature, can only be raised for the first time in collateral review proceedings because it is premised on a "*post-trial development* that cast[s] doubt on the reliability of evidence that played a critical role in the sentencing decision."[11] Petitioner submits that *Teague*'s non-retroactivity rule cannot be applied to bar collateral review of a federal constitutional claim that, by its nature, can only be raised in collateral review proceedings.[12]

[11] *See Florida v. Burr*, 496 U.S. 914, 918-19 (1990) (Stevens, J., dissenting) (describing the rule of *Johnson v. Mississippi* as a claim predicated on "a *post-trial development* that cast[s] doubt on the reliability of evidence that played a critical role in the sentencing decision").

[12] *See Teague*, 489 U.S. at 338 (Brennan, J., dissenting) (observing that "[s]ometimes a claim which, if successful, would create a new rule not appropriate for retroactive application on collateral review is better presented by a habeas case than by one on direct review. In fact, sometimes the claim is *only* presented on collateral review.") (emphasis supplied).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and a stay of execution should issue.

Respectfully submitted,

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