No. 23-7809

IN THE

Supreme Court of the United States

RUBEN GUTIERREZ

Petitioner,

v.

LUIS SAENZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX
VOLUME 1 OF 2

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-70009

RUBEN GUTIERREZ,

Plaintiff-Appellee,

versus

LUIS V. SAENZ; FELIX SAUCEDA, CHIEF, BROWNSVILLE POLICE DEPARTMENT,

Defendants-Appellants.

May 29, 2024, Filed

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.*

Appendix A

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.

Appendix B – Panel Order of the United States Court of Appeals for the Fifth Circuit Vacating Judgement of the United States District Court (Feb. 08, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-70009

RUBEN GUTIERREZ,

Plaintiff-Appellee,

versus

LUIS V. SAENZ; FELIX SAUCEDA, CHIEF, BROWNSVILLE POLICE DEPARTMENT,

Defendants-Appellants.

February 8, 2024, Filed

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

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)).

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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 Tex. Crim. App. Unpub. LEXIS 97, 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.

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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, 209 L. Ed. 2d 4 (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

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, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (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.

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, 235, 143 S. Ct. 955, 215 L. Ed. 2d 218 (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, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (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, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (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, 122 S. Ct. 2191, 153 L. Ed. 2d 453 (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

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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, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (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]

Id. In 2020, the Court of Criminal Appeals restated that reasoning when again denying relief. *Gutierrez*, 2020 Tex. Crim. App. Unpub. LEXIS 97, 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

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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).

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, 143 S. Ct. 955, 215 L. Ed. 2d 218 (No. 21-442)).[3]

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

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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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, 45 S. Ct. 148, 69 L. Ed. 411 (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

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

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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-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.

> . . . 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 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.

Appendix B

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, 143 S. Ct. 955, 215 L. Ed. 2d 218 (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.

Appendix C – Memorandum and Order of the United States District Court for the Southern District of Texas Denying Motion for Reconsideration and Granting Declaratory Judgment (March 23, 2021)

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

Civil No. 1:19-CV-185

RUBEN GUTIERREZ,

Plaintiff,

VS.

LUIS V. SAENZ, *et al.,*

Defendants.

Filed March 23, 2021

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.

Appendix C

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.

Appendix C

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 prose 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

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.

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

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

in the case. *Id.* at *7. It also concluded that these statements were probative as to whether Gutierrez could meet 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 relitigation." *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.

Appendix C

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 64.0l(b)(2)(B) if the court finds in the affirmative the issues listed in Subsection (a)(l), 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.*

Appendix C

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 fastdeveloping 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 Plaintiffs 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 plaintiffs 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 plaintiffs 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 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.*

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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).

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

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.

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.*

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

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> (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.

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.

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 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.

/s/ Hilda Tagle
Hilda Tagle
Senior United States District Judge

Appendix D – Order of the United States District Court for the Southern District of Texas Granting Entry of Partial Final Judgment (Dec. 8, 2021)

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

CIVIL NO. 1:19-CV-185

RUBEN GUTIERREZ, *et al,*

Plaintiffs,

VS.

LUIS V SAENZ, *et al,*

Defendants.

Filed December 08, 2021

ORDER

The Court is in receipt of Defendants Luis Saenz ("Saenz") and Felix Sauceda's ("Sauceda") Opposed Motion for Entry of Partial Final Judgment Pursuant to Federal Rule of Civil Procedure 54(b) and for Supplementation of the Record on Appeal. Dkt. 185. For the reasons discussed below, the Court **GRANTS** Defendants' motion.

Appendix D

I. Background

On September 26, 2019, Gutierrez filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Dkt. No. 1. Gutierrez's amended complaint challenges: (1) the constitutionality of the DNA testing procedures in Chapter 64 of the Texas Code of Criminal Procedure, Motion for Forensic DNA Testing ("Chapter 64") and (2) the execution protocol the Texas Department of Criminal Justice ("TDCJ") adopted on April 2, 2019 ("2019 Execution Procedure") which disallowed the presence of a prison-employed chaplain or outside spiritual advisor inside the execution room during an execution. Gutierrez's DNA claims are directed only towards Defendants Saenz and Sauceda ("Defendants"). *See* Dkt. No. 47 at 31 n.12.

Defendants filed a motion to dismiss Gutierrez's amended complaint. Dkt. No. 46. On June 2, 2020, the Court entered a Memorandum and Order granting in part and denying in part Defendant's motion to dismiss. Dkt. No. 48. Specifically, the Court dismissed issues that sought relitigation of the state court's denial of DNA testing, Gutierrez's Eighth Amendment claims, and his access to the courts claim. *Id.* At the same time, the Court declined to dismiss Gutierrez's DNA claims to the extent they challenged the constitutionality of Chapter 64 facially and as authoritatively construed by the state court. *Id.* at 13 and 31. The Court stayed Gutierrez's execution by separate order. Dkt. No. 57.

On appeal, the Fifth Circuit vacated the stay. *See Gutierrez v. Saenz*, 818 F. App'x 309 (5th Cir. 2020).

Ultimately, the Supreme Court vacated the Fifth Circuit's decision and remanded the case with instructions for the Fifth Circuit to return it to this Court. *Gutierrez v. Saenz*, No. 19-8695, 2021 WL 231538, at *1 (Jan. 25, 2021). After the Fifth Circuit issued its mandate, the Court ordered the parties to outline the remaining DNA issues to be adjudicated. Dkt. No. 134. After briefing by the parties, Dkt. Nos. 139 and 140, the Court entered a Memorandum and Order on March 23, 2021 granting 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 1s fundamentally unfair and offends procedural due process. Dkt. No. 141 at 26.

Defendants Saenz and Sauceda then filed a motion for partial final judgment. Dkt. No. 144. Defendants sought entry of a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) as to Gutierrez's DNA claims. On August 19, 2021 the Court entered an order and final judgment disposing of all then-pending litigation. Dkt. Nos. 172, 173.

Defendants Saenz and Sauceda filed a notice of appeal. The appeal is currently pending in the Fifth Circuit. On Gutierrez's motion to reconsider addressing his spiritual-advisor claims, the Court subsequently vacated the final judgment and order dismissing Gutierrez's amended complaint. Dkt. No. 182. The Court granted Gutierrez's

motion for leave to supplement or amend his amended complaint regarding the clergy claims. *Id.*

Defendants Saenz and Sauceda have agam moved for a partial final judgment under Rule 54(b). Dkt. No. 185. The Defendants also move to supplement the appellate record.

II. Rule 54 Standard

"When an action presents more than one claim for relief," Rule 54(b) allows a district court to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). "Rule 54(b) authorizes the district court to make immediately appealable a judgment that disposes, with finality, of one or more (but not all) claims, even though other claims remain pending in the district court so that the suit as a whole has not been finally disposed of by that court." *Williams v. Seidenbach*, 958 F.3d 341, 348 (5th Cir. 2020). A partial final judgment is meant to prevent the "hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

Rule 54(b) "reflects a balancing of two policies: avoiding the 'danger of hardship or injustice through delay which would be alleviated by immediate appeal' and 'avoid[ing] piecemeal appeals.'" *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 740 (5th Cir. 2000) (quoting *PYCA Indus., Inc. v. Harrison Cnty. Waste Water Mgmt.*

Dist., 81 F.3d 1412, 1421 (5th Cir. 1996)). A court may direct entry of a Rule 54(b) partial final judgment only after making two findings. First, the court must find that the judgment sought is final as "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980). Second, the court must find no just reason for delay in entering the partial final judgment. *Id.* at 8. The second inquiry requires the court to "take into account judicial administrative interests as well as the equities involved." *Id.* However, a district court should issue a partial final judgment "only when there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal; it should not be entered routinely as a courtesy to counsel." *PYCA Industries, Inc*, 81 F.3d at 1421.

III. Analysis

Defendants argue that the Court has expressly adjudicated all DNA claims. Dkt. No. 185 at 12. The March 23, 2020 Order which granted a declaratory judgment "is on grounds entirely separate from-and directed against Defendants unconnected to—the issues that remain pending (i.e., Gutierrez's spiritual-advisor claims) in this matter." Dkt. No. 185 at 5. In addition, Defendants argue that they "have a strong interest in seeking appellate remedies as to this Court's judgment, an interest that is particularly strong because, although this case is civil in nature, it bears on the State's interest in the finality of its criminal convictions." Dkt. No. 185 at 9-10. Because "[t]his Court has declared Texas's postconviction DNA testing

statute constitutionally infirm," Defendants argue that "[t]he issue of the constitutionality of Chapter 64 should be determined at the earliest possible time." *Id.*

Gutierrez opposes the entry of a partial final judgment. Gutierrez contends that "Defendants have made no showing of any prejudice, hardship, or injustice that would result were this Court to deny their motion." Dkt. No. 187 at 5.

The Court agrees with the Defendants. Although the Court vacated its August 19, 2021 order upon reconsideration of Gutierrez's motion to amend his amended complaint in regard to his spiritual-advisor claims, the Court made it clear in that order that it had decided all of the DNA claims. Dkt. No. 172 at 14. The Court stated that

> In the event that any uncertainty remains, the Court clarifies that all issues relating to Plaintiffs DNA claims are dismissed or denied with the exception of the Court's March 23, 2021 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.

Id. Furthermore, the Court's declaratory judgment only applies to Defendants Saenz and Sauceda. The adjudicated issues are entirely separate from the remaining spiritual-advisor claims. Defendants have a strong interest in finality and the efficient resolution of the DNA claims. Because there is no just reason for delay in entering the partial final judgment, the Court concludes that issuing a partial final judgment as to the DNA claims is appropriate under Rule 54(b).

IV. Supplementation of the Record on Appeal

Defendants also move for supplementation of the appellate record so that their appeal may move forward. Gutierrez only objects to supplementation on grounds that an appeal is premature before a final judgment issues. As the Court will enter a partial final judgment on the DNA issues, the Court grants Defendants' request and directs the Clerk to supplement the appellate record as necessary.

V. The Path Forward

Gutierrez's lawsuit involves two separate categories of claims which do not share a common set of factual issues, defendants, or procedural concerns. With the instant order, Gutierrez's appeal involving the DNA issues may proceed before the Fifth Circuit while Gutierrez's spiritual-advisor claims may proceed in this Court.

At the same time, Gutierrez has filed a separate lawsuit which involves the same defendants and issues as the spiritual-advisor claims in this case. *Gutierrez*

v. Collier, 1:21-cv-00129 (S.D. Tex.). The defendants in that action, however, have not answered and nothing is currently pending.

The DNA claims and the spiritual-advisor claims do not arise out of the same transaction, raise vastly different questions of law and fact, and involve no common witnesses or proof for the claims. Judicial economy may favor severing the spiritual advisor claims from this lawsuit and consolidating them with Gutierrez's 1:21-cv-00129 lawsuit.

The Court wishes to resolve the procedural issues in this case expeditiously. To that end, the Court **ORDERS** the parties to provide briefing by **December 17, 2021** on whether Gutierrez's spiritual-advisor claims should be severed from this lawsuit and consolidated with his 1:21-cv-00129 lawsuit, to then proceed under the 1:21-cv-00129 cause number.

VI. Conclusion

The Court **GRANTS** Defendants Saenz and Sauceda's motion for the entry of partial final judgment, Dkt. No. 185. The Court also **GRANTS** Defendants Saenz and Sauceda's request for the supplementation of the appellate record, Dkt. No. 185.

The Court **ORDERS** the parties to provide briefing on the trajectory of Gutierrez's spiritual-advisor claims on or before **December 17, 2021**.

The Court will enter a partial final judgment as to the DNA claims by separate order.

SIGNED this 8th day of December 2021.

/s/ Hilda Tagle
Hilda Tagle
Senior United States District Judge

Appendix E – Defendant's Opposed Motion for Entry of Partial Final Judgment, United States District Court for the Southern District of Texas (Nov. 16, 2021)

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

Civil Action No. 1:19-CV-185

RUBEN GUTIERREZ,

Plaintiff,

v.

LUIS V. SAENZ, *et al.*,

Defendants.

Filed Nov. 16, 2021

DEFENDANTS SAENZ AND SAUCEDA'S OPPOSED MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(B) AND FOR SUPPLEMENTATION OF THE RECORD ON APPEAL

[TABLES INTENTIONALLY OMITTED]

Appendix E

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I. Short Statement of the Nature and Stage of the Proceeding

Plaintiff Ruben Gutierrez was convicted and sentenced to death for the murder of eighty-five-year-old Escolastica Harrison. Gutierrez filed in this Court an amended civil-rights complaint raising two categories of claims: (1) claims challenging the constitutionality of Texas's postconviction DNA testing procedures[1] (DNA claims); and (2) claims challenging the Texas Department of Criminal Justice's (TDCJ) former execution protocol disallowing the presence of a prison-

1. Chapter 64 of the Texas Code of Criminal Procedure.

employed chaplain or outside spiritual advisor inside the execution room during an execution (spiritual-advisor claims). ECF No. 45 at 19-36. Gutierrez's DNA claims are directed *only* toward Defendants Luis Saenz and Felix Sauceda. ECF No. 47 at 24 n.12 ("Plaintiff does not contend that Defendants Collier, Davis, and Lewis are connected to the DNA testing claims."); ECF No. 172 at 1 n.1.

Defendants filed a motion to dismiss Gutierrez's amended complaint. ECF No. 46. This Court entered an order granting in part and denying in part Defendants' motion to dismiss. ECF No. 48 at 30-31. Specifically, this Court dismissed Gutierrez's DNA claims that sought relitigation of the state court's denial of DNA testing, his Eighth Amendment claims, and his access-to-courts claim but declined to dismiss Gutierrez's DNA claims to the extent they challenged the constitutionality of Chapter 64 facially and as authoritatively construed by the state court. ECF No. 48 at 12-15.

Following the stay of Gutierrez's previously scheduled execution, the parties provided additional briefing regarding Gutierrez's DNA claims. ECF Nos. 70, 118, 119, 122, 123, 139, 140. Defendants moved for reconsideration of this Court's order denying, in part, Defendants' motion to dismiss Gutierrez's DNA claims. ECF No. 119. This Court then entered an order denying Defendants' motion for reconsideration and granting Gutierrez a declaratory judgment. ECF No. 141 at 18, 26. Defendants Saenz and Sauceda filed a notice of appeal and requested a

stay of this Court's declaratory judgment pending appeal. ECF Nos. 147, 150. Gutierrez filed a motion to dismiss the appeal, which the Fifth Circuit granted. Order, *Gutierrez v. Saenz, et al.,* No. 21-70002 (5th Cir. June 24, 2021). Defendants Saenz and Sauceda then filed a motion for reconsideration of this Court's orders denying their motion to dismiss Gutierrez's amended complaint and granting Gutierrez a declaratory judgment. ECF No. 167.

While Defendants' appeal regarding Gutierrez's DNA claims was pending, Gutierrez filed a motion for leave to amend his amended complaint in light of TDCJ's revision of its Execution Protocol. ECF No. 153. Defendants Bryan Collier, Bobby Lumpkin, and Dennis Crowley moved to dismiss Gutierrez's spiritual-advisor claims as moot. ECF No. 158.

This Court later entered an order and final judgment disposing of all then-pending litigation. ECF Nos. 172, 173. Specifically, this Court dismissed with prejudice Gutierrez's spiritual-advisor claims and dismissed all DNA claims other than the claim as to which this Court granted a declaratory judgment. ECF No. 173. In doing so, this Court denied Defendants Saenz and Sauceda's motions for entry of a partial final judgment, a stay of judgment pending appeal, and reconsideration. ECF No. 172 at 14.

Following this Court's entry of its final judgment, Defendants Saenz and Sauceda filed a

notice of appeal.[2] ECF No. 176. Soon after, Gutierrez filed a motion to alter or amend this Court's judgment but *only* as to his spiritual-advisor claims. ECF No. 179. The Fifth Circuit then suspended its briefing schedule and stated briefing in that court would "resume once the United States District Court rule[s] on the motion to alter judgment and the electronic supplemental record on appeal is received." Exhibit A. This Court then granted Gutierrez's motion to alter or amend its judgment, vacated the final judgment and order dismissing Gutierrez's amended complaint, and granted Gutierrez's motion for leave to supplement or amend his amended complaint. ECF No. 182. The electronic record on appeal (EROA) has not yet been supplemented, and the Fifth Circuit's briefing order remains suspended.

II. Statement of the Issues to Be Ruled Upon by the Court

This Court has granted Gutierrez a declaratory judgment as to the constitutionality of Chapter 64 and has dismissed and denied Gutierrez's other DNA claims. ECF No. 172 at 14. This Court entered a final judgment to that effect. ECF No. 173. This Court later granted Gutierrez's motion to amend the judgment regarding his spiritual-advisor claims, and this Court vacated its final judgment. ECF No. 182. Defendants Saenz and Sauceda

2. Relying largely on this Court's declaratory judgment, Gutierrez moved in state court for DNA testing. The state trial court dismissed the motion for want of jurisdiction. Gutierrez's appeal of the trial court's order remains pending in the Texas Court of Criminal Appeals. *Gutierrez v. Texas,* No. AP-77,102.

seek entry of a partial final judgment as to the DNA claims pursuant to Federal Rule of Civil Procedure 54(b).

III. Summary of the Argument

Entry of a partial final judgment is appropriate because there is no just reason for delay in the entry of final judgment on the issues that are fully resolved by this Court's orders granting a declaratory judgment and denying Defendant Saenz and Sauceda's motion for reconsideration. This Court has fully resolved the DNA claims, which are on grounds entirely separate from and directed against Defendants unconnected to-the issues that remain pending (i.e., Gutierrez's spiritual-advisor claims) in this matter. Consequently, Defendants move this Court to enter final judgment pursuant to Federal Rule of Civil Procedure 54(b).[3] Defendants Saenz and Sauceda also respectfully request that this Court supplement the EROA as requested by the Fifth Circuit.

ARGUMENT

This Court *explicitly* adjudicated all of Gutierrez's DNA claims, rejecting Gutierrez's earlier argument that there remained unadjudicated DNA claims. ECF No.

3. By seeking entry of a partial final judgment under Rule 54(b), Defendants do not concede that this Court's orders granting a declaratory judgment and declining reconsideration were appropriate. Indeed, Defendants seek entry of a partial final judgment so that the judgment can be contested on appeal. Fed. R. Civ. P. 54(b); 28 U.S.C. § 1291.

172 at 13-14. And there is no DNA claim that remains to be adjudicated even after this Court granted Gutierrez's motion to alter this Court's judgment as to the entirely separate spiritual-advisor claims. For that reason, and the reasons discussed below, entry of a partial final judgment under Rule 54(b) as to Gutierrez's DNA claims is appropriate.

I. The Rule 54(b) Standard

The courts of appeal have jurisdiction of appeals from final decisions of the district courts. 28 U.S.C. § 1291. "When an action presents more than one claim for relief . . . or when multiple parties are involved," Rule 54(b) permits a district court to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b); *see Williams v. Seidenbach,* 958 F.3d 341, 346-47 (5th Cir. 2020). Otherwise, any order "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties." Fed. R. Civ. P. 54(b). "Rule 54(b) identifies the problem that it is attempting to solve (adjudication as to only some parties or some claims 'does not end the action' and is thus not, by itself, a final judgment), and then provides the solution (district courts may enter partial final judgment to facilitate appeal)." *Seidenbach,* 958 F.3d at 348-49.

The predicate for a partial final judgment under Rule 54(b) is the district court's resolution

of a distinct "claim for relief' against one or more parties. *Eldredge v. Martin Marietta Corp.,* 207 F.3d 737, 740-41 (5th Cir. 2000). Although "magical language"—e.g., a statement that there is "no just reason for delay"—is not required for an order or judgment to constitute a Rule 54(b) judgment, the district court's intent to enter such an order must be unmistakable. *Kelly v. Lee's Old Fashioned Hamburgers, Inc.,* 908 F.2d 1218, 1220 (5th Cir. 1990) (quoting *Crowley Maritime Corp. v. Panama Canal Comm'n,* 849 F.2d 951, 953 (5th Cir. 1988)).

A district court deciding whether to certify a Rule 54(b) judgment must make two determinations: (1) that "it is dealing with a 'final judgment,'" i.e., that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action"; and (2) "whether any just reason for delay exists."[4] *Briargrove Shopping Center Joint*

4. Several factors have been identified as being potentially relevant to this analysis:

> (1) the relationship between the adjudicated and the unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations,

Venture v. Pilgrim Enterprises, Inc., 170 F.3d 536, 539 (5th Cir. 1999) (quoting *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8 (1980)). The Supreme Court has explained that a court "must take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp.*, 446 U.S. at 8. This determination considers the "historic federal policy against piecemeal appeals." *Id.* Therefore, if the claims under review are separable from the remaining claims and if no appellate court would have to decide the same issues more than once through later appeals, a partial final judgment may be appropriate. *Id.* Even "the existence of nonfrivolous counterclaims" does not necessarily render Rule 54(b) certification inappropriate. *Id.* at 9.

II. This Court Has Expressly Adjudicated All DNA Claims.

This Court's earlier order and final judgment unmistakably reflected an intent to enter an immediately appealable final judgment. ECF Nos. 172, 173. This goes without saying because this Court entered final judgment. ECF No. 173. However, this Court vacated its order and final judgment. ECF No. 182 at 3. Nonetheless, the vacatur of the order

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> shortening the time of trial, frivolity of competing claims, expense, and the like.

Alpert v. Riley, No. H-04-CV-3774, 2008 WL 304742, at *9 (S.D. Tex. Jan. 31, 2008) (quoting *Akers v. Alvey,* 338 F.3d 491, 495 (6th Cir. 2003)).

dismissing Gutierrez's amended complaint and final judgment in no way altered the basis of this Court's judgment with respect to Gutierrez's DNA claims. ECF No. 182. There has been "an ultimate disposition" of all the DNA claims in this case, and that disposition has not been disturbed by this Court's order granting Gutierrez's motion to alter judgment. *Briargrove,* 170 F.3d at 539; *see Curtiss-Wright,* 446 U.S. at 7 (explaining that a district court deciding whether to certify a Rule 54(b) judgment must first determine that "it is dealing with a final judgment"); *Chieftain Intern. (U.S.) V. Statoil Exploration (U.S.) Inc.,* Nos. 99-1020, 99-1021, 99-1022, 2003 WL 1873906, at *3 (E.D. La. Apr. 14, 2003) ("[T]he . . . ruling as to Chieftain's declaratory judgment claim is 'final' because there are no issues left to be determined with respect to this claim."). Because this Court vacated its order and final judgment when it granted Gutierrez's motion, this Court should enter an order reflecting an "unmistakable intent to enter a partial final judgment under Rule 54(b)" with respect to the DNA claims. *Jackson v. Cruz,* 852 F. App'x 114, 116 (5th Cir. Mar. 24, 2021) (quoting *Briargrove,* 170 F.3d at 539); *see id.* at 116 n.3 ("[W]hen a subsequent order purportedly certifies a nonfinal judgment as final, we consider whether that subsequent order reveals the district court's unmistakable intent to enter a partial final judgment.").

III. There Is No Just Reason for Delay.

Entry of a Rule 54(b) judgment is appropriate because there is no just reason to delay appellate

resolution of Gutierrez's DNA claims. *See St. Paul Mercury Ins. Co. v. Fair Grounds Corp.,* 123 F.3d 336, 338 (5th Cir. 1997) ("[A] declaratory judgment is reviewable as a final judgment.") (citing 28 U.S.C. § 2201(a)). This is true because there can be no just reason to delay entry of a final judgment as to the fully adjudicated DNA claims until Gutierrez's entirely unrelated spiritual-advisor claims are resolved. *See Curtiss-Wright,* 446 U.S. at 7.

This Court has declared Texas's postconviction DNA testing statute constitutionally infirm. ECF No. 141 at 26. Defendants have a strong interest in seeking appellate remedies as to this Court's judgment, an interest that is particularly strong because, although this case is civil in nature, it bears on the State's interest in the finality of its criminal convictions. *See Calderon v. Thompson,* 523 U.S. 538, 555 (1998) (recognizing, in the context of federal habeas corpus, the Court's "enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system") (quotation marks omitted). Gutierrez argued before that Defendants have no interest in the finality of Gutierrez's conviction in this civil-rights suit, ECF No. 145 at 4, but Defendants showed this is plainly incorrect. ECF No. 146 at 6-7 (citing *Hill v. McDonough,* 547 U.S. 573, 583 (2006)). There is simply no reason to delay entry of judgment as to Gutierrez's DNA claims. The issue of the constitutionality of Chapter 64 should be determined at the earliest possible time.

Applying the factors identified in *Alpert,* it is clear there is no just reason for delay. *Alpert,* 2008 WL

304742, at *9. First, there is *no* relationship between the DNA and spiritual-advisor claims other than the fact that Gutierrez has sought to delay his execution by raising those claims together. Second, given that this Court has declined to reconsider its earlier orders, there is no possibility that review might be mooted by developments in this Court. Third, there is no possibility the Fifth Circuit would have to consider the same issues—i.e., application of the limitations period in a constitutional challenge to Chapter 64 and the merits of Gutierrez's DNA claims—a second time in this case if a partial final judgment is entered. Indeed, Defendants are entitled to appellate review in light of *Reed v. Goertz,* 995 F.3d 425 (5th Cir. 2021), of this Court's holding regarding the applicable limitations period. Fourth, there is no possibility of a set-off because this case does not involve damages. Finally, entry of a partial final judgment will not burden Gutierrez.

Gutierrez also argued before that the then-pending appeal in *Reed* supported his argument that this Court should not enter a partial final judgment as to the DNA claims because the appeal showed that issues similar to Gutierrez's were already in front of the Fifth Circuit. ECF No. 145 at 6. But the Fifth Circuit has since issued its opinion in *Reed*,[5] and this Court declined to apply it to this case. ECF No. 172 at 12-13. Defendants should be permitted to seek appellate remedies as to this Court's judgment, including this Court's holding that Gutierrez's DNA claims were not time-barred.

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5. The plaintiff in *Reed* has filed a petition for a writ of certiorari. *Reed v. Goertz, et al.,* No. 21-442.

Relatedly, because Gutierrez's DNA and spiritual-advisor claims are entirely unrelated and separable, there is no risk in *this* case of piecemeal appeals. *See Curtiss-Wright Corp.*, 446 U.S. at 10. Indeed, Gutierrez's DNA claims are directed at different parties than are the spiritual-advisor claims. Consequently, there is no reason resolution on appeal of the DNA claims should await resolution in this Court of the spiritual-advisor claims. *See Ackerman v. F.D.I.C.*, 973 F.2d 1221, 1225 (5th Cir. 1992) ("[T]he remaining claims which Appellants contend should prevent Rule 54(b) certification involve different parties. The district court's certification was neither unreasonable nor an abuse of discretion."). For the same reason, Gutierrez has no interest in unnecessary delay of entry of a partial final judgment as to the DNA claims.

For the reasons discussed above, entry of a partial final judgment pursuant to Rule 54(b) is appropriate. Therefore, this Court should enter a Rule 54(b) partial final judgment and an order reflecting an express determination that there is no just reason for delay and that it has dismissed and denied all DNA claims other than the claim as to which this Court granted a declaratory judgment. *See* ECF Nos. 172, 173.

IV. The Electronic Record on Appeal Should Be Supplemented.

Defendants Saenz and Sauceda's appeal of this Court's earlier judgment remains pending in the Fifth Circuit. *See* Exhibit A. The Fifth Circuit has suspended its briefing order in that appeal.

Exhibit A. The Fifth Circuit has stated briefing will resume once this Court rules on Gutierrez's motion to alter judgment and the EROA has been supplemented. Exhibit A. This Court has ruled on the motion to alter judgment, but it has not supplemented the EROA. Consequently, Defendants request that this Court supplement the EROA so that the Fifth Circuit may resume its briefing schedule or take any other action it deems appropriate in light of this Court's order granting Gutierrez's motion to alter judgment.

CONCLUSION

For the reasons discussed above, there is no just reason for delay in the entry of a partial final judgment as to Gutierrez's DNA claims. Defendants respectfully request that this Court enter a Rule 54(b) judgment as to those claims and to supplement the EROA.

Respectfully submitted,

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Appendix F – Order of the United States District Court for the Southern District of Texas Granting Motion to Alter or Amend Judgment (Oct. 29, 2021)

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

CIVIL NO. 1:19-CV-185

RUBEN GUTIERREZ, *et al*,

Plaintiffs,

VS.

LUIS V SAENZ, *et al*,

Defendants.

Filed October 29, 2021

ORDER

The Court is in receipt of Plaintiff Ruben Gutierrez's ("Gutierrez") September 16, 2021 Motion to Alter or Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e), Dkt. No. 179; Defendants Bryan Collier ("Collier"), Bobby Lumpkin ("Lumpkin") and Dennis Crowley's ("Crowley") (collectively "Defendants") Response, Dkt. No. 180; and Plaintiffs Reply, Dkt. No. 181. For the following reasons, the Court **GRANTS** Gutierrez's motion.

Appendix F

Federal Rule of Civil Procedure 59(e) authorizes a litigant to "call into question the correctness of a judgment." *In re Rodriguez*, 695 F.3d 360, 371 (5th Cir. 2012) (quoting *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002)). Relief under Rule 59(e) is appropriate "(1) where there has been an intervening change in the controlling law; (2) where the movant presents newly discovered evidence that was previously unavailable; or (3) to correct a manifest error of law or fact." *Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 182 (5th Cir. 2012). A Rule 59(e) motion "cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Morris v. PLIVA, Inc.*, 713 F.3d 774, 776 (5th Cir. 2013) (quoting *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). "[S]uch a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

The granting of this motion is based on the subsequent review of the following chronology: (1) the July 9, 2012 Texas Department of Criminal Justice ("TDCJ") Execution Procedure ("2012 Execution Procedure") which stated that the "Huntsville Unit Chaplain or a designated approved TDCJ Chaplain shall accompany the offender while in the Execution Chamber." Dkt. No. 109-6 at 63; (2) the April 21, 2021 TDCJ Execution Procedure ("2021 Execution Procedure") which states that "[i]f requested by the inmate and previously approved by the TDCJ, a TDCJ Chaplain or the inmate's approved spiritual advisor will be escorted into the execution chamber by an agency

representative to observe the inmate's execution." Dkt. No. 153-3 at 10; (3) the May 20, 2021 email from TDCJ counsel stating that the TDCJ would not permit the spiritual advisor to accommodate Gutierrez's spiritual needs as requested in the previous email from Gutierrez's counsel of the same date, Dkt. No. 153-4; (4) Chaplain Wayne Moss' ("Moss") undisputed deposition testimony that contact was allowed in the execution chamber under the 2012 Execution Procedure, 6/24/19 Moss Tr. at 19:4-8 in *Murphy v. Collier*, No. 4:19-cv-1106 (S.D. Tex. June 24, 2019), Dkt. No. 110-14; and (5) the recent filings in the United States Supreme Court addressing the TDCJ custom and practice of allowing touching and praying in the execution chamber. *See* Brief of Former Prison Officials as Amici Curiae in Support of Petitioner, at 2-11, *Ramirez v. Collier*, No. 21-5592, 2021 WL 4667642 (U.S.); Brief of Spiritual Advisors and Former Corrections Officials as Amici Curiae Supporting Petitioner, at 13-19, *Ramirez v. Collier*, No. 21-5592, 2021 WL 4670366 (U.S.).

This Court erred in concluding that Gutierrez was dilatory. While neither the 2012 Execution Procedure nor the 2021 Execution Procedure place limitations on the manner or means by which a spiritual advisor may accommodate an inmate's spiritual needs in the execution chamber, it is evident from Moss' deposition testimony that under the 2012 Execution Procedure touching the inmate was allowed. This is contrary to the representation made by Defendants in their response that "physical contact and audible prayer were never permitted under current or former TDCJ Execution Procedures," Dkt. No. 180 at 1-2. Gutierrez and his counsel had a reasonable expectation

that under the 2021 Execution Procedure the spiritual advisor would be allowed to meet his spiritual needs in the execution chamber because touching had been allowed under the 2012 Execution Procedure.

Therefore, premises considered, the Court **VACATES** the Order of Dismissal, Dkt. No. 172, and Final Judgment, Dkt. No. 173; **GRANTS** Gutierrez's September 16, 2021 Motion to Alter or Amend Judgment, Dkt. No. 179; **SETS ASIDE** its conclusion that Gutierrez was dilatory and **AMENDS** its August 19, 2021 Order accordingly, Dkt. No. 172; and **GRANTS** Gutierrez's May 27, 2021 Motion for Leave to Supplement or Amend the Amended Complaint, Dkt. No. 153.

SIGNED this 29th day of October 2021.

/s/ Hilda Tagle
Hilda Tagle
Senior United States District Judge

Appendix G – Plaintiff's Brief in Opposition to Defendant's Motion to Reconsider, United States District Court for the Southern District of Texas (July 27, 2021)

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

Civil Case No. 1:19-CV-185

THIS IS A CAPITAL CASE

RUBEN GUTIERREZ,

Plaintiff,

v.

LUIS V. SAENZ, CAMERON COUNTY DISTRICT ATTORNEY, *et al.*,

Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO RECONSIDER ORDER DENYING MOTION TO DISMISS AND ORDER GRANTING A DECLARATORY JUDGMENT

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Appendix G

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Dated: July 27, 2021

[TABLES INTENTIONALLY OMITTED]

STATEMENT OF THE ISSUES TO BE RULED ON BY THE COURT

Defendants have asked this Court to reconsider its orders denying in part their motion to dismiss and granting in part a declaratory judgment in favor of Plaintiff. Mot. to Reconsider, ECF No. 167 (hereinafter "2d Mot. to Reconsider"). In significant part, Defendants rehash arguments made in their prior submissions to the Court. Such repetitious arguments do not merit reconsideration or much of a response. Plaintiff replies primarily with respect to Defendants' arguments concerning the statute of limitations.

Appendix G

SHORT STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

Plaintiff Ruben Gutierrez filed in this Court an amended complaint under 42 U.S.C. § 1983, challenging (1) Texas's statute governing the availability of DNA testing for criminal defendants on its face and as construed by the Texas Court of Criminal Appeals (CCA) (DNA claims); and (2) the Texas Department of Criminal Justice's (TDCJ) protocol excluding both prison-employed chaplains and other spiritual advisors from being inside the execution chamber during an execution (execution chamber claims). Pl.'s Am. Compl. 19-36, ECF No. 45.

Defendants moved to dismiss the complaint. Mr. Gutierrez opposed the motion to dismiss and moved for a stay of his execution. This Court denied in part the motion to dismiss and granted the motion for a stay. On appeal, the Fifth Circuit vacated the stay. The Supreme Court vacated and remanded, instructing the Fifth Circuit to remand to this Court. *Gutierrez v. Saenz*, No. 19-8695, 2021 WL 231538, at *1 (U.S. Jan. 25, 2021).

Following the remand, the parties provided additional briefing on the remaining DNA claims. Defendants asked this Court to reconsider its prior ruling and dismiss the DNA claims in their entirety, ECF No. 119, while Plaintiff argued for relief on the merits. ECF No. 118. This Court entered an order denying Defendants' motion for reconsideration and granting Plaintiff a declaratory

judgment on part of the DNA claims. Mem. & Order 18, 26, ECF No. 141 (hereinafter "Mar. 23, 2021 Mem. & Order").[1]

Defendants asked this Court to enter a partial final judgment with respect to the DNA claims. ECF No. 144. When this Court did not enter a partial final judgment, Defendants attempted to appeal from this Court's non-final order, *see* ECF No. 147, and then asked for a stay of the declaratory judgment. ECF No. 150. Mr. Gutierrez asked the Fifth Circuit to dismiss the interlocutory appeal filed by Defendants. *Gutierrez v. Saenz*, No. 21-70002 (5th Cir. May 6, 2021). On June 24, 2021, the Fifth Circuit granted the motion to dismiss. *Id.*, Order (5th Cir. June 24, 2021). Defendants now ask this Court for a second time to reconsider its prior ruling and dismiss the DNA claims.

SUMMARY OF THE ARGUMENT

Reconsideration of this Court's prior rulings is not warranted. Defendants fail to show that Plaintiff's DNA claims are time barred, including under *Reed v. Goertz*, 995 F.3d 425 (5th Cir. 2021). Defendants' other arguments are repetitious of arguments previously rejected by this Court, and do not provide a basis for reconsideration.

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1. Defendants assert that, aside from the partial declaratory judgment, this Court "appears to have dismissed or otherwise denied Gutierrez's other [DNA] claims." 2d Mot. to Reconsider 3. Yet nothing in this Court's ruling actually purports to dismiss or deny any of Plaintiff's claims. *See* Mar. 23, 2021 Mem. & Order 26; Pl.'s Br. in Opp'n to Def'ts' Mot. for Entry of Partial Final J. 3-4, ECF No. 145.

Appendix G

[7]**ARGUMENT**

I. STANDARD GOVERNING MOTIONS TO RECONSIDER

Defendants request that this Court reconsider its prior rulings, pursuant to Fed. R. Civ. P. 54(b). 2d Mot. to Reconsider. Because this Court's prior rulings were interlocutory orders, this Court has the discretion to "'afford such relief from [its prior order] as justice requires.'" *Zimzores v. Veterans Admin.*, 778 F.2d 264, 266 (5th Cir.1985) (quoting 7 Moore's *Federal Practice* ¶ 60.20 at 60–170 (2d ed. 1985)). This standard may be met "where the court has patently misunderstood the parties, strayed far afield of the issues presented, or failed to consider a controlling or significant change in the law or facts since the submission of the issue." *North v. United States Dep't of Justice*, 892 F. Supp. 2d 297, 299 (D.D.C. 2012) (citing *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004)). Justice does not require reconsideration where the movant raises arguments that the court has "already rejected on the merits." *Capitol Sprinkler Inspection, Inc., v. Guest Services, Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011).

Since the filing of the Amended Complaint, there has been no factual development with respect to the DNA claims. Thus, on Defendants' request for reconsideration of this Court's order denying in part their motion to dismiss, the underlying question is whether the complaint fails to state a cause of action. Therefore, "all well-pleaded facts in the complaint must be accepted as true, and the complaint must be construed in a light most favorable to

the plaintiff." Mem. & Order 7, ECF No. 48 (hereinafter "June 2, 2020 Mem. & Order") (citing *SEC v. Cuban*, 620 F.3d 551, 553 (5th Cir. 2010)).

In significant part, Defendants rely on arguments that this Court has "already rejected on the merits," without attempting to show any of the factors discussed in *North*. This Brief focuses on arguments that this Court has not already rejected, or as to which Defendants contend that there have been significant changes since the Court's prior rulings.

II. PLAINTIFF TIMELY FILED HIS DNA CLAIMS.

This Court previously ruled that Plaintiff's cause of action accrued on February 26, 2020, when the CCA denied his request for DNA testing "under a revised version of the DNA testing statute." June 2, 2020 Mem. & Order 14 (citing *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *1 (Tex. Crim. App. Feb. 26, 2020)). Because the Amended Complaint was filed less than two months later, this Court found the DNA claims timely. *Id.* In support of their request for reconsideration of this ruling, Defendants rely primarily on *Reed*. Their reliance is misplaced for the reasons that follow.

A. Plaintiff Filed Within Two Years of the Claim's Accrual.

In *Reed*, the plaintiff made a single request for DNA testing in the state courts. 995 F.3d at 428. The trial court denied his request in November 2014. *Id.* at 431.

Reed appealed to the CCA, which affirmed the trial court's ruling in 2017. *Reed v. State*, 541 S.W. 3d 759 (Tex. Ct. Crim. App. 2017) (decision delivered April 12, 2017; rehearing overruled October 4, 2017). Mr. Reed sought certiorari review from the United States Supreme Court, which denied his petition. *Reed v. Texas*, 138 S. Ct. 2675 (2018). Mr. Reed filed his complaint under 42 U.S.C. § 1983 on November 11, 2019. *Reed v. Goertz*, 995 F.3d at 428.

There was no dispute that a two-year statute of limitations applied to Mr. Reed's claim. He contended that his claim was timely because it was filed within two years of the CCA's final ruling on his appeal, i.e., October 4, 2017. The Fifth Circuit rejected that argument, ruling that his claim accrued with the trial court's denial of his request in November 2014, which was the time when he "*first* becomes aware, or should have become aware, that his right has been violated." *Id.* at 431 (citation omitted) (emphasis in *Reed*).

Defendants attempt to draw a direct comparison to *Reed*, arguing that Mr. Gutierrez's first DNA request was denied by the trial court on July 27, 2010, and that his claim therefore accrued then. 2d Mot. to Reconsider 8. That comparison breaks down, however, because of the numerous factual and legal developments that took place in Mr. Gutierrez's case between July 2010 and the filing of his section 1983 complaint on September 26, 2019.

First, in 2011, Texas amended Chapter 64 to remove the "no-fault" provision, which had denied access to DNA testing if any fault for the lack of prior DNA testing was

attributable to the "convicted person." Tex. Code Crim. Proc. Art. 64.01(b)(1)(B) (West 2007). The removal of the "no-fault" provision changed the legal landscape. Prior to its removal, Mr. Gutierrez had no claim that this "no-fault" provision violated due process, and hence no viable claim under *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55 (2009), and *Skinner v. Switzer*, 562 U.S. 521, 534 (2011).

Second, the factual landscape changed significantly in 2019. In 2010, the State asserted as a fact that a head hair taken from the decedent's hand at autopsy did not exist in the evidence held by the State. *Ex parte Gutierrez*, No. 98-1391-CR-A, State's Resp. to Def't's Mot. for Forensic DNA Testing 9-10 (Tex. 107th Dist. Ct. July 7, 2010) (attached as Ex. A). The trial court accepted this assertion as a fact and relied on that fact as a basis for denying DNA testing. *See id.*, Order on Def't's Mot. for Forensic DNA Testing 2 (Tex. 107th Dist. Ct. July 27, 2010) (attached as Ex. B). The CCA affirmed that ruling. *Ex parte Gutierrez*, 337 S.W. 3d 883, 897-98 (Tex. Ct. Crim. App. 2011).

In 2019, current counsel finally obtained access to files in the possession of the Brownsville Police Department and the Cameron County District Attorney's Office. Am. Compl. 12, ECF No. 45. While such access may have been afforded pretrial, it was not afforded to state habeas or prior federal habeas counsel. When current counsel reviewed the files, they located the sealed, unopened sexual assault kit from the Brownsville Police Department, which likely contains the head hair previously said to be not in existence. *See* Photograph of sexual assault kit (attached

as Ex. C); Final Pathology Report of Dr. Dahm at 3 (attached as Ex. D) (reflecting that hair was collected as part of sexual assault evidence). This evidence and other evidence reviewed in the police and prosecutorial files led to additional investigation and the filing of the 2019 Chapter 64 request. Am. Compl. 12.

That request was supported by (1) new expert evidence regarding the probative value of the requested DNA testing and the unreliability of the witness identification in the case; (2) a determination by counsel after examining the evidence that additional evidence was preserved and available for testing; and (3) new declarations from trial witnesses and the victim's family. None of these new items or other pieces of evidence were included in Mr. Gutierrez's earlier motions for DNA testing because Mr. Gutierrez was unaware and could not have become aware of them until May 21, 2019, when the State first made available the police and prosecutor's files. Additionally, touch DNA and other forms of advanced DNA testing, which only recently became available, are critical for many of Mr. Gutierrez's requests. *See* App'x to Compl. 21-23, Aff. of Huma Nasir, ECF No. 1-1.

There is no question that a "substantial" change in the legal and factual landscape can result in a new accrual date for purposes of a statute of limitations. *See Whitaker v. Collier*, 862 F.3d 490, 495 (5th Cir. 2017) (a "substantial" change in state execution protocol would result in new accrual date for lethal injection challenge under § 1983). Here, both the governing statute and the factual basis for the claim have changed substantially since 2010.

Therefore, the accrual date should be the date of denial by the trial court of Mr. Gutierrez's second Chapter 64 request, i.e., June 27, 2019, or at most the date when the evidence was made available to Mr. Gutierrez, i.e., May 21, 2019.

Plaintiff filed his original Complaint on September 26, 2019. Compl., ECF No. 1. There should be no question that the claims in the Amended Complaint relate back to those in the original Complaint under Fed. R. Civ. P. 15(c). But even in the absence of relation back, the Amended Complaint is still timely because it was filed less than two years after the earlier of the possible accrual dates.

Because of the circumstances outlined above, *Reed* is not controlling here. True, *Reed* makes clear that the latest date for accrual of the claim is June 27, 2019, when the trial court denied the 2019 Chapter 64 request, rather than February 26, 2020, when the CCA affirmed the denial of relief. But this makes no difference since the claim is timely under either of those accrual dates.

B. The Claim Is Timely Based on Equitable Tolling.

Even if this Court were to rule that the claim accrued prior to 2019, it should still find the claim timely under equitable tolling principles. Defendants do not dispute that equitable tolling could render the claim timely but contend that Plaintiff is not entitled to equitable tolling based on a purported lack of diligence. 2d Mot. to Reconsider 10. This argument fails because Plaintiff has in fact been remarkably diligent in pursuing his DNA claims.

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Following the CCA's 2011 affirmance of the denial of the original Chapter 64 motion, Mr. Gutierrez re-opened the pending federal habeas proceedings, specifically requesting post-conviction DNA testing. Am. Compl. 10; *see Gutierrez v. Stephens*, No. 1:09-CV-22, Am. Br. for Pet. 92-95, ECF No. 19 (S.D. Tex. May 1, 2012). After this Court denied relief, Mr. Gutierrez sought to raise the claim on appeal. *See Gutierrez v. Stephens*, 590 F. App'x 371, 373 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 35 (2015).

On November 4, 2015, Mr. Gutierrez filed a motion for miscellaneous relief in the state trial court, seeking independent DNA testing of potentially exculpatory material. In its initial response, the State did not oppose that request. On April 11, 2018, however, the State presented, and the court signed, a proposed order denying the motion. Am. Compl. 11. After current counsel were appointed to represent Mr. Gutierrez, undersigned counsel sought access to the police and prosecutorial files. After reviewing those files, undersigned counsel promptly filed the second Chapter 64 motion requesting DNA testing. *Id.* at 12. On June 20, 2019, the trial court granted that request, before reversing itself a few days later at the State's request. *See id.* at 12-13; App'x to Compl. 1-4.

This is the opposite of the lack of diligence posited by the State. Mr. Gutierrez repeatedly used apparently available mechanisms in his attempt to obtain DNA testing. Even if it is assumed that he made those attempts in the wrong forum or via an inappropriate mechanism, such attempts are recognized as a basis for equitable tolling under Texas law. *See Bailey v. Gardner*, 154 S.W.

3d 917, 920 (Tex. Ct. App. 2005) (equitable tolling applies "where a claimant actively pursued his judicial remedies but filed a defective pleading during the statutory period").

As further support for equitable tolling, Plaintiff pointed out that Defendants concealed the evidence, including by asserting that the head hair did not exist in evidence. Pl.'s Resp. to Mot. to Dismiss 37, ECF No. 47. Defendants argue that fraudulent concealment can toll the limitations period, but that Plaintiff has not alleged that Defendants' concealment of the evidence meets the standard for fraudulent concealment. 2d Mot. to Reconsider 10 & n.2. Defendants' argument is without merit.

As noted above, Mr. Gutierrez has not relied on fraudulent concealment standing alone as a basis for equitable tolling, but rather on Defendants' concealment of the evidence, together with the other circumstances described above and in his response to Defendants' original motion to dismiss. *See* Pl.'s Resp. to Mot. to Dismiss 36-37. Plaintiff has alleged that Defendants had access to the evidence in question, that they failed to open the sealed sexual assault kit, but that they nevertheless represented that evidence did not exist within that kit. At the very least, that is concealment which supports the application of equitable tolling.

Defendants disclaim actual knowledge of the facts concealed and a fixed purpose to conceal the wrong. 2d Mot. to Reconsider 10 n.2 (citing *Timberlake v. A.H. Robins Co.*, 727 F.2d 1363, 1366 (5th Cir. 1984)). The Defendants' knowledge and purpose in concealing the

evidence are facts known only by Defendants themselves. As such, those facts are not amenable to resolution in the context of a motion to dismiss.

Because the relevant questions with respect to equitable tolling "are essentially factual in nature and depend on matters outside the pleadings, the applicability of the equitable tolling doctrine 'is not generally amenable to resolution on a Rule 12(b)(6) motion.'" *Moore v. Lockyer*, No. C 04-1952, 2005 WL 2334350, at *6 (N.D. Cal. Sept. 23, 2005) (citations omitted), *dismissal on other grounds aff'd sub nom. Moore v. Brown*, 295 F. App'x 176 (9th Cir. 2008). Because Plaintiff's claim is not subject to dismissal, this Court should deny the motion to reconsider.

III. MR. GUTIERREZ SUFFICIENTLY PLED THE CLAIM ON WHICH THIS COURT GRANTED RELIEF.

This Court granted a partial declaratory judgment based on irreconcilable Texas statutory provisions that, on the one hand, allow a death sentenced prisoner to obtain state habeas relief on a showing of innocence of the death penalty, but, on the other hand, deny DNA testing of evidence that would "demonstrate a person is innocent of the death penalty." Mar. 23, 2021 Mem. & Order 23 (citing *Gutierrez v. State*, 2020 WL 918669, at *8). Plaintiff alleged that the unavailability of testing for this purpose violates due process. Am. Compl. 28-29. Defendants erroneously assert that this Court granted relief on a claim that Plaintiff did not raise. 2d Mot. to Reconsider 12-13.

As Defendants acknowledge, Mr. Gutierrez alleged in the Amended Complaint that Chapter 64 unconstitutionally "prevents movants from establishing actual innocence of the death penalty" through DNA testing. 2d Mot. to Reconsider 12. Nevertheless, Defendants fault Mr. Gutierrez for failing to "cite [article 11.071] § 5(a)(3), the anti-parties special issues in article 37.071 § 2(b)(2), or otherwise refer[] to subsequent state habeas applications." *Id.* On this basis, Defendants argue that this Court granted relief as to a claim Mr. Gutierrez did not raise. *Id.* This argument is baseless.

Mr. Gutierrez alleged that Chapter 64 offends due process on its face and as construed by the CCA because a "defendant could never obtain testing in order to establish that he is ineligible for the death penalty," and thus "actually innocent" of the death penalty. Am. Compl. 28 (citing *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992)). Under Texas law, article 11.071 § 5(a)(3) is the vehicle through which new evidence is presented to achieve those ends. *See* Tex. Code Crim. Proc. art. 11.071 § 5(a)(3) (death sentenced prisoner may bring successive application to show ineligibility for the death sentence); Tex. Code Crim. Proc. art. 37.071 (eligibility requirements for death sentence); *see also Ex parte Kussmaul*, 548 S.W.3d 606, 623 n.15 (Tex. Crim. App. 2018) ("The proper and exclusive vehicle for obtaining judicial relief from a felony conviction on the basis of a favorable finding under Article 64.04 is a post-conviction application for writ of habeas corpus returnable to this Court under Article 11.07 [the non-capital counterpart to Article 11.071].").

Mr. Gutierrez obviously did not intend to obtain DNA testing that would exonerate him of the death penalty only to do nothing with that evidence. Defendants' argument boils down to finding fault with Mr. Gutierrez for not referencing Section 5(a)(3) by name. That argument is inconsistent with the "liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman v. Tarrant Cty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (citing Fed. R. Civ. Pro. 8(a)(2) and holding that a "heightened pleading standard" does not apply under § 1983). Mr. Gutierrez sufficiently pled his claim on which this Court granted relief, and Defendants' argument is groundless.

IV. DEFENDANTS' REMAINING ARGUMENTS ARE MERITLESS.

Defendants close with several contentions regarding the merits of this Court's prior ruling. 2d Mot. to Reconsider 14-20. Defendants make no attempt to show that these arguments merit reconsideration, beyond the bare and insufficient assertion that this Court's ruling is "mistaken." *Id.* at 14. We respond very briefly.

Defendants contend that the CCA has not expressly held that article 11.071 § 5(a)(3) provides what the statutory language says that it provides—a mechanism for showing that the defendant is ineligible for the death penalty because no rational juror would have found all of the alleged special issues. 2d Mot. to Reconsider 14-15. Defendants cite nothing to suggest that the CCA would refuse to apply the statute. This is not grounds for reconsideration.

Similarly, Defendants' arguments that the mental state at issue is subjective and that the CCA has not "explicitly incorporated" article 37.071 into article 11.071, 2d Mot. to Reconsider 16-17, are unavailing. All mental states, including specific intent, are subjective. That does not mean that a prisoner cannot obtain relief by disproving intent, or that the subjective nature of intent creates an absolute barrier to the relief contemplated in article 11.071, § 5. And while the CCA may not have incorporated article 37.071 into article 11.071, the Texas Legislature did. *See* Art. 11.071 § 5(a)(3). Defendants would have this Court declare that provision a dead letter. Again, that argument is not grounds for reconsideration.

Defendants say that the inability to obtain DNA evidence to prove innocence of the death penalty does not render art. 11.071, § 5(a)(3) "illusory" because that provision can be used for other purposes, e.g., to show ineligibility for the death sentence based on intellectual disability. 2d Mot. to Reconsider 18. But that possibility is irrelevant to the issues in this suit, and thus again is not grounds for reconsideration.

Finally, Defendants contend this Court should defer to the Texas Legislature. 2d Mot. to Reconsider 19-20. Plaintiff submits that this Court has appropriately deferred to legislative choices throughout its rulings in this case, but still appropriately found a due process violation based on the irreconcilable conflict between the legislative provisions at issue here. This Court should therefore deny the motion for reconsideration.

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CONCLUSION

For all of the reasons set forth above, Mr. Gutierrez respectfully requests that this Court deny Defendants' second motion for reconsideration.

Respectfully submitted,

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Dated: July 27, 2021

Appendix G

EXHIBIT A

IN THE DISTRICT COURT
107TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

CAUSE NO. 98-CR-1391-A

EX PARTE

RUBEN GUTIERREZ

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR FORENSIC DNA TESTING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the **STATE OF TEXAS,** by and through the Cameron County District Attorney Armando R. Villalobos, and, files its Response to Defendant's Motion for Forensic DNA Testing, and in support thereof, would show this Honorable Court the following:

I.

PROCEDURAL HISTORY

Defendant was indicted for the capital murder of Mrs. Escolastica Harrison. Mrs. Harrison was eighty-five (85) years old at the time of her murder. She was severely beaten and stabbed thirteen times with two different weapons. Mrs. Harrison was found dead, lying in a pool of her blood.

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On May 12, 1999, the defendant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, Tex. Code Crim. Proc., and the trial court, accordingly, set punishment at death. The Court of Criminals Appeals affirmed the defendant's conviction and sentence on direct appeal. *See Gutierrez v. State*, No. 73,462 (Tex. Crim. App. Jan. 16, 2002). On July 6, 2004, defendant filed his original application for writ of habeas corpus pursuant to Article 11.071, Tex. Code Crim. Proc. *See Ex parte Ruben Gutierrez*, WR-59, 552-01. On May 14, 2008, defendant's request for relief in his original application was denied with written order and opinion by the Court of Criminal Appeals. Defendant filed a federal petition for writ of habeas corpus in the United States District Court for the Southern District of Texas (Brownsville Division). The United States District Court stayed and abated the federal proceedings to allow the Defendant to pursue any unexhausted state claims.

Defendant filed in the 107th Judicial District Court of Cameron County a pro se request for appointment of counsel under Tex. Code Crim. Proc. Art. 64.01(c). The request was denied by this Court. The denial caused the attorney Margaret Schmucker to file a limited appearance of counsel and a motion to reconsider. The Defendant's motion to reconsider was also denied.

Defendant filed an appeal with the Texas Court of Criminal Appeals of the trial court's order denying the request for appointment of counsel. On March 24, 2010, the Texas Court of Criminal Appeals issued an opinion

dismissing the defendant's appeal. *Ex parte Ruben Gutierrez*, No. AP 76,186 (Tex. Crim. App 2009).

On April 6, 2010, the State had received a Notice of Limited Appearance of Counsel, for the limited purpose of filing a Motion for Forensic DNA Testing, but was not served with a copy of the actual Motion. On May 10, 2010, the State learned that Defendant's attorney had filed a Motion but a copy had not been forwarded by the trial court to the District Attorney's Office. On May 10, 2010, the Cameron County District Attorney's Office received a copy of the Motion from the 107th Judicial District Court. This State's response pursuant to Article 64.02 of the Texas Code of Criminal Procedure follows.

II.

STATEMENT OF FACTS

On the morning of Sunday, September 6, 1998, shortly after 1:00 a.m., the cold, stiff body of Escolastica Cuellar Harrison was found on her bedroom floor, face down in a pool of blood. The room was ransacked, and things were thrown on the bed as if somebody had gone through Mrs. Harrison's personal belongings. (RR 17, pp. 84-85, 113-118, 224-229).

Mrs. Harrison, an 85 year old widow, resided with her nephew, Avel Cuellar in a mobile home park at 409 Morningside Road, Brownsville, Texas. Mrs. Harrison owned the mobile home park in which they lived. The home doubled as the park's office. (RR 17, pp, 74-77).

Mrs. Harrison did not trust banks; she kept all her money in her home/office. At the time of her murder she had approximately $600,000.00 in her home. Only a few people knew about the money, and Defendant was one of those people. (RR 17, pp. 83-85, 88-90, 91-92, 95-99, 150; RR 18, pp. 195-198).

Brownsville Detective David Garcia arrived while the paramedics were still present. Since it was determined that her death was a homicide, Det. Garcia had the paramedics leave and he secured the building. Mrs. Harrison was still face down in the pool of blood. Garcia made arrangements to have the body taken to the pathologist for autopsy. (RR 17, pp. 35-54, SX-1 through SX-18).

The pathologist confirmed the death was a homicide. He observed numerous injuries all over Mrs. Harrison's face, neck and head. There were bruises, cuts, scrapes and stab wounds. There were thirteen stab wounds to her face and neck. She had sustained blows to her face and three cuts around her left eye. Some of the stab wounds had been inflicted with a straight-tipped instrument the size and shape of a flathead screwdriver. However, other stab wounds were round and the doctor opined that two different instruments had been used in the multiple stabbing. The pathologist concluded that Mrs. Harrison died from massive blows to the left eyebrow region of her face. The pathologist further opined that there could have been more than one person involved in inflicting the totality of the wounds because different types of instruments were used in the stabbing. (RR 19, pp. 215-280; RR 30, SX-73 through SX-98).

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On Sunday September 6, 1998, Detective Gilbert Garcia, Jr., the lead investigator, and other detectives began to canvass the area door-to-door for information. Detective Garcia was already aware that Avel Cuellar, the victim's nephew, Ramiro Martinez, and Crispin Villarreal had all given Defendant's name as being in the trailer park on September 5, 1998. His investigation led to witness Julio Lopez, who also identified Defendant at the scene. (RR 19, pp. 35, 41-48; RR 29, SX-4, SX-7; RR 30, SX-35, SX-64). Further, Detective Garcia found Mrs. Harrison's personal ledger in her home which had entries showing that she had lent money to the Defendant in the past (RR 17, pp. 97-99, 123-126; RR 18, 107-110; RR 29, SX-12, SX-24).

On September 8, 1998, Detectives Flores and Ortiz went to Defendant's house to talk to him since Defendant's name came up so often. Defendant was not home but his mother said she would bring him to the police station the next day. (RR 18, 115-120).

On September 9, 1998, Defendant voluntarily arrived at the Brownsville Police Station. Defendant met with Detective Flores in the Criminal Investigations Division offices. Det. Flores advised the Defendant of his rights, both orally and in writing. Upon completion, Det. Flores asked Defendant of his whereabouts on the weekend that Mrs. Harrison was murdered. Defendant stated that on Saturday, September 5, he was driving around with his cousin "Chuco" all day in a Corvette. Defendant stated that he was nowhere near Mrs. Harrison's mobile home park on that Saturday. When Det. Flores questioned

the Defendant on whether he had his days correct, the Defendant terminated the interview. (RR 18, pp. 120-135, 303-308).

Detectives Flores and Pineda followed up on the Defendant's statement and went to talk to the Defendant's cousin "Chuco", whose real name is Joey Maldonado. The statement that "Chuco" gave contradicted the statement which the Defendant had given. (RR 18, pp. 308-309).

Around the same time, the police received a Crime Stoppers tip that an individual named Rene Garcia, who was recently released from jail, was spending large amounts of money. Garcia had an outstanding warrant for theft by possession and was picked up in an alley by his home with $2,000 on his person. Garcia had also purchased merchandise in the amount of $5,600.00 and a vehicle for $6,000.00. Garcia gave a voluntary statement that implicated the Defendant and Pedro Gracia in the murder of Mrs. Harrison. Rene Garcia stated that Defendant had punched and stabbed the victim. (RR 18, pp. 140-147, 256, 310-312; RR 19, pp. 48-49; RR 30, SX-38, SX-39).

Based upon Garcia's statement, the police picked up Pedro Gracia. Gracia had also just purchased new vehicles and he showed police Where he had hidden $11,000.00 inside of a sofa in his home. Gracia gave a voluntary statement which implicated both the Defendant and Rene Garcia in the murder of Mrs. Harrison. (RR 18, pp. 145-147, 312-315; RR 30, SX-40, SX-41).

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On September 13, 1998, as a result of their investigation and the co-perpetrators' statements, the police obtained an arrest warrant for the Defendant (RR 18, pp. 148-150; RR 30, SX-42). On that same day, Defendant was arrested, waived his rights and provided a voluntary statement. (RR 18, pp. 152-179; RR 30, SX-43 through SX-45). According to Defendant, "there was no doubt about the fact that I planned the whole ripoff," but still claimed that he took no part in the murder. (RR 30, SX-45). He claimed that only Rene Garcia and Pedro Gracia went into the house with two screwdrivers. (RR 30, SX-45). He claimed that he waited at a park so distance away and when his co-perpetrators returned they had one bloody screwdriver, the blue suitcase and tool box, both of which were full of money. (RR 30, SX-45). At that time, defendant claims that Garcia told him that they had killed Mrs. Harrison. (RR 30, SX-45).

After Defendant finished giving his statement, he agreed to lead Detectives to the location of one of the murder weapons and a blue suitcase which belonged to Mrs. Harrison. The suitcase contained some of the stolen money. Defendant took the investigators to a location where he had thrown out one of the screwdrivers used to stab Mrs. Harrison, but the investigators could not locate the screwdriver. Next, Defendant led the Detectives to the location where he had disposed of the blue suitcase. Detectives searched the grassy, wooded area but could not find it. Defendant was allowed to exit the vehicle and he walked straight to an obscure location and pointed to the exact spot where the blue suitcase was located. (RR 18,

pp. 178-198; RR 29, SX-32; RR 30, SX-46 through SX-54, SX-56, SX-56A, SX-57).

Detectives, after receiving a statement from co-defendant Gracia, were led by Garcia to different locations where money totaling $80,000.00 was recovered. (RR 18, pp. 204-210; RR 30, SX-55). Additionally, Detectives were led by Defendant's wife's cousin, Juan Pablo Campos, to an aunt's house where Campos had hidden approximately $50,000.00 that the Defendant had given to Campos to hold for him. (RR 18, pp. 210, 323-326; RR 30, SX-62).

On September 14, 2008, Defendant provided another statement and admitted to lying in his statement that he had provided the previous day. (RR 19, pp. 51-102; RR 30, SX-66). In this statement, Defendant changed his story to say that Pedro Gracia was the driver and that Defendant and Rene Garcia went inside Mrs. Harrison's home. (RR 30, SX-66). Both he and Garcia had gotten screwdrivers from the back of the truck, one a flathead and one a star type (Philips). (RR 30, SX-66). He blamed Garcia for the stabbing and beating of Mrs. Harrison and he only watched and grabbed the money, but never intended the murder. (RR 30, SX-66). Defendant claim that he didn't get much money just a little stack of fifties ($50). (RR 28, SX-6). Defendant also claimed to have thrown one of the bloody screwdrivers out the vehicle's window as they fled. (RR 30, SX-66).

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III.

STATE'S RESPONSE PURSUANT TO TEX. CODE CRIM. PROC. ART. 64.02

A. Evidence Requested by the Defendant to be Tested.

1. Blood sample taken from victim Escolastica Harrison – preserved and in the custody of the Texas DPS McAllen Crime Lab;

2. Shirt belonging to nephew Avel Cuellar – in custody of the Brownsville Police Department;

3. Nail scrapings from victim Escolastica Harrison – in custody of the Brownsville Police Department;

4. Raincoat – in custody of the Brownsville Police Department;

5. Swatch from sofa – in custody of the Brownsville Police Department;

6. Single loose hair – not in existence.

The above referenced items, except the single loose hair, are in the custody of either the Brownsville Police Department or the Texas Department of Public Safety McAllen Crime Lab. The State respectfully has not physically delivered the evidence to the court to maintain the viability the biological evidence, specifically the blood

sample of the victim, and to facilitate the deliver of the evidence to the appropriate testing laboratory should this Court order that testing be performed.

B. Non-existence as evidence of single loose hair

Defendant requests DNA testing on a single loose hair which was identified during the autopsy; however, there is no record of the single loose hair actually being recovered by the Brownsville Police Department as alleged in defendant's motion. The State has been unable to identify any testimony regarding the single loose hair being recovered as evidence at the autopsy. The existence of the single loose hair as a piece of evidence has never been raised by or complained of by the defendant in the twelve years prior to the filing of his Motion for DNA Testing.

It has been said that when "potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." *Arizona v. Youngblood*, 488 U.S. 51(1988). In the absence of bad faith, a failure to preserve potentially useful evidence does not violate due process. *Id.* The single loose hair, although identified at the autopsy, was never recovered or preserved as a piece of evidence. One cannot test what cannot be found. Before a convicting court may order forensic DNA testing, it must be shown that the evidence "still exists and is in a condition making DNA testing possible." Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(I). A chain of custody must also be established. Tex. Code Crim. Proc.

art. 64.03(a)(1)(A)(ii)(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). Neither of these conditions can presently be met here. Therefore, the defendant cannot meet his burden as to the single loose hair.

IV.

DEFENDANT IS NOT ENTITLED TO A HEARING ON HIS MOTION FOR DNA TESTING.

A defendant is not automatically entitled to a hearing on a motion for DNA testing. *Whitaker v.* State, 160 S.W.3d 5, 8 (Tex. Crim. App. 2004) (concluding that Chapter 64 does not require the trial court to conduct a hearing); *Rivera v. State*, 89 S.W.3d 55, 58-59 (Tex. Crim. App. 2002) (holding that applicants for post conviction DNA forensic testing under 64.03 are not entitled to an evidentiary hearing with live testimony). Nothing in article 64.03 requires a hearing concerning whether a defendant is entitled to DNA testing; however, the Legislature has provided for a hearing under article 64.04 *after* a convicted person has obtained DNA testing under article 64.03. Tex. Code Crim. Proc. Ann. art. 64,03, 64.04; *Rivera*, 89 S.W.3d at 58-59. If a defendant has not already obtained DNA testing pursuant to article 64.03, the trial court does not err in refusing to conduct a hearing under article 64.03. *See Rivera*, 89 S.W.3d at 59. Therefore, a hearing on defendant's Motion for DNA Testing is unnecessary.

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V.

DEFENDANT HAS FAILED TO MEET THE REQUIREMENTS OF TEX. CODE CRIM. PROC. ART 64.01

Chapter 64 contains several requirements that must be met before a convicted person may obtain DNA testing. One of these requirements is an "unavailability" showing, which can be satisfied when the record shows one of several scenarios:

[The evidence in question . . .]

(1) was not previously subjected to DNA testing:

(A) because DNA testing was:

(i) not available; or

(ii) available, but not technologically capable of providing probative results; or

(B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice requite DNA testing; or

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

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Article 64.01(b) of the Texas Code of Criminal Procedure provides for post-conviction DNA testing if that evidence "was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense." Article 64.01(b)(i)(B) further states that the convicted person is not entitled post-conviction DNA testing if it was his fault that the biological material was not previously tested during his trial.

In *Routier v. State*, the Court of Criminal Appeals construed article 64.01(b)(i)(B) to mean that an applicant for post-conviction DNA testing must make a "particularized" showing that the biological materials were never tested through no fault of his own. *Routier*, 273 S.W.3d 241, 247 (Tex. Crim. App.2008). In that case, the appellant explained that his failure to request DNA testing or inspection of the physical evidence before his trial was not his fault because the State had the evidence in its possession. *Id.* The court rejected appellant's no-fault explanation as a mere assertion that the biological evidence had not been previously subjected to testing. *Id.* That such evidence was in the State's possession at the time of trial was also an insufficient explanation for why he had not tested the evidence when he had the chance.

Similar to *Routier*'s deficient motion, defendant's motion does not meet this "particularity-standard" under article 64.01(b)(B). The record reflects that, before trial, the State provided the defense team with unfettered access to all of the evidence in this case. (RR Vol. 3, p. 10-12), Defendant filed a pre-trial motion to inspect physical

evidence on February 5, 1999 which the judge granted on March 18, 1999, three weeks before the guilt/innocence trial actually began. (RR Vol. 3, p. 10). Defendant's argument that he was not allowed sufficient time to inspect the evidence and to have it independently tested does not comport with the record. The defendant's attorney at the hearing on the Motion to Inspect the Physical Evidence, stated as follows:

> 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.
>
> DEFENDANT: 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.
>
> THE COURT: Okay, For the record, I'll go ahead and grant the motion for the inspection and examination of the physical evidence.

RR Vol. 3, p. 10

From this, it is apparent that the defendant was not denied the opportunity to conduct DNA testing of his own at trial. After the inspection of the physical evidence by the Defense, no motion was ever made to the Court for independent testing of the evidence, an appointment of an independent expert, or for a continuance. During the trial, defendant's attorney cross-examined the crime scene investigator Juan Hernandez about the fingernail scrapings and the fact that they were not tested. RR Vol. 19, pp. 126-127. Further questions were asked about other apparent blood samples that were collected, specifically regarding blood on a raincoat, in bathroom, in back bathroom; on screen door to garage, and on couch. RR Vol. 19, p. 129. The existence of these apparent biological materials were not a secret to the defense. The defense chose not to pursue independent DNA testing at that time, based upon trial strategy as eluded to by the defendant's attorney at the March 18, 1999 hearing. Although the defendant was aware of the existence of biological evidence

prior to, during and after the trial and the Defense was given access to all the physical evidence and expert reports, the defendant waited twelve years to request any independent testing. Defendant has never raised an ineffective assistance of counsel claim on the basis that his trial attorneys failed to request independent testing on any biological evidence or a continuance for such testing.

Defendant on pg. 4, par. I of his Motion separates the "no fault" and "interest of justice require DNA testing" provision but the Court of Criminal Appeals has interpreted this phrase in a completely different manner. *Skinner v. State*, 293 S.W.3d 196 (Tex. Crim. App. 2009). The Court reads art 64.01(b)(1)(B) "no fault . . . interest of justice" as being a single alternative method of ascertaining the availability of DNA testing. *Id.* at 200-02. The Court has held that it is not enough to claim under this provision, as the defendant does on pgs. 6-8, par. I, C, that an exculpatory test result would change the outcome of the case. "The fact that testing would be outcome-determinative, if conducted does not mean that the testing was in some sense unavailable." *Id.* at 201.

As discussed above, the defendant has failed to meet the unavailability requirement of art. 64,01(b)(2)

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VI.

DEFENDANT HAS FAILED TO MEET THE REQUIREMENTS OF TEX. CODE CRIM. PROC. ART. 64.03.

A. The Statutory Provisions.

Article 64.03 provides:

(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; and
>
> (B) 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 the administration of justice.

Tex. Code Crim. Proc. art. 64.03(a).

Chapter 64 authorizes the convicting court to order only DNA testing and nothing more. *Wolfe v. State*, 120 S.W.3d 368, 372 (Tex. Crim. App. 2003). A convicting court is prohibited from granting a convicted person's request for DNA testing unless the requirements in article 64.03 are met. *Dinkins v. State*, 84 S.W.3d 639, 643 (Tex. Crim. App. 2002).

B. Identity Was Not and Is Not an Issue in this Case

"Under Article 64.03, a defendant is not entitled to DNA testing unless he first shows that unaltered evidence is available for testing; that identity was an issue in the case; that there is greater than a 50% chance that he would not have been convicted if DNA testing provided exculpatory results; and that the request is not to delay the execution of the sentence." *Prible v. State*, 245 S.W.3d 466, 467-68 (Tex. Crim. App. 2008), cert. denied, 129 S. Ct. 54 (2008). "The identity requirement in Chapter 64 relates to the issue of identity as it pertains to the DNA evidence. Therefore, if DNA testing would not determine the identity of the person who committed the offense or would not exculpate the accused, then the requirement of Art. 64.03(a)(2)(A) has not been met" Id. at 470.

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Defendant readily admits that Ruben Gutierrez (himself), Rene Garcia, and Pedro Gracia were the individuals involved in the robbery of victim Escolastica Harrison. See Defendant's Motion for DNA Testing, pg. 6, par. C. Mrs. Harrison was murdered during the robbery. The evidence showed at trial there were multiple assailants. The testimony of Dr. Dahm, pathologist, showed that the victim was severely beaten and stabbed at approximately same time by two different type of weapons and based upon the injuries could have been more than one person involved in the infliction of the wounds. RR Vol. 19, pp. 230-247, 268-271, 273-275.

1. Victim's Nephew Not a Suspect and Cleared of any Alleged Involvement Therefore Testing of his Clothing or Belongings is Irrelevant.

Defendant requests that certain items belonging to the victim's nephew, Avel Cuellar, be tested. Cuellar resided with the victim and found her the night of her murder. Cuellar During the police investigation and at trial, the issue of the involvement of Cuellar was addressed. The defense questioned the detectives regarding the possible involvement of Cuellar. RR Vol. 17, pp. 54-65. Cuellar was called as a witness and testified, the defense cross-examined him as to his possible motives and involvement in the murder. RR Vol. 17, pp. 146-196; 217-222. Cuellar denied any involvement in the murder of his aunt. Cuellar was cleared as a suspect by the police. RR Vol. 17, p. 54. The record shows that when Cuellar found his aunt lying in pool of her blood, he went over to her and tried to pick her up and got blood all over himself. RR Vol. 17, pp. 117-

18. He had blood on one hand and on his clothes. RR Vol. 17, p. 208.

The testing of the requested items: shirt belonging to victim's nephew, blood samples from Avel Cuellar's bathroom and from a raincoat located in or just outside Avel Cuellar's bedroom is simply a ruse. Logically the blood of the victim will be on these items. They will never be of any relevance in attempting to show the innocence of the defendant under any standard. The only purpose for a request to have these items tested for DNA can only be seen a ploy to delay the proceedings.

2. Statements are admissible for Court to consider in determining whether identity is at issue.

Defendant argues that the following statements and identifications should not be considered in determining whether the identity of the perpetrator was an issue at his trial: (1) Gutierrez's admission to police; (2) co-defendant's statement to police implicating Gutierrez in the murder; (3) identification of Gutierrez at the murder scene by his co-defendants; and (4) identification of Gutierrez at the murder scene by an eye-witness.

Unlike a criminal trial, a chapter 64 proceeding 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. See *Cravin v. State*, 95 S.W.3d 506, 510 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd). Rather, as set forth in chapter 64, the proceeding involves a motion made by the

defendant followed by the State's non-accusatory response required under the statute. *See id.*; Tex. Code Crim. Proc. arts. 64.01-64.02. This type of proceeding has been found to be analogous to a habeas corpus proceeding in that it is an independent, collateral inquiry into the validity of the conviction. *See Cravin*, 95 S.W.3d at 509-10. 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. *Id.* at 510 (citing *Ex parte Mines*, 26 S.W.3d 910, 914 (Tex. Crim. App. 2000)). The defendant does not have the right to confront and cross-examine witnesses. *Id.* at 510; *Thompson v. State*, 123 S.W.3d 781, 785 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (holding that appellant had no right to be present at the post-conviction hearing, no right to confront or cross-examine witnesses, and no right to have hearsay excluded).

Defendant's argument presumes the rules of evidence apply to an article 64.03 proceeding. However, this article does not require an evidentiary hearing to determine whether DNA evidence exists. *See Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002). Therefore, the rules of evidence are not necessarily implicated. *Mearis v. State*, 120 S.W.3d 20, 25 (Tex. App.—San Antonio Aug. 6, 2003, pet. ref'd).

Further, under the procedures set forth in article 64.02, the State is not required to include affidavits with its response in a post-conviction DNA inquiry. See Tex. Code Crim. Proc. art. 64.02(2)(8). Although a defendant's

motion for DNA testing must be accompanied by a sworn affidavit, the language in the statute requires only a written response from the State. *See id.* The trial court may then reach a decision based on these documents without holding a hearing. *Cravin*, 95 S.W.3d at 509.

Therefore, the trial court may consider the entire record before it, including the confession of the Defendant, the statements of the Co-defendants admitted through the investigating detectives at trial and the testimony of the eye-witness Julio Lopez, in ruling on the motion for DNA testing.

3. Gutierrez's Admission During Police Interrogation is Admissible For the Court to Consider in Determining Whether Identity is an Issue under Art. 64.03.

Defendant argues that his admission to police cannot be used for purposes of determining whether identity was at issue because his confession was obtained in violation of his constitutional right to remain silent. Defendant's confessions can be used by the trial court to determine whether identity is an issue in a Article 64 proceeding. In the alternative, no such violation occurred.

The issue of the admissibility of defendant's confessions has been already been addressed by this Court and the Texas Court of Criminal Appeals. On March 22, 1999, this Court considered evidence on Defendant's Motion to Suppress Statements of Defendant. This Court denied the defendant's motion to suppress his statements. RR

Vol. 4, p. 242. On direct appeal, the defendant argued that the trial court erroneously admitted all three of his written statements because they were involuntary. The Court of Criminal Appeals overruled the defendant's complained-of point of error and upheld the ruling of the trial court. *Gutierrez v. State*, No. 73,462 (Tex. Crim. App. January 16, 2002). Thereafter, the defendant raised these same arguments regarding the voluntariness of his confessions in grounds 3 and 4 of his Application for 11.071 Writ of Habeas Corpus. *Ex parte Gutierrez*, No. 59,552-01 (Tex. Crim. App. July 6, 2004). On September 15, 2004, the Court of Criminal Appeals remanded the writ as to grounds 1 and 2; however, it denied all remaining claims. *See id.* The defendant is improperly attempting to relitigate matters which have been finally determined, the defendant should be barred from raising this same issue based upon collateral estoppel. Therefore, confessions of the defendant are admissible for this Court to review in making its ruling on the Motion for DNA Testing.

In the alternative, if the Court wants to relitigate the issue of the defendant's statements, the State would argue as follows. In *Moran v. Burbine*, the Court held that a suspect's knowing and voluntary waiver of his rights is valid as a matter of law. *Moran*, 475 U.S. 412 (1986). Brownsville Police informed the defendant of his right to remain silent before the start of all four periods of questioning, and the defendant participated knowingly and voluntarily. Therefore, the defendant waived his right to remain silent (Vol. 4, P. 49, 63, 125).

Defendant further asserts, however, that his right to cut off questioning and remain silent was not "scrupulously

honored." In *Mosley*, the court held that statements obtained after a person in custody has exercised his right to remain silent" are admissible if his "right to cut off questioning was scrupulously honored" by police. *Michigan v. Mosley*, 423 U.S. 96 (1975). Intermediate courts have derived five factors from *Mosley* to determine whether a suspect's right to remain silence was "scrupulously honored" after suspect's initial invocation: (1) whether the suspect was informed of his right to remain silent prior to the initial questioning; (2) whether the suspect was informed of his right to remain silent prior to the subsequent questioning; (3) the length of time between initial questioning and subsequent questioning; (4) whether the subsequent questioning focused on a different crime: and (5) whether police honored the suspect's initial invocation of the right to remain silent. *United States v. Alvarado-Saldivar*, 62 F.3d 697, 699 (5th Cir.1995).

The facts of this case are analogous to *Mosley* in two respects. First, the defendant's incriminating statements were obtained from a different police officer than one who initially interviewed him. Detective Flores did the first three interrogations, two of which produced statements from the defendant. (SX. 44, 45, 66). Detective Garcia did the last interrogation which produced the third statement. The Court in *Mosley* held that the defendant's right to remain silent was honored, in part, for this very reason.

Second, there were significant gaps in time between each of the four interviews of the defendant. The Court in *Mosley* considered these gaps in time significant to the determination of whether the in-custody interrogations of

the defendant in that case operated to overcome his free choice. *Mosley*, 423 U.S. at 97. In this case, there was a four day gap in time between interrogations 1 and 2, and a one day gap in time between interviews 3 and 4. (SX. 44, 45, 66). Because these intervals are much longer than the two hour interval that produced the incriminating statements in *Mosley*, it is not likely that Gutierrez's free choice had been overcome as a result of police interrogation.

Defendant's attempts to distinguish *Mosley* from the present case because the interrogation producing the incriminating statement in that case was about an unrelated crime, and it was conducted at a different location from the previous interrogations. The Defendant highlights this distinction in his motion since all four interrogations of the Defendant happened at the same place and were based on events surrounding the same crime for which he was convicted (capital murder). However, the "fact that subsequent interrogations involve the same offense is not [itself] sufficient into find a violation of . . . Miranda rights under Mosley." *Jackson v. Wyrick*, 730 F.2d 1177, 1180 (8th Cir.1984). The Defendant's Miranda rights were "scrupulously honored," his admission to the police can be considered in determining whether identity was at issue for purposes of defendant's request for DNA testing.

4. Co-Defendant's Statements to Police Implicating Gutierrez in the Murder were Admissible.

The Defendant asserts that certain statements made to police by Defendant's Co-defendants were "testimonial" in nature and therefore violated "the Confrontation

Clause. *Crawford v. Washington*, 541 U.S. 36 (2004). Although Crawford was decided after Defendant's trial and direct appeal, the Defendant argues it should be applied to preclude consideration of Co-defendant's statements implicating him in the murder for purposes of determining whether identity was at issue in his Article 64 proceeding.

First, the Courts have already held that the right to cross-examine witnesses is not implicated in an art. 64.03 proceeding. *Cravin*, 95 S.W.3d at 509; *Thompson*, 123 S.W.3d at 785. Therefore, a *Crawford* claim cannot be raised to attempt to "hand-cuff" the trial court in a DNA proceeding from reviewing the entire record in making its determination under art. 64.03. The Court can review and consider the statements of the co-defendants in this matter to determine whether identity is an issue and if the Defendant has proven by the preponderance of the evidence whether he would have been convicted even if exculpatory DNA results ate returned.

Further, in *Crawford v. Washington*, the Supreme Court held that the Confrontation Clause prohibits "testimonial" statements of a witness who is not testifying at trial unless the witness is unavailable and the defendant had a prior opportunity to cross examine the unavailable witness. *Id.* at 53. The court did not elaborate on what it meant by "testimonial" but indicated that the term may include prior statements of a non-testifying witness made during police interrogations. *Id.* Even assuming, without agreeing, that the statements made by Gutierrez's co-defendants were "testimonial," these statements

can be considered by the court in denying/granting the Defendant's motion because *Crawford* is non-retroactive in Texas post-conviction proceedings.

The Supreme Court held that, although *Crawford* sets out a "new rule," it cannot be applied retroactively in federal habeas proceedings. *Whorton v Bockting*, 549 US 406 (2007) (holding that the principle enunciated in Crawford was not a watershed rule that implicated the fundamental fairness and accuracy of criminal proceedings). In *Danforth v. Minnesota*, the Supreme Court held that the federal rule of non-retroactivity had no bearing on whether the state could provide broader relief in state post-conviction proceedings. *Danforth*, 552 U.S. 264 (2008). In other words, the Court left up to the states the decision of whether the new-rule set out in *Crawford* had retroactive application in its own state post-conviction proceedings. The rule in Texas is that *Crawford* does not apply retroactively to cases on review in Texas state courts. *Ex Parte Lave*, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) (Texas mimics the federal standard for retroactive application of *Crawford*). Because *Crawford* was decided after the Defendant's trial and direct appeal, it cannot be applied retroactively to preclude consideration of the allegedly "testimonial" statements by co-defendants. Further, a trial court can consider evidence *Thompson v. State*, 123 S.W.3d 781, 785 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (holding that appellant had no right to be present at the post-conviction hearing, no right to confront or cross-examine witnesses, and no right to have hearsay excluded). Therefore, Co-defendant's statements to police implicating the Defendant

in the murder are admissible for purposes of considering whether identity was or is at issue in this case.

5. The Eye-witness Identification of Gutierrez at The Scene of Ms. Harrison's Murder is Admissible on the Issue of Whether Identity Was At Issue in This Case.

Witness Julio Lopez testified at trial that the Defendant was outside of the victim's home on the evening of the murder. RR Vol. 18, 73-83. He was able to pick the Defendant out of a lineup and positively identified the Defendant. RR Vol. 18, pp. 76, 78, 79, SX-35. The witness saw the Defendant run around to the back of the victim's home while another individual when to the front door of the home. RR Vol. 18, pp. 73-75. This statement corresponds with co-defendant

The Defendant argues that Lopez's identification of him at the scene of the murder is an unreliable and improper basis upon which to find that identity is not an issue in the case. He primarily relies on *Blacklock v. State*, 235 S.W.3d 231 (Tex. Crim. App. 2007). In that case, the appellant was convicted of sexual assault based in large part on the *victim*'s identification of appellant as the assailant. The court held that *victim*'s identification of appellant was "irrelevant to whether appellant's motion for DNA testing makes his identity at issue." *Id.* at 233; *Esparza v. State*, 282 S.W.3d 913, 922 (Tex. Grim. App. 2009)(suggesting that victim identifications of the accused are particularly irrelevant in Article 64 proceedings involving sexual assault crimes.).

The Defendant's reliance on *Blacklock* is misplaced, *Blacklock* stands for the following proposition: a convicting court is prohibited from finding that identity was not an issue solely on the basis of a **victim's** identification of the defendant in a **sexual assault** case. Because appellant's motion in Blacklock properly alleged that the victim's lone attacker had to be the donor of the semen for which he sought testing, the court granted his motion for DNA testing. The Defendant's case is distinguishable in that it is not a sexual assault case. It is also different because evidence connecting the Defendant to the murder-scene is established with independent evidence (i.e., his co-defendant's statements as well as his own admission) whereas the victim's identification in *Blacklock* was the primary source of inculpatory evidence. Furthermore, *Blacklock* is distinguishable by noting that the contested witness identification was not the victim of Gutierrez's crime; the witness in this case (Lopez) was actually a disinterested individual taking a walk in the neighborhood when he saw the Defendant in the back area of victim's house. (Vol. 18, p. 69-71). The fact that Lopez had no prior contact with the Defendant tends to remove the danger of false accusation (i.e., motive to lie). And, it is this danger that Article 64 primarily tries to protect against with its DNA-testing safety valve.

6. Gutierrez's Admission, Identification by Co-defendants and Identification by Witness are Relevant and Admissible to Whether the Identity was or is an Issue for Purposes of DNA Testing.

Under article 64.03(b), a convicting court is prohibited from finding that identity was not an issue in the case

solely on the basis of the applicant's admission or confession. Gutierrez argues that this section prohibits the court from considering: (1) Co-defendant's identification of Gutierrez at the scene of the murder; and (2) Gutierrez's admissions to police. Gutierrez misreads article 64.03(b) for two reasons.

The first reason is that section 64.03(b) does not bar consideration of the Co-defendant's implication and identification of the Defendant in the murder of the Mrs. Harrison. Section 64.03(b) explicitly prohibits a court from finding identity was not at issue on the basis of an "applicant's" admission or confession. Because Gutierrez's Co-defendants are not applicants for purposes of this motion, the reviewing court can consider Co-defendant's identification of Gutierrez at the crime-scene to determine whether identity was an issue in the case.

Second, although 64.03(b) applies to the Defendant's admission/confession, the section only prohibits a court from finding identity was not at issue based "solely" on an applicant's admission or confession. Here, an eye-witness and Gutierrez's Co-defendants place Gutierrez at the scene of the murder. The combination of these two sources of evidence provides independent evidence of the Defendant's involvement in the murder. *See Lacy v. State*, No. 2-08-318-CR; 2009 Tex. App. LEXIS 2197 (Tex. App.-Fort Worth April 2, 2009) (not designated for publication) (holding that although the court considered defendant's admissions, this did not violate article 64.03(b) because the statute only prohibits the court from finding that identity was not an issue in the case "solely on the basis

of" admissions). Because the Court would not be relying "solely" on the Defendant's admission in finding identity was not an issue, the court can consider the Defendant's admission for purposes of his Article 64 motion.

C. Gutierrez Would Still Have Been Found Death-eligible and Convicted of Capital Murder Even If Exculpatory Results Had Been Obtained Through Dna Testing.

In addition to the first statutory hurdle (i.e., showing that identity was an issue), the Defendant must also show that DNA testing would prove by a preponderance of the evidence that he would not have been convicted of capital murder if exculpatory results would have been obtained through DNA testing. Tex. Code Crim. Proc. art. 64.03(2)(a). On this point, the Defendant claims his case is a "classic 'mistaken-identity' case in which DNA testing can definitively disprove the State's theory that [he] killed Ms. Harrison." (See page 22 of Gutierrez's Motion for DNA Testing). To support his motion, the Defendant hopes DNA testing will show the following biological evidence came from a third party: (1) a shirt belonging to Cuellar (victim's nephew and housemate) containing blood stains; (2) blood samples collected from various parts of victim's residence; (3); nail-scrapings taken from the victim; and (4) a hair discovered around the third finger on the victim's left hand. Defendant has improper expectations for the use of exculpatory results of DNA analysis. The basis of this position is that exculpatory in this context means the DNA doesn't come back belonging to the Defendant, not that it automatically proves his innocence, i.e. sexual

assault case with one perpetrator. Even favorable DNA results for Defendant does little to prove that he would not have been convicted during the punishment phase of his capital murder trial.

Defendant's motion primarily relies on the following assumption: the absence of a DNA match concerning the four categories of biological material listed above proves that he was not present at the scene of the murder. From this assumption, the Defendant draws the conclusion that he could not have been the principal in the crime. Therefore, he could not have been death-eligible, much less convicted of capital-murder. This argument is flawed for two reasons: (1) it relies on an unsupported assumption; and (2) its conclusion is legally incorrect.

1. Unsupported Assumption

The biological material which the Defendant requests testing for can only lead to one of two conclusions: either the Defendant's DNA is found on the biological material, or his DNA is not found on the material. Based on the facts of this case, neither of the these two outcomes sufficiently preponderate against the totality of the evidence placing the Defendant at the scene of the murder. For example, if the blood on Cuellar's shirt and around the house does not belong to Gutierrez, evidence of this fact will merely confirm the following facts already established at trial: Cuellar was at a bar with a friend at the time his aunt was murdered. (Vol. 17, pp. 113-117). When Cuellar returned home with a hamburger and soft drink for his aunt (as was customary), he discovered her body on the floor in a pool

of blood. Id. In his distraught and emotional state, Cuellar attempted to pick up his aunt. Id. He got blood all over himself in the process. Id. Unsure what to do next, Cuellar left his aunts bedroom and called a family member who told him to wait outside, Id. at 118-121. Therefore, even the most favorable DNA result (i.e., a result showing that the blood on Cuellar's shirt and the blood around victim's house belongs to a third person) would do very little to exculpate the Defendant. The most logical deduction is that the blood belongs to the victim.

Furthermore, even if it is assumed that the nail-scrapings on Ms. Harrison's finger do not belong to the Defendant, evidence of this fact would be similarly non-exculpatory. It is very possible that the Defendant committed the murder without leaving any discernible DNA, or that he had help from another individual, or that another individual was present at the scene of the murder. The evidence adduced at trial showed there were two assailants in the victim's home and one was the defendant. It is also very possible that Ms. Harrison came into contact with another individual whose DNA matches the loose hair later found on her finger. The Defendant's reliance on this assumption (i.e., that the absence of a DNA match implies he was not present at the scene of Harrison's murder) is similar to the reliance of other defendants whose motions for post-conviction DNA testing have been summarily denied.

For example, in *Chambers v. State*, the defendant sought DNA-testing of a pistol and some ammunition recovered from the murder arguing that DNA testing

will reveal his co-defendant's fingerprints on the evidence. *Chambers*, No. 14-04-00177-CR, 2005 Tex. App. LEXIS 514 (Tex. App.—Houston [14th Dist.] Jan. 20, 2005)(not designated for publication). Defendant further argued favorable DNA results would prove that his co-defendant was the trigger-man in the murder. The appellate court held that even if his co-defendant's fingerprints were on the pistol and ammunition, it would not conclusively prove appellant did not participate in the murder.

In another case, *Walker v. State*, the defendant was convicted of murder based, in part, on the testimony of a witness who said he saw appellant beating the victim and then heard a gunshot. *Walker*, No. 05-06-01124-CR, 2007 Tex. App. LEXIS 5462 (Tex. App. Dallas July 12, 2007)(not designated for publication). The appellant asserted that if he had beaten the victim (as the witness claimed), then he would have left behind DNA evidence. The evidence identified at the crime scene included a blood sample and nail scrapings from the victim's fingernails. The Court held that appellant failed to carry his burden of showing entitlement to DNA testing because, even if appellant's DNA were not found on the evidence, it would not have prevented his conviction by a preponderance of the evidence. Instead, it would only indicate that the victim was successful at drawing appellant's skin or blood during her defensive struggle. *Id.*

Similar to the defendants in *Walker* and *Chambers*, the Defendant has failed to carry his burden of showing entitlement to DNA testing. Defendant was convicted in part on the strength of Lopez's identification, the

admissible statements of his Co-defendants implicating the Defendant in the murder, and his own admission that he was present at the scene of the crime. The evidence also showed that their were multiple assailants, Defendant and another individual, involved in the robbery and murder of the victim. *See Harrison v. State*, No. 14-07-00287-CR, 2008 Tex. App. LEXIS 592, *8-9 (Tex. App. Houston 14th Dist. Jan. 29, 2008)(not designated for publication). As the court reasoned in *Walker* and *Chambers*, even if the Defendant's DNA is not found on the nail scrapings from Ms. Harrison, it would only show that Ms. Harrison was unable to draw the Defendant's skin or hair in her struggle to fight him away. By itself, favorable DNA results would not be been able to place the Defendant away from the murder scene.

Granting the Defendant's Motion for DNA testing would "merely muddy the waters" by demonstrating that a third party, at some point in time (but not necessarily at the time of the crime), came into contact with the victim or Cuellar. In other words, a third-party match to the requested biological evidence does not overcome the overwhelming evidence of the Defendant's direct involvement in the murder. Therefore, even favorable DNA results for Gutierrez would be insufficient to support a finding by a preponderance of the evidence that he would not have been convicted of capital murder.

2. Legally Incorrect Conclusion

The second reason DNA testing would not help the Defendant is that he is incorrect regarding the law on death-eligibility. The Defendant argues that if he is not the donor of the biological evidence, then he was not present at the scene of the offense. From this unsupported assumption (discussed supra), the Defendant concludes that he could not be the principal in Harrison's murder. Therefore, favorable DNA results would have put him outside the class of the death-eligible. However, the Supreme Court in *Tison v. Arizona* did not restrict the State's use of the death-penalty solely to principal-murderers. Applying its proportionality review under the 8th Amendment, the Supreme Court held that the death penalty is a proportionate punishment for the crime of felony-murder when the defendant played a major role in the underlying crime and the defendant's acts showed a reckless indifference for human life. *Tison v. Arizona*, 481 U.S. 137 (1987); see also *Edmund v. Florida*, 458 U.S. 782 (1982) (the precursor to *Tison* which held that a death sentence may be imposed upon a felony-murder accomplice who killed, intended to kill, attempted to kill, or intended that deadly force be used).

Even assuming that favorable DNA results tend to show Gutierrez was not the principal in the murder, he would still have been death-eligible if the record indicates he played a major role in the underlying robbery, his acts showed a reckless indifference to human life, he intended to kill, attempted to kill, or intended that deadly force be

taken. *Tison*, 481 U.S. 137 (1987); *Edmund*, 458 U.S. 782 (1982). Gutierrez confessed that he planned the robbery, an eyewitness identified him at the scene of the murder, and his co-defendants implicated him in the murder. The totality of this evidence provides a sufficient basis to conclude he would have been death-eligible and convicted of capital murder even with favorable DNA results tending to indicate he was not the principal.

Furthermore, because the jury charge (Special Issue #2) instructed the jury on alternative theories for committing capital-murder, even the most exculpatory of DNA results would have had little bearing on the extent of his mental culpability as a felony murder accomplice. *See Luna v. State*, 268 S.W.3d 594, 600 (Tex. Crim. App. 2008) (holding that DNA testing of . . . evidence must exculpate [defendant] of all of the statutory aggravating factors that were alleged in the indictment to elevate murder to capital murder); *Martinez v. State*, 129 S.W.3d 101, 103 (Tex. Crim. App. 2004) (holding that if an indictment alleges different manner or means of committing capital murder in the conjunctive, the jury may properly be charged in the disjunctive, and the unanimity requirement is not violated by instructing the jury on alternative theories of committing the same offense). Therefore, a DNA test would have been of little use to the jury. Defendant's Motion for DNA testing would not acquit him of his capital murder conviction, even under the amended "preponderance of the evidence" standard.

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IV.

CONCLUSION

In sum, Defendant's request for post-conviction DNA testing does not meet the statutory requirement of art. 64.01(b)(1)(B), in that Gutierrez has waited twelve (12) years to request the testing of biological evidence that was available, he was aware of before his trial, had an opportunity to inspect it and no request was made to have it independently tested. Defendant had every opportunity to test the DNA, it was his fault that such evidence was not tested before trial.

In the alternative, Defendant cannot satisfy the two major statutory requirements under article 64.03. Gutierrez has failed to get over the first statutory hurdle because identity was not an issue in the case considering the strength of admissible and independent evidence connecting him to the murder-scene, his confession, the statements of his co-defendants and the testimony of an eye-witness. Even if the reviewing court finds identity to be an issue, Gutierrez has failed to get over his second major statutory hurdle because DNA testing would not prove by a preponderance of the evidence that Gutierrez would not have been convicted because there were multiple assailants, a negative result in the post-conviction DNA test would not conclusively exonerate the Defendant. *Harrison v. State*, 2008 Tex. App. LEXIS 592, 8-9 (Tex. App. Houston 14th Dist. Jan. 29, 2008). Even if negative test results were to supply an exculpatory inference, such an inference would not conclusively outweigh the other

evidence of Appellant's guilt *See Thompson v. State*, 95 S.W.3d 469, 472 (Tex. App.—Houston[1st Dist.] 2002, pet. ref'd). Alternatively, the absence of DNA evidence could simply mean that no forensic evidence was left at the scene of the crime by the Defendant during the offense. *See Rivera v. State*, 89 S.W.3d 55, 60 n. 20 (Tex. Crim. App. 2002).

As Judge Hervey succinctly stated in her concurring opinion in *Kutzner*, "Chapter 64 was intended to exonerate the innocent, not allow the guilty to 'muddy the waters'." *Patrick v. State*, 86 S.W.3d 592, 598(Tex. Crim. App. 2002) (citing *Kutzner v. State*, 75 S.W.3d 427, 438-439 (Tex. Crim. App. 2002))(emphasis added). Therefore, the evidence that could possibly be obtained from forensic DNA testing is not sufficient to demonstrate by a preponderance of the evidence that the Defendant would not have been convicted if the DNA test results had been obtained; rather, such evidence could only "mudd[y] the waters" at best. *Rivera*, 89 S.W.3d at 59; *Kutzner v. State*, 75 S.W.3d at 438-39; Tex. Code Crim. Proc. art. 64.03(a)(2). Based upon the facts and evidence of the case and the state of the law, this Court should deny Defendant's Motion for Forensic DNA Testing.

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IV.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State respectfully requests that this Court deny Defendant's Motion for Forensic DNA Testing.

Respectfully submitted,
ARMANDO R. VILLALOBOS
Cameron County (Criminal District)
Attorney

/s/ Lawrence J. Rabb
Lawrence J. Rabb
Assistant County and District Attorney
974 East Harrison Street
Brownsville, Texas 78520
(956) 544-0849/544-0869 FAX
Texas Bar No. 24010328

Appendix G

EXHIBIT B

IN THE DISTRICT COURT
107TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

CAUSE NO. 98-CR-1391-A

STATE OF TEXAS

v.

RUBEN GUTIERREZ

ORDER ON DEFENDANT'S MOTION FOR FORENSIC DNA TESTING

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.

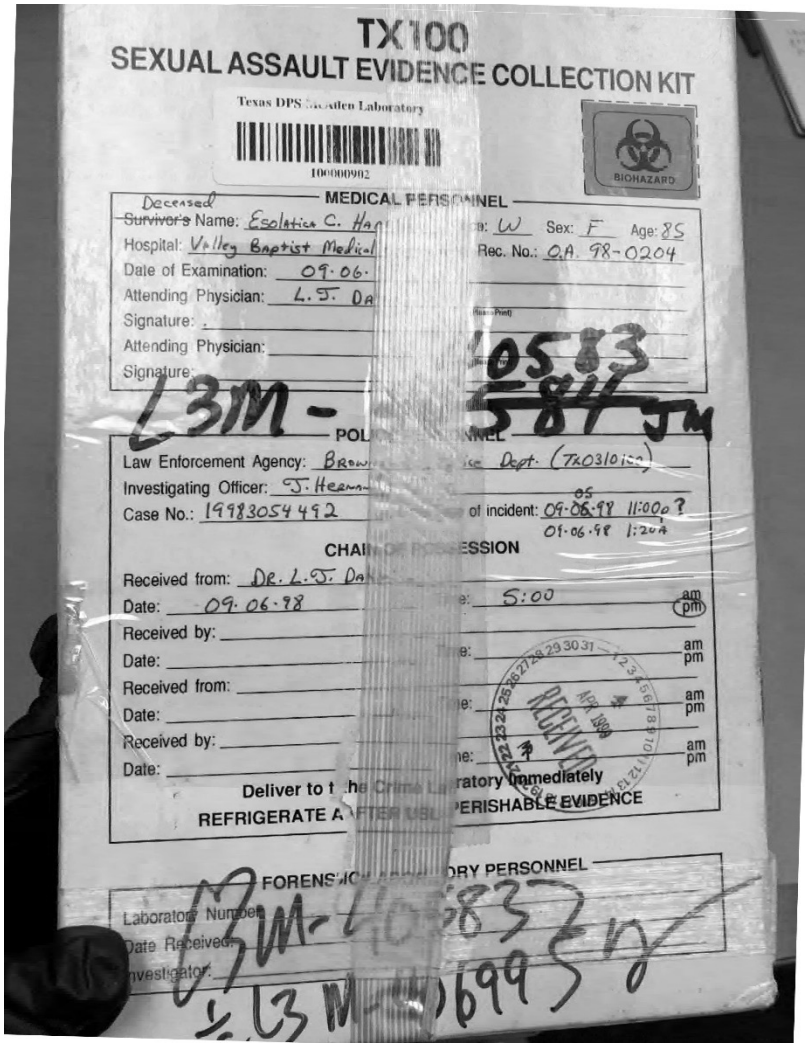
The Clerk of this Court is now directed to prepare certified copies of this Order, and transmit them to the parties, named listed herein below, as soon as possible.

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

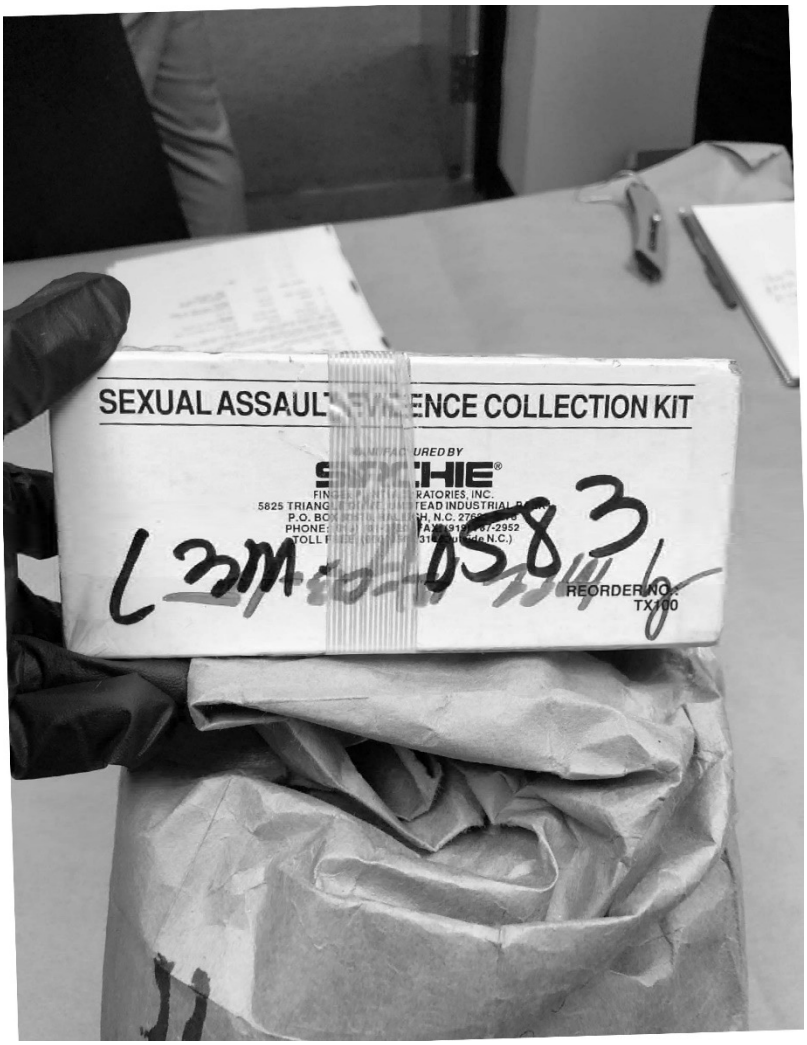
/s/
HON. BENJAMIN EURESTI, JR.,
107th Judicial District Court
Judge Presiding

Appendix G

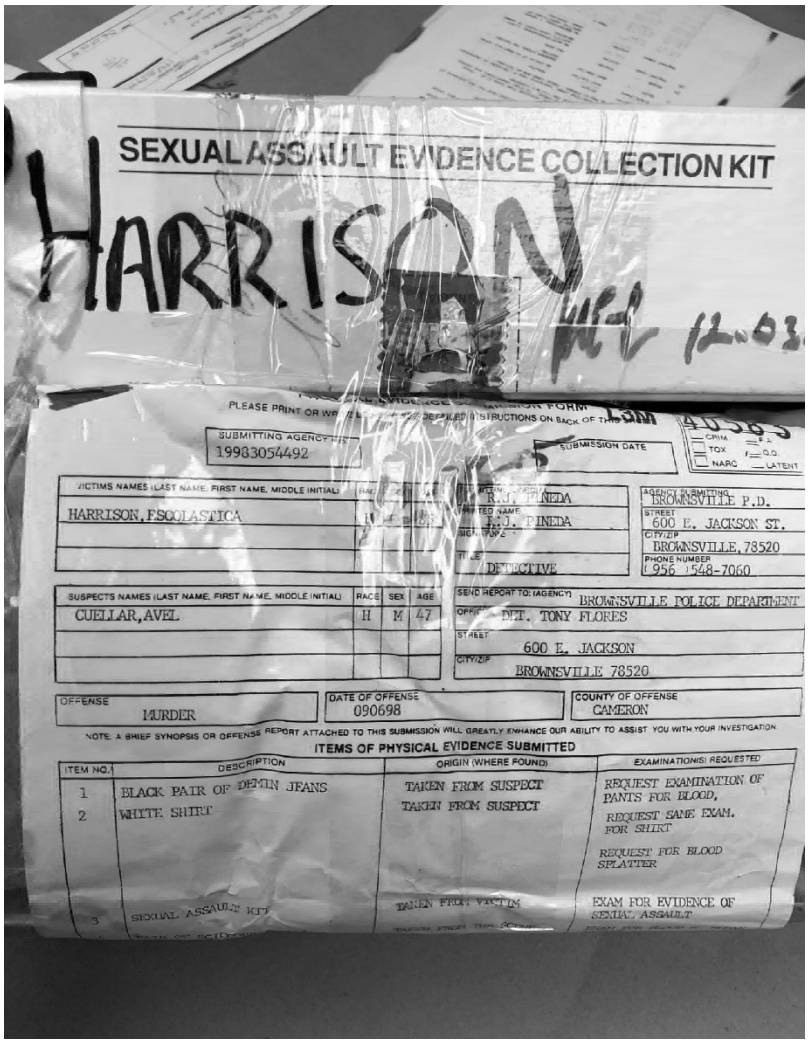
EXHIBIT C



Appendix G



Appendix G


SEXUAL ASSAULT EVIDENCE COLLECTION KIT
HARRISON
SUBMITTING AGENCY
19983054492
SUBMISSION DATE
VICTIMS NAMES (LAST NAME, FIRST NAME, MIDDLE INITIAL)
HARRISON, ESCOLASTICA
R.J. PINEDA
R.J. PINEDA
DETECTIVE
AGENCY SUBMITTING
BROWNSVILLE P.D.
STREET
600 E. JACKSON ST.
CITY/ZIP
BROWNSVILLE, 78520
PHONE NUMBER
(956) 548-7060
SUSPECTS NAMES (LAST NAME, FIRST NAME, MIDDLE INITIAL)
RACE
SEX
AGE
CUELLAR, AVEL
H
M
47
SEND REPORT TO: (AGENCY)
BROWNSVILLE POLICE DEPARTMENT
DET. TONY FLORES
600 E. JACKSON
BROWNSVILLE 78520
OFFENSE
MURDER
DATE OF OFFENSE
090698
COUNTY OF OFFENSE
CAMERON
NOTE: A BRIEF SYNOPSIS OR OFFENSE REPORT ATTACHED TO THIS SUBMISSION WILL GREATLY ENHANCE OUR ABILITY TO ASSIST YOU WITH YOUR INVESTIGATION
ITEMS OF PHYSICAL EVIDENCE SUBMITTED
ITEM NO.
DESCRIPTION
ORIGIN (WHERE FOUND)
EXAMINATION(S) REQUESTED
1
BLACK PAIR OF DEMIN JEANS
TAKEN FROM SUSPECT
REQUEST EXAMINATION OF PANTS FOR BLOOD,
2
WHITE SHIRT
TAKEN FROM SUSPECT
REQUEST SAME EXAM. FOR SHIRT
REQUEST FOR BLOOD SPLATTER
3
SEXUAL ASSAULT KIT
TAKEN FROM VICTIM
EXAM FOR EVIDENCE OF SEXUAL ASSAULT

Appendix G

EXHIBIT D

PATHOLOGY
P.O. Drawer 2588
Harlingen, Texas 78551

Lawrence J. Dahm, M.D. DeWitt S. Davenport, M.D.
Margie W. Cornwell, M.D. Wm. Eddy, HT, CT (ASCP)
CT (IAC)

October 14, 1998

OA-98-0204
HARRISON, ESCOLITICA, age 85 years
Authorized by: Justice of the Peace
Tony Torres
Date of Autopsy: 09/06/98
Time of Autopsy: 1:30 p.m.
Performed by: Dr. Dahm
Assisted by: Marvis Walton
Witnessed by: Det. Juan Hernandez
Brownsville Police Department

FINAL PRINCIPAL FINDINGS:

1. Massive blow to left eyebrow region of face, with:

    a. Fracture of underlying malar bone; abrasion of left malar skin.

    b. Lacerations (3) of left eyebrow, left forehead, and lateral left eyelid; left periorbital contusion.

c. Extensive contusions of base of cerebral hemispheres and upper-frontal brain stem including cerebral peduncles, thalamic and uncal regions, and hypothalamus; small white matter contusions of frontal lobe; internal laceration of right medial temporal lobe.

D. Penetrating laceration and contusion of left upper lip.

2. Two short, parallel linear lacerations of skin of upper right preauricular scalp, with underlying (minimal) penetrating skull puncture injury.

3. Four similar short penetrating linear lacerations of left posterolateral neck; lowest anterior-most crossing left external jugular vein; three posterior wounds penetrating fibromuscular tissue of posterior neck.

4. Shallow, penetrating short linear lacerations of right lateral neck (four) with two paired lacerations surrounded by skin abrasion.

5. Multiple curved shallow indentation (impression) marks of right posterolateral neck.

6. Three short linear penetrating scalp lacerations of left occipital scalp neck midline; two wound tracks nicking outer table of left occipital skull-bone.

7. Small contusion of soft tissues of right anterior shoulder.

8. Tiny abrasions of right wrist, right elbow, and right third digit knuckle.

OTHER FINDINGS:

1. Generalized arteriosclerosis, mild.,

2. Pulmonary anthracosis.

3. Surgical scar of midline lower abdomen; absence of uterus, fallopian tubes, and one ovary; fibrous peritoneal adhesions.

4. Small (probably surgical) linear scar of right mid-lateral abdomen.

5. Lipoma of left chest wall, below left breast.

FINAL SUMMARY:

This elderly woman died of homicidal blows to the left eyebrow area of the face, and the right side of the head. These blows were impacts with a blunt surface. The injuries severely and fatally damaged her brain. The blow to the right side of the head was inflicted with a narrow, sharp-edged instrument, such as a screwdriver, entering just in front of the top of the right ear. This injury slightly penetrated the skull. She was also struck multiple times on both sides of the neck and in the back of the head, probably

with the same or a very similar instrument. The blow or blows to the left face were inflicted with a blunt object or perhaps a shoed foot. The left facial blow(s) is (are) thought to be the lethal one(s). No alcohol was found in blood or urine. Urine drug screen was positive for amphetamines; antihistamines can turn this urine amphetamine screen test positive. Antihistamines at low level were found in subsequent blood testing; no amphetamines, or other drugs of abuse, or medications were found in her blood.

LJD/bpc/dh
10/14/98

Lawrence J. Dahm, M.D.
Pathologist

HISTORICAL INFORMATION:

This woman's body was found in the bedroom of her trailer park home, where she was the operator of the trailer park. Circumstances were suspicious according to the police; her nephew called the police at about 1 a.m. saying that she had collapsed and died. A large amount of blood was found at the scene on her face, and on the floor, and on other objects in the room. The nephew was said to have been intoxicated. Foul play was suspected by the police at the time.

GROSS DESCRIPTION:

EXTERNAL EXAMINATION:

Received is the body of a short, slightly built elderly woman whose height is 5 feet 4 inches, and weight 105 pounds. She has gray, wavy hair which has been dyed reddish-orange. Her eyes are medium brown.

Livor mortis is slight, but posterior. Rigor mortis is full.

The body is clad in a white background, multicolor pastel red, green, and blue print front-buttoning nightgown which drops to about the knees in length. Beneath this is a cream white-colored synthetic nylon slip. Some slightly torn, white cotton socks are found on the feet. The clothing is removed and submitted to Det. Hernandez.

Distinguishing marks include a midline lower abdominal scar from the umbilicus down to the symphysis pubis. There is also a short, faint linear scar of the right lower lateral abdomen, about 5 cm long and horizontally oriented. There is also a soft bulge of the lower left lateral chest just below the left breast. The breasts are small. There is a plain gold metallic band around the left fourth digit. Below the level of the neck there is no external evidence of traumatic injury. The fingernails are intact, short, and slightly blood-stained. A single loose hair is found around the third digit of the left hand. Nail scrapings are taken and submitted to Det. Hernandez as part of the rape examination. The back surfaces of the body are free of traumatic injury. There is a tiny punctate abrasion of the middle knuckle of the right third digit on the wrist side and another of the midline proximal wrist of the right hand. The back side of the right elbow also has a 2 mm abrasion. No additional lacerations or abrasions are found of the skin of either hand or of the forearms.

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INTERNAL EXAMINATION:

The trunk is open in the usual fashion. None of the ribs are fractured, but most of them are at least partially calcified. No body wall trauma is found except a minimal soft tissue contusion of the anterior right shoulder above the distal clavicle and insertion onto the humeral acromion joint. All serous membranes are smooth and glistening. No effusions are found in any body cavity. There is no evidence of internal visceral organ trauma. The uterus, fallopian tubes, and at least one ovary are missing. There are some fibrous adhesions of the lower abdomen. The vermiform appendix is still present, as is the gallbladder.

RESPIRATORY TRACT:

The larynx, trachea and mainstem bronchi are normal and free of traumatic injury. The right lung weighs 340 gm and the left lung 305 gm. Slight anthracotic streaking is present and there are no focal lesions in the lungs. The pulmonary vessels are normal.

CARDIOVASCULAR SYSTEM:

The heart weighs 255 gm. The coronary arteries are all widely patent and almost entirely free of arteriosclerosis, without any narrowing. The myocardium is a uniform, dark, slightly red-pink and is without focal lesions. The cardiac valves are normal and the great vessels enter and leave the appropriate chambers. There are no abnormal communications between chambers. The myocardium has no focal lesions.

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GASTROINTESTINAL TRACT:

The esophagus is normal, with minimal blood-staining of its mucosa. The stomach contains about 50 cc of thin, bloody fluid which is a red-purple and consistent with the color of slightly altered, recently swallowed blood. No food, pills, or foreign particle are found. The gastric mucosa is dark red-pink and diffusely slightly blood-stained and without focal lesions. It has a normal rugal pattern. No blood-stained material is found in the duodenum or the small bowel. The small and large bowels are unremarkable grossly.

The liver weighs 890 gm and is uniform medium brown-tan and without focal lesions. The gallbladder and extrahepatic biliary ducts and pancreas are normal.

The spleen and both kidneys have normal size and shape and normal architecture on their cut surfaces and are without focal lesions. Likewise, the adrenal and thyroid glands are normal and free of trauma. The small amount of remaining ovarian tissue is bound down to the top of the urinary bladder and it is not certain as to whether it is right or left.

GENITALIA EXAM:

The pubic region is free of traumatic injury. There are no identifiable abrasions or lacerations at the vaginal introitus. The introitus is somewhat patulous and the vagina has a moderate amount of cloudy, gray-white mucoid material. Pubic hair combings are taken and a

sample of pubic hair is plucked. Vaginal smears and swabs, rectal smears and swabs, and oral smears and swabs are made for spermatozoa and semen examination. A blood sample is also submitted to the police as a part of the rape kit examination.

No evidence of vaginal trauma is found.

MUSCULOSKELETAL SYSTEM AND SKIN:

See Head and Neck, and External and Truncal Examinations. No evidence of spinal vertebral trauma is found and no evidence of internal bony fracture can be seen.

HEAD AND NECK:

There is extensive traumatic injury to the face, head, and neck. First, there are three lacerations of the left eyebrow region of the face. The largest is a ragged, essentially V-shaped laceration about 2.5 to 3 cm long and gaping to about 1 cm wide, exposing underlying contused soft tissue and bone. It crosses the medial end of the left eyebrow. There is considerable periorbital purplish contusive discoloration around the left eye. There is another ragged complex laceration of the soft tissues between the eyelid and the eyebrow on the left on their lateral end, just above the lateral canthus of the eye. The smallest lesion is a slightly curving laceration about 1.5 cm above the mid left eyebrow, on the left forehead. It is about 1 cm long. There is underlying malar ridge fracturing at the lateral end of the left eyebrow. The more medial

orbital ridge has a slight nick in it underlying the largest V-shaped laceration. There is also a through-and-through skin laceration penetrating to buccal mucosa, and nearly vertically oriented, just above the left lateral end of the upper lip. The left upper lip is swollen and contusively discolored. The teeth, tongue and underlying gingival membranes are intact. The surface laceration on the skin is about 6 mm across with a somewhat ragged, but straight edges.

On the back of the head, just to the left of the midline in the upper occipital region of the scalp is a grouping of three short, straight lacerations with slightly ragged edges. The uppermost is about 3.5 mm long and the lower most is 3.5 mm long and they are separated by about 8 mm of vertical distance. Slightly to the lateral of these is a shorter straight laceration about 1.5 to 2 mm long. After the scalp is reflected, it is found that there are three corresponding shallow 1-2 mm straight edged, narrow nicks in the outer table of the bone. Multiple photographs are made of this skull injury.

The face and neck are covered with extensive dried blood which is scrubbed off. After scrubbing off the blood from the face and the neck, there is found to be a large number of injuries to both sides of the neck. First is a pair of straight, but ragged-edged lacerations about 5 mm long, located just in front off and slightly above the anterior insertion of the right auricle. They are thus in the uppermost right preauricular region, or lower lateralmost right temporal region. These lacerations penetrate to a small penetrating injury of the inner table

of the right posterior lower lateral temporal bone. There is minimal epidural ecchymosis associated with this small penetrating injury. No underlying injury to the brain or arachnoid matter is seen.

Also on the right, below and slightly behind the insertion of the right auricle in the upper posterolateral right neck, is a shallow laceration extending about 1 cm deep into the skin. It is also about 5 mm long. More anteriorly and below this is a very shallow laceration about 4 mm long of the skin and just below this is a pair of small oval lacerations about 1 cm apart, surrounded by an ill-defined zone of abrasion 4 to 5 mm wide. This is in the mid lateral right neck. Behind this posteriorly on the right neck is a system of three, somewhat curving, orangish-brown skin-surface impression marks. The uppermost is roughly horizontal with downwardly curving ends, and is about 2 cm long. The middle one is roughly vertically oriented and about 1 cm long. Both of these are about 4 to 5 mm wide. There is a long, shallow, curving roughly horizontal one inferiormost, about 2 mm wide and about 4 cm long. Multiple photographs are made of this accumulation of injuries.

Switching around to the left side of the neck, there is found to be a system of three 5 mm long straight edged, but somewhat ragged edged, lacerations of the left upper posterolateral neck, below and slightly behind the insertion of the left auricle. The uppermost is nearly vertically oriented with the lowermost almost horizontal and the middle one being at a 45 degree angle off of vertical. These penetrate the fibromuscular tissues of the

back of the left neck. More inferiorly and anterolaterally is a vertically oriented 5 mm similar laceration with ragged, but straight, edges surrounded by a considerable zone of contusive distension of the underlying skin. Exploration of this wound reveals it to penetrate the external jugular vein on the left. It is located posterolateral to the level of the thyroid cartilage.

The scalp is reflected in the usual fashion. No additional skull injuries are found. The brain is found to have patchy subarachnoid ecchymosis, especially over the left temporal and parietal regions. Blood is found in both lateral ventricles. Further description of the brain will be made after fixation and brain-cutting. The brain in the fresh state weighs 1195 gm.

After fixation, the external surfaces of the brain show widespread, but generally slight, subarachnoid ecchymosis. There are small zones of ecchymotic subarachnoid discoloration of the lateral parts of both cerebellar hemispheres. There is also a thin zone of right lateral parietal subarachnoid ecchymosis, and more extensive left cerebral subarachnoid ecchymosis spread over the lateral portions of the frontal, parietal, and lateral temporal lobes. The tips of both frontal cerebral lobes have slight subarachnoid ecchymosis as well. The inferior surfaces of the cerebral hemispheres, cerebellum and brain stem are free of identifiable abnormalities except slight arteriosclerosis. No blood or external disruption is seen.

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The cut surfaces of the cerebral hemispheres show blood in the right lateral ventricle. There are small areas of white matter contusions in the deep white matter of the mid to posterior parts of both frontal lobes, the left slightly greater than the right. In addition, there is extensive punctate contusion and disruption of the medial portions of both the right and left hypothalamic regions, as well as the medial thalamic gray matter. There is internal laceration and disruption below the medial portions of the right basal gangliar complex and above the right hippocampus and uncal gyral cortex. There is extensive contusion and punctate hemorrhage of the anterior and upper portions of mid brain, especially around and just above the red nuclei. No appreciable cerebral cortical striate or cerebellar cortical contusions are found. The cut surfaces of the posterior mid brain, pons and cerebellum are normal.

There is no evidence of brain swelling and no antecedent lesions are identified.

There is widespread moderate degree of arteriosclerosis of the vessels around the base of the brain. The cerebrospinal fluid is blood stained around the spinal cord, but no blood clots are found around the proximal spinal cord.

The dura is stripped and no additional fractures are found in the floor of the skull or the interior of the skull, other than what is described above. The occipital skull nicks do not penetrate the inner table and do not penetrate the full thickness of the outer table.

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The organs of the neck are carefully dissected. There is a large zone of hematoma about 4 x 5 cm around the left lateral neck, lateral to and behind the thyroid cartilage. This overlies the lacerated left external jugular vein. The carotid arteries are not damaged. The hypopharynx, larynx, and trachea are free of traumatic injury, as are the epiglottis and hypopharynx. The other penetrating lacerations of the right and left neck only enter the fibromuscular soft tissues. They do not pass between the bones of the spinal column.

No blood is found in the mouth or the hypopharynx, or the larynx.

No identifiable ligature marking of the neck is found. The hyoid bone, thyroid cartilages, and laryngeal cartilages are intact and free of other traumatic injuries.

MICROSCOPIC:

Sections from mid brain (MB), right and left thalamic regions (RT and LT), right and left frontal lobes (RF and LF), and left and right uncal/hippocampal regions (LH and RH), left jugular veins and surrounding soft tissues (JV) are examined. Also, sections of heart, lungs, spleen, liver, and kidney are examined.

Sections from the uncal regions, thalamic regions, and anterior mid brain from the cerebral peduncle regions and thalamic regions show extensive small interstitial hemorrhages in zones of disruption of mainly the white matter. A small white matter contusion with extravasation

of red cells is also found in the right frontal lobe section. A small amount of blood is found in the subarachnoid spaces overlying the frontal lobes. The more distal mid brain in the frontal areas also has extensive interstitial hemorrhage and contusion. The soft tissues around the left jugular vein have extensive extravasation of red cells with interstitial hemorrhage and hematoma formation. The vein wall is focally disrupted corresponding with the stab wound track seen grossly.

The other organs show no remarkable abnormalities; some blood is found in the larger bronchi, and there is minimal interstitial fibrosis in the myocardial papillary muscles of the left ventricle.

LJD/dh

Appendix H – Defendant's Opposed Motion to Reconsider Order Denying Motion to Dismiss and Order Granting a Declaratory Judgment, United States District Court for the Southern District of Texas (July 7, 2021)

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

Civil Action No. 1:19-CV-185
DEATH PENALTY CASE

RUBEN GUTIERREZ,

Plaintiff,

v.

LUIS V. SAENZ, *et al.*,

Defendants.

Filed July 7, 2021

DEFENDANTS' OPPOSED MOTION TO RECONSIDER ORDER DENYING MOTION TO DISMISS AND ORDER GRANTING A DECLARATORY JUDGMENT

[TABLES OMITTED INTENTIONALLY]

Appendix H

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant
Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal
Appeals Division

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City Attorney,
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EDWARD SANDOVAL
First Assistant
District Attorney,
Cameron County, Texas

I. Short Statement of the Nature and Stage of the Proceeding

Plaintiff Ruben Gutierrez was convicted and sentenced to death for the murder of eighty-five-year-old Escolastica Harrison. Gutierrez filed in this Court an amended civil-rights complaint raising two categories of claims: (1) claims challenging the constitutionality of Texas's postconviction DNA testing procedures[1] (DNA claims); and (2) claims challenging the Texas

1. Chapter 64 of the Texas Code of Criminal Procedure.

Appendix H

Department of Criminal Justice's (TDCJ) former execution protocol disallowing the presence of a prison-employed chaplain or outside spiritual advisor inside the execution room during an execution (spiritual-advisor claims). Pl.'s Am. Compl. 19-36, ECF No. 45.

Defendants filed a motion to dismiss Gutierrez's amended complaint. *See generally* Defs.' Mot. Dismiss, ECF No. 46. This Court entered an order granting in part and denying in part Defendants' motion to dismiss. Mem. & Order 30-31, ECF No. 48. Specifically, this Court dismissed Gutierrez's DNA claims that sought relitigation of the state court's denial of DNA testing, his Eighth Amendment claims, and his access-to-courts claim; but this Court declined to dismiss Gutierrez's DNA claims to the extent they challenged the constitutionality of Chapter 64 facially and as authoritatively construed by the state court. *Id.* at 12-15.

Following the stay of Gutierrez's previously scheduled execution, the parties provided additional briefing regarding Gutierrez's challenge to Chapter 64. ECF Nos. 70, 118, 119, 122, 123, 139, 140. Specifically, Defendants moved for reconsideration of this Court's order denying, in part, Defendants' motion to dismiss Gutierrez's DNA claims. Mot. to Reconsider, ECF No. 119. This Court then entered an order denying Defendants' motion for reconsideration and granting Gutierrez a declaratory judgment. Mem. & Order 18, 26, ECF No. 141. This Court also found Gutierrez's claim challenging Chapter 64's materiality standard failed. *Id.* at 21-22. Defendants

Saenz and Sauceda then sought entry of a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) as to the DNA claims, but this Court did not rule on the motion prior to the expiration of thirty days following entry of this Court's order. *See generally* Defs.' Mot. for Entry of Partial Final J., ECF. No. 144. Defendants Saenz and Sauceda filed a notice of appeal of this Court's orders denying, in part, Defendants' motion to dismiss and granting a declaratory judgment. ECF No. 14 7. While the appeal was pending, Defendants filed a motion in this Court requesting a stay of the declaratory judgment. *See generally* Defs.' Mot. for Stay of J. Pending Appeal, ECF No. 150. On the same day, Gutierrez filed a motion to dismiss Defendants' appeal. Mot. to Dismiss for Lack of Jurisdiction, *Gutierrez v. Saenz, et al.,* No. 21-70002 (5th Cir. May 6, 2021). This Court did not rule on Defendants' motion for a stay. On June 24, 2021, the Fifth Circuit entered an order granting Gutierrez's motion to dismiss Defendants' appeal. Order, *Gutierrez v. Saenz, et al.,* No. 21-70002 (5th Cir. June 24, 2021). On July 7, 2021, Gutierrez filed a third motion in state court seeking postconviction DNA testing. Mot. for Post-Conviction DNA Testing Pursuant to Chapter 64, *Ex parte Gutierrez,* No. 98-CR-1391-A (107th Dist. Ct. Cameron Cty., Tex.).

II. Statement of the Issues to Be Ruled Upon by the Court

This Court granted Gutierrez a declaratory judgment as to the constitutionality of Chapter 64 and appears to have dismissed or otherwise denied Gutierrez's other DNA claims. Mem. &

Order 7-8, 21-22, 26, ECF No. 141. Defendants Saenz and Sauceda seek reconsideration under Federal Rule of Civil Procedure 54(b) of this Court's order denying, in part, Defendants' motion to dismiss Gutierrez's amended complaint, ECF No. 48, and this Court's order granting a declaratory judgment, ECF No. 141.

III. Summary of the Argument

Reconsideration of this Court's prior orders, ECF Nos. 48 and 141, is appropriate because Gutierrez's DNA claims are plainly time-barred as made clear by the Fifth Circuit's holding in *Reed v. Goertz,* 995 F.3d 425, 430-31 (5th Cir. 2021). Moreover, this Court abused its discretion by granting a declaratory judgment as to a claim Gutierrez did not raise. Finally, this Court's conclusion that Chapter 64 violates procedural due process is erroneous.

ARGUMENT

I. Reconsideration of this Court's Prior Orders Is Appropriate.

This Court has the authority to reconsider its denial of Defendants' motion to dismiss and its order granting a declaratory judgment. Fed. R. Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims

and all the parties' rights and liabilities."); *see* ECF No. 141 at 12-13; *see also Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 171 (5th Cir. 2010) ("An order denying summary judgment is interlocutory, and leaves the trial court free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.") (citation omitted). Defendants sought entry of a partial final judgment to facilitate an appeal of this Court's orders, but this Court has not ruled on the motion.

Following Defendants' appeal of this Court's orders, the Fifth Circuit dismissed the appeal for lack of jurisdiction. Order, *Gutierrez v. Saenz, et al.*, No. 21-70002 (5th Cir. June 24, 2021). Consequently, no final, appealable judgment has been entered in this case and reconsideration of this Court's orders is permissible. *See Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336-37 (5th Cir. 2017) (holding the district court abused its discretion by applying Federal Rule of Civil Procedure 59(e) to a motion to reconsider a pre-judgment order); *Hardy v. Oprex Surgery (Baytown) L.P.*, No. H-18-3869, 2021 WL 76171, at *2 (S.D. Tex. Jan. 8, 2021) ("Here, the court considers Hardy's motion under Rule 54(b), not Rule 54(e), because the court's summary judgment order preserves one of her claims."); *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.*, 259 F. Supp. 2d 471, 475 (M.D. La. 2002) ("The only limitation on [reconsideration under Rule 54(b)] is

that if the court issues an order which expressly states that there is no just reason for delay, the order becomes a judgment that is final and appealable. . . . Rule 59(e) does not apply until such a final judgment has been entered."). As discussed below, the Fifth Circuit's holding in *Reed* and the erroneous bases of the declaratory judgment are sufficient reasons for this Court to reconsider its prior orders. *See Austin,* 864 F.3d at 336-37 (discussing the relative flexibility of Rule 54(b) allowing for reconsideration prior to entry of judgment and stating that the district court is free to reconsider a decision even in the absence of new evidence or an intervening change in law); *Jackson v. Standard Mortgage Corp.,* No. 6:18-CV-927, 2020 WL 133550, at *2 (W.D. La. Jan. 10, 2020) (noting that, *inter alia,* manifest errors of law or fact and intervening changes in the law are bases for reconsideration).

II. Gutierrez's DNA Claims Are Time-Barred.

In their motion to dismiss Gutierrez's amended complaint, Defendants argued that Gutierrez's DNA claims were time-barred because they were raised well over two years after he first unsuccessfully sought DNA testing in state court. Defs.' Mot. to Dismiss 33-36, ECF No. 46. This Court found Gutierrez's DNA claims timely because they were brought within two years of the Texas Court of Criminal Appeals's (CCA) affirmance of the denial of Gutierrez's *second* Chapter 64 motion.

Mem. & Order 14, ECF 48. Additionally, this Court found the claims timely because Gutierrez's second Chapter 64 motion for DNA testing was his first such motion filed after Chapter 64 was amended eight years earlier to remove the former no-fault provision. *Id.* This Court held that February 26, 2020—the date of the CCA's affirmance of the denial of Gutierrez's second Chapter 64 motion—was "the date Gutierrez would have reason to know of his alleged injury." *Id.* This Court's holding is erroneous under *Reed.*

In *Reed,* following his unsuccessful attempt at obtaining DNA testing in state court, the plaintiff filed a § 1983 action challenging the constitutionality of Chapter 64. *Reed,* 995 F.3d at 428 ("Reed's amended complaint challenges the constitutionality of Chapter 64, both on its face and as applied to him."). The Fifth Circuit held that the limitations period for a § 1983 claim—like Gutierrez's—"begins to run 'the moment the plaintiff becomes aware [] he has suffered an injury or has sufficient information to know that he has been injured.'" *Id.* at 431 (quoting *Russell v. Bd. of Trustees,* 968 F.2d 489, 493 (5th Cir. 1992)). The plaintiff complained, as Gutierrez does, "that he was denied access to the physical evidence that he wished to test." *Id.* And because "[a] n injury accrues when a plaintiff *first* becomes aware, or should have become aware, that his right has been violated," a claim challenging the constitutionality of Chapter 64 accrues when the trial court denies a motion for postconviction DNA testing. *Id.* (emphasis in original). The Fifth Circuit found the plaintiff's claims time-barred

because he "had the necessary information to know his rights were allegedly being violated as soon as the trial court denied his motion for post-conviction relief." *Id.* The Fifth Circuit explicitly rejected the argument that such claims do not accrue until the conclusion of an appeal from the trial court's denial of a Chapter 64 motion. *Id.*

As shown by *Reed,* Gutierrez had a complete and present cause of action as of July 27, 2010, when the trial court denied his first request for postconviction DNA testing. Order, *Ex parte Gutierrez,* No. 98-CV-1391-A (107th Dist. Ct. Cameron Cty., Tex.). The Fifth Circuit's holding in *Reed* directly contravenes this Court's holding that Gutierrez's claims did not accrue until the conclusion of the appeal of the denial of his *second* Chapter 64 motion. Mem. & Order, ECF No. 48 at 14.

Moreover, this Court cited no relevant authority for the proposition that a cause of action like Gutierrez's re-accrues simply by the filing of a successive motion for postconviction DNA testing. Gutierrez knew when his first motion for DNA testing was denied that Chapter 64 did not provide for postconviction DNA testing for the purpose of affecting his punishment. Similarly, the 2011 amendment to Chapter 64 removing the former no-fault provision did not constitute a fresh accrual (a fact plainly shown by Gutierrez's subsequent failure to file another Chapter 64 motion until 2019), since the no-fault provision was only one of many grounds on which Gutierrez's first Chapter 64 motion was denied. *See Ex parte Gutierrez,* 337 S.W.3d 883,

899-902 (Tex. Crim. App. 2011). And importantly, Gutierrez disclaimed reliance on the 2011 amendment to Chapter 64 as a basis for finding his claims timely. Pl.'s Reply 4, ECF No. 122 ("Contrary to Defendants' suggestion, Mr. Gutierrez does not contend that the 2011 amendment to Chapter 64 either expanded Gutierrez's ability to seek DNA testing or provided a basis to restart his limitations period.") (internal quotation marks and alterations omitted); Opp'n to Mot. to Vacate 17-18, *Gutierrez v. Saenz, et al.,* No. 20-70009 (5th Cir. June 12, 2020).

Gutierrez has argued that his DNA claims did not accrue until the conclusion of his second Chapter 64 proceeding because he presented new evidence (e.g., witness affidavits) in support of his second Chapter 64 motion and he was given the opportunity in 2019 to review the State's files at which time he found a hair that he alleged was one that had not been recovered at the time of his first Chapter 64 proceedings. Pl.'s Am. Compl. 12, 27 n.9, ECF No. 45; Pl.'s Reply 4, ECF No. 122. But his second unsuccessful attempt at obtaining postconviction DNA testing did not constitute a new accrual. *See Reed,* 995 F.3d at 431; *Savory v. Lyons,* 469 F.3d 667, 673 (7th Cir. 2006) ("[Plaintiffs] continued lack of access to the evidence is not a fresh act on the part of [Defendant]. Rather, it is the natural consequence of the discrete act that occurred when [Defendants] first denied access to the evidence."). Additionally, Gutierrez's "new" evidence was irrelevant to his Chapter 64 proceedings. *Reed v. State,* 541 S.W.3d 759, 774 (Tex. Crim. App. 2017)

("[O]ur review in this context does not consider post-trial factual developments.").

And Gutierrez's substitute counsel's purported discovery of a hair among the State's files-following a decade's worth of representation by his previously appointed counsel—does not constitute a new accrual, and Gutierrez has not identified any support for such an argument. Pl.'s Reply 4, ECF No. 122. Rather, Gutierrez's purported discovery of a single piece of evidence almost ten years after his initial Chapter 64 litigation concluded is more appropriately understood as an argument for equitable tolling, which requires a plaintiff to show he diligently pursued his rights and the existence of an extraordinary circumstance that stood in the way of a timely filing. *See Thompson v. Rovella,* 734 F. App'x 787, 790 (2d Cir. 2018); *Savory,* 469 F.3d at 674. But Gutierrez's demonstrable failure to exercise diligence during the near—decade that followed the state court's denial of his first Chapter 64 motion disentitles him to equitable tolling. *See Thompson,* 734 F. App'x at 790-91.

Moreover, while *fraudulent* concealment can toll the limitations period, Gutierrez has not even alleged, nor is it the case, that the State's assertion in 2010 that it was unable to locate the hair was fraudulent. Pl.'s Opp'n to Mot. to Dismiss 37, ECF No. 47;[2] *see Smith v. Palafox,*

2. Gutierrez cited in his opposition a case addressing an allegation of fraudulent concealment, but Gutierrez made no such factual allegation in his amended complaint—or any other

728 F. App'x 270, 277 (5th Cir. 2018) (declining to toll the limitations period for a medical-negligence case where plaintiffs evidence did not show the defendant knew his assertions were false); *Piotrowski v. City of Houston,* 237 F.3d 567, 577 n.13 (5th Cir. 2001); *Lozano v. Baylor University,* 408 F. Supp. 3d 861, 900 (W.D. Tex. Sept. 27, 2019). Rather, Gutierrez merely alleged that his assertion of innocence and the lack of DNA testing in his case were bases for equitable tolling. Pl.'s Opp'n to Mot. to Dismiss 37, ECF No. 47. But such allegations—allegations that would justify equitable tolling in virtually every case involving a criminal defendant's unsuccessful effort to obtain postconviction DNA testing in state court—are patently insufficient to show his case is extraordinary. *Savory,* 469 F.3d at 674 (finding the plaintiffs continued assertion of innocence insufficient to warrant equitable tolling). Consequently, Gutierrez has not even pled facts that could justify tolling of his limitations period.

Notably, the Fifth Circuit recently declined to apply the "continuing violation doctrine" to a claim challenging the plaintiffs sex-offender registration requirement, holding that the claim accrued when the plaintiff first learned of his alleged injury.

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pleading—of fraudulent concealment. Pl.'s Opp'n to Mot. to Dismiss 37-38, ECF No. 47 (citing *Timberlake v. A.H. Robins* Co., 727 F.3d 1363, 1366 (5th Cir. 1984)). Notably, in *Timberlake,* the Fifth Circuit stated that to prove fraudulent concealment a plaintiff must prove the defendant had actual knowledge of the facts allegedly concealed and a fixed purpose to conceal the wrong. 727 F.2d at 1366. Gutierrez made no such factual allegations in his pleadings.

Hearn v. McGraw, ____ F. App'x ____, 2021 WL 1440025, at *2-3 (5th Cir. Apr. 15, 2021). The court rejected the plaintiff's argument that the requirement that he register annually provided new accruals. *Id.* at *2. As in *Reed* and *Hearn,* Gutierrez's DNA claims allege one violation—the denial of his request for access to evidence to conduct DNA testing, which Gutierrez learned of in 2010. *See Reed,* 995 F.3d at 431. His subsequent unsuccessful attempt to obtain access to evidence to conduct DNA testing was not a "separate breach." *Hearn,* 2021 WL 1440025, at *2. And as in *Hearn,* there is reason not to permit Gutierrez to revive his limitations period after sleeping on his rights for almost a decade. *Id.* at *3. Because Gutierrez's DNA claims are plainly time-barred, this Court should reconsider its prior orders and dismiss those claims as such.

III. This Court Granted Relief as to a Claim Gutierrez Did Not Raise.

In his amended complaint, Gutierrez argued the CCA erred in denying his request for postconviction DNA testing because the results could show he lacked the requisite culpability under *Enmund/Tison*[3] to be sentenced to death. Pl.'s Am. Compl. 29, ECF No. 45. Gutierrez argued that the absence in Chapter 64 of a provision for testing for the purpose of affecting

3. *Enmund v. Florida,* 458 U.S. 782, 797 (1982); *Tison v. Arizona,* 481 U.S. 137, 157-158 (1987).

punishment prevents movants from establishing actual innocence of the death penalty and that their execution would constitute a miscarriage of justice. *Id.* (quoting *Sawyer v. Whitley,* 505 U.S. 333, 335 (1992)). Gutierrez also argued Chapter 64 was deficient because it does not permit testing to establish an aggravating circumstance was invalid or that mitigating circumstances exist. *Id.*

This Court granted relief on a different, unpled, basis. Specifically, this Court held that Chapter 64 violates procedural due process because it is "irreconcilable" with Texas's subsequent state habeas statute, article 11.071 § 5(a)(3). Mem. & Order 24, ECF No. 141. The conflict exists, this Court held, because Chapter 64 does not provide for testing for the purpose of demonstrating innocence of the death penalty, but article 11.071 § 5(a)(3) allows a state habeas applicant to obtain merits review of a subsequent habeas application if he makes a showing by clear and convincing evidence 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. *Id.* at 23, 23 n. 4 (quoting Tex. Code Crim. Proc. art. 37.071).

In his extensive briefing to this Court, Gutierrez never cited § 5(a)(3), the anti-parties special issue in article 37.071 § 2(b)(2), or otherwise referred to subsequent state habeas applications. Because this Court granted relief on a claim not raised by Gutierrez—thereby abusing its discretion by violating the principle of party presentation—

this Court should reconsider its order granting a declaratory judgment and dismiss Gutierrez's DNA claims. *See United States v. Sineneng-Smith,* 140 S. Ct. 1575, 1579 (2020) ("[Courts] do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.") (cleaned up).

IV. This Court's Conclusion that Chapter 64 Is Constitutionally Deficient Is Unsupported and Erroneous.

Even if Gutierrez's briefing could be liberally construed as raising the claim as to which this Court granted a declaratory judgment, this Court should reconsider its order granting a declaratory judgment. This Court based its opinion on the assertion that the absence in Chapter 64 of a provision for testing to prove innocence of the death penalty renders § 5(a)(3) "illusory." Mem. & Order 24, ECF No. 141. But this conclusion is mistaken for several reasons.

First, the CCA has not held that § 5(a)(3) wholly codified the *Sawyer* actual-innocence-of-the-death-penalty exception. *See Ex parte Blue,* 230 S.W.3d 151, 160 n.42 (Tex. Crim. App. 2007) ("We hesitate to declare that Article 11.071, Section 5(a)(3) *wholly* codifies the Supreme Court's doctrine of 'actual innocence of the death penalty,' even inasmuch as it has tied the exception to the bar on subsequent writs to the statutory criteria for the death penalty under Article 37.071.") (emphasis in original). And

the undersigned's research has not uncovered a case in which the CCA held the anti-parties special issue under article 37.071 § 2(b)(2) is within the ambit of article 11.071 § 5(a)(3).[4] *See Ex parte Wood,* 498 S.W.3d 926, 929 (Tex. Crim. App. 2016) (Alcala, J., concurring in stay of execution) (Judge Alcala's explanation that she "*would* hold that *Tison* spells out the same type of categorical ban on the death penalty for certain individuals much in the same way as *Atkins* has for intellectually disabled offenders") (emphasis added); *cf. Ex parte Foster,* No. WR-50,823-02, 2007 WL 2257150, at *1 (Tex. Crim. App. Aug. 7, 2007) (dismissing under article 11.071 § 5 claim alleging new evidence shows "no jury could have found he anticipated a life would be taken"). This Court identified no precedent suggesting that the CCA would consider a claim raised in a subsequent habeas application based on new DNA testing results alleging actual innocence of the death penalty because the results contradict the jury's finding

4. In *Ex parte Blue,* the CCA acknowledged that it would be theoretically possible to satisfy § 5(a)(3) by showing, but for a constitutional error, no rational juror would have answered the mitigation special issue—codified in article 37.071 § 2(e)(1)—in the State's favor. 230 S.W.3d at 160 n.42. As the Fifth Circuit explained in *Rocha v. Thaler,* a claim alleging trial counsel's failure to adequately present mitigating evidence is not a claim of categorical ineligibility for the death penalty. 626 F.3d 815, 827 (5th Cir. 2010). This, despite § 5(a)(3)'s reference to Texas's statutory special issues. Thus, the inclusion of the anti-parties special issue in the statutory scheme does not compel the conclusion that a claim alleging insufficient culpability in the capital murder amounts to a claim alleging ineligibility for the death penalty.

on the anti-parties special issue. That is, Chapter 64 does not deny a death-sentenced inmate a right that article 11.071 § 5(a)(3) provides, and it does not "barricade" the primary avenue for a death-sentenced inmate to make use of § 5(a)(3). Mem. & Order 24-25, ECF No. 141. Consequently, there is no inconsistency between Chapter 64 and § 5(a)(3), and the foundation of this Court's declaratory judgment is fundamentally flawed.

Second, and relatedly, this Court did not identify any precedent supporting the proposition that DNA testing for the purpose of showing actual innocence of the death penalty would prove ineligibility of the death penalty rather than mere unsuitability. *See Rocha,* 626 F.3d at 823; *id.* at 826-27 ("Evidence that might have persuaded the jury to decline to impose the death penalty is irrelevant under *Sawyer*."); *see also Ex parte White,* 506 S.W.3d 39, 48-50 (Tex. Crim. App. 2016) (rejecting applicant's argument that evidence that lessens a defendant's moral culpability falls under Texas Code of Criminal Procedure article 11.073 because the statute applies only to evidence related to "guilt claims" and explaining that under the CCA's actual innocence jurisprudence, punishment claims "are not really about innocence"); *cf. Webster v. Daniels,* 784 F.3d 1123, 1139 (7th Cir. 2015) ("[T]he Supreme Court has now established the Constitution itself forbids the execution of certain people: those who satisfy the criteria for intellectual disability that the Court has

established, and those who were below the age of 18 when they committed the crime. In virtually all other situations, Congress has almost unlimited discretion to select the penalty, or the range of penalties, that go along with a particular crime."). Rather, DNA testing for the purpose identified by Gutierrez would only permit a capital defendant to relitigate his guilt at the punishment phase, a right that does not exist. *Oregon v. Guzek*, 546 U.S. 517, 525 (2006). Similarly, the Supreme Court in *Sawyer* emphasized that the actual-innocence-of-the-death-penalty exception "must be subject to determination by relatively objective standards." 505 U.S. at 340. But the assessment of a defendant's culpability under *Enmund/Tison* or Texas's anti-parties special issue is necessarily a subjective one. Tex. Code Crim. Proc. art. 37.071 § 2(b)(2); *see State v. Miles*, 414 P.3d 680, 683 (Ariz. 2018) ("The culpable reckless mental state under *Tison* . . . is a subjective one."). And again, because the CCA has not explicitly incorporated article 37.071 § 2(b)(2) into article 11.071 § 5(a)(3), this Court's conclusion that Chapter 64 is constitutionally defective for not providing for punishment-related testing is mistaken.

Importantly, the Supreme Court has held there is no due process right to collateral proceedings at all. *See Murray v. Giarratano*, 492 U.S. 1, 7-8 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *Ex parte White*, 506 S.W.3d at 52 ("Like Chapter 64, Article 11.073 is a statute that created a remedy that

did not exist, and was not required to exist, prior to the enactment of the statute."). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Giarratano,* 492 U.S. at 10. The CCA was not required to—and, indeed, could not—grant DNA testing for the purpose of affecting Gutierrez's punishment. *See Ex parte White,* 506 S.W.3d at 51. And neither Gutierrez nor this Court have shown that the CCA would have considered a claim based on such evidence presented 1n a subsequent state habeas application under § 5(a)(3).

Third, this Court's assertion that the absence of a provision for punishment-related DNA testing in Chapter 64 renders article 11.071 § 5(a)(3) "illusory" is erroneous. Mem. & Order 24, ECF No. 141. The CCA regularly considers applications under that provision,[5] and it has granted applicants merits review of claims alleging ineligibility for the death penalty under it, *see, e.g., Ex parte Milam,* No. WR-79,322-04, 2021 WL 197088, at *1 (Tex. Crim. App. Jan. 15, 2021); *Ex parte Weathers,* No. WR-64,302-02, 2012 WL 1378105, at *1 (Tex. Crim. App. Apr. 18, 2012). Consequently, there is no support for a facial invalidation of Chapter 64 based on its interplay with § 5(a)(3). *See United States v. Salerno,* 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since

5. *See, e.g., Ex parte Blue,* 230 S.W.3d at 160; *Ex parte Rocha,* No. WR-52,515-04, 2008 WL 5245553, at *1 (Tex. Crim. App. Dec. 17, 2008); *Ex parte Sells,* No. WR-62,552-02, 2007 WL 1493151, at *1 (Tex. Crim. App. May 23, 2007).

the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid[.]").

Lastly, deference should be afforded to the Texas Legislature's judgment that postconviction DNA testing should be permitted only for the purpose of demonstrating innocence of the crime of conviction. *See District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 69 (2009) ("The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. When a State chooses to offer help to those seeking relief from convictions, due process does not dictate the exact form such assistance must assume.") (cleaned up); *cf. Schlup v. Delo,* 513 U.S. 298, 324-25 (1995) ("Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent."); *Dawson v. Suthers,* No. 14-CV-1919, 2015 WL 5525786, at *5 (D. Colo. Sept. 21, 2015) (rejecting equal protection challenge to state's postconviction DNA testing procedures because "[i]t is patently reasonable for the government to grant persons claiming actual innocence more access to postconviction remedies than it grants to persons who claim that their culpability for a crime is lessened by a diminished capacity"). Deference is particularly appropriate here, as Texas has declined

to extend postconviction DNA testing for the purpose of making a subjective showing that the Supreme Court has acknowledged "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Sawyer,* 505 U.S. at 340; *cf. Kansas v. Marsh,* 548 U.S. 163, 180 (2006) ("[T]he availability of DNA testing, and the questions is might raise about the accuracy of guilt-phase determinations in capital cases, is simply irrelevant to the question before the Court today, namely, the constitutionality of Kansas' capital *sentencing* scheme.") (emphasis in original). And as discussed above, the absence in Chapter 64 of a provision for punishment-related testing does not deprive death-sentenced inmates to a right otherwise protected by state law. Consequently, Chapter 64 is not constitutionally infirm, and this Court should reconsider its prior order and dismiss all of Gutierrez's DNA claims with prejudice.

Appendix H

CONCLUSION

For these reasons, this Court should reconsider its orders denying, in part, Defendants' motion to dismiss and granting Gutierrez a declaratory judgment and dismiss with prejudice all of Gutierrez's DNA claims.

Respectfully submitted,

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Appendix H

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Appendix H

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

Civil Action No. 1:19-CV-185
DEATH PENALTY CASE

RUBEN GUTIERREZ,

Plaintiff,

v.

LUIS SAENZ, *et al.,*

Defendants.

Filed July 7, 2021

ORDER

Defendants' Motion to Reconsider Order Denying, in Part, Motion to Dismiss, ECF No. 48, and Order granting Gutierrez a declaratory judgment, ECF No. 141, is hereby GRANTED and Plaintiffs DNA claims in this case are DISMISSED WITH PREJUDICE.

It is so ORDERED.

SIGNED on this the ___ day of ___, 2021.

_____
JUDGE PRESIDING

Appendix I – Defendant's Opposed Motion to Reconsider Order Denying Motion to Dismiss, United States District Court for the Southern District of Texas (October 22, 2020)

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

CIVIL ACTION NO. l:19-CV-185
DEATH PENALTY CASE

RUBEN GUTIERREZ,

Plaintiff,

v.

LUIS V. SAENZ, *et al.*,

Defendants.

DEFENDANTS' OPPOSED MOTION TO RECONSIDER ORDER DENYING MOTION TO DISMISS

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Appendix I

[TABLES INTENTIONALLY OMITTED]

Plaintiff Ruben Gutierrez was convicted and sentenced to death for the murder of eighty-five-year-old Escolastica Harrison. Gutierrez has repeatedly and unsuccessfully challenged his conviction and sentence in state and federal court. He has exhausted his postconviction remedies, including twice unsuccessfully seeking postconviction DNA testing in state court.

Relevant here, Gutierrez filed an amended civil-rights complaint alleging that Texas's postconviction DNA testing procedures[1] facially and as authoritatively construed by the Texas Court of Criminal Appeals (CCA) violate procedural due process. Pl.'s Amended Compl. 19-32, ECF No. 45. Defendants[2] filed a motion to dismiss Gutierrez's amended complaint. *See generally* Defs' Mot. Dismiss, ECF No. 46. This Court entered an order granting in part and denying in part Defendants' motion to dismiss. Mem. & Order 30-31, ECF No. 48.

This Court later granted Gutierrez's request for a stay of his previously scheduled execution. Order 3, ECF

1. Chapter 64 of the Texas Code of Criminal Procedure

2. Defendants are Luis Saenz, Cameron County District Attorney, Felix Sauceda, Jr., Chief, Brownsville Police Department, Bryan Collier, Executive Director, Texas Department of Criminal Justice (TDCJ), Bobby Lumpkin, Director, TDCJ, and Billy Lewis, Warden, TDCJ. Gutierrez sued each Defendant in his or her official capacity. Pl.'s Amended Compl. 4-5. Gutierrez 's DNA claims are directed only toward Defendants Saenz and Sauceda. Pl.'s Resp. 24 n.12, ECF No. 47.

No. 57. Defendants filed a motion in the Fifth Circuit to vacate the stay of execution, which was granted. *Gutierrez v. Saenz*, 818 F. App'x 309, 311-15 (5th Cir. June 12, 2020). Gutierrez then filed in the Supreme Court a petition for a writ of certiorari and an application for a stay of execution in which he abandoned his challenge to Texas's postconviction DNA testing statute. The Supreme Court granted Gutierrez's application for a stay of execution as to his Chaplain claims and ordered that this Court "should promptly determine . . . whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution." *Gutierrez v. Saenz*, — S. Ct. —, 2020 WL 3248349, at *1 (June 16, 2020). This Court then ordered the parties to, *inter alia,* "submit a brief regarding what, if any, DNA claims remain in this case and the merits of those claims." Order 1, ECF No. 70. For the reasons discussed below, this Court should reconsider its prior order denying, in part, Defendant's motion to dismiss and dismiss all of Gutierrez's DNA claims with prejudice. *See* Fed. R. Civ. P. 54(b).

ARGUMENT

I. This Court Should Reconsider Its Prior Order and Dismiss Gutierrez's DNA Claims with Prejudice Because the Fifth Circuit Concluded the Claims Are Entirely Without Merit and Gutierrez Has Waived Them.

In its Memorandum and Order, this Court properly granted Defendants' motion to dismiss Gutierrez's DNA

claims as barred by the *Rooker/Feldman*[3] doctrine insofar as they constituted as-applied challenges to the CCA's denial of DNA testing. Mem. & Order 11, 30. This Court also properly dismissed Gutierrez's claims to the extent he sought a permanent injunction requiring Defendants to release evidence for DNA testing.[4] *Id.* at 11, 30. Additionally, this Court properly dismissed Gutierrez's Eighth Amendment and access-to-courts claims for failing to state a claim upon which relief could be granted. *Id.* at 14-15, 30. However, this Court denied Defendants' motion to dismiss Gutierrez's claims that challenged the constitutionality of Texas's DNA statute facially and as authoritatively construed by the CCA. *Id.* at 15-16, 30-31.

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3. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923) (holding that the jurisdiction of the district court is strictly original); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 476, 482 (1983) (holding a United States district court has no authority to review final judgments of a state court in judicial proceedings).

4. Relatedly, as explained in Defendants' motion to dismiss, Defendants Saenz and Sauceda are immune from suit to the extent Gutierrez seeks anything beyond a declaratory judgment as to Chapter 64 and to the extent Gutierrez raised as-applied challenges to the CCA's denial of his request for DNA testing. Defs' Mot. Dismiss 18-19, 26-29, 36-37. Similarly, Gutierrez lacks standing to raise, and this Court lacks jurisdiction to consider, Gutierrez's DNA claims that raise as-applied challenges to the CCA's decision and to the extent he seeks an order directing Defendants Saenz and Sauceda to release evidence for DNA testing. *Id.* at 17-19. Moreover, Defendant Saenz is immune from suit to the extent Gutierrez alleges Saenz violated his constitutional rights as the Criminal District Attorney for Cameron County. *Id.* at 36-37. Gutierrez's DNA claims are also barred by issue preclusion to the extent they collaterally attack the CCA's decision. *Id.* at 37.

This Court has the authority to reconsider its denial of Defendants' motion to dismiss. Fed. R. Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."); *see Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 171 (5th Cir. 2010) ("An order denying summary judgment is interlocutory, and leaves the trial court free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law.") (citation omitted). For the reasons discussed below, this Court should reconsider its order to the extent it denied Defendants' motion to dismiss Gutierrez's DNA claims.

The Fifth Circuit, in its order vacating this Court's stay of Gutierrez's execution, held Gutierrez was not entitled to a stay based on his DNA claims because they were "unlikely to succeed on the merits," a holding Gutierrez did not challenge in the Supreme Court. *Gutierrez v. Saenz*, 818 F. App'x at 312. Consequently, Gutierrez's disentitlement to a stay of execution on his DNA claims is now law of the case. *See Clifford v. Gibbs*, 298 F.3d 328, 331 (5th Cir. 2002) ("[T]he law of the case doctrine applies only to issues that were actually decided, rather than all questions in the case that might have been decided, but were not."). The Fifth Circuit also explicitly rejected Gutierrez's claim that Chapter 64 violates *Osborne*[5] facially or as authoritatively construed

5. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

by the CCA. *Gutierrez v. Saenz*, 818 F. App'x at 312-13. Even if the Fifth Circuit's rejection of Gutierrez's DNA claims does not amount to law of the case, it is a strong indication that reconsideration is warranted and that Gutierrez's claims should be dismissed for failing to state a claim upon which relief could be granted.[6] *See Wood v. Collier*, 678 F. App'x 248, 249 (5th Cir. 2017) ("Previously, we denied a stay, finding that Plaintiffs were unlikely to succeed on the merits of their appeal. Nothing subsequent leads us to believe that conclusion was in error, and we affirm dismissal of those claims for the reasons previously stated.") (footnote omitted).

Additionally, Gutierrez did not seek review in the Supreme Court of his DNA claims. Pet. Cert. 9, *Gutierrez v. Saenz, et al.*, No. 19-8695 (June 15, 2020) ("Mr. Gutierrez also alleged violations of due process with respect to the denial of DNA testing (claims he does not present to this Court)."). Gutierrez's failure to raise the DNA claims on appeal should be construed as an abandonment of those claims. *See Medical Center Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (stating that the waiver doctrine "serves judicial economy by forcing parties to raise issues whose resolution might spare the court and parties later rounds of remands and appeals") (quoting *United States v. Castillo*, 179 F.3d 321, 326 (5th Cir. 1999), *rev'd on other grounds*, 530 U.S. 120 (2000)).

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6. Notably, the question of whether Chapter 64 comports with due process is a legal one, not a factual one. That is, Gutierrez's DNA claims challenging Chapter 64 facially and as authoritatively construed by the CCA are purely legal and are not amenable to—and could not require—factual development.

Appendix I

The district court in *Murphy v. Collier*, recently found that the plaintiff did not waive his execution-room claims by not raising them in the Fifth Circuit following the district court's grant of a stay of execution. Order 6-7, *Murphy v. Collier*, No. 4:19-CV-1106 (S.D. Tex. June 24, 2020), ECF No. 91. However, *Murphy* is distinguishable. There, the court concluded the plaintiff 's claims were not waived because he explained to the Fifth Circuit that he believed he would ultimately prevail on *all* his claims. *Id.* at 7. Here, Gutierrez made no such assertion when he failed to raise his DNA claims in the Supreme Court. Indeed, Gutierrez only requested a stay of execution to allow for consideration of his petition for a writ of certiorari, which raised only his claims challenging TDCJ's execution-room policy. Appl. for Stay of Execution 2-4, *Gutierrez v. Saenz, et al.*, No. 19A1052 (June 15, 2020) ("Mr. Gutierrez respectfully requests a stay of execution pending consideration and disposition of the petition for a writ of certiorari filed along with this application."); Pet. Cert. ii, 9, *Gutierrez v. Saenz, et al.*, No. 19-8695 (June 15, 2020). The Supreme Court's order staying Gutierrez's execution and remanding the case to this Court, then, did not revive his DNA claims.

The Fifth Circuit's finding that Gutierrez's DNA claims are wholly without merit and Gutierrez's abandonment of the claims warrant reconsideration of this Court's order denying, in part, Defendants' motion to dismiss. Therefore, this Court should reconsider its order denying Defendants' motion to dismiss and dismiss Gutierrez's DNA claims with prejudice. Moreover, for the reasons discussed below, Gutierrez's DNA claims fail as a matter of law.

II. Gutierrez's DNA Claims Should Be Dismissed with Prejudice Because They Fail to State a Claim Upon which Relief Can Be Granted.

Gutierrez's DNA claims fail to state a claim upon which relief could be granted. Specifically, the claims are time-barred and, as the Fifth Circuit has concluded, fail to state a viable claim under *Osborne*. *Gutierrez v. Saenz*, 818 F. App'x at 312-13. For the reasons discussed below, this Court should reconsider its previous order and dismiss Gutierrez's DNA claims with prejudice.

A. Gutierrez's DNA claims are time-barred.

In its order denying, in part, Defendants' motion to dismiss, this Court found Gutierrez's DNA claims timely because his second Chapter 64 motion came (eight years) after Chapter 64 was amended to remove the former "no fault" provision.[7] Mem. & Order 14; *see Skinner v. Switzer*, No. 2:09-CV-281, 2011 WL 5331656, at *2 (N.D. Tex. Oct. 27, 2011) (explaining that the former "no fault" provision of Chapter 64 was removed in 2011). But the 2011 amendment to Chapter 64 neither expanded Gutierrez's ability to seek DNA testing nor provided a basis to restart his limitations period. Indeed, the "no fault" provision was only one basis on which the CCA denied testing in Gutierrez's first postconviction DNA testing proceedings. *Ex parte Gutierrez*, 337 S.W.3d 883, 897-902 (Tex. Crim.

7. Gutierrez asserted in the Fifth Circuit that the 2011 amendment to Chapter 64 was not the basis for his second motion for DNA testing. Opp'n to Mot. to Vacate 17-18, *Gutierrez v. Saenz, et al.*, No. 20-70009 (5th Cir. June 12, 2020).

App. 2011). And Gutierrez's waiting *eight years* to seek DNA testing a second time belies any notion that the 2011 amendment to Chapter 64 constitutes the accrual of his limitations period. Delay of the accrual of the limitations period on this basis would also allow for an indefinite delay in pursuing post-conviction DNA testing remedies.

By way of example, Chapter 64 was amended in 2015 to allow an inmate to seek "DNA testing of evidence that has a reasonable likelihood of containing biological material," as opposed to only evidence the movant proved contained biological material. *See Reed v. State*, 541 S.W.3d 759, 772 (Tex. Crim. App. 2017) (discussing amendment to Chapter 64). Gutierrez does not rely on such an amendment that provided a new basis on which to seek DNA testing. Consequently, he cannot show that any amendment to Chapter 64 provided him a new legal basis for either seeking DNA testing or restarting his limitations period. *Cf. Whitaker v. Collier*, 862 F.3d 490, 495-96 (5th Cir. 2017) (affirming dismissal as time-barred civil-rights complaint challenging change in TDCJ execution protocol from the use of manufactured to compounded pentobarbital because the change to TDCJ's protocol was not "substantial").[8] Gutierrez has identified no support for delaying the commencement of his limitations period for several years based on an inapposite amendment to Chapter 64.

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8. In *Whitaker*, the Fifth Circuit recognized the unreasonable delays that may be occasioned by repetitive or piecemeal litigation. 862 F.3d at 495. The court declined to permit plaintiffs to restart their limitations period because doing so avoided "allowing a proliferation of claims that could indefinitely delay the sentence." *Id.*

Gutierrez's DNA claims are subject to a two-year limitations period. *Walker v. Epps*, 550 F.3d 407, 412-14 (5th Cir. 2008); Tex. Civ. Prac. & Rem. Code § 16.003(a) (West 2020). Assuming the CCA's affirmance—in 2011—of the denial of DNA testing is the appropriate accrual date for Gutierrez's DNA claims,[9] Gutierrez's complaint was more than six years untimely. This is the case even under the precedent he relied upon. *See Van Poyck v. McCollum*, 646 F.3d 865,867-68 (11th Cir. 2011) (holding that the limitations period accrues at the end of the state court appeal from the denial of DNA testing). Moreover, while the Eleventh Circuit has held that a claim challenging the denial of DNA testing accrues at the end of the state litigation seeking such testing, the Seventh Circuit has held that the limitations period for claims challenging the denial of DNA testing commences on the denial of a motion for testing rather than the conclusion of the appeal of that denial. *Savory*, 469 F.3d at 673. But again, Gutierrez's DNA claims are significantly time-barred using either accrual date.

Gutierrez argued that his second round of Chapter 64 litigation should restart his limitations period because his second Chapter 64 motion was supported by evidence and law that was not presented in his first motion. Pl.'s Resp. 34-36, ECF No. 47. But Gutierrez's "new" expert and lay witness declarations were irrelevant

9. *See Brookins v. Bristol Tp. Police Dept.*, 642 F. App'x 80, 81 (3d Cir. 2016) ("[Plaintiffs] challenge to the Government's failure to test evidence for DNA accrued, at the latest, when the state court denied his request for testing on April 28, 2011.") (citing *Savory v. Lyons*, 469 F.3d 667, 672-73 (7th Cir. 2006)).

to his Chapter 64 motion. *See Reed*, 541 S.W.3d at 774 ("[O]ur review in this context does not consider post-trial factual developments."). For the same reason, Gutierrez failed to show that his two Chapter 64 motions were meaningfully distinct. In the second round of litigation, the CCA assumed identity was at issue in Gutierrez's trial but concluded, as it did in 2011, that he failed to satisfy Chapter 64's materiality standard. *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *5-9 (Tex. Crim. App. Feb. 26, 2020); *Ex parte Gutierrez*, 337 S.W.3d at 901-02. The CCA did not authoritatively construe Chapter 64 in Gutierrez's second round of litigation in any meaningfully different way than it had nine years earlier.[10]

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10. In the most recent DNA proceeding, the CCA rejected Gutierrez's argument that his new evidence required it to reevaluate its prior opinion:

> Here, as in the 2010 DNA appeal, these three consistent statements unequivocally place [Gutierrez] 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 [Gutierrez] can meet his burden to show that he would not have been convicted should DNA testing reveal exculpatory results. [Gutierrez] 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.

Gutierrez v. State, 2020 WL 918669, at *5, *7 (footnote and citation omitted).

Gutierrez also fails to identify any viable ground for equitable tolling. The Fifth Circuit has held that state law governs tolling,[11] and Gutierrez identifies no applicable state law ground for equitable tolling. Nonetheless, even if Gutierrez could seek equitable tolling based on an extraordinary circumstance and diligence, he fails to justify it. *See Thompson v. Rovella*, 734 F. App'x 787, 790 (2d Cir. 2018). His assertion of innocence is insufficient. *See Savory*, 469 F.3d at 674. And Gutierrez fails to show any extraordinary circumstance or that he acted diligently.

Notably, Gutierrez asserted that no court has considered the purported violation of his constitutional rights that resulted from the lack of testing of the physical evidence. Pl.'s Resp. 37, ECF No. 47. But Gutierrez raised a claim in this Court during his federal habeas proceedings alleging the prosecution failed to timely turn evidence over to the defense to allow for DNA testing. *Gutierrez v. Stephens*, No. 1:09-CV-22, 2013 WL 12092544, at *41 (S.D. Tex. Oct. 3, 2013). This Court rejected the claim because, *inter alia*, Gutierrez made a reasonable decision at trial not to test the evidence. *Id.*

Moreover, Gutierrez plainly failed to act with diligence. He has offered no explanation for his four-year delay between the end of his first round of Chapter 64 litigation in 2011 and his filing a motion and a Public Information Act (PIA) request in 2015. Pl.'s Resp. 9, ECF No. 47. Gutierrez has offered no explanation for the following two-year delay during which he seems to have taken no

11. *Moon v. City of El Paso*, 906 F.3d 352, 358-59 (5th Cir. 2018).

further action on that motion and PIA request. Pl.'s Resp. 9, ECF No. 47. Gutierrez's conclusory assertions that he was not allowed—either through his previously-appointed counsel or his current counsel—to view the evidence until May 2019 and that touch DNA testing was not possible in 2010 neither establish diligence nor constitute a basis for a delayed accrual of his limitations period. In the end, Gutierrez waited eight years after his first unsuccessful attempt to obtain DNA testing to file suit. His failure to diligently pursue DNA testing disentitles him from equitable tolling. *See Thompson*, 734 F. App'x at 790-91. Therefore, this Court should reconsider its prior order and hold that Gutierrez's DNA claims are time-barred.

B. Gutierrez's DNA claims fail to state a claim under *Osborne* upon which relief could be granted.

As to the merits of Gutierrez's DNA claims, he has failed entirely to identify any constitutional infirmity in Chapter 64. *Gutierrez v. Saenz*, 818 F. App'x at 313 ("We conclude that Chapter 64 both facially and as applied by the [CCA] comports with the Supreme Court's decision in *Osborne.*"); *cf. Cromartie v. Sealy*, 941 F.3d 1244, 1252 (11th Cir. 2019) ("Every court of appeals to have applied the *Osborne* test to a state's procedure for postconviction DNA testing has upheld the constitutionality of it."). Consequently, this Court should reconsider its prior order and dismiss with prejudice Gutierrez's DNA claims.

Convicted individuals have no constitutional right to postconviction DNA testing; however, if a state provides

such a right, the procedures must satisfy due process. *See Osborne*, 557 U.S. at 69, 72-74. To demonstrate constitutional infirmity, a convicted individual must show that the postconviction procedures "are fundamentally inadequate to vindicate the substantive rights provided" such that the procedures "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 69-71.

To obtain postconviction DNA testing, Texas law requires the convicted person to show, *inter alia*, by a preponderance of the evidence he would not have been convicted if exculpatory results had been obtained through DNA testing. Tex. Code Crim. Proc. art. 64.03(a)(2)(A) (West 2020). Gutierrez's claims challenging this requirement cannot succeed because (1) Chapter 64's materiality standard is entirely consistent with *Osborne* in which the Supreme Court *explicitly* approved of states requiring movants to demonstrate the results of DNA testing would be "sufficiently material," (2) the CCA's denial of requests for DNA testing on a ground—"muddying the waters"—that is the functional equivalent to one the Supreme Court approved in *Osborne*—*"likely"* to "be conclusive"—cannot be fundamentally unjust, and (3) the CCA has not construed Chapter 64 as disentitling those convicted under the law of parties from DNA testing. *Osborne*, 557 U.S. at 64-65, 70; *see* Pl.'s Amended Compl. 21-22,28-29, ECF No. 45; Pl.'s Resp. 51, ECF No. 47. Indeed, the Fifth Circuit rejected Gutierrez's challenges to Chapter 64 for these reasons. *Gutierrez v. Saenz*, 818 F. App'x at 312.

First, Gutierrez asserted that Chapter 64's preponderance-of-the-evidence materiality standard violates procedural due process because it is "unusually onerous." Pl.'s Resp. 50, ECF No. 47. But he provided no basis on which to conclude requiring a showing that new evidence would simply preponderate in a movant's favor is *fundamentally* unjust.[12] *See Medina v. California*, 505 U.S. 437, 446 (1992) ("[I]t is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.") (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977));[13] Op. 2, *Harris v. Lykos*, No.

12. Notably, a materiality review that focuses on the effect of trial is a well-worn rule in many constitutional contexts. *See*, *e.g.*, *United States v. Bagley*, 473 U.S. 667, 681-82 (1985); *Strickland v. Washington*, 466 U.S. 668,695-96 (1984); *cf. Herrera v. Collins*, 506 U.S. 390,417 (1993) (assuming a claim of actual innocence could warrant habeas relief and explaining that "the threshold showing for such an assumed right would necessarily be *extraordinarily high")* (emphasis added).

13. To the extent Gutierrez might argue that historical practice indicates that application of a preponderance-of-the-evidence materiality standard is fundamentally unfair, he cannot make such a showing. First, as discussed in Defendants' motion to dismiss, Texas is not alone in applying such a burden, and other states apply stricter burdens. Defs' Mot. to Dismiss 44-45, ECF No. 46. Second, Gutierrez cannot make such a showing because the right to postconviction DNA testing is not historically rooted. *Cf. Hill v. Humphrey*, 662 F.3d 1335,1350-51 (11th Cir. 2011) (upholding state's application of a *reasonable-doubt* burden to claims of intellectual disability because, *inter alia*, the Supreme Court had not imposed any particular burden and there was "no historical tradition regarding the burden of proof as to that right").

4:12-CV-393 (S.D. Tex. June 18, 2013), ECF No. 32 ("Our traditions require exclusion—not inclusion—of irrelevant and unhelpful evidence. The law in Texas is similar to the federal rule—both of which are efficient and consistent with our constitutional protection of accuseds."), *aff'd, Harris v. Lykos*, 556 F. App'x 351, 351-52 (5th Cir. 2014). Considering the plain holding of *Osborne*, the deference owed under *Medina* and *Osborne* to the legislature's judgment in crafting postconviction DNA procedures, and Gutierrez's inability to show that due process requires a particular materiality standard in postconviction DNA testing procedures, Gutierrez fails to state a claim upon which relief can be granted.

Under the Alaska procedures the Supreme Court approved in *Osborne*, an inmate could seek DNA testing (1) through discovery to support a claim under the postconviction statute alleging that the testing would provide clear and convincing evidence he was innocent (i.e., the new evidence would be "sufficiently material"),[14] or (2) under the Alaska courts' interpretation of the state constitution, which required that the testing would likely be conclusive as to the identity of the perpetrator. *See Osborne*, 557 U.S. at 64-65, 70; *see also McKithen*

14. The postconviction statute at the time required an allegation that new, "material" facts existed. Alaska Stat. § 12.72.010(4) (2008); Alaska Stat. § 12.72.020(a), (b). Gutierrez was simply incorrect that materiality only "came into play" in the Alaska procedures when an inmate sought relief from his conviction. Pl.-Appellee's Opp'n to Mot. to Vacate 22, *Gutierrez v. Sanez, et al.*, No. 20-70009 (5th Cir. June 12, 2020); *see Osborne*, 557 U.S. at 64-65, 70.

v. Brown, 626 F.3d 143, 153 (2d Cir. 2010) (discussing procedures at issue in *Osborne).* Additionally, the Supreme Court in *Osborne* approved the federal statute providing access to DNA testing, which also required a showing of materiality—a reasonable probability. *Osborne*, 557 U.S. at 63 (citing 18 U.S.C. § 3600(a)(8)), 70.

The Supreme Court's explicit approval of such procedures renders Gutierrez's challenge to Chapter 64's materiality standard entirely inviable.[15] Gutierrez certainly failed to show the Alaska and federal standards approved by the Supreme Court in *Osborne* are so meaningfully different from Chapter 64's materiality standard that requiring a showing by, e.g., a reasonable probability is constitutionally permissible but requiring a showing by a preponderance of the evidence is *fundamentally* unjust. *See id.* at 69; *Medina*, 505 U.S. at 445; *Morrison*, 809 F.3d at 1068-69. This is diapositive of Gutierrez's DNA claims. *See Gutierrez v. Saenz*, 818 F. App'x at 312.

Gutierrez has attempted to avoid the Supreme Court's plain holding in *Osborne* by asserting that the Court

15. *See Morrison v. Peterson*, 809 F.3d 1059, 1068-69 (9th Cir. 2015) (approving California's "reasonable probability" materiality standard because it was less restrictive than Alaska's likely-to-be-conclusive requirement and because requiring a showing of a "reasonable probability" was consistent with requiring a showing of sufficient materiality); *Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257, 1266 n.2 (11th Cir. 2012); *Cunningham v. Dist. Attorney's Office for Escambia County*, 592 F.3d 1237, 1263 (11th Cir. 2010); *McKithen*, 626 F.3d at 153-54.

merely approved Alaska's purportedly lax discovery procedures. Pl.-Appellee's Opp'n to Mot. to Vacate Stay 20-21, *Gutierrez v. Saenz, et al.*, No. 20-70009 (5th Cir. June 12, 2020) (asserting the Alaska statutory procedure "purported to freely allow DNA testing under the discovery procedures"). But Gutierrez's argument entirely ignored that "*no litigant* [had] obtained evidence for DNA testing under the statute" through discovery. *Osborne*, 557 U.S. at 91 (Stevens, J., dissenting) (emphasis added). Gutierrez's claim also ignores the many instances noted above in which circuit courts have reviewed the constitutionality of states' postconviction DNA procedures in relation to the materiality standards approved in *Osborne*. *See*, *e.g.*, *Morrison*, 809 F.3d at 1068-69; *Alvarez*, 679 F.3d at 1266 n.2; *Cunningham*, 592 F.3d at 1263; *McKithen*, 626 F.3d at 153-54. Most importantly, as discussed above, Gutierrez has utterly failed to identify any support for his claim that due process requires a materiality standard more lenient than a preponderance.

That some states apply a burden lower than a preponderance of the evidence, Pl.'s Amended Compl. 22-23, does not establish that procedural due process requires a more lenient standard, or any particular standard. Indeed, the Supreme Court has indicated the opposite. *See Osborne*, 557 U.S. at 70 (quoting *Medina*, 505 U.S. at 446-48), *see also id.* at 73 n.4 (declining to recognize a substantive due process right to DNA testing because "the asserted right to access DNA evidence is unrooted in history or tradition"). And as Gutierrez acknowledged, several states apply standards similar to, or more onerous than Texas's standard, a mere preponderance. Pl.'s Amended Compl. 22-23.

Second, Gutierrez argued that the CCA's denial of DNA testing on the ground that any results would only "muddy the waters" is constitutionally impermissible, particularly where an inmate is tried under the law of parties. Pl.'s Resp. 51-52, ECF No. 47. He also asserted that Texas courts have denied DNA testing on that ground too broadly, i.e., unless the evidence of guilt is extraordinarily weak and testing would show the inmate had nothing to do with the crime. *Id.* at 51. Gutierrez was incorrect in both respects.[16]

Gutierrez's claim that it is constitutionally impermissible to deny testing where exculpatory results would only "muddy the waters" is flatly contrary to *Osborne*. 557 U.S. at 65, 70. There is nothing constitutionally impermissible about Texas courts' application of a basis that is the functional equivalent of one—"would likely be conclusive"—the Supreme Court has approved. *Osborne*, 557 U.S. at 65, 70; *see Gutierrez v. Saenz*, 818 F. App'x at 312. Moreover, Gutierrez did not identify any case in which the CCA has authoritatively construed Chapter 64 as disentitling inmates who were tried as a party from

16. Gutierrez's complaint that the CCA denied testing in 2011 because DNA testing would "muddy the waters" is curious. Pl.'s Resp. 52, ECF No. 47. If, as Gutierrez insists, he is not challenging the CCA's 2011 denial of DNA testing, then its reference to the "muddy the waters" concept should be of no moment. Indeed, the CCA did not deny Gutierrez's request for DNA testing in 2020 because testing would only muddy the waters. *Gutierrez v. State*, 2020 WL 918669, at *7-9. Instead, the CCA simply found that exculpatory results would not have changed the outcome of his trial. *Id.*

DNA testing. Pl.'s Amended Compl. 25, ECF No. 45. In fact, Gutierrez pointed only to a state court opinion that found reasonable grounds for DNA testing where the inmate was tried as a party. Pl.'s Resp. 61 (citing *Garcia v. State*, No. 01-05-00718-CR, 2007 WL 441716, at *3 (Tex. App.—Houston [1st Dist.], Feb. 8, 2007)); *see also State v. Long/ Shelton/Pitts /Kussmaul*, 2015 WL 2353017, at *2 (Tex. App.—Waco, May 14, 2015) (affirming trial court's finding that movants would not have been convicted as a principal or a party in light of DNA testing results). Consequently, Gutierrez entirely failed to show that Chapter 64, as authoritatively construed, is unfairly applied to those convicted under the law of parties.

Gutierrez is also incorrect that Texas courts apply the muddy-the-waters concept to deny testing unless there is extraordinarily weak evidence of guilt. Pl.'s Resp. 51. For example, the CCA has granted testing despite "overwhelming eyewitness identification and strong circumstantial evidence," *Esparza v. State*, 282 S.W.3d 913, 922 (Tex. Crim. App. 2009), where the victim knew the defendant and identified him as her attacker, *Blacklock v. State* 235 S.W.3d 231, 232-33 (Tex. Crim. App. 2007), and because the results could show that the jury would not have found beyond a reasonable doubt that the defendant was guilty. *Routier v. State*, 273 S.W.3d 241, 259 (Tex. Crim. App. 2008). And this, of course, does not include the many cases in which Texas inmates have been granted testing in cases that do not result in appellate opinions. *See*, *e.g.*, *Wilson v. State*, No. 74,390, 2003 WL 1821465, at *2 (Tex. Crim. App. Mar. 26, 2003) ("In fact, numerous trial courts have granted DNA testing for convicted persons who

satisfy the requirements of Articles 64.01 and 64.03.") (collecting cases). Gutierrez's unsupported argument to the contrary reveals that his claim is founded on nothing more than his disagreement with the CCA's decision in his case. And these cases disprove Gutierrez's assertion that Chapter 64, as construed by the CCA, "has erected an insuperable barrier" to DNA testing. Pl.-Appellee's Opp'n to Mot. to Vacate 19, *Gutierrez v. Saenz, et al.*, No. 20-70009 (5th Cir. June 12, 2020).

Gutierrez made no showing that it is fundamentally unfair to deny DNA testing where exculpatory results will not advance the clarity of the evidentiary landscape. The Supreme Court approved of procedures that included such a limitation in *Osborne.* 557 U.S. at 65. Gutierrez cannot succeed in challenging such a limitation here. *See Morrison*, 809 F.3d at 1068 ("[I]t does not violate due process to evaluate what potential impact a negative DNA test could have"); *Garcia v. Sanchez*, 793 F. Supp. 2d 866, 891 (W.D. Tex. 2011) ("There is nothing fundamentally unfair about requiring a criminal defendant such as plaintiff . . . to establish that any new evidence which might result from additional DNA testing raise legitimate doubts as to the defendant's guilt before such testing will be required.").

Gutierrez also argued that Alabama's procedures, which he asserted are similar to Chapter 64, were found potentially impermissible. Pl.'s Resp. 50, ECF No. 47 (citing *Wilson v. Marshall*, No. 2:14-CV-1106, 2018 WL 5074689, at *14 (M.D. Ala. Sept. 14, 2018)). But Gutierrez was flatly incorrect that Defendants made no meaningful attempt to

defend Chapter 64's "escape hatch." *Id.* Again, *Osborne's* approval of the inclusion of a materiality standard renders Gutierrez's DNA claims inviable. *See Morrison*, 809 F.3d at 1068. But more importantly, Alabama's "escape hatch" to which Gutierrez referred differs from Texas's materiality standard entirely. Alabama's postconviction DNA testing statute permits a court to deny a motion for testing if "the court determines that there is no reasonable probability that the testing *will produce* exculpatory evidence." Ala. Code § 15-18-200(f)(2) (emphasis added). Chapter 64's materiality standard requires a court to assume, as the CCA did in this case, that exculpatory results would be obtained through testing. Tex. Code Crim. Proc. art. 64.03(a)(2)(A); *see Routier*, 273 S.W.3d at 257 ("For purposes of this inquiry we must assume (without deciding, of course) that the results of all of the post-conviction DNA testing to which the appellant is entitled under Article 64.01(b) would prove favorable to her."). Gutierrez elided this crucial distinction, which renders *Wilson* entirely inapt.

Gutierrez also argued the CCA should not have been permitted to consider his cohorts' statements in making its materiality determination. Pl.'s Resp. 61, ECF No. 47. Gutierrez identified no support for his challenge. Notably, in federal habeas proceedings, a petitioner may avoid a procedural default by showing he is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). Under *Schlup*, a court considers "all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available

only after the trial." *Id.* at 328; *see House v. Bell*, 547 U.S. 518, 536-37 (2006).

Moreover, the CCA referred to Gutierrez's cohorts' statements only to conclude—as Gutierrez's confession already made clear—that he was inside the victim's home when she was murdered. *Gutierrez v. State*, 2020 WL 918669, at *7. Contrary to Gutierrez's assertion, the CCA did not give "preclusive effect" to the cohorts' statements. Pl.-Appellee's Opp'n to Mot. to Vacate 26, *Gutierrez v. Saenz, et al.*, No. 20-70009 (5th Cir. June 12, 2020); *see Gutierrez v. State*, 2020 WL 918669, at *7 ("[T]hese three consistent statements unequivocally place [Gutierrez] inside Harrison's home at the time of her murder."). Indeed, the CCA's conclusion would have certainly been the same even without reference to the cohorts' statements. In applying Chapter 64's materiality standard, the CCA referred only to *Gutierrez's* confession—not his cohorts' statements—and assumed Gutierrez's version of events was true in finding he failed to show that exculpatory results obtained from the various pieces of evidence would have changed the outcome of his trial. *Id.* at *7-9 (the CCA's repeated references to "[Gutierrez's] own statement"). Consequently, Gutierrez cannot show it was fundamentally unjust for the CCA to consider his cohorts' statements and their reliability in reaching a limited conclusion—that Gutierrez was in Ms. Harrison's home when she was murdered—that was already plainly established by other evidence.

Gutierrez also argued that Chapter 64 violates procedural due process because it does not provide for

testing to prove ineligibility for the death penalty.[17] Pl.'s Resp. 62-63, ECF No. 47. But 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 Osborne*, 557 U.S. at 69; *Emerson v. Thaler*, 544 F. App'x 325, 327-28 (5th Cir. 2013). Indeed, "due process does not dictate the exact form [postconviction relief] must assume." *Osborne*, 557 U.S. at 69. Texas has not provided procedures to vindicate a substantive right to DNA testing to prove innocence of the death penalty. Gutierrez cannot require it to do so, and his claim cannot succeed where he purported to make a procedural due process challenge to a non-existent procedure. *See Osborne*, 557 U.S. at 69. This claim was simply outside the scope of *Osborne;* it was not based "within the framework of the State's procedures for postconviction relief."[18] *Id.; cf. Dawson v. Suthers*, No. 14-CV-1919, 2015 WL 5525786, at *5 (D. Colo. Sept. 21, 2015) ("It is patently reasonable for the government to grant persons claiming actual innocence more access to postconviction remedies than it grants persons who claim that their culpability for a crime is lessened by a diminished capacity."). Consequently, Gutierrez failed to state a claim upon which relief could be granted.

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17. Gutierrez waived this claim by not raising it in the Fifth Circuit.

18. Additionally, the CCA assumed Chapter 64 provided for testing for the purpose of affecting punishment and decided Gutierrez was not entitled to such testing. *Gutierrez v. State*, 2020 WL 918669, at *8.

Lastly, to the extent Gutierrez argued that the CCA's denial of his motion harmed him because exculpatory results would have changed the result of his trial, such a claim is plainly an as-applied challenge to Chapter 64 beyond this Court's jurisdiction. Pl.'s Resp. 53-58, ECF No. 47; *see Alvarez*, 679 F.3d at 1262. Nonetheless, as the CCA discussed, the evidence against Gutierrez included his confession to arranging a burglary of Ms. Harrison's home and being in Ms. Harrison's home when she was murdered, a positive identification of Gutierrez by someone who did not know him, and three of Gutierrez's friends stating that he was near Ms. Harrison's trailer park on the evening of her murder. *Id.* at 886; *see Gutierrez v. Saenz*, 818 F. App'x at 312 ("In his briefing before this Court, [Gutierrez] wholly failed to show how the DNA testing he requests would be 'sufficiently material' to negate his guilt thus justifying the pursuit of DNA testing at this late date."). Gutierrez's effort to avoid the import of that circumstantial evidence fails.

As discussed above, Gutierrez's DNA claims cannot succeed because they run headlong into *Osborne.* He has identified no plausible meritorious challenge to Chapter 64. *Gutierrez v. Saenz*, 818 F. App'x at 312. Consequently, this Court should reconsider its prior order and dismiss all of Gutierrez's DNA claims with prejudice.

CONCLUSION

For these reasons, this Court should reconsider its order denying, in part, Defendants' motion to dismiss and dismiss with prejudice all of Gutierrez's DNA claims.

Respectfully submitted,

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Appendix I

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

CIVIL ACTION NO. 1:19-CV-185
DEATH PENALTY CASE

RUBEN GUTIERREZ,

Plaintiff,

v.

LUIS SAENZ, *et al.*,

Defendants.

ORDER

Defendants' Motion to Reconsider Order Denying Motion to Dismiss is hereby GRANTED and Plaintiff's DNA claims in this case are DISMISSED WITH PREJUDICE.

It is so ORDERED.

SIGNED on this ____ the day of _____, 2020.

/s/_____
JUDGE PRESIDING

Appendix J – Memorandum and Order of the United States District Court for the Southern District of Texas Granting in Part and Denying in Part Motion to Dismiss (June 2, 2020)

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

Civil Action No. 1:19-CV-185

RUBEN GUTIERREZ,

Plaintiff,

vs.

LUIS V. SAENZ, *et al.*,

Defendants.

Filed June 2, 2020

MEMORANDUM AND ORDER

The Court is in receipt of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon which Relief can be Granted, Dkt. No. 46. The Court is also in receipt of Plaintiff Ruben Gutierrez's (Gutierrez's) Response in Opposition to the Motion to Dismiss and Motion for Stay of Execution, Dkt. No. 47. This memorandum is divided into two parts, one considering the motion to dismiss the DNA claims the other considering the motion to dismiss the execution-chamber claims.

Appendix J

For the reasons stated below the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion to dismiss, Dkt. No. 46. The Court does not address the motion to stay execution in this Memorandum and Order and will consider that motion in a separate order.

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, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (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. Pursuant to February 28, 2020 Order Setting Execution Date he is scheduled to be executed on June 16, 2020 after 6:00 p.m. *Id.* Gutierrez was indicted along with Rene Garcia and Pedro Garcia for the robbery and murder of Escolastica Harrison ("Ms. Harrison"). *Id.* at 6. Pedro Garcia was released on bond and absconded. *Id.* Rene 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. 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.

On August 27, 2010, Judge Benjamin Euresti, Jr., the presiding judge of the 107th District Court, denied Gutierrez DNA testing under Chapter 64 of the Texas Code of Criminal Conduct and Procedure ("Chapter 64"). Dkt. No. 45 at 9; Tex. Crim. Proc. Code art. 64. The Texas Court of Criminal Appeals ("CCA") affirmed a denial of testing on the merits in 2011. Dkt. No. 45 at 9; *Ex parte Gutierrez*, 337 S.W.3d 883, 886 (Tex. Crim. App. 2011). On June 14, 2019, Gutierrez again sought DNA testing under a revised version of the statute. Dkt. No. 45 at 12-13. Judge Euresti granted the request on June 20, 2019 and his order was filed at 9:09 a.m. On June 27, 2019, two events occurred: at 11:10 a.m. Judge Euresti withdrew his order granting testing and at 11:13 a.m. he denied the motion for 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).[1] The CCA affirmed the 2019 denial of testing on the merits in 2020. Dkt. No. 45 at 13; *Gutierrez v. State*, No. AP-77,089, 2020 Tex. Crim. App. Unpub. LEXIS 97, 2020 WL 918669, at *1 (Tex. Crim. App. Feb. 26, 2020).

1. The Court takes judicial notice of the proceedings in *Ex Parte Ruben Gutierrez*, 98-CR-1391-A (Tex. 107th Judicial Dist. Ct.).

Appendix J

A. Complaint

This action arises under 42 U.S.C. § 1983 and challenges the constitutionality of Chapter 64. Dkt. No. 45 at 3; Tex. Crim. Proc. Code art. 64. Gutierrez challenges the constitutionality of post-conviction DNA testing section on its face and as it has been applied to him. *Id.* He claims the statute violates procedural due process because it denies a movant the ability to test evidence that would demonstrate he is innocent of the death penalty and it is unequally and unfairly applied to someone who is convicted under the law of parties. He also claims its different outcome standard is overbroad. Dkt. No. 45 at 25-26.

Gutierrez also claims a violation of his First Amendment right to access the courts, and his Eighth Amendment right to be free from cruel and unusual punishment. *Id.* at 31. He seeks a declaratory judgment holding Chapter 64 unconstitutional. *Id.* at 37.

Gutierrez challenges the State's refusal to release biological evidence for testing and requests an order declaring that the withholding of evidence for testing violates his rights and requests a preliminary and permanent injunction requiring the evidence be released for testing. *Id.* at 38. Gutierrez seeks testing of:

- blood sample taken from Ms. Harrison and retained by the Texas DPS McAllen Laboratory, pending pick up by the District Attorney;

- nightgown belonging to Ms. Harrison that may have touch DNA from her assailant(s);

- shirt belonging to Ms. Harrison's nephew and housemate, Avel Cuellar, containing apparent blood stains; retained by the Texas DPS McAllen Laboratory pending pick up by the District Attorney;

- nail scrapings in which "[a]pparent blood was detected" were taken from Ms. Harrison during autopsy and submitted to Det. Hernandez as part of rape examination kit;

- blood samples collected from a bathroom, from a raincoat located in or just outside Avel Cuellar's bedroom, and from the sofa in the front room of Ms. Harrison's house; and

- a single loose hair found around the third digit of the victim's left hand recovered during autopsy and submitted to Det. Hernandez as part of rape examination kit.

Dkt. No. 45 at 17-18.

Gutierrez claims he will be executed under conditions that violate the First Amendment's Free Exercise and Establishment Clauses and that substantially burden the exercise of his religious beliefs protected by the Religions Land Use and Institutionalized Persons Act ("RLUIPA")

of 2000, 42 U.S.C. § 2000cc *et seq. Id.* at 15. He claims relief is necessary to ensure he is executed in way that does not unfairly burden the exercise of his religious beliefs. *Id.* at 4.

Gutierrez requested a TDCJ-employed chaplain to accompany him during his final moments in the execution chamber. His request was denied based on the TDCJ execution procedure adopted on April 2, 2019, which prohibits all religious or spiritual advisors from entering the execution chamber. That TDCJ policy now states: "TDCJ Chaplains and Ministers/Spiritual Advisors designated by the offender may observe the execution only from the witness rooms." Facing an execution date, Gutierrez filed this lawsuit requesting "a reasonable accommodation to have a Christian chaplain in the execution chamber when he is executed. . . ." Dkt. No. 45 at 3.

Gutierrez maintains "having a Christian chaplain present in the chamber would help to ensure his path to the afterlife." Dkt. No. 45 at 14. Gutierrez alleges that TDCJ previously had a policy which "allowed a TDCJ-approved chaplain to be present inside the execution chamber at the time of execution, and that both TDCJ Chaplains J. Guy and Wayne Moss have indicated that they are willing to be present in the chamber at his execution (but for TDCJ's April 2019 Execution Procedure)." Dkt. No. 45 at 14. Gutierrez argues that TDCJ's new execution protocol violates (1) the First Amendment's Establishment Clause because it is not neutral between religions (claim four); (2) his Free Exercise rights by interfering with his ability to

practice his religion (claim five); and (3) the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, et seq. ("RLUIPA") (claim six).[2] Gutierrez requests a declaratory judgment that TDCJ's current policy violates the First Amendment and RLUIPA.

Gutierrez also requests a preliminary and permanent injunction prohibiting his execution until it can proceed in a manner that does not violate his rights.

III. Motion to Dismiss

Defendants filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim on which relief can be granted. Dkt. No. 46; *See* Fed. R. Civ. P. 12. Defendants argue in their motion that:

- Gutierrez is requesting mandamus relief for DNA testing, something it does not have jurisdiction to order. *Id.* at 17.

- Gutierrez's complaint is also a collateral attack on a state court decision rather than the Texas DNA testing statute and that the claims fail under the *Rooker-Feldman* doctrine for lack of jurisdiction. *Id.* at 30.

- They are entitled to Eleventh Amendment immunity to the extent Gutierrez seeks

2. Gutierrez's execution-chamber claims only apply to Defendants Davis, Collier, and Lewis.

anything beyond declaratory and injunctive relief. *Id.* at 26.

- The DNA testing claim is untimely. *Id.* at 33.

- Gutierrez's due process claims are barred by issue preclusion. *Id.* 37.

- Gutierrez's DNA challenge to his execution is only cognizable in habeas corpus. *Id.* at 38.

- Gutierrez's claims are "patently meritless" and the Texas DNA testing statutory framework protects inmates' rights. *Id.* at 39-61.

- The testing framework as written and applied by the CCA does not offend fundamental fairness and Gutierrez's claim fails as a matter of law. *Id.* at 46.

- This Court should dismiss Gutierrez's execution-chamber claims because he did not exhaust remedies by completing the prison grievance process. *Id.* at 22.

- Gutierrez's execution-chamber claims fail to state a claim upon which relief can be granted. *Id.* at 77.

Gutierrez's response to the motion to dismiss also includes a motion for stay of execution. Dkt. No. 47. He avers that he does not seek mandamus relief and that his claims are not subject to dismissal on jurisdictional grounds. *Id.* at 12, 22. Gutierrez argues his claims are not barred by the statute of limitations and issue preclusion does not bar his due process claims. *Id.* at 38. Gutierrez generally argues the Court has jurisdiction to consider his claims and that he states claims upon which relief can be granted. *Id.*; *see* Fed. R. Civ. P. 12. Gutierrez contends that his religion claims are exhausted and that he states a claim upon which relief can be granted. Dkt. No. 47 at 71-72. Gutierrez argues he may seek declaratory and injunctive relief from Defendants and that he names appropriate defendants for his lawsuit. *Id.* at 22.

IV. Motion to Dismiss Legal Standard

A. 112(b)(1) Lack of Subject Matter Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to assert a "lack of subject-matter jurisdiction" defense. Fed. R. Civ. P. 12(b)(1). In *Paterson v. Weinberger*, the Fifth Circuit distinguished between Rule 12(b)(1) facial and factual attacks: [I]f the defense merely files a Rule 12(b)(1) motion [and thereby makes a "facial attack"], the trial court is required merely to look to the sufficiency of the allegations in the complaint because they are presumed to be true. If those jurisdictional allegations are sufficient, the complaint stands. If a defendant makes a "factual attack" upon the court's subject matter jurisdiction over the lawsuit, the defendant submits

affidavits, testimony, or other evidentiary materials. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981). A Rule 12(b)(1) motion should be granted when "it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction." *Carroll v. Abide*, 788 F.3d 502, 504 (5th Cir. 2015).

B. 12(b)(6) Failure to State a Claim Upon Which Relief Can be Granted

Federal Rule of Civil Procedure 12(b)(6) authorizes a defendant to move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When performing a Rule 12(b)(6) analysis, all well-pleaded facts in the complaint must be accepted as true, and the complaint must be construed in a light most favorable to the plaintiff. *SEC v. Cuban*, 620 F.3d 551, 553 (5th Cir. 2010). To prevail past a motion to dismiss "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* A complaint does not need detailed factual allegations. *Id.* A claim survives a motion to dismiss when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The standard is one of plausibility not probability. *Id.* The court is not ruling on whether it

is likely the plaintiff will prevail but rather whether the plaintiff may proceed to offer evidence in support of its claims. *See id.* In evaluating a plaintiff's complaint in light of a defendant's motion to dismiss under Rule 12(b)(6), a court may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. It is not the duty of this Court to create a claim which has not been spelled out in the pleading. *Case v. State Farm Mut. Auto. Ins. Co.*, 294 F.2d 676, 678 (5th Cir. 1961).

DNA TESTING CLAIMS

V. Legal Standard

A. 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, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 55, 129 S. Ct. 2308, 174 L. Ed. 2d 38, (2009).

Such § 1983 actions are limited but not barred by the *Rooker-Feldman* doctrine. *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 adverse state court decisions 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. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (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. *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, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (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, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (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, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). Additionally, 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." *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 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 stated 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 challenges is not permissible if used to collaterally attack the state court judgment. *McKithen v. Brown*, 481 F.3d 89, 98-99 (2d Cir. 2007) ("by 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 post-conviction 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)).

B. Eleventh Amendment Immunity and Proper Defendants

The Eleventh Amendment provides state officials immunity from suit in federal court. An exception exists when a state actor enforces an unconstitutional law. *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). "Immunity does not bar suits against defendants in their official capacities." *Johnson v. Kegans*, 870 F.2d 992, 998 (5th Cir. 1989). To be a proper defendant in such a declaratory/injunctive action a defendant must have a connection to the enforcement of the disputed act. *K.P.*, 627 F.3d at 124. In *Skinner*, the Court found the plaintiff had properly stated a claim against Lynn Switzer, a district attorney, whose office had custody of the evidence plaintiff sought to have tested. *Skinner v. Switzer*, 562 U.S. at 529; *see also Emerson*, 544 F. App'x at 328 n. 2.

C. Access to the Courts

Prisoners have a right to some legal assistance to have meaningful access to the Courts. *Lewis v. Casey*, 518 U.S. 343, 350, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606 (1996). But access to the Courts does not encompass the ability to discover grievances. *Id.*

VI. DNA Testing Analysis

A. Subject Matter Jurisdiction and *Rooker-Feldman*

This Court does not have jurisdiction to consider a challenge to the CCA's decisions on Gutierrez's DNA testing motion itself, as it is barred by the *Rooker-Feldman* doctrine. *See Lance*, 546 U.S. at 463 (noting the "aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly"). Such a challenge, if successful, would effectively nullify a state court judgment, and only the Supreme Court is vested with jurisdiction for appeals from final state-court judgments. *See id.* The Court additionally does not have subject matter jurisdiction over Gutierrez's as-applied challenge to the extent it seeks to relitigate his state DNA testing complaint, as it also falls under the ambit of *Rooker-Feldman* as well. *See id; Alvarez.*, 679 F.3d at 1263; *Wade v. Monroe Cty. Dist. Attorney*, 800 F. App'x 114, 119 (3d Cir. 2020).

Gutierrez states in his response that he does not seek mandamus relief to compel a different outcome from the one he received from the CCA. Dkt. No. 47 at 19. Yet, Gutierrez also asks the Court in his complaint to

issue a "preliminary and permanent injunction requiring Defendants to produce and release for DNA testing" evidence he desires tested. Dkt. No. 46 at 38. The Court does not have jurisdiction to order such testing because it runs aground on a *Rooker-Feldman* shoal. *See Lance*, 546 U.S. at 463; *Skinner*, 562 U.S. at 532.

Accordingly, the Court **GRANTS** Defendant's motion to dismiss for lack of subject matter jurisdiction for claims which seek direct relief of a state court judgment, as barred by the *Rooker-Feldman* doctrine. *See Lance*, 546 U.S. at 463; *Carroll*, 788 F.3d at 504; *Skinner v. Switzer*, 562 U.S. at 532.

Yet just because some claims may be barred by the narrow *Rooker-Feldman* doctrine, that does not mean all causes of action relating to a state-court proceeding are barred. *Lance*, 546 U.S. at 464. This Court does have subject matter jurisdiction to consider federal questions, such as those brought within a § 1983 civil action for the deprivation of rights. *Osborne*, 557 U.S. at 69-70; *Skinner*, 562 U.S. at 532. Gutierrez's complaint articulates numerous federal grounds of relief regarding the DNA testing statute itself, for example: "a declaratory judgment that Article 64 of the Texas Code of Criminal Procedure, as applied by the CCA, is unconstitutional." *See id.*; Dkt. No. 45 at 36. Accordingly, just as the Courts in *Osborne* and *Skinner* had jurisdiction, this Court has jurisdiction to consider those questions and **DENIES** Defendants' motion to dismiss for lack of jurisdiction. *See id.*; *Carroll*, 788 F.3d at 504; *Osborne*, 557 U.S. at 69-70; *Skinner*, 562 U.S. at 532; *Elam v. Lykos*, 470 F. App'x. 275, 276 (5th Cir. 2012).

B. Eleventh Amendment and Proper Defendants

The Court must consider whether suit against defendants in this action is barred by the Eleventh Amendment. In DNA testing challenges district attorneys have been accepted as an appropriate defendant under the declaratory relief exception to Eleventh Amendment immunity because of their custodianship of the evidence at issue and role in the statute itself. *Skinner*, 562 U.S. at 529; *see also, Morrison v. Peterson*, 809 F.3d 1059, 1070 (9th Cir. 2015); *McKithen v. Brown*, 481 F.3d 89, 98-99 (2d Cir. 2007); *Wade v. Monroe Cty. Dist. Attorney*, 800 F. App'x 114, 119 (3d Cir. 2020).

Here, Saenz and Sauceda are the parties who have custody over the evidence Gutierrez seeks to have tested under the DNA statute. Because of their connection to the statute, its constitutionality directly implicates their duties under it. *See* Tex. Crim. Proc. Code art. 64. This Court again follows the path laid down by the Supreme Court in *Skinner* and concludes the Eleventh Amendment does not bar suit against Sauceda and Saenz for purposes of this DNA testing challenge for declaratory and injunctive relief. *See id.*

Defendants' argument that Saenz is absolutely immune from suit is misplaced as Saenz is being sued in his official capacity. Just as in *Skinner*, where a District Attorney was properly subject to suit in a DNA testing challenge, Saenz and Sauceda are proper parties here. *See Skinner*, 562 U.S. at 529; *Johnson*, 870 F.2d at 998 n.5.

Gutierrez states that the other Defendants are party to this suit for his religion claims, therefore it would be improper to dismiss them for a lack of connection to his DNA claims. *See* Dkt. No. 47 at 31. Accordingly, the Court **DENIES** Defendants' motion to dismiss on Eleventh Amendment grounds.

C. Stating a DNA Claim Under *Osborne* and *Skinner*

Gutierrez's claims challenge the constitutionality of the DNA testing statute on its face and as applied. Dkt. No. 45. He claims the statute violates procedural due process because: it denies a movant the ability to seek testing of evidence that would demonstrate he is innocent of the death penalty and it is unequally and unfairly applied to people who are convicted as a party. He argues the "different outcome" standard is overbroad. Dkt. No. 45 at 25-26. These claims are emblematic of claims upon which relief can be granted as they clearly state the alleged harm and relief requested. Indeed, this challenge tracks precisely the bounds of a DNA statute challenge the Supreme Court set out in *Osborne* and *Skinner*. *See Osborne*, 557 U.S. at 69-70; *Skinner*, 562 U.S. at 529.

As opposed to other claims that have been dismissed as frivolous or masked collateral attacks on state court judgments, Gutierrez descriptively identifies how Chapter 64 and its authoritative interpretation by the CCA may be denying a constitutional right. *See Elam*, 470 F. App'x. at 276; *Morrison*, 809 F.3d at 1070; *McKithen*, 481 F.3d at 98-99; *Wade*, 800 F. App'x at 119; *Alvarez*, 679 F.3d at 1263.

The Court **DENIES** Defendants' motion to dismiss for failure to state a claim regarding Gutierrez's claims challenging the constitutionality of Chapter 64.

D. DNA Testing Statute of Limitations

The CCA considered Gutierrez's Chapter 64 DNA testing motion on the merits on February 26, 2020. *Gutierrez v. State*, No. AP-77,089, 2020 Tex. Crim. App. Unpub. LEXIS 97, 2020 WL 918669, at *1 (Tex. Crim. App. Feb. 26, 2020). The CCA's 2020 opinion was also the first time it considered Gutierrez's claims under a revised version of the DNA testing statute. *Id.* Therefore, the CCA's decision began a new accrual period that was distinct from Gutierrez's 2009 petition under a prior version of the statute. *See Ex parte Gutierrez*, 337 S.W.3d 883, 886 (Tex. Crim. App. 2011). February 26, 2020 is the date Gutierrez would have reason to know of his alleged injury, and he filed his amended complaint April 22, 2020, well within the two-year statute of limitations period. *See* Dkt. No. 45; *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993); *Piotrowski*, 237 F.3d at 576.

The Court **DENIES** Defendants' motion to dismiss for failure to state a claim on statute of limitations grounds.

E. DNA Testing Issue Preclusion

A § 1983 challenge for the deprivation of a constitutional right is not the same as a Chapter 64 motion for DNA testing, nor was the DNA testing motion litigated or ruled on as a deprivation of right challenge. *See* Dkt. No. 45;

Gutierrez v. State, No. AP-77,089, 2020 Tex. Crim. App. Unpub. LEXIS 97, 2020 WL 918669, at *1 (Tex. Crim. App. Feb. 26, 2020). Gutierrez cannot know of, or challenge how a court will interpret and apply the statute to form the basis of a § 1983 suit for deprivation of constitutional right before such an interpretation is issued. *See id.* There is no record before the Court that Gutierrez litigated the constitutionality of the CCA's 2020 interpretation of the DNA testing statute in any other forum. Accordingly, issue preclusion does not apply. *See Weaver v. Texas Capital Bank N.A.*, 660 F.3d 900, 906 (5th Cir. 2011).

The Court **DENIES** Defendants' motion to dismiss for failure to state a claim on issue preclusion grounds.

F. Eighth Amendment Claims

Gutierrez's Eighth Amendment claim, that the DNA statute allows an execution to be carried out in a cruel and unusual way because it permits the execution of an innocent person, does not fall within the bounds of *Osborne* and *Skinner*. *See* Dkt. No. 45 at 37-38; *Skinner*, 562 U.S. 521. DNA statute claims are allowed to proceed under § 1983 because they do not challenge the guilt or innocence of the defendant. *Osborne*, 557 U.S. at 69-70; *Skinner*, 562 U.S. at 532. An essential element of Gutierrez's Eighth Amendment challenge is his purported innocence; therefore, the Court finds this claim necessarily implies the invalidity of the conviction and a remedy is not available in this § 1983 action. *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); *Skinner*, 562 U.S. 521. The Court **GRANTS** Defendants'

motion to dismiss Gutierrez' Eighth Amendment DNA testing claims for failure to state a claim upon which relief can be granted.

G. Access to Courts

Gutierrez's complaint does not state facts demonstrating a denial of mandated legal assistance, or other access to court issues. *See* Dkt. No. 45. A denial of DNA testing on the merits does not create an access to the courts claim as he has access to the Courts to litigate his grievances. *See* Dkt. No. 45 at 37; *Lewis v. Casey*, 518 U.S. 343, 350, 354, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). Accordingly, the Court **GRANTS** Defendants' motion to dismiss Gutierrez's access to the courts claim for failure to state a claim.

H. Merit of Gutierrez DNA Statute Claims

Defendants argue Gutierrez's DNA statute claims fail on the merits because nothing in the statute or the CCA's opinions violates procedural due process. Dkt. No. 46 at 39. Defendants correctly identify the *Medina* test that governs criminal procedural due process for DNA claims. Dkt. No. 46 at 60. However, Defendants fail to apply the *Medina* factors to Gutierrez's complaint. *Id.* Defendants do not cite binding authority as to why Texas' DNA testing statute is constitutional on its face and as applied by the CCA. Dkt. No. 46 at 73. The legal waters become murkier when Defendants improperly state the DNA standard

under review in *Osborne*,[3] and cite the CCA's own opinion for the proposition that Gutierrez is not entitled to DNA testing for evidence that could show he is innocent of the death penalty. *Id.*

In Gutierrez's complaint and response, he argues for relief based on several legal claims that the Court is dismissing in this opinion. Neither party has demonstrated a success or failure on the merits of Gutierrez's complaint and the fundamental adequacy of the process provided under Texas' DNA testing statute. *See Osborne*, 557 U.S. at 69; *Medina v. California*, 505 U.S. 437, 446, 112 S. Ct. 2572, 120 L. Ed. 2d 353; *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281; *see e.g.*, *Harris v. Lykos*, No. 12-20160, 2013 U.S. App. LEXIS 6106, 2013 WL 1223837, at *1 (5th Cir. Mar. 27, 2013). The Court expects the narrowing of issues will focus the legal briefing as this case progresses.

EXECUTION-CHAMBER CLAIMS

VII. Legal Standard

A. PLRA Exhaustion

Section 1997(e) of the Prison Litigation Reform Act (PLRA) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this

3. The standard cited by Defendants, Dkt. No. 46 at 58, is the post-conviction relief standard in Alaska, not the standard for access to DNA testing. *Osborne*, 557 U.S. at 65.

title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). TDCJ's grievance procedures require inmates to complete a two-step grievance process before a claim is exhausted. *See Rosa v. Littles*, 336 F. App'x 424, 428 (5th Cir. 2009) (citing *Johnson v. Johnson*, 385 F.3d 503, 515 (5th Cir. 2004)). Inmates must first file a Step One grievance within fifteen days of any alleged incident. *See Rosa*, 336 F. App'x at 428. Inmates may then appeal the Warden's decision on the Step One grievance by filing a Step Two grievance. *Id.* The Fifth Circuit "has held that, pursuant to the TDCJ's grievance process, a prisoner must pursue a grievance through both steps for it to be exhausted." *Id.*; *see also Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001) (stating that a prisoner must "pursue the grievance remedy to conclusion").

The PLRA's exhaustion requirement only requires a prisoner to complete "administrative remedies *as are available*. . . ." 42 U.S.C. § 1997e(a) (emphasis added). The Supreme Court has instructed that an inmate is only required to exhaust those "grievance procedures that are 'capable of use' to obtain '*some relief* for the action complained of.'" *Ross v. Blake*, ___ U.S. ___, 136 S. Ct. 1850, 1859, 195 L. Ed. 2d 117 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 738, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001)) (emphasis added). An inmate is not required to exhaust "an administrative remedy, although officially on the books, [which] is not capable of use to obtain relief." *Ross*, 136 S. Ct. at 1859; *but see Valentine v. Collier*, 956 F.3d 797, 804 (5th Cir 2020) ("[S]o long as the State's

administrative procedure grants authority to take *some action* in response to a complaint, that procedure is considered available, even if it cannot provide the remedial action an inmate demands.") (emphasis added).

B. First Amendment

Regarding regulation of First Amendment rights, the Supreme Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984). Accordingly, the Supreme Court has provided different considerations in First Amendment cases that depend on the context, including the *Turner* standard for some constitutional claims in the prison context. Under *Turner*, a federal court considers: (1) whether a "valid, rational connection exists between the prison regulation and the legitimate governmental interest put forward to justify it," (2) whether there exist "alternative means of exercising the fundamental right that remain open to prison inmates," (3) what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," and (4) whether there is an "absence of ready alternatives" to the regulation in question. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

In *Lemon*, the Supreme Court set out the general test for determining whether a government practice violates the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

Under *Lemon*, a court deciding whether government policy or practice violates the Establishment Clause asks "(1) whether the government activity in question has a secular purpose, (2) whether the activity's primary effect advances or inhibits religion, and (3) whether the government activity fosters an excessive entanglement with religion." *Van Orden v. Perry*, 351 F.3d 173, 177 (5th Cir. 2003).

C. RLUPIA

RLUIPA provides in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." RLUIPA "alleviates exceptional government-created burdens on private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005). Specifically, RLUPA states:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and

> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

VIII. Legal Analysis

A. PLRA Exhaustion

Gutierrez alleges he initially requested the presence of a TDCJ-employed chaplain through informal means. Dkt. No. 45 at 15. Gutierrez states that he spoke with TDCJ employees, filed an I-60 "Offender Request to Official" form, and had his attorneys email TDCJ's General Counsel on July 30, 2019 requesting a reasonable accommodation. Dkt. No. 1-1 at 16-17. When those efforts were unsuccessful, Gutierrez followed the formal grievance procedure by filing a Step One grievance on August 19, 2019. *Id.* at 18. Prison officials did not respond to Gutierrez's Step One grievance. Gutierrez filed this lawsuit on September 26, 2019, and no further action through the prison process has occurred. Dkt. No. 1.

Defendants argue that Gutierrez has failed to exhaust his administrative remedies. According to Defendants, even though Gutierrez received no response he should have proceeded to file a Step Two grievance and thus did not "satisfy even the 'spirit' of the exhaustion rule." Dkt. No. 46 at 22 n.10. Defendants support their argument by citing cases in which the Fifth Circuit has found a lack of exhaustion because an inmate failed to proceed to Step Two when he did not receive a response from prison

officials at Stage One. Dkt. No. 46 at 24-25 (collecting cases).

Gutierrez argues that his "inability to complete TDCJ's grievance process, however, was the direct result of Defendants' own design." Dkt. No. 47 at 15. Gutierrez emphasizes that "TDCJ's grievance procedures require the prison to answer a Step 1 grievance before a prisoner can file a Step 2 appeal of that decision. That requirement is made clear by TDCJ's Offender Orientation Handbook, which sets forth the grievance procedures." Dkt. No. 47 at 15. With the execution date of June 16, 2020, which was set on February 28, 2020, prison officials have not responded to Gutierrez's official requests.[4] Gutierrez alleges that TDCJ stonewalled to extinguish his complaints through the execution of his death sentence. Gutierrez argues that the exhaustion requirement cannot require him to disregard prison grievance procedure by filing a Step Two grievance without having received a response from prison officials, particularly when his execution could interrupt the grievance process. Dkt. No. 47 at 21-29.

Gutierrez also argues that a recent case indicates that exhaustion should be forgiven here. Facing an execution date, Patrick Henry Murphy asked TDCJ officials to allow his Buddhist spiritual advisor to accompany him in the execution chamber. Unable to resolve the case through informal means, Murphy filed suit in federal court without

4. According to his pleadings, TDCJ general counsel informed Gutierrez's attorneys by email that his request for a spiritual adviser in the execution chamber was denied. Dkt. No. 45 at 14.

having filed a prison grievance. *Murphy v. Collier*, 423 F. Supp. 3d 355, 361 (S.D. Tex. 2019). Notwithstanding his failure to exhaust, the U.S. Supreme Court stayed Murphy's execution. When the State of Texas again sought an execution date during the pendency of Murphy's litigation, the U.S. District Court found exhaustion unnecessary because TDCJ already had made clear it would not change its policy. *Murphy v. Collier*, No. 4:19-cv-1106, Order Staying Execution, Dkt. No. 57 at 5 n.1 (S.D. Tex. Nov. 7, 2019). On appeal, the Fifth Circuit rejected TDCJ's arguments based on exhaustion:

> The TDCJ also argues that the district court abused its discretion in granting the stay because Murphy's claims are unexhausted and therefore unlikely to succeed. Again, the Supreme Court implicitly rejected this argument in March. At every stage of the March 2019 proceedings, the TDCJ argued that Murphy's claims were unexhausted. The Supreme Court could not have permitted Murphy's case to proceed if it accepted the TDCJ's exhaustion argument. Because the Supreme Court has already rejected this argument, we reject it as well.

Murphy v. Collier, 942 F.3d 704, 709 (5th Cir. 2019).

Defendants attempt to distinguish the circumstances of the *Murphy* case because it came before the courts in a stay-of-execution context, rather than a Rule 12(b)(6) motion as in the instant case. Even with that distinction,

Defendants refuse to recognize a common element between the two cases: an important factual question exists of whether Texas prison officials will take any action through the general grievance process regarding an inmate's execution-chamber concerns.

Gutierrez gave notice of his claims through the formal process which halted when prison officials did not respond to his grievance. Dkt. No. 1-1 at 18. Gutierrez made even greater efforts to avail himself of the prison grievance procedure than those in *Murphy* where the Fifth Circuit and Supreme Court refused to stay an execution based on similar exhaustion arguments. *See Murphy*, 942 F.3d at 709; Dkt. No. 45 at 15. The lack of clarity created by *Murphy* regarding the exhaustion doctrine mirrors the lack of clarity on the exhaustion question in this case. A factual question exists about whether relief—which in this case presumably means a change to, or accommodation from, TDCJ policy—is actually available through the prison grievance process to death row inmates requesting the presence of a spiritual advisor in the execution chamber. Given the unresolved factual issue about the applicability of the PLRA exhaustion standard in this case, the Court **DENIES** Defendants' motion to dismiss on those grounds. *See* 42 U.S.C. § 1997e(a).

Before turning to the specific arguments that Defendants advance in the motion to dismiss, the Court discusses two fundamental concerns about their arguments. First, Defendants treat Supreme Court precedent regarding the application of the First Amendment in the prison context as settled when

important constitutional issues remain unclear. See Dkt. No. 46 at 77. Second, Defendants treat a recent statement by a Supreme Court Justice as settled law when his comments do not have the precedential effect necessary to prove that Gutierrez's claims fail as a matter of law, as discussed infra. *See id.* at 83.

B. Debate Over Legal Standard

Gutierrez's complaint argues that both the Free Exercise and Establishment Clauses of the First Amendment guarantee that a TDCJ-employed chaplain may accompany him into the execution chamber. Dkt. No. 45. The parties debate which standard should govern Gutierrez's First Amendment Claims. Gutierrez bases his arguments on *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). Defendants, on the other hand, argue that this Court instead should consider the claims under *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Supreme Court and Fifth Circuit law is not clear on which standard should govern Gutierrez's First Amendment claims. The Fifth Circuit has broadly stated that *Turner* is "the standard for establishing a First Amendment violation in the prison context." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 335 (5th Cir. 2009); *see also Omran v. Prator*, 674 F. App'x 353, 355 (5th Cir. 2016) (citing *Turner* and stating that "[p]rison policies that impinge on fundamental constitutional rights are reviewed under the deferential standard that a prison regulation is valid if it is reasonably related to legitimate penological interests"); *see also Baranowski v. Hart*, 486 F.3d 112, 120 (5th Cir.

2007) ("This court reviews prison policies that impinge on fundamental constitutional rights under the deferential standard set forth in *Turner*. . . ."). The Fifth Circuit has repeatedly applied the *Turner* framework to free-exercise claims in the prison setting. *See Triplett v. LeBlanc*, 642 F. App'x 457, 461 (5th Cir. 2016); *Mayfield v. Texas Dept. Of Criminal Justice*, 529 F.3d 599, 607 (5th Cir. 2008); *Freeman v. Texas Dept. of Criminal Justice*, 369 F.3d 854, 860 (5th Cir. 2004); *Adkins v. Kaspar*, 393 F.3d 559, 564 (5th Cir. 2004).

The U.S. Supreme Court, however, has not used *Turner* in every case arising from the prison system. *See Johnson v. California*, 543 U.S. 499, 510, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) (listing cases in which the Supreme Court has applied the *Turner* analysis). In fact, the Supreme Court has never used *Turner* to decide an Establishment Clause case brought by inmates. Fifth Circuit law is also not settled on whether *Turner* applies to Establishment Clause claims brought by inmates.[5]

5. Defendants point to a recent case in which a Fifth Circuit panel considered whether to apply *Lemon*'s strict scrutiny or *Turner* to an Establishment Clause case in the prison setting. In *Brown v. Collier*, 929 F.3d 218, 228-29 (5th Cir. 2019), Circuit Judge Priscilla Owen authored an opinion that was mostly joined by Judge Carolyn King. Judge King, however, did not join in the portion of the opinion endorsing the application of *Turner* to Establishment Clause cases. While Defendants rely on *Brown* to argue that *Turner* applies to all First Amendment claims, an opinion by one circuit judge is an insufficient basis to hold that Gutierrez's First Amendment claims fail as a matter of law. Other courts have been reluctant to use the *Turner* test in Establishment Clause cases. *See Americans United for Separation of Church*

The question of which First Amendment test will govern Gutierrez's claims is not determinative to the matters presently before the Court. As this case progresses, however, the Court will require additional briefing from the Parties with relevant law from this and other circuits related to which constitutional test governs the Establishment Clause claim.

C. Statements by Justice Kavanaugh

The Court notes that Defendants rely extensively on statements Justice Kavanaugh entered respecting the granting of the stay in the *Murphy* case. When the Supreme Court stayed Murphy's execution on March 28, 2019, Justice Kavanaugh entered a concurring statement which led to Texas' change in execution protocol. Justice Kavanaugh commented on equal-access aspects of Murphy's claim, proposing that "there would be at least

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and State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 426 (8th Cir. 2007) ("This court has consistently analyzed Establishment claims without mentioning the *Turner* standard, even when applying that standard to Free Exercise claims in the same case."); *Kaufman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir. 2005) (considering an Establishment Clause claim under *Lemon* test); *Scott v. Pierce*, 2012 U.S. Dist. LEXIS 190126, 2012 WL 12535442, at *3 (S.D. Tex. 2012) ("[T]he Supreme Court has never held that *Turner* should be applied to cases raising Establishment Clause issues."); *but see Rauser v. Horn*, 241 F.3d 330, 334 (3d Cir. 2001) (using the *Turner* standard in claim of retaliation against an inmate exercising Establishment Clause rights); *Maye v. Klee*, 915 F.3d 1076, 1085 (6th Cir. 2019) ("This circuit has not yet resolved the question of whether we look to *Turner* to determine whether prison officials violated the Establishment Clause. . . .").

two possible equal-treatment remedies available to the State going forward: (1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room." *Murphy v. Collier*, 139 S. Ct. 1475 (2019) (Kavanaugh, J., concurring),

On April 2, 2019, TDCJ followed Justice Kavanaugh's recommendation and changed its execution policy. Dkt. No. 1-1 at 8. On May 13, 2019, Justice Alito, joined by Justices Thomas and Gorsuch, entered statement dissenting from the Supreme Court's earlier order. Justice Alito's dissent argued that the Supreme Court should not have stayed Murphy's execution because he had not filed his section 1983 lawsuit in a timely manner. Justice Alito, however, went on to opine that the First Amendment issues in that case were not easily decided. Justice Alito highlighted that the "flimsy record" precluded any decision about whether Texas could safely accommodate Murphy's request to have his spiritual advisor in the execution chamber. Justice Alito stated "that the prison setting justifies important adjustments in the rules that apply outside prison walls. Determining just how far those adjustments may go is a sensitive question requiring an understanding of many factual questions that cannot be adequately decided on the thin record before us." Additionally, "unresolved factual issues" remained about whether the current policy furthers TDCJ's "compelling interest in security," "is narrowly tailored to serve that interest," and "can be sustained on that basis. . . ." *Murphy*, 139 S. Ct. at 1484 (Alito, J., dissenting from grant of application for stay).

Appendix J

In response to Justice Alito's dissent, Justice Kavanaugh authored a statement in which Chief Judge Roberts joined. Justice Kavanaugh recounted that "Texas changed its unconstitutional policy, and it did so effective immediately. Texas now allows all religious ministers only in the viewing room and not in the execution room." Justice Kavanaugh went on to opine:

> The new policy solves the equal-treatment constitutional issue. And because States have a compelling interest in controlling access to the execution room, as detailed in the affidavit of the director of the Texas Correctional Institutions Division and as indicated in the prior concurring opinion in this case, the new Texas policy likely passes muster under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U.S.C. § 2000cc et seq., and the Free Exercise Clause.
>
> Put simply, this Court's stay facilitated the prompt resolution of a significant religious equality problem with the State's execution protocol and should alleviate any future litigation delays or disruptions that otherwise might have occurred as a result of the State's prior discriminatory policy.

Murphy, 139 S. Ct. at 1476 (statement of Kavanaugh, J.).

Appendix J

Defendants argue that "the litigation in Murphy's case has little, if any, bearing on Plaintiff's Chaplain claim," Dkt. No. 46 at 69 n.32, but then repeatedly rely on Justice Kavanaugh's two statements as having established law that binds this Court. Defendants particularly use Justice Kavanaugh's statements to argue that *Turner* should apply to all Gutierrez's First Amendment claims and that Gutierrez has not pleaded a claim upon which relief can be granted. However, a statement by a Supreme Court Justice does not carry binding precedential effect. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 2020 U.S. LEXIS 2407, 2020 WL 1906545, at *7 (2020) (examining the precedential effect of an opinion by a single Supreme Court Justice and remarking that "no case has before suggested that a single Justice may overrule precedent"). Even if Justice Kavanaugh's statements could be construed as an indication of how the Supreme Court may rule in the future, this Court's role at the pleading stage is not to prognosticate the ultimate decision on an inmate's claim. The ultimate question in a Rule 12(b)(6) motion is whether, when viewed in a light most favorable to the plaintiff, the complaint states a valid claim. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter*, 313 F.3d 305, 312 (5th Cir. 2002). This review does not question the plaintiff's likelihood of success; instead, it only decides whether he has pleaded a legally cognizable claim. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004). Statements by less than a majority of the Supreme Court are an insufficient basis to show that, as a matter of law, Gutierrez has not made a claim on which relief can be granted.

Having addressed those two fundamental concerns about Defendants' arguments, the Court turns to the question of whether Gutierrez has sufficiently pleaded claims that survive the motion to dismiss.

D. Establishment Clause

Gutierrez argues that the TDCJ policy excluding his chosen spiritual advisor violates the Establishment Clause. Under the First Amendment, "Congress shall make no law respecting an establishment of religion." U.S. Const., amend. I. The Establishment Clause prohibits the governmental entities from preferring one religion over others, but also prevents the creation of laws that demonstrate hostility toward religion. *See American Legion v. American Humanist Association*, ___ U.S. ___, 139 S. Ct. 2067, 2074, 204 L. Ed. 2d 452 (2019); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 845-46, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *Larson v. Valente*, 456 U.S. 228, 246, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982). Prior to April 2, 2019, Gutierrez would have been entitled to the presence of a chaplain in his final moments. Gutierrez claims that the revocation of that policy was an act hostile to religion. Dkt. No. 45 at 35.

Defendants primarily rely on the *Turner* standard and argue that "the deferential standard applied by the Supreme Court and Fifth Circuit to Establishment Clause claims leads to the conclusion that TDCJ's protocol is plainly permissible." Dkt. No. 46 at 71. Applying the *Turner* factors, Defendants argue that: (1) the new protocol is rationally connected to its security interests;

(2) excluding a spiritual advisor from the execution chamber does not prevent an inmate from exercising his religion the during his execution; (3) allowing Gutierrez to have TDCJ approved chaplains would require the same right to be extended to inmates of all denominations and some inmates would request a spiritual advisor who was not a TDCJ approved chaplain;[6] and (4) no ready alternatives exist to allowing an outsider into the execution chamber. Dkt. No. 46 at 71-72. Accordingly, Defendants argue that "there are no ready alternatives that would alleviate the security risks of allowing such an outsider into the execution chamber during an execution." Dkt. No. 46 at 72.

Gutierrez primarily bases his response on the *Lemon* test. Gutierrez argues that the new TDCJ policy is not neutral between religion and non-religion and is inherently suspect. Gutierrez does not dispute the fact that TDCJ has a compelling interest in security throughout an execution. Neither does the State dispute that Texas has long allowed inmates to have TDCJ-employed chaplains in the execution chamber. According to Gutierrez, the removal of that accommodation signals hostility toward religion.[7]

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6. Defendants premise these arguments on *Turner* which instructed that "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90.

7. Parties debate TDCJ's intent in the change of its policy. Defendants premise their arguments on the assumption that "TDCJ's revision of its protocol regarding the presence of chaplains during an execution was in response to the Supreme

Alternatively addressing Defendants' arguments under the *Turner* standard, Gutierrez contends that the Supreme Court "has 'found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a *neutral* fashion, without regard to the content of the expression.'" Dkt. No. 47 at 68 (quoting *Turner*, 482 U.S. at 90 (emphasis added)). Gutierrez contends that the new TDCJ policy restricts his First Amendment rights in a non-neutral fashion that is hostile toward religion. Dkt. No. 47 at 78.

Further, Gutierrez argues that Defendants' arguments about security concerns are speculative. Defendants do not suggest that the relief Gutierrez requests—the presence of a TDCJ chaplain as has been allowed many times before—will pose any security threat in his own execution. The concerns Defendants raise are those that may occur in other executions, such as that of Patrick Henry Murphy who requested the attendance of a spiritual advisor unaffiliated with the prison system. At the

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Court's action in *Murphy*." Dkt. No. 46 at 72. Given the timing of the policy change and the fact that there was no official statement or justification by TDCJ that would explain why it began disallowing the presence of TDCJ-employed clergy, it could be reasonable to infer that Defendants acted in response to Justice Kavanaugh's statement in *Murphy*. *See McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 861, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005) (emphasizing "the intuitive importance of official purpose to the realization of Establishment Clause values"). At this point, it appears that TDCJ acted with an "obvious secular motivation of maintaining a safe and orderly execution process," but at the pleadings stage that speculation is insufficient to dismiss Gutierrez's complaint. Dkt. No. 46 at 72.

pleadings stage, the Court lacks information about how the requested relief would impact the way Texas conducts the execution of other inmates. This lawsuit has still not developed factual information relating to how many other faith groups are represented on death row, what security risks exist for allowing non-TDCJ spiritual advisors into the death chamber, and what rigor must attend training clergy for the execution process. Assuming that granting relief to Gutierrez would force Defendants to allow access to chaplains from all faith groups represented on death row, the pleadings do not give insight into what security concerns exists, how pervasive those risks may be, and why TDCJ cannot easily accommodate any rights while still maintaining security. Defendants' arguments about secondary ripples from the Gutierrez's rights are too speculative and undeveloped to dismiss this case on the pleadings.

Simply, Defendants' cursory arguments about security concerns do not show that Gutierrez has failed to plead a claim on which relief can be granted. The Court **DENIES** Defendants' motion to dismiss Gutierrez' Establishment Clause claim. *See Twombly*, 550 U.S. at 555.

E. Free Exercise Clause

Unlike the Establishment Clause claim, Fifth Circuit law shows that the *Turner* framework governs Gutierrez's Free Exercise Claim. To state a free exercise claim under the First Amendment, a plaintiff must allege sufficient facts showing a sincere religious belief that the official action or regulation substantially burdens. *Hernandez*

v. Comm'r, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989). A prison policy that substantially burdens an inmate's ability to practice his religion withstands a First Amendment challenge when it is "reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (quoting *Turner*, 482 U.S. at 89). The Parties rely on the same discussion relating to Gutierrez's Establishment Clause claim to address his Free Exercise claim. The Court concludes that Gutierrez has sufficiently pleaded his claim that the current TDCJ policy precludes his sincere desire to have a spiritual advisor present during his execution. The Court **DENIES** the motion to dismiss the Free Exercise claim for the same reasons as the Establishment Clause claim.

F. RLUIPA

Gutierrez argues that the absence of a chaplain in the execution chamber violates his rights under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA or Act), 114 Stat. 804, 42 U.S.C. § 2000cc-1(a)(1)-(2).

As an initial matter, Defendants argue that Gutierrez has not "assert[ed] that the physical presence of a chaplain in the execution chamber is *required* for him to exercise his religion or to 'guide[]' [him] at the time of the execution." Dkt. No. 46 at 64 (emphasis added). Defendants have not identified any law sanctioning the dismissal of a RLUIPA claim based on religious devotion preferred

by an inmate rather than compelled by his religion.[8] In his amended complaint, Gutierrez states he believes that "having a Christian chaplain present in the chamber would help to ensure his path to the afterlife." Dkt. No. 45 at 14. Gutierrez's statement that prohibiting him "from being guided at the time of death by a Christian chaplain is an explicit and substantial burden on religious exercise" provides a sufficient basis for his RLUIPA claim. Dkt. No 45 at 35-36.

Defendants also dispute the sincerity of Gutierrez's belief insofar as they argue that he "provides no support for his conclusory assertion that the presence of a TDCJ chaplain in the witness room—rather than the execution chamber and during visitation on the day of the execution—is a substantial burden on his exercise of his religion." Dkt. No. 46 at 64. Initially, "it falls to the plaintiff to demonstrate that the government practice complained of imposes a 'substantial burden' on his religious exercise." *Adkins v. Kaspar*, 393 F.3d 559, 567 (5th Cir. 2004) (citing 42 U.S.C. § 2000cc-2); *see also Holt v. Hobbs*, 574 U.S. 352, 360, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015). "[W]hether the government action or regulation in question imposes a substantial burden on an adherent's religious exercise" requires "a case-by-case, fact-specific inquiry." *Adkins*, 393 F.3d at 571. Defendants argue that Gutierrez "fails to demonstrate that TDCJ's policy would truly force him

8. The Supreme Court has "not addressed whether . . . there is a difference between a State's interference with a religious practice that is compelled and a religious practice that is merely preferred." *Murphy*, 139 S. Ct. at 1484 (Alito, J., dissenting from grant of application for stay).

to 'substantially modify his religious behavior'" by having his spiritual advisor in the viewing room, rather than the execution chamber. Dkt. No. 46 at 64 (quoting *Adkins*, 393 F.3d at 570). At the pleadings stage, however, Gutierrez is not required to establish that he is entitled to relief. His burden is only to plead sufficient facts to state a claim for relief that is plausible on its face. *See Twombly*, 550 U.S. at 570. Gutierrez has made that showing.

Defendants further argue that they have a valid security interest in preventing clergy from being present in the execution chamber. To reach this conclusion, Defendants do not argue that their previous policy that allowed TDCJ clergy to be present created a security risk, nor could they given its long history. Instead, Defendants argue that "[w]hile Plaintiff frames the relief he requests as straightforward—because TDCJ has in the past permitted its chaplains to attend executions—he ignores the inevitable consequences of that relief." Dkt. No. 46 at 67. Defendants argue that granting Gutierrez the relief he requests creates the constitutional concern which in *Murphy* "the Supreme Court signaled . . . was impermissible because spiritual advisors not employed by TDCJ could not be present in the execution chamber." Dkt. No. 46 at 66. Defendants' argument, however, rests on giving Justice Kavanaugh's statements precedential effect. *See Murphy*, 139 S. Ct. at 1476 (statement of Kavanaugh, J.). Justice Kavanaugh's statements do not have the precedential effect necessary to prove that a RUILPA claim fails as a matter of law. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 2020 U.S. LEXIS 2407, 2020 WL 1906545, at *7 (2020)

Throughout the motion to dismiss, Defendants express concerns about the security problems that may result in the execution of other inmates if the Court grants Gutierrez the relief he requests. Security is a paramount consideration in the assessment of an RLUIPA claim. Defendants correctly argue that "it is indisputable that TDCJ's penological interest in security is a compelling interest." Dkt. No. 46 at 65. However, RLUIPA does not require "unquestioning deference" to prison administrators. *Holt*, 574 U.S. at 864. A prison must "prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest." *Id.* At this stage of litigation, the Court has no specific facts before it concerning future security concerns possibly caused by future executions.

IX. Conclusion Regarding Execution-Chamber Claims

In *Murphy*, three dissenting Supreme Court Justices commented that the issues raised by similar claims "are not simple, and they require a careful consideration of the legitimate interests of both prisoners and prisons." *Murphy*, 139 S. Ct. at 1485 (Alito, J., dissenting from grant of application for stay). Defendants' motion to dismiss may raise issues needing resolution as the case progresses, but those issues do not decide the matter immediately before the Court, which is whether Gutierrez pleaded a valid legal claim that survives a motion to dismiss. *See* Fed. R. Civ. P. 12(b); *Twombly*, 550 U.S. at 555. The Court **DENIES** Defendants' motion to dismiss Gutierrez's execution-chamber claims.

X. Conclusion

For the foregoing reasons and after examining the briefs, pleading and relevant law the Court **GRANTS IN PART** and **DENIES IN PART** Defendants Motion to Dismiss, Dkt. No. 46. The Court hereby:

- **GRANTS** 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.

- **GRANTS** 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.

- **GRANTS** Defendants' motion to dismiss Gutierrez's access to the courts claim for failure to state a claim upon which relief can be granted.

- **DENIES** Defendants' motion to dismiss for lack of subject matter jurisdiction Gutierrez's claims which challenge the constitutionality of Texas' DNA testing statute on its face and as authoritatively construed by the CCA.

- **DENIES** Defendants' motion to dismiss due to Eleventh Amendment immunity.

- **DENIES** Defendants' motion to dismiss Gutierrez's constitutional challenge to the Texas DNA testing statute for failure to state a claim.

- **DENIES** Defendants' motion to dismiss due to the statute of limitations.

- **DENIES** Defendants' motion to dismiss due to issue preclusion.

- **DENIES** Defendants' motion to dismiss Gutierrez's Texas DNA statute challenge on the merits without additional briefing.

- **DENIES** Defendants' motion to dismiss Gutierrez's execution-chamber claims for failure to state a claim.

SIGNED this 2nd day of June, 2020.

/s/ Hilda Tagle
Hilda Tagle
Senior United States District Judge

Appendix K – Plaintiff's Response to Defendants' Motion to Dismiss, United States District Court for the Southern District of Texas (May 27, 2020)

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

Civil Case No. 1:19-CV-185
THIS IS A CAPITAL CASE
EXECUTION SET FOR
June 16, 2020

RUBEN GUTIERREZ,

Plaintiff,

v.

LUIS V. SAENZ, CAMERON COUNTY DISTRICT ATTORNEY, *et al.*,

Defendants.

Filed May 27, 2020

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

[TABLES OMITTED INTENTIONALLY]

Appendix K

INTRODUCTION

Plaintiff Ruben Gutierrez is a Texas death row inmate. Plaintiff has filed an Amended Complaint under 42 U.S.C. § 1983 alleging denials of his rights under the First, Eighth, and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[1] Plaintiff seeks declaratory and injunctive relief.[2] Defendants have moved to dismiss the Amended Complaint for lack of subject-matter jurisdiction and for failing to state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(1), (6).

The Amended Complaint was filed on April 22, 2020. Mr. Gutierrez's execution is scheduled for June 16, 2020. Defendants have failed to show that the Amended Complaint should be dismissed, and therefore this Court should proceed to consider Plaintiff's allegations of constitutional violations on the merits.

I. STANDARDS OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

"A claim may not be dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1) unless it appears certain that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Ace Am. Ins. Co. v. Huntsman Corp.*, 255 F.R.D. 179, 186 (S.D. Tex. 2008) (citing *Bombardier Aerospace Emp. Welfare*

1. 42 U.S.C. §§ 2000cc-2000cc-5.

2. Plaintiff also requests a stay of his execution.

Benefits Plan v. Ferrer, Poirot & Wansbrough, 354 F.3d 348, 351 (5th Cir. 2003); *Home Builders Ass'n of Miss., Inc. v. Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998)).

Challenges to subject-matter jurisdiction under Rule 12(b)(1) may be raised either as a facial attack or as a factual attack. *See Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981). "A facial attack consists of a Rule 12(b)(1) motion unaccompanied by supporting evidence, challenging the court's jurisdiction based solely on the pleadings." *Levin v. Minn. Life Ins. Co.*, No. H-0701330, 2008 WL 2704772, at *2 (S.D. Tex. July 7, 2008) (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990); *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981)). With respect to facial attacks, the court "must accept all allegations in the complaint as true." *Id.* (citing *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1261 (11th Cir. 1997); *Paterson*, 644 F.3d at 523). Factual attacks question "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (citing *Lawrence*, 919 F.2d at 1529).

A facial attack is essentially an attack on the existence of a federal cause of action. In that situation, "'the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case' under either Rule 12(b)(6) or Rule 56." *Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5th Cir. 2004) (quoting *Williamson*, 645 F.2d at 415). As the Fifth Circuit explained in *Williamson*:

> [N]o purpose is served by indirectly arguing the merits in the context of federal jurisdiction. Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits. This refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides, moreover, a greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) . . . or Rule 56 . . . [,] both of which place greater restrictions on the district court's discretion.

Williamson, 645 F.2d at 415.

Defendants facially attack the Amended Complaint on the grounds that Plaintiff is improperly seeking mandamus relief; that Defendants have Eleventh Amendment immunity; and that Plaintiff's DNA claims are barred by the *Rooker-Feldman* doctrine. Mot. to Dismiss 17-29, 26-33. All of these facial attacks should be addressed under Rule 12(b)(6). *Wilson v. Marshall*, No. 2:14-cv-1106-MHT- SRW, 2018 WL 5074689, at *2-3 (M.D. Ala. Sept. 14, 2018) (so treating facial challenge based on the *Rooker-Feldman* doctrine), *adopted*, 2018 WL 5046077, at *1 (M.D. Ala. Oct. 17, 2018).

B. Federal Rule of Civil Procedure 12(b)(6)

A motion to dismiss under Rule 12(b)(6) tests the adequacy of the complaint against the standard set forth in

Rule 8: "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The question on a motion to dismiss is "'not whether [Gutierrez] will ultimately prevail' on his procedural due process claim, but whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 529-30 (2011) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)) (citing *Swierkewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

The court reviewing a motion to dismiss takes the factual allegations of the complaint as true and construes them in the light most favorable to the plaintiff. *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004). The complaint must state a facially plausible claim; this is satisfied "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

The substantive standard under *Skinner* for plaintiffs alleging a constitutional violation resulting from denial of post-conviction access to DNA is "whether the postconviction relief procedures as applied . . . were 'fundamentally inadequate to vindicate the substantive rights provided.'" *Harris v. Lykos*, No. 12-20160, 2013 WL 1223837, at *1 (5th Cir. Mar. 27, 2013) (unpublished) (quoting *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009)). Notably, in *Harris* itself the district court erred by concluding that the plaintiff had "failed to state a claim recognized at law." *Id.* The Fifth Circuit vacated the district court's decision and remanded for further proceedings.

II. THIS COURT SHOULD GRANT A STAY OF EXECUTION.

The typical factors to be considered with respect to a request for a stay are as follows:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

In a capital case, the likelihood of success factor is satisfied when the plaintiff makes a "substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (citation and quotation marks omitted). That showing is made if the plaintiff shows that the "issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Id.* at 893 n.4 (citation and quotation marks omitted). As the Fifth Circuit has recognized, "In a capital case, the possibility of irreparable injury weighs heavily in the movant's favor." *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (per curiam). In a capital case, the movant "must present a substantial case on the merits when a serious legal question is involved and show that the

balance of equities weighs heavily in favor of granting the stay." *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987) (per curiam).

Given that the Rule 12(b)(6) standard precludes dismissal if the plaintiff presents a facially plausible claim, the *Barefoot* standard is satisfied when the complaint survives a motion to dismiss. Where that standard is met, courts have granted stays of execution. *See Bartee v. Reed*, No. SA-12-CA-420-FB, Order Granting Motion for Stay of Execution (W.D. Tex. May 2, 2012) (granting stay in § 1983 action alleging unconstitutional denial of access to DNA testing) (attached as Ex. 1); *see also Skinner v. Switzer*, 559 U.S. 1033 (2010) (granting stay pending disposition of petition for writ of certiorari).

Defendants do not argue any of the stay factors other than likelihood of success on the merits. As *O'Bryan* recognizes, the irreparable injury factor is clearly satisfied in this case. While it is true that the State has an interest in enforcing its judgments, the harm to Mr. Gutierrez if a stay is not granted is irreparable. Moreover, the public interest is "in having a just judgment," *Arizona v. Washington*, 434 U.S. 497, 512 (1978), not simply in having an execution, particularly of a man who could be proved innocent by DNA testing. *See Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."). Given these stakes, the balance of harms clearly weighs in Mr. Gutierrez's favor.[3]

3. Defendants argue that Mr. Gutierrez has only a de minimis interest in having a chaplain of his faith present with him in the execution chamber. Mot. to Dismiss Amended Compl. 15. The

Appendix K

Defendants argue that a stay should be denied because the Amended Complaint is subject to dismissal for lack of jurisdiction and failure to state a claim. Mot. to Dismiss Amended Compl. 14-15. Plaintiff shows below that these arguments are without merit. Defendants also argue that a stay should be denied with respect to the DNA testing claims because Plaintiff purportedly waited too long to seek relief under § 1983. *Id.* at 16-17 & n.8.[4] Defendants err.

Mr. Gutierrez has fought since 2009 to have the forensic evidence in his case DNA tested. He has repeatedly

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assertion that a person about to die has no meaningful interest in having a religious or spiritual adviser next to him is dubious on its face. In any event, the Supreme Court has not treated the right of a person to "die with a minister of his own faith by his side" as insignificant. *Dunn v. Ray*, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting from grant of application to vacate stay). Rather, it granted a stay in *Murphy v. Collier*, 139 S. Ct. 1475 (2019), necessarily recognizing as significant the legal issue whether a State can discriminate between religions in this regard. *See id.* at 1476 (Kavanaugh, J., concurring in grant of application for stay); *id.* at 1480 (Alito, J., dissenting) (recognizing that claim was substantial, but arguing that Murphy had been dilatory in raising it).

4. Defendants do not raise such an argument with respect to the chaplain claims. In *Murphy*, the Supreme Court granted an application for stay where Murphy requested a Buddhist chaplain a month before the scheduled execution. *Id.* at 1476 n.* (Kavanaugh, J., concurring in grant of stay); *id.* at 1477 (statement of Kavanaugh, J., and Roberts, C.J.). Mr. Gutierrez first requested a chaplain in the execution chamber by July 30, 2019, three months before the execution that was scheduled in 2019. He renewed that request in the Amended Complaint. Those requests were timely.

requested DNA testing through different procedural mechanisms over the past ten years, and has maintained since the day he was arrested, over twenty years ago, that he did not kill Ms. Harrison.

Mr. Gutierrez first requested DNA testing in his initial federal habeas corpus petition filed on January 26, 2009. *See Gutierrez v. Quarterman*, No. 1:09-cv-00022 (S.D. Tex.) (ECF No. 1). The district court granted a stay and abeyance, and in May 2009, Mr. Gutierrez sought the appointment of counsel and DNA testing in state court pursuant to an earlier version of Texas Code of Criminal Procedure Chapter 64. The State opposed. The trial court ultimately denied Mr. Gutierrez's motion for DNA testing, and the Court of Criminal Appeals affirmed. *Ex parte Gutierrez*, 337 S.W.3d 883, 886 (Tex. Crim. App. 2011). That affirmance was based in part on a finding that Mr. Gutierrez was at fault for not seeking DNA testing at trial. *Id.* at 895. The "at fault" provision of Chapter 64, barring relief for defendants who did not request DNA testing at trial, was later removed from the statute. *See* Tex. Crim. Proc. Code Ann. § 64.01 (West 2019); Vernon's Tex. Sess. Law Serv. Ch. 366 (S.B. 122) (amending § 64.01 to remove "at fault" provision).

Even following the denial of his Chapter 64 request, Mr. Gutierrez kept fighting for DNA testing. On November 3, 2015, Mr. Gutierrez filed a request pursuant to the Public Information Act, seeking the documents establishing the chain of custody for the sexual assault kit, which contained much of the biological material recovered in this case. *See* November 3, 2015, PIA Request (attached as Ex. 2). The District Attorney opposed

disclosure, *see* District Attorney Response to PIA Request (attached as Ex. 3), even though the Attorney General indicated that the District Attorney's response was untimely, and that there was no compelling reason to withhold the requested information. *See* Attorney General Reply (attached as Ex. 4).

On November 4, 2015, the day after sending his Public Information Act request, Mr. Gutierrez filed a motion for miscellaneous relief in the trial court, seeking independent DNA testing of potentially exculpatory material under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In its initial response to the motion, the State did not oppose Mr. Gutierrez's request for DNA testing. However, on April 11, 2018, the trial court signed the State's proposed order denying the motion. On April 18, 2018, one week later, the clerk of the trial court issued Mr. Gutierrez's Warrant of Execution, with his execution date set for September 12, 2018.

Unbeknownst to Mr. Gutierrez, his attorney, Margaret Schmucker, was removed from the Fifth Circuit's CJA appointment panel under case number 17-98007 on December 15, 2017. *See Gutierrez v. Stephens*, No. 1:09-cv-00022 (S.D. Tex.) (ECF No. 63). On July 24, 2018—over seven months after being removed from the Fifth Circuit CJA roster, and over three months after Mr. Gutierrez's execution warrant had been signed—Ms. Schmucker filed a motion seeking to be relieved as counsel to Mr. Gutierrez. *Id.* (ECF No. 56). On August 6, 2018, the district court granted the motion to withdraw and appointed Richard W. Rogers, III, as counsel. *Id.* (ECF No.

63). On August 14, 2018, the court appointed the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO") as co-counsel. *Id.* (ECF No. 71).

One week after the FCDO was appointed, it filed Public Information Act requests on behalf of Mr. Gutierrez for all of the evidence, files, and discovery in Mr. Gutierrez's case. Although the District Attorney's office agreed that the FCDO was entitled to these documents, the District Attorney's office did not comply with this request until months later—in May 2019, *after* it had taken steps to secure issuance of an execution warrant on April 30, 2019—and even then, the compliance was only partial.

Mr. Gutierrez filed his motion requesting DNA testing under Chapter 64 on June 14, 2019, three weeks after the FCDO was able to review the partial evidence that was made available by the Brownsville Police Department and the Cameron County District Attorney's Office, and before the second 2019 warrant was issued.[5] Moreover, the 2019 request under Chapter 64 was far from being a rehash of the 2011 request. Mr. Gutierrez's current counsel has done substantial investigation and consulted expert witnesses to present new evidence that supports his application for DNA testing. This new evidence was presented to the trial court within three weeks after the Brownsville Police Department and the Cameron County District Attorney's office first made evidence available to

5. The initial warrant was recalled by the trial court on June 20, 2019, because it was defective. *See* App. to Compl. 1.

counsel that counsel had been requesting for months, since just days after their appointment.[6]

In this context, it is remarkable for Defendants to assert that Plaintiff has failed to act diligently and "made no efforts for more than a year to seek DNA testing." Mot. to Dismiss Amended Compl. 16 n.8. As Defendants are aware, Mr. Gutierrez requested discovery in August 2018—discovery that was necessary to support the 2019 Chapter 64 request, and that Defendant Saenz did not oppose. Even so, Defendant Saenz did not provide the discovery until after an execution warrant had been signed. Mr. Gutierrez has in fact acted diligently in his decade-long quest for DNA testing.

The four factors to be considered in deciding whether to grant a stay weigh heavily in Plaintiff's favor. Accordingly, this Court should grant a stay of execution. A proposed order granting the requested relief is attached as Ex. 5.

III. PLAINTIFF DOES NOT SEEK MANDAMUS RELIEF.

Defendants argue that Plaintiff is in effect seeking mandamus relief that is beyond this Court's jurisdiction under 42 U.S.C. § 1983. Mot. to Dismiss Amended Compl. 17-20. The core of the argument is that Plaintiff supposedly

6. This fact pattern is analogous to that in *Skinner*. *See Skinner*, 562 U.S. at 528-29 (Skinner twice sought DNA testing under Article 64; his second request "was bolstered by discovery he had obtained in the interim").

"does not adequately allege . . . that the procedures [under Chapter 64 are] inadequate," but rather that the "state courts erred in their interpretation and application of state law." *Id.* at 17-18. Defendants err.

First, Defendants misconstrue Plaintiff's claim. As developed in §§ V.B and VI, *infra*, Plaintiff does in fact allege that the procedures provided under Chapter 64, both facially and as "authoritatively construed" by the Texas courts, *Skinner*, 562 U.S. at 532, violate due process. And Plaintiff does not allege that the state courts erred in their application of state law. Defendants' argument falls of its own weight.

Second, in *Skinner*, the Supreme Court allowed a very similar suit to proceed, as did the Fifth Circuit in *Harris v. Lykos*. Those authorities implicitly reject Defendants' argument.

Third, the mandamus concept does not apply. It is true that there is no federal authority to "issue writs of mandamus to direct state courts and their judicial officers in the performance of their duties where mandamus is the only relief sought." *Moye v. Clerk, DeKalb Cty. Superior Court*, 474 F.2d 1275, 1276 (5th Cir. 1973). Here, however, Mr. Gutierrez does not seek to direct state judicial officers in the performance of their duties, and mandamus is not the relief sought.

Fourth, the authorities cited by Defendants do not actually support their argument. In *Pruett v. Choate*, 711 F. App'x 203, 206 (5th Cir. 2017), the plaintiff alleged,

unlike here, that his rights were violated by the Texas courts' arbitrary application of the DNA statute. The Fifth Circuit did *not* adopt the district court's "mandamus" approach, but rather determined that Plaintiff's arbitrary application theory did not state an actionable due process claim. *Id.* at 206-07. The court commented that Pruett would have no remedy other than the prohibited one of mandamus "[u]nless Pruett's due-process rights were violated." *Id.* at 206 n.10. But when, as here, the complaint does not allege arbitrary application, but rather a due process violation, the mandamus theory does not come into play. Similarly, in *Ramirez v. McCraw*, 715 F. App'x 347, 350 (5th Cir. 2017), the Fifth Circuit did not adopt the mandamus theory, but rather determined that the plaintiff's claim had no merit, and that the plaintiff had been dilatory in bringing it.

Finally, though couched in jurisdictional terms, Defendants' argument is at best a way of contending that Plaintiff has not stated a claim on which relief can be granted under *Skinner*. That argument is addressed in §§ V.B and VI, *infra*.

IV. PLAINTIFF HAS EXHAUSTED ADMINISTRATIVE REMEDIES WITH RESPECT TO THE CHAPLAIN CLAIMS.

Mr. Gutierrez has exhausted the administrative remedies available to him with respect to the chaplain claims and is entitled to sue in court. *See* 42 U.S.C. § 1997e(a). Defendants' argument to the contrary, Mot. to Dismiss Amended Compl. 20-25, is inapt.

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In *Murphy v. Collier*, 942 F.3d 704 (5th Cir. 2019), the Fifth Circuit rejected a similar argument. In *Murphy*, the court noted that the United States Supreme Court "implicitly rejected" TDCJ's exhaustion defense when it stayed Murphy's execution, because the Court could not have permitted Murphy's case to proceed otherwise. *Id.* at 709 (discussing *Murphy v. Collier*, 139 S. Ct. 1475 (2019)). *Murphy* is directly contrary to Defendants' argument.

Indeed, Plaintiff has done more to exhaust his chaplain claims than Murphy did. Murphy did not file a prison grievance at all, but simply "communicated about his concerns with general counsel for TDCJ," which declined to change the protocol. *Murphy v. Collier*, No. 4:19-cv-1106, Order Staying Execution 7 n.1 (S.D. Tex. Nov. 7, 2019) (attached as Ex. 2), *mot. to vacate stay denied*, *Murphy v. Collier*, 942 F.3d 704 (5th Cir. 2019). In *Murphy*, the district court found that further exhaustion would be pointless, where the TDCJ had made clear it would not change its policy and Murphy's execution was imminent. *Id.* at 7-8 n.1.

Here, Plaintiff attempted to resolve his request for a chaplain informally by speaking to TDCJ employees, submitting an I-60 form, and having his counsel email TDCJ's General Counsel requesting a reasonable accommodation. TDCJ counsel denied the request for an accommodation. After those efforts failed, Plaintiff filed a grievance on August 19, 2019. App. to Compl., ECF No. 1-1, at 16-17.[7]

7. The August 19 grievance is considered a "Step 1" grievance according to TDCJ's grievance procedures. TDCJ Offender Orientation Handbook, Ex. 3 at 73-74.

Mr. Gutierrez did not receive a response to his I-60 form until October 10, 2019, *see* Advisory, ECF No. 18, and still has not received a response to his Step 1 grievance. As TDCJ officials including Defendants Collier, Davis and Lewis were well aware, all of these actions took place during the pendency of a warrant for Plaintiff's execution on October 30, 2019.

Defendants argue that Plaintiff has not exhausted the available administrative remedies because he did not pursue the grievance process to conclusion. Mot. to Dismiss Amended Compl. 21. Plaintiff's inability to complete TDCJ's grievance process, however, was the direct result of Defendants' own design. TDCJ's grievance procedures require the prison to answer a Step 1 grievance before a prisoner can file a Step 2 appeal of that decision. That requirement is made clear by TDCJ's Offender Orientation Handbook, which sets forth the grievance procedures for offenders: "Step 2 appeals *shall* be accompanied by the original, *answered* Step 1." Ex. 3 at 73 (emphasis added); *see also id.* at 74 ("[Y]ou may appeal the Step 1 decision by filing a Step 2 (I-128)."]; *id.* at 75 ("The original answered Step 1 shall be submitted with a Step 2 Appeal.").

The prison did not respond promptly to Plaintiff's Step 1 grievance. The TDCJ had forty days in which to respond to the Step 1 grievance. Ex. 3 at 74. That time period expired on September 28, 2019. TDCJ's grievance procedures expressly precluded him from moving on to Step 2—an appeal of the warden's decision—without a response to the Step 1 grievance. Thus, TDCJ's failure to

respond to the Step 1 grievance rendered further steps in the grievance process unavailable to Plaintiff.

The Prison Litigation Reform Act ("PLRA") requires an inmate to pursue only those administrative remedies "as are available" to him before filing suit. 42 U.S.C. § 1997e(a). While the PLRA does not define "available," courts have generally understood that term to mean "capable of use for the accomplishment of a purpose: immediately utilizable." *Underwood v. Wilson*, 151 F.3d 292, 295 (5th Cir. 1998) (per curiam) (citing Webster's New Int'l Dictionary, 150 (3d ed. 1981)), *overruled on other grounds as explained in Gonzalez v. Seal*, 702 F.3d 785 (5th Cir. 2012). In *Ross v. Blake*, the Supreme Court provided examples of circumstances under which an administrative remedy is *not* capable of use. 136 S. Ct. 1850, 1859-60 (2016). A remedy is not capable of use when the rules are so opaque that an ordinary or rational inmate cannot be expected to use it. *Id.* Nor is a remedy capable of use when "prison administrators thwart inmates from taking advantage of a grievance process through . . . misrepresentation." *Id.* at 1860.

Both of the above *Blake* scenarios apply here. First, when a procedure for pursuing a remedy does not mean what it says, that remedy is "essentially 'unknowable'" to prisoners and they cannot be expected to use it. *Id*. at 1859. Second, if Step 2 actually was available to Plaintiff, despite not having a Step 1 answer, then the language of the grievance procedures is at odds with, and a clear misrepresentation of, the actual process. That misrepresentation thwarted Plaintiff from pursuing further administrative remedies. *Id.* at 1860.

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Courts have recognized not only that "clear misrepresentation[s]" can render remedies unavailable, but also that even merely misleading statements can have the same effect. *See, e.g.*, *Davis v. Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015) (grievance procedures are unavailable if prison officials "misle[a]d the inmate as to the . . . rules of the grievance process" or "inaccurately describe the steps he needs to take to pursu[e] [a remedy]") (internal citations and quotation marks omitted); *id.* (citing *Brown v. Croak*, 312 F.3d 109, 112-13 (3d Cir. 2002) (inmates are "'entitled to rely on instructions by prison officials that are at odds with the wording of [the facility's grievance policy]'")); *see also Hardy v. Shaikh*, No. 19-1929, 2020 WL 2551046, at *4-6 (3d Cir. May 20, 2020) (collecting cases interpreting "misrepresentation" and emphasizing importance of prisons reasonably communicating remedies to prisoners and strictly complying with their own policies). In this case, the TDCJ Offender Orientation Handbook's misrepresentation of prison grievance procedures is even more egregious than a misleading statement by a prison official.

Filing a Step 2 appeal in direct contravention of TDCJ grievance procedures cannot constitute "proper exhaustion" of administrative remedies as the PLRA requires. *See Jones v. Bock*, 549 U.S. 199, 217-18 (2007). "Proper exhaustion" means an inmate must follow "the applicable procedural rules" as defined "not by the PLRA, but by the prison grievance process itself." *Id.* According to TDCJ grievance procedures, Step 2 was beyond the boundaries of proper exhaustion in this case. Defendants cannot stand by the plain language of the TDCJ grievance

procedures, which require an inmate to wait for the prison to answer a Step 1 grievance before filing a Step 2 appeal of that decision, and simultaneously contend that Step 2 was in fact "available" and "proper" to pursue even without the required Step 1 response, *see* Mot. to Dismiss Amended Compl. 24. They cannot have it both ways.

The Fifth Circuit, too, has made clear that "under some circumstances, a prison's failure to respond to a prisoner's grievances can result in the prisoner's administrative remedies being deemed exhausted." *Wilson v. Epps*, 776 F.3d 296, 301 (5th Cir. 2015). Those circumstances include where, as here, a prison's procedures prescribe deadlines by which its authorities must respond to grievances and do not set out any additional steps that prisoners must take upon that time elapsing. In that case, a prisoner has exhausted the available administrative remedies "when the time limits for the prison's response set forth in the procedures have expired." *Underwood*, 151 F.3d at 295;[8] *see also Brengettcy v. Horton*, 423 F.3d 674, 682 (7th Cir. 2005) (following the Eighth and Fifth Circuits and holding that administrative remedies are exhausted when a prison fails to respond to a prisoner's grievance within the required time and grievance procedures do not

8. The situation in *Underwood* is distinct from a futility argument, see Mot. to Dismiss Amended Compl. 22 n.10. Rather, *Underwood* recognizes scenarios where there is no way to both comply with the applicable rules and proceed to the next step when a prison does not respond, making additional steps unavailable—not merely futile. In those situations, a plaintiff is not excepted from the PLRA's exhaustion requirement but instead deemed to have exhausted the available administrative remedies.

instruct prisoners what to do when there is no decision to appeal); *id.* (noting that holding otherwise would permit prison officials to "exploit the exhaustion requirement through indefinite delay in responding to grievances") (internal citations and quotation marks omitted).

Since *Underwood*, the Fifth Circuit has clarified that the crucial question is whether the prison's grievance policy allows or prohibits a prisoner from proceeding to further steps of the grievance procedure if the prison fails to respond. *See Cantwell v. Sterling*, 788 F.3d 507, 590 n.2 (5th Cir. 2015) ("*Cantwell I*") (comparing *Underwood* with *Wilson v. Epps*). That determination requires close scrutiny of the requirements of a prison's grievance procedures. *Id.* The grievance procedure at issue in *Wilson v. Epps* expressly provided that "expiration of response time limits without receipt of a written response *shall entitle the offender to move on to the next step* in the process." *Wilson v. Epps*, 776 F.3d at 300 (emphasis added). But here, as in *Underwood*, the grievance procedure did not set out steps Plaintiff should have taken when he did not receive a response, and indeed prohibited Plaintiff from pursuing a Step 2 appeal.

All of the decisions relied on by Defendants, *see* Mot. to Dismiss Amended Compl. 24-25, predate the Fifth Circuit's opinions in *Cantwell I* and *Davis*, 798 F.3d 290 (5th Cir. 2015), with the exception of the district court's decision on remand in *Cantwell*. None is persuasive. On remand, the district court failed to perform the analysis of the relevant circumstances and applicable procedures that *Cantwell I* directed the court to conduct. *Cantwell v. Sterling*, No.

6:12-cv-082-WSS, 2016 WL 7971768 (W.D. Tex. May 18, 2016). Nor did any of the other decisions closely scrutinize the prisons' actual grievance procedures. *See, e.g.*, *Hicks v. Lingle*, 370 F. App'x 497, 499 (5th Cir. 2010) (holding that inmate failed to complete Tarrant County jail's two-step grievance process without explaining whether he could do so consistent with jail's procedures); *Johnson v. Cheney*, 313 F. App'x 732, 733 (5th Cir. 2009) (same as to TDCJ inmate and procedures); *Mesquiti v. Gallegos*, No. C- 09-136, 2010 WL 2928168, at *2 (S.D. Tex. June 23, 2010) (same); *Amir-Sharif v. Gonzalez*, No. 3:06-CV-2269, 2007 WL 1411427, at *2 (N.D. Tex. May 14, 2007) (same as to Dallas County jail inmate and grievance procedures, which did not require inmate to attach prison's response to appeal); *Jefferson v. Loftin*, No. 3:04-CV-1102, 2005 WL 4541891, at *4 (N.D. Tex. Mar. 16, 2005) (same as to TDCJ inmate and procedures).[9] There is no dispute that TDCJ's grievance procedure involves two steps; the only question is whether a prisoner is permitted to proceed to file a Step 2 appeal without the prison's response to Step 1. He is not, and he should therefore be deemed to have properly exhausted available administrative remedies when the time for the prison to respond to his Step 1 grievance lapsed.

Defendants' reliance on a purported lack of exhaustion, to which they have themselves contributed, is insupportable for another reason. If the TDCJ fails to respond to the Step 1 grievance and precludes exhaustion by rule, Mr.

9. *Powe v. Ennis*, 177 F.3d 393 (5th Cir. 1999), is also inapposite. In that case, Powe received responses and was able to complete the grievance process. *Id.* at 394.

Gutierrez could be executed before he even has the opportunity to exhaust the grievance procedure. This would be the very definition of "exploit[ing] the exhaustion requirement through indefinite delay in responding to grievances." *Brengettcy*, 423 F.3d at 682. Such a tactic must be rejected.

The exhaustion requirement exists to provide defendants adequate notice of plaintiffs' claims and "an opportunity to resolve disputes concerning the exercise of their responsibilities before being haled into court." *Jones*, 549 U.S. at 204. Plaintiff has given adequate notice of his claims through TDCJ's formal and informal grievance procedures. Plaintiff's counsel has already been told by TDCJ counsel that his request for a spiritual adviser in the execution chamber has been denied. This Court should deny Defendants' motion to dismiss based on a purported failure to exhaust administrative remedies.

V. PLAINTIFF'S CLAIMS ARE NOT SUBJECT TO DISMISSAL ON JURISDICTIONAL GROUNDS.

A. Plaintiff May Seek Declaratory and Injunctive Relief from Defendants.

Defendants argue that the Eleventh Amendment provides them immunity from suit, and that the *Young* exception for injunctive and declaratory relief does not apply to this case. Mot. to Dismiss Amended Compl. 26-29 (citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908)). Plaintiff does not dispute that his remedies are limited to declaratory and injunctive relief; indeed, those are the only

types of relief sought in the Amended Complaint. Under *Young*, Plaintiff is entitled to seek such relief.

"In order to use the *Ex parte Young* exception, a plaintiff must demonstrate that the state officer has 'some connection' with the enforcement of the disputed act." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (quoting *Young*, 208 U.S. at 157). The requirement is not particularly onerous; it exists "to prevent litigators from misusing the exception" by suing irrelevant state actors. *Id.*[10] Plaintiff readily meets the "some connection" requirement.

First, the Supreme Court has allowed suit against a district attorney in very similar circumstances. In *Skinner*, the State argued that Lynn Switzer, the District Attorney whose office prosecuted Skinner, was not a proper defendant because she had purportedly taken no action to deprive the plaintiff of a federal right. *Skinner v. Switzer*, No. 09-9000, Brief for Respondent, 2010 WL 3559537, at *52-53 (U.S. Sept. 9, 2010). The Supreme Court rejected that argument, noting that the plaintiff had properly named as defendant "respondent Lynn Switzer,

10. Citing *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc), Defendants argue for a more demanding requirement that Plaintiff show that these Defendants have the "particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." Mot. to Dismiss Amended Compl. 28. But as *K.P.* (also cited by Defendants) points out, the Eleventh Amendment analysis in *Okpalobi* "did not garner majority support," and hence "is not binding precedent." *K.P.*, 627 F.3d at 124.

whose office prosecuted Skinner and has custody of the evidence Skinner would like to have DNA tested." *Skinner*, 562 U.S. at 529.[11]

Second, it is abundantly clear that Defendants Saenz and Sauceda have "some connection" to the enforcement of Chapter 64.[12] For DNA testing to be available at all, the relevant biological material must be "in the possession of the state." Tex. Code Crim. Proc. Ann. art. 64.01. Plaintiff alleges that Defendants have custody and possession of the material to be tested. Amended Compl. 4-5. Moreover, art. 64.02 provides as follows:

> (a) On receipt of the motion, the convicting court shall:
>
> (1) provide the attorney representing the state with a copy of the motion; and
>
> (2) require the attorney representing the state to take one of the following actions in response to the motion not later than the 60th day after

11. Counsel is aware of no reported decision following Skinner in which a court addressed an Eleventh Amendment defense to a § 1983 suit seeking forensic testing of physical evidence. Defendants' novel argument is without merit.

12. Plaintiff does not contend that Defendants Collier, Davis and Lewis are connected to the DNA testing claims. Rather, they are named as defendants because they are the relevant actors with respect to the chaplain claims. Plaintiff does not understand Defendants to raise any Eleventh Amendment defense with respect to the chaplain claims.

> the date the motion is served on the attorney representing the state:
>
> (A) deliver the evidence to the court, along with a description of the condition of the evidence; or
>
> (B) explain in writing to the court why the state cannot deliver the evidence to the court.
>
> (b) The convicting court may proceed under Article 64.03 after the response period described by Subsection (a)(2) has expired, regardless of whether the attorney representing the state submitted a response under that subsection.

Tex. Code Crim. Proc. Ann. art. 64.02.

These provisions make clear that the District Attorney is a significant actor in proceedings under Chapter 64, and may take actions that render it unnecessary for a prisoner to proceed under article 64.03. Thus, the District Attorney necessarily has "some connection" to enforcement of the statute. Moreover, in this case Defendant Saenz delayed production of discovery Plaintiff needed to frame his motion under Chapter 64 until after a warrant had been signed.[13]

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13. One week after the Federal Community Defender Office ("FCDO") was appointed, in August 2018, it filed Public Information Act requests on behalf of Mr. Gutierrez for all of the evidence, files, and discovery in Mr. Gutierrez's case. Although the District Attorney's office agreed that the FCDO was entitled to these documents, the District Attorney's office partially

Third, as a practical matter, the District Attorney's connection is closer still. In this case, as in many other Texas cases, the District Attorney's position is actually dispositive of the court's ruling. Here, apparently in the mistaken belief that Defendant Saenz did not oppose the request for DNA testing, the state district court initially granted the motion. App. to Compl. 2. On being apprised of the fact that Defendant Saenz actually opposed DNA testing, the district court withdrew its original order and entered an order denying DNA testing. App. to Compl. 3, 4. In these circumstances, for Defendant Saenz to assert that he had *no* connection to the enforcement of the act blinks reality.

B. Plaintiff's DNA Claims Are Not Barred by the *Rooker-Feldman* Doctrine.

Defendants contend that Plaintiff's DNA claims are barred by what is known as the *Rooker-Feldman* doctrine. Mot. to Dismiss Amended Compl. 30-33. Particularly in light of the fact that the Supreme Court rejected such an argument in *Skinner*, Defendants' argument is without merit.

The *Rooker-Feldman* doctrine occupies a "narrow ground." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005) (rejecting attempts to expand the doctrine). As clarified in *Exxon*, *Rooker-Feldman* "is confined to cases of the kind from which the

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complied with this request only months later—in May 2019, *after* it had taken steps to secure issuance of an execution warrant on April 30, 2019.

doctrine acquired its name: cases brought by state-court losers . . . inviting district court review and rejection of [the state court's] judgments." 544 U.S. at 284.

In *Skinner*, the Supreme Court rejected application of the *Rooker-Feldman* doctrine to a claim very similar to Plaintiff's. The Court explained why the claim was not barred as follows:

> Skinner does not challenge the adverse [state court] decisions themselves; instead, he targets as unconstitutional the Texas statute they authoritatively construed. . . . [A] state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action. Skinner's federal case falls within the latter category. There was, therefore, no lack of subject- matter jurisdiction over Skinner's federal suit.

Skinner, 562 U.S. at 532-33 (footnotes omitted).

Defendants attempt to avoid the holding of *Skinner* by asserting that here "Plaintiff does not attack the statute providing for postconviction DNA testing but the CCA's interpretation of it." Mot. to Dismiss Amended Compl. 25. The purported distinction is evanescent. *Skinner* holds that a challenge to adverse state court decisions is barred, but a challenge to the statute as "authoritatively construed" by the Texas courts is permissible. 562 U.S. at 532-33. That is precisely the challenge that Plaintiff has brought:

> 65. Chapter 64 on its face and as construed by the CCA violates fundamental fairness. On its face and as construed by the CCA, the statute effectively precludes DNA testing.
>
> 66. Article 64.03(a)(2) requires movants to show by a preponderance of the evidence that they would not have been convicted if exculpatory results had been obtained by DNA testing. This is a particularly high standard of proof. Most state and federal statutes use lower standards of proof, usually some variation on requiring a showing of "reasonable probability" of acquittal. As construed by the CCA, article 64.03(a)(2) effectively precludes testing to establish innocence, and further precludes testing to establish innocence of the death penalty.

Compl. paras. 65-66 (footnotes omitted).

In support of their argument, Defendants rely on *Alvarez v. Attorney General for Florida*, 679 F.3d 1257 (11th Cir. 2012). Mot. to Dismiss Amended Compl. 32-33. No Fifth Circuit decision has cited *Alvarez* or adopted its reasoning, and it is also inapposite. In *Alvarez*, the plaintiff "expressly abandoned *any* challenge to the facial constitutionality of Florida's procedures." *Id.* at 1263 (emphasis in original). Instead, Alvarez brought only an as-applied challenge that "plainly and broadly attacks the state court's *application* of Florida's DNA access procedures to the facts of his case; notably, it does not challenge the constitutionality of those underlying

procedures." *Id.* (emphasis in original). This was crucial to the decision in *Alvarez*, which held that claims of the former type are barred by *Rooker-Feldman*, while claims of the latter type proceed under *Skinner*. *Id.*

As shown in the passage from the Amended Complaint quoted above, Plaintiff here brings the latter type of claim. He challenges the constitutionality of the Texas procedures both facially and as they have been construed by the CCA; his challenge is decidedly *not* limited to an attack on the Texas court's application of the state's DNA procedures. As such, *Alvarez* actually confirms that his claim is *not* barred by *Rooker-Feldman*.

The same is true with respect to the other decisions cited by Defendants (mostly without any discussion or parentheticals). Most of those decisions distinguish between claims that challenge the constitutionality of the statute (including as the statute has been authoritatively construed by the state courts) and an attack on the particular state court judgment. *See, e.g.*, *Wade v. Monroe Cty. Dist. Attorney*, 800 F. App'x 114, 117-19 (3d Cir. 2020) (same; plaintiff complained that the state court's application of the statute to him was unfair); *Cooper v. Ramos*, 704 F.3d 772, 780-81 (9th Cir. 2012) (same; complaint attacked state court's application of statutory factors in plaintiff's case); *McKithen v. Brown*, 626 F.3d 143, 154-55 (2d Cir. 2010) (same; attack on state court's interpretation of statute). The exception is the pre-*Skinner* decision in *In re Smith*, 349 F. App'x 12, 14-15 (6th Cir. 2009), which applied Sixth Circuit precedent under which the pertinent question for *Rooker-Feldman* is whether

the source of the injury is the state court judgment. Significantly, however, in *Skinner* the Supreme Court cited with approval Judge Sutton's dissent from the Sixth Circuit majority's *Rooker-Feldman* ruling. *See Skinner*, 562 U.S. at 532 (citing *Smith*, 349 F. App'x at 18 (Sutton, J., concurring and dissenting) (plaintiff's challenge to adequacy of procedures not barred by *Rooker-Feldman*)).

Because Plaintiff's claim is indistinguishable from that upheld against a *Rooker-Feldman* challenge in *Skinner*, Defendants' argument fails.

VI. PLAINTIFF'S AMENDED COMPLAINT STATES CLAIMS ON WHICH RELIEF CAN BE GRANTED.

Defendants argue that Mr. Gutierrez's claims are subject to dismissal for failure to state a claim for relief under Rule 12(b)(6). Specifically, Defendants contend that Mr. Gutierrez's claims "are barred by the applicable statute of limitations, are barred by issue preclusion, not cognizable in a civil-rights action, and fail to state a facially plausible claim for relief." Mot. to Dismiss Amended Compl. 33. For the reasons that follow, the Court should decline to dismiss the case on any of these grounds.

A. Mr. Gutierrez's DNA Claims Are Not Barred by the Applicable Statute of Limitations.

The statute of limitations for a § 1983 action is determined by the general statute of limitations governing personal injuries in the forum state. *See Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001); *Gartrell*

v. Gaylor, 981 F.2d 254, 256 (5th Cir. 1993) ("Because there is no federal statute of limitations for civil rights actions brought pursuant to 42 U.S.C. § 1983, a federal court borrows the forum state's general personal injury limitations period.") (citing *Owens v. Okure*, 488 U.S. 235, 249-50 (1989)). In Texas, that period is two years. *See Piotrowski*, 237 F.3d at 576; Tex. Civ. Prac. and Rem. Code § 16.003(a).

Although Texas law supplies the applicable limitations period, "federal law governs when a cause of action under § 1983 accrues." *Gartrell*, 981 F.2d at 257 (citing *Lavellee v. Listi*, 611 F.2d 1129, 1130 (5th Cir. 1980)). "Under federal law, a cause of action accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.*

The Fifth Circuit has not specifically defined an accrual date for claims concerning the denial of DNA testing. The Fifth Circuit cases cited by Defendants support only the broader proposition that a cause of action for personal injury generally accrues in Texas "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Gonzales v. Wyatt*, 157 F.3d 1016, 1020 (5th Cir. 1998); *see also Russell v. Bd. of Trustees*, 968 F.2d 489, 493 (5th Cir. 1992) ("Under federal law, the [limitations] period begins to run the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured."). Neither case had anything to do with claims concerning the denial of DNA testing; instead, *Gonzales* was the appeal of a limitations-based dismissal of a prisoner's

pro se § 1983 lawsuit against a corrections officer for use of excessive force, and *Russell* involved the denial of reinstatement of certain retirement plan benefits to a deceased employee's widow following her remarriage to and subsequent divorce from someone else.[14]

Defendants do not argue that the Fifth Circuit has formulated any rule regarding an accrual date for § 1983 claims based on the denial of DNA testing. Instead, they

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14. The district court cases listed in Defendants' string cite also fail to meaningfully advance their argument because, unlike the instant case, they did not involve at least one denial of DNA testing that happened within the statute of limitations period. *See* Mot. to Dismiss Amended Compl. 35. In *Quinonez* and *Padilla*, the most recent denial of DNA testing complained of by each plaintiff took place roughly five years before they filed their respective § 1983 complaints. *See Quinonez v. Texas*, No. CV H-16-0822, 2016 WL 2894920, at *2 (S.D. Tex. May 17, 2016); *Padilla v. Watkins*, No. 3:11-CV-2232-MBK, 2012 WL 1058143, at *3 (N.D. Tex. Feb. 2, 2012), *report and recommendation adopted*, No. 3:11-CV-2232-MBK, 2012 WL 1065463, at *1 (N.D. Tex. Mar. 29, 2012). In *Moore,* the court equitably tolled the statute of limitations based in large part on the plaintiff's allegation "that he has diligently pursued his claims in various state court post-conviction proceedings." *Moore v. Lockyer*, No. C 04-1952 MHP, 2005 WL 2334350, at *6 (N.D. Cal. Sept. 23, 2005), *aff'd sub nom. Moore v. Brown*, 295 F. App'x 176, 178 (9th Cir. 2008); *see also id.* ("[E]quitable tolling of a statute of limitations is particularly appropriate for two categories of plaintiffs, the first being those who are incarcerated and thus unable to pursue their claims with the same effectiveness as an individual who does not suffer from the disability of imprisonment, and the second being plaintiffs who have sought redress in another forum and seek to pursue a federal civil rights action only after the claims advanced in that forum have been denied. . . . Here, both circumstances are present. . . ." (citation omitted)).

rely on a Seventh Circuit case to support their argument that "[c]laims complaining of the denial of DNA testing accrue on the date when such request was *first* denied by a state court." Mot. to Dismiss Amended Compl. 34 (citing *Savory v. Lyons*, 469 F.3d 667, 763 (7th Cir. 2006)); *see also id.* at 36 ("[Plaintiff's] continued lack of access to the evidence is not a fresh act on the part of [Defendant]. . . . .") (quoting *Savory*, 469 F.3d at 673). The Seventh Circuit's decisions, however, are not binding on this court, and no state or federal court within the Fifth Circuit has ever cited the Seventh Circuit for the propositions Defendants wish to invoke here. *See Salazar v. Dretke*, 419 F.3d 384, 404 (5th Cir. 2005) ("To state the obvious, [that case] is not binding precedent on this court because it is an opinion of one of our sister circuits."). Moreover—and as Defendants acknowledge—at least one other circuit has held that the accrual date does not occur until "the end of the state litigation in which the inmate unsuccessfully sought access to evidence." Mot. to Dismiss Amended Compl. 35 (citing *Pettway v. McCabe*, 510 F. App'x 879, 879-80 (11th Cir. 2013)); *see also Van Poyck v. McCollum*, 646 F.3d 865, 867-68 (11th Cir. 2011) ("Plaintiff's claim is based on the refusal of the state officers to make specific evidence available to him. In the circumstances, their refusal was apparent no earlier than 2005: the end of the state litigation in which Plaintiff unsuccessfully sought access to the evidence.").

Nevertheless, relying on a single case from the Seventh Circuit, Defendants urge the Court to find that Mr. Gutierrez's claim accrued on either July 27, 2010 (i.e., the date the state trial court first denied Mr. Gutierrez's

first DNA testing motion), or May 4, 2011 (i.e., the date the CCA affirmed this first denial). *See* Mot. to Dismiss Amended Compl. 35. The Court should decline to adopt this approach not only because it is not the rule within the Fifth Circuit, but also because it fails to address Mr. Gutierrez's most recent request for DNA testing, which was made on June 14, 2019, and based on new information and evidence that the State had not made available to Mr. Gutierrez at the time he filed his 2010 request.

The injury at issue in this § 1983 action stems not from the state trial court's denial and the CCA's subsequent affirmance of Mr. Gutierrez's *first* request for DNA testing, but rather the state trial court's denial and the CCA's subsequent affirmance of Mr. Gutierrez's *most recent* request for DNA testing. The request properly at issue in this action was made nine years after Mr. Gutierrez's first request, and was based on both new facts and different law than his earlier request. Mr. Gutierrez's most recent request sought DNA testing for new and additional items that were never previously available to Mr. Gutierrez, and it was supported by (1) new expert evidence regarding the probative value of the requested DNA testing and the unreliability of the witness identification in the case; (2) a determination by counsel after examining the evidence that additional evidence was preserved and available for testing; and (3) new declarations from trial witnesses and the victim's family. None of these new items or other pieces of evidence were included in Mr. Gutierrez's earlier motions for DNA testing because Mr. Gutierrez was unaware and could not have become aware of them until May 21, 2019, when the State first made available several boxes for review at the Brownsville Police Department and

the Cameron County District Attorney's Office, including items that Mr. Gutierrez specifically wishes to subject to DNA testing.[15] Mr. Gutierrez filed his request based on these materials on June 14, 2019, just over three weeks after his counsel was finally allowed by the State to access them for the first time.

Furthermore, unlike his earlier request, Mr. Gutierrez's most recent request for DNA testing came after Chapter 64 was amended to eliminate the "at fault" provision of the prior statute. That provision, which required a defendant to show that no DNA testing occurred at the time of trial "through no fault of the convicted person," formed part of the basis for the trial court's previous denial of Mr. Gutierrez's request for DNA testing. *See Ex parte Gutierrez*, 337 S.W. 3d at 889, 895. The "at fault" provision was removed when the statute was last amended, thereby gutting that portion of the trial court's rationale for having denied Mr. Gutierrez's earlier request. *See* Tex. Crim. Proc. Code Ann. art. 64.01(b)(1)(B) (West 2017).

Because of the critical differences between Mr. Gutierrez's 2019 and 2010 requests, it is simply not true that "Plaintiff's arguments as to the denial of DNA testing have

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15. Undersigned counsel repeatedly requested access to these documents and other physical items in possession of various state offices, but the State waited until May 21, 2019, to make it available. After reviewing those materials and the information gathered, undersigned counsel was able to conduct additional investigation and determine that the physical evidence was preserved and could be subjected to DNA testing. This review also gave rise to the new witness declarations and new expert evidence undergirding the 2019 motion for DNA testing.

remained almost unchanged since his prior unsuccessful attempt." Mot. to Dismiss Amended Compl. 36. Tellingly, Defendants do not cite either of Mr. Gutierrez's requests or arguments in support thereof; instead, they cite only portions of state court opinions addressing a different issue. *See id.* (citing *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *7-9 (Tex. Crim. App. Feb. 26, 2020)); *Ex parte Gutierrez*, 337 S.W.3d at 900-02). In so doing, Defendants ignore the fact that the CCA treated Mr. Gutierrez's 2019 request as separate and distinct from his 2010 request:

> [Gutierrez] 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.

Gutierrez, 2020 WL 918669, at *5.

The CCA did not affirm the denial of Mr. Gutierrez's most recent request for DNA testing until February 26, 2020.[16] *See Gutierrez v. State*, 2020 WL 918669, at *1.

16. Unlike the earlier request, Mr. Gutierrez's most recent request was initially granted by the trial court. On June 27, 2019,

Accordingly, February 26, 2020, is the accrual date of the injury underlying this § 1983 action because that date marked the end of state litigation over Mr. Gutierrez's most recent request for access to specific evidence. *See Van Poyck*, 646 F.3d at 867-68.

Finally, even assuming arguendo that Mr. Gutierrez should have filed a § 1983 claim challenging the denial of his 2010 request for DNA testing within two years of the CCA's affirmance in May 2011, this Court "possess[es] the power to use equitable principles to fashion their own tolling provisions in exceptional situations in which state statutes of limitations eradicate rights or frustrate policies created by federal law." *Rodriguez v. Holmes*, 963 F.2d 799, 805 (5th Cir. 1992) (citing *Meyer v. Frank*, 550 F.2d 726, 729 (2d Cir.) ("It is well settled that the federal courts have the power to toll statutes of limitations borrowed from state law in appropriate circumstances."), *cert. denied*, 434 U.S. 830 (1977)). Throughout his trial and in the proceedings since, Mr. Gutierrez has maintained that he is innocent of killing Escolastica Harrison, and that he had no knowledge that others were going to assault or kill her. None of the items collected during the investigation of this case has been subjected to DNA testing that could identify the actual perpetrator(s) of this murder, and no court has ever considered the resulting violation of Mr. Gutierrez's federal rights. Given that Mr. Gutierrez faces execution for a crime he has consistently claimed he did not commit, the Court has ample grounds for exercising its equitable powers to find that his DNA claim is timely.

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however, the trial court suddenly and without explanation reversed course and denied Mr. Gutierrez's motion for DNA testing.

For these reasons, the Court should find that the instant cause of action did not accrue until the state trial court denied Mr. Gutierrez's request and the CCA affirmed that denial on February 26, 2020. Even assuming arguendo that the cause of action accrued prior to Mr. Gutierrez's 2019 request, Defendants' concealment of the evidence and Mr. Gutierrez's exercise of reasonable diligence in attempting to discover his cause of action, as set forth above, tolls the statute of limitations. *See Timberlake v. A.H. Robins Co.*, 727 F.2d 1363, 1366 (5th Cir. 1984). Therefore, the cause of action accrued or the statute began to run within the last two years, and the action is timely. At a minimum, there are factual disputes on all of these issues, rendering it inappropriate to decide these issues on a motion to dismiss.

B. Defendant Saenz Does Not Have Absolute Immunity from This Lawsuit.

In a mere two sentences, Defendant Saenz asserts that the DNA claims against him should be dismissed because, "as the Criminal District Attorney for Cameron County, Saenz is entitled to absolute prosecutorial immunity." Mot. to Dismiss Amended Compl. 36-37. Although Saenz might enjoy absolute immunity "from personal liability for damages under section 1983," *Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997), this is irrelevant here because Mr. Gutierrez has sued Saenz neither personally nor for damages. *See* Amended Compl. 4 ("[Saenz] is being sued in his official capacity."); *id.* at 36-38 (seeking only declaratory and injunctive relief, without any request for damages).

Absolute immunity does not apply to shield prosecutors from official liability for declaratory relief under § 1983. *See Johnson v. Kegans*, 870 F.2d 992, 998 n.5 (5th Cir. 1989) ("Immunity does not bar suits against defendants in their official capacities."); *Booth v. Galveston Cty.*, 352 F. Supp. 3d 718, 737 (S.D. Tex. 2019) ("Importantly, absolute prosecutorial immunity is inapplicable to suits for prospective relief." (citing *Johnson*, 870 F.2d at 998-99)). Because Plaintiff has sued Defendant Saenz only in his official capacity and only for declaratory and injunctive relief, Defendant Saenz does not have absolute immunity from this lawsuit.

C. Mr. Gutierrez's Due Process Claims Are Not Barred by the Doctrine of Issue Preclusion.

Defendants next argue that Mr. Gutierrez "is precluded from collaterally attacking the CCA's decisions" in *Ex parte Gutierrez*, 337 S.W.3d at 899-902, and *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *5-9 (Tex. Crim. App. Feb. 26, 2020). Mot. to Dismiss Amended Compl. 37. As pointed out repeatedly in this Response, *see, e.g.*, § IV.B, *supra*, this § 1983 action does not attack the CCA's prior decisions and does not raise the same issues as those already decided in *Ex parte Gutierrez* and *Gutierrez v. State*. Therefore, the Court should not bar Mr. Gutierrez's present claims.

"In determining the preclusive effect of an earlier state court judgment, federal courts apply the preclusion law of the state that rendered the judgment." *Weaver v. Tex. Capital Bank N.A.*, 660 F.3d 900, 906 (5th Cir. 2011)

(citing *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 381 (1985); *Conn. Bank of Comm. v. Congo*, 309 F.3d 240, 248 (5th Cir. 2002); 28 U.S.C. § 1738). "Because the judgment at issue is from a Texas state court, Texas preclusion law applies." *Id.* Texas law provides as follows:

> Claim preclusion, or res judicata, bars assertion of a claim in a subsequent case when: (1) there is a prior final judgment on the merits by a court of competent jurisdiction; (2) the parties in the second action are the same or in privity with those in the first action; and (3) the second action is based on the same claims as were raised or could have been raised in the first action."

Id. (citing *Igal v. Brightstar Info. Tech. Grp., Inc.*, 250 S.W.3d 78, 86 (Tex. 2008)).

In *Ex parte Gutierrez*, Mr. Gutierrez appealed 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." *Id.* at 886. That case was brought pursuant to Chapter 64 of the Texas Code of Criminal Procedure, which authorizes a motion seeking forensic DNA testing of evidence containing biological material under certain circumstances. *See id.* at 888-89 (discussing Mr. Gutierrez's grounds for appeal and applicable standards under Chapter 64). Similarly, in the 2019 proceedings, Mr. Gutierrez urged that he was entitled to testing under Chapter 64. *See Gutierrez v. State*, 2020 WL 918669, at *5.

Here, Mr. Gutierrez is not collaterally attacking the state court's decisions in the Chapter 64 cases. Instead, Mr. Gutierrez filed the present lawsuit to challenge the State's deprivation of his rights under the United States Constitution. *See* 42 U.S.C. § 1983 (providing a cause of action to those who challenge a State's "deprivation of any rights . . . secured by the Constitution"); *see also, e.g.*, Amended Compl. para. 81 ("Defendants have deprived Plaintiff of his liberty interests in utilizing state procedures to obtain an acquittal and/or reduction of his sentence, in violation of his right to Due Process of Law under the Fourteenth Amendment to the Constitution of the United States of America."); *id.* at para. 85 ("These failures have deprived Mr. Gutierrez of his fundamental right to access the courts under the First and Fourteenth Amendments."). This is the first time that Mr. Gutierrez has litigated the denial of his due process rights.

Far from having "adversely" resolved Mr. Gutierrez's allegations "that he was denied due process during the 2011 and most recent postconviction DNA proceedings in state court," Mot. to Dismiss Amended Compl. 37, the state court never considered any denial of Mr. Gutierrez's due process rights at all. *Cf. Gutierrez*, 337 S.W.2d at 899-902; *Gutierrez v. State*, 2020 WL 918669, at *6-9. The state court never once mentioned the Fourteenth Amendment, let alone addressed Mr. Gutierrez's due process rights. To the contrary, the state court expressly disclaimed any adjudication of Mr. Gutierrez's constitutional rights. *See Ex parte Gutierrez*, 337 S.W.2d at 889 ("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.'") (citing *Ex parte Mines*, 26 S.W.3d 910, 914 (Tex. Crim. App. 2000), for the proposition that "there is no constitutional right to post-conviction DNA testing"); *Gutierrez v. State*, 2020 WL 918669, at *4 (same). This Court should not preclude Mr. Gutierrez from now pursuing the constitutional due process rights to which he is entitled. *See also Wilson v. Marshall*, 2018 WL 5074689, at *11-12 (rejecting res judicata defense against § 1983 action for DNA testing).

D. Mr. Gutierrez's Claims Alleging that His Execution Would Be Unconstitutional Are Cognizable Under § 1983.

Defendants argue that Mr. Gutierrez's claims that his execution would violate the Eighth Amendment "constitute a challenge to the validity of [his] conviction and sentence," and therefore are cognizable only in habeas. Mot. to Dismiss Amended Compl. 38. They contend that "[t]hese claims necessarily imply that his conviction and sentence are unconstitutional due to the State's actions," and further that Mr. Gutierrez "explicitly seeks through these claims to avoid his sentence by obtaining what could only be construed as a permanent stay of execution." *Id.*

The Supreme Court held expressly in *Skinner* that a convicted state prisoner may seek DNA testing of crime-scene evidence in a § 1983 action. *See* 562 U.S. at 534. The Court explained that "[s]uccess in [the prisoner's] suit for

DNA testing would not 'necessarily imply' the invalidity of his conviction. While test results might prove exculpatory, that outcome is hardly inevitable; as earlier observed, . . . results might prove inconclusive or they might further incriminate [the prisoner]." *Id.* (citing *Nelson v. Campbell*, 541 U.S. 637, 647 (2004) ("[W]e were careful in [*Heck v. Humphrey*, 512 U.S. 477 (1994),] to stress the importance of the term 'necessarily.'")).

The same rationale applies here. Defendants' argument that Mr. Gutierrez's claims "necessarily imply that his conviction and sentence are unconstitutional due to the State's actions," Mot. to Dismiss Amended Compl. 38, holds no water because, as the Court explained in *Skinner*, it is "hardly inevitable" that the DNA test results might prove exculpatory. *Skinner*, 562 U.S. at 534. Further, if Mr. Gutierrez prevails on his claim,

> he would receive only access to the DNA, and even if DNA testing exonerates him, his conviction is not automatically invalidated. He must bring an entirely separate suit or a petition for clemency to invalidate his conviction. If he were proved innocent, the State might also release him on its own initiative, avoiding any need to pursue habeas at all.

Osborne, 557 U.S. at 66.

Because a favorable judgment on the instant claim would not necessarily invalidate his conviction or sentence, Mr. Gutierrez's claim is cognizable under

§ 1983. *See Booth*, 352 F. Supp. 3d at 734 ("Where an individual does not seek an 'injunction ordering . . . immediate or speedier release into the community . . . and a favorable judgment would not necessarily imply the invalidity of their convictions or sentences,' he or she may 'properly invoke[] § 1983.'") (quoting *Skinner*, 562 U.S. at 523-24).

E. Plaintiff's DNA Claims Are Not Subject to Dismissal.

1. Defendants' general arguments are without merit.

Defendants make four general arguments in support of their Rule 12(b)(6) motion: (a) that Plaintiff is attacking the correctness of the CCA's 2011 and 2020 decisions; (b) that *Osborne* erects a high standard against such claims; (c) that the Texas statute on its face is reasonable and at least as accommodating as the Alaska procedures at issue in *Osborne*; and (d) that the CCA decisions rejecting Plaintiff's DNA requests were not unreasonable. *See* Mot. to Dismiss Amended Compl. 39-62. These general arguments fail, in part because they are based on misperceptions of Plaintiff's claims.

(a) Plaintiff does not allege that "Chapter 64 violates due process because the CCA" erred in various respects. Mot. to Dismiss Amended Compl. 30. Rather, Plaintiff alleges that Chapter 64 "on its face and as construed by the CCA" effectively forecloses a person in Plaintiff's situation from obtaining the DNA testing that Chapter 64

purportedly gives him a right to pursue. Amended Compl. paras. 65-66. Like Skinner, Plaintiff "does not challenge the adverse CCA decisions themselves; instead, he targets as unconstitutional the Texas statute they authoritatively construed." *Skinner*, 562 U.S. at 532. And like Skinner, Plaintiff alleges a violation of procedural due process, not substantive due process.

(b) There is no question that Plaintiff must satisfy the substantive standard set forth in *Osborne*, i.e., he must show that the procedures under Chapter 64 "are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69; *see Pruett*, 711 F. App'x at 206. But Plaintiff's claim is different from Osborne's. Unlike Osborne, who "attempted to sidestep state process through . . . a federal lawsuit," *Osborne*, 557 U.S. at 71, Plaintiff has repeatedly attempted to avail himself of the state process. In that respect, Plaintiff, like Skinner, "is better positioned to urge in federal court 'the inadequacy of the state-law procedures available to him in state postconviction relief.'" *Skinner*, 562 U.S. at 530 n.8 (quoting *Osborne*, 557 U.S. at 71).

(c) Again, Plaintiff's claims are not an attack on the CCA's decisions, but on Chapter 64 as authoritatively construed by the CCA. Therefore, arguments that the CCA did not "err" miss the mark. Plaintiff does not ask this Court to review (under any standard) any decision by the Texas courts; rather, Plaintiff alleges that the CCA's construction of Chapter 64 has rendered the State's procedures "fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69.

2. Chapter 64, on its face and as authoritatively construed by the CCA, deprived Plaintiff of procedural due process.

Chapter 64 purports to grant convicted Texas defendants a mechanism by which they can obtain DNA testing of critical biological evidence collected in their cases. "Modern DNA testing can provide powerful new evidence unlike anything known before. . . . [T]here is no technology comparable to DNA testing for matching issues when such evidence is at issue. DNA testing has exonerated wrongly convicted people. . . ." *Osborne*, 557 U.S. at 62 (citations omitted). Consequently, Plaintiff has a "liberty interest in demonstrating his innocence with new evidence under state law." *Id.* at 68.

Chapter 64 contains a large number of hurdles that applicants must overcome if they are to obtain DNA testing. Many of these are at least facially reasonable. But the requirement that applicants prove by a preponderance of the evidence that they "would not have been convicted if exculpatory results had been obtained through DNA testing," Tex. Crim. Proc. Code Ann. art. 64.03(a)(2)(A), as construed by the Texas courts, has erected an insuperable barrier. The Amended Complaint alleges both that the statutory standard is unusually and unreasonably high, and that the standard has been authoritatively construed in such a manner as to render it virtually impossible to meet. *See* Amended Compl. paras. 65-71.

Appendix K

a. The facial challenge

Defendants first contend that there is nothing fundamentally unfair about the standard itself. According to the Defendants:

> The Alaska state law at issue in *Osborne* required a greater showing—that "newly discovered evidence" established "by clear and convincing evidence" the convicted person was innocent and that testing "would likely be conclusive" on the issue of the convicted person's innocence. The Supreme Court's approval of Alaska's procedures is dispositive of Plaintiff's challenge to Chapter 64's preponderance-of-the-evidence standard.

Mot. to Dismiss Amended Compl. 43 (citing *Osborne*, 557 U.S. at 65, 68).

Defendants misconstrue the holding and applicability of *Osborne*. At the time *Osborne* was decided, Alaska did not have a DNA testing statute. *Osborne*, 557 U.S. at 64. Rather, under Alaska post-conviction law, a petitioner could bring a claim alleging newly discovered evidence, and could obtain relief from his conviction based on new evidence that clearly and convincingly establishes innocence. *Id.* Under Alaska post-conviction law, a prisoner could use discovery procedures to request DNA testing. *Id.* at 64-65. Additionally, Alaska precedent suggested that a prisoner could obtain DNA testing on a showing that the conviction relied primarily on identification

evidence, that there was demonstrable doubt concerning the identification, and that scientific testing would likely be conclusive. *Id.* at 65.

Notably, the clear and convincing standard—on which Defendants rely—was not the standard for obtaining DNA testing; rather, it was the standard for obtaining relief based on newly discovered evidence, including the results of DNA tests. And the Court made clear that if a prisoner seeks relief alleging newly discovered evidence, "state law permits general discovery," *Osborne*, 557 U.S. at 64 (citing Alaska Rule Crim. Proc. 35.1(g)), and that under Alaska law these discovery procedures "are available to request DNA evidence for newly available testing to establish actual innocence," *id.* (citing *Patterson v. State*, No. A-8814, 2006 WL 573797, *4 (Alaska App. Mar. 8, 2006)). Thus, as far as the Court was aware, the procedure for an Alaska prisoner to obtain DNA testing at that time was for the prisoner to file a post-conviction relief application and request discovery, which was generally available.

In *Osborne*, the Court suggested that this vague but open-ended procedure likely passed constitutional muster. *Osborne*, 557 U.S. at 69-70. But it emphasized that this suggestion was provisional because Osborne himself "has not tried to use the process provided to him by the State of attempted to vindicate the liberty interest that is now the centerpiece of his claim." *Id.* at 70-71. As a result, Osborne could not show any inadequacy in the State's procedures:

> His attempt to sidestep state process through a new federal lawsuit puts Osborne in a very

> awkward position. If he simply seeks the DNA through the State's discovery procedures, he might well get it. If he does not, it may be for a perfectly adequate reason, just as the federal statute and all state statutes impose conditions and limits on access to DNA evidence. It is difficult to criticize the State's procedures when Osborne has not invoked them.

Id. at 71.

Given all of the above, it is clear that—contrary to the Defendants' argument—*Osborne* itself is not "dispositive of Plaintiff's challenge." Mot to Dismiss Amended Compl. 43. Neither is Defendants' string cite to decisions from other circuits dispositive. *Id.* at 43-44 (citing *Morrison v. Peterson*, 809 F.3d 1059, 1068-69 (9th Cir. 2015); *Alvarez*, 679 F.3d at 1266 n.2; *Cunningham v. Dist. Attorney's Office for Escambia Cty.*, 592 F.3d 1237, 1263 (11th Cir. 2010); *McKithen*, 626 F.3d at 153-54).

Of those decisions, *Morrison* is most analogous to this case, but in the cited passage from *Morrison* the court ignored the distinctive features of the Alaska process and Osborne's failure to pursue available state court remedies, discussed above. *McKithen* is distinguishable because there, as in *Osborne*, the plaintiff failed to diligently pursue state court remedies. *See Newton v. City of New York*, 779 F.3d 140, 150 (2d Cir. 2015) (noting that the plaintiff there had "demonstrated that (in contrast to Osborne and McKithen) he diligently and repeatedly tried the State's procedures for obtaining the necessary

DNA evidence"). The cited passage from *Alvarez* is dicta, given that Alvarez had abandoned any facial challenge to Florida's DNA access procedures. *See Alvarez*, 679 F.3d at 1262. Finally, *Cunningham*, which reviewed Alabama's procedures, primarily stands for the proposition that a comparative approach to facial challenges is appropriate. But it does not absolve Texas's procedures from such a challenge. Indeed, after *Cunningham* the district court in *Wilson v. Marshall* denied a motion to dismiss a complaint raising a facial challenge to Alabama's procedures in capital cases, on grounds equally applicable here:

> [A]s the [Alabama] statute is written, movants could meet all [the other statutory] requirements . . . but, nevertheless, find their motion properly denied if the trial court rejects the prima facie evidence of exculpatory results and finds, without the benefit of analysis or testing of DNA evidence by anyone, that the DNA testing which has never occurred cannot reasonably produce exculpatory evidence that would exonerate the movant. Plaintiff's allegations sufficiently suggest that this statutory escape hatch may present facial due process problems.

Wilson v. Marshall, 2018 WL 5074689, at *14.

Although wedded to a comparative approach for facial challenges, Defendants largely ignore Plaintiff's showing, *see* Amended Compl. 22 n.7, that the Texas standard is unusually onerous. Instead, Defendants simply argue that a few states have even more onerous requirements. Mot.

to Dismiss Amended Compl. 44. But Defendants make no meaningful attempt to defend the statutory "escape hatch" whereby Texas can deny testing—even though all other requirements are met—based on speculation that "DNA testing that has never occurred cannot reasonably produce exculpatory evidence." *Wilson v. Marshall*, 2018 WL 5074689, at *14. Accordingly, the facial challenge is not subject to dismissal. Moreover, neither is the challenge to the statute as authoritatively construed by the Texas courts.

b. As authoritatively construed by Texas courts, the requirement to prove by a preponderance that the defendant would have been acquitted is fundamentally unfair.

Chapter 64 requires a convicted person to establish by a preponderance of evidence that he would not have been convicted had DNA testing yielded exculpatory results. *Leal v. State*, 303 S.W.3d 292, 296 (Tex. Crim. App. 2009). At least since 2002, the Texas courts have interpreted this requirement as precluding testing if the proposed testing would simply "muddy the waters." *Kutzner v. State*, 75 S.W.3d 427, 439 (Tex. Crim. App. 2002). In practice, the Texas courts have used this concept to preclude testing unless (1) the evidence of guilt at trial was extraordinarily weak; *and* (2) testing could conclusively prove that the defendant had nothing to do with the crime, as opposed to raising reasonable doubt with respect to the defendant's guilt. *See, e.g.*, *Hall v. State*, 569 S.W.3d 646, 656 (Tex. Crim. App. 2019) (no testing allowed because

the record "contains *other substantial evidence of guilt* independent of that for which the movant seeks DNA testing") (emphasis added) (footnote and quotation marks omitted); *State v. Swearingen*, 424 S.W.3d 32, 38-39 (Tex. Crim. App. 2014) (exculpatory fingernail scrapings would not *exclude* defendant from having been the killer); *Brewer v. State*, 143 S.W.3d 389, 394 (Tex. App. 2004) (requirement not met; evidence tying witnesses to crime scene evidence would not matter because witnesses' credibility was impeached at trial); *Bingley v. State*, No. 14-03-01297-CR, 2004 WL 744486, at *3 (Tex. App. Apr. 8, 2004) (requirement not met where victim knew defendant and identified him); *Eubanks v. State*, 113 S.W.3d 562, 566 (Tex. App. 2003) (same where defendant requested testing of pubic hair combings).

Plaintiff alleges that these authoritative constructions of the statute by the Texas courts heighten the fundamental unfairness of the statutory standard itself. This type of allegation was expressly authorized as an appropriate due process challenge by the Supreme Court in *Skinner*, 562 U.S. at 532. Nevertheless, Defendants repeatedly assert that Plaintiff is making an impermissible claim that Texas courts committed errors of state law. Mot. to Dismiss Amended Compl. 46-47 & n.22, 56. Because Plaintiff's claim is cognizable under *Skinner*, Defendants' argument should be rejected.

The CCA applied the same expansive "muddy the waters" reasoning in Mr. Gutierrez's case. *Gutierrez*, 337 S.W.3d at 901-02. Reliance on that concept avoids confronting the likelihood that exculpatory results would

lead a jury to have reasonable doubt as to the defendant's guilt. As such, the "muddy the waters" notion is simply an all-purpose basis for arbitrarily denying access to DNA testing, in violation of due process.

Defendants argue that article 64.03(a)(2)(A) is a materiality requirement, and that materiality requirements are not unconstitutional. Mot. to Dismiss Amended Compl. 47-49. As discussed above, the problems with article 64.03(a)(2)(A) are not that it requires a showing of materiality, but that (a) it provides an unusually high standard of materiality; (b) it purports to require an assessment of materiality before anyone knows what the results of testing would be—the questionable "escape hatch" discussed in *Wilson v. Marshall*; and (c) Texas courts have construed the requirement in such a way that it creates an insuperable barrier to obtaining testing. This does not prove that Texas has violated due process, but it does establish that the allegations of the Amended Complaint, "given the plain language of [Texas's] DNA law, call the constitutionality of the DNA law into question sufficiently to state a claim and allow [Mr. Gutierrez] to move beyond the initial pleading stage of this lawsuit." *Wilson v. Marshall*, 2018 WL 5074689, at *15.

c. The statute and the CCA's construction of it harmed Mr. Gutierrez.

Although there is no requirement to show prejudice from this type of due process violation, Mr. Gutierrez was in fact prejudiced. *See* Amended Compl. 26-27. Defendants argue at some length that testing would not

do Mr. Gutierrez any good. Mot. to Dismiss Amended Compl. 53-57. Many of Defendants' arguments relate to factual matters that cannot properly support a motion to dismiss under Rule 12(b)(6). Nevertheless, we respond to them here.

Any DNA evidence that identified other individuals as being involved in the murder would likely have changed the outcome of the trial. A DNA profile tying Avel Cuellar to the crime would be especially likely to have changed the outcome of the trial. Cuellar was one of the prosecution's main witnesses. Investigators identified blood on the shirt Cuellar was wearing on the night of the crime, but conducted no pattern interpretation of those stains. A pattern interpretation could determine whether the stains are (1) transfer consistent with blood transfer of the type that would corroborate Cuellar's testimony that he tried to pick up the victim's body after he found her or (2) spatter stains that are consistent with Cuellar having been near the victim as she was stabbed and beaten. Decl. of Professor Timothy M. Palmbach, App. to Compl. 25.

Furthermore, Cuellar's clothing could be tested for touch DNA left by one of his co-assailants. The State's theory of the crime was that two people simultaneously attacked the decedent at very close range, using their hands and sharp weapons. The trailer itself was a small and confined space, especially the area where the victim's body was found. It is likely that if Cuellar was one of the people in the trailer who attacked the decedent, he would have been touched at some point by one of the co-assailants. That person could have left touch DNA on his

clothing. Nasir Aff., App. to Compl. 20-23. Cuellar was not known to have had any connection to co-defendants Garcia or Gracia—and thus evidence that Garcia's DNA or Gracia's DNA was deposited onto Cuellar's clothing would raise an inference that one of them committed the murder with Cuellar. *Id.*

If the jurors had heard evidence that Cuellar's DNA had been found underneath the victim's fingernails or on her nightgown, it is more likely than not that they would have rejected his testimony. If they had heard evidence that Cuellar had bled in the bathroom or on the couch, it is more likely than not that they would have believed that he had been involved in a struggle with the victim. If they had heard that Cuellar had the DNA of Garcia and/or Gracia on his bloody clothing, it is more likely than not that they would have believed it was Cuellar, not Ruben Gutierrez, who was the mastermind of and committed this crime. If they had heard evidence that the victim died holding a hair from Cuellar's head, they would have rejected Cuellar's testimony outright. And if they had heard that the blood stains on Cuellar's shirt were consistent with the victim and indicative of blood spatter resulting from an attack rather than blood transfer resulting from contact with a dead body, they more likely than not would have believed that he had committed the murder. Evidence tying Cuellar to the murder would have completely undermined his testimony and raised sufficient reasonable doubt to change the outcome of the trial.[17]

17. Defendants suggest that it may not be possible to obtain reference samples for Cuellar, Garcia and Gracia. Mot. to Dismiss Amended Compl. 56. Again, this is a factual issue inappropriate

If DNA testing had inculpated Cuellar on more than one of the tested items— in other words, if there had been redundancy among the profiles—it is extremely unlikely that the jury would have believed Cuellar's claim that he was not involved in the murder. Cuellar's involvement would have destroyed the prosecution's trial theory that Ruben Gutierrez and Rene Garcia alone killed the victim, and Cuellar was just a grieving nephew.

Even if the DNA profiles on the items Plaintiff seeks to test are not consistent with Cuellar, any results showing that two individuals were at the scene, neither of whom was Plaintiff, would have rendered an acquittal more likely than not. Two profiles found in the fingernail scrapings would be highly probative. In cases of violent crime, prosecutors have frequently relied on DNA evidence obtained from a victim's fingernail scrapings and clippings as highly probative evidence of a defendant's guilt, particularly where there is evidence that the victim struggled with the perpetrator. *See, e.g.*, *State v. Benjamin*, 861 A.2d 524, 536 (Conn. App. Ct. 2004) (affirming assault conviction by citing evidence of defendant's DNA under victim's nails); *Cotton v. State*, 144 So. 3d 162, 168 (Miss. Ct. App. 2013) (affirming murder conviction based on presence of defendant's DNA under victim's nails); *Webster v. State*, No. 01-16-00163-CR, 2017 WL 2806786, at *6 (Tex. App.

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for resolution on a motion to dismiss. We note, however, that Cuellar was charged with child sexual abuse in 1999 and pled guilty in 2000. *See State v. Cuellar*, No. 99-CR-0001677-B (Tex. 138th Judicial Dist.). Therefore, Cuellar's DNA should be available through CODIS. Moreover, Rene Garcia is currently in custody serving a life sentence for this homicide.

June 29, 2017) (unpublished) (affirming murder conviction because, inter alia, a rational jury could find that evidence of defendant's DNA in victim's fingernail clippings was probative of guilt).

Any male DNA found on the nightgown is also likely to have come from an assailant. This case involves a prolonged, violent struggle, in which the perpetrator(s) used one or more screwdrivers to attack the victim. The assailants were necessarily in close physical proximity to the victim, and defensive wounds on her hands and arms indicate that she fought back. There is a high likelihood that the assailant(s) grabbed the victim's nightgown as they tried to subdue her. Palmbach Decl., App. to Compl. 27; Nasir Aff., App. to Compl. 21-22. If a jury heard that two male profiles were found on the nightgown, one of which was consistent with Garcia and the second of which was consistent with Gracia or another individual, especially Cuellar, or the testing otherwise excluded Ruben Gutierrez, the jury would more likely than not have believed that Plaintiff was not involved in the murder.

Similarly, a DNA profile—from the only foreign hair that was collected from the victim's body—that excluded Mr. Gutierrez would likely have resulted in an acquittal. The hair was found curled around her finger, suggesting that she grabbed an assailant's hair during the struggle. Any profile obtained from that hair would likely identify one of the perpetrators.

Because of the violence of the assailants' struggle with the victim, the defensive wounds on the victim's hands and

arms, and the blood under her nails, it is likely that one or both of the assailants suffered at least one laceration. The fact that there were blood drops throughout the house indicates that whoever left those drops was actively bleeding himself, and had more than mere passing contact with the victim. Palmbach Decl., App. to Compl. 26; Nasir Aff., App. to Compl. 22. A single profile from these blood stains that matched neither Plaintiff nor Garcia would be definitive proof that another individual had been involved in the murder, contradicting the State's theory and making it more likely than not that the jury would have acquitted.

Finally, if an identical profile or profiles foreign to Mr. Gutierrez, Rene Garcia, and the victim were obtained from multiple pieces of evidence, such redundancy would be highly probative of the fact that Mr. Gutierrez did not participate in the murder. An identical profile from, for example, the victim's fingernail scrapings, touch DNA on the victim's nightgown, touch DNA found on Cuellar's clothing, and blood stains found in the bathroom would be persuasive proof that the owner of that profile was involved in the crime. The State would have had to provide the jury with an explanation of how somebody other than the two perpetrators it claimed were in the house would leave behind such a trail of biological evidence without having been involved in the crime.

Defendants attempt to avoid these conclusions on several grounds, none of which has merit.

Defendants claim that there was overwhelming evidence that Plaintiff was inside Ms. Harrison's house, as follows:

> [T]he evidence—four eyewitness identifications of Plaintiff and the statements of Plaintiff and his cohorts—"unequivocally" placed him inside Ms. Harrison's home at the time she was killed.

Mot. to Dismiss Amended Compl. 51 (citing *Gutierrez v. State*, 2020 WL 918669, at *7) (footnote and additional citation omitted).

This is remarkably misleading. First, while *Gutierrez v. State* did say the evidence "unequivocally" placed Mr. Gutierrez inside the house, it relied solely on the statements of Mr. Gutierrez and his co-defendants; it did not say a word about eyewitness identifications, let alone "four eyewitness identifications." *See Gutierrez v. State*, 2020 WL 918669, at *7. Second, the suggestion that there were "four eyewitness identifications of Plaintiff" that placed him inside the house is inaccurate. The notion of *four* eyewitness identifications is not supported by anything in the record. In 2011, the CCA relied on a single eyewitness identification as helping to establish identity, an issue not addressed by the CCA in 2020. But the testimony of that *single* eyewitness placed Mr. Gutierrez *outside* Ms. Harrison's house, not inside it. *See Ex parte Gutierrez*, 337 S.W.3d at 894. And in the 2019 proceedings, Plaintiff cast significant doubt on the reliability of that witness's testimony, *see* Compl. para. 67, with the result that the CCA in 2020 did not cite or rely on that testimony. The non-existent "four eyewitness identifications" are a red herring.

Defendants also contend that the CCA did not rely "solely" on Mr. Gutierrez's third and allegedly coerced

statement as the basis for denying relief. Mot. to Dismiss Amended Compl. 51 & n.24. Again, Defendants are wide of the mark.

The materiality provision that the CCA relied on in denying relief requires the movant to show by a preponderance of the evidence that he "would not have been convicted if exculpatory results had been obtained through DNA testing." Art. 64.03(A)(2)(a). To support its decision, the CCA relied generally on the three statements of Mr. Gutierrez and his co-defendants as placing him inside the house. *Gutierrez v. State*, 2020 WL 918669, at *7. To support the proposition that DNA testing would not have been material, however, the CCA did rely solely or almost solely on Mr. Gutierrez's own statement. *See id.* (explaining why the victim's fingernail scrapings would not be material, even if exculpatory, and relying solely on Mr. Gutierrez's statement); *id.* at *8 (same as to why hair found in victim's hand would not be material, even if exculpatory); *id.* (same as to why DNA from victim's nightgown, robe and slip would not be material, even if exculpatory); *id.* (same as to blood samples and Cuellar's clothing). Even leaving aside the new evidence that Mr. Gutierrez's statement was coerced, *but see* Amended Compl. 24 & n.8, such reliance is inconsistent with article 64.03(b).

Moreover, the materiality provision is purportedly focused on whether Mr. Gutierrez would likely be acquitted at a trial that included the untested DNA evidence. *See* Art. 64.03(A)(2)(a). At such a trial, however—as at the original trial—the co-defendants' statements would be excluded as unreliable under *Bruton v. United States*, 391 U.S. 123, 136 (1968). Defendants make no attempt to

explain how it is fair to consider inadmissible evidence in deciding the likely outcome of a trial.

Defendants contend that Plaintiff could still not demonstrate that he would likely have been acquitted under Texas's law of parties. Mot. to Dismiss Amended Compl. 53-54. "Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense *and* encourages its commission by words or other agreement." *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996). At trial—and in the current proceedings—the State argued that Mr. Gutierrez was present inside the house and an active participant in the murder. Evidence showing instead that he at most participated in planning a burglary but was not present inside the house and did not assault the decedent would put the case in an entirely different light, even under the law of parties. *See Garcia v. State*, No. 01-05-00718-CR, 2007 WL 441716, at *3 (Tex. App. Feb. 8, 2007) (unpublished) (where State's trial theory was that defendant was one of two men who were present at scene of crime, DNA evidence could be exculpatory if it cast doubt on that theory).

Finally, Defendants suggest that perhaps the testing would not be particularly exculpatory. Mot. to Dismiss Amended Compl. 56-58. This suggestion cannot be a basis for dismissing the Amended Complaint. Plaintiff has alleged that the testing likely would be exculpatory. Amended Compl. 26-27. Plaintiff's allegations are supported by the reports or declarations of three highly qualified experts. A18-42. Defendants' assertions in this regard might be the appropriate subject of a motion for summary judgment or a contested trial, but not of a motion to dismiss.

d. The lack of any provision for DNA testing to show innocence of the death penalty is unconstitutional.

Furthermore, the CCA ruled in the alternative that DNA testing is not available to show innocence of the death penalty, and that Mr. Gutierrez could not show that he was innocent of the death penalty under *Tison v. Arizona*, 481 U.S. 137, 158 (1987). *See Gutierrez*, 337 S.W.3d at 901. Denying testing that would prove innocence of the death penalty in itself violates due process and the Eighth Amendment. Moreover, this case is distinguishable from *Tison*. In *Tison*, the defendant was involved in assembling "a large arsenal of weapons" and entering a prison with an ice chest full of those weapons in order to, along with other family members, help his brother escape. *Id.* at 139. The defendant's family abducted and killed a family of four in the course of the ongoing escape. The *Tison* defendant had been involved in obtaining a large cache of weapons, and he himself brandished a gun against prison guards. *Id.* at 139, 144. Given the large number of guns involved and the fact that the *Tison* defendant actually brandished a gun during the crime, it must have been foreseeable to him that somebody was likely to be killed. In Mr. Gutierrez's case, however, exculpatory DNA evidence would support his contention that he was not involved in the assault and took no part in the decision to murder the victim. Thus, the DNA evidence would likely show that Mr. Gutierrez was not eligible for the death penalty.

Defendants contend that there is nothing wrong with construing the statute to preclude testing for innocence

of the death penalty. Mot. to Dismiss Amended Compl. 58-59. Given the life and liberty interests at stake, such a construction of the statute would be fundamentally unfair.

3. The access to courts claim does not fail as a matter of law.

Defendants argue that the access to courts claim fails because the due process claim fails. Mot. to Dismiss Amended Compl. 60-61. But the converse is true—because the due process claim is viable, the access to courts claim is also viable.

4. The Eighth Amendment claim does not fail as a matter of law.

As discussed above, Texas has construed Chapter 64 to preclude testing that would "only" establish innocence of the death penalty. Reliability of death sentences is a core requirement of the Eighth Amendment. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (referring to the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case"). Refusing to allow DNA testing that could show innocence of the death penalty therefore violates the Eighth Amendment, as well as due process. Plaintiff does not contend that the Eighth Amendment prohibits his execution, but rather that his due process and Eighth Amendment rights have been violated by the arbitrary denial of DNA testing that could prove his innocence of the death penalty. Consequently, Defendants' challenge to the Eighth Amendment claim is without merit.

F. TDCJ's Revised Execution Policy Violates the Establishment Clause, the Free Exercise Clause, and RLUIPA.

1. Establishment Clause claim

Mr. Gutierrez has pled facts sufficient to state a claim that TDCJ's execution procedure violates the Establishment Clause because it is not neutral between religion and non-religion. *See Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009) (explaining that on a motion to dismiss, the "strict standard of review" asks "whether in the light most favorable to the plaintiff and with every doubt resolved on his behalf, the complaint states any valid claim for relief" (second quotation quoting 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 601 (1969))).

The Establishment Clause of the First Amendment prohibits governments from advancing or inhibiting religion. U.S. Const. amend. I; *see also Larson v. Valente*, 456 U.S. 228, 246 (1982); *Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973). TDCJ's prior policy, which allowed TDCJ-approved spiritual advisers into the execution chamber, ran afoul of the Establishment Clause because it favored Christian and Muslim prisoners over those of different religions. *See Murphy*, 139 S. Ct. at 1475 (Kavanaugh, J., concurring). Prohibiting all spiritual advisers from being present in the execution chamber may have solved one constitutional infirmity, but TDCJ's new policy is not neutral between religion and non-religion. Laws or policies that are not neutral between religion and non-religion are inherently

suspect and subject to strict scrutiny. *See Larson*, 456 U.S. at 246. The policy can survive this level of scrutiny only if it is narrowly tailored to a compelling interest. *Id.* at 247; *see also Murphy v. Collier*, 942 F.3d 704, 707 (5th Cir. 2019) (affirming district court opinion, which found TDCJ's execution policy regarding access to clergy "may not be the least restrictive means" of accomplishing its goal of maintaining security).[18] While TDCJ may have a compelling interest in maintaining security throughout the execution protocol, there is no evidence or reason to conclude that TDCJ's discriminatory policy serves this interest. Indeed, as pled in the complaint, TDCJ has developed and adopted procedures to provide security clearance to certain individuals, allowing them to be present in the execution chamber during executions. Amended Compl. para. 91.

Defendants do not dispute that the revised policy is not neutral. Instead, they argue that, rather than subject TDCJ's policy to strict scrutiny, this Court should apply a "reasonableness test." Mot. to Dismiss Amended Compl.

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18. Defendants claim that the *Murphy* litigation has little bearing on Plaintiff's chaplain claims, because Plaintiff did not allege claims regarding TDCJ's preexecution "holding area" policies as Murphy did in his amended complaint. Mot. to Dismiss Amended Compl. 69 n.32. In addition, Defendants contend that Murphy'sexecution was most recently stayed because the Fifth Circuit found he had a strong likelihood of success on the merits of his holding area claims. *Id*. Defendants err. Murphy's amended complaint continued to allege that TDCJ's prohibition on advisers in the execution chamber violated his constitutional rights because it favors non-religion over religion. *Murphy*, 942 F.3d at 707 n.1. Acknowledging that claim, the Fifth Circuit clarified that its decision to grant Murphy a stay focused on his holding area claim merely "because that was the focus of the district court's analysis." *Id.*

70 (citing *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019), and *Brown v. Collier*, 929 F.3d 218 (5th Cir. 2019)). Defendants' argument fails.

First, *American Legion* is inapposite. That case concerned whether retaining certain religious monuments, symbols, and practices might run afoul of the Establishment Clause. *Am. Legion*, 139 S. Ct. at 2090 (holding that the Bladensburg Cross, commemorating soldiers who served in World War I, does not violate the Establishment Clause). The Court did not employ a "reasonableness test," as Defendants suggest, *see* Mot. to Dismiss Amended Compl. 70. Instead, the Court grappled with how religious symbols can take on secular and cultural meanings or purposes over time.

Here, there is no doubt that Mr. Gutierrez's request—and the requests of other prisoners seeking spiritual guidance and comfort at the time of their executions—serves a religious purpose. *See Murphy*, 942 F.3d at 707 (noting that district court rejected TDCJ's argument that TDCJ clergy serve a primarily secular role in execution process). If anything, the reasoning of *American Legion* compels the conclusion that TDCJ's revised policy is hostile to religion. *See Am. Legion*, 139 S. Ct. at 2090 ("[D]estroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."); *id.* at 2091 ("[A]s the Court explains, ordering [the Peace Cross's] removal or alteration at this late date would signal 'a hostility toward religion that has no place in our Establishment Clause traditions.'") (Breyer, J., concurring).

Second, the Fifth Circuit's opinion in *Brown v. Collier* does not command that the Court apply a "reasonableness test" here, as Defendants suggest. In *Brown*, the Fifth Circuit examined a prison policy that required all religious activities attended by more than four inmates to be supervised by a prison chaplain, guard, or outside volunteer, which conflicted with an ongoing consent decree that required TDCJ to allow Muslim inmates to be indirectly supervised if prison staff or volunteers were unavailable. 929 F.3d at 224.

The Fifth Circuit held that "[w]hen policies ostensibly designed to honor the Free Exercise rights of inmates are challenged on the basis that they violate the Establishment Clause because the policies favor one or more faith groups over another, logic demands that [the standard set forth in *Turner v. Safley*, 482 U.S. 78, 81 (1987),] applies." *Id.* at 244. Rather than applying strict scrutiny, the *Brown* court concluded that prison officials "attempting to accommodate the religious beliefs of varying faith groups . . . must operate within a zone of 'reasonableness.'" *Id.* Here, TDCJ's revised policy is not an attempt to accommodate prisoners' religious practices. In denying death-sentenced prisoners the long and widely held spiritual practice to pass to the afterlife with a chaplain or spiritual adviser at their side, TDCJ's revised policy is hostile to all religion. *See, e.g.*, *Dunn*, 139 S. Ct. at 662 (Kagan, J., dissenting from grant of application to vacate stay) (referring to the right of a person to "die with a minister of his own faith by his side").

Even if the Court believes Mr. Gutierrez's Establishment Clause claim must be reviewed under the

Turner factors, Mr. Gutierrez has pled sufficient facts to survive a motion to dismiss. As a threshold matter, the Supreme Court has "found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a *neutral* fashion, without regard to the content of the expression." *Turner*, 482 U.S. at 90 (emphasis added). In addition, under *Turner*, a court is to consider four factors:

> (1) whether the challenged restrictions bear a "valid, rational connection" to a "legitimate and neutral" governmental interest;
>
> (2) whether alternative means are open to inmates to exercise the asserted right;
>
> (3) what impact an accommodation of the right would have on guards and inmates and prison resources; and
>
> (4) whether there are "ready alternatives" to the regulation.

Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (citing *Turner*, 482 U.S. at 89-91) (internal quotations omitted).

Answering the threshold question, TDCJ's policy is not neutral. *See Turner*, 482 U.S. at 90. By denying all religious inmates access to a spiritual adviser at the time they are dying and when they believe they will be entering some form of an afterlife, TDCJ's policy favors non-religious inmates. In addition, Mr. Gutierrez has pled that, under the previous policy, TDCJ followed

a procedure through which it could be confident that the chaplains approved to be present in the execution chamber were not a security threat. Defendants do not explain why continuing to use this process to approve religious and spiritual advisers who may be allowed in the execution chamber "would require TDCJ to permit the attendance of potentially ill- suited individuals in the execution chamber." Mot. to Dismiss Amended Compl. 72. Defendants simply claim that the relief Mr. Gutierrez seeks would require TDCJ to allow spiritual advisers from "all conceivable denominations," arguing that such relief is "plainly infeasible," "unworkable on its face," and "untenable." *Id.* at 52, 53, 57. Defendants twice refer to the "217" or "more than 200" faiths represented in the TDCJ system, *id.* at 67, 71, but make no representations as to how many faiths are represented on Texas's death row, which makes up less than one percent of the TDCJ system. Defendants have not demonstrated that using TDCJ's existing security screening process would be unworkable to provide religious and spiritual advisers to death-sentenced prisoners at the time of their execution. While TDCJ has the ready alternative of training and allowing spiritual advisers to be present in the execution chamber, a condemned prisoner has no alternative for receiving the spiritual guidance and comfort of clergy in his last moments of life. *See Murphy*, 942 F.3d at 708 n.2 (it is uncertain whether a prisoner and his spiritual adviser can communicate between the chamber and witness room).

2. Free Exercise Clause claim

TDCJ's policy will impermissibly interfere with Mr. Gutierrez's ability freely to exercise his religion. Mr.

Gutierrez believes having a chaplain present in the execution chamber will secure his path to the afterlife.

The level of scrutiny to be applied when reviewing policies that hinder an individual's ability freely to exercise his religion depends on whether the law is neutral and generally applicable. As Justice Kennedy explained in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 531. A law that does not satisfy both of these requirements, however, "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* TDCJ's revised policy is not neutral because it evinces a hostility toward religion and favors non-religious, over religious, inmates. Accordingly, the policy is permissible only if it can survive strict scrutiny.

The policy cannot survive strict scrutiny where TDCJ already has TDCJ- employed chaplains who have been cleared to be present in the execution chamber, and indeed have attended executions in the past, and also has ample time to take measures necessary to screen spiritual advisers of other faiths as needed using its existing security screening procedures.

Even under the standard applied to prisoners' First Amendment claims under *Turner*, Mr. Gutierrez is entitled to relief, because Defendants' revised policy is not neutral in that it evinces a hostility toward religion in general. The same procedure previously used to prepare TDCJ

chaplains and other employees to serve in the execution chamber can be used to prepare other spiritual advisers. TDCJ's refusal to take that modest step, and instead deny all religious inmates the presence of their advisers at such a crucial time, demonstrates a hostility to religion that the First Amendment cannot tolerate.

3. RLUIPA claim

Defendants argue that Mr. Gutierrez's RLUIPA claim should be dismissed because he has not "assert[ed] that the physical presence of a chaplain in the execution chamber is required for him to exercise his religion or to 'guide[]' [him] at the time of the execution." Mot. to Dismiss Amended Compl. 64.

However, Mr. Gutierrez explained in his grievance:

> [A]fter having spoken to both [Chaplain] Guy, and Chaplain Moss (Huntsville Unit Chaplain) both are willing to be present with me during this stressful and trying time, up until[] the very end. Given how Chaplain Moss has been present inside the chamber for other executions, he's well versed in the process, yet he too, is being denied from being inside the chamber come my execution. All I'm merely asking is to have a Chaplain who's been TDCJ approved to be present with me during my execution, of which, will help make this whole process a little less inhumane, and thus, help secure that my path to the thereafter is ensured without any further [hindrance] from TDCJ Officials.

App. to Compl. 16-17.

The State would have this Court dismiss out of hand Mr. Gutierrez's sincere religious belief that the presence of a chaplain will guide him to the afterlife, but that is not the standard on a motion to dismiss.

"In RLUIPA, in an obvious effort to effect a complete separation from the First Amendment case law, Congress deleted the reference to the First Amendment and defined the 'exercise of religion' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 696 (2014) (quoting 42 U.S.C. § 2000cc-5(7)(A)). Accordingly, if the Court believes TDCJ's policy does not violate Mr. Gutierrez's rights pursuant to the Free Exercise Clause because Mr. Gutierrez's request to have a chaplain by his side to guide him to the afterlife is not something he is compelled to do by his religion, the Court should nevertheless find TDCJ's policy violates RLUIPA.

Mr. Gutierrez's belief in Christianity is sincere. *See* App. to Compl. 16-17. Prohibiting Mr. Gutierrez from being guided at the time of his death by a Christian chaplain is an explicit and substantial burden on religious exercise in violation of RLUIPA. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 360-62 (2015) (where prisoner shows exercise of religion—in that case, growing a half-inch beard—was "grounded in a sincerely held religious belief," enforced prohibition "substantially burdens his religious exercise"); Catechism of the Catholic Church §§ 1524-1525 (concerning longstanding practice of administering *viaticum* to those facing death).

Appendix K

CONCLUSION

For the reasons set forth herein and in Plaintiff's prior submissions, the motion to dismiss the complaint should be denied.

Respectfully submitted,

/s/ Peter Walker
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Federal Community Defender for the
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Counsel for the Plaintiff

Appendix K

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ORDER GRANTING MOTION FOR STAY OF EXECUTION PENDING DISPOSITION OF PLAINTIFF'S COMPLAINT FILED PURSUANT TO 42 U.S.C. § 1983

Before the Court is plaintiff's Motion for Stay of Execution Pending Disposition of Plaintiff's Complaint Filed Pursuant to 42 U.S.C. § 1983. (Docket no. 3). Plaintiff is scheduled to be executed on or after 6:00 p.m. today. Plaintiff seeks a stay of execution pending the disposition of his 42 U.S.C. § 1983 claim for further DNA testing. Plaintiff filed his complaint and motion for stay on the afternoon of his execution after the Texas Court of Criminal Appeals denied relief. There is federal subject matter jurisdiction over plaintiff's complaint and the DNA claim he brings is cognizable under 42 U.S.C. § 1983. *Skinner v. Switzer*, 131 S. Ct. 1289, 1296-1300 (2011). Given that plaintiff's execution is imminent and because the state court handed down its decision today, it appears from the limited briefing and authorities before the Court that plaintiff has shown a significant possibility of success on the merits. *Hill v. McDonough*, 547 U.S. 573 (2006). Accordingly, the Court is of the opinion that plaintiff's motion for stay of execution should be granted pending further briefing and consideration by this Court of plaintiff's motion brought under 42 U.S.C. § 1983.

IT IS THEREFORE ORDERED that plaintiff's Motion for Stay of Execution Pending Disposition of Plaintiff's Complaint Filed Pursuant to 42 U.S.C. § 1983 (docket no. 3) is GRANTED such that plaintiff's execution scheduled for on or after 6:00 p.m. today is STAYED pending disposition of his 42 U.S.C. § 1983 claim.

IT IS FURTHER ORDERED that counsel shall CONFER and file, **on or before May 15, 2012**, a briefing schedule to address the issues raised in plaintiff's complaint.

It is so ORDERED.

SIGNED this 2nd day of May, 2012.

/s/ Fred Biery
FRED BIERY
CHIEF UNITED STATES
DISTRICT JUDGE

Appendix K

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November 3, 2015

Luis V. Saenz, District Attorney
Office of the District Attorney
964 E. Harrison Street
Brownsville, TX 78520

RE: Open Records Request
Federal Freedom of Information Request

Dear District Attorney Saenz:

Pursuant to the Open Records Act and the Federal Freedom of Information Act, I am requesting copies of the documents establishing the chain of custody for, and current location of, a sexual assault kit from the autopsy conducted by Dr. Lawrence J. Dahm on Escolastica Harrison on September 9, 1998. The pathology report from the autopsy is number 0A-98-0204.

According to the "EXTERNAL EXAMINATION" section of the final pathology report dated October 14, 1998, as well as sworn trial testimony, Dr. Dahm gave the sexual assault kit to Brownsville Detective Juan Hernandez who placed it into evidence. The evidence custodian at the time was Merlin Rasco. The Brownsville Police Department case number was 19983054492.

Appendix K

According to a Report authored by Alex Madrigal II, a Criminalist employed by the Texas Department of Public Safety Crime Laboratory in McAllen, and dated March 19, 1999, Rey J. Pineda submitted part or all of the sexual assault kit to the lab for testing on September 10, 1998. Also according to the Report the submitted evidence was retained only pending pick up by the Brownsville Police Department. The Crime Laboratory case number was L3M-40583.

Please provide the signed documents establishing chain of custody from the time of autopsy to present together with any list(s) of the contents of the sexual assault kit.

If the sexual assault kit is determined to have been lost, I am requesting copies of the documents establishing the chain of custody up to its last known location and all written communications between your office and the office of the last known custodian either requesting or documenting the nature and extent of the search conducted for it and the results thereof.

If the sexual assault kit has been destroyed, I am requesting copies of the documentation of its destruction and a copy of the statute, policy, or procedure pursuant to which it was destroyed.

Sincerely,

Margaret Schmucker

Cc: Files

Appendix K

Cameron County Courthouse
964 E. Harrison Street Brownsville, Texas 78520
Mainline: 956.544.0849 Fax: 956.544.0869

CAMERON COUNTY
DISTRICT ATTORNEY
Luis V. Saenz
District Attorney

November 23, 2015

VIA CERTIFIED MAIL RETURN
RECEIPT REQUESTED & FAX

Hon. Margaret Schmucker
Law Office of Margaret Schmucker
2301 S. Lakeline Blvd., Suite 800-53
Cedar Park, Texas 78613
F: 877-465-7066

RE: PIA Request

Ms. Schmucker:

The Cameron County District Attorney's Office is in receipt of your November 3, 2015 public information request wherein you are seeking materials contained in the prosecutorial file for the *State of Texas v. Ruben Gonzalez,* Cause No. 98-CR-1391-A. Specifically, the items sought include:

(1) Chain of custody documents for the sexual assault kit from Escolastica Harrison's autopsy,

(2) If the sexual assault kit is determined to be lost, documents establishing the chain of custody up to its last known location and all written communication between the Cameron County District Attorney's Office and the office of the last known custodian either requesting or documenting the nature and extent of the search conducted for it and the results thereof, and/or,

(3) If the sexual assault kit has been destroyed, copies of the documentation of its destruction and a copy of the statute, policy, or procedure pursuant to which it was destroyed.

Upon review of your request, it appears any and all responsive information/materials relate to a pending criminal prosecution. Accordingly, this information is exempt from disclosure pursuant to § 552.108 of the Texas Government Code. *See Houston Chronicle Publ'g Co. v. City of Houston,* 531 S.W.2d 177 (Tex. Civ. App. – Houston [14th Dist.] 1975), *Holmes v. Morales,* 924 S.W.2d 920 (Tex. 1996), *and* Tex. Atty. Gen. Let. Rul. OR1999-2649. For these reasons, all materials/information responsive to your request are withheld.

Appendix K

A brief has been submitted to the Texas Attorney General requesting a decision concerning disclosure of the responsive information. Please contact me if you have any questions or concerns

Respectfully yours,

/s/ Edward A.Sandoval
Edward A. Sandoval
ASSISTANT DISTRICT ATTORNEY

Encls.

Appendix K

Cameron County Courthouse
964 E. Harrison Street Brownsville, Texas 78520
Mainline: 956.544.0849 Fax: 956.544.0869

CAMERON COUNTY
DISTRICT ATTORNEY
Luis V. Saenz
District Attorney

November 23, 2015

Via Certified mail return
Receipt Requested & Fax

Office of the Attorney General
Open Records Division
P.OL. Box 12548
Austin, Texas 78711

RE: PIA - Request for Attorney General Decision

Dear Sir or Madam:

The Cameron County District Attorney's Office (CCDA) has received a Public Information Act Request seeking the disclosure of documents relating to an ongoing criminal investigation. The CCDA has withheld the information responsive to said request (said documents are privileged and not subject to disclosure under the Public Information Act) and, pursuant to §552.301 of the Government Code, we respectfully request a Texas Attorney General Decision on the matter.

Please contact me if there are questions.

Respectfully yours,

/s/ Edward A. Sandoval
Edward A. Sandoval
Assistant District Attorney

Encls.

Appendix K

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Post Office Box 12548, Austin, Texas 78711-2548 •
(p12) 463-2100 • www.texasattorneygeneral.gov

February 5, 2016

OR2016-02806

Dear Mr. Sandoval:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 597358.

The Cameron County District Attorney's Office (the "district attorney's office") received a request for information pertaining to a specified sexual assault kit. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code.[19] We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the obligations of the district attorney's office under section 552.301 of the Government

19. Although you also raise section 552.101 of the Government Code for the submitted information, you provide no arguments explaining how this exception is applicable to the information at issue. Therefore, we assume you no longer assert this exception. *See* Gov't Code§§ 552.301, .302.

Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving a written request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *See* Gov't Code § 552.301(b). The district attorney's office received the request for information on November 3, 2015. You inform us the district attorney's office was closed on November 11, 2015, in observance of Veteran's Day. We note this office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Thus, the district attorney's office's ten-business-day deadline was November 18, 2015. However, the envelope in which you submitted the information under section 552.301(b) bears a post meter mark of November 23, 2015. *See id.* § 552.308(a) (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the district attorney's office failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich,* 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd of Ins.,* 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994).

Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* ORD 630. The district attorney's office claims section 552.108 of the Government Code for the submitted information. However, this exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally) 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, no portion of the submitted information may be withheld under section 552.108 of the Government Code. As you raise no other exceptions to disclosure, the submitted information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839.

Appendix K

Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

/s/ Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Appendix K

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

Civil Case No. 1:19-CV-185
THIS IS A CAPITAL CASE

RUBEN GUTIERREZ,

Plaintiff,

v.

LUIS V. SAENZ, CAMERON COUNTY DISTRICT ATTORNEY, *et al.*,

Defendants.

Filed May 27, 2020

ORDER

AND NOW, upon consideration of Plaintiff's request for a stay of execution, it is hereby ORDERED as follows:

1. Plaintiff's Motion is **GRANTED.**

2. Petitioner's execution scheduled to occur on June 16, 2020 is hereby stayed.

/s/_____
HILDA G. TAGLE
UNITED STATES DISTRICT JUDGE

SIGNED this ___ day of _____, 2020.