OCTOBER TERM, 2023

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN GUTIERREZ,
Petitioner,

v.

LUIS V. SAENZ, Cameron County District Attorney;
FELIX SAUCEDA, Chief, Brownsville Police Department,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---
EXECUTION SCHEDULED FOR JULY 16, 2024

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Index to Appendix

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 29, 2024
Lyle W. Cayce
Clerk

No. 21-70009

RUBEN GUTIERREZ,

Plaintiff—Appellee,

versus

LUIS V. SAENZ; FELIX SAUCEDA, *Chief, Brownsville Police Department*,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:19-CV-185

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before SOUTHWICK, HAYNES, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 8, 2024
Lyle W. Cayce
Clerk

No. 21-70009

RUBEN GUTIERREZ,

Plaintiff—Appellee,

versus

LUIS V. SAENZ; FELIX SAUCEDA, *Chief, Brownsville Police Department*,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:19-CV-185

Before SOUTHWICK, HAYNES, and HIGGINSON, *Circuit Judges.*

LESLIE H. SOUTHWICK, *Circuit Judge*:

In 1999, Ruben Gutierrez was convicted of capital murder and sentenced to death in a Texas state court. Since 2011, Gutierrez's efforts to secure postconviction DNA testing have been denied in state and federal court. In this Section 1983 case, the district court accepted his claim that a particular limitation in Texas's DNA testing statute was unconstitutional. We conclude that Gutierrez had no standing to make this claim. We VACATE the district court's judgment and REMAND for the complaint to be dismissed for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

In September 1998, 85-year-old Escolastica Harrison was murdered. *Ex parte Gutierrez*, 337 S.W.3d 883, 886 (Tex. Crim. App. 2011). Harrison had been living with her nephew, Avel Cuellar, in a home that also served as the office for a mobile-home park in Brownsville, Texas. Gutierrez and Cuellar were friends. They along with other friends frequently gathered behind Harrison's home to drink and socialize. Because of Harrison's mistrust of banks, she had about $600,000 in cash in her home. Gutierrez had befriended Harrison and sometimes ran errands for her. Sadly, that led to Gutierrez's finding out about the money. Gutierrez crafted a plan to steal it.

Three men were involved in the crime on September 5, 1998: Gutierrez, Rene Garcia, and Pedro Gracia. Only two entered the home, and Gutierrez insists he was the one who stayed outside. Harrison was murdered during the robbery. Police soon considered Gutierrez a suspect.

On three separate days, Gutierrez made three contradictory statements to the police. Gutierrez first told police he was not involved with Harrison's murder, claiming an alibi. When the alibi failed, Gutierrez told police that he had planned to "rip off" Harrison but had waited at a park while Rene Garcia and Pedro Gracia stole from her; he had never wanted them to kill her. Gutierrez last stated that he had lied about waiting in a park and that he had, in fact, been in Harrison's home on the day of her murder. When Rene Garcia failed to lure Harrison outside the home so that Gutierrez could discretely steal the money, Gutierrez entered and saw Rene Garcia repeatedly stab the victim with a screwdriver. Gutierrez took the money, and Pedro Gracia drove the three of them away from the home.

At the 1999 trial in Cameron County state district court, the prosecution's theory was that Gutierrez intentionally murdered Harrison, either as a principal or party. The prosecution relied on (1) the testimony of the medical

examiner that the stab wounds came from two different screwdrivers; (2) Gutierrez's statement that he and Rene Garcia had been inside the victim's home with two different screwdrivers; and (3) four witnesses placing Gutierrez at the crime scene on the day of the killing.

The jury was instructed that it could convict Gutierrez for capital murder if it found he acted alone or as a party with an accomplice to cause Harrison's death intentionally. The jury returned a general verdict of guilt, and in April 1999 the trial judge sentenced him to death. The Texas Court of Criminal Appeals affirmed in 2002.

Then began decades-long postconviction proceedings. Gutierrez filed a state habeas application that was denied by the Texas Court of Criminal Appeals in 2008. Gutierrez then filed a habeas application in federal district court in 2009. The district court stayed the proceedings to allow him to pursue unexhausted state law claims in state court. As part of these additional claims, Gutierrez requested counsel be appointed to file a Texas Code of Criminal Procedure Chapter 64 motion for DNA testing of several pieces of evidence: (1) a blood sample taken from the victim; (2) a shirt belonging to Cuellar that had blood stains on it; (3) nail scrapings from the victim; (4) several blood samples from in the home; and (5) a loose hair recovered from the victim's finger. The state court denied the request, and the Court of Criminal Appeals dismissed Gutierrez's appeal from the decision as premature because he had not actually filed a motion for DNA testing at that point.

Gutierrez then filed his state-court motion for postconviction DNA testing under Chapter 64 in 2010. In his motion, Gutierrez acknowledged being one of the three men involved in the robbery of Harrison. He claimed DNA evidence would show he was not one of the two individuals who entered the victim's home — and by extension, would show by a preponderance of the evidence that jurors would not have convicted him of capital murder

or sentenced him to death. The trial judge denied the motion. The Court of Criminal Appeals affirmed in 2011, in part on the grounds that Chapter 64 "does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received." *Id.* at 901 (citing TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A)).

The federal district court reopened the habeas case once the state proceedings concluded in 2011. It denied Gutierrez's habeas application entirely and his request for a certificate of appealability. *See Gutierrez v. Stephens*, 590 F. App'x 371, 374 (5th Cir. 2014). This court also denied a certificate of appealability. *Id.* at 375.

Over the next few years, Gutierrez continued to seek DNA testing. In June 2019, the state district court initially granted his motion for DNA testing but withdrew the order a few days later and then denied the motion. On February 26, 2020, the Court of Criminal Appeals upheld the denial. *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *9 (Tex. Crim. App. Feb. 26, 2020).

While the state-court proceedings were ongoing, Gutierrez brought this suit under 42 U.S.C. § 1983 in the United States District Court, Southern District of Texas in Brownsville. The only defendants who are parties to this appeal are Cameron County District Attorney Luis V. Saenz and Brownsville Police Chief Felix Sauceda, Jr. Gutierrez's September 2019 complaint challenged both (1) the constitutionality of Texas postconviction DNA testing procedures, and (2) execution protocols prohibiting the presence of chaplains or religious ministers inside the execution room. Gutierrez amended his complaint after the February 2020 decision of the Court of Criminal Appeals. The defendants moved to dismiss. The district court granted the defendants' motion in part but declined to dismiss

Gutierrez's challenge to the constitutionality of Texas law on DNA testing. Gutierrez's execution was then stayed.

This court vacated the district court's stay, but our decision was in turn vacated by the Supreme Court. *Gutierrez v. Saenz*, 818 F. App'x 309, 315 (5th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 1260 (2021). The Supreme Court ordered us "to remand the case to the District Court for further and prompt consideration of the merits of petitioner's underlying claims regarding the presence of a spiritual advisor in the execution chamber." *Gutierrez*, 141 S. Ct. at 1261. That is what we did.

In March 2023, the district court granted the defendants' opposed motion to dismiss Gutierrez's religious exercise claims as moot after the Director of the Texas Department of Criminal Justice submitted an affidavit approving Gutierrez's request to have his chosen spiritual adviser pray aloud and place a hand on Gutierrez's shoulder during the execution, among other requests. Gutierrez did not appeal the dismissal.

Besides the religious accommodation issues, Gutierrez continued his efforts to acquire DNA testing. He claimed that a limitation under Texas law for acquiring that testing was unconstitutional. The alleged invalidity was not directly with Chapter 64 but with how it improperly limited the rights granted in another Texas statute that governs successive habeas applications for those sentenced to death. *See* TEX. CODE CRIM. PROC. art. 11.071. As the federal district court put it, "Texas grants the substantive right to file a second habeas petition with a clear and convincing showing of innocence of the death penalty in Article 11.071 [§ 5(a)(3)], and then Chapter 64 denies the petitioner access to DNA evidence by which a person can avail himself of that right." *Gutierrez v. Saenz*, 565 F. Supp. 3d 892, 910 (S.D. Tex. 2021). In the district court's view, the right to bring a successive habeas application to claim innocence of the death penalty was "illusory" and therefore violated

procedural due process. *Id.* at 910–11. The district court granted a declaratory judgment for Gutierrez. *Id.* at 911. The district court later entered partial final judgment as to the DNA claims. The defendants timely appealed.

DISCUSSION

Because we conclude that Gutierrez did not have standing to bring this suit, it is the only issue we consider.[1]

Texas prisoner Gutierrez brought suit under Section 1983 to challenge the constitutionality of a limitation under Texas law for when death-row inmates are entitled to DNA testing of evidence. Section 1983 is the necessary federal statutory vehicle because, as we will later discuss at some length, the Texas Court of Criminal Appeals earlier denied Gutierrez the testing he seeks. Though barred from making a direct challenge in federal court to that state-court denial, he may make a facial challenge to the statutes, rules, and interpretations on which the denial was based. *See Truong v. Bank of Am., N.A.*, 717 F.3d 377, 382 (5th Cir. 2013). The Supreme Court recently applied those principles when it allowed another Texas inmate's claim of constitutional defect in Texas's DNA testing procedures after the Court of Criminal Appeals had denied such testing. *See Reed v. Goertz*, 598 U.S. 230,

[1] The district court rejected the defendants' argument that Gutierrez's constitutional challenge is barred by the relevant statute of limitations. Section 1983 claims are subject to a state's general personal injury statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). The parties agree that the relevant statute is Texas's general personal injury statute of limitations, which is two years. TEX. CIV. PRAC. & REM. CODE § 16.003(a). The district court concluded that events long after the 2011 Texas Court of Criminal Appeals opinion that first upheld the denial of DNA testing to Gutierrez had restarted the two-year period. Those events, though, such as amendments to the DNA statute, would have to be germane to the claim that prohibiting testing for evidence that at most would affect sentencing violated due process. Otherwise, the claim was untimely. In light of our ruling as to standing, we need not resolve this separate issue.

235 (2023). Even though the Court of Criminal Appeals had already rejected that prisoner's effort to have DNA testing of evidence, the Supreme Court allowed the claim because he did "'not challenge the adverse' state-court decisions themselves, but rather 'target[ed] as unconstitutional the Texas statute they authoritatively construed.'" *Id.* (quoting *Skinner v. Switzer*, 562 U.S. 521, 532 (2011)).

Reed's argument was that strict chain-of-custody requirements violated due process. *Id.* at 233. Gutierrez has a different claim, namely, that the state violates due process by permitting testing only if the evidence could establish the prisoner would not have been convicted, thereby preventing testing if resulting evidence would be relevant only to the sentence. The defendants allege that Gutierrez has no standing to make that claim. If a party lacks Article III standing to pursue claims, a federal court lacks subject matter jurisdiction to adjudicate them. *See Abraugh v. Altimus*, 26 F.4th 298, 304 (5th Cir. 2022). We examine standing *de novo*. *NAACP v. City of Kyle*, 626 F.3d 233, 236 (5th Cir. 2010).

To establish Article III standing, a plaintiff must prove that: (1) an "injury in fact" has occurred; (2) the injury can fairly be traced to the defendant's conduct; and (3) a favorable ruling will likely redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The defendant district attorney and police chief assert that Gutierrez cannot satisfy the third requirement. Gutierrez's claimed injury is not redressable against these defendants, the argument goes, because they do not enforce Texas's DNA testing statute and the district court's declaratory judgment does not direct them to do anything. Our question, then, is whether a declaratory judgment that Texas's procedures for DNA testing are constitutionally flawed redresses the claimed injury.

Seeking an answer, we return to the recent Supreme Court precedent that allowed a different inmate to assert a claim about flaws in Texas's DNA testing requirements. *See Reed*, 598 U.S. 230. The Court concluded that a prisoner had standing to pursue a declaratory judgment against a state prosecutor that Texas's postconviction DNA testing law "failed to provide procedural due process." *Id.* at 233–34; *see Reed v. Goertz*, 995 F.3d 425, 428 (5th Cir. 2021) (stating that Reed sought a declaratory judgment), *rev'd* 598 U.S. at 237. A favorable declaratory judgment would likely redress the injury, the Court found, because it "would eliminate the state prosecutor's justification for denying DNA testing." *Reed*, 598 U.S. at 234.

> In other words, in "terms of our 'standing' precedent, the courts would have ordered a change in a legal status," and "the practical consequence of that change would amount to a significant increase in the likelihood" that the state prosecutor would grant access to the requested evidence and that [the prisoner] therefore "would obtain relief that directly redresses the injury suffered."

Id. (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)).

That analysis initially seems equally applicable here. Gutierrez has brought his claim against the correct party — the local prosecutor — and, like Reed, challenges a Texas DNA testing requirement. Texas argues there is a distinction, though. This prosecutor would not likely reverse course and allow testing, the argument posits, even were a federal court to declare Texas may not deny DNA testing that would affect only the punishment stage. Allegedly keeping the prosecutor on course is the Texas Court of Criminal Appeals' prior holding that such a decision would not entitle Gutierrez to testing. *Gutierrez*, 337 S.W.3d at 901. We now examine that part of the state court's opinion.

Gutierrez's relevant argument both in 2011 and now starts with the fact that Article 11.071 § 5(a)(3) of the Texas Code of Criminal Procedure allows a death-row inmate's claim that, "but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072." Section 5(a)(2) provides that, "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt." Because the statute allows an inmate to contest his conviction and also his sentence, Gutierrez argues it is unconstitutional for Chapter 64 to permit DNA testing only for claims about the conviction.

The Court of Criminal Appeals, though, held in 2011 that "even if Chapter 64 did apply to evidence that might affect the punishment stage as well as conviction," Gutierrez would not be entitled to the testing because he "would still have been death-eligible." *Gutierrez*, 337 S.W.3d at 901. The court held that his eligibility existed because the evidence was sufficient to show his knowing participation in the robbery and a mental state at least of reckless indifference to the possibility of murder. *Id.* at 901 & n.61.

Gutierrez agrees that the appeal turns on whether DNA evidence might show he was not "death-eligible" but argues DNA testing could show just that by proving he did not commit the murder itself and neither intended nor anticipated anyone would be killed. That collection of requirements comes from Article 37.071 § (2)(b) of the Texas Code of Criminal Procedure, a provision that identifies the jury issues when guilt would arise if jurors find that the defendant was a party to a crime.

Instead of "not death-eligible," the district court and some of our cited authorities have used the awkward phrase "innocent of the death penalty." *See Gutierrez*, 565 F. Supp. 3d at 901. That wording has been used

when discussing the test for whether a prisoner with a capital sentence may bring a successive habeas application in federal court. The inmate must show, "based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Sawyer v. Whitley*, 505 U.S. 333, 346 (1992) (quoting *Sawyer v. Whitley*, 945 F.2d 812, 820 (5th Cir. 1991)). Gutierrez agrees that the Court of Criminal Appeals' use of "death-eligible" is the equivalent. In *Sawyer*, the Supreme Court wrote "that the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence." *Id.* at 347.

The Texas Court of Criminal Appeals held that even if DNA evidence demonstrated Gutierrez was not in the house when Harrison was murdered, that proof "would not overcome the overwhelming evidence of his direct involvement in the multi-assailant murder." *Gutierrez*, 337 S.W.3d at 902. Whatever DNA evidence might prove, other evidence sufficiently supported that Gutierrez was still legally subject to the death penalty:

> Appellant would still have been death-eligible because the record facts satisfy the *Enmund/Tison* culpability requirements that he played a major role in the underlying robbery and that his acts showed a reckless indifference to human life.[2]

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[2] The court's footnote 61 to the statement was this:

> *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L.Ed.2d 127 (1987) (Eighth Amendment does not prohibit death penalty as disproportionate in case of defendant whose participation in felony that results in murder is major and whose mental state is one of reckless indifference); *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982); Article 37.071(2)(b)(2).

Id. In 2020, the Court of Criminal Appeals restated that reasoning when again denying relief. *Gutierrez*, 2020 WL 918669, at *8.

The State's argument here is that *Reed* does not apply when a Section 1983 plaintiff is seeking a declaratory judgment that some state statute or rule violates federal law, but the highest state court already considered that possible violation and found it would not justify the relief being sought. We conclude that if the reasons the state court found there would be no effect do not raise another issue of federal law, there is merit to the distinction between *Reed* and this case.

The *Reed* question here is would a Texas prosecutor, having in hand a federal court's opinion that a DNA testing requirement violated federal law and also an earlier Court of Criminal Appeals opinion that this particular prisoner was not injured by that specific violation, *likely* order the DNA testing? In applying the concept of likely effect, the Supreme Court in *Reed* quoted an opinion analyzing standing for a challenge to the "counting method" used by the Census Bureau and Secretary of Commerce when allocating congressional seats after the 2000 census. *Evans*, 536 U.S. at 460–61. The Court stated that the President and Secretary were likely to abide by an authoritative pronouncement from the Court that the counting method violated either a statute or the Constitution. *Id.* at 463–64. We interpret that holding as the result of the Court's fact-specific evaluation, not just a categorical statement that whenever the Supreme Court speaks, government officials will respond mechanically. The specifics of the case are important in deciding how the decision is *likely* to affect a relevant actor. We conclude that a state prosecutor is quite likely to follow what his state's highest criminal court has already held should be the effect of such a decision.

The final step before adopting the proposed distinction is to see if it actually distinguishes *Reed.* We start with what Reed argued at the Supreme

Court. "Among other things, Reed argued that the law's stringent chain-of-custody requirement was unconstitutional and in effect foreclosed DNA testing for individuals convicted before 'rules governing the State's handling and storage of evidence were put in place.'" *Reed*, 598 U.S. at 233 (quoting Joint Appendix at 39, *Reed*, 598 U.S. 230 (No. 21-442)).[3]

If *Reed* is to be distinguished from the case, we need to determine if the Court of Criminal Appeals held, even if chain-of-custody limitations violated federal law, that Reed's claim would still fail. That court certainly gave lengthy consideration to Reed's effort to acquire DNA testing of certain evidence. *See Reed v. State*, 541 S.W.3d 759, 764–80 (Tex. Crim. App. 2017). The court held that numerous items were not available for DNA testing because the chain of custody for them was broken. *Id.* at 770. The court did not discuss the constitutionality of the state's chain-of-custody requirements or whether Reed would gain the testing if they violated a federal right.[4]

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[3] It gives us some pause that the Supreme Court in *Reed* did not mention examining the state court's decision for whether it might affect the prosecutor's likely actions. That could mean, implicitly, that the state court opinion was irrelevant. Instead, perhaps this principle applies: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided." *Johnson v. Halstead*, 916 F.3d 410, 419 n.3 (5th Cir. 2019) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). We examined the *Reed* briefs at the Supreme Court; none argued that some holding in the state court opinion would affect the prosecutor's likely actions.

We adopt the "lurk in the record" option and consider the distinction viable. As we discuss, one good reason for silence in the briefs and in the Supreme Court opinion is that the Court of Criminal Appeals made no similar pronouncement in its *Reed* decision.

[4] The initial briefs submitted to the Texas Court of Criminal Appeals in *Reed* did not allege unconstitutionality in the chain-of-custody requirements. Understandably, then, the state court's opinion did not discuss, as the *Gutierrez* opinion did, whether DNA testing would be justified even if the relevant requirements were unconstitutional. Reed first raised a constitutional argument about chain of custody in his motion for rehearing. The state court denied rehearing without an opinion. *See* Order Denying Rehearing, *Reed*, 541 S.W.3d 759 (No. AP–77,054), available at https://search.txcourts.gov/Case.aspx?cn=AP-

Considering this background, what is the federal issue that could be resolved in this Section 1983 suit that would have a likely effect on the prosecutor? The Court of Criminal Appeals has already found that Gutierrez would have no right to DNA testing even if the statutory bar to testing for evidence about sentencing were held to be unconstitutional. The federal district court found unconstitutionality, but according to the Court of Criminal Appeals, any new evidence "would not overcome the overwhelming evidence of his direct involvement in the multi-assailant murder." *Gutierrez*, 337 S.W.3d at 902. Gutierrez acknowledges he is not entitled to DNA testing for what amounts to mitigation evidence, *i.e.*, evidence that might cause a reasonable juror to decide not to vote for the death penalty because, for example, he did not himself commit the murder.

The following summarizes Gutierrez's argument as to what DNA evidence could prove:

> DNA evidence that identifies perpetrators but excludes Mr. Gutierrez would establish that Mr. Gutierrez was not present inside the trailer where the murder took place and did not participate in the murder. This evidence thus would cast doubt on whether Mr. Gutierrez "actually caused the death of the decedent or . . . intended to kill the deceased or anticipated that a human life would be taken." Tex. Code Crim. Proc. Ann. art. 37.071(b)(2).

Gutierrez's disagreement with the Court of Criminal Appeals' finding that DNA evidence would not override the "overwhelming evidence" of guilt of a capital crime is a factual disagreement about the potential effect of new evidence on jurors. This declaratory judgment action is a facial

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77,054&coa=coscca. Thus, the Texas court made no holding in *Reed* comparable to its holding in *Gutierrez* about potential invalidation of the challenged requirement.

challenge to Texas statutes. It is not properly used to contest fact-findings by a state court in that court's prior denial of DNA testing.

Reed is properly distinguished. As to Gutierrez, the Texas Court of Criminal Appeals effectively anticipated an unfavorable federal court ruling. That court held, should the limitation on DNA testing for evidence relevant only to conviction be invalid, the facts in the trial record would prevent Gutierrez from receiving the DNA testing because such evidence could not change the fact that he was death-eligible. As a result, we conclude that a state court, if presented with Gutierrez's request for DNA testing, would be bound by the Texas Court of Criminal Appeals' holding that such testing would be meaningless. The *Reed* analysis that standing requires that a prosecutor be *likely* to grant access to the requested evidence should a favorable federal court ruling be obtained cannot be satisfied on the facts of this case.

Because there is not a substantial likelihood that a favorable ruling by a federal court on Gutierrez's claims would cause the prosecutor to order DNA testing, Gutierrez's claims are not redressable in this Section 1983 suit. We VACATE the district court's judgment and REMAND to have the complaint dismissed for lack of jurisdiction.

STEPHEN A. HIGGINSON, *Circuit Judge,* dissenting:

With respect, I disagree that Ruben Gutierrez, a defendant facing execution, lacks standing to bring this suit.

I do not see a meaningful distinction from *Reed v. Goertz*, 598 U.S. 230 (2023), where the Supreme Court held "a prisoner had standing to pursue a declaratory judgment against a state prosecutor that Texas's post-conviction DNA testing law 'failed to provide procedural due process,'" Majority Op. at 7 (quoting in part *Reed*, 598 U.S. at 234). In the same context we face here, relating to a capital defendant's challenge to Texas's post-conviction DNA testing procedures, the Supreme Court clarified that if a federal court decides that procedure violates due process, the decision "would have ordered a change in a legal status [that] would amount to a significant increase in the likelihood that the state prosecutor would grant access to the requested evidence and that [the prisoner] therefore would obtain relief that directly redresses the injury suffered." *Reed*, 598 U.S. at 234.

Like Reed, Gutierrez filed suit against the appropriate local prosecutor and made a similar claim regarding Texas's DNA testing regime. While I appreciate the majority's careful tracing of the state-court case history and fair inquiry into what the named state prosecutor might or might not do, I do not perceive that the Supreme Court contemplated this nuance and distinction. Instead of conducting a fact-specific inquiry and delving into what District Attorney Goertz himself would do, the Court determined that a declaratory judgment invalidating Texas's DNA testing procedure would significantly increase the likelihood that the state prosecutor would grant access to the requested DNA testing.

Because the standing analysis of *Reed* applies here, Gutierrez, also facing execution, has standing to bring suit.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

RUBEN GUTIERREZ,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL NO. 1:19-CV-185
	§	
LUIS V SAENZ, *et al*,	§	
	§	
Defendants.	§	

MEMORANDUM & ORDER

The Court is in receipt of Plaintiff Ruben Gutierrez's ("Gutierrez") Brief regarding DNA Claims, Dkt. No. 118, and of Defendants' Motion for Reconsideration. Dkt. No. 119. The Court is also in receipt of responses from Gutierrez and Defendants to their respective brief/motions. Dkt. Nos. 122, 123. Finally, the Court is in receipt of briefs from Gutierrez and Defendants regarding the effect of the Supreme Court's vacatur in this case. Dkt. Nos. 139, 140.

I. Jurisdiction

This action arises under 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343. Additionally, the Supreme Court determined in *Skinner v. Switzer* that a § 1983 action is the proper vehicle for a suit challenging a state DNA testing statute. *Skinner v. Switzer*, 562 U.S. 521, 534 (2011).

II. Background

Gutierrez is incarcerated at the Allan B. Polunsky Unit of the Texas Department of Criminal Justice ("TDCJ") in Livingston, Texas. Dkt. No. 45 at 4-5. Gutierrez was sentenced to death for the murder of Escolastica Harrison in 1999. *Id.*

In this suit, Gutierrez has named as Defendants Luis V. Saenz ("Saenz"), District Attorney for the 107th Judicial District; Felix Sauceda, Jr. ("Sauceda"),

Chief of the Brownsville Police Department; Bryan Collier (Collier"), Executive Director of the TDCJ; Lorie Davis ("Davis"), director of the Correctional Institutions Division of the TDCJ and Billy Lewis ("Lewis"), the senior warden of the Huntsville Unit where inmates are executed. Dkt. No. 45.

Gutierrez's complaint concerns 1) execution chamber free exercise of religion claims and 2) a challenge to Texas's DNA testing statute. Dkt. No. 45. This opinion only considers Gutierrez's DNA testing challenge.

Gutierrez's action arises under 42 U.S.C. § 1983 and challenges the constitutionality of the DNA testing procedures in Chapter 64 of the Texas Code of Criminal Procedure, Motion for Forensic DNA Testing ("Chapter 64"). Dkt. No. 45 at 3; Tex. Crim. Proc. Code art. 64. Gutierrez alleges he has repeatedly sought DNA testing which has been unfairly denied. Dkt. No. 45. Gutierrez challenges the constitutionality of Chapter 64 on its face and as it has been applied to him. *Id.* He claims the statute violates procedural due process because it denies him the ability to test evidence that would demonstrate he is innocent of the death penalty, and that it is unequally and unfairly applied to someone who is convicted of capital murder under the law of parties. *See* Tex. Penal Code Ann. § 7.01. He also claims Chapter 64's preponderance of the evidence/different outcome standard is overbroad. Dkt. No. 45 at 25-26. He seeks a declaratory judgment that Chapter 64 is unconstitutional. *Id.* at 37. Gutierrez challenges the State's refusal to release biological evidence for testing and requests the Court declare that the withholding of evidence for testing violates his procedural due process rights. *Id.* at 38.

On June 2, 2020, this Court granted in part and denied in part a motion to dismiss Gutierrez's complaint for failure to state a claim and lack of jurisdiction. Dkt. No. 48. On June 9, 2020, finding substantial factual and legal issues that were unresolved in this case, the Court stayed Gutierrez's execution that was scheduled for June 16, 2020. Dkt. No. 57. The Fifth Circuit vacated the stay of execution on June 12, 2020. *Gutierrez v. Saenz*, 818 F. App'x 309 (5th Cir. 2020). Gutierrez sought certiorari review of his execution chamber religion claims. *Gutierrez v. Saenz*, 19-8695, Petition for a Writ of Certiorari. The Supreme Court stayed

Gutierrez execution on June 16, 2020. *Gutierrez v. Saenz*, 207 L. Ed. 2d 1075 (June 16, 2020); *see Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

On June 17, 2020, this Court set a deadline for the Parties to submit a brief regarding "what, if any, DNA claims remain in this case and the merits of those claims." Dkt. No. 70. Gutierrez filed his DNA claims brief on October 22, 2020. Dkt. No. 118. Defendants did not file a brief and instead filed a Motion for Reconsideration of the Court's June 2, 2020 order granting in part and denying in part Defendants motion to dismiss. Dkt. No. 119; *See* Dkt. No. 48. Response briefs were filed by both Parties on October 29, 2020. Dkt. Nos. 122, 123.

The Supreme Court issued a Grant, Vacate, and Remand ("GVR") order in this case on January 25, 2021. *Gutierrez v. Saenz*, No. 19-8695, 2021 WL 231538, at *1 (U.S. Jan. 25, 2021). The Supreme Court remanded to the Fifth Circuit with instructions to remand to the District Court for "further and prompt consideration of the merits of petitioner's underlying claims regarding the presence of a spiritual advisor in the execution chamber." Following the Supreme Court's instructions, the Fifth Circuit remanded to this Court on February 26, 2021. Dkt. No. 133.

III. Arguments

Gutierrez argues the Fifth Circuit's vacatur of the stay of execution focused solely on whether he had made a sufficient showing on the merits of the stay and did not rule on the ultimate merits of any of his DNA claims. Dkt. No. 118. Gutierrez argues that the question to be decided by the undersigned is whether Gutierrez has stated a claim on which relief can be granted. *Id.* He argues that the Fifth Circuit misconstrued the facts in *Osborne* and this case, and therefore the Fifth Circuit's opinion was legally erroneous when applying *Osborne* to his DNA claims and should not be relied on by this Court. *Id.* at 10-13. Gutierrez argues Chapter 64's standard requiring him to prove by a preponderance of the evidence that he would not have been convicted of capital murder has created an insurmountable barrier to obtaining DNA testing. Gutierrez further argues that Texas courts have construed that standard in a way that is "virtually impossible to meet." *Id.* at 9. Gutierrez also argues the standard which allows for assessment of

evidence before it exists is an escape hatch that violates due process. *Id.* at 14. Additionally, he argues the procedures for DNA testing are fundamentally inadequate to vindicate the substantive rights the State of Texas provides. *Id.* Gutierrez argues the legal standard erects an impossibly high barrier to a defendant seeking to establish his innocence of a crime for which he was convicted. *Id.* at 14. Finally, Gutierrez argues the Chapter 64 standard precludes a defendant seeking to establish his innocence of the death penalty from receiving DNA testing, violating his rights under the Due Process Clause. *Id.* at 28-29.

Defendants' motion for reconsideration moves the Court to reconsider its prior order and dismiss Gutierrez's DNA claims because the Fifth Circuit concluded all of Gutierrez's claims are entirely without merit. Dkt. No. 119 at 8. Defendants then reassert the arguments they raised in the motion to dismiss regarding a time bar and a failure to state a claim. *Id.* Defendants argue the Fifth Circuit's ruling should be followed to dispose of all DNA claims in this action. Dkt. No. 140. Gutierrez argues that the Fifth Circuit's ruling no longer has precedential effect and further that no court has reached the merits of his DNA claims in this case. Dkt. No. 139.

IV. State Court DNA Proceedings

Gutierrez was indicted along with Rene Garcia ("Garcia") and Pedro Gracia ("Gracia") for the robbery and murder of Escolastica Harrison ("Harrison"). *Id.* at 6. Gracia was released on bond and absconded. *Id.* Garcia pleaded guilty and was sentenced to life imprisonment. *Id.* Gutierrez pleaded not guilty, was tried by a jury, convicted, and sentenced to death in 1999. *Id.* at 7.

a. 2009 DNA Testing Motion

While proceeding in the 107th District Court before Judge Benjamin Euresti, Jr. ("Judge Euresti"), Gutierrez made several motions related to DNA testing. Following a May 14, 2008 denial of a state habeas petition, Gutierrez made a pro se motion for appointment of counsel on May 8, 2009 for the purpose of requesting DNA testing under Chapter 64. The motion was denied by Judge Euresti on May 29, 2009 and the Texas Court of Criminal Appeals ("CCA") dismissed Gutierrez's

appeal on March 24, 2010, concluding the denial of counsel was not appealable. *Gutierrez v. State*, 307 S.W.3d 318, 319 (Tex. Crim. App. 2010).

With assistance of his federal habeas counsel, Gutierrez moved for DNA testing under Chapter 64 on April 5, 2010. *State of Texas, v. Ruben Gutierrez*, 2010 WL 8231200 (Tex. Dist.). On August 27, 2010, Judge Euresti denied Gutierrez DNA testing under Chapter 64. Dkt. No. 45 at 9; Tex. Crim. Proc. Code art. 64. On May 4, 2011, the CCA affirmed the denial of the DNA testing motion. *Ex parte Gutierrez*, 337 S.W.3d 883, 886 (Tex. Crim. App. 2011). The CCA concluded Gutierrez was not entitled to appointment of counsel because "reasonable grounds" did not exist for filing a motion for post-conviction DNA testing. *Id.* at 890. The CCA upheld the trial court's decision that identity was not at issue in the case. *Id.* at 894. Finally, the CCA held that Gutierrez failed to establish that he would not have been convicted of capital murder if exculpatory evidence had been obtained through DNA testing. *Id.* at 899. It stated Gutierrez failed to show that potential exculpatory evidence obtained through DNA testing would create a greater than 50% chance that he would not have been convicted. *Id.* As an example, the court cited *Blacklock v. State* where the evidence fairly alleged "that the victim's lone attacker is the donor of the material for which appellant seeks DNA testing." *Id.* at 900; *see Blacklock v. State*, 235 S.W.3d 231, 232 (Tex. Crim. App. 2007). "In cases involving accomplices, the burden is more difficult because there is not a lone offender whose DNA must have been left at the scene." *Id.* The ultimate question, the CCA wrote, is "[w]ill this testing, if it shows that the biological material does not belong to the defendant, establish, by a preponderance of the evidence, that he did not commit the crime as either a principal or a party." *Id.* at 900. The CCA held the testing of fingernail scrapings of Harrison would be exculpatory only if the results showed co-defendant Gracia's DNA. *Id.* at 901. Such an outcome defies common sense, the CCA decided, as "[t]he only conceivable 'exculpatory' result would be DNA from the third accomplice, Pedro Gracia, in the fingernail scrapings. But is this plausible? All

three robbers agreed that Pedro Gracia was the driver and did not go inside Mrs. Harrison's home." *Id.* at 901.[1]

In conclusion, the CCA held that Chapter 64 could only be invoked by persons who "'would not have been *convicted* if exculpatory results' were obtained." *Id.* (emphasis in original). The CCA held the statute does not authorize testing when exculpatory results only affect the punishment received. *Id.* The CCA did not rule on the implications of its ruling on the procedure for subsequent habeas proceedings as provided by Texas Code of Criminal Procedure Article 11.071 § 5(a)(3). *See infra*, p. 19.

b. 2019 DNA Testing Motion

On June 14, 2019, Gutierrez again sought DNA testing under a revised version of Chapter 64.[2] Dkt. No. 45 at 12-13. Judge Euresti granted the request for DNA testing on June 20, 2019 and his order was filed by the Clerk of the Court at 9:09 a.m. On June 27, 2019, two orders were signed by Judge Euresti and filed. At 11:10 a.m. an order was filed withdrawing the order granting DNA testing and at 11:13 a.m. an order was filed denying the motion for DNA testing. Dkt. Nos. 1-1 at 3-5; 45 at 13; *Ex parte Gutierrez*, No. 98-CR-1391-A, Order (Tex. 107th Judicial Dist. Ct. June 20, 2019). On February 26, 2020, the CCA affirmed the June 27, 2019 denial of testing on the merits. Dkt. No. 45 at 13; *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *1 (Tex. Crim. App. Feb. 26, 2020). The CCA held that Gutierrez failed to establish that he would not have been convicted if exculpatory results had been obtained through DNA testing because of Gutierrez's conviction as a party. *Id.* at *8 (citing *Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006)). The CCA concluded that the statements of Gutierrez and the codefendants were probative as to whether identity was at issue in the case. *Id.* at *7. It also concluded that these statements were probative as to whether Gutierrez could meet

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[1] The CCA referred to the statements of the three codefendants that were submitted by the State in opposition to the DNA testing motion but that were not presented at trial. *Ex parte Gutierrez*, 337 S.W.3d at 893.

[2] Texas removed a no-fault requirement from the DNA testing statute in 2011. *See* Tex. Code Crim. Proc. Ann. art. 64.01

his burden to show that he would not have been convicted should DNA testing reveal exculpatory results. *Id.* at *7.

The CCA reiterated its interpretation of Chapter 64 that the statute applies only to testing evidence which could demonstrate by a preponderance of the evidence that a person would not have been convicted of a crime. *Id.* at *9. The CCA stated that even if the testing showed Gutierrez did not commit the murder, he would still have been death eligible. *Id.* at *9 (citing *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987)).

V. Federal Court Proceedings

a. District Court Proceedings

Gutierrez filed his complaint in this Court on September 26, 2019, when the CCA had not yet ruled on the 2019 DNA testing motion. Dkt. No. 1. On January 7, 2020, the Court stayed the case pending resolution of Gutierrez's appeal before the CCA. Dkt. No. 35. Following the final decision from the CCA on February 26, 2020, the Court lifted the stay on March 9, 2020. Dkt. No. 41. Gutierrez filed an amended complaint on April 22, 2020. Dkt. No. 43. Defendants moved to dismiss for failure to state a claim and lack of jurisdiction on May 12, 2020. Dkt. No. 46. The undersigned issued a Memorandum and Order June 2, 2020 granting in part and denying in part the motion to dismiss. Dkt. No. 48. In its order the Court:

- Granted Defendants' motion to dismiss for lack of subject matter jurisdiction all claims which seek relief or relitigation of the CCA's denial of DNA testing as barred by the *Rooker-Feldman* doctrine.
- Granted Defendants' motion to dismiss Gutierrez's Eighth Amendment Claims for failure to state a claim upon which relief can be granted in a § 1983 action.
- Granted Defendants' motion to dismiss Gutierrez's access to the courts claim for failure to state a claim upon which relief can be granted.
- Denied Defendants' motion to dismiss for lack of subject matter jurisdiction Gutierrez's claims which challenge the constitutionality of

the Texas DNA testing statute on its face and as authoritatively construed by the CCA.

- Denied Defendants' motion to dismiss based on Eleventh Amendment immunity.
- Denied Defendants' motion to dismiss Gutierrez's constitutional challenge to the Texas DNA testing statute for failure to state a claim.
- Denied Defendants' motion to dismiss due to the statute of limitations.
- Denied Defendants' motion to dismiss due to issue preclusion.
- Denied Defendants' motion to dismiss Gutierrez's Texas DNA statute challenge on the merits without additional briefing.
- Denied Defendants' motion to dismiss Gutierrez's execution-chamber claims for failure to state a claim.
- Reserved its decision on Gutierrez's motion to stay execution.

Following additional briefing on the stay of execution motion, the Court granted a stay of execution on June 9, 2020. Dkt. No. 57. The Court concluded its previous analysis demonstrated there are outstanding and novel legal and factual questions to be resolved and Gutierrez had made a showing of likelihood of success on the merits of at least one of his DNA or execution-chamber claims. *Id.*

b. Fifth Circuit Ruling

The Fifth Circuit vacated the stay of execution on June 12, 2020. *Gutierrez v. Saenz,* 818 F. App'x 309, 312 (5th Cir. 2020), *cert. granted, judgment vacated,* No. 19-8695, 2021 WL 231538 (U.S. Jan. 25, 2021). The Fifth Circuit concluded that Chapter 64, facially and as applied, comported with the Supreme Court's decision in *Osborne. Id.*

Turning to the execution-chamber claims, the Fifth Circuit applied *Turner* to Gutierrez's Establishment Clause claim and concluded Gutierrez failed to make a strong showing of likelihood of success on the merits in establishing that TDCJ's execution policy is not reasonably related to legitimate penological interests. *Gutierrez v. Saenz,* 818 F. App'x at 313 (citing *Turner v. Safley*, 482 U.S. 78 (1987)). The Fifth Circuit held that Gutierrez's impending death does not amount to a

showing of irreparable injury, "given the extent of Gutierrez's litigation and re-litigation." *Id.* at 314. The Court concluded all four stay factors did not weigh in Gutierrez's favor and vacated the stay. *Id.*

c. Supreme Court GVR

When the Fifth Circuit issued its mandate, the Court regained jurisdiction over this case. *Arenson v. S. Univ. Law Ctr.*, 963 F.2d 88, 90 (5th Cir. 1992) ("The district court regained jurisdiction over the case upon our issuance of the mandate."). Gutierrez appealed the Fifth Circuit's decision on grounds solely related to the execution chamber claims, and this Court was divested of jurisdiction over the execution chamber claims pending appeal before the Supreme Court. *See Griggs*, 459 U.S. at 58 ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990) ("When one aspect of a case is before the appellate court on interlocutory review, the district court is divested of jurisdiction over that aspect of the case.").

On January 25, 2021, the Supreme Court granted Gutierrez's petition for a writ of certiorari, it vacated the Fifth Circuit's June 12, 2020 order granting the motion to vacate the stay of execution in this case, and remanded to the Fifth Circuit with instructions to remand the case to the District Court for "for further and prompt consideration of the merits of petitioner's underlying claims regarding the presence of a spiritual advisor in the execution chamber in light of the District Court's November 24, 2020 findings of fact." *Gutierrez v. Saenz*, No. 19-8695, 2021 WL 231538, at *1 (U.S. Jan. 25, 2021). In its order, the Supreme Court stated that "[a]lthough this Court's stay of execution shall terminate upon the sending down of the judgment of this Court, the disposition of the petition for a writ of certiorari is without prejudice to a renewed application regarding a stay of execution should petitioner's execution be rescheduled before resolution of his claims regarding the presence of a spiritual advisor in the execution chamber." *Id.*

Following the Supreme Court's mandate, the Fifth Circuit repeated the Supreme Court's instruction and remanded on February 26, 2021, returning jurisdiction over all aspects of this case to this Court. Dkt. No. 133.

VI. Post-Conviction Laws in Texas

a. Article 11.071

Texas Code of Criminal Procedure Article 11.071 Procedure in Death Penalty Case ("Article 11.071") specifies the requirements for habeas corpus procedure in death penalty cases. Tex. Code Crim. Proc. Ann. art. 11.071. Section 5(a)(3) grants the right of a subsequent habeas petition if a defendant can show by clear and convincing evidence, he would have been innocent of the death penalty. *Id.* Section 5(a)(3) reads:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> [...]
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Id.

The Fifth Circuit has determined that this section incorporates the Supreme Court's innocence of the death penalty standard as described in *Sawyer v. Whitley*. "The Texas legislature incorporated into § 5(a)(3) both *Sawyer's* definition of 'actual innocence of the death penalty' and *Sawyer's* clear-and-convincing standard of proof for such a claim." *Rocha v. Thaler*, 626 F.3d 815, 823 (5th Cir. 2010).

In *Sawyer v. Whitley*, the Court recognized the importance of being able to challenge the absence of aggravating factors in post-conviction proceedings to demonstrate a person's innocence of the sentence of death. *Sawyer v. Whitley*, 505

U.S. 333, 345 (1992). "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Id.*

In applying § 5(a)(3) the CCA determined petitioners must make

> "'a threshold showing of evidence that would be at least sufficient to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find' that 'the applicant is ineligible for the death penalty.' In other words, the CCA makes a threshold determination of whether the facts and evidence contained in the successive habeas application, if true, would make a clear and convincing showing that the applicant is actually innocent of the death penalty. The CCA concluded that performing this kind of threshold review was consistent with the fact that, in enacting § 5(a)(3), the Texas 'Legislature apparently intended to codify, more or less, the doctrine found in *Sawyer v. Whitley*.'

Rocha, 626 F.3d at 822 (quoting *Ex parte Blue*, 230 S.W.3d 151, 162 (Tex. Crim. App. 2007)).

b. Chapter 64

Chapter 64 grants a right to DNA testing. Tex. Code Crim. Proc. Ann. art. 64. The statute's motion requirements allow for testing of biological material that was not previously subject to DNA testing or was subject to testing but can be subject to newer testing techniques. Tex. Code Crim. Proc. Ann. art. 64.01 Motion. After 2011, this section no longer included a no-fault requirement for a defendant to move for DNA testing. *See* Tex. Code Crim. Proc. Ann. art. 64.01 (Effective: September 1, 2007 to August 31, 2011).

Article 64.03 lists the requirements to be eligible for DNA testing:

(a) A convicting court may order forensic DNA testing under this chapter only if:

(1) the court finds that:

(A) the evidence:

(i) still exists and is in a condition making DNA testing possible; and

(ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(B) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and

(C) identity was or is an issue in the case; and

(2) the convicted person establishes by a preponderance of the evidence that:

(A) the person would not have been convicted if exculpatory results had been obtained through DNA testing; and

(B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

(b) A convicted person who pleaded guilty or nolo contendere or, whether before or after conviction, made a confession or similar admission in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea, confession, or admission, as applicable.

(b-1) Notwithstanding Subsection (c) a convicting court shall order that the requested DNA testing be done with respect to evidence described by Article 64.01(b)(2)(B) if the court finds in the affirmative the issues listed in Subsection (a)(1), regardless of whether the convicted person meets the requirements of Subsection (a)(2).

Tex. Code Crim. Proc. Ann. art. 64.03.

VII. Legal Standard

a. Reconsideration

Although a motion to reconsider is not explicitly provided for in the Federal Rules of Civil Procedure, under Rule 54 a Court may revise any of its orders or other decision before the entry of judgment adjudicating all the claims and rights of the parties. Fed. R. Civ. P. 54(b). Reconsideration of interlocutory orders are

discretionary. *Zimzores v. Veterans Admin.*, 778 F.2d 264, 267 (5th Cir. 1985). The Court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981).

b. Law of the Case, Mandate Rule, GVR

"When a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper v. United States*, 562 U.S. 476, 506 (2011). The doctrine expresses the practice of courts to refuse to reopen what has been decided. *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016). Statute, law, and the nature of judicial hierarchy also binds lower courts to honor the mandate of a superior court. 28 U.S.C. § 2106; "The law of the case doctrine posits that ordinarily 'an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on subsequent appeal.'" *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004). The law of the case is not "inviolate" in three circumstances: 1) when facts are later determined to be significantly different, 2) after an intervening change in law, and 3) the earlier decision is clearly erroneous. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). "The mandate rule [...] has the same exceptions as does the general doctrine of law of the case; these exceptions, if present, would permit a district court to exceed our mandate on remand." *Id.*

A lower court must implement the letter and spirit of the higher court's mandate and cannot ignore explicit directives. *Lee*, 358 F.3d at 321. The mandate rule covers issues decided expressly and by implication. *Id.* A careful reading of the reviewing court's opinion is required to determine what issues were actually decided by the mandate. *Id.*

GVRs ("Grant, Vacate, Remand") are granted by the Supreme Court to conserve its resources and to assist "the court below by flagging a particular issue that it does not appear to have fully considered" and it helps the Supreme Court in obtaining the "benefit of the lower court's insight" before the Supreme Court rules on the merits. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). "A GVR

'does 'not amount to a final determination on the merits.'" *Kenemore v. Roy*, 690 F.3d 639, 642 (5th Cir. 2012). "A GVR does not bind the lower court to which the case is remanded; that court is free to determine whether its original decision is still correct in light of the changed circumstances or whether a different result is more appropriate." *Id.*

"The effect of vacating the judgment below is to take away from it any precedential effect." *Troy State Univ. v. Dickey*, 402 F.2d 515, 516 (5th Cir. 1968). At the same time, the vacated decision is still available to be cited for its "persuasive weight." *NASD Dispute Resolution, Inc. v. Judicial Council*, 488 F.3d 1065, 1069 (9th Cir. 2007); *Johnson v. Bd. of Educ. of City of Chicago*, 457 U.S. 52, 53 (1982). When a decision is vacated "all is effectually extinguished." *Falcon v. Gen. Tel. Co.*, 815 F.2d 317, 320 (5th Cir. 1987) (citing *Lebus v. Seafarer's International Union, Etc.*, 398 F.2d 281 (5th Cir.1968)).

c. Section 1983 DNA Testing Challenge: *Osborne* and *Skinner*

The U.S. Supreme Court stated in *Osborne* and then in *Skinner* that challenges to DNA testing procedures may be brought in a § 1983 action because requesting access to testing does not necessarily imply the guilt or innocence of a defendant as the defendant is not yet in possession of exculpatory evidence. *Skinner v. Switzer*, 562 U.S. 521, 534 (2011); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55, (2009). Such § 1983 actions are limited, but not barred, by the *Rooker-Feldman* doctrine, which prohibits relitigation of state judgments in federal court. *Skinner*, 562 U.S. at 532. A challenge to the constitutional adequacy of state-law procedures for post-conviction DNA testing is not within *Rooker-Feldman's* ambit. *Id.* So long as the Plaintiff does not challenge the state court decisions on DNA testing themselves "it is not an impediment to the exercise of federal jurisdiction that the 'same or a related question' was earlier aired between the parties in state court." *Skinner*, 562 U.S. at 532.

DNA testing is a powerful tool in the criminal justice system and states are experimenting with the challenges and opportunities posed by DNA evidence. *Osborne*, 557 U.S. 52, 62 (2009). The Supreme Court decided in *Osborne* to not

constitutionalize the area of DNA testing so as to not "short-circuit what looks to be a prompt and considered legislative response" from the states in this fast-developing area of science and law. *Id.* Accordingly, there is no "freestanding" substantive due process right to access DNA evidence, and federal courts should not presume that state criminal procedures are inadequate to deal with DNA evidence. *Osborne*, 557 U.S. at 73-74. Post-conviction DNA testing claims are not "parallel" to a trial right and are not analyzed under the *Brady* framework. *Id.* at 69; *see Brady v. Maryland*, 373 U.S. 83 (1963). Yet, a state's DNA testing procedures must still comply with some baseline constitutional protections. *Osborne*, 557 U.S. at 69.

The questions a court asks are 1) whether the state has granted a liberty interest in demonstrating innocence with new evidence and 2) whether the procedures for vindicating that liberty interest are adequate. *Id.* Such procedures must not "'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress[] any recognized principle of fundamental fairness in operation.'" *Id.* (citing *Medina v. California*, 505 U.S. 437, 446 (1992)). Federal courts may only disturb a state's postconviction procedures if they are "fundamentally inadequate to vindicate the substantive rights provided." *Id.*

To determine if a procedure violates procedural due process a court looks to the standards of the common law as they existed at the time of adoption of the Fifth and Fourteenth Amendment. *Patterson v. New York*, 432 U.S. 197, 202 (1977). Additionally, a procedure should not offend a deeply rooted principle of justice of the American people. *Id.* Widespread acceptance or rejection among the states may indicate whether procedure is contrary to the conscience of the people. *Id.* The Court in *Osborne* found "nothing inadequate" with Alaska's postconviction relief in general or its DNA testing procedures. *Osborne*, 557 U.S. at 69-70. The Court noted that Alaska's procedures requiring evidence to be newly available, diligently pursued and sufficiently material are similar to federal law and the law of other states and are not inconsistent with the conscience of the people or fundamental fairness. *Id.* at 70. The Court held Alaska's constitutionally created right of DNA access provided

additional protection to parties who may not be able to seek testing under statute. *Id.* The *Osborne* Court noted that exhaustion of a state law remedy is not required but can be useful to demonstrate that the procedures do not work in practice. *Id.* at 71.

Circuit courts addressing § 1983 DNA complaints have encountered facial and "as-applied" procedural Due Process claims. An as-applied challenge is not permissible if used to collaterally attack the state-court judgment. *McKithen v. Brown*, 481 F.3d 89, 98–99 (2d Cir. 2007) ("[B]y bringing an as-applied challenge, [Plaintiff] is asking the federal district court to review the validity of the state court judgment"); *Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257, 1263 (11th Cir. 2012) (holding that the *Rooker-Feldman* doctrine bars Plaintiff's as applied procedural due process attack on the state court judgment); *Wade v. Monroe Cty. Dist. Attorney*, 800 F. App'x 114, 119 (3d Cir. 2020) (reversing because "the state court entered a ruling based upon Wade's situation, and made no broad pronouncement about how the statute should be construed in all cases"). Instead, an as-applied challenge is permissible so far as it illuminates the authoritative construction of a state law to determine constitutional adequacy. *Morrison v. Peterson*, 809 F.3d 1059, 1070 (9th Cir. 2015) (finding plaintiff's as-applied challenge is permissible and "merely argues a defect that is not apparent from the face of the statute"). The Second Circuit approved of a plaintiff's as-applied challenge and reinstated a jury verdict which determined plaintiff was deprived of procedural due process by the city's poor evidence handling system. *Newton v. City of New York*, 779 F.3d 140, 159 (2d Cir. 2015).

In unpublished opinions, the Fifth Circuit has repeatedly identified Article 64 of the Texas Code of Criminal Procedure as a substantive right created by the state for post-conviction DNA testing. "Texas has created a right to post-conviction DNA testing in Article 64 of the Texas Code of Criminal Procedure. Thus, '[w]hile there is no freestanding right for a convicted defendant to obtain evidence for postconviction DNA testing, Texas has created such a right, and, as a result, the state[-]provided procedures must be adequate to protect the substantive rights provided.'" *Emerson*

v. Thaler, 544 F. App'x 325, 327-28 (5th Cir. 2013) (quoting *Elam v. Lykos*, 470 F. App'x. 275, 276 (5th Cir. 2012)).

d. Procedural Due Process and *Medina*

The protections of procedural due process have "limited operation" and the Supreme Court has construed the category of infractions that violate fundamental fairness "very narrowly." *Medina*, 505 U.S. at 443. The Due Process Clause does not establish federal courts as promulgators of state rules of criminal procedure nor should federal courts cause "undue interference" with legislative judgments and the Constitution's balance of liberty and order. *Id.* (citing *Spencer v. Texas*, 385 U.S. 554, 564 (1967)). A procedure should not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202. Historical practice may be probative of whether a procedural rule can be characterized as fundamental. *Medina*, 505 U.S. at 446. Contemporary widespread acceptance or rejection among the states may also help illuminate whether a procedure is contrary to the conscience of the people. *Schad v. Arizona*, 501 U.S. 624, 642 (1991).

The historical and state consensus inquiries are often combined to determine if a procedure violates due process, with great deference being given to established historical practice. *Id.* Constitutionality is not established by cataloging the practices of the states; nor does it ignore basic principles of justice. *Martin v. Ohio,* 480 U.S. 228, 236 (1987); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). When a practice defies the structural prerequisites of the country's criminal justice system, due process is appropriately invoked. *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996). Fundamental fairness is not an easy rule to apply and a district court should be careful to not impose personal notions of fairness. *Dowling v. United States*, 493 U.S. 342, 353 (1990).

VIII. Analysis

a. Motion for Reconsideration

Defendants move the Court to reconsider its prior ruling granting in part and denying in part Defendants' Rule 12 motion to dismiss in light of the Fifth Circuit's opinion vacating the stay of execution. Dkt. No. 119; Fed. R. Civ. P. 12.

The Fifth Circuit's decision did not consider the 12(b) legal standard for determining whether there was a lack of subject matter jurisdiction or whether Gutierrez stated a claim upon which relief could be granted. *Gutierrez*, 818 F. App'x at 312. Although the Fifth Circuit ruled on several issues, it did not consider the sufficiency of Gutierrez's complaint survive a Rule 12(b) challenge because the Rule 12(b) decision was not before the Fifth Circuit and is an entirely different legal standard. *Id.* The Fifth Circuit's decision was at a different procedural stage of the litigation. *Id.* After reviewing this Court's Rule 12 decision, the undersigned finds no sufficient cause to rescind or modify its order. *See Melancon*, 659 F.2d at 553. This Court will also not make another ruling on those issues. *See Musacchio*, 136 S. Ct. at 716. Accordingly, the Court **DENIES** Defendants' motion for reconsideration. Dkt. No. 119.

b. Fifth Circuit's Ruling

In vacating this Court's stay of execution, the Fifth Circuit ruled that, as a matter of law, Chapter 64's materiality standard[3] on its face and as applied by the CCA does not offend the constitution. *Gutierrez v. Saenz*, 818 F. App'x 309, 312-13 (5th Cir. 2020). The Supreme Court vacated this order. Although the DNA question was not on appeal, the result of vacatur is that the conclusions of the Fifth Circuit no longer have mandatory effect and instead may be considered for their "persuasive weight." *See NASD Dispute Resolution*, 488 F.3d at 1069; *Lee*, 358 F.3d at 320; *Falcon*, 815 F.2d at 320.

The Fifth Circuit's decision attempted to reach a conclusion on the merits of the DNA testing motion under Texas law. It concluded that Gutierrez failed to show "how the DNA testing he requests would be 'sufficiently material' to negate

[3] Under Chapter 64 a convicted person must show "by a preponderance of the evidence that: (A) [he] would not have been convicted if exculpatory results had been obtained through DNA testing." Art. 64.03(a)(2).

his guilt thus justifying the pursuit of DNA testing" under Chapter 64 of Texas law. *Gutierrez v. Saenz*, 818 F. App'x at 314-15. The Fifth Circuit determined that under Chapter 64, Gutierrez had not shown by a preponderance of the evidence that he would not have been convicted of the death penalty if exculpatory results were obtained, and therefore he cannot prevail. *Id.*

This conclusion about a fundamental issue is clearly erroneous as a matter of law. The Fifth Circuit did not have jurisdiction to rule on Gutierrez's DNA testing motion because Gutierrez's DNA testing motion reached a merits determination in the highest criminal court in the state of Texas. *See* Dkt. 48 at 11; *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *1 (Tex. Crim. App. Feb. 26, 2020). This type of review of a state court proceeding is reserved for the United States Supreme Court and when performed by a lower Court, such as the Fifth Circuit, it is violative of the *Rooker-Feldman* doctrine. *See* Dkt. No. 48 at 11-12; *Lance*, 546 U.S. at 463 (holding the *Rooker-Feldman* doctrine bars parties from appealing an unfavorable state-court decision to a lower federal court). It was for this reason that this Court did not pass judgment on this question when it was presented at an earlier stage of this litigation. *See* Dkt. 48 at 11. Accordingly, the Court concludes that the Fifth Circuit's decision on this issue is not persuasive. *See id.*

In the vacated opinion the Fifth Circuit decided that, as a matter of law, Chapter 64's standard of proof for testing on its face and as applied by the CCA does not offend the constitution. *Gutierrez v. Saenz*, 818 F. App'x 309, 312-13 (5th Cir. 2020). The Fifth Circuit stated "[a]lthough the Court in *Osborne* did not resolve the appropriate materiality standard, it did approve of Alaska's postconviction procedures, as applied to DNA testing, requiring that defendants seeking access to DNA evidence must show the evidence is 'sufficiently material.'" *Gutierrez v. Saenz*, 818 F. App'x at 312. The Fifth Circuit concluded "[w]e see no constitutionally relevant distinction between what was approved in *Osborne* — sufficiently material — and requiring an inmate to show materiality by a preponderance of the evidence." *Id.* Gutierrez argues this overstates and misconstrues the holdings in *Osborne* and Chapter 64. Dkt. No. 118.

The Fifth Circuit summarized Chapter 64's standard as requiring the movant to "show materiality by a preponderance of the evidence." *Gutierrez v. Saenz*, 818 F. App'x at 312. To be specific, the standard is "by a preponderance of the evidence that: (A) [petitioner] would not have been convicted if exculpatory results had been obtained through DNA testing." Art. 64.03(a)(2). Materiality means "having a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Fountain*, 277 F.3d 714, 717 (5th Cir. 2001) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1998)). Materiality can also be defined as "[h]aving some logical connection with the consequential fact. *Material*, Black's Law Dictionary (11th ed. 2019).

Prospectively assessing whether yet-to-be-performed DNA testing results would have led the jury to a different outcome from the one they reached based on all the evidence is a different type of undertaking than determining if a fact is "capable of influencing [] the decision of the decision-making body." *Fountain*, 277 F.3d at 717. Therefore, even if the Supreme Court intended to signal approval of a "sufficiently material" standard for DNA testing, which is unclear, the Court cannot infer from such approval that the Supreme Court also intended to indicate that it approved of a 'preponderance of the evidence he would not have been convicted' standard. *See Osborne*, 557 U.S. at 69-70. The Court therefore declines to follow the Fifth Circuit's vacated conclusion on this matter. *See Gutierrez v. Saenz*, 818 F. App'x at 312.

Additionally, after a thorough review of the Fifth Circuit's decision, this Court concludes the Fifth Circuit did not discuss Gutierrez's claim that Chapter 64 violates procedural due process because it denies a movant the ability to test evidence that would demonstrate he is innocent of the death penalty, as opposed to demonstrating innocence of capital murder. *See Gutierrez*, 818 F. App'x at 314. This claim is legally distinct from the other questions ruled on by the Fifth Circuit and was omitted from the opinion. *See id.* Therefore, this Court must rule on this issue without the benefit of the persuasive authority of the Fifth Circuit's vacated opinion. See *NASD*, 488 F.3d at 1069.

c. Is Chapter 64's 'Preponderance of the Evidence' Test Insurmountable?

Gutierrez first challenges Chapter 64 on the grounds that the evidentiary standard to obtain DNA testing is so high that is virtually impossible to meet on its face and as applied by the CCA. Dkt. No. 118.

Historical practice and this country's fundamental principles of justice do not countenance an illusory right that cannot be obtained. *See Patterson*, 432 U.S. at 202. Rights that are ostensibly granted but then taken away through inadequate procedure offend procedural due process. *See Osborne*, 557 U.S. at 69; *Cooper*, 517 U.S. at 368. Therefore, because Texas has granted a substantive right to DNA testing under Chapter 64, making that right meaningless through an impossibly high evidentiary standard that no petitioner could reasonably meet would create a procedure that is fundamentally inadequate and offends the Constitution. *See Medina*, 505 U.S. at 443; *See Osborne*, 557 U.S. at 69.

Under Chapter 64, to obtain testing a petitioner must prospectively demonstrate "by a preponderance of the evidence that: (A) [petitioner] would not have been convicted if exculpatory results had been obtained through DNA testing." Art. 64.03(a)(2). This is undoubtably a complex and high standard of proof. *See id.* It places a great burden on the petitioner to present compelling hypotheticals as to what DNA evidence might show if tested while leaving great leeway for Texas courts to speculate as to how these hypotheticals would or would not have influenced a jury verdict. *See id.*

Even in the face of this high standard, Gutierrez's challenge fails for three reasons. First, the Court is mindful of the Supreme Court's holding in *Osborne* that there is no freestanding right to DNA evidence under substantive due process. *See Osborne*, 557 U.S. at 72. This Court will not impose its own notion of fundamental fairness on Chapter 64 and further blur the line between substantive and procedural due process. *See Dowling v*, 493 U.S. at 353; *Medina*, 505 U.S. at 443. Second, Gutierrez has only shown that Art. 64.03(a)(2) is a very difficult standard to meet. *See* Dkt. No. 118. He has not shown that it is impossible for him or another

petitioner to ever meet this high burden. *See id.* Gutierrez has not shown it is impossible to receive DNA testing under Chapter 64. In its decisions the CCA has articulated how it believes Gutierrez's petition is lacking, and implied what would be required for a successful petition. *See Gutierrez v. State*, No. AP-77,089, 2020 WL 918669; *see also Esparza v. State*, 282 S.W.3d 913, 922 (Tex. Crim. App. 2009). Third, Gutierrez has not demonstrated that the 'preponderance of the evidence he would not have been convicted' standard offends historical practice or a fundamental principle of justice of the nation. *See* Dkt. No. 118; *Osborne*, 557 U.S. at 69. While Gutierrez has shown that many states establish much lower standards of proof for access to DNA testing, a counting of majorities is insufficient to meet this standard of procedural due process. *See* Dkt. No. 118, *Martin,* 480 U.S. at 236; *Dowling*, 493 U.S. at 353.

The Court acknowledges the potentially problematic nature of a statutory "escape hatch" that allows denial of DNA testing when a court concludes the "DNA testing which has never occurred cannot reasonably produce exculpatory evidence that would exonerate the movant." *See Wilson v. Marshall,* No. 214CV01106MHTSRW, 2018 WL 5074689, at *14 (M.D. Ala. Sept. 14, 2018), report and recommendation adopted, No. 2:14CV1106-MHT, 2018 WL 5046077 (M.D. Ala. Oct. 17, 2018). Yet so too must the Court take note of other statutory procedures which require a strong showing of new evidence before receiving relief. *See Garcia v. Sanchez*, 793 F. Supp. 2d 866, 891 (W.D. Tex.) (citing *House v. Bell*, 547 U.S. 518, 536 (2006), *aff'd sub nom. Garcia v. Castillo*, 431 F. App'x 350 (5th Cir. 2011)).

DNA testing is a new and developing area of law and without a greater showing by Gutierrez of prejudice or impossibility of access, the Court concludes it is premature to discern a fundamental principle of justice for burdens of proof in DNA testing procedure. *See Martin,* 480 U.S. at 236; *Dowling*, 493 U.S. at 353; *Osborne*, 557 U.S. at 69; *Medina*, 505 U.S. at 443.

d. Does Chapter 64 Otherwise Offend Procedural Due Process?

As discussed above, Texas has established a substantive right to DNA testing in Article 64 of its code of Criminal Procedure. *See Gutierrez v. Saenz et al.*, No. 20-

70009 at 3; *Emerson*, 544 F. App'x at 327–28. Texas has construed this right to mean a person can only obtain DNA testing when the movant can show the testing would demonstrate he is innocent of the crime for which he is convicted. *Gutierrez v. State*, 2020 WL 918669, at *8. Texas denies DNA testing of evidence that would only demonstrate a person is innocent of the death penalty. *Gutierrez v. State*, 2020 WL 918669, at *8.

Texas has also established a substantive right to bring a subsequent habeas petition for a person convicted of the death penalty when that person can show "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury...." Tex. Code Crim. Proc. art. 11.071 § 5(a)(3).[4] This section incorporates the actual innocence of the death penalty doctrine as described in *Sawyer*. *Rocha*, 626 F.3d at 822 (citing *Sawyer*, 505 U.S. at 345). Article 11.071 has been construed by the CCA to mean that petitioners must make a threshold showing that "the applicant is actually innocent of the death penalty." *Id.*

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[4] Article 11.071 § 5(a)(3) incorporates Tex. Code Crim. Proc. Ann. art. 37.071 which mandates the special verdict questions to be answered by the jury during the punishment phase of a capital case:

> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
> (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.
> (c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.
> (d) The court shall charge the jury that:
> (1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

Tex. Code Crim. Proc. Ann. art. 37.071.

These two statutory provisions are irreconcilable. Texas grants the substantive right to file a second habeas petition with a clear and convincing showing of innocence of the death penalty in Article 11.071, and then Chapter 64 denies the petitioner access to DNA evidence by which a person can avail himself of that right.[5] *See Gutierrez v. State*, 2020 WL 918669, at *8; Tex. Code Crim. Proc. art. 11.071 § 5(a)(3); Tex. Crim. Proc. Code art. 64.03(a)(C)(2)(A); *See Osborne*, 557 U.S. at 62. Article 11.071 § 5(a)(3) creates a substantive right uniquely for a defendant convicted of the death penalty, and that right is protected by procedural due process just as Chapter 64 creates a right that is protected by procedural due process. *See Osborne*, 557 U.S. at 62. These procedures cannot "'transgress[] any recognized principle of fundamental fairness in operation." *Id.* (quoting *Medina*, 505 U.S. at 448).

The procedural due process doctrine protects against procedures which confound the structural prerequisites of the criminal justice system. *Cooper*, 517 U.S. at 367. A process which amounts to a "meaningless ritual" is historically and contemporarily disproved of by the courts. *See Douglas v. People of State of Cal.*, 372 U.S. 353 at 358 (1963); *Burns v. United States*, 501 U.S. 129, 136 (1991) (holding a statutory reading "renders meaningless the parties' express right") *abrogation recognized by Dillon v. United States*, 560 U.S. 817 (2010); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (deciding a law would render rights "meaningless promises"). When such conflict is found between laws, they must be interpreted to preserve the substantive rights or risk constitutional infirmity. *See id.*

A bar on Chapter 64 DNA testing to demonstrate innocence of the death penalty renders Article 11.071 § 5(a)(3) illusory. *See Gutierrez v. State*, 2020 WL 918669, at *8; Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). Only the few people who can make a clear and convincing showing of innocence of the death penalty without DNA evidence may avail themselves of the right. Texas procedure creates a process which gives a person sentenced to death the substantive right to bring a subsequent

[5] For criminal defendants, DNA testing is "powerful new evidence unlike anything known before" for the purposes of proving culpability. *See Osborne*, 557 U.S. at 62.

habeas action under Article 11.071 § 5(a)(3), but then barricades the primary avenue for him to make use of that right. *See Gutierrez v. State*, 2020 WL 918669, at *8; Tex. Code Crim. Proc. art. 11.071 § 5(a)(3); Tex. Crim. Proc. Code art. 64.03(a)(C)(2)(A).

Defendants argue Gutierrez's challenge to Chapter 64 for denying testing for ineligibility of the death penalty fails because "Gutierrez can only challenge the procedures that are provided by a state's postconviction testing scheme—he cannot insist that a federal court require the state to add procedures that do not exist in the statute." *See* Dkt. No. 119 at 29. This argument fails because Texas law already provides in statute a procedure and substantive right based on innocence of the death penalty. *See* Article 11.071 § 5(a)(3). The Court need not impose its own notions of fairness, invoke substantive due process, or become a promulgator of state rules of procedure. *See Dowling*, 493 U.S. at 353. *Medina*, 505 U.S. at 443; *Osborne*, 557 U.S. at 69. Instead, the Court must only insist on access to the rights and processes that Texas law already provides. *See* Article 11.071 § 5(a)(3).

A stark conflict exists between Chapter 64 and Article 11.071. Texas courts have applied these laws in a way that denies a habeas petitioner sentenced to death his rights granted by the State of Texas and protected under the Due Process Clause of the Constitution. *See Osborne*, 557 U.S. at 69. *Douglas*, 372 U.S. 353 at 358. Due process does not countenance procedural sleight of hand whereby a state extends a right with one hand and then takes it away with another. To do so renders meaningless an express right and transgresses a principle of fundamental fairness. *See Osborne*, 557 U.S. at 69; *Medina*, 505 U.S. at 446; *Douglas*, 372 U.S. at 358; *Burns*, 501 U.S. at 136; *Griffin v. Illinois*, 351 U.S. at 17.

The Court **HOLDS** that granting a right to a subsequent habeas proceeding for innocence of the death penalty but then denying DNA testing for a movant to avail himself of that right creates a system which is fundamentally inadequate to vindicate the substantive rights the State of Texas provides. *See Gutierrez v. State*, 2020 WL 918669, at *8; Tex. Code Crim. Proc. art. 64.03(a)(C)(2)(A); Tex. Code

Crim. Proc. Ann. art. 11.071 § 5(a)(3); *See Osborne*, 557 U.S. 52, 69 (2009); *Medina*, 505 U.S. at 446.

IX. Conclusion

For the aforementioned reasons, the Court **DENIES** Defendants' motion for reconsideration. Dkt. No. 119.

Furthermore, the Court **GRANTS** Gutierrez a declaratory judgment concluding that giving a defendant the right to a successive habeas petition for innocence of the death penalty under Texas Code of Criminal Procedure Article 11.071 § 5(a)(3) but then denying him DNA testing under Texas Code of Criminal Procedure Article 64.03(a)(C)(2)(A) unless he can demonstrate innocence of the crime is fundamentally unfair and offends procedural due process.

SIGNED this 23rd day of March, 2021.

Hilda Tagle
Senior United States District Judge

2010 WL 8206935 (Tex.Dist.) (Trial Order)
District Court of Texas,
107th Judicial District.
Cameron County

State of Texas,
v.
Ruben GUTIERREZ.

No. 98-CR-1391-A.
July 27, 2010.

Order on Defendants Motion for Forensic DNA Testing

Hon. Benjamin Euresti, Jr., Judge Presiding.

ON THIS DAY CAME TO BE CONSIDERED DEFENDANT'S MOTION FOR DNA TESTING, and the Court, in reviewing the applicable statutes governing the instant Motion, Tex. Code Crim. Proc. Art. 64.01, *et seq.,* Defendant's Motion, the State's Response, and the court's entire record, finds that Defendant's prayer for relief cannot be favored, for the following reasons:

1. Defendant's Motion fails to comply with Texas Code Crim. Proc. Art. 64.01(b)(1)(B). Defendant did have the opportunity to inspect all physical evidence in the State's possession before trial began including those specific items listed in his motion. There has been no complaint raised regarding ineffective assistance of trial counsel for any alleged failure to have an independent expert appointed, to have testing performed on any evidence, or to request a continuance prior to trial so these matters could be done. Trial counsel advised this Court, prior to trial, that after reviewing the evidence it would make any such requests if it deemed necessary. No such requests were made and no objections were lodged. Thus, fault is attributable to the "convicted person" as to why the biological material was not previously subjected to DNA testing. This Court finds that Defendant has failed to make a "particularized" showing that the biological materials were never tested through no fault of his own. *Routier v. State,* 273 S.W.3d 241,247 (Tex.Crim.App.2008).

2. In reviewing State's response pursuant to Tex. Code Crim. Proc. Art. 64.02, the Court finds that DNA evidence, specifically the single loose hair described in Defendant's motion, does not exist because it was never recovered as evidence in the investigation of the case and there is no record of a chain of custody for the single loose hair. The Court finds that the non-existence of this piece of evidence was not caused by any bad faith of the State.

3. Further, even if fault was not attributable to the Defendant concerning the remaining untested biological evidence listed in his motion, the Court finds the following:

a. The Defendant has failed to satisfy the statutory requirement of Tex. Code Crim. Proc. Art. 64.03(a)(1)(B), specifically that identity was not and is not an issue in the case considering the entire record, to include the Defendant's statements, the Co-defendants' statements to investigators, the testimony of an eyewitness connecting the Defendant to the murder scene.

b. The Defendant has failed to satisfy the statutory requirement of Tex. Code Crim. Proc. Art. 64.03(a)(2)(A), specifically the Defendant has failed to establish by a preponderance of the evidence that he would not have been convicted if "exculpatory results had been obtained through DNA testing."

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Forensic DNA Testing is hereby DENIED.

The Clerk of this Court is now directed to prepare certified copies of this Order, and transmit them to the parties, named listed herein below, as soon as possible.

Signed for entry on 27th day of August, 2010.

<<signature>>

HON. BENJAMIN EURESTI, JR.,

107th Judicial District Court

Judge Presiding

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337 S.W.3d 883
Court of Criminal Appeals of Texas.

Ex parte Ruben GUTIERREZ, Appellant.

No. AP–76,406.
|
May 4, 2011.

Synopsis

Background: After affirmance of defendant's capital murder conviction and death sentence, defendant requested appointment of counsel to assist him in preparing a motion for postconviction DNA testing. The 107th District Court, Cameron County, Benjamin Euresti, Jr., J., denied the request. Defendant appealed. The Court of Criminal Appeals, 307 S.W.3d 318, dismissed appeal as premature. Thereafter, defendant filed motion for post-conviction DNA testing. The District Court denied request. Defendant appealed both the order denying his request for appointed counsel and order denying his motion for DNA testing.

Holdings: The Court of Criminal Appeals, Cochran, J., held that:

[1] defendant was not entitled to appointed counsel to assist him in filing motion for post-conviction DNA testing;

[2] defendant made a considered decision to forego DNA testing at trial, and, thus, he failed to show that the lack of DNA testing at trial occurred through no fault of his own;

[3] single loose hair purportedly taken from victim's finger was not available for DNA testing; and

[4] defendant failed to establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing of victim's fingernail scrapings and other evidence.

Affirmed.

Attorneys and Law Firms

***886** Margaret Schmucker, Austin, for Appellant.

Lawrence J. Rabb, Asst. County and Dist. Atty., Brownsville, Lisa C. McMinn, State's Atty., Austin, for State.

OPINION

COCHRAN, J., delivered the opinion of the Court in which MEYERS, WOMACK, JOHNSON, KEASLER and HERVEY, JJ., joined.

Appellant appeals from two trial court orders-the first denying his request for appointed counsel to assist him in filing a motion for post-conviction DNA testing, and the second denying his motion for the testing itself. We will affirm.

I.

Background

Appellant was convicted of capital murder and sentenced to death for his participation in the robbery and murder of eighty-five-year-old Escolastica Harrison. Mrs. Harrison lived with her nephew, Avel Cuellar, in a mobile-home park in Brownsville. She owned the mobile-home park, and her home doubled as the park's office. Mrs. Harrison did not trust banks, and, at the time of her murder, she had about $600,000 in cash hidden in her home. Appellant was one of the few people who knew about Mrs. Harrison's money. Mrs. Harrison had befriended appellant because he was friends with her nephew, Avel. Appellant sometimes ran errands for Mrs. Harrison, and he borrowed money from her. Appellant, Avel, and others routinely gathered behind Mrs. Harrison's home to drink and visit.

Appellant, then 21 years old, orchestrated a plan to steal her money. On September 5, 1998, he and an accomplice, Rene Garcia—whom Mrs. Harrison did not know—entered Mrs. Harrison's home to carry out this plan. A third accomplice, Pedro Gracia, was the driver. When appellant and Rene Garcia left with Mrs. Harrison's money, she was dead. Avel Cuellar found her body late

that night—face down in a pool of blood. She had been severely beaten and stabbed numerous times. Mrs. Harrison's bedroom was in disarray, and her money was missing.

The next day, detectives canvassed the area for information. Detective Garcia, the lead investigator, already knew that appellant's drinking buddies—Avel Cuellar, Ramiro Martinez, and Crispin Villarreal—had all said that appellant was in the trailer park the evening of the murder. Another witness, Julio Lopez, also said appellant was there. [1]

1 Mr. Lopez did not know appellant. The police showed him some "loose photos," and he picked out appellant in "a few seconds" and was "absolutely positive" about that identification. But by the time of trial, Mr. Lopez was not able to identify appellant in person.

On September 8, 1998, detectives went to appellant's home. He was not there, but his mother said she would bring him to the police station. The next day, appellant voluntarily came to the police station to make a statement. He gave an alibi. He said he had seen Avel Cuellar and another friend, Ramiro Martinez, at the trailer park on the Friday before the murder, but on the Saturday of the murder, he drove around with Joey Maldonaldo in Maldonaldo's Corvette all day long. They were nowhere near Mrs. Harrison's mobile-home park. When police asked him if he had his days mixed up, appellant cut off questioning. The alibi did not pan out. Joey Maldonaldo's statement did not mesh with appellant's.

***887** Four days later, as a result of statements given by appellant's two accomplices, Rene Garcia and Pedro Gracia, and their own investigation, the police obtained an arrest warrant for appellant. He made a second statement. This time, he admitted that he had planned the "rip off," but said that he had waited at a park while Rene Garcia and Pedro Gracia did it. He said that when his two cohorts came to pick him up, Rene Garcia was holding a screwdriver covered in blood and said that he had killed Mrs. Harrison. Rene Garcia and Pedro Gracia had taken a blue suitcase and a tackle/tool box full of money. Appellant said, "There was no doubt about the fact that I planned the whole rip off but I never wanted for either one of them to kill Mrs. Harrison. When I saw that Pedro was grabbing the money from the tackle/tool box and heard some crumbling plastic I decided that I did not want any money that they had just ripped off." Appellant told the police that his accomplices had told him where they had thrown the blue suitcase away. Appellant led the detectives to a remote area, but when the officers could not find the blue suitcase, appellant was allowed out of the car, and he walked straight to it.

The next day appellant made a third statement, admitting that he had lied in his previous one "about being dropped off in the park, about not being with Rene." He said Pedro Gracia drove the truck and dropped him and Rene Garcia off at Mrs. Harrison's home. The initial plan was for Rene Garcia to lure Mrs. Harrison out of her home by asking to see a trailer lot. Then appellant would come around from the back of her home, run in, and take the money without her seeing him. But when appellant ran around to the front, Rene Garcia and Mrs. Harrison were still inside the house. Appellant said Rene Garcia knocked out Mrs. Harrison by hitting her, and then he repeatedly stabbed her with a screwdriver. The screwdriver "had a clear handle with red, it was a standard screwdriver. We had got the screwdriver from the back of the truck in a tool box along with another screwdriver, a star type." Appellant gathered the money. "When he started stabbing her, I pulled out the blue suitcase from the closet and the black tool box fell. It opened when it fell and I saw the money." Appellant tossed the tool box to Rene Garcia, and headed out the door with the blue suitcase. Rene Garcia followed, and Pedro Gracia pulled the truck around to pick them up. Pedro Gracia dropped them off down a caliche road and appellant filled "up the little tool box with the money that was in the suitcase," while Rene Garcia filled up his shirt. They abandoned the suitcase, and Pedro Gracia picked them up and drove appellant home.

Much of the money was recovered. Appellant's wife's cousin, Juan Pablo Campos, led police to $50,000 that appellant had given him to keep safe. The prosecution's theory at trial was that appellant, either as a principal or as a party, intentionally murdered Mrs. Harrison during a robbery. The prosecution emphasized (1) the medical examiner's testimony that two different instruments caused the stab wounds, [2] (2) appellant's admission that he and Rene Garcia went inside Mrs. Harrison's home office with two different screwdrivers, and (3) the fact that four different people—Avel Cuellar, Ramiro Martinez, and Crispin Villarreal from "the drinking group" ***888** and another passerby, Mr. Lopez, who did not know appellant—all saw him at the mobile-home park the day that Mrs. Harrison was killed.

2 The medical examiner testified that Mrs. Harrison suffered defensive wounds that indicated she had struggled for her life and tried to "ward off blows or attacks of some sort." He said that she was stabbed approximately thirteen times by two different instruments. One "almost certainly" was a flat-head screwdriver and the other was possibly a Phillips-head screwdriver.

The jury was instructed that it could convict appellant of capital murder if it found that appellant "acting alone or as a party" with the accomplice intentionally caused the victim's death. The jury returned a general verdict of guilt, and, based on the jury's findings at the punishment phase, the trial judge sentenced appellant to death.

We affirmed appellant's conviction and sentence on direct appeal in 2002 [3] and denied his application for a writ of habeas corpus in 2008. Appellant filed a petition for writ of habeas corpus in federal district court, but that court stayed and abated the federal proceedings to allow the appellant to pursue unexhausted state claims.

3 *Gutierrez v. State,* No. AP–73,462 (Tex.Crim.App. Jan. 16, 2002) (not designated for publication).

Appellant then filed a request for appointment of counsel under Article 64.01(c) in the original trial court. In support of his motion for counsel appellant noted he was seeking DNA testing of the following evidence:

- a blood sample taken from the victim, Escolastica Harrison;
- a shirt belonging to the victim's nephew and housemate, Avel Cuellar, containing apparent blood stains;
- nail scrapings taken from victim during an autopsy;
- blood samples collected from Avel Cuellar's bathroom, from a raincoat located in or just outside his bedroom, and from the sofa in the front room of the victim's house; and
- a single loose hair found around the third digit of the victim's left hand that was found during the autopsy.

Appellant accompanied his request with a copy of the autopsy report and lab reports, his assertion that the identity of Mrs. Harrison's killer is and was an issue at trial, and his statement that exculpatory results would support his position that he neither murdered Mrs. Harrison nor anticipated her murder. The trial judge denied the request, finding that there were no "reasonable grounds" for filing a motion for post-conviction DNA testing. [4]

4 *See* TEX.CODE CRIM. PROC. art. 64.01(c).

Appellant filed an interlocutory appeal that this Court dismissed as premature. We held that an order denying appointed counsel under Article 64.01(c) is not an immediately appealable order under Rule 25.2(a)(2), [5] and that "[t]he better course is for a convicted person to file a motion for DNA testing and, if and when the motion is denied, appeal any alleged error made by the trial judge in refusing to appoint counsel." [6]

5 TEX.R.APP. P. 25.2(a).

6 *Gutierrez v. State,* 307 S.W.3d 318, 323 (Tex.Crim.App.2010).

Appellant then filed a motion for post-conviction DNA testing. In it, he acknowledged that the three men involved in the robbery of Mrs. Harrison were himself, Rene Garcia, and Pedro Gracia. But he relies on the evidence that only two people entered the home to argue that exculpatory DNA test results (results that established that he was not one of those two) would show, by a preponderance of the evidence, that he would not have been convicted of capital murder or sentenced to death. The trial judge denied the request for testing because appellant (1) failed to meet the "no fault" provision of Chapter 64, and, alternatively, (2) failed to ***889** establish either that "identity was or is an issue in the case" or that it was more probable than not that he would not have been convicted if exculpatory results had been obtained through DNA testing. [7]

7 *See* Articles 64.01(b)(1)(B), 64.03(a)(1)(B) & (a)(2)(A).

II.

Chapter 64 and the Standard of Review

[1] There is no free-standing due-process right to DNA testing, and the task of fashioning rules to "harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice" belongs "primarily to the legislature." [8] In Texas, Chapter 64 of the Code of Criminal Procedure requires the judge of the convicting court to order DNA testing when requested by a convicted person if it finds all of the following:

8 *District Attorney's Office v. Osborne,* — U.S. ——, 129 S.Ct. 2308, 2316, 174 L.Ed.2d 38 (2009). *See also Ex parte Mines,* 26 S.W.3d 910, 914 (Tex.Crim.App.2000) (there is no constitutional right to post-conviction DNA testing).

(1) evidence exists that by its nature permits DNA testing;

(2) the evidence was either:

(a) justifiably not previously subjected to DNA testing [because DNA testing i) was not available, or ii) was incapable of providing probative results, or iii) did not occur "through no fault of the convicted person, for reasons that are of such a nature that the interests of justice require DNA testing"]; or

(b) subjected to previous DNA testing by techniques now superseded by more accurate techniques;

(3) that evidence is in a condition making DNA testing possible;

(4) the chain of custody of the evidence is sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(5) identity was or is an issue in the underlying criminal case;

(6) the convicted person has established by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained through DNA testing; and

(7) the convicted person has established by a preponderance of the evidence that the request for DNA testing is not made to unreasonably delay the execution of sentence or administration of justice. [9]

9 *See* 43B George E. Dix & Robert O. Dawson, 43B TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 45.188 (2d ed. 2001 & 2008–09 Supp.) (setting out a summary of Articles 64.01(a)-(b) & 64.03(a)-(b)).

[2] **[3]** An indigent convicted person intending to file a motion for post-conviction DNA testing now has a limited right to appointed counsel. That entitlement used to be absolute, [10] but it is now conditioned on the trial judge's finding "that reasonable grounds exist for the filing of a motion." [11] If all of the prerequisites set out ***890** above are met, the convicting court must order testing. Then, after "examining the results of testing under Article 64.03, the convicting court must hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." [12] Exculpatory DNA testing results do not, by themselves, result in relief from a conviction or sentence. Chapter 64 is simply a procedural vehicle for obtaining certain evidence "which might then be used in a state or federal habeas proceeding." [13]

10 *Winters v. Presiding Judge of the Criminal Dist. Court No. Three of Tarrant County,* 118 S.W.3d 773, 775 (Tex.Crim.App.2003) (former version of Article 64.01(c) required appointment of counsel even if the appointment would be a "useless act" because no evidence containing biological material was available for testing).

11 *Gutierrez v. State,* 307 S.W.3d 318, 321 (Tex.Crim.App.2010) (explaining that appointment of counsel in a post-conviction DNA proceeding is determined by three criteria: (1) defendant must inform the convicting court that he wishes to submit a motion for DNA testing; (2) the convicting court must find that "reasonable grounds" exist for filing a DNA motion; and (3) the convicting court must find that the movant is indigent); *Blake v. State,* 208 S.W.3d 693, 695 (Tex.App.-Texarkana 2006, no pet.) (trial courts must now also find reasonable grounds for the motion to be filed).

12 Article 64.04.

13 *Thacker v. State,* 177 S.W.3d 926, 927 (Tex.Crim.App.2005).

[4] In reviewing the trial judge's Chapter 64 rulings, this Court usually gives "almost total deference" to the trial judge's findings of historical fact and application-of-law-to-fact issues that turn on witness credibility and demeanor, but we consider *de novo* all other application-of-law-to-fact questions. [14]

14 *Routier v. State,* 273 S.W.3d 241, 246 (Tex.Crim.App.2008).

III.

Appellant raises five issues on appeal. The first relates to the denial of his motion for counsel; the rest relate to the denial of the motion for DNA testing. We will address each issue in turn, although they are interrelated.

A. Appellant is not entitled to appointed counsel because "reasonable grounds" do not exist for the filing of a motion for post-conviction DNA testing.

1. *Appellant's request for counsel.*

Appellant asserted that reasonable grounds exist for filing a motion for DNA testing because exculpatory results would tend to support his assertion that "he was not present during, did not participate in, and did not know or anticipate the victim's murder and is thus not guilty of capital murder." [15] The State responded that appellant's request for appointment of counsel was deficient because exculpatory test results would only "muddy the waters" [16] and would not provide any basis for habeas corpus relief. The State pointed to the following evidence in arguing that there were no reasonable grounds to file a motion: (1) appellant's statement-admitted at trial-that he was present in Mrs. Harrison's home when the murder took place and that he assisted in taking the money; (2) other trial evidence that appellant and an accomplice entered the home with two types of screwdrivers, that Mrs. Harrison's stab wounds were caused by two different ***891** instruments, and that Mrs. Harrison knew and could identify appellant; and (3) the statements of Pedro Gracia and Rene Garcia—referred to but not admitted at trial—that appellant was present in the home and participated in the robbery and murder of the victim.

15 Appellant's Request For Appointment of Counsel at 4.

16 The State, citing *Kutzner v. State,* 75 S.W.3d 427, 439 (Tex.Crim.App.2002), also faulted appellant for not presenting an argument that, if DNA testing is performed, the possible exculpatory results would prove him to be actually innocent. As appellant points out—this is the wrong standard because 1) *Kutzner* involved a motion for forensic DNA testing instead of a request for the assistance of counsel in the preparation of such a motion, and 2) that reading of *Kutzner* has been superseded by statute, as this Court recognized *Smith v. State,* 165 S.W.3d 361 (Tex.Crim.App.2005) (convicted person must prove that, had the results of the DNA test been available at trial, there is a 51% chance that he would not have been convicted).

The trial judge denied the request for counsel finding that appellant "has failed to allege and prove that reasonable grounds exist for a motion to be filed under Chapter 64[.]"

2. *A finding of reasonable grounds requires more than an inarticulate hunch or intuition to suggest that exculpatory results would have changed the verdict.*

[5] **[6]** The statute does not define "reasonable grounds," but courts of appeals have developed some guiding principles. Though a convicted person need not prove entitlement (or a prima facie case of it) to DNA testing as a precondition for obtaining appointed counsel, [17] whether "reasonable grounds" exist for testing necessarily turns on what is required for testing. Basic requirements are that biological evidence exists, that evidence is in a condition that it can be tested, that the identity of the perpetrator is or was an issue, and that this is the type of case in which exculpatory DNA results would make a difference. [18] Courts have found that reasonable grounds for testing are not present if no biological evidence exists or if it has been destroyed, [19] or if identity was not or is not an issue. [20] Reasonable grounds are present when the facts stated in the request for counsel or otherwise known to the convicting court reasonably suggest that a "valid" or "viable" argument for testing can be made. [21]

17 *Lewis v. State,* 191 S.W.3d 225, 227–28 (Tex.App.-San Antonio 2005, pet. ref'd) (the statute requires only a showing of "reasonable grounds" for a motion to be

filed, not the establishment of a "prima facie" case). *See In re Franklin,* No. 03–07–00563–CR, 2008 WL 2468712 at *2 (Tex.App.-Austin June 19, 2008, no pet.) (not designated for publication) ("an indigent inmate need not prove his entitlement to testing as a precondition for obtaining appointed counsel to assist him in filing a testing motion.").

18 Article 64.03(a)(1)(A)(i), (a)(1)(B).

19 *Atkins v. State,* 262 S.W.3d 413, 416–17 (Tex.App.-Houston [14th Dist.] 2008, pet. ref'd) (skirting question of what "reasonable grounds" means "because appellant has failed to allege even that DNA was taken and exists"), *abrogated on other grounds by Gutierrez v. State,* 307 S.W.3d 318 (Tex.Crim.App.2010); *James v. State,* 196 S.W.3d 847, 850 (Tex.App.-Texarkana 2006, pet. ref'd) ("A motion for post-conviction DNA testing may request testing only of evidence containing biological material 'that was secured in relation to the offense that is the basis of the challenged conviction[.]' ... James' motion does not make this statutorily required request, nor does it allege facts which would form the basis of a finding that the motion was reasonable. Accordingly, the trial court properly denied James' request for court-appointed counsel because his application fails to show there is any reasonable ground for the application."); *Blake v. State,* 208 S.W.3d 693, 695 (Tex.App.-Texarkana 2006, no pet.) ("the trial court had evidence that no biological material still existed that could be submitted for DNA testing. We believe that this evidence provided a sufficient justification for the trial court to determine there were no reasonable grounds for the Chapter 64 motion to be filed.").

20 *Lewis,* 191 S.W.3d at 229 ("Because Lewis' motion for post conviction DNA testing fails to meet two of the preconditions to obtaining DNA testing under Chapter 64, specifically that the evidence still exists and that identity is or was an issue in the case, it also fails to demonstrate 'reasonable grounds for a motion to be filed.' ").

21 House Research Organization, Bill Analysis, Tex. H.B. 1011, 78h Leg., R.S. (2003) (Supporters Say) ("By requiring reasonable grounds before appointing an attorney for an indigent person seeking post-conviction DNA testing, HB 1011 would weed out frivolous claims while still ensuring a person with a valid claim access to testing.... When in doubt, a judge would err on the side of caution and appoint a lawyer in case the convicted person had a valid claim."). *See In re Franklin,* 2008 WL 2468712 at *2 ("reasonable grounds for a testing motion are present when the facts stated in the request for counsel or otherwise known to the trial court reasonably suggest that a plausible argument for testing can be made. Conversely, reasonable grounds for a testing motion are not present if the record before the trial court shows that DNA testing is impossible or that no viable argument for testing can be made.").

***892** An analogy to the Fourth Amendment distinction between "reasonable suspicion" and "probable cause" construct may be helpful: Before appointing an attorney, the trial judge needs "reasonable grounds" to believe that (1) a favorable forensic test is a viable, fair and rational possibility, and (2) such a test could plausibly show that the inmate would not have been convicted. Before ordering testing, the inmate must establish, by a preponderance of the evidence, "probable cause" that he would not have been convicted if exculpatory DNA results are obtained.

Alternatively, one could approach the "reasonable grounds" questions in the opposite direction. The trial judge could simply assume that the result of any proposed DNA testing is "exculpatory" in the sense that the test will prove that the inmate is not the source of that DNA. That is a "favorable" or "exculpatory" test result. But if that "favorable" or "exculpatory" finding would not change the probability that the inmate would still have been convicted, then there are no reasonable grounds to appoint an attorney and no justification for ordering any testing. A "favorable" DNA test result must be the sort of evidence that would affirmatively cast doubt upon the validity of the inmate's conviction; otherwise, DNA testing would simply "muddy the waters." [22]

22 *See Rivera v. State,* 89 S.W.3d 55, 59 (Tex.Crim.App.2002) (citing *Kutzner,* 75 S.W.3d at 439).

3. *Appellant does not have reasonable grounds to file a motion for DNA testing.*

[7] **[8]** Appellant argues that the trial judge's decision to deny his request for appointed counsel was outside the zone of reasonable disagreement because the identity of the murderer was at issue for purposes of Article 64.01. In making this argument, appellant asserts that the trial judge was not entitled to consider either appellant's third statement to police—because it was purportedly

taken in violation of his right to remain silent[23]—or his accomplices' statements—because they were neither admissible nor admitted at trial and appellant has never had a chance to confront and cross-examine those accomplices.[24] Appellant further argues that, even if these statements can be considered, they are irrelevant to whether the murderer's identity is an issue for purposes of DNA testing.

23 Appellant filed a pretrial motion to suppress his statements, which the trial judge denied. This Court upheld the trial judge's ruling admitting appellant's third statement on direct appeal and denied the same claim in his state writ.

24 Appellant argues that, because he had no opportunity to cross-examine his accomplices, their testimonial statements should not be considered by any court in determining whether the murderer's identity is at issue for purposes of Article 64.01.

[9] **[10]** First, because a person's effort to secure testing under Chapter 64 does not involve any constitutional considerations, the trial judge could properly consider the accomplices' statements. ***893** Although evidence offered against a defendant at a criminal trial and challenged on constitutional grounds must be admissible to give adequate protection to the values that exclusionary rules are designed to serve, a Chapter 64 proceeding is not a "criminal trial."[25] Rather, it is an independent, collateral inquiry into the validity of the conviction, in which exclusionary rules have no place, and there are no constitutional considerations.[26] Article 64.03 does not require any evidentiary hearing before the trial judge decides whether a convicted person is entitled to DNA testing.[27] And, if a hearing is held, the convicted person has no right to be present, no right to confront or cross-examine witnesses, and no right to have hearsay excluded or an affidavit considered.[28] The legislature has placed no barriers to the type of relevant and reliable information that the trial judge may consider when determining if identity was or is an issue in the case. The information must be reliable, but it need not be admissible or previously admitted at trial.[29] In short, in a Chapter 64 proceeding, the constitution ***894** does not bar a judge from considering statements that were (or should have been) inadmissible at trial. The written statements made by appellant and his two accomplices, which were attached to the State's brief submitted to the trial judge, are as much a part of this record as the documents in appellant's appendix.[30]

25 *See, e.g., Lego v. Twomey,* 404 U.S. 477, 488–89, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (exclusionary rules aim to deter lawless conduct by police and prosecution and often operate at the expense of placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence); *Thompson v. State,* 123 S.W.3d 781, 784–85 (Tex.App.-Houston [14th Dist.] 2003, pet. ref'd) (unlike a criminal trial, a Chapter 64 proceeding is an independent, collateral inquiry into the validity of the conviction).

26 *Prible v. State,* 245 S.W.3d 466, 469 (Tex.Crim.App.2008). *See, e.g., Ex parte Mines,* 26 S.W.3d 910, 914 (Tex.Crim.App.2000) (criminal defendant enjoys a presumption of innocence and a constitutional right to be present at a pretrial or trial hearing; applicant for post-conviction writ of habeas corpus enjoys neither); DIX & DAWSON, *supra,* note 9, § 45.181 (recognizing that this Court, in *Prible,* made it clear "that a convicted person's effort to secure testing to show that another person was involved in the offense involved no constitutional considerations").

27 *Rivera v. State,* 89 S.W.3d 55, 58–59 (Tex.Crim.App.2002) (art. 64.03 does not require a hearing of any sort concerning the convicting court's determination of whether a convicted person is entitled to DNA testing, but art. 64.04 requires a hearing after a convicted person has obtained DNA testing under art. 64.03). *See id.* at 61 (Hervey, J., concurring) (noting that Chapter 64 does not prohibit a convicting court from exercising its discretion to conduct an evidentiary hearing with live witnesses for the purpose of resolving issues under art. 64.03).

28 *See Thompson,* 123 S.W.3d at 784–85 ("Unlike a criminal trial, a chapter 64 proceeding such as this one does not implicate an appellant's confrontation-clause rights because this type of proceeding does not necessarily involve any witnesses or accusations against the appellant. Rather, as set forth in chapter 64, the proceeding involves a motion made by the applicant followed by the State's non-accusatory response required under the statute. This type of proceeding is analogous to a habeas corpus proceeding in that it is an independent, collateral inquiry into the validity of the conviction. Therefore, as in a post-conviction writ of habeas corpus

proceeding, an applicant for a post-conviction DNA analysis enjoys neither a presumption of innocence nor a constitutional right to be present at a hearing.") (citations omitted).

29 *See Hall v. State,* 297 S.W.3d 294, 298 (Tex.Crim.App.2009) ("The court of appeals erred to hold that a Rule 702 *Kelly* [*v. State*, 824 S.W.2d 568 (Tex.Crim.App.1992)] gatekeeping hearing is required to show the reliability of LIDAR technology to measure speed at a hearing on a motion to suppress. Nevertheless, the court of appeals correctly held that the trial judge abused his discretion when denying Hall's suppression motion because there was no evidence that LIDAR technology, as used in this case, supplied probable cause for the stop."). *See also id.* at 300–01 (Price, J., concurring) (setting out the "blue cube" theory, in which an officer testified that a person was speeding simply because a "blue cube" on his dashboard so indicated).

30 *See, e.g., Ex parte Campbell,* 226 S.W.3d 418, 423–24 (Tex.Crim.App.2007) (habeas court could properly consider exhibits attached to State's Motion to Dismiss; "His Chapter 64 request, the trial court's retesting order, the DPS results, and the trial court's findings are all attached as exhibits to the State's motion and are as much a part of this habeas record as are applicant's attachments.").

Second, these statements are highly probative of whether the murderer's identity is an issue for purposes of DNA testing. Appellant properly notes that confessions and witness statements do not necessarily preclude a finding of reasonable grounds for granting a DNA motion. Article 64.03(b) provides that "A convicted person who ... made a confession or similar admission in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of [that] ... confession, or admission[.]" [31] And we have held that, at least under some circumstances, a witness's statement may be "irrelevant" to whether a motion for DNA testing makes identity an issue. [32] But appellant's confession is not the sole basis for finding that identity was not an issue. The State also points to Julio Lopez's testimony that appellant was outside of the victim's home on the evening of the murder and that he ran around to the back of the victim's home while another person went to the front door. Mr. Lopez's testimony independently corroborates appellant's own statement concerning his actions.

31 TEX.CODE CRIM. PROC. art. 64.03(b).

32 *Blacklock v. State,* 235 S.W.3d 231, 233 (Tex.Crim.App.2007) ("That the victim testified that she knew appellant and identified him as her attacker is irrelevant to whether appellant's motion for DNA testing makes his identity an issue").

Furthermore, this is not a case in which testing of biological evidence left by a lone assailant is sought. [33] This case was tried under the law of parties, and the identity of the parties—appellant, Rene Garcia, and Pedro Gracia—was not an issue at trial, and it is not an issue now. This combination, of (1) appellant's third statement, placing him inside Mrs. Harrison's home with a screwdriver in his hand, (2) Rene Garcia's statement that places him inside Mrs. Harrison's home and stabbing her, and (3) Pedro Gracia's statement that places him inside Mrs. Harrison's home at the time of the murder, is highly probative of whether identity was or is an issue. The trial judge is the sole judge of the credibility of these three consistent statements, all of which clearly and unequivocally place appellant inside Mrs. Harrison's home at the time of her murder. Therefore, we adopt this factual finding. [34] Together with all the circumstantial evidence admitted at trial, [35] this information supports ***895** the trial judge's ultimate legal ruling that there are no "reasonable grounds" for a motion to be filed under Chapter 64. [36]

33 *Esparza v. State,* 282 S.W.3d 913, 922 (Tex.Crim.App.2009); *Smith v. State,* 165 S.W.3d 361, 364–65 (Tex.Crim.App.2005).

34 *See Rivera v. State,* 89 S.W.3d 55, 59 (Tex.Crim.App.2002) (in reviewing trial judge's ruling on request for DNA testing, we give almost complete deference to the trial judge's determination of historical facts and application-of-law-to-fact issues that turn on credibility and demeanor).

35 The trial judge reasonably could have concluded that appellant, the self-admitted mastermind of the robbery and the only one of the three robbers who knew where Mrs. Harrison kept her cash, was most unlikely to tell his two cohorts the location of that money and then send them off into her house unsupervised to find the cache and bring it back as he waited patiently in the park. Furthermore, the trial judge could have reasonably concluded that only appellant had the motive to kill the 83–year–old

woman during the robbery because he was the only one of the three whom she would have immediately recognized.

36 *See Rivera,* 89 S.W.3d at 59 ("[T]he ultimate question of whether a reasonable probability exists that exculpatory DNA tests would prove innocence is an application-of-law-to-fact question that does not turn on credibility and demeanor and is therefore reviewed *de novo.*").

B. Appellant's second issue is without merit because appellant was "at fault" in not seeking DNA testing at trial.

In his order denying DNA testing, the trial judge found that appellant failed to comply with Article 64.01(b)(1)(B) because it was his fault that the biological material was not previously tested during his trial. [37]

37 Specifically, the court noted that:

> Defendant did have the opportunity to inspect all physical evidence in the State's possession before trial began including those specific items listed in his motion. There has been no complaint raised regarding ineffective assistance of trial counsel for any alleged failure to have an independent expert appointed, to have testing performed on any evidence, or to request a continuance prior to trial so these matters could be done. Trial counsel advised this Court, prior to trial, that after reviewing the evidence it would make any such requests if it deemed necessary. No such requests were made and no objections were lodged. Thus, fault is attributable to the "convicted person" as to why the biological material was not previously subjected to DNA testing.

1. *Defendants must, in the usual case, avail themselves of DNA technology available at the time of trial.*

[11] If DNA testing was not done at the time of trial, the convicted person must show that (a) DNA testing was not available; (b) DNA testing was available "but not technologically capable of providing probative results"; or (c) no DNA testing occurred "through no fault of the convicted person, for reasons that are of such a nature that the interests of justice require DNA testing." [38] Because the biological materials a convicted person seeks to subject to post-conviction testing under Chapter 64 are, by definition, in the State's possession at the time of trial, convicted persons cannot simply rely on the State's possession at the time of trial to invoke the no-fault provision of Subsection (b)(1)(B). [39] Rather, the person must make a more particularized showing of the absence of fault under Article 64.01(b)(1)(B) because Chapter 64 requires "defendants to avail themselves of whatever DNA technology may be available at the time of trial." [40] If trial counsel declines to seek testing as a matter of reasonable trial strategy, then post-trial testing is not usually required in the interest of justice. "To hold otherwise would allow defendants to 'lie behind the log' by failing to seek testing because of a reasonable fear that the results would be incriminating at trial but then seeking testing after conviction when there is no ***896** longer anything to lose." [41]

38 TEX.CODE CRIM. PROC. art. 64.01(b).

39 *Routier v. State,* 273 S.W.3d 241, 247 (Tex.Crim.App.2008).

40 *Id.* at 248. As long as it would have been apparent to the movant at the time of trial that the evidence containing biological material would "have discrete and independent probative value, the overall import of the statute mandates that she seek such testing at that time, or forego testing later." *Id.*

41 *Skinner v. State,* 293 S.W.3d 196, 202 (Tex.Crim.App.2009) (Conversely, "evidence that counsel provided constitutionally ineffective assistance in failing to seek DNA testing of certain items could be sufficient to show that the failure to test was not appellant's fault 'for reasons that are of a nature such that the interests of justice require DNA testing.' The reasoning behind permitting challenges to the effectiveness of a trial attorney's representation is that '[a]n accused is entitled to be assisted by an attorney ... who plays the role necessary to ensure that the trial is fair.' ").

2. *Appellant made a considered decision to forgo DNA testing at trial.*

[12] Appellant points out that, although the physical evidence was made available to the defense team for inspection, it was not made available until the Friday before the Monday trial. Appellant argues that this was too late because "a motion for a relatively lengthy continuance would have been pointless." [42] That is, he argues, the motion would have been denied, and that denial would have been affirmed on appeal. [43] But this is sheer speculation, unsupported by the record. The record

reflects that appellant filed a pre-trial motion to inspect physical evidence on February 5, 1999, and the judge granted it on March 18, 1999.[44] After that inspection, the defense never made any motion for independent testing of the evidence, for an appointment of an independent expert, or for a continuance. And no claim or showing of ineffective assistance has been made or is apparent here.

42 Appellant's Brief at 27.

43 *Id.*

44 The following colloquy occurred during the hearing.

> State: Okay. Motion to inspect, examine and test physical evidence, Judge, that's their—I'm not —I don't know if they want to do independent testing. That's not been brought to my attention. I'm not sure what the status of that is today. Once again, they can look at it. If they want to do independent testing, I need to know because the lab in Austin—I mean, in McAllen will have to assist us in getting the evidence ready to ship somewhere.
>
> Defense: Judge, with this motion, we're asking for any type of physical evidence. For example, there was blood samples that were taken, fingerprints that might have been taken, fingerprint—I'm sorry, fingernail scrapings that were taken from the victim.
>
> We're asking that, first of all, we be allowed to inspect them. I know that the Department of Public Safety still has them in their possession. And we're simply asking for us to be allowed to inspect them. If at that time we deem it necessary to have them examined by experts, then we would urge—we would require that at that time or ask for that at that time.
>
> ...
>
> ...
>
> Court: Okay, For the record, I'll go ahead and grant the motion for the inspection and examination of the physical evidence.

Although there is no explicit explanation from counsel why he did not ask for testing, counsel's strategy became clear at trial. Appellant used the fact that the Brownsville Police Department failed to test the evidence containing biological DNA evidence to argue the lack of investigation and the existence of reasonable doubt during the trial. Appellant cross-examined the crime-scene investigator Juan Hernandez about the fingernail scrapings and the fact that they were not tested. Counsel asked similar questions about other apparent blood samples that were collected—blood on a raincoat, in bathrooms, on the screen door to the garage, and on the couch. During his closing argument, defense counsel repeatedly stated that the Brownsville Police fell down on the job.[45]

45 Defense closing arguments included the following statements:

* "Escolastica Harrison had some—some scrapings on her fingertips. That—those scrapings would tell you who the killer is. Those scrapings, if they were tested, they would tell you who is the individual that killed Escolastica Harrison."
* "Besides the scrapings, she also had some hair. She had a hair on her fingernails also. Did they test this for you? No. That's the job of the D.A.'s Office. That's the job of the Brownsville Police Department. They need to go ahead and show you as much evidence as they have, as much evidence as they can."
* "But what did the Brownsville Police Department do? They don't do this. Why? Because in this type of case, probably in any other type of case, what their initial thing to do is to try to get a voluntary statement."
* "If they do not get a statement from any of the individuals, they need to do some work. They need to go ahead and send the scrapings to be tested. They need to do further investigation."
* "In this kind of case, they would probably—what they're doing is trying to go ahead and get the easy way out. The easy way out is to try to get a statement from the individuals."
* "He also stated that there was a foot in the blood. Did they check into that? No. Did they bring you any information as to that? No. They just tell you there was something on there, but why check into it? They're going to get voluntary statements. Why check into it further?"
* "That's—as to the Brownsville Police Department, that's what mainly everybody does. They give voluntary statements. Why look for the scrapings? Why look for anything else? Why try to go ahead and investigate further? For what? We know that everybody's going to give a voluntary statement."
* "He also testified that there was blood in the toilet, on Ruben's toilet. He also testified that there was blood also on the doorknob and on the floor of the toilet. That's what the officers testified to. Did they check into that? No."

> * "Nobody went to get the fingerprints. Nobody went over to try to go ahead and dust for fingerprints. Nobody did anything but get voluntary statements."

***897** Because the record affirmatively shows that DNA testing was available to appellant before trial on the very items that he requests be tested now, and defense counsel apparently did not have testing performed on those same items because of sound trial strategy,[46] the trial judge did not err in finding that the appellant failed to meet the unavailability requirement of Article 64.01(b)(1)(B). We adopt his finding.

46 *Skinner v. State,* 293 S.W.3d 196, 202 (Tex.Crim.App.2009) (if trial counsel declined to seek testing because of a reasonable fear that the results would be incriminating at trial, post-trial testing is not usually required by the interests of justice).

C. Appellant has not shown that "the single loose hair" that he would like to have tested currently exists or could be delivered to the convicting court.

In his third issue, appellant claims that the trial court's finding that "the single loose hair" found in Mrs. Harrison's hand during the autopsy "does not exist because it was never recovered as evidence"[47] is not supported by the record. In its response to appellant's motion, the State explained that all of the items for which appellant requested testing, except for the ***898** single loose hair, were in the custody of either the Brownsville Police Department or the Texas Department of Public Safety–McAllen Crime Lab. The State informed the trial judge that, after making inquiry and further review, it did not find that "the single loose hair" was ever collected as evidence. That hair was identified during the autopsy by Dr. Dahm who stated that he believed he gave it to the Brownsville Police Department. But there was no other indication in the record that it was collected or given to the police. Rather, "The single loose hair is not identified by the Texas Department of Public Safety in its March 17, 1999 report as being evidence submitted to it by the Brownsville Police Department."

47 The trial judge specifically found the following:

> In reviewing State's response pursuant to Tex.Code Crim. Proc. art. 64.02, the Court finds that DNA evidence, specifically the single loose hair described in Defendant's motion, does not exist because it was never recovered as evidence in the investigation of the case and there is no record of a chain of custody for the single loose hair. The Court finds that the non-existence of this piece of evidence was not caused by any bad faith of the State.

1. *The State's duty to investigate the existence of the evidence.*

[13] Article 64.02 requires the attorney representing the State to take one of the following actions in response to a motion for DNA testing: 1) deliver the evidence to the court, along with a description of the condition of the evidence; or 2) explain in writing to the court why the State cannot deliver the evidence to the court.[48] If the trial judge "finds that the State has not exercised due diligence in attempting to locate the evidence, the court certainly has implied authority to order those responsible for the safekeeping and custody of the evidence to conduct a further search."[49] But, if the trial judge finds, as a factual matter, that the evidence no longer exists and its disappearance is not caused by the bad faith of the State, the requested item simply is not available for DNA testing.

48 TEX.CODE CRIM. PROC. art. 64.02.

49 *In re State,* 116 S.W.3d 376, 384–85 (Tex.App.-El Paso 2003, no pet.) (orig. proceeding).

2. *The trial judge reasonably found that "the single loose hair" was never recovered as evidence.*

[14] Appellant argues that the State's assertion that the single loose hair "was never recovered" is contradicted by the autopsy report and Dr. Dahm's testimony. Thus, he argues that the judge's factfinding is not entitled to deference, especially because the trial judge failed to conduct further inquiry given such direct contradiction by the medical examiner.

The State responds that the convicting court was entitled to rely on its explanation for why it could not deliver the single loose hair to the court. We agree. Dr. Dahm's testimony was that he believed that he had submitted the hair.

> Q. When you were conducting your autopsy, am I correct in stating that you found a piece of hair or loose—a single loose piece of hair around Escolastica Harrison's third digit upper left hand?
>
> A. I believe so, yes, sir.

Q. And what is it that you did with that loose piece of hair?

A. I believe it was submitted to the police.

But the police do not have it. And there is no record that they ever had it. The trial judge acted well within his discretion in crediting the State's representation that the hair had not been collected, despite Dr. Dahm's belief that he had submitted it to the police. We adopt the trial judge's ruling that the hair is not available for DNA testing.

***899 D. The trial judge acted within his discretion in finding that identity was not and is not an issue in this case.**

Appellant asserts that identity was an issue at trial because appellant argued that, although he planned the robbery, "he was not present at the scene of the offense, did not plan the victim's murder, did not participate in the victim's murder, did not know that his co-defendant's intended to commit murder, and could not have reasonably anticipated that his co-defendants intended to commit murder." [50] In support of this assertion, appellant again argues that the trial judge could not consider the three statements by all three participants that appellant was inside Mrs. Harrison's home at the time she was murdered. We resolved this argument against appellant in his first issue. The three statements could be considered in this Chapter 64 proceeding, and they are highly probative. [51] The considerable circumstantial evidence and inferences from that evidence bolster the reliability of the statements. The convicting court had sufficient information to support his finding that the identity was and is not an issue and that appellant was directly involved in the murder of Mrs. Harrison.

50 Appellant contends that, under his theory, "the two men present at the scene of the offense were Rene Garcia and Pedro Gracia. DNA testing that identified Pedro Gracia (or indeed any other male other than Gutierrez or Rene Garcia) as the donor of the blood and/or tissue samples taken from the victim and/or the scene of the offense would establish that Gutierrez was not, in fact, the second man." Appellant's Motion for Forensic DNA Testing at 7.

51 *See, e.g., In re McBride,* 82 S.W.3d 395, 397 (Tex.App.-Austin 2002, no pet.) (identity not at issue where prior DNA test inculpated defendant, even though that test was not admitted into evidence).

E. Appellant has failed to establish, by a preponderance of evidence that he would not have been convicted of capital murder if exculpatory results had been obtained through DNA testing.

Appellant asserts that only two individuals entered Mrs. Harrison's home, and that favorable DNA test results would prove that he was not one of them, which would, in turn, establish a 51% chance that he either would not have been convicted of capital murder or would not have been "death-eligible." The State responds that appellant cannot show that he would not have been convicted of capital murder if exculpatory results are obtained because such results do not "sufficiently preponderate against the totality of the evidence placing the Defendant at the scene of the murder."

1. *The convicted person must establish, by a preponderance of the evidence, that he would not have been convicted if exculpatory DNA results are obtained.*

[15] Under Article 64.03, a convicted person is not entitled to DNA testing unless he first shows that there is "greater than a 50% chance that he would not have been convicted if DNA testing provided exculpatory results [.]" [52] The burden under Article 64.03(a)(2)(A) is met if the record shows that exculpatory DNA test results, excluding the defendant as the donor of the material, would establish, by a preponderance of the evidence, that the defendant would not have been convicted. Such was the case in *Blacklock v. State,* [53] where ***900** we held that the defendant's motion for DNA testing fairly alleged, and showed by a preponderance of the evidence, "that the victim's lone attacker is the donor of the material for which appellant seeks DNA testing." [54] In cases involving accomplices, the burden is more difficult because there is not a lone offender whose DNA must have been left at the scene. [55] And DNA testing would frequently confirm that the material belongs, as one would expect, to the victim of the crime. The bottom line in post-conviction DNA testing is this: Will this testing, if it shows that the biological material does not belong to the defendant, establish, by a preponderance of the evidence, that he did not commit the crime as either a principal or a party? [56]

52 *Prible,* 245 S.W.3d at 467–68; *see also Wilson v. State,* 185 S.W.3d 481, 484 (Tex.Crim.App.2006).

53 235 S.W.3d 231(Tex.Crim.App.2007).

54 *Id.* at 232–33. *See also Esparza v. State,* 282 S.W.3d 913, 922 (Tex.Crim.App.2009) ("In sexual assault cases like this, any overwhelming eye-witness identification and strong circumstantial evidence ... supporting guilt is inconsequential when assessing whether a convicted person has sufficiently alleged that exculpatory DNA evidence would prove his innocence under Article 64.03(a)(2)(A).").

55 In *Whitaker v. State,* 160 S.W.3d 5 (Tex.Crim.App.2004), we held that testing blood found on the gun used as the murder weapon and finding that it did not belong to the defendant in a case involving three conspirators would not be exculpatory since the blood could have belonged to the victim or one of the other co-conspirators, or it could have been left on the rifle prior to the murder. *Id.* at 9.

56 *See, e.g., Prible v. State,* 245 S.W.3d 466, 470 (Tex.Crim.App.2008) ("without more, the presence of another person's DNA at the crime scene would not constitute affirmative evidence of the appellant's innocence" requiring relief under Chapter 64); *Bell v. State,* 90 S.W.3d 301, 306 (Tex.Crim.App.2002) (holding that evidence of another person's DNA, if found on hair, cigarette butt, and blood-stained bath mat collected from crime scene, does not constitute affirmative exculpatory evidence).

2. *Appellant has not established, by a preponderance of the evidence, that he would not have been convicted if exculpatory results had been obtained through DNA testing.*

[16] The available evidence that appellant wants tested and what it could show is as follows:

(1) A blood sample from Mrs. Harrison.

The DNA from Mrs. Harrison will undoubtedly be her own, not appellant's. There is no evidentiary value in testing this.

(2) A shirt belonging to Avel Cuellar containing apparent blood stains.

There is no reason to think that DNA from this shirt would belong to appellant or to the murderers. It should belong to Mrs. Harrison from when Mr. Cuellar discovered her body, stepped in the pool of blood around her, and picked her up, getting blood on his shirt.

(3) Blood samples collected from Avel Cuellar's bathroom and from the sofa in the front room.

Again, there is no reason to think that DNA from these blood samples would belong to appellant or to the murderers.

(4) Fingernail scrapings taken from Mrs. Harrison.

This is the only material that might conceivably contain DNA from the murderers.

But a test showing that appellant's DNA was not in those scrapings would not establish his innocence. First, there is no evidence to suggest that the 85–year–old victim was able to hit or scratch her murderers with her fingernails as they attacked her and stabbed her thirteen times in the face and neck. Second, even if some DNA were found in Mrs. Harrison's ***901** fingernail scrapings, there is no way of knowing whether it came from one of her murderers. Third, any DNA from her murderers might just as likely have come from appellant's accomplice, Rene Garcia, and that would not exculpate appellant. The only conceivable "exculpatory" result would be DNA from the third accomplice, Pedro Gracia, in the fingernail scrapings. But is this plausible? All three robbers agreed that Pedro Gracia was the driver and did not go inside Mrs. Harrison's home. Appellant, not Gracia, was seen running around the back of Mrs. Harrison's home the evening of the murder. And it defies common sense to think that appellant, who freely admitted that "I planned the whole ripoff," told his cohorts where Mrs. Harrison's secret stash of cash was hidden and then sent them, without supervision, off to rob her while he waited patiently for their return at a park far away. That scenario is not believable. And the trial judge was not required to believe it. [57]

57 *Rivera,* 89 S.W.3d at 60.

[17] But even if one accepted such an implausible scenario, exculpatory nail scrapings would not make it less probable that appellant "planned the ripoff" and was a party to Mrs. Harrison's murder. Chapter 64 deals only with testing evidence that could establish, by a preponderance of the evidence, that the person "would not have been *convicted* if exculpatory results"

were obtained.[58] The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received.[59] In this case, even supposing that a DNA test result showed Gracia's DNA in the fingernail scrapings taken from Mrs. Harrison, this evidence would, at best, show only that Gracia, rather than appellant, was the second stabber in the house. It would not establish that appellant, who admittedly masterminded "the rip-off," was not a party to Mrs. Harrison's murder.[60] And, even if Chapter 64 did apply to evidence that might affect the punishment stage as well as conviction, appellant still would not be entitled to testing. Appellant would still have been death-eligible because the record facts satisfy the *Enmund/Tison* culpability requirements that he played a major role in the underlying robbery and that his acts showed a reckless indifference to human life.[61]

58 TEX.CODE CRIM. PROC. art. 64.03(a)(2)(A).

59 *See Kutzner v. State,* 75 S.W.3d 427, 437–42 (Tex.Crim.App.2002) (concluding, after lengthy analysis of legislative language and intent, that statute was intended to provide testing only for those who would not have been "prosecuted or convicted" of the offense had the exculpatory test results been previously available, not for those who might show a "different outcome unrelated to the convicted person's guilt/innocence"); *Torres v. State,* 104 S.W.3d 638, 642 (Tex.App.-Houston [1st Dist.] 2003, pet. ref'd) ("[W]e hold that a defendant may not seek forensic DNA testing for the purpose of affecting the punishment assessed.").

60 *See Rivera,* 89 S.W.3d at 60 (finding that the absence of the victim's DNA from underneath the defendant's fingernails would not have supported the probability of his innocence in light of defendant's confession which was corroborated by independent evidence; "Even if one concluded that negative test results supplied a very weak exculpatory inference, such an inference would not come close to outweighing [defendant's] confession.").

61 *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (Eighth Amendment does not prohibit death penalty as disproportionate in case of defendant whose participation in felony that results in murder is major and whose mental state is one of reckless indifference); *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); Article 37.071(2)(b)(2).

In sum, granting DNA testing in this case would "merely muddy the waters." ***902** Appellant does not seek testing of biological evidence left by a lone assailant, and a third-party match to the requested biological evidence would not overcome the overwhelming evidence of his direct involvement in the multi-assailant murder. Having overruled all of appellant's points of error, we affirm the convicting court's orders denying the request for appointment of counsel and denying the motion for forensic DNA testing pursuant to Texas Code Criminal Procedure Chapter 64.

KELLER, P.J. and PRICE, J., concurred.

All Citations

337 S.W.3d 883

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IN THE 107TH DISTRICT COURT
OF CAMERON COUNTY, TEXAS

EX PARTE RUBEN GUTIERREZ,	)	
	)	
	)	Cause No.–98–CR–1391–A
Applicant	)	
	)	

ORDER

This Court hereby ORDERS:

(1) that the following items be submitted for DNA testing:

a. fingernail scrapings collected from the victim;
b. the victim's nightgown, slip, robe, and socks;
c. blood samples collected from the victim's home, and
d. clothing collected from Avel Cuellar;
e. the hair that was wrapped around the victim's finger

(2) Order, pursuant to Article 64.035, that any unidentified profiles developed be compared with the databases maintained by the DPS and the FBI.

Signed this 20th day of June, 2019.

Hon. Benjamin Euresti, Jr.
Presiding Judge
107th Judicial District Court

FILED 9:09 o'clock A M
ERIC GARZA - DISTRICT CLERK

JUN 20 2019

DISTRICT COURT OF CAMERON COUNTY, TEXAS
By _____ Deputy #15

CAUSE NO. 98-CR-1391-A

EX PARTE	§	**IN THE DISTRICT COURT**
	§	
	§	**107TH JUDICIAL DISTRICT**
	§	
RUBEN GUTIERREZ	§	**CAMERON COUNTY, TEXAS**

ORDER WITHDRAWING PREVIOUS ORDER OF JUNE 20, 2019 GRANTING MOTION TO TEST FORENSIC DNA EVIDENCE

On June 20, 2019, this court signed an Order granting the Movant's Ruben Gutierrez's Motion for Forensic DNA Testing under Articles 64.01 et seq. of the Texas Code of Criminal Procedure. The Court granted said motion prior to the filing of the State's Response to the Motion for DNA testing.

The court finds that the Order, dated June 20, 2019, granting Movant's request for the proposed DNA testing, should be withdrawn and have no effect.

IT IS THEREFORE ORDERED that the previous ORDER granting Ruben Gutierrez Request for Forensic DNA Testing is hereby WITHDRAWN and it is further ordered the parties may respond to the other parties requests and/or responses.

Dated: June 27, 2019.

Honorable Judge Benjamin Euresti, Jr.
Presiding Judge
107th Judicial District Court, Texas

Entered on _____

By: _____
District Clerk

FILED 11:10 o'clock A M
ERIC GARZA - DISTRICT CLERK

JUN 27 2019

DISTRICT COURT OF CAMERON COUNTY, TEXAS
By _____ Deputy #15

RECEIVED 6/26/2019 2:08 PM
98-CR-00001391 / 34694476
ERIC GARZA
Cameron County District Clerk
By Daniela DeLossantos Deputy Clerk

CAUSE NO. 98-CR-1391-A

EX PARTE	§	**IN THE DISTRICT COURT**
	§	
	§	**107TH JUDICIAL DISTRICT**
	§	
RUBEN GUTIERREZ	§	**CAMERON COUNTY, TEXAS**

ORDER DENYING MOTION TO TEST FORENSIC DNA EVIDENCE

On June 27, 2019, this court heard Movant Ruben Gutierrez's Motion for Forensic DNA Testing under Articles 64.01 et seq. of the Texas Code of Criminal Procedure, and the State's response to the motion. On review of the pleadings, evidence, and arguments, the court finds that Movant has not shown by a preponderance of the evidence that a reasonable probability exists that defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.

The court further finds by a preponderance of the evidence that Movant's request for the proposed DNA testing is made for the purpose of unreasonably delaying the execution of sentence or administration of justice.

IT IS THEREFORE ORDERED that the Motion of Ruben Gutierrez for Forensic DNA Testing is hereby DENIED.

Dated: June 27, 2019

Honorable Judge Benjamin Euresti, Jr.
Presiding Judge
107th Judicial District Court, Texas

FILED 11:13 o'clock A M
ERIC GARZA - DISTRICT CLERK

JUN 27 2019

DISTRICT COURT OF CAMERON COUNTY, TEXAS
By _____ Deputy #15

Entered on _____

By: _____
District Clerk

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,089

RUBEN GUTIERREZ, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM DENIAL OF MOTION FOR FORENSIC DNA TESTING IN CAUSE NO. 98-CR-00001391-A FROM THE 107TH JUDICIAL DISTRICT COURT CAMERON COUNTY

Per curiam.

O P I N I O N

Appellant appeals from a trial court order denying his motion for post-conviction DNA testing filed pursuant to Texas Code of Criminal Procedure Chapter 64.[1] Appellant

[1] References to Chapters or Articles are to the Texas Code of Criminal Procedure unless otherwise specified. Appellant also filed a motion to stay his execution pending resolution of this appeal. However, because we stayed appellant's execution in conjunction with appellant's pending motion for leave to file a petition for a writ of mandamus, this motion is moot and it is dismissed. *See In re Ruben Gutierrez*, No. WR-59,552-03 (Tex. Crim. App. Oct. 22, 2019) (not (continued...)

raises only two points of error but argues extensively about a third issue on which the court did not expressly rule. After reviewing all of the issues, we find appellant's points of error to be without merit. Consequently, we affirm the trial court's order denying testing.

I. *Background*

A. *Facts of the Case/Direct Appeal and Initial Habeas*

In our opinion affirming the trial court's denial of appellant's prior Chapter 64 motion for DNA testing, we summarized the facts of the case as follows:

> Appellant was convicted of capital murder and sentenced to death for his participation in the robbery and murder of eighty-five-year-old Escolastica Harrison. Mrs. Harrison lived with her nephew, Avel Cuellar, in a mobile-home park in Brownsville. She owned the mobile-home park, and her home doubled as the park's office. Mrs. Harrison did not trust banks, and, at the time of her murder, she had about $600,000 in cash hidden in her home. Appellant was one of the few people who knew about Mrs. Harrison's money. Mrs. Harrison had befriended appellant because he was friends with her nephew, Avel. Appellant sometimes ran errands for Mrs. Harrison, and he borrowed money from her. Appellant, Avel, and others routinely gathered behind Mrs. Harrison's home to drink and visit.
>
> Appellant, then 21 years old, orchestrated a plan to steal her money. On September 5, 1998, he and an accomplice, Rene Garcia–whom Mrs. Harrison did not know–entered Mrs. Harrison's home to carry out this plan. A third accomplice, Pedro Gracia, was the driver. When appellant and Rene Garcia left with Mrs. Harrison's money, she was dead. Avel Cuellar found her body late that night–face down in a pool of blood. She had been severely beaten and stabbed numerous times. Mrs. Harrison's bedroom was in disarray, and her money was missing.

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[1](...continued)
designated for publication).

The next day, detectives canvassed the area for information. Detective Garcia, the lead investigator, already knew that appellant's drinking buddies–Avel Cuellar, Ramiro Martinez, and Crispin Villarreal–had all said that appellant was in the trailer park the evening of the murder. Another witness, Julio Lopez, also said appellant was there.[2]

On September 8, 1998, detectives went to appellant's home. He was not there, but his mother said she would bring him to the police station. The next day, appellant voluntarily came to the police station to make a statement. He gave an alibi. He said he had seen Avel Cuellar and another friend, Ramiro Martinez, at the trailer park on the Friday before the murder, but on the Saturday of the murder, he drove around with Joey Maldonaldo in Maldonaldo's Corvette all day long. They were nowhere near Mrs. Harrison's mobile-home park. When police asked him if he had his days mixed up, appellant cut off questioning. The alibi did not pan out. Joey Maldonaldo's statement did not mesh with appellant's.

Four days later, as a result of statements given by appellant's two accomplices, Rene Garcia and Pedro Gracia, and their own investigation, the police obtained an arrest warrant for appellant. He made a second statement. This time, he admitted that he had planned the "rip off," but said that he had waited at a park while Rene Garcia and Pedro Gracia did it. He said that when his two cohorts came to pick him up, Rene Garcia was holding a screwdriver covered in blood and said that he had killed Mrs. Harrison. Rene Garcia and Pedro Gracia had taken a blue suitcase and a tackle/tool box full of money. Appellant said, "There was no doubt about the fact that I planned the whole rip off but I never wanted for either one of them to kill Mrs. Harrison. When I saw that Pedro was grabbing the money from the tackle/tool box and heard some crumbling plastic I decided that I did not want any money that they had just ripped off." Appellant told the police that his accomplices had told him where they had thrown the blue suitcase away. Appellant led the detectives to a remote area, but when the officers could not find the blue suitcase, appellant was allowed out of the car, and he walked straight to it.

The next day appellant made a third statement, admitting that he had

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[2] Mr. Lopez did not know appellant. The police showed him some "loose photos," and he picked out appellant in "a few seconds" and was "absolutely positive" about that identification. But by the time of trial, Mr. Lopez was not able to identify appellant in person.

lied in his previous one "about being dropped off in the park, about not being with Rene." He said Pedro Gracia drove the truck and dropped him and Rene Garcia off at Mrs. Harrison's home. The initial plan was for Rene Garcia to lure Mrs. Harrison out of her home by asking to see a trailer lot. Then appellant would come around from the back of her home, run in, and take the money without her seeing him. But when appellant ran around to the front, Rene Garcia and Mrs. Harrison were still inside the house. Appellant said Rene Garcia knocked out Mrs. Harrison by hitting her, and then he repeatedly stabbed her with a screwdriver. The screwdriver "had a clear handle with red, it was a standard screwdriver. We had got the screwdriver from the back of the truck in a tool box along with another screwdriver, a star type." Appellant gathered the money. "When he started stabbing her, I pulled out the blue suitcase from the closet and the black tool box fell. It opened when it fell and I saw the money." Appellant tossed the tool box to Rene Garcia, and headed out the door with the blue suitcase. Rene Garcia followed, and Pedro Gracia pulled the truck around to pick them up. Pedro Gracia dropped them off down a caliche road and appellant filled "up the little tool box with the money that was in the suitcase," while Rene Garcia filled up his shirt. They abandoned the suitcase, and Pedro Gracia picked them up and drove appellant home.

Much of the money was recovered. Appellant's wife's cousin, Juan Pablo Campos, led police to $50,000 that appellant had given him to keep safe. The prosecution's theory at trial was that appellant, either as a principal or as a party, intentionally murdered Mrs. Harrison during a robbery. The prosecution emphasized (1) the medical examiner's testimony that two different instruments caused the stab wounds,[3] (2) appellant's admission that he and Rene Garcia went inside Mrs. Harrison's home office with two different screwdrivers, and (3) the fact that four different people–Avel Cuellar, Ramiro Martinez, and Crispin Villarreal from "the drinking group" and another passerby, Mr. Lopez, who did not know appellant–all saw him at the mobile-home park the day that Mrs. Harrison was killed.

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[3] The medical examiner testified that Mrs. Harrison suffered defensive wounds that indicated she had struggled for her life and tried to "ward off blows or attacks of some sort." He said that she was stabbed approximately thirteen times by two different instruments. One "almost certainly" was a flat-head screwdriver and the other was possibly a Phillips-head screwdriver.

> The jury was instructed that it could convict appellant of capital murder if it found that appellant "acting alone or as a party" with the accomplice intentionally caused the victim's death. The jury returned a general verdict of guilt, and, based on the jury's findings at the punishment phase, the trial judge sentenced appellant to death.

Ex parte Gutierrez, 337 S.W.3d 883, 886-88 (Tex. Crim. App. 2011) (footnotes in original).

Appellant raised ten points of error on direct appeal, including challenges to the sufficiency of the evidence and the voluntariness of his statements. We affirmed appellant's conviction and sentence. *Gutierrez v. State*, No. AP-73,462 (Tex. Crim. App. Jan. 16, 2002) (not designated for publication). In his initial state habeas application, appellant raised twenty allegations, including challenges to the voluntariness of his statements. This Court denied appellant relief. *Ex parte Gutierrez*, No. WR-59,552-01 (Tex. Crim. App. May 14, 2008) (not designated for publication).

B. *Prior Chapter 64 DNA Appeal and Subsequent Habeas Proceeding*

In April 2010, appellant filed in the trial court a Chapter 64 motion for DNA testing. In the motion, appellant acknowledged that three men were involved in the Harrison robbery: himself, Rene Garcia, and Pedro Gracia. Relying on evidence that only two people entered the home, appellant argued that exculpatory DNA test results would show that he would not have been convicted of capital murder or sentenced to death. Although appellant did not specifically state in his motion which items he wanted tested, his discussion of the evidence indicates that he sought DNA testing of:

- a blood sample taken from the victim;
- a shirt belonging to the victim's nephew and housemate, Cuellar, containing apparent blood stains;
- nail scrapings taken from the victim during the autopsy;
- blood samples collected from Cuellar's bathroom, from a raincoat located in or just outside his bedroom, and from the sofa in the front room of the victim's house; and
- a single loose hair found around the third digit of the victim's left hand during the autopsy.

Appellant accompanied his request for testing with a statement in which he asserted that the identity of Harrison's killer was an issue at trial and continues to be an issue. He also asserted that testing excluding him as a contributor of the biological material would have changed the trial's outcome. In other words, appellant essentially asserted that exculpatory results would have supported his position that he neither murdered Harrison nor anticipated her murder. The trial judge denied the request, finding that:

- appellant had the opportunity to have the evidence tested before trial, but did not avail himself of that opportunity;
- the single loose hair "does not exist because it was never recovered as evidence in the investigation of the case";
- the defendant failed to show that identity was an issue in the case considering his own statements, the statements of the co-defendants, and the statement of an eyewitness who connected him to the murder scene; and
- the defendant failed to establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained

through DNA testing.[4]

This Court affirmed the trial court's denial of testing. *See Gutierrez*, 337 S.W.3d 883.

Immediately after this Court affirmed the trial court's denial of appellant's motion for Chapter 64 DNA testing, appellant filed in the trial court a subsequent writ of habeas corpus application. In one of the claims raised in that application, appellant asserted that the State failed to disclose material and exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, appellant asserted that the State should have submitted certain biological evidence for DNA testing. This Court dismissed the application because it failed to meet the Article 11.071, section 5, requirements for a subsequent writ application. *Ex parte Gutierrez*, No. WR-59,552-02 (Tex. Crim. App. Aug. 24, 2011) (not designated for publication).

In November 2015, appellant filed in the trial court a "Motion for Miscellaneous Relief." In the motion, appellant sought a court order declaring that he had

> a constitutional due process right under *Brady v. Maryland*, . . ., to conduct independent DNA tests on potentially exculpatory biological evidence in [the State's] custody or control and that [the State] . . . be ordered to release the evidence to Defendant under a reasonable protocol regarding chain of custody and preservation of the evidence, in order that Defendant can have the evidence tested at his own expense.

Appellant requested access for DNA testing to the same items that he had previously requested in his Chapter 64 motion. The State did not oppose the request for testing, but neither did the State agree to the relief requested. The trial court ultimately denied the

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[4] *See* Arts. 64.01 and 64.03 (2010).

motion in April 2018. Slightly more than a year later, appellant filed his second Chapter 64 motion for post-conviction DNA testing, which is the subject of this appeal.

II. *Chapter 64 and the Standard of Review*

As we stated in our opinion on appellant's prior Chapter 64 appeal, "There is no free-standing due-process right to DNA testing, and the task of fashioning rules to 'harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice' belongs 'primarily to the legislature.'" *Gutierrez*, 337 S.W.3d at 889 (quoting *District Attorney's Office v. Osborne*, 557 U.S. 52, 62 (2009)); *see also Ex parte Mines*, 26 S.W.3d 910, 914 (Tex. Crim. App. 2000) (stating that there is no constitutional right to post-conviction DNA testing). The Texas Legislature created a process for such testing in Chapter 64.

Under Chapter 64, the convicting court must order DNA testing only if the court finds that:

1. the evidence "still exists and is in a condition making DNA testing possible;"

2. the evidence "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;"

3. "there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and"

4. "identity was or is an issue in the case[.]"

Art. 64.03(a)(1). Additionally, the convicted person must establish by a preponderance of

the evidence that:

1. he "would not have been convicted if exculpatory results had been obtained through DNA testing; and"

2. "the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice."

Art. 64.03(a)(2).

In reviewing a judge's ruling on a Chapter 64 motion, this Court gives almost total deference to the judge's resolution of historical fact issues supported by the record and applications-of-law-to-fact issues turning on witness credibility and demeanor. *Reed v. State*, 541 S.W.3d 759, 768 (Tex. Crim. App. 2017). But we consider *de novo* all other application-of-law-to-fact questions. *Id.* at 768-69.

III. *The Current Chapter 64 Motion and the Trial Court's Ruling*

In June 2019, appellant filed in the trial court his second Chapter 64 motion for DNA testing. In the motion, he requested testing of:

- fingernail scrapings collected from the victim;
- the victim's nightgown, robe, and slip;[5]
- a hair found in the victim's hand;
- blood samples collected from the victim's bathroom, from a raincoat located in Cuellar's bedroom, and from the sofa in the victim's living room; and

[5] In the first paragraph of his motion, appellant requests testing of the victim's nightgown, robe, and slip. However, in the conclusion paragraph, appellant requests testing of the victim's nightgown, robe, slip, *and socks*. For purposes of our analysis, this discrepancy makes no difference.

- clothing collected from Cuellar.

Appellant accompanied his request with an affidavit. Therein, he asserted that the identity of Harrison's killer was an issue at trial and that, had the jury learned of a third party profile on the items collected as evidence, it would not have convicted him or sentenced him to death.

The trial judge denied the request in a written order stating in pertinent part:

> On review of the pleadings, evidence, and arguments, the court finds that Movant has not shown by a preponderance of the evidence that a reasonable probability exists that defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.
>
> The court further finds by a preponderance of the evidence that Movant's request for the proposed DNA testing is made for the purpose of unreasonably delaying the execution of sentence or administration of justice.

The court made no other explicit findings of fact or conclusions of law.

IV. *Appellant's Arguments on Appeal and the Court's Analysis*

The two points of error appellant raises on appeal specifically concern the Article 64.03(a)(2) requirements, and neither implicates the Article 64.03(a)(1) requirements. However, a substantial portion of appellant's brief and of his reply brief discuss a third issue: the (a)(1) identity requirement. We will review all of the Article 64.03(a) requirements.

A. *Article 64.03(a)(1) Requirements*

In his motion for DNA testing, appellant asserted that the items he sought to have

tested contained biological material, were in a condition making DNA testing possible, and had an intact chain of custody.[6] *See* Art. 64.03(a)(1)(A) and (B). The State did not contest these assertions. The trial court did not make express findings that these requirements of Article 64.03(a)(1) had been met, but we will assume in the absence of argument or evidence to the contrary that they have been.

Appellant also asserted in his motion that identity was an issue in this case. *See* Art. 64.03(a)(1)(C). He conceded that this Court found in its opinion on his prior DNA appeal that identity was not an issue in this case. However, he argued that new evidence requires the Court to re-evaluate this holding. Specifically, appellant asserted that new evidence: casts doubt on a witness's identification of him at the crime scene; shows that the lead detective testified falsely in the case; and shows that his third statement was not voluntarily given. Further, appellant asserted that compelling evidence points to the victim's nephew, Cuellar, as the actual killer. The State contested appellant's assertions on the identity issue. Again, the trial court did not make an express finding regarding this requirement of Article 64.03(a)(1).

Appellant raises the same arguments on appeal, and the State continues to contest appellant's assertions that identity is an issue. However, we need not determine whether

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[6] In his 2010 motion for DNA testing, appellant requested testing of "a single loose hair found around the third digit of the victim's left hand that was recovered during the autopsy." The State could not locate the hair, and the trial court determined that the loose hair was not collected as evidence. *See Gutierrez*, 337 S.W.3d at 897-98. Appellant's counsel represent that they have located the hair with the other evidence in the case, and appellant again requests testing of this hair.

identity is an issue in this case because appellant has failed to establish that he would not have been convicted if exculpatory results had been obtained through DNA testing. *See Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006) (stating that, even if DNA testing showed that an additional perpetrator was involved, it would have "no effect whatsoever" on the appellant's conviction as a party).

B. *Article 64.03(a)(2) Requirements*

In his first express point of error on appeal, appellant asserts that "the district court wrongly concluded that [he] failed to prove that exculpatory DNA test results would likely have resulted in his acquittal[.]" In the second, he asserts that "the district court wrongly concluded that [his] request for DNA testing was intended to unreasonably delay the execution of sentence or the administration of justice[.]"

1. *Whether the district court wrongly concluded that appellant failed to establish that he would not have been convicted if exculpatory results had been obtained through DNA testing*

According to the evidence presented, the eighty-five-year-old Harrison lived with her nephew (Cuellar) in a trailer park that she owned. She did not trust banks, so she kept large sums of cash in her home/office, a fact that appellant knew. Harrison was killed in her home by what appeared to be two different weapons. She also suffered bruising and contusions. Four people had seen appellant in the trailer park on the day Harrison was killed. Three of those witnesses knew appellant.

Although the police initially suspected Cuellar, their investigation led them to

appellant. When questioned, appellant originally told the police that he was driving around with a friend on the day of the offense, but the friend did not corroborate appellant's account. During their investigation, the police obtained statements from appellant's accomplice Garcia.[7] In the last of three statements he gave the police, Garcia stated that appellant planned "the whole rip off." He said that he (Garcia) entered the home office to talk to Harrison about renting a lot. Garcia said he was then supposed to hit Harrison, but he could not do it. He stated that appellant, who had subsequently entered the home, hit Harrison and dragged her into another room. When she started waking up, appellant stabbed her with a screwdriver.

Accomplice Gracia also gave a statement to the police. Gracia explained that appellant showed him a house appellant intended to burglarize. Appellant then pressured Gracia until he agreed to pick up appellant and another person after they finished the job. Gracia stated that, soon after the burglary, he heard that the woman who owned the trailer park had been killed.

As a result of these statements and their own further investigation, the police arrested appellant. At this time, appellant gave a statement in which he admitted that he planned "the whole rip off," but he stated that he stayed at a park while Garcia and Gracia committed the offense. He also stated that he never wanted them to kill the victim. In a

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[7] As established in appellant's prior DNA appeal, statements from Garcia and Gracia are properly considered in a Chapter 64 motion for DNA testing analysis. *Gutierrez*, 337 S.W.3d at 892.

second statement, appellant repeated what he had said earlier, but added details about Cuellar. Appellant said that: Cuellar had stolen from Harrison a couple of months earlier, he was mean to her, she was going to kick him out, and he shot up heroin and smoked marijuana. Finally, in a third statement, appellant admitted that he lied in his earlier statements about not being in the house. He further admitted that he had been in Harrison's house during the offense and that he had found the money. But he stated that Garcia stabbed the victim multiple times. He also noted that Cuellar told him to "rip . . . off" Harrison. Appellant later led the police to a remote area where he and his accomplices had thrown the suitcase that had contained money stolen from the house. Finally, sometime after the crime, appellant's wife's cousin led police to $50,000 that appellant had given him to keep safe.

Appellant now asserts that he should be allowed to DNA test the several items previously listed because exculpatory results will show by a preponderance of the evidence that he never would have been convicted. Appellant cannot make this showing. In appellant's prior DNA appeal, during the discussion of whether identity was an issue, we recognized that this case was tried under the law of parties. We found that the combination of the following was highly probative of whether identity was, in fact, an issue: (1) appellant's third statement, placing him inside Harrison's home with a screwdriver; (2) Garcia's statement placing appellant inside Harrison's home and stabbing her; and (3) Gracia's statement placing appellant inside Harrison's home at the

time of the murder. *Gutierrez*, 337 S.W.3d at 894-95.

Here, as in the 2010 DNA appeal, these three consistent statements unequivocally place appellant inside Harrison's home at the time of her murder. As they were probative of the identity issue in the prior appeal, these statements are also highly probative here. Specifically, they are highly probative of whether appellant can meet his burden to show that he would not have been convicted should DNA testing reveal exculpatory results.[8] *See id.* at 899. Appellant admitted planning "the whole rip off," showing his involvement as a party. In cases involving accomplices, a defendant can only meet his burden under Article 64.03(a)(2)(A) if he can show that the testing, if exculpatory, will establish that he did not commit the crime as either a principal or a party. *Id.* at 900; *see also Wilson*, 185 S.W.3d at 485. We now turn to each of the items requested.

a. *Fingernail scrapings collected from the victim*

Appellant asserts that, since the victim fought her attacker, DNA under her fingernails will show the killer's identity. We disagree. First, even though the medical examiner opined that the victim had "defensive wounds," there is no evidence in the record to suggest that the five-foot-four-inch, 105-pound, 85-year-old Harrison was able

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[8] As previously noted, appellant asserts that his third statement was not voluntarily given. He asserts that new evidence confirms this. We disagree. Appellant challenged the voluntariness of his third statement in a pretrial motion to suppress, on appeal, and in his initial state habeas application. *See Gutierrez* at 892 n.23. Both the trial court and this Court found the statement to be voluntary. Appellant now presents "new evidence" allegedly showing that the police coerced and mistreated two other witnesses in this case. Therefore, he postulates that the police also coerced him. Appellant's argument does not overcome the prior court holdings.

to hit or scratch her murderers as they attacked and stabbed her thirteen times in the face and neck. Second, even if DNA were found in the fingernail scrapings, it could just as easily have come from an accomplice. Notably, in his own statement, appellant accused Garcia of actually killing Harrison. Therefore, appellant's DNA might well not be present in the fingernail scrapings. Such a finding would not relieve him of liability as a party in the case.

Further, even if testing revealed the presence of DNA belonging to someone other than Garcia or appellant, it would not negate appellant's own admission in his statements that he planned "the whole rip off." Appellant asserts that a DNA profile tying Cuellar to the crime "would be especially likely to have changed the outcome of the trial." But one would expect to find Cuellar's DNA among the samples collected from the scene. Cuellar lived in the home and he found Harrison's body. Finding Cuellar's DNA in the fingernail scrapings would not negate appellant's own admissions or other evidence placing appellant at the scene of the crime. Given the evidence, appellant simply cannot show a greater than 50% chance that a jury would not convict him if DNA results excluded him as a contributor of any material under Harrison's fingernails since appellant expressly admitted to planning "the whole rip off" and could have been convicted as a party. *See* Art. 64.03(a)(2).

b. *The victim's nightgown, robe, and slip*

Appellant asserts that touch-DNA from the victim's nightgown, robe, and slip

could show the murderer's identity. Again, appellant simply cannot show a greater than 50% chance that a jury would not convict him if DNA results excluded him as a contributor of any material. By appellant's own statement, Garcia killed Harrison, not him. Therefore, one would expect not to find appellant's DNA on these items. That result would not release appellant from party liability for the offense.

Appellant again asserts that finding Cuellar's DNA on the victim's clothing would show that Cuellar was the murderer. However, just as the murderer could have transferred DNA to the victim, so could have Cuellar when he found the body or just by sharing the same house. This possibility would not make a different trial outcome likely.

c. *A hair found in the victim's hand*

Even if the hair found in Harrison's hand belonged to her attacker, appellant cannot show by a preponderance of the evidence that the result of the trial would have been different if DNA results exculpated him as the contributor of the hair. By appellant's own statement, Garcia killed Harrison, not him. Therefore, one would not expect to find appellant's DNA on this item. An exculpatory result would not release appellant from party liability for the offense.

d. *Blood samples collected from the victim's bathroom, from a raincoat located in Cuellar's bedroom, and from the sofa in the victim's living room*

Again, by appellant's own statement, Garcia killed Harrison, not him. Further, appellant admitted involvement and Cuellar discovered Harrison's body. Regardless of

whose DNA, if any, is found in these samples, no result would release appellant from party liability for the offense.

e. *Clothing collected from Cuellar*

From the facts presented, blood on Cuellar's clothing is likely to be the victim's. Cuellar lived with the victim and he found her body. Appellant speculates that Cuellar is actually the killer. He postulates that a "blood stain . . . pattern interpretation" of Cuellar's clothes would show that the blood on his clothing was actually cast off from Cuellar killing Harrison and not transfer that would be expected when a person picks up a bloody victim. But blood stain pattern interpretation is not accomplished through DNA testing. Therefore, this argument is not properly part of a Chapter 64 motion or analysis.

Under the circumstances, appellant has not established by a preponderance of the evidence that he would not have been convicted if exculpatory results were obtained through DNA testing. Thus, he has not met the requirements of Article 64.03(a)(2) and the trial court properly denied him testing.

f. *General due process argument*

Finally, appellant argues in this point of error that, by limiting Chapter 64 to innocence (a finding that he would not have been convicted), he was denied his due process rights. Appellant raised a similar argument in his previous DNA appeal. In that opinion, we stated:

> Chapter 64 deals only with testing evidence that could establish, by a preponderance of the evidence, that the person "would not have been

> *convicted* if exculpatory results" were obtained. The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received. In this case, even supposing that a DNA test result showed Gracia's DNA in the fingernail scrapings taken from Mrs. Harrison, this evidence would, at best, show only that Gracia, rather than appellant, was the second stabber in the house. It would not establish that appellant, who admittedly masterminded "the rip-off," was not a party to Mrs. Harrison's murder. And, even if Chapter 64 did apply to evidence that might affect the punishment stage as well as conviction, appellant still would not be entitled to testing. Appellant would still have been death-eligible because the record facts satisfy the *Enmund/Tison*[9] culpability requirements that he played a major role in the underlying robbery and that his acts showed a reckless indifference to human life.

Gutierrez, 337 S.W.3d at 901 (footnotes omitted). The reasoning in that appeal continues to apply here. Appellant's first point of error is overruled.

2. *Whether the district court wrongly concluded that appellant failed to establish that the request for the proposed DNA testing was not made to unreasonably delay the execution of sentence or administration of justice*

Because appellant has not met the requirements of Article 64.03(a)(2)(A), he is not entitled to DNA testing under Chapter 64. Thus, even if we resolved this claim in his favor, he would not receive relief. Therefore, we need not determine whether the trial court properly found that appellant also failed to establish by a preponderance of the evidence that his request for DNA testing was not made to unreasonably delay the execution of sentence or the administration of justice. Appellant's second point of error

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[9] *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987) (Eighth Amendment does not prohibit death penalty as disproportionate in case of defendant whose participation in felony that results in murder is major and whose mental state is one of reckless indifference).

is moot.

Having determined that appellant failed to meet his burden under the statute, we affirm the convicting court's order denying the motion for forensic DNA testing pursuant to Texas Code Criminal Procedure Chapter 64.

Delivered: February 26, 2020
Do Not Publish

CAUSE NO. 98-CR-1391-A

IN RE:	§	**IN THE DISTRICT COURT**
	§	
	§	**107TH JUDICIAL DISTRICT**
RUBEN GUTIERREZ	§	
	§	**CAMERON COUNTY, TEXAS**
	§	

ORDER GRANTING THE STATE'S PLEA TO THE JURISDICITON

On this day this Honorable Court considered the State of Texas's Plea to the Jurisdiction of Ruben Gutierrez's Motion/Petition for Chapter 64 DNA Testing. The court is of the opinion that the State's Plea to the Jurisdiction is with merit and should be **GRANTED**.

THEREFORE IT IS ADJUDGED, DECREED, AND ORDERED that the State's Plea to the Jurisdiction of Ruben Gutierrez's July 7, 2021 Motion/Petition for Chapter 64 DNA Testing is **GRANTED** and said Motion/Petition for Chapter 64 DNA testing is **DISMISSED/DENIED FOR WANT OF JURISDICTION**.

Entered on this 8th day of July, 2021.

Signed: 7/8/2021 06:41 PM

Benjamin Euresti Jr
Honorable Judge Presiding

In the Court of Criminal Appeals of Texas

No. AP-77,102

RUBEN GUTIERREZ,

Appellant,

v.

THE STATE OF TEXAS

On Appeal from Order Dismissing Motion for DNA Testing
In Cause No. 1998-CR-1391-A in the 107th District Court
Cameron County

YEARY, J., delivered the opinion for a unanimous Court.

This is a direct appeal from Appellant's third motion for post-conviction DNA testing brought under Article 64.05 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 64.05. Because

Appellant was convicted of capital murder and sentenced to death, his appeal is to this Court. *See id.* ("[I]f the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the court of criminal appeals."); *Gutierrez v. State*, No. AP-73,462 (Tex. Crim. App. Jan. 16, 2002) (not designated for publication). Appellant's current motion seeks to test the same biological materials he sought to have tested in his first two motions, both of which the convicting court denied, and both of which denials this Court subsequently affirmed. *Ex parte Gutierrez*, 337 S.W.3d 883 (Tex. Crim. App. 2011); *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669 (Tex. Crim. App. Feb. 26, 2020) (not designated for publication).

I. BACKGROUND

Appellant planned and, with two accomplices, committed the robbery and murder of eighty-five-year-old Escolastica Harrison, the owner of a mobile-home park in Brownsville.[1] After his conviction was affirmed on direct appeal, he filed a motion for DNA testing, seeking to have various items of biological evidence tested. Appellant was attempting to show that Harrison's nephew, Avel Cuellar, was the true perpetrator of the offense. This Court denied his appeal, at least in part on the ground that favorable test results would not have established by a preponderance of the evidence that he would not have been *convicted*. *Gutierrez*, 337 S.W.3d at 900–02.

[1] For a more detailed narrative of the case against Appellant, see this Court's published opinion rejecting his first motion for DNA testing. *Gutierrez*, 337 S.W.3d at 886–88. *See also Ex parte Gutierrez*, 307 S.W.3d 318 (Tex. Crim. App. 2010) (dismissing Appellant's appeal of the denial of appointed counsel for his first DNA motion as premature).

In 2019, Appellant filed a second motion for DNA testing in the convicting court, seeking to have the same biological evidence tested. *Gutierrez*, 2020 WL 918669, at *5. This Court affirmed the convicting court's denial of this second motion, once again on the basis that favorable results would not have established by a preponderance that Appellant would not have been *convicted*. *Id.* at *6–8. In both of his DNA appeals, Appellant argued that he should be able to have the biological evidence tested, not just to show he would not have been *convicted*, but also to show that he was "innocent of the death penalty"; and that to fail to recognize this as a valid basis for DNA testing under the statute would deprive him of due process. In both opinions, this Court rejected this argument as inconsistent with the language of our DNA testing statute. *Gutierrez*, 337 S.W.3d at 901; *Gutierrez*, 2020 WL 918669, at *8–9.

Since this Court affirmed the denial of Appellant's second motion for DNA testing, however, Appellant filed a civil rights action in a federal district court under 42 U.S.C. Section 1983.[2] In that action, he argued that Texas' statutory criteria for determining when such testing is authorized is constitutionally deficient. For reasons we need not fully elaborate upon here, the federal district court agreed with Appellant that procedural due process requires that DNA testing be made

[2] The United States Supreme Court has held that inmates may vindicate their procedural due process rights, as they arise in the context of requests for post-conviction DNA testing under state statutes, by way of federal litigation under 42 U.S.C. § 1983. *Skinner v. Switzer*, 562 U.S. 521, 533–34 (2011).

available.[3] *Gutierrez v. Saenz*, No. 1:19-CV-185, 2021 WL 5915452, at *14–15 (S.D. Tex. Mar. 23, 2021). That court opined that testing must be permitted not just for those for whom the results might demonstrate that they would not have been *convicted* of capital murder, but also for those for whom post-conviction DNA testing might establish that they were "innocent of the death penalty" as well, consistent with Article 11.071, Section 5(a)(3) of the Code of Criminal Procedure. *See Gutierrez v. Saenz*, 2021 WL 5915452, at *15 (explaining in its opinion that "giving a defendant the right to a successive habeas petition for innocence of the death penalty under Texas Code of Criminal Procedure Article 11.071 § 5(a)(3) but then denying him DNA testing under Texas Code of Criminal Procedure Article 64.03(a)(2)(A) unless he can demonstrate innocence of the crime is fundamentally unfair and offends procedural due process"); TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(3) (providing that: "(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that: . . . (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 , 37.0711 , or 37.072").

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[3] Only *procedural* due process claims are available to inmates contesting the validity of state post-conviction DNA testing statutes under 42 U.S.C. § 1983; they may not bring *substantive* due process claims. *Skinner*, 562 U.S. at 535 (citing *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72–74 (2009)).

In affirming the denial of Appellant's previous DNA-testing motions, this Court held that he was unable to show that he would not have been *convicted* even with favorable test results. *Ex parte Gutierrez*, 337 S.W.3d at 900–01; *Gutierrez v. State*, 2020 WL 918669, at *6–8. Appellant has now argued in his third motion for DNA-testing—based on the federal district court's opinion—that he must be allowed to test the biological materials because favorable test results would establish that he is innocent of the death penalty. Those test results, he contends, would permit him to pursue a subsequent post-conviction writ application under Article 11.071, Section 5(a)(3); and the failure to permit him to pursue such testing would violate procedural due process, just as the federal district court concluded.

In response to Appellant's third motion for DNA-testing, the State filed a motion styled a "Plea to the Jurisdiction," in which it asked the convicting court to dismiss Appellant's third DNA motion on the ground that the convicting court lacked jurisdiction to adjudicate it. Because the federal district court declared Article 64.03 to be unconstitutional, the State contended, there was no longer any legitimate statutory authority for DNA testing at all, and so there was no legal basis for Appellant to claim entitlement to such testing, and no "special" jurisdiction in the convicting court to permit it. *See State v. Patrick*, 86 S.W.3d 592, 594 (Tex. Crim. App. 2002) (plurality opinion) ("When a conviction has been affirmed on appeal and the mandate has issued, general jurisdiction is not restored in the trial court. The trial court has special or limited jurisdiction to ensure that a higher court's mandate is carried out and to perform other functions specified by statute, such as finding facts in

a habeas corpus setting, or as in this case determining entitlement to DNA testing."). The convicting court granted the State's motion and dismissed Appellant's motion for DNA testing "for want of jurisdiction." This appeal followed.

II. ANALYSIS

Whatever jurisdiction the convicting court has to entertain Appellant's motion for post-conviction DNA testing must be derived from Chapter 64 of the Texas Code of Criminal Procedure. *Id.* Under Article 64.03(a)(2)(A), specifically, a convicting court may only order DNA testing for a defendant who "would not have been *convicted* if exculpatory results had been obtained through DNA testing[.]" TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A) (emphasis added); *see Gutierrez*, 337 S.W.3d at 901 ("The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that [the defendant] received."). A federal district court judge has now opined, however, that Article 64.03(a)(2)(A) is constitutionally deficient because it fails to also authorize a convicting court to order DNA testing for a defendant for whom testing might establish that they were "innocent of the death penalty" as well. *Gutierrez v. Saenz*, 2021 WL 5915452, at *15. And on the basis of that opinion, the state trial court in this case dismissed for want of jurisdiction Appellant's motion for DNA testing. But we do not believe the federal district court's opinion with respect to the constitutionality of Article 64.03(a)(2)(A) divests the convicting court in this case of its statutory jurisdiction to determine whether Appellant is entitled to the DNA testing he seeks.

It is worth noting that nothing about the federal district court's

opinion in *Gutierrez v. Saenz* purported, in any way, to invalidate what the statute already legitimately authorizes.[4] It is also worth observing that the federal district court's decision in that case is not final, and that it is currently pending on appeal to the United States Court of Appeals for the Fifth Circuit. *Gutierrez v. Saenz*, No. 21-70009 (5th Cir. Dec. 13, 2021). But our resolution of this case turns first and foremost on the principle that state courts are not bound by decisions of the lower federal courts. *See Johnson v. Williams*, 568 U.S. 289, 305 (2013) ("[T]he views of the federal courts of appeals do not bind [a state court] when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law."); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("While [state] courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court."); Bryan A. Garner et al., THE LAW OF JUDICIAL PRECEDENT 691 (2016) ("[L]ower federal courts don't have appellate jurisdiction over state courts.").

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[4] It is said that "[a] statute is rendered completely inoperative if it is declared to be facially unconstitutional." 16A AM. JUR. 2D *Constitutional Law* § 194 (2020), at 71. Not so with a statute that is declared merely unconstitutional "as applied." *See id.* § 180, at 48 ("Unlike a statute that is held unconstitutional on its face, which cannot be enforced in any future circumstances, a statute that is held unconstitutional as applied can be enforced in those future circumstances where it is not unconstitutional."). Here, no provision of Chapter 64 was held to operate unconstitutionally, except to the extent that Section 64.03(a)(2)(A) would limit post-conviction DNA testing to persons who "would not have been convicted" with favorable testing results, to the exclusion of those who, though convicted, would not have been assessed a death sentence.

The Supremacy Clause of the United States Constitution explains that the constitution, laws, and treaties of the United States are the "supreme law of the land," and state court judges are bound by them notwithstanding anything to the contrary that may be found in the constitution or laws of any state. U.S. CONST. ART. VI, Cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). But that does not mean that state courts are bound by lower federal court decisions. This Court has described "both state and federal courts" as being "of parallel importance," even in when addressing questions involving the interpretation of federal constitutional law. *Pruett v. State*, 463 S.W.2d 191, 194 (Tex. Crim. App. 1970). "[Our state courts] are not required to follow [even] Fifth Circuit federal constitutional interpretations." *Reynolds v. State*, 4 S.W.3d 19, 20 n.17 (Tex. Crim. App. 1999) (citing to *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.")); *see also DeFreece v. State*, 848 S.W.2d 150, 155 (Tex. Crim. App. 1993) (in which this Court refused to follow the Fifth Circuit's holding with respect to a federal constitutional issue not yet resolved by the United States Supreme Court). However, both state and federal courts "answer to the Supreme Court on direct review." *Pruett*, 463

S.W.2d at 194.

The trial court in this case was not divested of its jurisdiction to entertain and resolve Appellant's third motion for post-conviction DNA testing by the federal district court's opinion. For that reason, the trial court erred to dismiss Appellant's motion "for want of jurisdiction." We express no opinion at this juncture with respect to an appropriate disposition of the merits of Appellant's motion. We conclude only that the convicting court erred to grant the State's "Plea to the Jurisdiction" (of Appellant's motion filed under Chapter 64 of the Texas Code of Criminal Procedure) outright.

III. CONCLUSION

Accordingly, we vacate the convicting court's order and remand the cause to that court for further proceedings not inconsistent with this opinion.[5]

DELIVERED: March 30, 2022
PUBLISH

[5] Appellant urges *this* Court to simply render judgment in his favor on the merits of his motion for post-conviction DNA testing, in light of the federal district court's ruling in the 42 U.S.C. § 1983 lawsuit in *Gutierrez v. Saenz*. Appellant's Brief at 10, 47. But, of course, in our capacity as a direct appeals court under Article 64.05, we ourselves lack jurisdiction to do anything other than to review the actions of the convicting court. *See Varga v. State*, 309 S.W.3d 92, 93 (Tex. Crim. App. 2010) ("[W]e have held appellate jurisdiction to review a trial court's order relating to postconviction DNA testing is limited to the appellate jurisdiction conferred by the DNA testing statute."). The convicting court has yet to rule on the merits.

CAUSE NO. 98-CR-1391-A

IN RE:	§	**IN THE DISTRICT COURT**
	§	
	§	**107TH JUDICIAL DISTRICT**
RUBEN GUTIERREZ	§	
	§	**CAMERON COUNTY, TEXAS**
	§	

ORDER DENYING

On this 26th day of May, 2022 this Honorable Court considered the State of Texas's Response to Ruben Gutierrez's Motion/Petition for Chapter 64 DNA Testing. The court is of the opinion that the State's Response has merit, namely that Gutierrez's Third Request for Chapter 64 DNA Testing is collaterally estopped, barred by the doctrine of res judicata, and barred by the doctrine of the law of the case. The court finds the relief sought by Gutierrez should be **DENIED**.

THEREFORE IT IS ADJUDGED, DECREED, AND ORDERED that Ruben Gutierrez's July 7, 2021 Motion/Petition for Chapter 64 DNA Testing is **DENIED**.

Entered on this _____ day of 5/26/2022 9:37:03 AM, 2022.

FILED
98-CR-00001391
May 27, 2022 10:08 AM
LAURA PEREZ-REYES
CAMERON COUNTY DISTRICT CLERK
BY: Hernandez, Christina

Benjamin Euresti Jr
Honorable Judge Presiding

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Associated Case Party: RUBEN GUTIERREZ

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Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
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