WR-70,969-02
COURT OF CRIMINAL APPEALS
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THIS IS A CAPITAL CASE

IN THE 454TH DISTRICT COURT
MEDINA COUNTY, TEXAS

AND

THE COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

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

SUGGESTION TO RECONSIDER, ON THE COURT'S OWN MOTION, DISMISSAL OF APPLICANT'S FIRST SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Applicant Ramiro Gonzales respectfully suggests that this Court reconsider, on its own motion, the dismissal of his First Subsequent Application for a Writ of Habeas Corpus (No. WR-70,969-02) (hereinafter, "First Subsequent Habeas Corpus Application"). There, Mr. Gonzales alleged, *inter alia*, that his trial counsel was ineffective because counsel unreasonably failed to develop and present evidence during the sentencing phase that Mr. Gonzales suffers from Fetal Alcohol Spectrum Disorder and was subjected to sexual, emotional, and physical abuse as a child. Trial counsel also failed to explain the impact of these mitigating circumstances on Mr. Gonzales's development and how they reduced his moral culpability for the crime.[1] This Court held, *inter alia*, that Mr. Gonzales's ineffectiveness claim failed to satisfy the requirements of Article 11.071, § 5, and dismissed his first subsequent application as "abuse of the writ."[2]

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[1] First Subsequent Application for a Writ of Habeas Corpus, *Ex parte Gonzales*, No. WR-70,969-02 (Feb. 23, 2011).

[2] *Ex parte Gonzales*, No. WR-70,969-02, 2012 WL 340407 (Tex. Crim. App. Feb. 1, 2012) (not designated for publication).

However, Mr. Gonzales's *initial* opportunity at habeas review (No. WR-70,969-01, hereinafter, "Initial Application") was thwarted by the filing of a document by court-appointed counsel that "was not a proper writ application."[3] The Initial Application was a facially deficient nine-page document that failed to allege a single cognizable claim for relief.[4] The "substantive" portion of the Initial Application—*the part that purported to allege "grounds for relief"—was a mere three-and-a-half pages*.

Three of the four "grounds for relief" in the Initial Application had either (1) already been raised and rejected on direct appeal, or (2) had not been raised on direct appeal but could have been, and thus were barred from habeas review under this Court's well-established precedents.[5] One

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[3] *Ex parte Medina,* 361 S.W.3d 633, 642 (Tex. Crim. App. 2011) (quoting *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002)).

[4] Of those nine pages, the first page was devoted to a recitation of facts establishing Mr. Gonzales' "confinement and restraint," which was not in dispute. The second page consisted of a highly condensed summary of the evidence at both phases of Mr. Gonzales' nine-day capital trial. A third page listed the headings of the four "grounds for relief" in all-capital letters. The seventh and eighth pages included a prayer for relief, appointed counsel's signature, and an affidavit of verification. The ninth page of the document was the certificate of service.

[5] *See*, *e.g.*, *Ex parte Nailor*, 149 S.W.3d 125, 131 (Tex. Crim. App. 2004) ("Claims raised and rejected on direct appeal are generally not cognizable on habeas corpus"); *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989) ("The Great Writ should not be used in matters that should have been raised on appeal.").

"ground" was merely a single sentence in length and was unsupported by any legal authority whatsoever. Because the Initial Application alleged no cognizable claims for habeas relief and was insufficiently pled on its face, regardless of its title, it was not "a proper writ application under Article 11.071."[6]

The trial court entered findings of fact and conclusions of law recommending that the Initial Application "should be in all things denied as being *frivolous* and without merit." Findings of Fact, Conclusions of Law, and Recommendation at *4 (Conclusion of Law H), *Ex parte Gonzales*, No. 04-02-09091-CR (38th Dist. Ct., Medina County, Tex., May 14, 2012) (emphasis added).

This Court denied relief, adopting the trial court's finding that the Initial Application was "in all things … frivolous." *Ex parte Gonzales*, No. WR-70,969-01, 2009 WL 3042409 (Tex. Crim. App. Sept. 23, 2009), *den'd after remand*, 2012 WL 2424176 (Tex. Crim. App. June 27, 2012).[7]

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[6] *See Medina*, 361 S.W.3d at 637 (habeas application that "does not allege specific facts, which, if proven true, would entitle applicant to relief" is "not a proper writ application under Article 11.071").

[7] Significantly, in its order adopting the trial court's recommendation that the Initial Application was "in all things … frivolous and without merit," this Court explicitly *declined to adopt* only the findings entered by the trial court purporting to conclude

In the years since Mr. Gonzales's court-appointed counsel filed the Initial Application in 2008, Texas has taken substantial steps to ensure that *every* death-sentenced inmate receives appropriate representation in initial state habeas corpus proceedings.[8] And in those rare instances where a facially–deficient initial application has been filed in a death penalty case, this Court has invoked its equitable powers to appoint new counsel and give the habeas applicant another opportunity for post-conviction review.[9] Cases like *Ex parte Kerr* and *Ex parte Medina*[10] reflect

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that trial counsel had rendered effective assistance of counsel. *Ex parte Gonzales*, 2009 WL 3042409 at *1 (declining to adopt the trial court's findings 20-22 and conclusions A-F and I). Among the findings and conclusions that this Court declined to adopt were a finding that Mr. Gonzales's trial lawyers "did enthusiatically [sic] and vigorously represent [him] at all times" (finding 20), and conclusions of law that Mr. Gonzales "did at all times receive effective assistance of counsel in all respects and at all times" (conclusion of law A), and that his trial counsel "did render effective assistance of counsel to the defendant in all aspects in regard to the trial of this matter" (conclusions of law B and C).

[8] In 2009, the Legislature established the Office of Capital Writs (now, the Office of Capital and Forensic Writs), which is appointed as counsel in the vast majority of capital initial state habeas corpus proceedings and provides high quality representation. As this Court is aware, an initial 11.071 writ application filed by the OCFW reflects extensive investigation, is pled with detailed specificity, raises cognizable "extra-record" grounds for relief, and is typically supported by numerous declarations and other extra-record evidence.

[9] As this Court has observed, "habeas corpus is an equitable remedy," the disposition of which "must be underscored by elements of fairness and equity." *Ex parte Perez*, 398 S.W.3d 206, 210, 216 (Tex. Crim. App. 2013).

[10] *Ex parte Kerr*, 64 S.W.3d 414 (Tex. Crim. App. 2002); *Ex parte Medina*, 361 S.W.3d 633 (Tex. Crim. App. 2011).

this Court's recognition that principles of fairness and equity weigh in favor of giving death-sentenced habeas applicants a second opportunity at habeas review where the initial writ application filed by court-appointed counsel was so grossly deficient that it failed to amount to a "proper" or "cognizable" writ application, thus depriving the applicant of the "one full and fair opportunity" to which they are entitled under Texas law.[11]

Therefore, Mr. Gonzales respectfully suggests that this Court reconsider, on its own motion, its dismissal of the First Subsequent Habeas Corpus Application as an abuse of the writ and reopen it for consideration of the ineffective assistance of counsel claim raised therein. Doing so would not require this Court to create or recognize a new rule in habeas corpus proceedings. Instead, this Court should apply the principles of its decisions in *Kerr* and *Medina*, find that Mr. Gonzales's Initial Application was not a true or "proper" habeas application, reconsider its dismissal of Mr. Gonzales's First Subsequent Habeas Corpus Application as an abuse of the writ, and reopen the First Subsequent Habeas Corpus Application for consideration on the merits.

[11] *Kerr*, 64 S.W. 3d at 419; *Medina*, 361 S.W.3d at 642–43.

I. STATEMENT OF THE CASE

Following Mr. Gonzales's 2006 conviction and death sentence, the Medina County trial court appointed San Antonio solo practitioner Terry McDonald to represent Mr. Gonzales in initial state habeas corpus proceedings. As described more fully below, Mr. McDonald's representation was grossly deficient and fell far below prevailing, applicable professional standards for performance by habeas counsel promulgated by the State Bar of Texas that were in force at the time[12]—as did his final product. On September 22, 2008, Mr. McDonald filed a nine-page, facially deficient document styled as an "Application for Writ of Habeas Corpus," thereby foreclosing Mr. Gonzales's "one full and fair opportunity to present his constitutional or jurisdictional claims" to which he was statutorily entitled under Texas law.

[12] State Bar of Texas, Guidelines and Standards for Texas Capital Counsel (adopted Apr. 21, 2006), Guidelines 12.2 ("Duties of Post-Trial Counsel") and 12.2(B) ("Duties of Habeas Corpus Counsel"). *See also* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (adopted February 2003), Guideline 10.15.1 ("Duties of Post-Conviction Counsel").

A. Mr. McDonald's Representation Fell Far Short of the Prevailing Standards of Care for Texas Postconviction Counsel in Capital Cases.

Mr. McDonald's timesheets, submitted to support requests for compensation for work he claimed to have performed, reflect that he:

- *never* met with Mr. Gonzales at any time during the course of his appointment;[13]

- failed to conduct *any* review of the case beyond the appellate record;[14]

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[13] Failure to meet with the client at any time during the course of the representation violates every professional standard and guideline that has ever been promulgated for representation in criminal cases. The applicable Guideline of the State Bar of Texas Guidelines and Standards for Texas Capital Counsel, Guideline 12.2(B), states:

> "Without exception, habeas counsel has a duty to meet the capital client face-to-face as soon as possible after appointment. Counsel, or some member of the defense team, should make every effort to establish a relationship of trust with the client. It is also essential for counsel or some member of the defense team to develop a relationship of trust with the client's family or others on whom the client relies for support and advice."

State Bar of Texas Guidelines and Standards for Texas Capital Counsel, Guideline 12.2(B), para. 2.a. *See also* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (hereinafter "ABA Guidelines"), Commentary to 10.15.1 ("Collateral counsel has the same obligation as trial and appellate counsel to establish a relationship of trust with the client.")

[14] *See* State Bar of Texas Guidelines and Standards for Texas Capital Counsel, Guideline12.2(B), para. 1.a.:

> "*Habeas corpus counsel must understand* that the state habeas corpus proceeding is not a second direct appeal. *Direct appeal-like, record-based claims are not cognizable in state habeas corpus and can be fatal to the capital client.* Counsel should not accept an appointment if he or she is not prepared to undertake the comprehensive extra-record based investigation that habeas corpus demands."

- *never* interviewed any member of Mr. Gonzales's family or any other witness pertinent to issues at any phase of the trial;[15]

- failed to request *any* funding for expert assistance;[16]

- failed to conduct any evaluation of any kind of Mr. Gonzales.[17]

See also State Bar of Texas Guidelines and Standards for Texas Capital Counsel, Guideline12.2(B), 3 ("The Duty to Investigate") (emphasis added).

[15] *See* State Bar of Texas Guidelines and Standards for Texas Capital Counsel, Guideline12.2(B), para. 5.f:

> "Habeas corpus counsel should locate and interview the capital client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others."

[16] *See* State Bar of Texas Guidelines and Standards for Texas Capital Counsel, Guideline12.2(B), para. 3.a.:

> "Because habeas corpus counsel must review what are, in essence, two different trials, providing quality representation in capital cases requires counsel to conduct a thorough and independent investigation of both the conviction and sentence. Habeas corpus counsel must promptly obtain the investigative resources necessary to examine both phases, including the assistance of a fact investigators and a mitigation specialist, as well as appropriate experts."

[17] *See* State Bar of Texas Guidelines and Standards for Texas Capital Counsel, Guideline12.2(B), para. 5.b.:

> "Habeas corpus counsel should not rely on his or her own observations of the capital client's mental status as sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance. For that reason, at least one member of the defense team should be qualified to screen for mental or psychological disorders or defects and recommend further investigation of the client if necessary."

Given Mr. McDonald's wholesale failure to look beyond the trial record, it is unsurprising that he failed to plead a single cognizable claim for relief in the document he filed on Mr. Gonzales's behalf.

B. Mr. Gonzales's Initial Application Failed to Allege Any Cognizable Challenge to His Conviction or Sentence.

On September 22, 2008, Mr. McDonald filed a facially deficient nine-page "Application for Writ of Habeas Corpus."[18] This was an application in name only, and raised only four record-based, non-cognizable[19] grounds for relief:

- **Ground A** was two paragraphs long and was a record-based challenge to court-ordered discovery that could have been raised on direct appeal, and thus did not present a cognizable claim for post-conviction review.[20]

- **Ground B** consisted of three paragraphs of generic legal briefing about the test for ineffective assistance of counsel under *Strickland v. Washington*, and a fourth paragraph that failed to meet the pleading requirement of *any* factual allegations relevant to the *Strickland* test's prejudice

[18] *See* Exhibit A (Mr. McDonald's "[Initial] Application for Writ of Habeas Corpus," filed Sept. 22, 2008).

[19] *See*, *e.g., Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004); *Nailor*, 149 S.W.3d at 131.

[20] *See Townsend*, 137 S.W.3d at 81 ("The Great Writ should not be used in matters that should have been raised on appeal. Even a constitutional claim is forfeited if the applicant had the opportunity to raise the issue on appeal.").

prong. The claim thus did not allege facts which, if proven true, would entitle Mr. Gonzales to relief[21] and, as with Ground A, was a record-based issue that could have been raised on direct appeal, and thus did not present a cognizable claim for post-conviction review.[22]

- **Ground C** was a single paragraph raising a generic, non-case-specific challenge to the mitigation special issue instruction which had already been raised and rejected on direct appeal, and thus did not present a cognizable claim for post-conviction review.[23]

- **Ground D** consisted of a single *sentence*: "The ground for relief as stated in Ground 'C' based on the protections of the United States Constitution incorporates the argument and authorities for relief under the provisions of the Texas Constitution." Apart from the general reference to unspecified "provisions of the Texas Constitution," no legal authority of any kind was cited in support of this "claim."

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[21] *See Strickland v. Washington*, 466 U.S. 668, 688 (1986) (requiring that a defendant claiming ineffective assistance of counsel must show both that counsel performed deficiently and that the deficient performance prejudiced the defense); *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018) ("To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate two things: deficient performance and prejudice.") Without any allegations that the outcome of the proceeding would have been different but for counsel's deficiencies, let alone any attempt to demonstrate *how*, the document fails entirely to address the required prejudice prong and therefore, even if proven true, could not entitle Mr. Gonzales to any relief from either judgment or sentence.

[22] *See Townsend*, 137 S.W.3d at 81 ("The Great Writ should not be used in matters that should have been raised on appeal. Even a constitutional claim is forfeited if the applicant had the opportunity to raise the issue on appeal.").

[23] *Nailor*, 149 S.W.3d at 131 ("Claims raised and rejected on direct appeal are generally not cognizable on habeas corpus"); *see also* Direct Appeal Brief at 44-46.

The Initial Application filed by Mr. McDonald was deficient on its face. As this Court has said: "A Texas writ application must be complete on its face. It must allege specific facts so that anyone reading the writ application would understand precisely the factual basis for the legal claim." *Medina*, 361 S.W.3d at 637–38. Because Texas law requires the specific pleading of facts underlying legal claims, an appropriate habeas application "may, and frequently does, also contain affidavits, associated exhibits, and a memorandum of law to establish specific facts that might entitle the applicant to relief." *Id.*[24] Mr. McDonald not only failed to attach any proof to the Initial Application; he did not allege any extra-record facts at all.

In short, the perfunctory, "frivolous"[25] nine-page document filed by Mr. McDonald, consisting of four non-cognizable grounds and

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[24] *See also* State Bar of Texas Guidelines and Standards for Texas Capital Counsel, Guideline 12.1(B)(7)(d) (Duties of Post-Trial Counsel) (2006) ("Habeas counsel should attach all available proof to the application (affidavits, documentary evidence, etc.) …. When proof is unavailable, habeas counsel should plead all factual allegations with the greatest possible specificity.").

[25] The trial court's findings of fact and conclusions of law recommended that the Initial Application "should be in all things denied as being *frivolous* and without merit." Findings of Fact, Conclusions of Law, and Recommendation at *4 (Conclusion of Law H), *Ex parte Gonzales*, No. 04-02-09091-CR (38th Dist. Ct., Medina County, Tex., May 14, 2012) (emphasis added). This Court denied relief, adopting the trial court's finding that the Initial Application was "in all things … frivolous." *Ex parte*

unsupported by any specific extra-record factual allegations whatsoever, failed in any meaningful sense to be an application for writ of habeas corpus. *See* Sec. II., *infra.*

C. Mr. Gonzales's Right to Develop and Present His Claims For Habeas Corpus Relief in Federal Court Was Extinguished by the Grossly Deficient Initial Application.

On January 20, 2011, Mr. Gonzales, represented by newly appointed counsel Michael Gross, filed a petition for writ of habeas corpus with the federal district court.[26] In his federal habeas petition, Mr. Gonzales presented ten claims for relief, including an ineffective assistance of trial counsel (IATC) claim alleging that trial counsel was ineffective for failing to investigate and present, *inter alia,* evidence of Fetal Alcohol Spectrum Disorder (FASD). *Id.* at 21. Mr. Gonzales further alleged that trial counsel was ineffective for failing to investigate and present evidence of the cumulative effects of the abuse he suffered

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Gonzales, No. WR-70,969-01, 2009 WL 3042409 (Tex. Crim. App. Sept. 23, 2009), *den'd after remand*, 2012 WL 2424176 (Tex. Crim. App. June 27, 2012).

[26] Petition for Writ of Habeas Corpus by a Person in State Custody, *Gonzales v. Thaler*, No. 10-CV-165-OLG (Jan. 20, 2011) (ECF Doc. 12).

throughout childhood, specifically sexual abuse at the hands of an older male cousin.[27] *Id.* at 23.

In support of the claim, Mr. Gonzales submitted an unfunded declaration by Dr. Richard S. Adler, M.D., the director of FASDExperts, a multidisciplinary assessment group that conducts forensic evaluations in cases of suspected Fetal Alcohol Spectrum Disorders (FASDs).[28] Dr. Adler's declaration reflected his preliminary review of the trial record, prior psychological test results of Mr. Gonzales, and other materials related to the trial. *Id.*

In addition, Mr. Gonzales submitted an unfunded affidavit by mitigation specialist Gerald Byington, with attachments consisting of notes and a "timeline" prepared by the trial team's mitigation specialist, Linda Mockridge, in which she advised the trial team that "[d]ue to the sexual nature of both crimes, [she] highly encourage[d]" an assessment for sexual offenders, and recommended Mark Steege,

[27] The abuser, Gilbert Trevino, is identified as an uncle in the petition but is characterized correctly as a cousin in the mitigation specialist's notes—Mr. Trevino's mother was the sister of Mr. Gonzales's grandmother, making the two related as second cousins.

[28] Dr. Adler's declaration is attached as Exhibit B.

LCSW, LPC, who specializes in sexual disorders and sexual abuse.[29] Mr. Byington's affidavit identified numerous red flags of abuse that trial counsel failed to investigate or develop that should have led trial counsel to engage an appropriate expert to explain the impacts of abuse and prenatal alcohol exposure.

Just a few days after filing his federal habeas petition, Mr. Gonzales filed a motion for authorization of funds for expert assistance in support of his ineffective assistance of trial counsel claim.[30] Specifically, Mr. Gonzales sought funding for:

- An evaluation for Fetal Alcohol Spectrum Disorder (FASD) to be conducted by Drs. Richard Adler, Paul Conner, and Natalie Brown, all associated with FASDExperts.

- The appointment of a mitigation specialist to perform additional mitigation investigation in support of the ineffective assistance of trial counsel claim because "the nature of the claim requires the Petitioner to produce and prove the existence of the above-described mitigation evidence." *Id.* at 8.

- A sexual abuse evaluation by Mark Steege, LMSW, LPC, regarding "emotional, physical, and biological abuses and neglect factors" requested in order to

[29] Mr. Byington's affidavit is attached as Exhibit C.

[30] Motion for Authorization to Obtain Expert Assistance, *Gonzales v. Thaler*, No. SA-10-CA-165-OG (Jan. 25, 2011) (ECF Doc. 14).

> "clarify the effect on Petitioner of the sexual disorders and abuse." *Id.* at 5, 7.

In support of the motion, Mr. Gonzales attached the declaration from Dr. Adler, *supra*, highlighting the red flags related to FASD to demonstrate that a claim of potential merit existed. *Id.* at 8–9. Mr. Gonzales also cited to the affidavit of Mr. Byington, discussing the red flags available to trial counsel concerning the cumulative effects of sexual abuse and other risk factors on Mr. Gonzales (and specifically in relation to the crime of conviction), in support of the requested funding. *Id*. at 3–7 (citing affidavit of Gerald Byington, LMSW).

In response, the federal district court stayed the case and sent Mr. Gonzales back to state court to exhaust available state remedies for the unexhausted claims presented in his federal habeas petition, noting that the new claims "ha[d] not yet been factually or legally developed."[31]

The federal district court explained that a remand to the Texas state courts was appropriate because

> [t]here may very well be legitimate reasons for believing that, with the assistance of a trained investigator or

[31] Order Granting Stay, *Gonzales v. Thaler*, No. 10-CV-165-OLG (Jan. 31, 2011) (ECF Doc. 16), at 4.

> someone else possessing expertise or qualifications, undiscovered potentially mitigating evidence relevant to the issues that can legitimately be brought before this Court at this juncture (i.e., which existed at the time of the petitioner's trial) are [sic] still available for discovery at this point in time.

Id. at 11. While the federal district court correctly recognized that Texas law did not provide Mr. Gonzales with access to state-funded counsel in connection with a successive state habeas application—and therefore that Mr. Gonzales would be "without any realistic means of 'fairly presenting' his currently unexhausted claims to the state courts in a successive state habeas corpus proceeding"—the court nonetheless refused to grant undersigned counsel's request for funding to develop those claims, suggesting that the proper source of funding would be in state court. *Id.* at 9–12.

On February 23, 2011, Mr. Gonzales, represented by undersigned counsel Michael Gross, filed in this Court Mr. Gonzales's First Subsequent Habeas Corpus Application raising, *inter alia,* an ineffective assistance of trial counsel claim containing numerous—yet still unfunded and not fully developed—allegations of ineffective assistance of counsel, including "Lack of Fetal Alcohol Spectrum Disorders Expert" and "Lack of Sexual, Emotional, Physical, Biological

Abuse Expert."[32] The First Subsequent Habeas Corpus Application spanned 110 pages not including exhibits—more than eleven times the length of the application filed by initial state habeas counsel.

In sharp contrast to the Initial Application filed by Mr. McDonald, the First Subsequent Habeas Corpus Application contained detailed factual allegations about mitigating evidence that trial counsel failed to develop and present at the penalty phase of Mr. Gonzales's trial. But on February 1, 2012, this Court summarily dismissed the application for state habeas relief as an abuse of the writ and dismissed the motion for funding in the same order.[33]

Thus, throughout his initial round of state and federal post-conviction review, Mr. Gonzales was denied any funding whatsoever to investigate or retain expert assistance in relation to his claims related to trial counsel's failure to properly investigate and present evidence of FASD and multiple "synergistic" childhood abuses by his caretakers in every court.

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[32] Subsequent Application for Post-Conviction Writ of Habeas Corpus and Brief in Support at 20–27, *Ex parte Gonzales,* WR-70,969-02 (Tex. Crim. App. Feb. 23, 2011).

[33] *Ex parte Gonzales*, No. WR-70,969-02, 2012 WL 340407 (Tex. Crim. App. Feb. 1, 2012) (unpublished) ("The Motion for Funding for Expert Assistance is also dismissed.") (citing *Ex parte Blue*, 230 S.W.3d 151, 167 (Tex. Crim. App. 2007)).

II. THIS COURT SHOULD ADJUDICATE THE MERITS OF MR. GONZALES'S FIRST SUBSEQUENT HABEAS CORPUS APPLICATION BECAUSE HIS INITIAL APPLICATION DID NOT QUALIFY AS A "PROPER" HABEAS APPLICATION.

More than twenty years ago, this Court held that a document purporting to be a "habeas application" was so grossly deficient in form and substance that it did not qualify as a proper habeas application; thus Art. 11.071, § 5 did not bar consideration of a subsequent habeas application. *See Kerr*, 64 S.W.3d at 420. *Kerr* addressed a putative habeas application that failed to challenge the validity of the underlying judgment. *Id*. at 419.

Since then, this Court has applied the rationale of *Kerr* to other pleadings which, though captioned as "habeas applications," are inadequately pled and substantively deficient. *Ex parte Medina*, 361 S.W.3d 633, 643 (Tex. Crim. App. 2011). In *Medina*, the purported application "merely state[d] factual and legal conclusions" and did not "set out specific facts or contain any exhibits, affidavits, or a memorandum of law that allege[s] any specific facts." *Id*. at 640. In *Medina*, which was decided eight months after this Court dismissed Mr. Gonzales's First Subsequent Habeas Corpus Application, this Court held

that the deficient initial application filed by Mr. Medina's court-appointed lawyer was not "in fact, 'an application for writ of habeas corpus' under Article 11.071 of the Texas Code of Criminal Procedure." *Id.* at 634-35. Rather than simply deny relief based on the deficient pleading and deprive Mr. Medina of his "one full and fair opportunity" to present his constitutional claims in an initial writ application, this Court exercised its discretion under Article 11.071, § 4A(b)(3) to appoint new counsel and allow 180 days in which to prepare and file a new initial state habeas application. *Id.* at 643. The Court's reasoning likewise compels the conclusion that Mr. Gonzales's first subsequent application was in fact his first proper application for habeas corpus relief.[34]

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[34] To the extent that *Medina* draws a distinction between "counsel's intentional refusal to plead specific facts that might support habeas-corpus relief" and other instances where a purported writ application is facially inadequate, such a distinction does not bar the Court from declaring Mr. McDonald's filing a non-application in this case. First, *Kerr* did not involve intentional conduct on the part of habeas counsel, this Court characterized counsel's failure to adequately plead a claim as "an innocent mistake." *Kerr*, 63 S.W.3d at 420. As in *Kerr*, there is no reason to conclude Mr. McDonald's deficient pleading was the product "of a Machiavellian strategy designed to thwart the proper statutory procedure for filing a death penalty writ." *Id.* at 421. But failing to adequately plead a cognizable claim was undoubtedly a "mistake."

Second, a pleading either states sufficient facts to flesh out a cognizable claim, or it does not. Either way, the applicant suffers "through no fault of his own." *Medina*, 361 S.W.3d. at 642. As several members of this Court have observed:

> Whether a document pleads sufficient specific facts so as to constitute a "writ application" in contemplation of Article 11.071 cannot reasonably be made to turn on the good faith of the attorney who

"[A]n application for a writ of habeas corpus … must contain sufficient specific facts that, if proven to be true, might entitle the applicant to relief. The document filed in this case does not contain such specific facts and is not a proper 'application.'" *Medina*, 361 S.W.3d. at 642; *see also, e.g.*, *Ex parte Dennis*, 665 S.W.3d 569, 572 (Tex. Crim. App. 2022) ("Texas law has long required *all* post-conviction applicants for writs of habeas corpus to plead specific facts which, if proven to be true, might call for relief." (emphasis supplied)). Any "fact issues that must be resolved are those contained within the writ application and the State's controverting answer. Without specific facts, factual contentions, and factual issues set out in the application, the convicting court has nothing to resolve." *Id*.

Mr. McDonald failed entirely to investigate, identify, or plead *any* specific facts which, if true, might entitle Mr. Gonzales to relief. The "frivolous" nine-page document he produced was deficient on its face and

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> prepared it—it is either sufficiently well drawn or it is not. Such a document cannot be regarded as a writ application when competent counsel perniciously omits sufficiently specific facts but not a writ application when the facts are left out because of competent counsel's plainly incompetent representation.

Ex parte Alvarez, 468 S.W.3d 543, 550–51 (Tex. Crim. App. 2015) (mem. op.) (Yeary, J., joined by Johnson and Newell, JJ., concurring).

should be deemed a "non-application" by this Court for the purposes of Article 11.071, § 5. *See Kerr*, 64 S.W.3d at 419; *Medina*, 361 S.W.3d at 642.

III. MR. GONZALES'S FIRST SUBSEQUENT HABEAS CORPUS APPLICATION WAS HIS FIRST *PROPER* HABEAS CORPUS APPLICATION BECAUSE IT PLED SPECIFIC FACTS WHICH, IF TRUE, REQUIRE RELIEF.

Because the initial filing by Mr. McDonald was a "non-application," *supra*, this Court should reconsider its disposition of Mr. Gonzales's First Subsequent Habeas Corpus Application, re-open the proceedings on that application, and remand the application to the trial court for merits review. Even without the benefit of funding for expert or investigative assistance from either the state or federal courts, Mr. Gonzales, represented by appointed federal habeas counsel Michael Gross, alleged a meritorious claim of ineffective assistance of trial counsel in his First Subsequent Habeas Corpus Application, including, *inter alia*, specific allegations that trial counsel failed to investigate and present available mitigating evidence:

> Witnesses were interviewed pretrial by the defense and provided information about Ramiro's history of being the victim of sexual abuse. *Id*. Ramiro's cousin, R.G., admitted

> to the mitigation specialist pretrial that R.G. had also been sexually abused by Trevino. *Id.*
>
> The mitigator's notes state that, "R[.]G[.], cousin admitted that Gilbert Trevino was sexually abusive to her for [sic] age 6-7 when he babysat her while living with her family. Her mother M[.] added that Gilbert's father, Juan, sexually abused his daughters and raped his wife." *Id.* Neither R.G. not her mother, M., testified at Ramiro's trial. *Id.*
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> …
>
> No expert addressed the impact of substance abuse on Ramiro. No expert addressed the impact of neglect and rejection on the development of Ramiro. No expert addressed the synergy of the effects of Ramiro's sexual victimization, emotional and physical abuse, neglect and rejection by his mother and caregivers, exposure to alcohol and other drugs in utero, his own substance abuse problem with the fact that he was only 72 days past his 18th birthday at the time of the offense in this case. "Each of these issues has been well documented in the literature to have significant, severe and dysfunctional consequences on the cognitive, emotional, characterological and social development of a child." "Ramiro had all of these issues simultaneously present in him." "Because of the comorbid presence of these conditions it would seem essential for the defense to not only address the individual impact of these issues, but to also assist the jury in understanding the impact of this constellation of dysfunctions."

[First] Subsequent Application for Post-Conviction Writ of Habeas Corpus and Brief in Support, at 22–25 (citations omitted).

A. Trial Counsel Rendered Deficient Performance.

Capital trial counsel has a duty to investigate and develop mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel's failure to investigate available mitigating evidence fell below prevailing standards of care and was unreasonable); *Rompilla v. Beard*, 545 U.S. 374 (2005) (failure to pursue red flags signaling available mitigating evidence was unreasonable). Trial counsel had an obligation to secure the assistance of experts in a capital trial. ABA Guideline 11.4.1 ("Counsel should secure the assistance of experts where it is necessary or appropriate for … presentation of mitigation"); *see also* David C. Stebbins & Scott P. Zenney, *Zen and the Art of Mitigation Presentation, or, The Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial*, THE CHAMPION, Aug. 1986, at 18 ("The use of social workers and psychologists as part of the defense team is a necessity—not a luxury").

Failure to seek out relevant expert assistance is outside the range of competence assistance. *Sears v. Upton*, 561 U.S. 945, 951 (2010) (holding trial counsel ineffective, in part, for failing to present expert testimony that could have helped jury better understand defendant in a

1993 capital trial because "[c]ompetent counsel should have been able to turn some of the adverse evidence into a positive").

As alleged in Mr. Gonzales's First Subsequent Habeas Corpus Application, trial counsel were deficient because they failed, despite glaring red flags, including explicit instruction from their mitigation specialist, to even consult with experts in the relevant areas of Fetal Alcohol Spectrum Disorder (FASD) and sexual abuse and disorders. The single expert retained by defense counsel was not qualified to evaluate Mr. Gonzales for FASD, and was not an expert in sexual, emotional, physical, or biological abuse.

1. Trial counsel failed to investigate and present available evidence of Fetal Alcohol Spectrum Disorder.

As Mr. Gonzales (represented by undersigned counsel Gross) alleged in the First Subsequent Habeas Corpus Application, the jury never heard that Mr. Gonzales has FASD, not because of any strategic decision on trial counsel's part but instead because they failed entirely to pursue, let alone present, appropriate experts. First Subsequent Habeas Corpus Application at 20–22.

To support this claim, undersigned counsel attached the unfunded affidavit of FASD expert Dr. Richard Adler, who concluded

that, based on evidence available to trial counsel, "there is basis for further evaluation to determine definitively whether FASD is present or not." *Id*. at 3. Specifically, Dr. Adler summarized the following red flags in the record supporting the conclusion that FASD should be "highly suspected" and evaluation of Mr. Gonzales was warranted:

> a. Testimony at trial from [Mr. Gonzales's] maternal aunts concerning his mother's use of alcohol, marijuana and volatile inhalants during the pregnancy and an intentional overdose during pregnancy aimed at aborting the fetus (requiring treatment at a hospital).
>
> b. Testimony at trial by defense neuropsychologist regarding Mr. Gonzalez's [sic] history of developmental delay, immaturity, learning problems in the areas of Reading, Vocabulary, and problems with Social Skills, Problem-solving/Coping. There was similar testimony regarding school failure, multiple retentions, early onset of substance abuse.
>
> c. Review of a summary sheet of psychological testing data, over five years old, that reflected the following:
>
> i. A "split" (i.e. significant difference) between Verbal and Nonverbal performance on the IQ test used (i.e., RIAS),
>
> ii. The IQ test utilized (i.e. RIAS) is suboptimal for the forensic evaluation of FASD; retesting using the Wechsler Adult Intelligence Scale-IV (WAIS-IV) should be undertaken.
>
> …
>
> v. There was no data conveyed concerning Mr. Gonzalez's [sic] Functional/Adaptive Behavior. Such assessment is critically important to a thorough evaluation of FASD.

d. As further effort to conduct an initial review of the case, I asked the Defense Mitigation Specialist to complete a screening questionnaire developed by our team. Of the thirty-four items identified that we have found associated with persons with FASD facing legal charges, the Mitigation Specialist endorsed 23 that were present at the time of trial and which could have been identified by trial counsel. Of the five different categories (i.e. Offense Conduct, Arrest Conduct, Interview with Client, Prior Legal History, and Life History), there were items endorsed in each of them.

Exhibit B (First Subsequent Habeas Corpus Application, Exhibit 10) at 4–5.

Dr. Adler concluded that "**there is abundant information to support the conclusion that FASD should be HIGHLY SUSPECTED and that a thorough diagnostic evaluation to address this should be undertaken**." Exhibit B at 5 (emphasis in original). But no funding was ever granted to undertake this thorough diagnostic evaluation at that time.

Dr. Julian Davies, Clinical Professor of Pediatrics at the University of Washington School of Medicine, who has twenty years of experience evaluating children and adults at the longest running FAS diagnostic clinic in the country, recently reviewed the "abundant information" available to defense counsel at trial and met with Mr. Gonzales in May

2024. After performing the "thorough diagnostic evaluation" Dr. Adler recommended in 2010, Dr. Davies found "to a reasonable degree of medical certainty that Mr. Gonzales has **Sentinel Physical Findings/Neurodevelopmental Disorder/Alcohol Exposed**." Exhibit D at 1 (emphasis in original). Particularly relevant here, Dr. Davies found "functional evidence of moderate brain impairments" that are consistent with those caused by prenatal alcohol exposure." *Id.*

Dr. Davies described his "findings [that] indicate worrisome prenatal alcohol exposure, short stature, borderline head circumference, and moderate brain dysfunction, all of which support an FASD diagnosis. Moreover, the differential diagnosis process implicates prenatal alcohol as a prominent potential cause of his impairments." *Id.* at 4. Fetal Alcohol Spectrum Disorder evaluations explore four diagnostic criteria: (1) prenatal alcohol exposure; (2) growth deficiency; (3) FAS facial features; and (4) evidence of brain damage. *Id.* at 4. Dr. Davies discussed each in turn.

Relying on evidence available to trial counsel, Dr. Davies noted that, "[a]s is common with adult evaluations, we lack precise quantities/frequencies of maternal drinking during pregnancy, but since

her sister [Emma] reported [Mr. Gonzales's mother] Julia drinking every chance she got during his pregnancy (while staying with an alcoholic in a home stocked with alcohol), it was likely to be in a high-risk drinking pattern." *Id.* Importantly, "alcohol use is not required to meet a certain threshold, as harms from maternal drinking at low to moderate levels have been demonstrated. High-risk levels of prenatal alcohol exposure would have made it more likely that he would sustain *in utero* brain damage." *Id.* at 5.

Considering growth deficiency—again relying on evidence available to trial counsel—Dr. Davies found that "**Mr. Gonzales has moderate growth impairment**.… About 19% of individuals seen in our FASD clinic have moderate-severe growth deficiency." *Id.* at 5 (emphasis in original). Clinicians "pay close attention to growth in this population because alcohol-exposed people with growth deficiency (like Mr. Gonzales) are 2–3 times more likely to have severe brain dysfunction." *Id.* And though Mr. Gonzales presents with only one of three "cardinal" facial features of FASD, that "*does not by itself implicate or rule out impacts of maternal drinking*." *Id.* at 6 (emphasis supplied).

Finally, with respect to structural and functional evidence of brain damage, Dr. Davies found that Mr. Gonzales "has a small head circumference, at the 4th percentile." *Id.* at 6. Although the four-prong criteria used at Dr. Davies's clinic uses a "conservative threshold" of "below the 3rd percentile to serve as structural evidence of brain damage," Dr. Davies notes that both the CDC and the Institute of Medicine consider a head circumference "below the 10th percentile as evidence of structural brain impairment, and Mr. Gonzales's "4th percentile head size is still a significant flag for associated brain dysfunction, even in the context of short stature." *Id.* And functionally, based on available evidence, "Mr. Gonzales's academic achievement is on the borderline between area of concern [testing below the 17th percentile] and significant impairment [below the 3d percentile]. Intellectual functioning, language/communication, and executive functioning are areas of concern, with attention and visual-motor abilities as potential additional areas of concern." *Id.* at 7.

Dr. Davies noted numerous "severe and pervasive" risk factors for brain dysfunction in Mr. Gonzales's history that "likely multiplied his

risk of adverse outcomes such as disrupted school experience, trouble with the law, confinement, and drug/alcohol problems." Exhibit D at 9.

Contextualizing Mr. Gonzales's teenage substance use within his life history and FASD diagnosis, Dr. Davies noted that:

> Mr. Gonzales started using substances at a very young age, and by late adolescence his conduct was clearly influenced by substance use disorder and drug-seeking behaviors. This is unfortunately not surprising, as Ramiro had multiple interacting strong risk factors for substance abuse.
>
> Mr. Gonzales has a prominent genetic family history of addiction, prenatal exposures to alcohol and drugs, plus a traumatic childhood in a home environment where substance abuse was common. These influences interact with each other to increase future risk for substance use disorders. For example, research shows that prenatal alcohol exposure increases lifetime odds of alcoholism above any expected genetic risk; the fetus develops "a taste for alcohol" in the womb. This phenomenon extends more broadly to substance misuse, especially when close caregivers use drugs with you in adolescence, you are allowed to drop out of middle school, and when mood disorders and grief from the traumatic death of maternal figures are not appropriately treated.
>
> […]
>
> Dr. Milam testified that based on her personal observation, interviews, and records review, Ramiro was immature—at a thirteen-to-fourteen-year level. She opined that this was due to Ramiro essentially raising himself, but I would suggest another possibility: *FASD*.

Id. at 14 (emphasis supplied).

Finally, Dr. Davies observes that

> Longitudinal imaging of brain maturation in FASD (such as cortical thinning which reflects pruning and efficiency) has shown reduced developmental cortical thinning during childhood and adolescence in frontal, parietal, and limbic regions (areas associated with emotional regulation and executive functioning).
>
> So, in addition to the well-documented immaturity of adolescent brains relative to adults, it is likely that at just over 18 years of age, Ramiro's brain functioning with regard to emotional and behavioral self-regulation was both *immature* (since these systems continue to develop into the 20s for typically developing young adults) and *dysmature* (even more delayed than the typical late adolescent).

Id. at 15.

2. Trial counsel failed to investigate and present available evidence and expert testimony concerning the sexual, physical, and emotional abuse suffered by Mr. Gonzales.

As pled in Mr. Gonzales's first subsequent habeas application, "vital mitigation evidence … was not provided to the jury. Defense counsel's performance was deficient in failing to obtain a sexual, emotional, physical, and biological abuse expert in this case." First Subsequent Habeas Corpus Application at 27. This claim was supported by an unfunded affidavit from a mitigation specialist who reviewed the

evidence available to trial counsel and highlighted the following red flags that should have been pursued and developed:

- An admission to the defense team by another family member, R.G., that the same cousin, Gilbert Trevino, had also sexually assaulted her;

- The statement of R.G.'s mother that Trevino's father sexually abused his daughters and raped his wife;[35]

- Statements from two additional family members, maternal aunt Vicky Wilson and cousin Jessica Keegan, that they were suspicious Trevino had molested Mr. Gonzales as a child;

- Vicky Wilson's statements that there was incest in the Trevino household, that Gilbert Trevino would watch her getting dressed through the window;

- A statement from maternal aunt Maggie Moreno, the twin sister of Mr. Gonzales's mother, that she witnessed Trevino masturbating naked in the living room when he was living in the household and that Mr. Gonzales had confided in her that Trevino had molested him;[36]

- Reports from family members that a 20-year-old woman had sex with Mr. Gonzales (who was 12 at the time), became pregnant with his child, and left the area when the child was born to avoid prosecution for her sexual abuse of Mr. Gonzales.

[35] Neither R.G. nor her mother testified at trial.

[36] Ms. Moreno did not testify at trial.

Exhibit C (First Subsequent Habeas Corpus Application, Exhibit 11).

Despite numerous "red flags" that Mr. Gonzales had been sexually abused as a child—and notwithstanding available literature discussing the link between sexual victimization and later sexually assaultive behavior, and the explicit recommendation of the mitigation specialist— trial counsel presented only two vague secondhand reports of abuse, by Vicky Wilson[37] and Jessica Keegan,[38] and made no attempt to

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[37] In fact, defense counsel presented evidence from Ms. Wilson that she did *not* have personal knowledge of the abuse, but simply "had a feeling" and had some conversations about it, to which she was not allowed to testify:

> DEFENSE COUNSEL: Did you ever notice, from your own personal knowledge, notice anything inappropriate about the relationship between Gilbert Trevino and Ramiro Gonzales?
>
> VICKY WILSON: No, I just had a feeling something was wrong.
>
> …
>
> DEFENSE COUNSEL: I don't want you to tell me anything that anyone has said to you. Just tell me if you ever had a conversation about sexual abuse between Gilbert Trevino and Ramiro Gonzales.
>
> VICKY WILSON: Yes.
>
> DEFENSE COUNSEL: Is that what you are talking about today, that it was just a feeling that you had?
>
> VICKY WILSON**:** Yes.

41 RR 167–68.

[38] Ms. Keegan testified briefly concerning the statutory rape of Mr. Gonzales at twelve or thirteen by an adult woman. 41 RR 220–21. Defense counsel's complete lack of understanding of Mr. Gonzales's trauma history and the import of the statutory rape is revealed by the line of questioning itself, which asked Ms. Keegan if she "learn[ed]

obtain an evaluation or present any expert testimony to the jury explaining the effects of the historical abuse.

After laying out the available evidence and numerous red flags of sexual and other abuses suffered by Mr. Gonzales, undersigned counsel Gross explained that

> [T]he jury never heard the effect on Ramiro of the synergy of Ramiro's sexual victimization, emotional and physical abuse, neglect and rejection by his mother and caregivers, exposure to alcohol and other drugs in utero, and his own substance abuse problem with the fact that Ramiro was barely an adult … The jury was never advised about the impact of this constellation of dysfunctions on Ramiro. The reason the jury never heard this is because the defense failed to obtain a sexual, emotional, physical, and biological abuse expert.

First Subsequent Habeas Corpus Application at 26.

As noted in the First Subsequent Habeas Corpus Application, however, "[t]he [trial] mitigat[ion specialist] recognized the importance of this type of sexual abuse." First Subsequent Habeas Corpus Application at 24. In her report, the mitigation specialist stated: "'Due to the sexual nature of both crimes, highly encourage an ABEL assessment for sexual offenders, best is Mark Steege[]. I can contact once you get funding.'" *Id.* Despite this encouragement, trial counsel never sought

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of a relationship or of a girlfriend that was older and that [Mr. Gonzales] was going out with?" *Id.* at 220.

funding for Mr. Steege, LCSW, LPC, who is a treatment professional who specializes in treating sexual disorders and abuse. As Mr. Gonzales alleged in the First Subsequent Habeas Corpus Application:

> [B]ecause a sexual assault was part of both the capital offense and the prior felony conviction that resulted in a life sentence it would seem essential to provide the jury with an understanding of how [Mr. Gonzales]'s prior history of being a victim of sexual assault was a significant contributing factor in this case.

Exhibit C (First Subsequent Habeas Corpus Application, Exhibit 11).

But this "essential" understanding was never developed, let alone presented at trial. Indeed, funding was never sought for *any* sexual abuse or trauma expert, nor was any testimony explaining the impacts of this "constellation of dysfunctions" presented at trial, despite the clear red flags with which Mr. Gonzales's life history is replete and the sexual nature of both the charged offense and the aggravating evidence. Had funding *ever* been granted for expert assistance in this area, the meritorious claim of IATC pled in the First Subsequent Habeas Corpus Application would have been substantiated.

Dr. Kate Porterfield, a clinical psychologist who specializes in the impact of trauma and loss on children, has worked for 25 years at the Bellevue/NYU Center Program for Survivors of Torture. Exhibit E at 1–

2. Dr. Porterfield performed the very kind of synergistic trauma evaluation of Mr. Gonzales that trial counsel never pursued and that undersigned counsel Gross was consistently denied. After reviewing the trial evidence, conducting her own interviews of family members, and meeting with Mr. Gonzales himself, Dr. Porterfield found "striking across all of this data … the prevalence of traumatic stress in Ramiro's life, dating back to early childhood." *Id.* at 8. After extensively summarizing the body of scientific knowledge concerning the physical, emotional, and psychological impacts of traumatic stress on children and their development, *id.* at 3–8, Dr. Porterfield explained that "[r]ather than simply positing a correlation between adverse life events in childhood and poor outcomes in adulthood, there exists scientific consensus, based upon studies from multiple disciplines, that early abuse and neglect *alter* brain development and functioning and *cause* these negative outcomes." *Id.* at 5.

Concerning the repeated sexual abuse Mr. Gonzales suffered as a child—information available to trial counsel—Dr. Porterfield reported that Mr. Gonzales's childhood was marred by "multiple forms of abuse at the hands of adult caregivers and other adults who were in his home and

connected to his family." *Id.* at 9. Contrary to the two vague hearsay suggestions of abuse halfheartedly offered at trial, Dr. Porterfield describes in specific detail the intergenerational history of abuse across numerous perpetrators in the Gonzales family. *Id.* at 9–11. Through her clinical expertise and familiarity with existing research, Dr. Porterfield made clear that "confusion in his memory as to what age these events took place, an outcome of chronic, severe childhood trauma that is common in childhood sexual abuse survivors." *Id.* at 10. Furthermore, "[n]ondisclosure of childhood sexual victimization is quite common, particularly in males." *Id.* at n. 20.

Dr. Porterfield reports that "[c]hild sexual abuse has been specifically linked to multiple psychological problems in children. Evidence shows that adults who were sexually abused as children manifest higher rates of numerous psychiatric syndromes and symptoms, even than individuals who suffered other types of child abuse." *Id.* at 19. Had trial counsel consulted with Dr. Porterfield, or anyone with relevant expertise, they would have learned that "the impact of this trauma was pervasive and severe in [Mr. Gonzales]'s functioning. He demonstrated impairments in emotional regulation, sense of self, interpersonal

relationships, learning, and behavioral control." *Id.* at 20. Dr. Porterfield found "remarkabl[e] [that] across the course of his childhood and adolescence he received no therapeutic services or other intervention beyond criminal prosecution. *The crimes that he committed are tragically and inextricably linked to the trauma he suffered and the lack of care provided to him*." *Id.*

B. Mr. Gonzales Was Prejudiced by Trial Counsel's Deficient Performance.

The sexual assault and murder of Bridget Townsend was undeniably a terrible crime. But "[a]lmost without exception," death penalty cases "arise from extremely egregious, heinous, and shocking facts;" if such facts alone were always enough to render constitutional error non-prejudicial, "habeas relief based on [error] in the punishment phase would virtually never be available," making this Court's review "a hollow judicial act." *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001); *see also Foust v. Houk*, 655 F.3d 524, 546 (6th Cir. 2011) ("[p]owerful aggravating circumstances … do not preclude a finding of prejudice, even when our review is constricted to assessing [how] the state court weighed … mitigating and aggravating factors"). In short, the fact that the crime was terrible does not mean that the jury, had it heard

all available mitigating evidence, would not have chosen to spare Mr. Gonzales's life.

Nor is *Strickland* prejudice foreclosed because Mr. Gonzales's trial counsel presented some meager mitigating evidence. The Supreme Court emphatically has "never limited the [*Strickland*] prejudice inquiry … to cases [where] little or no mitigation evidence [was] presented." *Sears*, 561 U.S. at 954. On the contrary, the Court "ha[s] found deficiency and prejudice [where] counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Id.*[39]

[39] *See also*, *e.g.*, *Lewis v. Dretke*, 355 F.3d 364, 368 (5th Cir. 2003) (district court erred in upholding trial counsel's performance on the ground that counsel had presented some mitigating evidence, where that "skeletal testimony" was "wholly inadequate to present … a true picture" of the defendant's life); *Cargle v. Mullin*, 317 F.3d 1196, 1210 (10th Cir. 2003) (testimony of sole mitigation witness was "brief, unprepared, personally remote, and fairly generic"); *Jermyn v. Horn*, 266 F.3d 257, 310–11 (3rd Cir. 2001) (state court's decision that defendant had not shown *Strickland* prejudice, apparently based on counsel's "ha[ving] put some mitigating evidence before the jury, even though [jurors] did not hear the substance of what was uncovered [in post-conviction]," was objectively unreasonable; that counsel presented "some mitigating evidence of a different nature and quality" is "largely beside the point" if other, significant evidence was omitted); *Collier v. Turpin*, 177 F.3d 1184, 1201 (11th Cir. 1999) (counsel ineffective for failing to elicit relevant mitigating facts from the witnesses actually called at trial; counsel's examination of those witnesses was "minimal" and "elicit[ed] very little relevant evidence about Collier's character").

A court assessing an ineffective assistance of counsel claim in a capital case must be "conscious of the overwhelming importance of the role mitigation plays in the just imposition of the death penalty." *Mayes v. Gibson*, 210 F.3d 1284, 1288 (10th Cir. 2000). A jury that lacks the "fullest information possible concerning the defendant's life and characteristics" cannot make an individualized choice between life and death. *Williams v. New York*, 337 U.S. 241, 247 (1949); *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). The task facing counsel who defends a defendant on trial for his life, like Mr. Gonzales, is to "explain to the jury why [the] defendant may have acted as he did," to "connect the dots between, on the one hand, [the] defendant's mental problems, life circumstances, and personal history and, on the other, his commission of the crime." *Hooks v. Workman*, 689 F.3d 1148, 1204 (10th Cir. 2012). The mitigation case presented at Mr. Gonzales's trial accomplished none of these goals, even though the necessary raw material—persuasive, powerful mitigating evidence—was available.

As discussed in section III. A., *supra*, trial counsel failed to pursue or even consult with appropriate experts in the face of the "red flags" of prenatal alcohol exposure explicitly identified by their mitigation

specialist, Linda Mockridge. And trial counsel similarly failed to pursue or even consult with appropriate experts in the face of the identified red flags of childhood sexual abuse, including multiple reporting family members and the explicit identification of the issue by mitigation specialist Mockridge. Exhibit C at 6–7, 11–15. Instead, trial counsel only retained neuropsychologist Dr. Daneen Milam, who lacked the requisite expertise and was unqualified to evaluate or diagnose FASD.[40]

Due to trial counsel's deficient performance, the jury never heard evidence explaining the effect of the sexual victimization, emotional and physical abuse, neglect and rejection by Mr. Gonzales's mother and caregivers, his exposure to alcohol and other drugs in utero, and his introduction to substance abuse by family members when he was still a child. And because trial counsel failed to investigate and present this evidence, the State argued to the jury that it did not exist. 43 RR 40, 53, 56, 61–62.

Thus, trial counsel's unreasonable failure to investigate and present readily available mitigating evidence and provide appropriate

[40] *See Hinton v. Alabama*, 571 U.S. 263 (2014) (trial counsel's failure to request funds to replace an expert he knew to be inadequate constituted deficient performance in a capital case).

expert testimony to support that evidence before the jury resulted in a lackluster and barely credible mitigation presentation, supported only by the affirmatively damaging presentation of the single defense expert at penalty, Dr. Milam, and invited the prosecution's mischaracterization and denial during both cross-examination and closing argument.

1. The fact that Mr. Gonzales has been diagnosed with FASD is explanatory, independently mitigating, and contradicts Dr. Milam's inaccurate trial testimony that Mr. Gonzales had a "normal" brain.

Because Dr. Milam was not an expert in FASD evaluation or diagnosis, she testified that her testing revealed that "he was absolutely within normal limits. There was *no brain damage; none whatsoever*." 42 RR 11. But Dr. Davies found, and would have testified to at trial, "functional evidence of moderate brain impairments" that are "consistent with those caused by prenatal alcohol exposure," as well as structural evidence of brain impairment, a head size in the 4th percentile, that is "a significant flag for associated brain dysfunction." Exhibit D at 1, 6–7.

Had the jury heard from a qualified expert that Mr. Gonzales was diagnosed with FASD and the impacts and evidence of this diagnosis, rather than Dr. Milam's inaccurate assertion that his brain was "normal" with "no brain damage, none whatsoever," jurors would have gained an

entirely different understanding of Mr. Gonzales's abilities and impairments. With regards to Mr. Gonzales's development, Dr. Milam simply testified that she thought "he's thirteen or fourteen years old, approximately, mentally," 42 RR 77, but could not explain or defend this opinion to the jury. Importantly, instead of Dr. Milam's testimony that Mr. Gonzales was simply "immature," a proper expert could explain the diagnostic concept of *dysmaturity* and how the FASD diagnosis would have further arrested his physical and neurological development, compounding his age-related impairments in brain function and emotional and behavioral regulation. *See* Exhibit D at 15 (explaining that "One of the hallmark features of FASD is 'dysmaturity,'" described as "developmental and adaptive gaps that widen with time" and as a consequence of FASD, "brain functioning with regard to emotional and behavioral self-regulation" are *particularly* delayed well into late adolescence).

Had the jury heard instead from Dr. Davies, Dr. Adler, or a similarly qualified FASD expert, Dr. Milam's subjective opinion that Mr. Gonzales was "immature" would have instead been explained in terms of the relevant diagnostic criteria. The jury would not have been presented

instead with the harmful and untrue testimony that Mr. Gonzales's brain was "normal," and the specific *effects* of trial counsel's half-hearted suggestion that his mother abused substances during her pregnancy would have instead been made clear to jurors.

2. Expert testimony substantiating and explaining the impacts of the sexual and other abuses suffered by Mr. Gonzales would have explanatory value in relation to the charges, is independently mitigating, and would undermine the prosecution's allegations that the abuse history was incredible.

As described *supra*, trial counsel mustered just two witnesses who testified vaguely to hearsay suggesting that Mr. Gonzales was sexually abused. Prosecutors were thus able to elicit confirmation from Dr. Milam that "this allegation never came up before this trial proceeding was set." 42 RR 53. But trial counsel did not present available evidence that other family members who did not testify had been sexually abused by the same perpetrators, Exhibit C at 11–15, nor were they able to refute the prosecution's allegations of fabrication without such evidence. Without expert testimony explaining the impacts of not only sexual abuse, but emotional and physical neglect, abuse, and abandonment, prosecutors were able to argue to jurors that "completely inconsistent histories were

given" and "it's highly suspicious that that ever even happened." 43 RR 61–62.

Had trial counsel consulted with and presented testimony from an expert like Dr. Porterfield, they would have had a better rejoinder to such arguments. Jurors would have instead heard testimony concerning the link between childhood sex abuse and various negative outcomes and behaviors to which Dr. Porterfield could have testified. Exhibit E at 20. Specifically, they would have heard that "*the crimes that [Mr. Gonzales] committed are tragically and inextricably linked to the trauma he suffered and the lack of care provided to him*." *Id.* But as a result of trial counsel's failures, they were left to simply insist to the jury that this was so.

3. Had the jury heard the available evidence and expert testimony of FASD and synergistic, long-term sexual, emotional, and physical abuse, there is a reasonably probability that at least one juror would have struck a different balance in answering the special issue questions.

The Supreme Court has "never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears*, 561 U.S. at 955. The mere fact that trial counsel called Dr. Milam, or presented some purported mitigation testimony, does not

and should not insulate them from compliance with professional standards of care. Without this affirmatively damaging and inaccurate testimony from the defense's only, ill-equipped expert, and faced instead with competent expert testimony confirming and explaining the import of Mr. Gonzales's FASD, there is a reasonable likelihood that at least one juror might have reached a different result.

Prosecutors capitalized on trial counsel's failures in closing argument. Indeed, because trial counsel failed to investigate and present available evidence of sexual abuse and expert testimony related to its effects, the prosecution was able to argue, unrefuted, that Mr. Gonzales

> had loving grandparents. *And the most important thing about that is that he knew he was loved*. He knew he was loved. He has a big family: 9 aunts, cousins. *You could only be so fortunate to grow up in a setting where there are so many people that are loving you and taking care of you and looking out for you*.

43 RR 40 (emphasis supplied).

But had the jury heard a qualified "clinical opinion" like Dr. Porterfield's, they would have instead heard "that in Ramiro's life there is evidence of sustained and profound physical and emotional neglect due to his caregivers' impaired emotional functioning, dysfunctional dynamics towards child-rearing, and their general state of being

overwhelmed, exacerbated by lack of supportive resources," Exhibit E at 12, and how that "sustained and profound physical and emotional neglect" impacted his development and functioning.

During their own closing argument, the defense begged the jury to imagine Ramiro as a fetus exposed to substances, 43 RR 47, despite having presented no evidence about how that substance exposure delayed his development, impaired his functioning and judgment, and made him more vulnerable to substance issues of his own. This failure enabled the prosecution to remind jurors that defense counsel "keep bringing up the mother, Julia, and her drug use during pregnancy. *If there was any link* between that kind of behavior and crime or violence or growing up to commit capital murder, you know, they would have brought you that. *There's nothing there*." *Id.* at 56 (emphasis supplied). But in fact, as the mitigation specialist told trial counsel, as undersigned counsel Gross suspected, and as Dr. Davies has confirmed, *there is something there.*

Dr. Davies, Dr. Adler, or any qualified FASD expert could have credibly made that link explicit for the jury. Instead, as a result of trial counsel's failure to investigate available evidence and pursue the glaring red flags flying at the time of trial, counsel were left only with their own

bare assertions that Mr. Gonzales was somehow impacted and Dr. Milam's milquetoast testimony about "myelinization" and "attachment disorder," completely undermined by her own erroneous claim that his brain was "normal." This failure enabled prosecutors in closing argument to remind jurors that "There's nothing wrong with him. [Dr. Milam] had to tell you. She had to admit that to you. There's nothing wrong with him." 43 RR 62.

Instead of being presented with the "fullest information possible concerning the defendant's life and characteristics" required to make an individualized choice between life and death, *Lockett*, 438 U.S. at 603, the jury that sentenced Mr. Gonzales to death was presented with an inaccurate and incomplete view, unsupported by available evidence, that allowed the State to argue to the jurors that no such evidence existed at all. But had trial counsel properly investigated and presented expert testimony concerning the available mitigating evidence of FASD and multiple forms of abuse, "there is a reasonable probability that at least one juror would have struck a different balance" in answering the special issues questions. *Wiggins*, 539 U.S. at 537 (holding that defendant was

prejudiced at capital sentencing by counsel's failure to present mitigating evidence of childhood trauma).

Mr. Gonzales was prejudiced by trial counsel's deficient performance, and he respectfully suggests this Court reconsider, on its own initiative, its disposition of Mr. Gonzales's First Subsequent Habeas Corpus Application, and reopen that proceeding to consider the merits of his claim that trial counsel rendered constitutionally ineffective assistance at the penalty phase of trial. Upon such consideration, he respectfully submits, his death sentence should be reversed.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Ramiro Felix Gonzales respectfully suggests that this Court, on its own initiative, reconsider the dismissal of Mr. Gonzales's First Subsequent Corpus Habeas Application (No. WR-70,969-02), determine that the Initial Application (No. WR-70,969-01) filed by Terry McDonald was a "non-application," and re-open the First Subsequent Habeas Corpus Application and remand to the trial court for review of the ineffective assistance of trial counsel claim on the merits.

Respectfully submitted,

/s/ Michael Gross
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CERTIFICATE OF SERVICE

I certify that the foregoing application, with exhibits attached, was served on Mark Haby, Edward Shaughnessy, and Matthew Ottoway, counsel for the State, via the Court's electronic filing system on this 17 day of June, 2024.

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

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Thea Posel on behalf of Thea Posel
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Envelope ID: 88883256
Filing Code Description: Motion
Filing Description: Suggestion to Reconsider, on the Court's Own Motion, Dismissal of Applicant's First Subsequent Writ of Habeas Corpus
Status as of 6/17/2024 3:29 PM CST

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