THIS IS A CAPITAL CASE

IN THE 38TH 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:**
	§	*July 13, 2022*

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

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
(512) 232-9391

COUNSEL FOR RAMIRO FELIX GONZALES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal

State

Constitutional Provisions

State Statutes

Federal Statutes

Secondary Sources

INTRODUCTION

Ramiro Gonzales was 18 years and 71 days old in 2001 when he committed the offense for which he was sentenced to die. At his 2006 trial, the prosecution urged Mr. Gonzales's jury to find a probability of future dangerousness based on an erroneous diagnosis of antisocial personality disorder, evidence of falsely inflated recidivism rates, materially false testimony by a jail inmate, and a history of impulsive acts by a traumatized and immature teenager.

But as this application demonstrates, the diagnosis confidently pronounced by the State's psychiatric expert at punishment—that Mr. Gonzales has antisocial personality disorder, which effectively dictates a future of violent misbehavior—was wrong. The recidivism rates to which the State's expert testified—"in the eightieth percentile or higher"—were not only false, but "a demonstrable urban legend."[1] The jailhouse inmate has recanted his testimony in a sworn declaration appended here. And the State's expert himself now recognizes that Mr. Gonzales in fact "**does not** pose a threat of future danger to society."

---

[1] Tamara Lave, *Inevitable Recidivism—The Origin and Centrality of an Urban Legend.* 34 INT.'L J. L. & PSYCH. 185, 194 (2011).

This Court, like the Supreme Court, has recognized that, even after a constitutionally valid death sentence has been imposed in a procedurally fair trial, new evidence may become available which demonstrates that the information underlying the death sentence was "materially inaccurate." *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988); *Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010). In such cases, the death sentence is irrevocably tainted and is a violation of the Eighth and Fourteenth Amendments.

Mr. Gonzales's death sentence—based on a future dangerousness determination shaped by a misdiagnosis, false statistics, and entirely invented aggravating evidence—is a violation of the Eighth and Fourteenth Amendments to the United States Constitution and cannot stand.

STATEMENT REGARDING CONFINEMENT AND SENTENCE

Mr. 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. Mr. Gonzales is confined and sentenced to death 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 July 13, 2022. Copies of the order scheduling the execution and the warrant of execution are attached as Exhibit B.

PROCEDURAL HISTORY

On August 25, 2006, a Medina County jury found Mr. Gonzales guilty of capital murder "in the course of committing any or all of the following offenses: (1) aggravated sexual assault, (2) kidnapping, or (3) robbery" pursuant to Tex. Penal Code Ann. § 19.03(a)(2). 38 RR 54; CR 971.[2] On September 6, the jury returned an affirmative answer to Special Issue Number One, finding that "there is a probability that the

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

Defendant would commit criminal acts of violence that constitute a continuing threat to society," and returned a negative answer to Special Issue Number Two, finding that there was not "a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." 43 RR 77; CR 1033-34.

On June 17, 2009, a divided Court of Criminal Appeals ("CCA") affirmed the conviction and sentence, with two judges concurring and one judge dissenting. *Gonzales v. State*, No. AP-75,540 (Tex. Crim. App. June 17, 2009) (not designated for publication), *cert. denied*, *Gonzales v. Texas,* 559 U.S. 942 (2010).

Terry McDonald was appointed to represent Mr. Gonzales in his initial state habeas proceedings pursuant to Tex. Code Crim. Proc. art. 11.071, §2. On September 22, 2008, Mr. McDonald filed on Mr. Gonzales's behalf a document styled as an "Application for Writ of Habeas Corpus." *See* Exhibit C (McDonald's "[Initial] Application for Writ of Habeas Corpus," filed Sept. 22, 2008). The document filed by Mr. McDonald was just nine pages long including the certificate of service, and devoted less than four pages of argument to the four meager claims raised. *Id.*

Mr. McDonald did not file proposed findings of fact and conclusions of law on Mr. Gonzales's behalf. *Cf.* Tex. Code Crim. Proc. art. 11.071 §§ 8(b), 9(e) (requiring parties to "file proposed findings of fact and conclusions of law for the convicting court to consider"). On October 23, 2008, without conducting an evidentiary hearing, a visiting judge signed an order recommending that the application be denied as not simply "without merit," but "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).

On September 23, 2009, the Court of Criminal Appeals adopted the trial court's findings in part and denied relief. *Ex parte Gonzales*, No. WR–70,969–01, 2009 WL 3042409 (Tex. Crim. App. Sept. 23, 2009) (not designated for publication).

Pursuant to 18 U.S.C. § 3599, undersigned counsel Michael C. Gross was appointed to represent Mr. Gonzales in federal habeas proceedings. On August 26, 2010, counsel filed a sealed ex parte request for funding for a mitigation specialist, which was denied. *See* Order Unsealing & Denying Without Prejudice Motion for Expert, *Gonzales v. Thaler*, No. 10-CV-165-OLG (Aug. 31, 2010) (ECF Doc. 11), at 5.

On January 20, 2011, Mr. Gross filed an initial petition for writ of habeas corpus on Mr. Gonzales's behalf in federal district court, and renewed his request for investigative and expert assistance to develop claims alleged in the petition. On January 31, 2011, without ruling on the funding motion, the federal district court stayed the federal proceeding to allow Mr. Gonzales to return to state court to exhaust several undeveloped and unexhausted claims. *See* Order Granting Stay, *Gonzales v. Stephens*, No. 10CV–165–OG, 2014 WL 496876 (W.D. Tex. Jan. 15, 2014) (ECF No. 16).

On February 23, 2011, attorney Gross filed a subsequent application for writ of habeas corpus in the trial court and requested funding for expert and investigatory assistance to develop evidence in support of the unexhausted claims. On February 1, 2012, the Court of Criminal Appeals dismissed the pending application and denied the requests for funding in a single order. *Ex parte Gonzales*, No. WR-70,969–02, 2012 WL 340407 (Tex. Crim. App. Feb. 1, 2012) (not designated for publication).

After proceedings resumed in federal court in September 2012, the district court denied the pending motion for expert funding and

assistance. Order, *Gonzales v Thaler*, No. 10-CV-165-OLG (Sept. 14, 2012) (ECF Doc. 27). The following month, Mr. Gonzales filed an amended federal habeas petition, re-urging, inter alia, the ineffective assistance of counsel claim for which funding was requested. Amended Petition for Writ of Habeas Corpus, *Gonzales v. Thaler*, No. 10-CV-165-OLG (Oct. 25, 2012) (ECF Doc. 28).

On January 15, 2014, the federal district denied Mr. Gonzales's amended petition and declined to issue a certificate of appealability ("COA"). 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 subsequently affirmed the denial of a certificate of appealability. *Gonzales v. Stephens*, 606 Fed. Appx. 767 (5th Cir. 2015).[3]

[3] Because Mr. Gonzales was denied "reasonably necessary" expert and investigative funding throughout state and federal habeas corpus proceedings, Mr. Gonzales filed a Rule 60(b) motion following the Supreme Court's decision in *Ayestas v. Davis*, 584 U.S. --, 138 S. Ct. 1080 (2018) (holding that courts in the Fifth Circuit imposed an improperly high burden on indigent habeas petitioners seeking funding under 18 U.S.C. § 3599). Mr. Gonzales sought to reopen his federal habeas proceedings for review of his prior funding requests under the proper standard as clarified by *Ayestas*. The federal district court dismissed the Rule 60(b) motion as a second or successive federal habeas petition, alternatively denied the motion on its merits, and denied a COA. *Gonzales v. Davis*, No. 5:10-cv-00165-OLG (W.D. Tex. Jul. 3, 2018). The Fifth Circuit subsequently affirmed the denial of the Rule 60(b) motion on its merits. *Gonzales v. Davis*, 788 Fed. Appx. 250 (5th Cir. 2019). The Supreme Court declined review. *Gonzales v. Davis*, 140 S. Ct. 2771 (May 18, 2020) (mem.).

On September 14, 2020, the trial court signed an order directing that Mr. Gonzales be executed on April 20, 2021. That date was subsequently modified to November 17, 2021, and then to July 13, 2022. *See* Exhibit B.

SUMMARY OF STATE'S EVIDENCE AT TRIAL

On October 7, 2002, then-19-year-old Ramiro Gonzales confessed to the kidnapping, rape, and murder of Bridget Townsend and led authorities to her remains on the Middle Verde Ranch. *See* 35 RR 61, 74. Ms. Townsend, the live-in girlfriend of local drug dealer Joe Leal, had been missing since January 16, 2001. *See id.* at 134, 211.

At the time of his confession, Mr. Gonzales had just pled guilty to charges stemming from a separate offense that occurred in September 2001. On October 1, 2002, Mr. Gonzales pled guilty to the kidnapping and sexual assault of Florence "Babo" Teich in Bandera County and was sentenced to two life terms in the Texas Department of Criminal Justice. *See* 40 RR 143. While awaiting transfer from the local jail to TDCJ, Mr. Gonzales was interviewed by local television news reporter Gina Galaviz about his plea in the Teich case. *See id.*; 35 RR 40. Although Ms. Galaviz asked him about Bridget Townsend's disappearance, Mr. Gonzales did

not make any admissions at that time. After returning to his cell that evening he lit his mattress on fire, then asked to speak to the sheriff. 39 RR 44. Several days later, when Sheriff James MacMillian came to speak with Mr. Gonzales about the mattress incident, Mr. Gonzales informed him that he knew where Ms. Townsend's body was and led authorities to her remains. *See* 35 RR 64-68.

Texas Ranger Skylor Hearn took several statements from Mr. Gonzales, the last of which was written and read to the jury at his 2006 capital murder trial. 35 RR 134. In that statement, Mr. Gonzales admitted that he went to Mr. Leal's home to obtain more cocaine but found Ms. Townsend there alone. *Id.* at 135. She let him in, and he immediately began searching the house for drugs. *Id.* Finding none, Mr. Gonzales took several hundred dollars of cash from the bedroom closet, at which point Ms. Townsend indicated she was calling Mr. Leal. *Id.* Ms. Townsend was then tied up and driven to a deserted area of the ranch where she was sexually assaulted and shot once with a shotgun. *Id.* at 136-37. Mr. Gonzales told Ranger Hearn he returned to the area a couple of months later because he "was thinking it was a dream" but instead saw the remains. *Id.* at 193-94. The defense presented no evidence on the

merits. 37 RR 118. After hearing Mr. Gonzales's confession and testimony from various members of law enforcement, the jury convicted Mr. Gonzales of capital murder. 38 RR 54.

At the penalty phase, the State introduced evidence from several jailers to testify about incidents that occurred while Mr. Gonzales was awaiting trial. *See generally* 39 RR 14-149, 40 RR 3-49. These included several fights, possession of contraband (tobacco), and the attempt to light his mattress on fire. *Id.* The State also called two men who were in jail with Mr. Gonzales to testify against him, both of whom attempted to invoke their Fifth Amendment right against self-incrimination. 39 RR 151-59 (Randy James Hernandez); *id.* at 185-86 (Frederick Lee Ozuna). After Mr. Hernandez refused to testify, the State called several jailers to testify to his statements that Mr. Gonzales attempted to take medication from him by intimidation, despite the fact that Mr. Gonzales is five foot one. 39 RR 160-174, 97.

One of the most disturbing allegations introduced in the sentencing proceeding was inmate Frederick Ozuna's claim that Mr. Gonzales told him he returned to the scene several times to commit acts of necrophilia with Ms. Townsend's deceased body. *Id.* at 188. Despite Mr. Ozuna's

initial attempts to invoke the Fifth Amendment, the trial court allowed prosecutors to read his prior statement to the jury and question him about the contents. *Id.* at 187-91.

Florence Teich testified that she was kidnapped at knifepoint from her real estate office in Bandera by Mr. Gonzales. 40 RR 74. Ms. Teich told the jury that Mr. Gonzales forced her to drive her truck towards the nature area, *id.* at 75, and when she attempted to escape he pulled her back into the truck. *Id.* at 76-77. They drove to Middle Verde Ranch, where Mr. Gonzales bound her with duct tape and took her to a small cabin. *Id.* at 78-79, 81. Ms. Teich described a harrowing ordeal in which she was raped and left in the cabin by Mr. Gonzales; she ultimately escaped and found her way through the ranch to the road where she was eventually picked up by park ranger Paul Fuentes. *Id.* at 82-97. Mr. Gonzales was apprehended in Ms. Teich's truck shortly after, following a pursuit culminating in a crash. *Id.* at 137.

To conclude its penalty presentation, the State called psychiatrist Dr. Edward Gripon. 41 RR 50-122. Dr. Gripon told the jury that Mr. Gonzales "certainly" had antisocial personality disorder, 41 RR 70, and potentially "some type of significant underlying psychosexual disorder."

Id. at 82. He testified that "sexual assault has the highest continuum of recidivism," and "there is lots of data out there" indicating that recidivism rates "are way up in the eighty percentile or better." *Id.* at 87-88. Dr. Gripon told the jury Mr. Gonzales "would pose a risk to continue to commit threats or acts of violence" "wherever he goes," even in a carceral setting. *Id.* at 66, 94. The State rested on Dr. Gripon's opinion. *Id.* at 122.

CLAIMS FOR RELIEF

THE STATE VIOLATED THE EIGHTH AMENDMENT AND DUE PROCESS BY PRESENTING FALSE AND MATERIALLY INACCURATE EXPERT TESTIMONY—NOW DISAVOWED BY THE EXPERT HIMSELF—AT PUNISHMENT

THE STATE VIOLATED DUE PROCESS BY PRESENTING OF FALSE TESTIMONY FROM JAIL INMATE FREDERICK LEE OZUNA AT PUNISHMENT

MR. GONZALES' DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE THERE EXISTS A NATIONAL CONSENSUS THAT THE DEATH PENALTY IS AN EXCESSIVE PUNISHMENT FOR OFFENDERS LESS THAN 21 YEARS OLD AT THE TIME OF THE CRIME

CLAIM ONE

THE STATE VIOLATED THE EIGHTH AMENDMENT AND DUE PROCESS BY PRESENTING FALSE AND MATERIALLY INACCURATE EXPERT TESTIMONY—NOW DISAVOWED BY THE EXPERT HIMSELF—AT PUNISHMENT

This Court has recognized that "a death sentence based on materially inaccurate evidence violates the Eighth Amendment." *Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010) (citing *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988)); *see also Velez v. State*, No. AP-76,051, 2012 WL 2130890 at *32 (Tex. Crim. App. 2012) (not designated for publication) (same). Thus, in *Estrada*, this Court reversed a death sentence because the State presented expert testimony at the penalty phase about the defendant's potential for future dangerousness that was revealed to be "incorrect" and "mistaken" on the basis of facts that came to light after trial, even though "both parties seem to agree that [the expert's] incorrect testimony was not intentional." *Estrada*, 313 S.W.3d at 287.

Here, the State elicited extensive testimony from its expert witness, psychiatrist Dr. Edward Gripon, that was materially inaccurate in not just one but four respects that completely undermine the reliability of his

testimony. Dr. Gripon told the jury that Mr. Gonzales had antisocial personality disorder (what, as Dr. Gripon explained, was formerly called "psychopathy" or "sociopathy"), 41 RR 67-70; that he possibly had "some type of significant underlying psychosexual disorder," *id.* at 82; and that he would "certainly" pose a threat, even if incarcerated, because of "the presence of … antisocial personality disorder, and clearly … antisocial features." *Id.* at 92. The State also elicited testimony from Dr. Gripon discounting the possibility that Mr. Gonzales's criminal offenses were attributable to his struggles with drug addiction. *Id.* at 80-81. Finally, the State elicited extensive testimony from Dr. Gripon about the recidivism rates for sex offenders that was demonstrably false. Thus, Dr. Gripon testified that persons who commit sexual assault "have an extremely high rate of … recidivism." 41 RR 84; *see also id.* at 86 (sexual assault "frequently" is "not something that … a person does one time and then quits. There is a very high incidence of continued reoffending in those cases."). Specifically, Dr. Gripon asserted that the recidivism rate for sexual assault offenders was "above the fifty-one percentile," 41 RR 75, and that "lots of data" supported a recidivism rate "in the eighty percentile or better." *Id.* at 88. Dr. Gripon added that "sexual assault has

the highest continuum of recidivism" when looking at "types of significant, aggressive, violent behavior." *Id.* at 87. In response to the prosecutor's question about what type of offender presents "the worst prognosis for recovery," Dr. Gripon responded that "people who have sexual related offenses have the most difficulty with treatment, and they have an extremely high rate of recurrence." *Id.* at 87-88.

But today, after conducting a re-evaluation of Mr. Gonzales, Dr. Gripon has concluded that his prior findings were erroneous:

- Mr. Gonzales does *not* meet the diagnostic criteria for antisocial personality disorder, Exhibit D [report of Dr. Edward Gripon, dated May 25, 2022] at 8 ("No diagnosis at present time");

- Mr. Gonzales's crimes are "obviously associated with his severe drug addiction/dependency which began when he was a teenager," *id*. at 9, and not to any underlying psychopathology; and

- "to a reasonable degree of medical probability," Mr. Gonzales "does not pose a threat of future danger to society." *Id*. at 12 (emphasis in original).

Further, Dr. Gripon acknowledges that his trial testimony regarding recidivism rates was incorrect:

> At Mr. Gonzales's trial, I testified that his offense displayed sadistic tendencies, and opined that he posed a significant risk of future acts of violence. Regarding the likelihood of recidivism for sexual offenses, I testified that there is lots of data out there about

> the person who commits forcible rape and the likelihood that they will continue that. The percentages are way up in the eighty percentile or better." Trial Transcript Vol. 41 at p. 88.
>
> However, *we now know this statistic to be inaccurate*. A 2015 article traced the origins of the 80 percent sex offender recidivism rate to a "bare assertion" in a 1986 article in Psychology Today, authored by a counselor with no credentials in empirical research, that contained no citations or references to recidivism studies and was unsubstantiated by any data. *In fact, peer-reviewed statistical studies have shown that the actual recidivism rate for sex offenses is much lower; a 2018 comprehensive survey of longitudinal studies found recidivism rates below 20% after 25 years. In particular, studies have consistently found substantially lower rates of sexual recidivism among juveniles or young offenders, such as Mr. Gonzales*, than among older adult sex offenders.

Exhibit D at 10-11 (emphasis supplied).

To be clear, Mr. Gonzales's claim is not that every determination of future dangerousness at trial is vulnerable to later attack in light of a record of good behavior while incarcerated on death row. But where, as here, the trial expert relied upon by the State to carry its burden of proof on the future dangerousness special issue now acknowledges that his trial opinion was erroneous, and that error was due to reliance on "materially inaccurate" evidence and false testimony, the Constitution compels relief. *See Johnson*, 486 U.S. at 590; *Estrada*, 313 S.W.3d at 287; *Ex parte Chavez*, 371 S.W.3d 200, 207-08 (Tex. Crim. App. 2012).

The State's case for death relied heavily upon Dr. Gripon's testimony, which was offered to address the central issue before the jury at punishment: whether Mr. Gonzales could be sufficiently incapacitated in a prison environment, or whether he posed such a significant risk of future acts of violence that death was the only appropriate punishment. Because this testimony went directly to the issues that determined Mr. Gonzales's death sentence, there is at least a reasonable likelihood that the false testimony affected the judgment of the jury at punishment. *See Ex parte Weinstein*, 421 S.W.3d 456, 665 (Tex. Crim. App. 2014). Mr. Gonzales is entitled to relief.

A. The State's Expert Witness on Future Dangerousness was Dr. Edward Gripon, Who Evaluated Mr. Gonzales in 2006 and Again in the Past Year.

At the penalty phase, the State presented extensive testimony from Dr. Edward Gripon about the conclusions he drew from his review of records and from his three-hour evaluation of Mr. Gonzales prior to trial. 41 RR 50-121.

After establishing Dr. Gripon's educational background and professional experience, the State asked Dr. Gripon whether he was able to "make a determination" about whether Mr. Gonzales "would commit

criminal acts of violence that would constitute continuing threats to society." 41 RR 66. Dr. Gripon responded: "It would be my opinion that he would pose a risk to continue to commit threats or acts of violence." *Id.*

1. Dr. Gripon testified that Mr. Gonzales has antisocial personality disorder.

The State then elicited testimony from Dr. Gripon diagnosing Mr. Gonzales with antisocial personality disorder. 41 RR 67-75. Dr. Gripon explained that antisocial personality disorder ("ASPD") was formerly known in psychiatry as sociopathy or psychopathy. 41 RR 69. He defined ASPD as "a condition in which the person has repeated criminal acts, and will have a lack of social conscience, with no life plan and little remorse. They don't learn from past behavior because they don't modify their behavior based on the expectations of society." 41 RR 68. He continued: "An antisocial person knows their conduct is wrong, but they either don't care or they have these self-serving reasons to obtain whatever their goal is. They let them drive them and they are not to society's norms or expectations…. It's just a pattern of behavior that is maladaptive. The person just acts that way because that's the way they are." 41 RR 70.

Dr. Gripon explained that an ASPD diagnosis requires that the person have had, before age 18, "symptoms that would be consistent with conduct disorder." 41 RR 68. When the prosecution asked Dr. Gripon if he "[saw] those traits" in Mr. Gonzales's history, he said he did. 41 RR 70. He said he saw "an early onset of conduct related problems," which would support a diagnosis of conduct disorder, and then an "escalat[ion]" of conduct that led him to conclude that "certainly there is an antisocial personality disorder present here, based upon these records." 41 RR 70.

2. Dr. Gripon testified that there was an 80% chance that Mr. Gonzales would reoffend.

Questioned about the "prognosis" for whether a person who has committed a criminal offense will "escalate" or trend "downward," Dr. Gripon testified that certain crimes, such as sexual assault, have a particularly high degree of recurrence or recidivism, making the prognosis for positive growth "terrible." 41 RR 75. As he explained:

> There are just certain crimes, for instance, that people commit that, frequently, they don't commit again. A simple murder is an example of that. A lot of times it's associated with a certain aspect or a passion, you know, and people know each other and they get in some kind of argument and one gets killed. That has a very low penetration [sic] for a reoccurrence.
>
> Now sexual assault has an extremely high level of recurrence. It's above the fifty-one percentile, you know, so it's probable.

> So if a person starts sexually assaulting individuals, then they will generally continue that until they are stopped in some way or in some manner, or something prevents them from doing that. It's not a behavior that someone kind of delves into for awhile and then quits.

41 RR 75-76.

Later in the direct examination, the prosecution returned to the issue of recidivism, asking Dr. Gripon to elaborate on his earlier testimony:

> Q. You've talked a great deal, well, not a great deal, but you have mentioned that sexual offenses have a high repeat rate. Can you tell us what is the concept of recidivism? What does that mean?
>
> A. That's the tendency to continue in the case of a particular type of a crime, and then you get into the difficult to reoffend. If one is talking about rape, that's something, the sexual assault, that tends to, in people who express that type of behavior, it tends to frequently be a continued type of expression.
>
> It's not something that frequently a person does one time and then quits. There is a very high incidence of continued reoffending in those cases.
>
> [...]
>
> Q. Of all types of criminal offenders, which ones have the highest rate of recidivism?
>
> A. If you are talking about felonies, then it's the rapist. Now some alcohol and substance abuse problems probably have a greater risk of being continued….
>
> But if you are looking at types of significant, aggressive, violent behavior, then sexual assault has the highest continuum of recidivism.

Q. So of all of the felony offenses, which one is the hardest to treat?

A. Sexual offenses are the hardest to treat. Now if you are looking at treatment modalities, there is a broad range of treatment modalities, but none of which work with certainty.

Q. Prognosis-wise, which offender has the worst prognosis for recovery?

A. Well, again, those who have psychosexual disorders, you know, pedophiles, rapists, the people who have sexual related offenses have the most difficulty with treatment, and they have an extremely high rate of recurrence.

Q. Do you have any kind of data? Can you put that in any kind of data or a percentage?

A. Well, there is lots of data out there about the person who commits forcible rape and the likelihood they will continue that. The percentages are way up in the eighty percentile or better.

41 RR 86-88.

3. Dr. Gripon testified that Mr. Gonzales's drug addiction was of little significance.

To discount the role that Mr. Gonzales's drug addiction played in his criminal conduct, the prosecutor asked Dr. Gripon if he was "aware that the defendant claimed to be high on drugs at the time" of the offense. 41 RR 79. Dr. Gripon said he was aware of that claim, but that he did not think that Mr. Gonzales's "decisions … were driven by drug ingestion alone…. [I]t might have a disinhibiting effect and release—I mean if he has any inhibitions, then it might release what few were left. But it's not going to have any other significant impact on him." 41 RR 80.

4. Dr. Gripon testified that Mr. Gonzales would be a threat "wherever he goes."

The prosecution also asked Dr. Gripon to comment on Mr. Gonzales's "potential for rehabilitation" in light of the second offense, involving Ms. Teich:

> Q. Have you reviewed any records that would indicate that the defendant in fact denies that offense ever occurred?
>
> A. I think he has—yes, probably both of them.
>
> Q. What does that tell you about his potential for rehabilitation?
>
> A. Well, that's going to be a tough one. If that was the goal or the direction you were going, that's going to be tough. If you don't take responsibility for your own actions, then certainly it's not going to get any better….
>
> Q. Would it be impossible? If they are not going to admit that they have done any wrong, would it even be possible?
>
> A. You know, you attorneys have always taught me that theoretically anything is possible. I would say it's possible but you would have to place it around one or two percent. It would be so low that … if that person were sent to someone for treatment, … I would clearly not suggest that I could guarantee that I could be effective. I would not guarantee or even suggest any kind of outcome. So it would certainly be fourth down and long yardage.

41 RR 84-85.

Toward the end of direct examination, the prosecution asked Dr. Gripon if he considered Mr. Gonzales to be "a threat in the free world?" 41 RR 92. Dr. Gripon answered: "Certainly…. We have the presence of,

in my opinion, an antisocial personality disorder, and clearly there are antisocial features." 41 RR 92. Similarly, the prosecution asked him if he considered Mr. Gonzales to be "a threat in a prison setting?" 41 RR 94. Dr. Gripon responded: "Yes.… He's been in jail now for a couple of years or more, and he's been a problem here, and that will continue wherever he goes." 41 RR 94.

The prosecution concluded the direct examination by asking Dr. Gripon to compare "the attributes" of Mr. Gonzales's offenses to those of serial killers. 41 RR 96. Dr. Gripon responded:

> Well, I've seen some serial killers, and a couple of mass murders. You know, there are aspects of once a person kills, as I said, one time, particularly if they enjoy some aspect of that, like the dominance and control, you know, when they commit a crime they are not likely to want to leave a living witness to testify against them or to, you know, get them into any difficulty.
>
> Now this could certainly lead to that, but I can't tell you what would happen … yet I don't think it would volitionally stop.

41 RR 96.

B. The State Presented False and Materially Inaccurate Evidence Related to Future Dangerousness.

Like the death sentences overturned in *Estrada* and *Velez*, Mr. Gonzales's sentence is based on materially inaccurate evidence, now disavowed by Dr. Gripon himself:

- In contrast to the evidence presented at trial, Mr. Gonzales does *not* meet the diagnostic criteria for antisocial personality disorder, Exhibit D [report of Dr. Edward Gripon, dated May 25, 2022] at 8 ("No diagnosis at present time");

- In contrast to his testimony that there was "lots of data" about sex offender recidivism rates "way up in the eightieth percentile or better," the actual data indicates this testimony was false, *id.* at 10-11;

- Mr. Gonzales's crimes are "obviously associated with his severe drug addiction/dependency which began when he was a teenager," *id.* at 9, and not, as Dr. Gripon testified at trial, to any underlying psychopathology, such as sociopathy or antisocial personality disorder;

- The "fellow jail inmate['s] … claim[s] that Mr. Gonzales made statements to him … about returning to the crime scene several times to have sex with Townsend's deceased body" that were "to say the least, a significant piece of information regarding consideration of 'future danger'" in Dr. Gripon's opinion have since been recanted,[4] *id.* at 11-12; and

- "to a reasonable degree of medical probability," Mr. Gonzales "does not pose a threat of future danger to society." *Id.* at 12 (emphasis in original).

1. Dr. Gripon's testimony that a diagnosis of antisocial personality disorder was "certainly" and clearly" present was incorrect, as he himself now acknowledges.

At the penalty phase, Dr. Gripon testified that a diagnosis of antisocial personality disorder was "certainly" and "clearly" present. *See*

[4] This false testimony is addressed in detail in Claim Two, *infra.*

41 RR 70 ("In my opinion, certainly there is an antisocial personality disorder present here, based upon these records."); 41 RR 92 ("We have the presence of, in my opinion, an antisocial personality disorder, and clearly there are antisocial features.").

However, Dr. Gripon's recent evaluation disavows his prior diagnosis of antisocial personality disorder, finding "no diagnosis" of any psychological disorder today. Exhibit D at 8 ("No diagnosis at present time.").

The absence of any present diagnosis necessarily disproves Dr. Gripon's trial testimony asserting that antisocial personality disorder was "certainly" and "clearly" present. 41 RR 70, 92. This conclusion follows because that specific disorder is one that begins early in life and becomes a fixed, immutable characteristic that persists across the lifespan—as Dr. Gripon told the jury, "it's the way that the person's personality is formed;" once someone has developed antisocial personality disorder, "that's the way they are." 41 RR 69, 70. "A personality disorder is an *enduring* pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is *pervasive and inflexible*, has an onset in adolescence or early

adulthood, is *stable over time*, and leads to distress or impairment." American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION ("DSM-V") (2013), at 645 (emphasis supplied); *see also* American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION ("DSM-IV") (1994). That Dr. Gripon can now describe Mr. Gonzales as "a significantly different person both mentally and emotionally" compared to when he was first evaluated establishes that Dr. Gripon incorrectly diagnosed Mr. Gonzales with antisocial personality disorder in 2006. If Mr. Gonzales had indeed ever had that disorder, by definition, no profound internal transformation could have taken place.[5]

[5] Further, Dr. Gripon's suggestion in 2006 that Mr. Gonzales might also suffer from "some type of significant underlying psychosexual disorder," 41 RR 82, was informed by jailhouse informant Frederick Ozuna's since-recanted testimony that Mr. Gonzales had stated to him that he returned to the crime scene several times to perform repeated acts of necrophilia with the victim's body. Exhibit D at 11. As Dr. Gripon explained, Mr. Ozuna's testimony was "to say the least, a significant piece of information regarding consideration of 'future danger' at the time." *Id*. However, Mr. Ozuna has since disavowed those claims in a sworn declaration, *see* Claim Three, *infra*, and during the September 2021 evaluation, Mr. Gonzales vehemently denied that any such events ever occurred. Based on his assessment of Mr. Gonzales, Dr. Gripon credits Mr. Gonzales's denials. Exhibit D at 12. Thus, another "significant" piece of information on which the State's expert based his opinion has now been proven false to the expert's own satisfaction.

2. Dr. Gripon's testimony that sex offenders have "extremely high recidivism rates" was false and misleading.

Dr. Gripon's testimony that extremely high recidivism rates were endemic among sex offenders and that sex offenders pose a higher risk of recidivism compared to other offenders was demonstrably false. Further, his testimony about sex offender recidivism rates was misleading insofar as it did not include the key fact that juvenile sex offenders have lower recidivism rates and are more receptive to treatment than adult offenders. Each of these factual assertions was individually material to the jury's future dangerousness determination but, taken together, they leave no doubt that the jury was given a materially false impression that there existed a heightened likelihood that Mr. Gonzales would commit violent criminal acts in the future.[6]

Dr. Gripon testified at punishment that persons who commit sexual assault "have an extremely high rate of … recidivism." 41 RR 84; *see also id.* at 86 (sexual assault "frequently" is "not something that … a person does one time and then quits. There is a very high incidence of continued

[6] This false impression, in turn, was a keystone of Dr. Gripon's materially inaccurate testimony regarding future dangerousness, addressed in Claim One, *supra*.

reoffending in those cases."). Specifically, Dr. Gripon asserted that the recidivism rate for sexual assault offenders was "above the fifty-one percentile," 41 RR 75, and that "lots of data" supported a recidivism rate "in the eighty percentile or better." *Id.* at 88. Dr. Gripon added that "sexual assault has the highest continuum of recidivism" when looking at "types of significant, aggressive, violent behavior." *Id.* at 87. In response to the prosecutor's question about what type of offender presents "the worst prognosis for recovery," Dr. Gripon responded that "people who have sexual related offenses have the most difficulty with treatment, and they have an extremely high rate of recurrence." *Id.* at 87-88.

Dr. Gripon's assertion that the recidivism rate for sex offenders was at or above 80% was grounded in "lots of data" was false. 41 RR 88.[7]

[7] Two studies published by the Bureau of Justice Statistics ("BJS") in 2002 and 2003 produced a wide range of estimated recidivism rates, including figures *as high as* 51.8% and as low as 11.2%. Perhaps as important, those studies counted as "recidivism" any action by the offender that resulted in a return to custody, such as parole violations, without distinguishing technical violations (e.g., belatedly notifying the authorities of a change of address, failing to attend a meeting with a parole officer without prior permission) from new criminal violations. Patrick A. Langan & David J. Levin, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002) (measuring the total number of sex offenders back in prison for a new offense *or parole violation*); Patrick A. Langan, Erica L. Schmitt & Matthew R. Durose, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 13 (2003) (measuring the total number of sex offenders returned to prison for any type of new crime).

Instead, the claim that the rate of recidivism of sex offenders is as high as 80% reflects commonly cited erroneous estimates of sexual recidivism rates that are many times higher than the actual documented rates. In fact, no reliable statistical study has *ever* supported such a high recidivism rate.

In 2015, Professor Ira Mark Ellman, the Distinguished Professor of Law and Affiliate Professor of Psychology at Arizona State University, set out to determine the origin of the claimed 80% recidivism rate. Professor Ellman traced the claim to a single sentence in a March 1986 *Psychology Today* article authored by Robert Freeman-Longo, a counselor with no apparent background or qualifications in statistical research or recidivism studies. According to Professor Ellman:

> [Freeman-Longo's] article has this sentence: "Most untreated sex offenders released from prison go on to commit more offenses—indeed, as many as 80% do." But the sentence is a bare assertion: the article contains no supporting reference for it. Nor does its author appear to have the scientific credentials that would qualify him to testify at trial as an expert on recidivism. He is a counselor, not a scholar of sex crimes or re-offense rates, and the cited article is not about recidivism statistics. It's about a counseling program for sex offenders [Freeman-Longo] then ran in an Oregon prison. His unsupported assertion about the recidivism rate for untreated sex offenders was offered to contrast with his equally unsupported

> assertion about the lower recidivism rate for those who complete his program.[8]

As the *New York Times* subsequently reported in 2017, Freeman-Longo's claimed 80% recidivism rate for sex offenders was "an entirely invented number."[9]

Indeed, Freeman-Longo—the only source for the claimed 80% rate in the first place—has himself repudiated it. Interviewed in 2016, Freeman-Longo called it "unfortunate" that a number he pulled from thin air had made its way into the public consciousness. "That recidivism rate is probably higher than we would say today. I don't think the recidivism rate for untreated sex offenders is necessarily 80 percent. I don't know exactly what it is, but I would say that's a very high estimate."[10] In short,

---

[8] Ira Mark Ellman & Tara Ellman, "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Offender Recidivism Rates*, 30 CONST. COMM. 495, 498 (2015) (footnotes and citations omitted).

[9] David Feige, *When Junk Science About Sex Offenders Infects the Supreme Court*, ("*Junk Science*"), THE NEW YORK TIMES (Sept. 12, 2017), at https://www.nytimes.com/2017/09/12/opinion/when-junk-science-about-sex-offenders-infects-the-supreme-court.html (describing Professor Ellman's work tracing the "80%" myth from Freeman-Longo's unsupported *Psychology Today* article through a Department of Justice manual cited in turn by Solicitor General Ted Olson's brief in *McKune v. Lile*).

[10] Joshua Vaughn, *Closer Look: Finding Statistics to Fit a Narrative*, THE SENTINEL (Mar. 25, 2016), at https://cumberlink.com/news/local/closer_look/closer-look-finding-statistics-to-fit-a-narrative/article_7c4cf648-0999-5efc-ae6a-26f4b7b529c2.html.

no scientific evidence whatsoever supports the claim that the recidivism rate for sex offenders is as high as 80%.

On the contrary, numerous peer-reviewed statistical studies have consistently established that the true recidivism rate among sex offenders is much lower than 80%, indeed lower than 50%. For example, a "meta-study"[11] published in 2017 drew data from 20 independent studies, which had follow-up periods from 6 months to 31.5 years, to analyze the risk of sexual recidivism over time.[12] This meta-study found the rate of sexual recidivism was 18.5% after 25 years.[13] And a 2019 study conducted by the BJS found that the recidivism rate for a subsequent sex offense was only 7.7% after nine years.[14] While these two studies produced different rates of recidivism, the variance can be explained by

---

[11] Meta-analysis is "quantitative technique for synthesizing the results of multiple studies of a phenomenon into a single result by combining the effect size estimates from each study into a single estimate of the combined effect size or into a distribution of effect sizes." *See* "meta-analysis," APA DICTIONARY OF PSYCHOLOGY, available at https://dictionary.apa.org/meta-analysis.

[12] R. Karl Hanson, et al. *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCH., PUB. POL., & L. 46, 50 (2017).

[13] *Id*. at 53.

[14] Mariel Alper & Matthew R. Durose, *Recidivism of sex offenders released from state prison: A 9-year follow-up (2005-14),* BUREAU OF JUSTICE STATISTICS (2019), p. 5.

the 2017 study's longitudinal nature and its focus on offenders identified by other criteria as "high-risk." In any case, the recidivism rate for sex offenders reported by peer-reviewed statistical studies is consistently much lower than the 80% or even 51% recidivism rates cited in the trial testimony of the prosecution's expert here. Thus, the State-sponsored testimony about the recidivism rate among sex offenders left the jury with the false impression that sex offenders are far more likely to reoffend than is supported by any reliable statistical assessment.

Similarly, Dr. Gripon's testimony that "sexual assault has the highest continuum of recidivism," 41 RR 78, is also demonstrably incorrect. The 2019 BJS study found that persons incarcerated for sex offenses have lower recidivism rates compared to those incarcerated for crimes in almost every other category of offense.[15] Those imprisoned for sexual offenses were found to have a 7.7% chance of recidivism in the sexual offense category—far below the 80% or 51% rates cited to Mr. Gonzales' jury—and had lower overall rates of recidivism for *every* other category of crime than did those convicted of all other crimes combined.

[15] Alper & Durose, *supra* n. 14 at 4, Table 2.

That sexual offenders have lower rates of general recidivism as compared to other types of offenders has been consistently verified in numerous studies.[16] And strikingly, the 2019 BJS study showed that those imprisoned for a sexual offense had a 28.1% recidivism rate for *any* subsequent violent offense, significantly lower than the 39.6% rate amongst all others incarcerated for any non-sexual offense combined.[17] This consensus directly contradicts these aspects of the testimony from the State's expert.

Further, Dr. Gripon's testimony about recidivism rates was misleading because he did not inform the jury that adolescent offenders have a lower recidivism rate than adults. Without this information, the jury could not make an informed judgment about Mr. Gonzales's risk of future dangerousness, because he was only 18 years and 71 days old at

---

[16] *See, e.g.*, Turgut Ozkan et al., *Predicting Sexual Recidivism*, 32 SEXUAL ABUSE 375, 376 (2020) (noting that "individual who committed sexual offenses are known to recidivate at lower rates than people with nonsexual offensive histories); Tamara Lave & Franklin Zimring, *Assessing the Real Risk of Sexually Violent Predators: Doctor Padilla's Dangerous Data* 55 AM. CRIM. L. REV. 705, 729 (2018) ("The overall arrest rate for released sex offenders was just over 40% in three years, lower than the re-arrest frequencies for other types of incarcerated offenders.").

[17] Alper & Durose, *supra* n. 14 at 4, Table 2.

the time of the offense. This material omission gave the jury a false impression of Mr. Gonzales's risk of future dangerousness.

Studies on adolescent sexual offenders have consistently found even the highest rates of sexual recidivism to be "below 20%," but "most are around 10%."[18] Even the sexual recidivism rates for adolescents who have been convicted of multiple sex crimes are similarly low, at a rate of 12.3%.[19] And "[r]esearch to date clearly indicates that adolescents who have committed sexual offenses present relatively low risk for sexual re-offense (around 10 % across studies) [and] have similar sexual recidivism rates and lower non-sexual recidivism rates than other adolescent offenders."[20]

Moreover, as young offenders mature, recidivism rates fall. By age 38, the chance that a person who committed a sexual offense before age 21 will reoffend sexually "drops to the same level as an individual who

---

[18] Amanda Fanniff et al., *Risk and Outcomes: Are Adolescents Charged with Sex offenses Different from Other Adolescent Offenders?* 46 J. YOUTH AND ADOLESCENCE 1394, 1395 (2017).

[19] *Id.* at 1396.

[20] *Id.* at 1411.

was not convicted of *any* crime prior to the age of 21."[21] Because the actual recidivism rate for adolescent offenders is lower than even that of adult offenders, this aspect of Dr. Gripon's testimony also left the jury with a false impression of the likelihood of Mr. Gonzales's reoffending.

In addition to lower recidivism rates, adolescent sexual offenders respond better to treatment than adult offenders. Specifically, Cognitive Behavioral Therapy has been cited as the "most effective" treatment for adolescent offenders because

> juveniles are still maturing, developing, and experimenting ... [so] they are more responsive to cognitive restructuring and skills development. This is consistent with findings that juvenile sex offenders who receive treatment have low rates of reoffending.[22]

Indeed, a 2016 meta-analysis of sex offender recidivism studies indicates that "the sex offender treatments for adolescents produced an overall 24% reduction in recidivism, which is almost 3.8 times bigger than the grand mean effect size of sex offender treatments for adults."[23]

---

[21] *Id*. at 1395.

[22] Bitna Kim et al., *Sex Offender Recidivism Revisited: Review of Recent Meta-analyses on the Effects of Sex Offender Treatment*, 17(1) TRAUMA, VIOLENCE & ABUSE 105, 106-07 (2016).

[23] Kim, et al., *supra* n. 22 at 109–113.

Thus, asserting that "[s]exual offenses are the hardest to treat," 41 RR 87, without properly accounting for or explaining the material differences between adolescent and adult offenders, misled the jury by suggesting that Mr. Gonzales could not be rehabilitated. *See also id.* (calling it "more likely than not" that sexual offenders of any age "will continue in that pattern, unless something stops them," and adding that "ultimately they will get old and die, you know. I mean something will stop them.").

3. Dr. Gripon's testimony that Mr. Gonzales's drug addiction did not have a "significant impact" on him has now been disavowed by Dr. Gripon.

At trial, the State elicited testimony from Dr. Gripon downplaying the relationship between Mr. Gonzales's drug addiction and his criminal offenses. Dr. Gripon testified that while "nobody has ever … been high on drugs that [have] improved their judgment" or had "any positive impact," "it's not going to explain" his criminal conduct and "it's certainly not going to excuse it." 41 RR 79. He went on to assert that Mr. Gonzales's "decisions … were [not] driven by drug ingestion alone" and that other than "a disinhibiting effect" the drugs did "not … have any other significant impact on him." 41 RR 80-81.

In contrast to his trial testimony, Dr. Gripon today reports:

> *Mr. Gonzales's history of criminal behavior is obviously associated with his severe drug addiction/dependency which began when he was a teenager*. At the time of this offense in 2001, he was only a few months past his 18th birthday, and his behavior was significantly affected by his self-medication in the form of drug use and resulting drug-seeking behavior.

Exhibit D at 9 (emphasis supplied). Dr. Gripon also states in his report:

> Mr. Gonzales has developed significant insight into his earlier behaviors, particularly with respect to the role drugs played in his behavior as a teenager and his criminal offenses. *He has come to understand the role drugs played in his life, and there is no doubt that he ended up in his current dilemma because of his florid history of substance abuse.*

Id. at 6 (emphasis supplied).

4. Dr. Gripon's trial testimony that Mr. Gonzales "certainly" presents a "threat" "wherever he goes" is inconsistent with Dr. Gripon's opinion that Mr. Gonzales does not present a future danger.

At punishment, Dr. Gripon testified: "It would be my opinion that he would pose a risk to continue to commit threats or acts of violence." 41 RR 66. He asserted that Mr. Gonzales would "certainly" present "a threat," whether in "the free world" or "in a prison setting." 41 RR 92, 94. Dr. Gripon testified that he "[didn't] see how one could believe that [Mr. Gonzales's behavior [was] going to change in prison," and that instead it would "continue wherever he goes." 41 RR 94. He concluded: "[I]t's not within reasonable psychiatric probability that it would just miraculously

stop." 41 RR 97. These assumptions—proven false by fifteen years of changed behavior in prison—track the erroneous diagnosis of antisocial personality disorder. If Mr. Gonzales did indeed have a fixed personality disorder that was "pervasive and inflexible," and remained "stable over time" by definition, there would be no reason to believe a controlled setting would have made a difference or improved his behavior.

However, after his recent evaluation Dr. Gripon has concluded otherwise: "[I]t is my opinion, to a reasonable psychiatric probability, that he **does not** pose a threat of future danger to society." *Id.* at 12 (emphasis in original).

C. The State's Presentation of False and Materially Inaccurate Testimony at the Penalty Phase Violates the Eighth Amendment and Due Process.

The presentation of false and materially inaccurate testimony at the penalty phase of a capital trial violates both the defendant's right to due process under the Fourteenth Amendment and the defendant's right to heightened reliability in capital sentencing under the Eighth Amendment.

1. The State's presentation of false testimony violates the Fourteenth Amendment, regardless of the prosecutors' good or bad faith.

The State's presentation of false testimony violates due process. *See Napue v. Illinois*, 360 U.S. 264, 265, 272 (1959) (due process violated by presentation of codefendant's testimony that he had received no promise of consideration from State in exchange for his testimony when in fact an agreement did exist); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (due process violated where a prosecutor made agreement with witness that he would not be prosecuted in exchange for his testimony but witness testified he could still be prosecuted, even where different prosecutor trying case did not have knowledge of agreement).

Presentation of false or misleading evidence violates due process, even if the falsity of the evidence was unknown to the State or unintentional on the part of the witness. *See Townsend v. Burke*, 334 U.S. 736, 740–41 (1948) (finding conviction based on "materially untrue" information violates due process "whether caused by carelessness or design"); *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011) (Texas "allows applicants to prevail on due-process claims [even] when the State has unknowingly used false testimony"); *Chavez*, 371

S.W.3d at 208 (due process violation does not require perjury by a State's witness, but instead "it is sufficient that the testimony was 'false.'") (citing, *inter alia*, *Johnson*, 486 U.S. 578, 590 (1988)). To be entitled to habeas relief based on false or misleading testimony, an applicant must show that (1) false evidence was presented at trial; and (2) the false evidence was material to the jury's verdict. *Weinstein*, 421 S.W.3d at 665.

Due process requires a new trial if there is "any reasonable likelihood" that the false testimony affected the jury's judgment. *Napue*, 360 U.S. at 271; *Chavez*, 371 S.W.3d at 206–07 (materiality standard for false testimony is "whether there is a 'reasonable likelihood that the false testimony affected the applicant's conviction or sentence.'"). If it is shown by a preponderance of the evidence that the error contributed to the applicant's punishment, relief is required. *Weinstein*, 421 S.W.3d at 665.

2. The State's presentation of materially inaccurate testimony at the penalty phase of a capital trial, even if not intentional, violates the Eighth Amendment.

This Court has recognized that "a death sentence based on materially inaccurate evidence violates the Eighth Amendment." *Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010) (citing *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988)); *Velez v. State*, No. AP-

76,051, 2012 WL 2130890 (Tex. Crim. App. 2012) (same). The Eighth Amendment requires a new sentencing proceeding when the evidence relied on by the jury to sentence the defendant to death was "materially inaccurate," even if the facts demonstrating that the trial evidence was inaccurate do not emerge until after sentencing. *Johnson*, 486 U.S. at 590.

In *Johnson v. Mississippi*, one of the three aggravating circumstances found by the jury was that the defendant had been previously convicted of a violent felony in New York. 486 U.S. at 581. The prosecutor relied heavily on this evidence in arguing for the death penalty. *Id*. After Johnson was sentenced to death in Mississippi, his lawyers won a reversal of the prior conviction in New York on constitutional grounds. *Id*. at 582. Despite this newly developed evidence, the post-conviction courts in Mississippi refused to vacate Johnson's death sentence. *Id*. at 583-84. The Supreme Court reversed, holding that the Eighth Amendment's requirement of greater reliability in capital sentencing determinations was violated because "the jury was allowed to

consider evidence that has been revealed to be materially inaccurate." *Id.* at 590.[24]

While *Johnson* was concerned with evidence of a subsequently invalidated prior conviction, the rule has been applied in other contexts to require resentencing where evidence admitted at the penalty phase of a capital trial was later revealed to be materially inaccurate.

This Court, for example, relied on *Johnson* to reverse death sentences in *Estrada*[25] and *Velez*[26] because the State had presented "materially inaccurate" testimony from the same expert witness, A.P. Merillat. In both cases, Merillat, who was deemed qualified by the trial court to testify as an expert on prison violence and regulations, testified that a convicted capital murderer sentenced to life without parole could

---

[24] *See also Florida v. Burr*, 496 U.S. 914, 918-19 (1990) (Stevens, J., dissenting from order vacating judgment and remanding for further consideration in light of *Dowling v. United States*, 493 U.S. 342 (1990)) (explaining that the "paramount importance of reliability in the determination that death is the appropriate punishment" was implicated in *Johnson* "by a post-trial development that cast doubt on the reliability of evidence that played a critical role in the sentencing decision. *Johnson* made clear, what was apparent before, … that a death sentence cannot stand when it is based on evidence that is materially inaccurate.") (citations omitted).

[25] *Estrada v. State*, 313 S.W.3d 274 (Tex. Crim. App. 2010).

[26] *Velez v. State*, No. AP-76,051, 2012 WL 2130890 (Tex. Crim. App. 2012) (not designated for publication).

achieve a lower, less restrictive classification status based on good behavior while incarcerated. *Estrada*, 313 S.W.3d at 286-88; *Velez*, 2012 WL 2130890 at *31. On direct review in each case, this Court took judicial notice of a July 2005 TDCJ regulation providing that no inmate sentenced to life without possibility of parole could receive a lower or less restrictive classification status for *any* reason. *Id*. Citing *Johnson*, among other cases,[27] this Court reversed both death sentences based on Merillat's "materially inaccurate" testimony. *Estrada*, 313 S.W.3d at 287; *Velez*, *supra*, at *32. Indeed, the Court did so even though, in *Estrada*, both parties apparently agreed that "Merillat's incorrect testimony was not intentional." 313 S.W.3d at 287.

[27] In *Estrada*, this Court found appellant's sentence "constitutionally intolerable," relying on both its own decisions and those of the United States Supreme Court as well as this Court, including *Johnson*, 486 U.S. at 590 (holding death sentence based on "materially inaccurate" evidence violates Eighth Amendment); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (reversing sentence after finding due process violation based on "materially untrue" evidence); *Ex parte Chabot*, 300 S.W.3d 768 (2009) (finding due process violation based on accomplice's false testimony); *Ex parte Carmona*, 185 S.W.3d 492, 497 (Tex. Crim. App. 2006) (same, where defendant's community supervision was "revoked solely on the basis of perjured testimony"); *Simmons v. South Carolina*, 512 U.S. 154, 161-62 (1994) (finding due process violation where jury requested and was "a straight answer about [defendant's] parole eligibility"). In a later passage in *Estrada*, this Court cited *Napue v. Illinois*, 360 U.S. 264 (1959) (finding due process violation where conviction was obtained after State failed to correct false testimony from its own witness). *Estrada*, 313 S.W.3d at 287.

Accordingly, the Eighth Amendment rule of *Johnson v. Mississippi* is not limited to circumstances where a prior conviction used as an aggravating factor at sentencing is subsequently overturned. Instead, this rule requires relief where (1) *at* trial, a death sentence is returned based on evidence that appears at the time to be accurate and valid, but (2) *after* trial, facts are uncovered, or factual developments occur, which could not have been known at trial and which reveal that some of the evidence and aggravating factors relied on at trial were materially inaccurate.

D. The State's Presentation of False and Materially Inaccurate Evidence Regarding Future Dangerousness Contributed to the Jury's Punishment Verdict.

Inaccurate evidence is material where there is at least a reasonable likelihood that the false testimony affected the judgment of the jury at punishment. *See Weinstein*, 421 S.W.3d at 456; *see also Estrada*, 313 S.W.3d at 287 (concluding that because there was a "fair probability" that appellant's death sentence was influenced by Merillat's "incorrect testimony," reversal was required).

Here, there is a fair probability—indeed, there can be no reasonable doubt—that State expert Dr. Gripon's testimony as to future dangerousness "contributed to" the judgment as to punishment.[28]

It bears repeating that Mr. Gonzales was a *teenager*, just 18 years and 71 days old, at the time of the capital offense. That is, he was just a little over two months beyond the date when he would have been considered "*categorically* less culpable than the average criminal" and thus exempt from a death sentence irrespective of the severity of the offense. *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)) (emphasis supplied). Yet as the Supreme Court has also acknowledged, drawing the constitutional line at 18 is necessarily arbitrary, since the qualities that distinguish youths from adults "do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. Indeed, everything that the Supreme Court observed in *Roper* about offenders under age 18 applies with equal force to Ramiro Gonzales at 18 years and 71 days of age.[29]

---

[28] Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL. & L. 267, 305 (2001) (clinical psychological expert testimony concerning future dangerousness in mock trial setting had strong effect on jurors).

[29] *See* Claim Three, *infra.*

In answering the future dangerousness special issue, 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. There is at least a fair probability that 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," but instead would "continue wherever he goes" influenced the jury's determination. *Weinstein*, 421 S.W.3d at 456; *see also Estrada*, 313 S.W.3d at 287 (because there was a "fair probability" that appellant's death sentence was influenced by expert's "incorrect testimony," reversal was required).

Jurors are particularly vulnerable to crediting expert predictions of dangerousness when they have just convicted a defendant of a death-

eligible offense.[30] 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.[31]

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));[32] *see also*, *e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 259 (1988)

---

[30] *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).

[31] Beecher-Monas, *supra* n. 30, at 1018-19.

[32] *See also Velez*, 2012 WL 2130890 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; 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").

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

At closing argument, the State relied heavily on Dr. Gripon's testimony to assert that Mr. Gonzales would present a continuing threat of future dangerousness:

> Best evidence of dangerousness? *Past behavior. Dr. Gripon told you that. He's the psychiatrist. He's the one that came in here, not with an agenda; to tell you the true facts*. And he said in all his many, many years of practice that is the best predictor of future dangerousness is your past behavior… *And Dr. Gripon looked at everything and says, yes, he will. The way he's acting in these jails is pretty indicative [of] how he's going to continue to act in an incarceration setting*.

43 RR 54-55 (emphasis supplied). Dr. Gripon's assessment that the offense had a "psychosexual sadistic component" allowed the State to argue that Mr. Gonzales simply made the choice "to continue on with evil" because "what he did to Bridget … made him hungry for it. It made him want more." 43 RR 68. Mr. Gonzales simply "liked the feeling of degrading and over-powering and humiliating people and forcing them to do unthinkable things, and the sheer pleasure of it." *Id.* at 68-69. In its rebuttal closing argument, the State again repeatedly invoked Dr. Gripon's testimony to urge the jury to return answers to the special issue questions that would require a death sentence:

> 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.
>
> […] 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. He denies he offended, which makes it even worse because if you don't take responsibility for your actions, it's almost impossible to treat you. And he won't. To this day, he won't take responsibility for what he did to Babo Teich.
>
> […] 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).

Moreover, as in *Estrada*, the jury here sent out notes during penalty phase deliberations that reflect that the jurors were deliberating over issues directly related to the testimony now shown to be inaccurate.[33] Here, the jury sent a note asking whether the sentences for Mr. Gonzales' prior guilty plea case would be served concurrently or consecutively with

---

[33] *See Estrada*, 313 S.W.3d at 286-87 (noting that the jury set out two notes during penalty phase deliberations—one asking what would happen if the jury could not "come to a decision" on the future-dangerousness special issue, and the second asking whether there was a possibility that the defendant would be eligible for a less restrictive status if sentenced to life imprisonment—which the State *conceded* "suggest that Merillat's mistaken testimony may have contributed to the jury's decision on punishment").

whatever sentence they returned in the capital case. The trial court commented: "They want to know what's going to happen. Obviously, they're looking at a life sentence; otherwise, why would they care?" 43 RR 75. Jurors also asked whether Mr. Gonzales would ever obtain trustee privileges while incarcerated. *Id.* at 76.[34] From their communications during deliberation, it is apparent that jurors were considering whether long-term imprisonment might sufficiently incapacitate Mr. Gonzales, but were instead told that people with antisocial personality disorder—the ones "at one time … called … psychopaths [or] sociopaths"—"don't learn from past behavior because they don't modify their behavior based on the expectations of society and that sort of thing." *Id.* at 68-69.

This dehumanizing characterization is a far cry from Dr. Gripon's current assessment that Mr. Gonzales not only has proven himself capable of growth and change but in fact has "developed significant insight" into his own actions. Exhibit D at 5. After spending three-and-a-half hours with Mr. Gonzales at the Polunsky Unit, Dr. Gripon noted that

[34] As *Estrada* and *Velez* illustrate, a life-sentenced inmate's future custody status can play a major role in the jury's deliberations on the future dangerousness question. *Estrada*, 313 S.W.3d at 287 (granting relief after finding "a fair probability that appellant's death sentence was based upon Merillat's incorrect testimony").

Mr. Gonzales has now taken "full responsibility for the offense and displayed significant remorse,"[35] has "grown [and] matured emotionally and intellectually," and "is now a significantly different person both mentally and emotionally." *Id.* at 6, 8, 12.

> At the time of the commission of this offense Mr. Gonzales was barely 18 years old. With the passage of time and significant maturity he is now a significantly different person both mentally and emotionally. This represents a very positive change for the better.
>
> At the current time, considering all of the evidence provided to me, my evaluation of Mr. Gonzales, and his current mental status, it is my opinion, to a reasonable psychiatric probability, that he **does not** pose a threat of future danger to society in regard to any predictable future acts of criminal violence.

Exhibit D at 12 (emphasis in original).

Both the diagnostic label itself and Dr. Gripon's description of its associated traits gave jurors a roadmap to answer the future dangerousness special issue in the affirmative.[36] And the power of this

---

[35] *See also* Exhibit D at 6 ("Mr. Gonzales expressed remorse for taking the life of this young woman, Bridget Townsend. Although he does not know exactly what he would tell the victim's mother, he wishes that he could speak to her and try to express his regret for his actions, which he tries to understand.").

[36] Studies have shown that merely injecting the diagnostic label of psychopathy into a capital sentencing proceeding increases the likelihood that jurors will both perceive the defendant as more dangerous and sentence them death. *See, e.g.*, John F. Edens, et al., *Effects of psychopathy and violence risk testimony on mock juror perceptions of dangerousness in a capital murder trial*, 10 PSYCH., CRIM. & L. 393 (2004) (controlled study results suggesting that mock jurors' perceptions of dangerousness in the context of the Texas capital sentencing scheme were based mainly on diagnostic label

particular label is well-documented: "the accumulated literature suggests a significantly greater likelihood" that jurors will view defendants labeled as psychopaths as dangerous, "with concomitant increased rates of imposition of a death sentence."[37] Therefore, there exists at least a reasonable likelihood that the false and prejudicial diagnosis of antisocial personality disorder contributed to the jury's punishment verdict.

The State's own expert is now of the opinion that, contrary to the testimony he provided at trial, Mr. Gonzales does *not* have antisocial personality disorder, *nor* does he pose a risk of future acts of violence. Further, Dr. Gripon has acknowledged both that his trial testimony was based in part on statistical evidence that "we now know … to be inaccurate" and that "a significant piece of information regarding

---

of "psychopathy"); John F. Edens, et al., *No sympathy for the devil: Attributing psychopathic traits to capital murderers also predicts support for executing them*, 4 PERSONALITY DISORDERS: THEORY, RESEARCH, AND TREATMENT 175 (2013).

[37] David DeMatteo, Heath Hodges, and Jaymes Fairfax-Columbo, *An Examination of Whether Psychopathy Checklist-Revised (PCL-R) Evidence Satisfies the Relevance/Prejudice Admissibility Standard*, in ADVANCES IN PSYCHOLOGY AND LAW 228 (2016); Shannon E. Kelley, et al., *Dangerous, depraved, and death-worthy: A meta-analysis of the correlates of perceived psychopathy in jury simulation studies*. 75 J. CLINICAL PSYCH. 627 (2019) (finding higher likelihood of both determinations of dangerousness and death verdicts across 10 different studies examining association between perceived defendant psychopathy and legal outcomes).

consideration of 'future danger' at the time"[38]—the alleged statements about necrophilia introduced through inmate Frederick Ozuna—has been revealed to be false.[39]

Because the authoritative nature of Dr. Gripon's opinion and testimony went directly to the central task of the jury during penalty phase deliberations, and to the special issue questions that determined punishment, Mr. Gonzales has made a prima facie case that the State's false evidence regarding future dangerousness contributed to the jury's penalty phase verdict. To authorize and grant relief on this claim would break no new ground nor require this Court to do any more than follow its own precedent and that of the Supreme Court.

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

Texas law allows a habeas petitioner to return to court and be heard on the merits of a subsequent application for state habeas corpus relief 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

[38] Exhibit D at 11.

[39] The introduction of Ozuna's false testimony is addressed in detail in Claim Two, *infra*.

> 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 section 5(a) determination as a "threshold," requiring that a subsequent state habeas applicant "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] by a preponderance of the evidence." *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (emphasis supplied). Mr. Gonzales can satisfy this requirement.

Mr. Gonzales filed his most recent state habeas application on February 23, 2011. *Ex parte Gonzales*, No. 04-02-9091-CR (38th Dist. Ct., Medina Co., Texas). Both the factual and legal bases for this claim were not available at the time the prior application was filed, for the following reasons.

First, the articles and studies debunking the oft-cited "frightening and high" recidivism rate of over 80% were previously unavailable to Mr. Gonzales, as they were not published until after Mr. Gonzales's most recent state habeas application was filed in February 2011. Professor Ellman's scholarly article exposing Robert Freeman-Longo's claim of an

80% recidivism rate as unsupported by any empirical study was not published until 2015, and David Feige's article in *The New York Times* bringing Professor Ellman's exposé to the attention of the general public appeared two years later, in 2017. Thus, the factual basis for this aspect of the claim was not available to Mr. Gonzales when he filed his previous habeas application, making it "newly available" to him in satisfaction of section 5.

Second, Dr. Gripon recently reevaluated Mr. Gonzales and reported his findings in May 2022, more than a decade after the filing of the most recent prior application in this case. His present conclusions are based not only on his personal impressions of Mr. Gonzales in September 2021, but on the recently-solidified consensus that the oft-cited "frightening and high" recidivism rate of over 80% is "an entirely invented number"[40] and "a demonstrable urban legend"[41] and voluminous records and other expert evaluations produced in the decade since the February 2011 filing of the last state habeas application. Exhibit D at 2 (listing documents

[40] Feige, *Junk Science*, *supra* n. 9.

[41] Lave, *Inevitable Recidivism*, *supra* n. 1.

reviewed including, *inter alia*, declaration of trial witness Frederick Ozuna; 2021 report of Dr. Katherine Porterfield, Ph.D.; TDCJ incarceration records dating from 2006-present; artwork of Mr. Gonzales, 2016-21). The factual basis for this claim is therefore "newly available" under the meaning of section 5.

Furthermore, the legal basis for this claim was not available at the time the prior application was filed in February 2011. Since then, this Court has made clear that an applicant can show a due process violation based on the jury's consideration of false testimony even where it cannot be shown that the State was aware that the evidence was false. *Ghahremani*, 332 S.W.3d at 478.[42] On the date Mr. Gonzales filed his previous application, "the error standard … applied to [prior false testimony claims] was more difficult for an applicant to establish than the present standard now applicable to due process claims of unknowing use of false testimony." *Chavez*, 371 S.W.3d at 206-07. Dr. Gripon himself

[42] This Court decided *Ghahremani* on March 9, 2011. In affirming that *un*knowing use of false testimony by the State violates due process, the *Ghahremani* Court cited this Court's prior decision in *Ex parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2009), where the State proposed—and the trial court adopted—findings recommending relief on due process grounds where a key government witness committed perjury. Because the parties did not dispute the falsity nor materiality of the testimony, the court found it "need not reach the issue of the State's knowledge." *Chabo*t, 300 S.W.3d at 772.

has now attested his trial testimony was wrong in significant respects, even though nothing indicates that the State was aware of that falsity at the time. Because Texas law now recognizes a due process violation under these circumstances and did not at the time of the filing of Mr. Gonzales's last habeas application, the legal basis for this claim is also "newly available" under the meaning of section 5. *Id*.

Mr. Gonzales has shown that his claim of false evidence presented by the State entitles him to relief and has demonstrated that this claim is based on newly available facts *and* law. This Court should stay Mr. Gonzales's scheduled execution date and authorize further proceedings on this claim.

CLAIM TWO

THE STATE VIOLATED DUE PROCESS BY PRESENTING FALSE TESTIMONY FROM JAIL INMATE FREDERICK LEE OZUNA AT PUNISHMENT.

At punishment, the State called Frederick Ozuna, who had been incarcerated with Mr. Gonzales in Medina County, to testify that Mr. Gonzales told him that he returned several times to the location where he shot Bridget Townsend to have sex with her corpse. Mr. Ozuna has now acknowledged under oath that this testimony was false. Exhibit F. By its nature, Mr. Ozuna's testimony was both extremely inflammatory and uniquely prejudicial. Further, Mr. Ozuna's false testimony tainted the testimony of a second penalty phase witness, Dr. Edward Gripon, who relied upon Mr. Ozuna's false claims in concluding that Mr. Gonzales would present a continuing danger in the future.[43] Finally, the State emphasized Mr. Ozuna's false claims in its closing arguments. Thus, it is reasonably likely that Mr. Ozuna's false testimony affected the jury's judgment at punishment, particularly given that jurors sent a note[44]

---

[43] Dr. Gripon has now repudiated his own conclusions about Mr. Gonzales's future dangerousness. *See* Claim One, *supra*.

[44] The trial court commented, "[t]hey want to know what's going to happen. Obviously, they're looking at a life sentence; otherwise, why would they care?" 43 RR 75.

asking whether the sentences for Mr. Gonzales' was serving at the time of trial would be served concurrently or consecutively with whatever sentence was returned in the instant case. Relief from Mr. Gonzales' death sentence is required.

A. The State Presented False Evidence at Mr. Gonzales's Trial in The Form of Frederick Ozuna's Testimony.

1. At punishment, despite repeated attempts to invoke his Fifth Amendment privilege against self-incrimination, Mr. Ozuna was compelled to testify that Mr. Gonzales claimed that he "had sex with the body" several times after he killed Ms. Townsend.

On August 29, 2006, the State called Mr. Ozuna, a cellmate of Mr. Gonzales in the Medina County jail, to testify in its case-in-chief at punishment. 39 RR 184, 195. In June and July 2006, after jury selection in Mr. Gonzales's capital murder trial had already begun, Mr. Ozuna signed two statements written for him by Sgt. Jeffrey Yarbrough in which he claimed that, *inter alia*, Mr. Gonzales told him "he raped and tortured [Bridget] and made her fulfilled his fantasys [sic]," and that "[Mr. Gonzales] said he went back 3 or 4 times and had sex with the body … he said he would do it again and he enjoyed it." *See* 39 RR 187; State's Exhibit 130 (June 30, 2006 statement of Frederick Lee Ozuna, Jr.); *cf.* 6

RR 3 (June 26, 2006 commencement of jury selection); *see also* 39 RR 189; State's Exhibit 131 (July 24, 2006 statement of Frederick Lee Ozuna Jr.).

From the outset of Mr. Ozuna's testimony there were signs that either his out-of-court statements, his testimony, or both, were false. As soon as the prosecutor mentioned Mr. Gonzales's name—"Was there a time where an inmate by the name of Ramiro Gonzales was in the same cell with you?"—Mr. Ozuna attempted to invoke his Fifth Amendment right against self-incrimination. 39 RR 185. The State tried again to ask about Mr. Gonzales, and Mr. Ozuna responded: "Same thing. I plead the Fifth." *Id.* Switching tacks, the prosecutor asked Mr. Ozuna if he had given two statements to Investigator Yarbrough; Mr. Ozuna responded that he "would like to recant [his] statement." 39 RR 186.

The trial court then interjected, scolding Mr. Ozuna:

> THE COURT: Let me tell you this right now. If you gave a statement here, and if you lie about that statement, that's false swearing and it's a misdemeanor. But if you lie in this courtroom, then that's aggravated perjury and that's a felony and that can go up to ten years in the pen and a ten thousand dollar fine.
>
> THE WITNESS: Yes, sir.
>
> THE COURT: Are you going to answer any questions at all?
>
> THE WITNESS: *No.*
>
> THE COURT: None at all?

THE WITNESS: *No questions*.

39 RR 186 (emphasis added).

Undeterred by Mr. Ozuna's repeated attempts to invoke his privilege against self-incrimination,[45] the prosecutor simply ignored his assertions:

> Q. (BY MS. POPPS) Did the defendant tell you what to say here in court today?
>
> A. No, ma'am.
>
> Q. Are you denying that you gave statements to Jeff Yarbrough in this case?
>
> A. *I plead the Fifth*.
>
> MS. POPPS: Your Honor, we can't keep doing this. We've got evidence here to present, and he has no right to plead the Fifth in that regard. I would just ask that you order him to testify.
>
> THE COURT: That question is answerable.
>
> Q. (BY MS. POPPS) Did you give a statement to Sergeant Yarbrough on two different questions?
>
> A. Yes.

---

[45] If the statement Mr. Ozuna gave to Sgt. Yarborough was true, then he had no reason to believe that testifying to its contents would incriminate him and therefore an invocation of the privilege would be invalid. However, if the statement was false—as Mr. Ozuna has now sworn it is—then it would be reasonable to invoke the Fifth Amendment in order not to commit perjury. Thus, the trial court should have *at least* allowed Mr. Ozuna to consult with an attorney rather than join the prosecutor in overriding Mr. Ozuna's repeated assertions of the Fifth Amendment privilege and resulting compulsion of testimony, which arguably induced him to commit perjury over his repeated attempts to invoke his constitutional right not to be "compelled to disclose facts tending to criminate" himself. *See Rogers v. United States*, 340 U.S. 367, 372 (1951).

Q. And in those statements did you tell Sergeant Yarbrough that the defendant had told you some details about the crime he committed?

THE COURT: Just show him the statement first so that we know that he's talking about his statement.

Q. (BY MS. POPPS) I'm showing you what has been marked as State's Exhibit 130. Is that the statement that you gave to Jeff Yarbrough?

A. Yes.

Q. So that's your signature at the bottom?

A. Yes.

Q. And that is verifying everything in this statement is true and correct?

A. (No answer)

THE COURT: Did you swear to that statement?

THE WITNESS: Yes.

Q. (BY MS. POPPS) In this statement did you tell Sergeant Yarbrough that the defendant told you that he had raped and tortured Bridget Townsend and he made her fulfill his sexual fantasies?

A. *I plead the Fifth.*

THE COURT: Did he tell you that?

THE WITNESS: Yes.

39 RR 186-88 (emphasis added).

Once the trial court had intervened in the prosecutor's questioning of Mr. Ozuna and elicited his acknowledgment that he had given out-of-court statements to Sgt. Yarbrough, the prosecutor proceeded to question

Mr. Ozuna using his out-of-court statements. She employed a series of leading questions, reading from those statements line by line and asking him to confirm what he had told Sgt. Yarbrough:

> Q. (BY MS. POPPS) And did you also say that the defendant told you that Bridget Townsend tried to run but that he caught up to her and he beat her?
>
> A. Yes.
>
> Q. Did you also tell Jeff Yarbrough that after the defendant had killed Bridget Townsend that he said he had sex with her?
>
> A. Yes.
>
> Q. And is that what the defendant told you?
>
> A. Yes.
>
> Q. And did he tell you that he went back three or four other times to have sex with her body?
>
> A. Yes.
>
> Q. And did you ask the defendant if he regretted it, and did he say, "No," and did he also say that he would do it again?
>
> A. Yes.
>
> Q. And did he say he enjoyed it?
>
> A. Yes.

39 RR 188-89.

The prosecutor then showed Mr. Ozuna his second sworn statement to Sgt. Yarbough and proceeded to use it in the same fashion—demanding Mr. Ozuna's assent to a series of leading questions about

what he had told Sgt. Yarbrough. 39 RR 189-91. As before, both the prosecutor and the trial court consistently disregarded Mr. Ozuna's repeated attempts to invoke his privilege against self-incrimination:

> Q. And in this statement did you talk about the things that the defendant told you about trying to escape from this jail?
>
> A. Yes.
>
> Q. Can you tell us what he told you in that regard?
>
> A. *I plead the Fifth.*
>
> Q. Did he want you to be part of this escape plan?
>
> A. Yes.
>
> Q. Did he tell you that he would fake an injury to himself so that he could get taken to the clinic?
>
> A. *I plead the Fifth.*
>
> Q. Did the defendant tell you that or not?
>
> A. Yes.

39 RR 189-90 (emphasis supplied).

2. Mr. Ozuna has now recanted his statements and swears that his trial testimony was false.

Mr. Ozuna has since recanted his trial testimony in a sworn declaration. Exhibit F (sworn declaration of Frederick Lee Ozuna, Jr.). Mr. Ozuna recalls being housed with Mr. Gonzales at the Medina County Jail, and "remember[s] him keeping to himself a lot." Exhibit G at 1. Mr.

Gonzales told Mr. Ozuna that he was accused of capital murder. *Id.* Mr. Ozuna remembers that an officer pulled him and other inmates out of their cells to question them about Mr. Gonzales. *See* Exhibit F at 1. Mr. Ozuna spoke to this officer twice and signed a statement that was written by the officer "not long before I was forced to testify." *Id* at 1, 2.

During their conversations, the officer "made clear" that if Mr. Ozuna "cooperated … and gave him a statement about Ramiro, it would benefit [Mr. Ozuna] and increase the chances that [he] would get out of jail." Exhibit F at 1. The officer also threatened that if Mr. Ozuna "didn't cooperate," it would make his situation "even worse," because the officer would "make sure" he was "convicted and severely sentenced" in his own case. Exhibit F at 1-2. Looking back, Mr. Ozuna feels "stupid" for believing the officer, because he now realizes a severe sentence was not possible in his case, although at the time he "took these threats seriously." *Id.* at 2.

The interviewing officer "shared information … about the details" of the crime against Bridget Townsend with Mr. Ozuna, and "would present information … and ask me to agree with it." Exhibit F at 2. For example, although Mr. Ozuna's 2006 statement indicates that "Ramiro

told me that he tied up, abducted, raped, tortured, and murdered a girl named Bridget[,] [t]hat statement is untrue. These were things the officer told me to say to spice up the statement." Exhibit F at 2. The officer also "added [details] in order to make [the] statement more believable." *Id.*

Referring to his statements that Mr. Gonzales "said he went back 3 or 4 times to have sex with the body" and that Mr. Gonzales did not regret it and "said he would do it again [and] said he enjoyed it," Mr. Ozuna's recantation is unequivocal: "Ramiro never said those things to me." Exhibit F at 3.

B. Due Process is Violated When the State Presents False Evidence or Testimony.

The State's presentation of false testimony violates due process. *See Napue*, 360 U.S. at 265, 272; *Giglio*, 405 U.S. at 154–55.

Due process is denied when the State uses false or materially misleading testimony to obtain a conviction or a particular sentence, regardless of prosecutors' intent. *Chavez*, 371 S.W.3d at 207; *see also Townsend*, 334 U.S. at 740–41. This Court has specifically held that Texas "allows applicants to prevail on due-process claims [even] when the State has unknowingly used false testimony." *Ghahremani*, 332 S.W.3d at 478; *see also Chavez*, 371 S.W.3d at 206-07 (citing *Ghahremani* for the

"present standard" governing unknowing use of false testimony claims and holding that "unknowing use of false testimony" was a new legal basis under Tex. Code Crim. Pro. art. 11.071 §5).

An applicant need not show that one of the State's witnesses committed perjury; rather "it is sufficient that the testimony was 'false.'" *Chavez*, 371 S.W.3d at 208 (citing, *inter alia*, *Johnson*, 486 U.S. at 590). To be entitled to habeas relief based on false or misleading evidence, an applicant must show that (1) false evidence was presented at trial; and (2) the false evidence was material to the jury's verdict. *Weinstein*, 421 S.W.3d at 665.

Due process requires a new trial if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." *Napue*, 360 U.S. at 271; *Chavez*, 371 S.W.3d at 206–07 ("The present standard for materiality of false testimony is whether there is a 'reasonable likelihood that the false testimony affected the applicant's conviction or sentence.'"). A defendant who proves by a preponderance of the evidence that the error contributed to their punishment is entitled to sentencing relief. *Weinstein*, 421 S.W.3d at 665.

C. The State Knew or Should Have Known Mr. Ozuna's Statement Was False.

Although Mr. Gonzales is entitled to relief upon a showing that materially false evidence was unknowingly presented by the State at trial, *Weinstein*, 421 S.W.3d at 665, circumstances here demonstrate that the State knew or should have known that Mr. Ozuna's statements were false.

Under certain circumstances, knowledge of perjured testimony may be imputed to a prosecutor who lacks actual knowledge of the falsity. *Ex parte Castellano*, 863 S.W.2d 476, 480-81 (Tex. Crim. App. 1993) (citing *Giglio,* 405 U.S. at 154). For the purposes of imputing knowledge to the prosecution, courts have "declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel." *Ex parte Adams*, 768 S.W.2d 281, 292 (Tex. Crim. App. 1989) (quoting *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979)). And while due process may be violated even where the State is not aware of the false nature of evidence or testimony, circumstances here make clear that the State knew, or should have known, that Mr. Ozuna's testimony was false.

First, both of Mr. Ozuna's statements to law enforcement were produced *after* jury selection in Mr. Gonzales's 2006 trial had begun. This Court has acknowledged that the testimony of jailhouse witnesses is "inherently unreliable." *Phillips v. State*, 463 S.W.3d 59, 66 (Tex. Crim. App. 2015); *see also id*. (observing that the Texas Legislature likewise "recogni[zes] that incarcerated individuals have an incentive to provide information against other incarcerated individuals"). That risk is particularly acute in death penalty trials, given their high-profile and high-stakes nature,[46] which provides particular incentives for jailhouse informants to concoct "evidence" in hopes of obtaining leniency in their own cases or some other benefit.[47] That the State's evidence purporting

---

[46] *See, e.g.*, Bluhm Legal Clinic, *The Snitch System*, NORTHWESTERN UNIVERSITY SCHOOL OF LAW CENTER ON WRONGFUL CONVICTIONS (Winter 2004-05) (accessible at https://files.deathpenaltyinfo.org/legacy/documents/SnitchSystemBooklet.pdf) (finding that, in 2005, unreliable jailhouse snitch testimony was "the leading cause of wrongful convictions in U.S. capital cases").

In 2006, a landmark study on exonerations concluded that nearly 50% of wrongful murder convictions had involved perjury by a witness, such as a jailhouse inmate, who stood to gain from false testimony. Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003,* 95 J. CRIM. L. & C. 523, 543-44 (2006); *see also*, *e.g.*, Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 625 (2007) (identifying false testimony from jailhouse inmate witnesses as a "major contributing cause[ ] to wrongful convictions"). And an earlier seminal examination of miscarriages of justice in 350 potentially capital cases had found that one-third of those cases involved perjured testimony, frequently from jailhouse informants. Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).[48] Because Ms. Townsend's

to convey statements made by Mr. Gonzales about the crime was generated inside the very facility in which Mr. Gonzales was being held—*during* Medina County's only death penalty trial in the modern era—should have made prosecutors skeptical about Mr. Ozuna's unverifiable tales.

More important, however, the State knew or should have known that Mr. Ozuna's testimony was false because he repeatedly attempted to "plead the Fifth" rather than testify, *see* 39 RR 185, and explicitly attempted to recant his statement on the stand. *Id.* at 186 ("I would like to recant my statement."). As described in sec. A.1., *supra*, the trial court intervened and warned Mr. Ozuna: "If you lie about that statement, that's false swearing and it's a misdemeanor. But if you lie in this courtroom, then that's aggravated perjury and that's a felony and that can go up to ten years in the pen and a ten thousand dollar fine." 39 RR 186.

Despite Mr. Ozuna's efforts to recant his statement to law enforcement from the witness stand, and notwithstanding his repeated

---

remains were not discovered for more than nineteen months after she disappeared, no forensic evidence could establish any physical, much less sexual, contact between her and Mr. Gonzales.

attempts to avoid testifying about its contents both before and after being warned about the consequences of perjury, the State persisted in questioning Mr. Ozuna about the contents of his prior statements. *See* 39 RR 185-91. In fact, Mr. Ozuna attempted to "plead the Fifth" *six* times in just five pages of testimony, but the State relentlessly demanded answers about the statements Mr. Ozuna had attributed to Mr. Gonzales. *See id.* at 185-90.

In his 2019 declaration, Mr. Ozuna explained that "[b]ecause I knew my statement was not true, I attempted to plead the Fifth [Amendment] and refuse to answer questions, but I wasn't allowed to do that. Because I was threatened with perjury, I decided to stick to my statement and just cooperate with the prosecutor's questions. I regret that." Exhibit F at 3. Although the State succeeded in presenting its damaging evidence, Mr. Ozuna nonetheless reports that retaliation followed his attempts to recant. Immediately after he testified, Mr. Ozuna was "put in solitary confinement for over a year … . I believe they did that to me to punish me for not being a cooperative witness." *Id.*

D. The False Testimony was Material.

False testimony is material if there exists "a 'reasonable likelihood that the false testimony affected the applicant's conviction or sentence.'" *Chavez*, 371 S.W.3d at 206–07 (quoting *Ghahremani*, 332 S.W.3d at 478); *see also Chabot*, 300 S.W.3d at 771 (new trial required where defendant proves by preponderance of the evidence that the error contributed to their conviction).

Here, Mr. Ozuna's false testimony that Mr. Gonzales bragged about repeatedly returning to the scene to have sex with her corpse undoubtedly contributed to the death sentence in this case for at least three reasons. First, Mr. Gonzales was serving life in prison for an unrelated case at the time of trial; the other case also involved allegations of kidnapping and sexual assault. And Mr. Gonzales' purported confession that he had sex with Ms. Townsend before shooting her lacked any corroboration at all; Mr. Ozuna's statement and testimony provided false corroboration for that otherwise wholly speculative detail.[48] Therefore, the false testimony buttressed the State's case that Mr.

[48] Because Ms. Townsend's remains were not discovered for more than nineteen months after she disappeared, no forensic evidence could establish any physical, much less sexual, contact between her and Mr. Gonzales.

Gonzales was a serial sexual predator, despite the absence of physical or other circumstantial evidence to substantiate the sexual assault allegations involving Ms. Townsend.

Second, other than the prior charge (to which Mr. Gonzales had pled guilty four years before his 2006 trial) Mr. Gonzales had no history of sexually violent behavior. Accordingly, the State repeatedly capitalized on Mr. Ozuna's testimony in closing argument to enhance its case for a "future dangerousness" finding—emphasizing the import of Mr. Ozuna's testimony, dismissing the significance of his reticence to testify, and working to bolster his credibility. 43 RR 53 (reminding the jury that "ultimately [Mr. Ozuna] had to admit that the defendant said those things to him."); *id.* ("Maybe [Mr. Gonzales] thinks that [Mr.] Ozuna is his compadre and he can tell him the dirty, dark little secrets about what he did to Bridget"); *id.* at 53-54 ("…the fact that her clothing is put back together … [doesn't] say[] one thing or another. Maybe that's his preference [to] dress them again.").

Finally, and most importantly, the State used Mr. Ozuna's statement in questioning and presenting its expert witness, forensic psychiatrist Dr. Edward Gripon.

Dr. Gripon told the jury that this case was "unique," specifically the "sexual aspect of it" when combined with the prior sexual offense, which he "ke[pt] going back to," calling it "extremely important." 41 RR 95. Dr. Gripon told the jury that the presence of an alleged sexual component to Ms. Townsend's murder "raises a question, at least, of some type of significant underlying psychosexual disorder." 41 RR 82. He stated specifically that Mr. Gonzales might be "a sexual predator, like someone who is seeking a series of victims and who is preying upon women." *Id.* In response to the State's query about "murder added on top of a sexual violent offense," Dr. Gripon testified that such a combination would support "a terrible prognosis … just an awful prognosis." *Id.* at 89. He emphasized the relationship of this prognosis to Mr. Gonzales' future dangerousness, telling the jury that "sexual offenses are the hardest to treat." *Id.* at 85.

Specifically drawing the jury's attention to Mr. Ozuna's false testimony that Mr. Gonzales returned to view and have sex with Ms. Townsend's body, Dr. Gripon explained that "[i]f you go back to view [the body], knowing that they are out there … and you go back to that scene … that has a psychosexual sadistic component to it." 41 RR 77. As the

direct examination of Dr. Gripon drew to a close, the State asked about specific "attributes about the defendant's crimes, like they were in close proximity to each other, the sexual components, the obsession with dead bodies? I mean does that correlate to what you have seen in cases of serial killers?" 41 RR 96. Dr. Gripon warned the jury that "[he] d[id]n't think that [Mr. Gonzales's behavior] would volitionally stop," drawing specific parallels between the "exploitation of women" and the fact that Mr. Gonzales "sexually assaulted these people." *Id.* Thus, the allegations that Mr. Gonzales sexually violated Ms. Townsend's body after her death were repeatedly highlighted and emphasized by the State's psychological expert, who painted Mr. Gonzales as a likely serial psychosexual predator with antisocial personality disorder who would unquestionably pose a future danger.

In closing argument, the State thundered that Mr. Gonzales was "a sexual predator and a murderer and he'll never stop," and reminded them that "Dr. Gripon told you that." 43 RR 69. The State highlighted Dr. Gripon's discussion of "several factors that were significant to him, including Mr. Gonzales's alleged "morbid fascination with death and dead bodies [and] 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 [Mr. Gonzales]." *Id.*

The record clearly shows that the jury was troubled by what the State, through Dr. Gripon, had presented as a common thread running through both cases. During deliberations, jurors sent a note asking whether the sentences for Mr. Gonzales's prior guilty plea case would be served concurrently or consecutively with whatever sentence was returned in the capital case. The trial court commented, "[t]hey want to know what's going to happen. Obviously, they're looking at a life sentence; otherwise, why would they care?" 43 RR 75. The day Ms. Townsend disappeared, Mr. Gonzales was only eighteen years and seventy-one days old. The crimes to which he pled guilty occurred just eighteen months later. The jury appears to have understood that they were being asked to make a determination of future dangerousness that rested heavily on the behavior of a young man who might yet turn away from violence, and to have been weighing seriously whether he could be sufficiently incapacitated in prison to warrant sparing his life.

The State's future dangerousness case rested heavily on the alleged parallels between Mr. Gonzales's prior conviction and the State's theory

of the Townsend offense, buttressed by Mr. Ozuna's false statements attributed to Mr. Gonzales. This reliance was compounded by the "significant" weight State's expert Dr. Gripon placed on the contents of Mr. Ozuna's false statements. Exhibit D (report of Dr. Gripon) at 11 (Mr. Ozuna's since-recanted statement "was, to say the least, a significant piece of information regarding consideration of 'future danger' at the time"). Therefore, there exists at least a reasonable likelihood that Mr. Ozuna's false testimony contributed to the jury's verdict at penalty. Mr. Gonzales's death sentence should therefore be vacated, and the case remanded for a new punishment hearing that comports with due process.

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

Texas law allows a habeas petitioner to return to court and be heard on the merits of a subsequent application for state habeas corpus relief 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 section 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] by a preponderance of the evidence." *Blue*, 230 S.W.3d at 163. Mr. Gonzales can satisfy this requirement.

Appointed federal habeas counsel filed Mr. Gonzales's second and most recent application for state habeas relief on February 23, 2011. In March of 2011, this Court made clear that it would allow applicants to prevail on due process false testimony claims when the State unknowingly used false testimony. *Ghahremani*, 332 S.W.3d at 478. Therefore, at the time of the filing of Mr. Gonzales's last application, "the error standard … applied to [prior false testimony claims] was more difficult for an applicant to establish than the present standard now applicable to due-process claims of unknowing use of false testimony." *Chavez*, 371 S.W.3d at 206-07. The legal basis for this claim is therefore "newly available" within the meaning of section 5.

Furthermore, the facts underlying this claim—that the substance of Mr. Ozuna's testimony at punishment was false—were previously unavailable to Mr. Gonzales. As Mr. Ozuna states, and as the trial record demonstrates, he was threatened with prosecution for either false swearing or perjury when he attempted to assert his Fifth Amendment privilege against testifying. 39 RR 186. At the time of Mr. Gonzales's trial, Mr. Ozuna was awaiting resolution of his own case and believed that refusing to testify would trigger retaliation and a harsher sentence in his own case. *See* Exh. G. Mr. Ozuna was also under the supervision of TDCJ at the time, according to Texas Department of Public Safety records.

Moreover, until just a few weeks before the filing of Mr. Gonzales's most recent state habeas application in 2011, Mr. Ozuna was serving out a term of deferred adjudication. Mr. Ozuna's fear of reprisal and retaliation from the State, were he to recant his false statements from Mr. Gonzales's punishment hearing, made his recantation unavailable to Mr. Gonzales at that time. Now, however, Mr. Ozuna has arrived at a place where he can admit under oath that his compelled punishment-

phase testimony against Mr. Gonzales was false and express his "regret" that he lacked the fortitude to stand up to the prosecution in 2006.

Mr. Gonzales has shown that his claim of false evidence presented by the State entitles him to relief and has demonstrated that this claim is based on both a new legal basis and newly discovered facts. This Court should stay Mr. Gonzales's scheduled execution and remand to the convicting court for review of this claim on the merits.

CLAIM THREE

MR. GONZALES'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE THERE EXISTS A NATIONAL CONSENSUS THAT THE DEATH PENALTY IS AN EXCESSIVE PUNISHMENT FOR OFFENDERS LESS THAN 21 YEARS OLD AT THE TIME OF THE CRIME.

Ramiro Gonzales was just 18 years and 71 days old on the day of the offense for which he is scheduled to die July 13. He still lived in the only home he'd ever known, in which he was raised from infancy. He was not yet old enough to legally purchase alcohol,[49] carry a handgun,[50] or run for public office in Texas.[51] He was too young to acquire a credit card without an "adult" co-signer[52] or to obtain a commercial driver's license.[53]

---

[49] TEX. AL. BEV. CODE § 106.01 (defining "minor" as "a person under 21 years of age"); § 106.02 (prohibiting purchase of alcohol by a minor).

[50] TEX. GOVT. CODE § 411.172(a)(2) (person must be "at least 21 years of age" to be eligible to carry a handgun in Texas). Similarly, the federal government limits sales of handguns and ammunition by licensed dealers to persons 21 years of age and older. 18 U.S.C. § 922(b)(1); 27 C.F.R. § 478.99(b).

[51] TEX. CONST. ART. 3 § 6 (state senators must be 26 years or older); TEX. CONST. ART. 3 § 7 (state representatives must be 21 years or older).

[52] The Credit Card Act of 2009 bans credit cards for people under the age of 21 unless they have an adult co-signer or show proof that they have the means to repay the debt. 15 U.S.C. §1637(c)(8); 15 U.S.C. §1637(p) (parents, guardian, or co-signer required to consent to any increase credit limit where person is under age 21).

[53] 49 C.F.R. §§391.11(b)(1), 390.3(f) & 391.2 (driver must be 21 years of age or older to drive a commercial vehicle interstate or to transport passengers or hazardous materials interstate).

Indeed, consistent with the laws of states across the country,[54] for most purposes Texas law considered him a "minor" and not an "adult."[55]

In 2005, the Supreme Court held in *Roper v. Simmons*[56] 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 the nearly two decades since *Roper*, a national consensus has clearly emerged against imposing the death penalty on defendants under age 21. Three very recent developments in particular support this conclusion:

---

[54] *See* Exhibit I ("Age Restrictions Under Selected Federal and State Laws"). *See also J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (discussing "legal disqualifications" historically "placed on children as a class, including "limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent").

[55] *See, e.g.*, TEX. PROPERTY CODE § 141.002(1) ("'Adult' means an individual who is at least 21 years of age"); § 141.002(11) ("'Minor' means an individual who is younger than 21 years of age").

[56] 543 U.S. 551 (2005).

First, in April 2020, the Texas Law Review published a comprehensive nationwide study of all death sentences and executions imposed in the United States since *Roper*.[57] The study reached the following conclusions:

> Two predominant trends emerge. *First, there is a national consensus against executing people under [age] twenty-one*. This consensus comports with what 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. Second, young people of color are disproportionately sentenced to die—even more so than adult capital defendants. The role of race is amplified when the victim is white. These trends confirm that the logic that compelled the Court to ban the executions of people under eighteen extends to people under twenty-one.

Id. at 921 (emphasis supplied).

In line with the Supreme Court's Eighth Amendment jurisprudence,[58] the *Death by Numbers* study constitutes prima facie

---

[57] John H. Blume, Hannah L. Freedman, Lindsey S. Vann & Amelia Courtney Hritz, *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles from Eighteen to Twenty-One*, 98 Tex. L. Rev. 921 (2020) (hereinafter, "*Death by Numbers*").

[58] In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that imposing sentences of life imprisonment without parole on juveniles convicted of nonhomicide offenses violated the Eighth Amendment. The *Graham* Court relied on a study similar to *Death by Numbers* in finding a national consensus against this practice. *See id*. at 62-63 (finding "a consensus against" imposing life without parole on such youthful offenders based on a nationwide study examining "actual sentencing practices in jurisdictions where the sentence in question is permitted by statute") (citing to P.

evidence of a national consensus against executing those who committed murder as late adolescents (or "youthful offenders," defined as defendants up to age 21).

Second, on February 5, 2018, the American Bar Association's ("ABA") House of Delegates adopted a formal resolution calling on all death-penalty jurisdictions to prohibit capital punishment for any individual 21 years old or younger at the time of the offense.[59] The ABA cited the "evolution of both the scientific and legal understanding surround young criminal defendants and broader changes to the death penalty landscape" and concluded that "offenders up to and including age 21" should be categorically exempt from receiving the death penalty. *Id.* at 14.

Annino, D. Rasmussen, & C. Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490079)).

[59] *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.

Third, on May 12, 2022, the American Psychological Association, the leading scientific and professional organization in the field of psychology, issued a resolution for public comment 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." Exhibit J at 5.

Modern neuroscientific research has shown that brain development and maturation—which the *Roper* Court found renders young offenders categorically ineligible for the death penalty—in fact continue well after age 18. Older adolescents, over the age of 18, also differ from adults in significant ways that both diminish their culpability and impair the reliability of the capital sentencing process. In such emerging adults, the parts of the brain that enable impulse control and reasoned judgment remain not yet fully developed. Thus, adolescents of *any* age are less able to envision—let alone comprehend—the full range of potential future consequences of their immediate actions, and less able to control their impulses, than adults. In a very real sense, 18-, 19-, and 20-year-olds are not yet the people they will ultimately become.

In *Roper*, the Court acknowledged that "a line must be drawn" somewhere when determining which ages are categorically excluded from capital punishment on account of their youth, and therefore barred use of the death penalty for defendants under age 18. 543 U.S. 551, 574. However, both scientific developments and statistical studies analyzing the frequency with which death sentences have been imposed on young death-eligible defendants since that 2005 decision point to a national consensus that the line instead lies at age 21.

As discussed further below, Mr. Gonzales's age at the time of the capital offense renders him categorically ineligible for the death penalty under the Eighth and Fourteenth Amendments.

A. The "Evolving Standards of Decency that Mark the Progress of a Maturing Society" under the Eighth and Fourteenth Amendments Forbid the Execution of Persons Under Age Twenty-One.

The Supreme Court has held that the scope of Eighth Amendment protection is not "static," but instead must reflect "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Thus, a punishment that was once accepted and deemed constitutionally permissible may nevertheless become

*un*constitutional if it is shown that contemporary "standards of decency" now reject it.

Applying this principle, the Court has held that "evolving standards of decency" bar the execution of certain distinct classes of defendants either (1) because the death penalty would be "grossly out of proportion" to the severity of the crime,[60] or (2) because defendants in the class categorically "lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."[61]

The Court applies a two-part test to determine whether imposing a particular punishment is inconsistent with "evolving standards of decency." First is an examination of "objective indicia of consensus," including state legislative enactments, and sentencing and execution data, *Roper*, 543 U.S. at 564–65, as well as the opinions of social and professional organizations, international practice, and polling data, *id*. at 561, 576–78, to determine if a consensus has emerged.

---

[60] *See*, *e.g.*, *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty disproportionate for the crime of raping an adult woman); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty disproportionate for non-triggerman in robbery-murder); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (death penalty disproportionate for defendant convicted of raping a child).

[61] *Atkins v. Virginia*, 536 U.S. 304 (2002) (persons with mental retardation); *Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile defendants).

Once a consensus against imposing a punishment in particular circumstances is found, the Supreme Court exercises its own independent judgment regarding proportionality, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Kennedy*, 554 U.S. at 421. As it exercises its independent judgment, the Court considers "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham v. Florida,* 560 U.S. 48, 61 (2010).

B. Objective Indicia of a National Consensus Against Imposing the Death Penalty on Late Adolescents.

With respect to the first prong of its proportionality test—whether there is a national consensus against a questioned sentencing practice—the Supreme Court has historically looked to relevant legislative enactments. More recently, the Supreme Court has considered additional "measures of consensus other than legislation," *Kennedy*, 554 U.S. at 433, such as "actual sentencing practices." *Graham*, at 62 ("Actual sentencing practices are an important part of the Court's inquiry into consensus.").

Indeed, in *Graham*, the Court determined that a national consensus had emerged against sentencing juvenile non-homicide

offenders to life imprisonment without parole based *entirely* on a nationwide study of actual sentencing practices in such cases. 540 U.S. at 62–64. The State of Florida argued in *Graham* that there was no national consensus against the challenged sentencing practice because 37 states as well as the District of Columbia and the Federal government still permitted sentences of life without parole for at least some juvenile nonhomicide offenders. *Id.* at 62. However, the Court rejected this argument as "incomplete and unavailing," because "[t]here are measures of consensus other than legislation." *Id.* (quoting *Kennedy*, 554 U.S. at 433). Instead, relying on a nationwide study of "actual sentencing practices" in jurisdictions where statutes permitted such harsh sentences, the Court observed that of the 37 jurisdictions that allowed life-without-parole sentences for juvenile nonhomicide offenders, "only 11 jurisdictions … in fact *impose* life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization." *Id.* at 64 (emphasis added). The Court thus concluded that a national consensus

against the practice existed wholly on the basis of a nationwide study of "actual sentencing practices." *Graham*, 560 U.S. at 62–63.

1. Like the study that formed the sole basis for the Court's decision in *Graham*, the nationwide Death By Numbers study shows that actual sentencing practices reveal a national consensus against imposing the death Penalty on late adolescents, even where statutes would permit such sentences.

With respect to "objective indicia," the landscape of the death penalty for offenders under the age of 21 has changed meaningfully since *Roper* was decided.

In April 2020, the Texas Law Review published an article by four Cornell Law School professors and researchers titled "Death By Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles From 18 to 21."[62] The article reports a comprehensive, nationwide study of all post-*Roper* death sentences and executions of youthful offenders (that is, offenders who were at least 18 but not older than 21). After surveying every such sentence and execution and applying the Court's evolving-standards-of-

[62] Blume et al., *Death By Numbers*, *supra* n. 57.

decency methodology, the authors find a national consensus against imposing the death penalty on late adolescents.

The conclusions of the *Death by Numbers* researchers are supported by a quantitative analysis of a comprehensive set of nationwide data. The authors compiled a database of every death sentence and execution across the country between 2005, when *Roper* was decided, and December 2018. *Death by Numbers*, *supra,* at 938. This extensive data included each offender's age at the time of the crime, each offender's race and gender, the victim(s)' race and gender (where available), and the final outcome of the case (i.e., execution, reversal resulting in a sentence of less than death, or pending). *Id.* at 939. In total, the authors identified 1,351 death sentences imposed between 2005 and December 2018. *Id.*

The *Death by Numbers* study then identified the following statistical trends:

- A diminishing rate of imposition of the death penalty on late adolescents, particularly when compared to the capital sentencing rate of adults;

- A diminishing number of jurisdictions that have sentenced late adolescents to death;

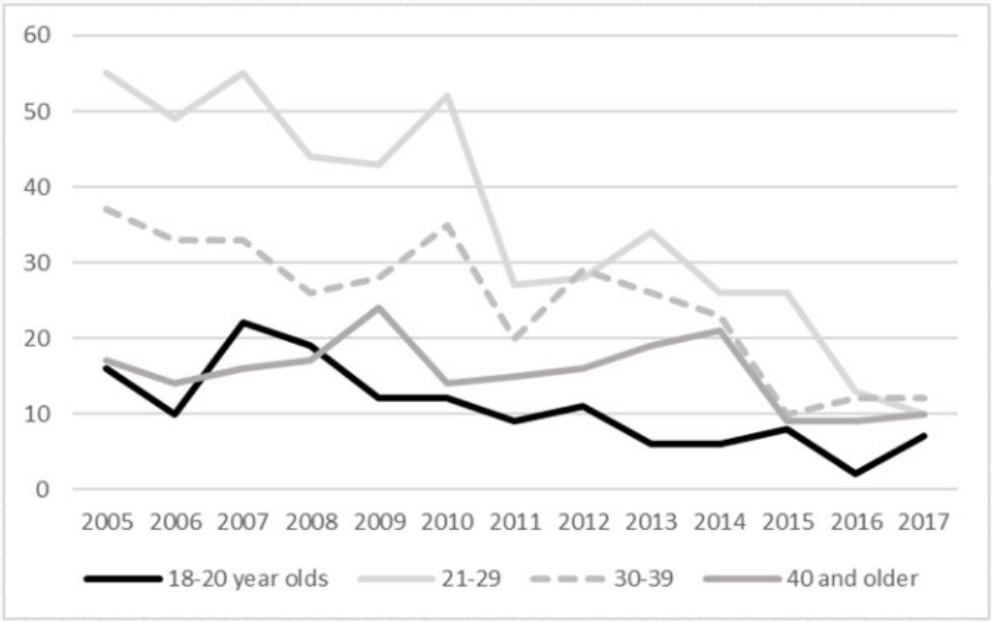
- A diminishing number of executions of late adolescents, again particularly when compared to executions of adults.

Each of these statistical trends is discussed in turn below.

(a) Imposition of death sentences on late adolescents (18- to 20-year-olds) has steadily fallen since *Roper*, particularly in relation to the capital sentencing rate of adults.

The analysis of sentencing practices in *Death by Numbers* demonstrates a steady and substantial decline in the number of death sentences imposed on late adolescents since *Roper* was decided, and that although death sentences for both late adolescents and older adults declined over the same period, the rate of decline for late adolescents was significantly greater than for older adults. *See* Figure 1.

Figure 1: Death Sentences by Year and Age Group

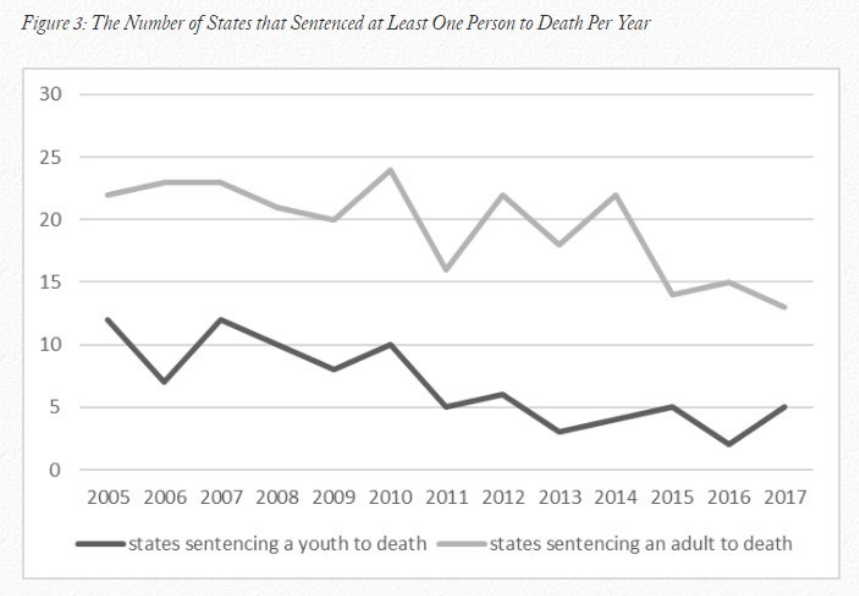


Note: The figure displays the number of death sentences imposed each year by age of the offender at the time of the crime.

Since 2005, only 165 death sentences have been imposed on late adolescents and "the number of youthful offenders sentenced to death … has been declining." *Id.* at 939; *see also* Figure 1. An analysis of the percentage of late adolescents convicted of death eligible offenses compared to the percentage of late adolescents sentenced to death indicates they are "unlikely to receive death sentences when compared to older homicide offenders." *Id.* Since 2013, at most nine youthful offenders have been sentenced to die in any one year, a decline of 64%. *Id*. at 940.

(b) The number of states sentencing late adolescents (18- to 20-year-olds) to death has substantially declined since *Roper*, particularly in relation to the number of states imposing death sentences on adults.

Further, the few death sentences imposed against late adolescents are highly geographically concentrated. *Id.* at 941. Five jurisdictions make up 65% of all death sentences of late adolescents since *Roper*. *See* Figure 3.



This geographic concentration has only increased in the years since *Roper*. *Id.* In 2005, thirteen jurisdictions sentenced a late adolescent to death. In each of the last five years covered by the study (2015-2020), at most five jurisdictions sentenced a youthful offender to death. *Id*. And 28 states and the military have not sentenced a single late adolescent to death since *Roper* as compared to 18 states that have not sentenced an adult to death in that timeframe. *Id.*

(c) No death sentence for a late adolescent (18- to 20-year-old) imposed since *Roper* has yet resulted in an execution.

The national consensus against imposing the death penalty against late adolescents is also apparent from an analysis of executions since *Roper*. *Id.* at 944. No death sentence for a late adolescent imposed after

Roper has resulted in an execution. *Id*. at 943. Since *Roper* was decided, 35 states and the military have not executed a late adolescent. *Id.* The executions of late adolescents that have taken place have been highly geographically concentrated. *Id.* Texas, with 56 executions of youthful offenders, accounted for 55% of all such executions between 2005 and the end of 2018.

> Therefore, the authors concluded that the data showed "a clear national consensus against executing offenders who were under twenty-one at the time of their offense." Since *Roper*, there has been a consistent downward trend in the number of states that sentence youthful offenders to die. Youthful offenders are wholly protected from execution in twenty-three states, and in thirty-five states a youthful offender would not be executed—fifteen more than in *Roper*, twenty-two more than in *Graham*, and fourteen more than in *Miller*. Such a consistent and deepening movement away from executing a class of defendant is a hallmark indication that a national consensus exists.

Id. at 944.

2. Other objective factors also demonstrate that a national consensus has emerged against imposing death sentences on late adolescents.

The Supreme Court has considered and weighed other objective factors, such as relevant professional opinion, in concluding that the Eighth Amendment bars imposition of the death penalty on a particular class of defendants. *Cf. Atkins*, 536 U.S. at 316 (examining the positions

of leading professional organizations in support of a ban on executing the mentally retarded). Professional opinion, too, supports a categorical exemption for late adolescents.

As noted *supra*, in February 2018 the ABA's House of Delegates resolved that "each jurisdiction that imposes capital punishment [should] 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."[63] The resolution sets out the following rationale:

- Advances in neuroimaging "have led to the current medical recognition that brain systems and structures are still developing into an individual's mid-twenties," *id*. at 3;

- "[E]mpirical research shows that most delinquent conduct during adolescence involves risk-taking behavior that is part of normative developmental processes, *id*. at 6;

- "[R]esearch suggests that late adolescents, like juveniles, are more prone to risk-taking and that they act more impulsively than older adults in ways that likely influence their criminal conduct," *id*. at 7;

- "[S]cientists, researchers, practitioners and corrections professionals are all now recognizing that individuals in late adolescence are in many ways developmentally closer to their peers under 18 than to those who are fully neurologically developed," *id*. at 8; and

- Both state and federal legislators have created greater restrictions and protections for late adolescents in a range of

[63] *See* ABA *Late Adolescent Death Penalty Resolution*, *supra* n. 59.

> areas of law, including "a consistent trend toward extending the services of traditional child-serving agencies, including the child welfare, education, and juvenile justice systems, to individuals over the age of 18," *id*.

The ABA resolution thus concludes that "[t]he rationale supporting the bans on executing either juveniles, as advanced in *Roper v. Simmons*, or individuals with intellectual disabilities, as set forth in *Atkins v. Virginia*, also apply to offenders who are 21 years old or younger when they commit their crimes." *Id*. at 13.

Similarly, just weeks ago, the American Psychological Association issued for public comment a resolution calling on the "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." Exhibit J at 5. The APA relies on many of the same rationales as the ABA resolution:

- "[N]euroscientific research demonstrates brain development at age 17 has not become static and there is significant, ongoing brain development in the 'late adolescent class,'" *id*. at 1;

- "[A]s of 2013, the Diagnostic and Statistical Manual of Mental Disorders (5th ed.; DSM-5, American Psychiatric Association, 2013) eliminated the age 18 cutoff for the expression and diagnosis of some developmental disorders, recognizing the developmental period to extend to age 18 and beyond," *id*. at 2;

- "[D]evelopmental neuroscience, including research on both the structure and function of brain development, establishes that significant maturation of the brain continues through at least age 20, especially in the key anatomical regions of brain systems implicated in the evaluation of behavioral options, making decisions about behavior, meaningfully considering the consequences of acting and not acting in a particular way, the ability to consider behavior rationally and act deliberately in stressful or highly charged emotional environments, and in the development of personality and what is popularly known as character," *id*.;

- "[I]n the context of capital cases where death is a potential penalty, which typically involve crimes that have occurred in situations of high emotional arousal, it is especially noteworthy that current developmental neuroscience documents that during emotionally charged situations, the late adolescent class responds more like younger adolescents than like young adults," *id*. at 3;

- "[I]t is thus clear the brains of 18- to 20-year-olds are not yet fully developed in those key brain systems related to higher-order executive functions such as impulse control, planning ahead, weighing consequences of behavior, emotional regulation, control, and arousal, risk avoidance, and other key elements of behavioral determination," *id*.

The APA resolution thus concludes:

> [B]ased upon the rationale of the *Roper* decision and currently available science, [the] APA concludes the same prohibitions that have been applied to application of the penalty of death for persons ages 17 and younger should apply to persons ages 18 through 20. The same scientific and societal reasons as given by the *Roper* court in banning death as a penalty for those under the age of 18 apply to the late adolescent class.

Id. at 5.

C. The Same Rationales the Supreme Court has Identified in Categorically Exempting Others from the Death Penalty Apply with Equal Force to Individuals Under Age 21.

1. Late adolescents share the same characteristics of juvenile adolescents that led the *Roper* Court to conclude that inflicting the death penalty on defendants under 18 violates the Eighth Amendment.

The first part of the Eighth Amendment's "evolving standards" analysis involves an examination of "objective indicia of society's standards, as expressed in legislative enactments and state practice," to determine if a consensus has emerged against imposing the challenged punishment. *Roper*, 543 U.S. at 572. Once such a consensus is found, the Supreme Court exercises its own independent judgment, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Kennedy*, 554 U.S. at 421. As it exercises its own independent judgment regarding proportionality, the Court considers "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham,* 560 U.S. at 61.

The Eighth Amendment demands congruence with evolving standards of decency for all punishments. Because of its severity, however, capital punishment requires more. A capital sentence violates the Eighth Amendment when it is "grossly out of proportion to the severity of the crime" or "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). In *Gregg*, the Supreme Court identified retribution and deterrence as the two principal penological justifications that capital punishment must serve. Subsequently, the Court held that unless the punishment of death as "applied to those in [the defendant's] position measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Enmund*, 458 U.S. at 798 (1982).

Roper provides an instructive example of how the Court conducts this analysis. To explain its ultimate conclusion that juveniles are "categorically less culpable" than adults, the *Roper* Court cited a number of general differences related to brain development that "demonstrate that juvenile offenders cannot reliably be classified among the worst

offenders." *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 316). In particular, *Roper* focused on "[t]hree general differences" between juveniles and adults that compelled a categorical exemption. 543 U.S. at 569.

First, youthful offenders lack maturity and a sense of responsibility, a deficiency that "often result[s] in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569. States recognize this immaturity and irresponsibility in many statutory enactments by, for instance, prohibiting juveniles from voting, serving on juries, or marrying without parental consent. *Id*. Because of this difference, for which they are not responsible. juveniles' "irresponsible conduct is not as morally reprehensible as that of an adult." *Id*. at 570.

Second, the Court recognized that juveniles are far more susceptible to the influences of environmental factors, including peer pressure. *Roper*, 543 U.S. at 569. For example, *Roper* approvingly cited *Eddings v. Oklahoma*'s observation that "youth … is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Id*. (citing *Eddings*, 455 U.S. 104, 115 (1982)). The Court also pointed to the lack of control that juveniles have over their

surroundings, and their lack of experience or ability to extricate themselves from scenarios that may lead to criminal involvement. *Id*. Due to these innate differences, the *Roper* Court concluded: "juveniles have greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id*. at 570.

Third, juveniles' personalities are more transitory, and their character is not as well-formed, as adults. *Roper*, 543 U.S. at 570. Accordingly, a juvenile's commission of a heinous crime is less conclusive evidence of an "irretrievably depraved character;" from a "moral standpoint," it would be "misguided" to equate a minor's failings with those of an adult, because "a greater possibility exists that a minor's character deficiencies will be reformed." *Id*.

Thus, the Court concluded that "[t]hese differences render suspect any conclusion that a juvenile falls among the worst offenders." *Roper*, 543 U.S. at 570. Accordingly, neither retribution nor deterrence were sufficient reasons for imposing the death penalty on a juvenile. *Id*. at 571–72. Under the theory of retribution, the death penalty is disproportional for juveniles, because it is the "most severe penalty" while their "culpability or blameworthiness is diminished, to a

substantial degree, by reason of youth and immaturity." *Id*. at 571. Likewise, society's interest in deterrence is not served "because teenagers are not generally able to make the kinds of cost-benefit analyses that are capable of being deterred by an increased sanction." *Id*. at 572.

2. The vulnerabilities and limited culpability of offenders between ages 18 and 21 parallel those outlined in *Roper* and *Atkins*, and thus demonstrate the need for categorical protection from execution.

In the fourteen years since *Roper*, scientific understanding of the significance of youth has fundamentally changed. Neuroscience now supports a more nuanced view of the physiological markers of youth, how those markers affect behavior, and ways in which young people's brains continue developing into their mid-twenties.

Over the past 30 years, a growing body of research has revealed that vital brain development continues well after the age of 18. Advancements in neuroimaging and neuroscience have deepened our understanding of the human brain, how it develops, and how it is impacted by environmental factors. Recent studies have established that the prefrontal cortex, the part of the brain responsible for long-term thinking and planning, is not fully formed and functioning until the mid- to late-20s. As such, the brains of young adults are more similar to those

of adolescents than the general adult population; further, individuals who have endured trauma may have a younger developmental age compared to their biological age.

Typical human brain development occurs sequentially and is heavily impacted by environment beginning in the prenatal period.[64] In general terms, the brain has four main sections: the brainstem, the diencephalon and cerebellum, the limbic system, and the cortex. The brainstem, diencephalon, and cerebellum—known as the "reptile brain"—are the oldest and least evolved parts of the human brain. Development there occurs during the prenatal and infancy period and is primarily responsible for biological and homeostatic processes such as regulating body temperature, heart rate and appetite, among other regulatory tasks. The limbic system is next to develop, occurring during childhood and adolescence, and regulates emotion. It houses the amygdala and the hippocampus. The amygdala is the "key brain region responsible for the processing, interpretation, and integration of

---

[64] Bruce Perry, *Child maltreatment: A neurodevelopmental perspective on the role of trauma and neglect in psychopathology*, in CHILD AND ADOLESCENT PSYCHOPATHOLOGY 93–128 (T.P. Beauchaine & S.P. Hinshaw eds., 2008), https://www.semanticscholar.org/paper/Child-maltreatment%3A-A-neurodevelopmental-on-the-of-Perry/c863f8115673b42ef0efcb54e04d7e1d137e7094.

emotionally relevant information," while the hippocampus largely controls how we store and retrieve memory.[65] The cortex is the most evolved part of the human brain and does not reach its full maturity until late 20s or early 30s. This part of the brain is responsible for problem-solving, abstract thinking, decision-making, risk perception and assessment, judgment, impulse control, spontaneity, and emotional regulation.[66]

During young adulthood, the human brain experiences a unique developmental stage involving a "maturity gap" between the limbic and cortex systems. Upon puberty, the brain begins to rewire itself through neural pruning, which maximizes efficiency across the brain, and myelination, which facilitates communication and connectivity between parts of the brain; these processes typically occur throughout late adolescence.[67] Changes occur rapidly in the limbic areas, resulting in a

---

[65] Perry, *supra* n. 64.

[66] B.J. Casey et al., *The adolescent brain*, 1124(1) ANN. N.Y. ACAD. SCI. 111–126 (2008), https://pubmed.ncbi.nlm.nih.gov/18400927/.

[67] Abigail A. Baird et al., *Functional magnetic resonance imaging of facial affect recognition in children and adolescents*, 38(2) J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 195–199 (1999), https://www.sciencedirect.com/science/article/pii/S0890856709628975.

limbic system that is significantly closer to full maturity than the frontal cortex. This results in a "maturity gap" between the more mature limbic system and a still-developing cortex, especially in the prefrontal cortex area.[68] Moreover, adolescents at this developmental stage experience an imbalance in their neurotransmitter levels, as dopamine increases and serotonin decreases. This imbalance, in favor of dopamine, leads to a propensity for risky, impulsive decisions and behaviors.[69] The young brain is vulnerable to increased sex hormones, stressors (physical, mental, economic, and psychological), substance use, nutrition, sleep, pharmacotherapy, and additional inputs from one's heredity and environment.[70] The young brain is also vulnerable to impaired decision making, especially when strong emotions are involved, as the limbic

---

[68] B.J. Casey et al., *Braking and accelerating of the adolescent brain*, 21(1) J. RES. ADOLESC. 21–33 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3070306/.

[69] Warren Binford, *Criminal capacity and the teenage brain: Insights from neurological research*, 14(3) THE DYNAMICS OF YOUTH JUSTICE & THE CONVENTION ON THE RIGHTS OF THE CHILD IN SOUTH AFRICA 1–6 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209505.

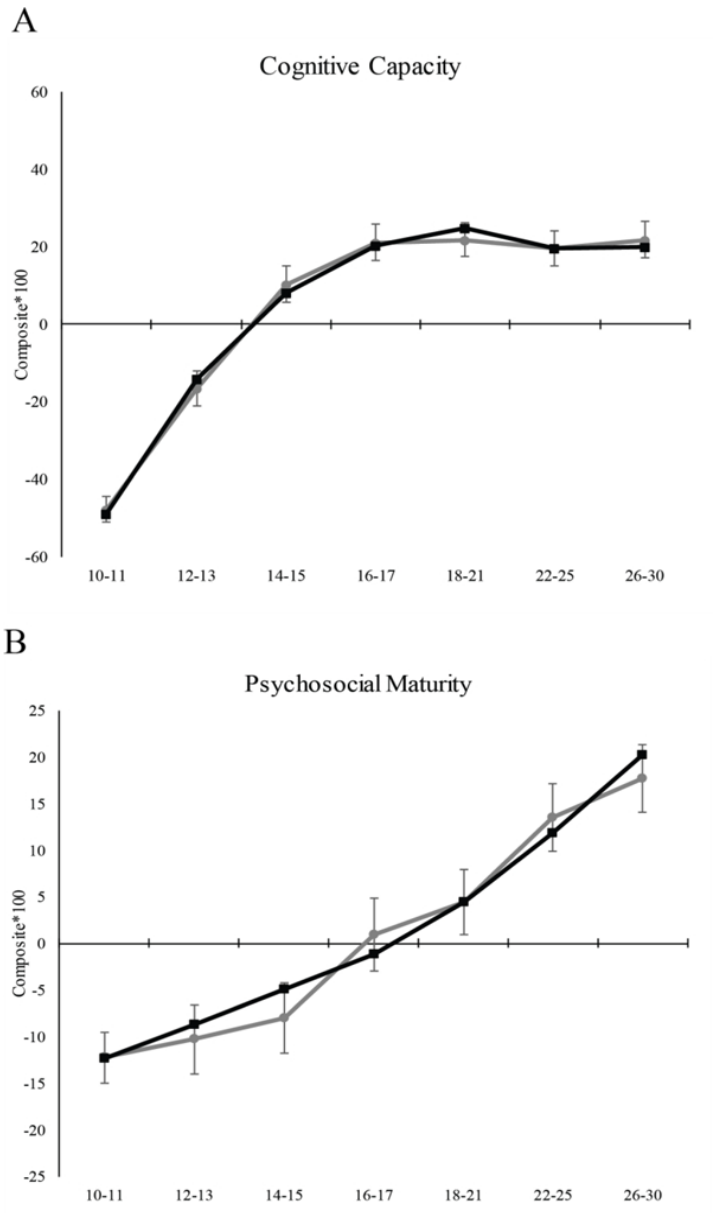
[70] Mariam Arain et al., *Maturation of the adolescent brain*, 9 NEUROPSYCH. DIS. TREAT. 449–461 (2013), https://www.ncbi.nlm.nih.gov/pmc/ articles/PMC3621648/.

system will override the still-developing cortex, site of logical thought.[71] Thus, this gap leads to increased risky behavior and impulsivity among young adults, along with the need for peer affiliation, which largely changes by the time the young adult reaches full brain maturation.[72]

These behaviors are not unique to young adults in the United States. A team of twenty researchers studied 5,200 individuals from 11 countries between the ages of 10 and 30, and found that in eight of the 11 countries, young adults aged 18 through 21 showed less psychosocial maturity as compared to adults in their late 20s.

[71] Casey et al., *supra* n. 68, at 21–33.

[72] Robert M. Sapolsky, BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST (2017).



This means that "young adults—like adolescents—are more likely than somewhat older adults to be impulsive, sensation seeking, and sensitive to peer influence in ways that influence their criminal conduct" due largely to the lack of psychosocial maturity (including the capacity for self-restraint, which does not fully mature until the mid- to late-

20s).[73] The results of this global study appear to "align with neuroscientific evidence that the brain continues to develop during the early 20s, especially with regard to connectivity among brain regions in ways that improve self-regulation" across young adults worldwide.[74] In other words, in all ways relevant to moral culpability the brains of people under twenty-one are like teenagers' brains, because they can trigger adult emotions but not manage or process them—unlike the brains of adults.

Such psychological studies are complemented by growing developments in neuroscience. Magnetic resonance imaging (MRI) scans, which depict the size and shape of brain structures, have generally shown that the brain develops from the bottom up, with the prefrontal cortex being the last to develop.[75] As youth transition into late adolescence, white matter gradually increases, *see* Figure 2, while grey matter

---

[73] Grace Icenogle et al., *Adolescents' cognitive capacity reaches adult levels prior to their psychosocial maturity: Evidence for a "maturity gap" in a multinational, cross-sectional sample*, 43(1) LAW HUM. BEHAV. 83 (2019), https://pubmed.ncbi.nlm.nih.gov/30762417/.

[74] *Id.* at 80.

[75] Arain et al., *supra* n. 70, at 449–461.

decreases, *see* Figure 3, starting with sensorimotor and brainstorm systems.[76]

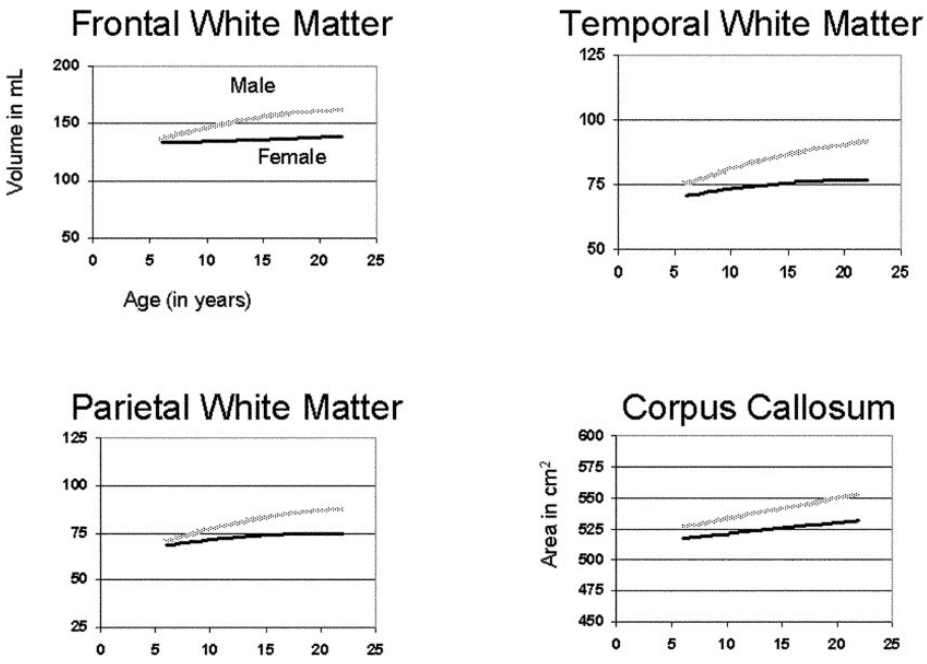


FIGURE 2. White matter in brain relative to age.

[76] Nitin Gogtay et al., *Dynamic mapping of human cortical development during childhood through early adulthood*, 101(21) PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 8174–8179 (2004).

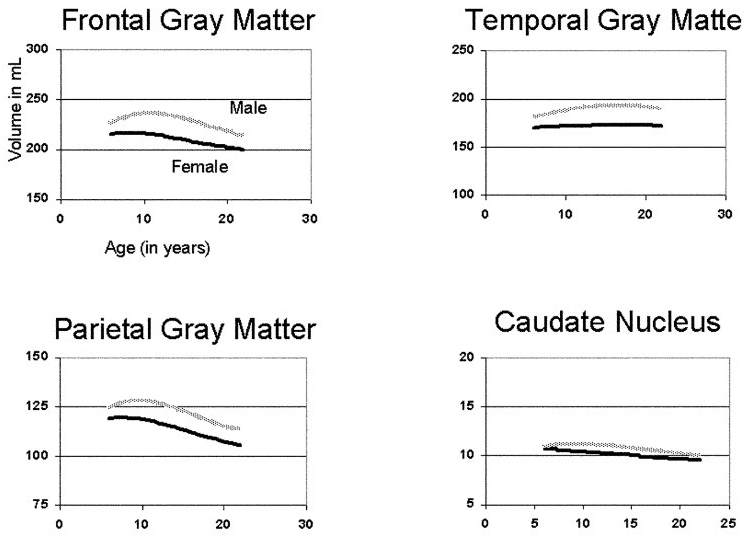


FIGURE 3. Gray matter relative to age.

Eventually, white matter maturates in the executive and emotion systems in the mid-to-late 20s.[77] Specifically, recent neuroimaging studies show that the volume of white matter in the brain is relatively stable until around age twenty-one, when it begins to increase dramatically.[78] That is important because greater volume of white matter increases neurocircuitry, thus improving the exchange of information

---

[77] Daniel J. Simmonds et al., *Developmental stages and sex differences of white matter and behavioral development through adolescence: A longitudinal diffusion tensor imaging (DTI) study*, 92 J. NEUROIMAGE 356–68 (2014), https://pubmed.ncbi.nlm.nih.gov/24384150/.

[78] Lars T. Westlye et al., *Life-Span Changes of the Human Brain White Matter: Diffusion Tensor Imaging (DTI) and Volumetry*, 20 CEREB. CORTEX 2055, 2062 (2010) (describing lifetime neurological development), https://pubmed.ncbi.nlm.nih.gov/20032062/.

throughout the limbic system.[79] This means that the brains of people under twenty-one are poorly integrated.[80]

One study with 168 participants found white matter growth, as well as overall structural brain development, had "still not reached their plateau" by age 23.[81] Another study discovered that the brains of young people aged 18 to 21 functioned in response to a threat in a way that was more comparable to 13-to-17-year-olds than those aged 22 to 25.[82] This

---

[79] Jay N. Giedd, *Structural magnetic resonance imaging of the adolescent brain*, 1021 ANN. N.Y. ACAD. SCI. 77 (2004), https://pubmed.ncbi.nlm.nih.gov/15251877/.

[80] Bradley C. Taber-Thomas and Koraly Perez-Edgar, *Emerging Adulthood Brain Development, in* THE OXFORD HANDBOOK OF BRAIN DEVELOPMENT 9 (Jeffrey Jensen Arnett ed., 2015). In one study designed to test the real-world impacts of an underdeveloped frontolimbic system, researchers asked teenagers, "emerging adults" (defined in the study as people ages eighteen to twenty-one), and young adults in their mid-twenties to exercise impulse control under emotionally neutral and emotionally arousing conditions. Alexandra O. Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCHOL. SCI. 549 (2016), https://www.researchgate.net/publication/295869288_When_Is_an_Adolescent_an_Adult_Assessing_Cognitive_Control_in_Emotional_and_Nonemotional_Contexts. Although emerging adults performed similarly to young adults in response to emotionally neutral cues, that pattern flipped in response to threatening cues: emerging adults performed like teenagers and their brain activity looked like that of teenagers, not adults. *Id.* at 556–57.

[81] Christian K. Tamnes et al., *Brain maturation in adolescence and young adulthood: Regional age-related changes in cortical thickness and white matter volume and microstructure*, 20 CEREB. CORTEX 534 (2010), https://academic.oup.com/cercor/article/20/3/534/414689.

[82] Cohen et al., *supra* n. 80, at 549-64.

research has crucial implications for young offenders whose cognitive and executive functions, such as self-regulation, judgment, decision making, and impulsivity, have yet to mature, thus drastically diminishing their moral culpability and making the maximum punishment disproportionate.

3. Late adolescent Black and Latino defendants require similar, special considerations that have been previously extended to persons with intellectual disabilities in *Atkins v. Virginia*, 536 U.S. 304 (2002).

Young people of color are disproportionately sentenced to die—even more so than older adult capital defendants of color. The role of race is further amplified when the victim is white. Part of *Atkins*'s rationale for exempting rationale defendants with intellectual disability from the death penalty was that intellectually disabled people are a particularly vulnerable class. *Atkins* expressed concern about the heightened "possibility of false confessions," the lesser ability of such defendants "to give meaningful assistance to their counsel," the fact that they are "typically poor witnesses," and that "their demeanor may create an unwarranted impression of lack of remorse for their crimes," all of which could enhance the likelihood of a death sentence "in spite of factors which

may call for a less severe penalty." *Atkins*, 536 U.S. 304, 320–21 (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Furthermore, damaging stereotypes can impermissibly influence the sentencing determination and exacerbate the inherent vulnerabilities of this particular class.

Research on racial disparities in capital sentencing and executions demonstrate that young men of color face an increased likelihood of harsher punishment than older adults. While executions of those who were under 21 at the time of their offense are decreasing, out of this group it is disproportionately Black and Latino offenders who are executed. The heightened risk that racial discrimination will play a role in sentencing renders this class of offenders particularly vulnerable and in need of protection from the death penalty like the protection granted to people with intellectual disabilities in *Atkins*.

Numerous studies have shown that Black and Latino young men are more likely to be sentenced to jail or prison and receive longer incarceration sentences than other defendants (i.e., defendants who are older, female, or white).[83] In fact, one study reviewed sentencing data in

[83] Peter S. Lehmann, *Sentencing other people's children: the intersection of race, gender, and juvenility in the adult criminal court*, 41 J. CRIME JUSTICE 553 (2018), https://www.tandfonline.com/doi/full/10.1080/0735648X.2018.1472624; Besiki L.

Pennsylvania and found that young men of color receive harsher punishments than their white and female counterparts.[84] Several recent studies found that Latino men receive similar or even harsher sentences than Black and white defendants.[85]

Researchers have posited that Latino men receive harsher punishments in certain contexts due to prejudicial narratives and stereotypes linked to immigrants and Latino people more broadly, including that they are "culturally dissimilar and threatening" compared to Black or white people.[86] In Southern border states, young Latino men like Mr. Gonzales are frequently associated with violence and

---

Kutateladze et al., *Cumulative disadvantage: Examining racial and ethnic disparity in prosecution and sentencing*, 52 CRIMINOLOGY 514 (2014), https://onlinelibrary.wiley.com/doi/full/10.1111/1745-9125.12047.

[84] William D. Bales & Alex R. Piquero, *Racial/Ethnic differentials in sentencing to incarceration*, 29 JUSTICE Q. 742 (2012), https://heinonline.org/HOL/LandingPage?handle=hein.journals/jquart29&div=37&id=&page=.

[85] *E.g.*, Bales & Piquero, *supra* n. 84 (finding that young Latino men receive harsher sentences than white defendants, though not as harsh as young Black men in the study group).

[86] Casey T. Harris & Ben Feldmeyer, *Latino immigration and White, Black, and Latino violent crime: A comparison of traditional and non-traditional immigrant destinations*, 42 SOC. SCI. RES. 202 (2013), https://pubmed.ncbi.nlm.nih.gov/23146607/.

criminality.[87] Young men of color have historically been linked to violent crime as illustrated by the virulent spread of the "super predator" narrative that emerged in the late 1980s and early 1990s.[88] These narratives have led to increased calls for punitive legislation that only furthers marginalization and criminalization of young men of color.[89] Research has shown that deviant labeling increases negative stereotypes associated with disadvantaged and underserved youth.[90] It is therefore unsurprising that (namely white) people, including white criminal justice workers, associate late adolescent offenders of color with delinquency and

---

[87] Malcolm D. Holmes et al., *Minority threat, crime control, and police resource allocation in the southwestern United States*, 54 CRIME DELINQ. 128 (2007), https://journals.sagepub.com/doi/10.1177/0011128707309718.

[88] Gayle M. Rhineberger-Dunn, *Myth versus reality: Comparing the depiction of juvenile delinquency in metropolitan newspapers with arrest data*, 83 SOCIOL. INQ. 473 (2013), https://onlinelibrary.wiley.com/doi/full/10.1111/soin.12006.

[89] Michael Welch et al., *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 YOUTH SOC. 3 (2002), https://journals.sagepub.com/doi/10.1177/0044118X02034001001.

[90] Jón Gunnar Bernburg & Marvin D. Krohn, *Labeling, life chances, and adult crime: The direct and indirect effects of official intervention in adolescence on crime in early adulthood*, 41 CRIMINOLOGY 1287 (2003), https://www.researchgate.net/publication/227602907_Labeling_life_chances_and_adult_crime_The_direct_and_indirect_effects_of_official_intervention_in_adolescence_on_crime_in_early_adulthood.

violent crime and thus are more likely to support punitive policies against juvenile defendants.[91]

These racialized sentencing disparities are most apparent in capital proceedings. Due to in-group preference, racial prejudice, and implicit bias,[92] jurors tend to return harsher recommendations—such as the death penalty—for defendants from different racial or ethnic backgrounds, and more lenient decisions for defendants from the same racial or ethnic background, as the jurors themselves.[93] Among people aged 21 and under sentenced to death since *Roper*, 73% of death sentences in this age group were imposed against Black and Latino offenders, who are far more likely to receive a death sentence than their

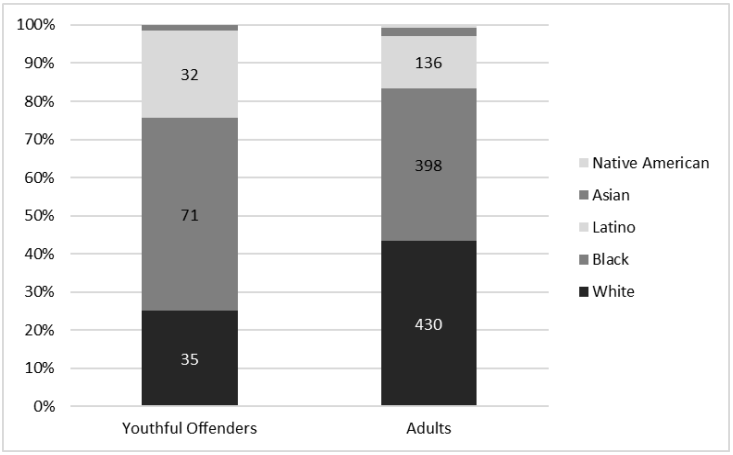
---

[91] Justin T. Pickett & Ted Chiricos, *Controlling other people's children: Racialized views of delinquency and Whites' punitive attitudes toward juvenile offenders*, 50 CRIMINOLOGY 673 (2012), https://psycnet.apa.org/record/2012-19582-004; Peter S. Lehmann et al., *Race, juvenile transfer, and sentencing preferences: Findings from a randomized experiment*, 9 RACE JUSTICE 251 (2017), https://journals.sagepub.com/doi/full/10.1177/2153368717699674.

[92] Jerry Kang et al., *Implicit bias in the courtroom*, 59 UCLA L. REV. 1124 (2012), https://www.researchgate.net/publication/256016531_Implicit_Bias_in_the_Courtroom.

[93] Dennis J. Devine & D.E. Caughlin, *Do they matter? A meta-analytic investigation of individual characteristics and guilt judgments*, 20 PSYCHOL. PUB. POL. L. 109 (2014), https://psycnet.apa.org/record/2014-14497-001.

white peers (25%). These disparities are even more stark than those among adult defendants over 21 sentenced to death (45% white and 53% Black and Latino).[94]

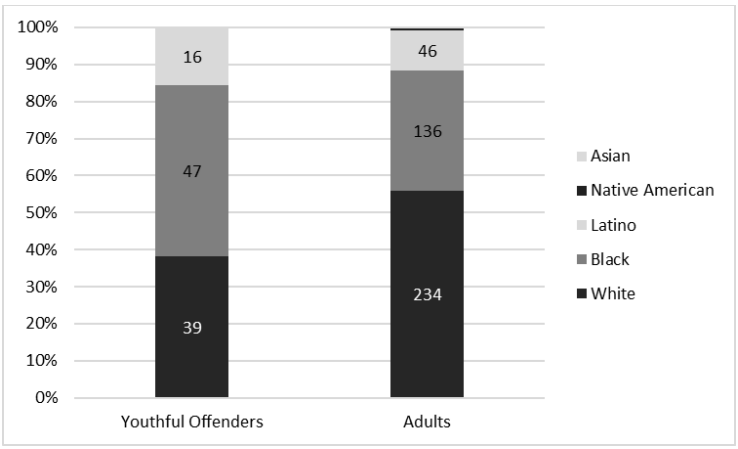


Death Sentences by Race and Age at Crime, 2005–2017[95]

Similarly, Black and Latino young defendants are disproportionately executed compared to white young defendants and to adult defendants.

[94] Blume et al., *Death By Numbers, supra* n. 57, at 947.

[95] *Id*. at 948.



Executions by Race and Age at Crime, 2005–2017[96]

And when the victim is white, racial disparities in sentencing and executions are amplified. In those cases, Black and Latino defendants are even more likely to receive a death sentence.[97] More than two thirds of late adolescent capital cases resulting in a death sentence involved white victims.[98] Although 59% of late adolescent homicide defendants are white, post-*Roper* 38% of Black late adolescent defendants convicted of killing a white victim were executed, whereas 28% of white late adolescent defendants convicted of killing a white victim were executed.[99]

---

[96] Blume et al., *Death By Numbers, supra* n. 57 at 949.

[97] Jennifer S. Hunt, *Race, ethnicity, and culture in jury decision making*, 11 ANNU. REV. L. SOC. SCI. 269 (2015), https://www.annualreviews.org/doi/abs/10.1146/annurev-lawsocsci-120814-121723.

[98] Blume et al., *Death by Numbers*, *supra* n. 57, at 950.

[99] *Id.*

Notably, 39% of white adult defendants convicted of killing a white victim were executed compared to 22% of Black adult defendants convicted of killing a white victim.

Moreover, a defendant's socioeconomic class can worsen sentencing disparities. In addition to juror bias against Latino defendants with low socioeconomic status (SES),[100] white jurors in particular are more likely to recommend the death penalty for Latino defendants from low SES backgrounds where mitigating evidence is "weak" than for Latino defendants from high SES backgrounds or white defendants from any SES background lacking strong mitigating evidence.[101]

Lastly, research shows that race and age also correlate with the likelihood of a vacated death sentence. Despite the fact that 34% of late adolescent white defendants and 35% of Black late adolescent defendants

---

[100] Cynthia Willis-Esqueda et al., *The effects of ethnicity, SES, and crime status on juror decision making: A cross-cultural examination of European American and Mexican American mock jurors*, 30 HISP. J. BEHAV. SCI. 181 (2008), https://journals.sagepub.com/doi/10.1177/0739986308315319.

[101] Russ K.E. Espinoza & Cynthia Willis-Esqueda, *The influence of mitigation evidence, ethnicity, and SES on death penalty decisions by European American and Latino venire persons*, 21 CULTUR. DIVERS. ETHNIC MINOR. PSYCHOL. 288 (2015), https://psycnet.apa.org/record/2014-34823-001.

ultimately had their death sentences vacated, only 3% of Latino late adolescent defendants obtained the same result.[102] A similar pattern holds for adults: only 14% of Latino adult defendants had their sentences vacated, compared to 27% of white adult defendants and 30% of Black adult defendants. These differences reveal the insidious ways in which perceptions of dangerousness associated with race and age create disproportionate negative outcomes for Black and Latino young men.

D. A Categorical Ban Against Imposing the Death Penalty on Defendants Under 21 is Constitutionally Required.

In short, people under 21 display the same traits identified in *Atkins*, *Roper*, and *Miller* as diminishing blameworthiness and undermining the case for retributive punishment. Their reduced culpability removes them, as a class, from the group of defendants that can reliably be considered the worst of the worst. Sentencing and execution patterns and developments in law and social attitudes show a national consensus in support of this exemption, along with a need to protect late adolescent defendants of color from the death penalty due to

[102] *Id.*

the heightened risk they face that racial discrimination will influence the sentencing decisions in their cases.

The death penalty violates the Eighth Amendment where, as here, it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

The Court recognized in *Roper* that the 18-year cutoff was arbitrary, but cited scientific, societal, and legal justifications for drawing the line there. In the intervening years, those justifications have eroded. Today, "[t]he evolving standards of decency that mark the progress of a maturing society"[103] demand that the categorical bar be extended to age 21.

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

Texas law allows a habeas petitioner to return to court and be heard on the merits of a subsequent application for state habeas corpus relief if it is shown, *inter alia*, that

[103] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

> 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 section 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] by a preponderance of the evidence." *Blue*, 230 S.W.3d at 163 (emphasis supplied). Mr. Gonzales can satisfy this requirement.

Appointed federal habeas counsel filed Mr. Gonzales's most recent state habeas application on February 23, 2011.

The factual basis for this claim was not available at the time the prior application was filed. The nationwide study[104] establishing that a national consensus against imposing the death penalty against defendants under age 21, cited extensively above, was just published in

[104] Blume et al., *Death by Numbers*, *supra* n. 57.

2020. The ABA's formal resolution calling on all death-penalty jurisdictions to prohibit capital punishment for any individual 21 years old or younger at the time of the offense was passed in 2018.[105] And most recently, the American Psychological Association's 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" was opened for public comment in May 2022. All of these developments occurred within the last four-and-a-half years, while Mr. Gonzales's prior application was filed over a decade ago. The factual basis for this claim is therefore "newly available" under the meaning of section 5.

F. 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).

Above, Mr. Gonzales has alleged facts showing the emergence of a national consensus against the execution of older adolescents extending

[105] *See* ABA *Late Adolescent Death Penalty Resolution*, *supra* n. 59.

the Eighth Amendment rule announced in *Roper* to all those under 21 at the time of the offense. As this Court held in *Ex parte Blue*, "the language of Article 11.071, Section 5(a)(3) is broad enough on its face to accommodate an absolute constitutional prohibition against, as well as statutory ineligibility for, the death penalty." 230 S.W.3d at 161. The *Blue* Court explicitly contemplated the application of section 5(a)(3) to categorical exemptions from death eligibility because

> [u]pon satisfactory proof at trial that a capital murder defendant is mentally retarded *or was a juvenile*, no rational juror would answer any of the special issues in the State's favor, if only for the simple reason that the statutory special issues would not be submitted to the jurors in the first place. Because the constitution absolutely prohibits imposing the death penalty upon a mentally retarded *or juvenile offender*, once it has been definitively shown at trial that the offender was in fact retarded *or a juvenile*, no jury would even have occasion to answer the statutory special issues. In short, no rational juror would answer the special issues in favor of execution because no rational juror *could,* consistent with the Eighth Amendment.

Blue, 230 S.W.3d at 161 (emphasis supplied).

As explained above, the Supreme Court's rationales for exempting juveniles under the age of 18 from death eligibility apply with equal force to Mr. Gonzales, who was just 71 days over the age of 18 at the time of the crime for which he is sentenced to death. The developmental, psychological, and behavioral differences between youths and adults are

so significant that young defendants cannot not be subject to execution because "juvenile offenders cannot with reliability be classified among the worst offenders." *Roper*, 543 U.S. at 569. By virtue of his young age, Mr. Gonzales was similarly impaired, and had yet to develop the psychological, behavioral, and moral culpability required by the Eighth Amendment to be considered eligible for the ultimate punishment. Evolving standards of decency now demonstrate a national consensus against exposing *any* adolescent to the death penalty, as explained above. Under application of the appropriate constitutional standard, "no rational juror would answer the special issues in favor of execution because no rational juror *could,* consistent with the Eighth Amendment." *Blue*, 230 S.W.3d at 161.

Mr. Gonzales therefore requests that this Court stay his scheduled execution date and authorize further proceedings on this claim.

CONCLUSION & PRAYER FOR RELIEF

The State relied on materially inaccurate evidence and testimony to secure a death sentence for Mr. Gonzales that was unreliable because it rested on false premises. The trial diagnosis of antisocial personality disorder was wrong. The State's recidivism evidence has been proven to be false. The entirely-fabricated evidence of necrophilia underlying the State expert's opinion has been recanted. And the State's expert himself now acknowledges that his trial opinion and testimony were inaccurate. The import of this false evidence and testimony bore directly on the jury's crucial determination that Mr. Gonzales would be a future danger. Mr. Gonzales is entitled to relief.

Furthermore, Mr. Gonzales was 18 years and 71 days old in 2001 when he committed the offense for which he was sentenced to die. But today, the evolving standards of decency that mark the progress of a maturing society demand that the categorical bar be extended to age 21.

For these reasons, Mr. Gonzales prays that this Court stay the scheduled execution, find that the requirements of section 5 have been met, and remand this case to the trial court for further development on the claims contained herein.

Respectfully submitted,

Raoul D. Schonemann
State Bar No. 00786233
Thea J. Posel
State Bar No. 24102369
Capital Punishment Clinic
University of Texas School of Law
727 E Dean Keeton
Austin, Texas 78705
rschonemann@law.utexas.edu
tposel@law.utexas.edu
(512) 232-9391 phone
(512) 471-3489 fax

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

Attorneys for Ramiro Felix Gonzales

CERTIFICATE OF SERVICE

I certify that the foregoing application, with exhibits attached, was served on Mark Haby, Medina County Criminal District Attorney, via the Court's electronic filing system on this 30th day of June, 2022.

/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 25,011 words, excluding the parts exempted by Tex. R. App. Proc. 9.4(i)(1). This pleading complies with the typeface requirements of Tex. R. App. Proc. 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 30, 2022

/s/ Thea J. Posel

STATE OF TEXAS §

COUNTY OF TRAVIS §

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.

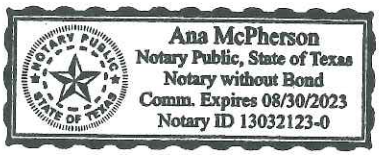
2. I am the duly authorized attorney for Ramiro Felix Gonzales, having the authority to prepare and to verify Mr. Gonzales's Subsequent Application for Post-Conviction Writ of Habeas Corpus.

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 30, 2022.



Notary Public, State of Texas