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 2 OF 2

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TABLE OF APPENDICES

Table of Appendices

Page

Table of Appendices

Table of Appendices

Table of Appendices

Appendix L – Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Lack of Subject Matter Jurisdiction, United States District Court for the Southern District of Texas (May 12, 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' 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

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Appendix L

[TABLES INTENTIONALLY OMITTED]

Plaintiff Ruben Gutierrez is a Texas death row inmate who is currently scheduled to be executed after 6:00 p.m. (CDT) on June 16, 2020. Plaintiff has filed an amended civil-rights complaint asserting a denial of his rights under the First, Eighth, and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[1] *See generally* Pl.'s Amended Compl. Plaintiff specifically seeks prospective relief in the form of a declaratory judgment that Texas Code of Criminal Procedure article 64 is unconstitutional facially and as-applied to Plaintiff and that the Texas Department of Criminal Justice's (TDCJ) execution protocol violates Plaintiff's rights under the First Amendment and RLUIPA. Pl.'s Amended Compl. 36-38. Plaintiff also seeks prospective injunctive relief in the form of a stay of execution and release of evidence for DNA testing. Pl.'s Amended Compl. 3738. Defendants[2] respectfully move to dismiss the complaint for lack of subject matter jurisdiction and for failing to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1), (6) (West 2020).

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1. 42 U.S.C. § 2000cc et seq.

2. Defendants are Luis Saenz, Cameron County District Attorney, Felix Sauceda, Jr., Chief, Brownsville Police Department, Bryan Collier, Executive Director, TDCJ, Lorie Davis, Director, TDCJ, and Billy Lewis, Warden, TDCJ. Plaintiff sued each Defendant in his or her official capacity. Pl.'s Amended Compl. 4-5.

Appendix L

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

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

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

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

The next day, detectives canvassed the area for information. Detective Garcia, the lead investigator, already knew that [Plaintiff's] drinking buddies—Avel Cuellar, Ramiro Martinez, and Crispin Villarreal—had all said that [Plaintiff] was in the trailer park the evening of the murder. Another witness, Julio Lopez, also said [Plaintiff] was there.[3]

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

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

park. When police asked him if he had his days mixed up, [Plaintiff] cut off questioning. The alibi did not pan out. Joey Maldonaldo's statement did not mesh with [Plaintiff]'s.

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

Appendix L

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

> Much of the money was recovered. [Plaintiff's] wife's cousin, Juan Pablo Campos, led police to $50,000 that [Plaintiff] had given him to keep safe. . . .
>
> The jury was instructed that it could convict [Plaintiff] of capital murder if it found that [Plaintiff] "acting alone or as a party" with the accomplice intentionally caused the victim's death. The jury returned a general verdict of guilt, and, based on the jury's findings at the punishment phase, the trial judge sentenced [Plaintiff] to death.

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

B. The punishment-phase

1. The State's punishment case

> At punishment, the prosecution presented evidence of [Plaintiff's involvement with the criminal justice system since he was 14-years old. As a juvenile, [Plaintiff] committed several burglaries, he assaulted a police officer, and he threatened to kill a teacher and a security officer. Attempts to rehabilitate [Plaintiff] in various juvenile detention facilities were unsuccessful. [Plaintiff] was a disciplinary problem in these facilities and he often escaped from them.

> As an adult, [Plaintiff] committed various misdemeanor offenses. He also was convicted of forgery. While doing time in Cameron County Jail on this state jail conviction, [Plaintiff] instigated an "almost riot" because county jail employees would not give him any Kool-Aid. Shortly thereafter [Plaintiff] complained about cold coffee and threw it at a guard.
>
> While awaiting trial for this offense, [Plaintiff] was assigned to the "high risk" area of the Cameron County Jail from where [Plaintiff], the accomplice, and another individual attempted an escape during which [Plaintiff] told a guard not to interfere or he would be "shanked." Immediately following the jury's guilt/innocence verdict in the instant case, [Plaintiff] said that he might kill an assistant district attorney.

Gutierrez v. State, No. 73,462, slip op. at 6 (Tex. Crim. App. 2002) (unpublished opinion).

2. Plaintiff's punishment evidence

The defense presented the testimony of Dr. Jonathan Sorenson, an expert on future dangerousness. 24 RR 4-47.[4] Dr. Sorenson testified regarding the actuarial method of assessing an inmate's potential for future dangerousness.

4. "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by volume number and followed by the internal page number(s).

24 RR 13-15. He stated that data indicates murderers made the best inmates. 24 RR 17. He also testified regarding studies that had been conducted showing that inmates who were incarcerated for homicide were at a very low likelihood of committing another homicide. 24 RR 19-22. Moreover, Dr. Sorenson testified that an inmate's age was the best predictor of future dangerousness. 24 RR 24. Finally, Dr. Sorenson testified that a twenty-one-year-old inmate with a prior criminal record was not more likely than not to commit violent acts. 24 RR 27.

The defense also presented the testimony of Plaintiff's aunt, Hilda Garcia. 24 RR 49-70. She testified that Plaintiff was easy-going and was a responsible husband and father. 24 RR 56. She also testified that Plaintiff was lovable and caring and helpful to people who need help. 24 RR 57.

II. Trial, Direct Appeal, and Postconviction Proceedings

Plaintiff was convicted and sentenced to death for the murder of Escolastica Harrison. The Texas Court of Criminal Appeals (CCA) upheld Plaintiff's conviction and death sentence. *Gutierrez v. State*, No. 73,462, slip op. at 21. Following a remand to the trial court regarding claims of ineffective assistance of counsel,[5] the CCA denied Plaintiff's state habeas application based on the trial court's findings of fact and conclusions of law and based on its own review. *Ex parte Gutierrez*, 2008 WL

5. *Ex parte Gutierrez*, 2004 WL 7330936, at *1 (Tex. Crim. App. Sept. 15, 2004).

2059277, at *1 (Tex. Crim. App. May 14, 2008); SHCR-01 at 86-94.[6]

Plaintiff then filed his federal petition. Pet., *Gutierrez v. Stephens*, No. 1:09-CV-22 (S.D. Tex. Jan. 26, 2009). This Court granted Plaintiff a stay of the proceedings so that he could return to state court to pursue additional claims. Order, *Id.* (S.D. Tex. Apr. 28, 2009).

Plaintiff sought the appointment of counsel for purpose of filing a motion for DNA testing. Plaintiff's request was denied. *Gutierrez v. State*, 307 S.W.3d 318, 319 (Tex. Crim. App. 2010). Thereafter, Plaintiff unsuccessfully sought DNA testing in state court. *Ex parte Gutierrez*, 337 S.W.3d at 901-02. He then filed a subsequent state habeas application, which was dismissed as an abuse of the writ. Order, *Ex parte Gutierrez*, No. 59,552-02 (Tex. Crim. App. Aug. 24, 2011).

This Court then lifted its stay and denied habeas corpus relief and a certificate of appealability (COA). Order, *Gutierrez v. Stephens*, No. 1:09-CV-22 (S.D. Tex. Oct. 3, 2013). The Fifth Circuit denied Plaintiff's application for a COA. *Gutierrez v. Stephens*, 590 F. App'x 371, 384 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 35 (2015).

In April 2018, the state trial court scheduled Plaintiff's execution. Plaintiff's appointed counsel later filed a motion

6. "SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court. *See generally Ex parte Gutierrez*, No. 59,552-01.

to withdraw and for substitution of counsel, which this Court granted. Order, *Gutierrez v. Davis*, No. 1:09-CV-22 (S.D. Tex. Aug. 6, 2018). Plaintiff's substituted counsel then filed a motion for appointment of supplemental counsel, which this Court granted. Order, *Id.* (S.D. Tex. Aug. 14, 2018). Plaintiff filed a motion for a stay of execution, which this Court granted. Order, *Id.* (S.D. Tex. Aug. 22, 2018). The Fifth Circuit denied the Respondent's motion to vacate the stay of execution. Order, *Gutierrez v. Davis*, No. 18-70028 (5th Cir. Sept. 10, 2018).

In June 2019, Plaintiff moved in the state trial court for DNA testing. The court initially granted the motion but later withdrew its order and denied Plaintiff's motion. Pl.'s App. at 001-004. Plaintiff appealed the trial court's denial of his motion for DNA testing, and the CCA affirmed the trial court's order.[7] *Gutierrez v. State*, 2020 WL 918669, at *9 (Tex. Crim. App. Feb. 26, 2020).

On or about August 19, 2019, Plaintiff filed with TDCJ

7. The trial court scheduled Plaintiff's execution for October 30, 2019. Plaintiff filed in the CCA a motion for leave to file an application for a writ of mandamus challenging the validity of the then-pending execution warrant. The CCA stayed Plaintiff's October 30, 2019 execution and ordered the trial court and District Clerk to provide additional information. Order, *In re Gutierrez*, No. 59,552-03 (Tex. Crim. App. Oct. 22, 2019). The CCA dismissed Plaintiff's motion as moot on February 26, 2020. Order, *Id.* (Tex. Crim. App. Feb. 26, 2020). Plaintiff also filed a direct appeal of the trial court's order denying his motion to recall the order and warrant related to the scheduled October 30, 2019 execution. Plaintiff withdrew the appeal, and the CCA dismissed it. Op., *Gutierrez v. State*, No. AP-77,090 (Tex. Crim. App. Oct. 11, 2019).

an Offender Grievance form requesting that a Christian chaplain be allowed to be present in the execution chamber during the execution. Pl.'s App. at 016-17. Plaintiff states that "TDCJ has not yet granted or denied" the grievance. Pl.'s Amended Compl. 15.

Plaintiff filed in this Court a civil-rights complaint. Plaintiff later requested, and was granted, a stay of these proceedings to await the CCA's decision in his appeal of the trial court's order denying his request for DNA testing. Order, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Jan. 7, 2020). This Court lifted the stay following the CCA's decision, Order, *Id.* (S.D. Tex. March 9, 2020), and Plaintiff filed an Amended Complaint. Defendants move to dismiss Plaintiff's Amended Complaint.

SUMMARY OF THE ARGUMENT

Plaintiff raises two challenges. The first is to the constitutionality of Texas's postconviction DNA statute, Chapter 64 of the Texas Code of Criminal Procedure, as construed by the CCA and asks that this Court order DNA testing (DNA claims). Pl.'s Amended Compl. 19-32. The second challenge asks this Court to invalidate TDCJ's execution protocol and order that TDCJ permit the presence of a Christian chaplain in the execution chamber during Plaintiff's execution (Chaplain claims). Pl.'s Amended Compl. 32-36.

Plaintiff's DNA claims must be dismissed for lack of jurisdiction. The claims fundamentally request mandamus relief—to force state and county actors to release evidence

for DNA testing—but this Court has no jurisdiction to so order. The Court also lacks jurisdiction because Plaintiff is simply attacking a state court's opinion rather than the State's postconviction DNA testing statutory scheme.

Plaintiff's DNA claims should also be dismissed for failure to state a claim upon which relief may be granted. His claims are undeniably untimely under the applicable two-year statute of limitations. Plaintiff also fails to state a claim for which relief may be granted because the state court's denial of DNA testing did not violate fundamental fairness, it did not bar him access to the courts, it does not constitute cruel and unusual punishment, and it did not deny him the opportunity to prove his innocence.

Plaintiff's Chaplain claims must be dismissed for lack of jurisdiction because they also seek mandamus relief, i.e., to compel a state actor to behave in a particular manner. Plaintiff's Chaplain claims must also be dismissed because they were brought prior to exhaustion. Lastly, Plaintiff's Chaplain claims must be dismissed for failing to state a claim for which relief may be granted. For these reasons, Plaintiff's request for a stay of execution should be denied.

ARGUMENT

I. The Standards of Review

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

"It is incumbent on all federal courts to dismiss an action whenever it appears that subject matter jurisdiction

is lacking." *Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted). The party seeking to invoke jurisdiction bears the burden of demonstrating its existence. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). "[T]here is a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court." *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) (citation omitted). An action may be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) on any of three separate bases: (1) the complaint standing alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint, the undisputed facts, and the court's resolution of disputed facts. *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1384 (5th Cir. 1989).

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

In analyzing a claim under Federal Rule of Civil Procedure 12(b)(6), the Court accepts all well-pleaded facts as true, viewing 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). However, "the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litig*, 495 F.3d 191, 205 (5th Cir. 2007)

(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face 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, 678-79 (2009).

"The plausibility standard is not akin to a 'probability requirement,' but asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Accordingly, [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *In re Katrina*, 495 F.3d at 205 (quoting *Twombly*, 544 U.S. at 555). It is insufficient, then, to plead facts that are merely consistent with wrongful conduct; a plaintiff must instead plead facts that plausibly suggest that he or she is actually entitled to relief. *Twombly*, 550 U.S. at 556-57. Further, the pleading must contain something more than a recitation of facts that merely creates a suspicion of a legally cognizable right of action on the assumption that all the allegations in the complaint are true. *Id.* In challenging a state court's denial of relief from postconviction DNA testing, the plaintiff must demonstrate that "the postconviction relief procedures . . . were 'fundamentally inadequate to vindicate the substantive rights provided.'" *Harris v. Lykos*, 2013 WL 1223837, at *1 (5th Cir. 2013) (citing *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009)).

II. The Court Should Deny Plaintiff's Request for a Stay of Execution.

"Filing an action that can proceed under § 1983 does not entitle the [plaintiff] to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). A request for a stay "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* (citing *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004)). Rather, Plaintiff must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983)). When the requested relief is a stay of execution, a court must consider:

> (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)).

Importantly, a federal court must consider "the State's strong interest in proceeding with its judgment" and "attempt[s] at manipulation," as well as "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 649-50. Indeed, "there is

a strong presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 650.

First, as discussed below, the Court lacks jurisdiction to grant Plaintiff the relief he requests. He is, consequently, disentitled to a stay of execution because he cannot make a strong showing that he is likely to succeed on the merits of claims seeking relief that the Court lacks jurisdiction to grant. *See Nken*, 556 U.S. at 434. Second, as discussed below, Plaintiff's claims fail as a matter of law. *See Ramirez v. McCraw*, 715 F. App'x 347, 350-51 (5th Cir. 2017); *Pruett v. Choate*, 711 F. App'x 203, 206-08 (5th Cir. 2017) (denying plaintiff's motion for a stay of execution because he failed to show that Texas's postconviction DNA statute violated due process). Plaintiff's DNA claims are plainly barred by limitations, and none of his claims state a facially plausible claim for relief. He cannot justify a stay to litigate patently meritless claims.

For the same reason, Plaintiff cannot show that he would suffer irreparable harm if denied a stay of execution. As the Fifth Circuit has explained, "the merits of [the movant's] case are essential to [the court's] determination of whether he will suffer irreparable harm if a stay does not issue." *Walker v. Epps*, 287 F. App'x 371, 375 (5th Cir. 2008). As discussed below, Plaintiff's complaint is subject to dismissal for a multitude of reasons. Consequently, he cannot show that he would be irreparably harmed if denied additional process to which he has no entitlement. To the extent Plaintiff might argue irreparable harm will occur if he is executed without a chaplain's presence

in the execution chamber, he cannot justify a stay. As discussed below, Section VI(F), TDCJ will—consistent with its protocol—permit Plaintiff to visit with a chaplain on the day of the execution, and a chaplain may be present during the execution in the witness room. Pl.'s App. at 012. Consequently, the potential harm has been mitigated and is not substantial enough to overcome the State's and victims' interest "in the timely enforcement of a sentence." *Hill*, 547 U.S. at 548.

Lastly, when Plaintiff most recently requested DNA testing in June 2019, more than eight years had elapsed since the CCA last denied DNA testing. *Ex parte Gutierrez*, 337 S.W.3d at 901-02. Plaintiff faced a scheduled execution in 2018, but he did not file a motion for DNA testing at that time. He did not file such a motion until June 2019. In light of the significant delay in Plaintiff's request for DNA testing, he cannot overcome the strong presumption against granting a stay or demonstrate that the balance of equities entitles him to a stay of execution.[8] Therefore,

8. Assuming Plaintiff will argue that the Motion for Miscellaneous Relief he filed in state court in November 2015 tilts the balance of equities in his favor, such an argument should be rejected. First, Plaintiff's motion was not a Chapter 64 motion. *See Skinner v. State*, 484 S.W.3d 434, 437 (Tex. Crim. App. 2016). Rather, the motion sought the disclosure of exculpatory evidence so that Plaintiff could obtain testing of it at his own expense. Consequently, the motion did not imbue the trial court with jurisdiction to grant DNA testing. *Id.; see Marks v. State*, 2010 WL 598459, at *1 n.2 (Tex. Crim. App. 2010) ("We note that having found that Marks failed to satisfy Chapter 64, the trial court lacked jurisdiction to alternatively allow Marks DNA testing at his own expense.") (citing *State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002) (plurality op.)). Indeed, it appears that Plaintiff

Plaintiff's request for a stay should be denied. *See Ramirez*, 715 F. App'x at 350 (denying plaintiff's motion for a stay of execution where he filed a motion for DNA testing only fifty-four days before his scheduled execution and nearly twenty years after his conviction); *Garcia v. Castillo*, 431 F. App'x 350, 355 (5th Cir. 2011) (denying stay of execution in civil-rights lawsuit because the requested DNA testing would not establish the plaintiff's innocence of capital murder and because the "balance of equities" weighed against a stay of execution).

III. Plaintiff Lacks Standing to Bring Suit Against Defendants Because His Requests for Relief Are, in Fact, a Mandamus Request Beyond this Court's Jurisdiction.

Plaintiff has not demonstrated standing with regard to his claims. "[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke jurisdiction must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990). Standing requires: (1) that the plaintiff establish that he has suffered an "injury in fact"; (2) that there is a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before

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did not treat the motion as a Chapter 64 motion because he did not appeal its denial to the CCA. *See* Tex. Code Crim. Proc. art. 64.05. Moreover, as Plaintiff acknowledges, Pl.'s Amended Compl. 11, the motion was denied in April 2018. He then made no efforts for more than a year to seek DNA testing.

the court"; and (3) that it is "likely," as opposed to merely "speculative," the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To establish the third prong of standing, a plaintiff must plead redressability—the injury complained of must be redressable by the relief sought. *Id.*

This Court lacks jurisdiction to grant the relief Plaintiff requests. Plaintiff asks, *inter alia*, that this Court force state officials to release evidence for DNA testing Pl.'s Amended Comp. 37-38. Plaintiff does not adequately allege, however, that the procedures provided in Chapter 64 are inadequate to protect his due process rights. Rather, the basis of Plaintiff's DNA claims is that the state courts erred in their interpretation and application of state law. Pl.'s Amended Comp. 21-29. That is, dissatisfied with the CCA's decision affirming the trial court's denial of relief, Plaintiff is asking this Court to compel state officials to do what he believes the state court should have held those officials were required to do. Consequently, the bulk of the relief Plaintiff requests is not available to him because it "is in the nature of mandamus." *Norton v. Enns*, 2014 WL 3947158, at *3 (N.D. Tex. 2014). But federal courts "do not have jurisdiction to issue the writ against a state actor or agency." *Id.* (citing *Moye v. Clerk, Dekalb Cnty. Superior Court*, 474 F.2d 1275 (5th Cir. 1973)). "Instead, if relief is available to [Plaintiff], he must obtain it through a mandamus action or other appropriate action in the state courts." *Id.*

In *Swearingen v. Sharon Keller, et. al.*, the plaintiff filed a civil rights action alleging that a due process violation

resulted from the CCA's inconsistent and arbitrary rulings during the postconviction DNA testing process and that the state courts had violated his constitutional rights by denying him his ability to establish his innocence. Order, No. A-16-CV-1181 (W.D. Tex. July 7, 2017). The district court held that it lacked jurisdiction because the plaintiff's complaint was "properly construed as a petition for mandamus relief." *Id.* The district court explained that the complaint was "the equivalent of a petition for mandamus relief because it request[ed]" the district court "to direct the state court to require the DNA testing [Swearingen] requested and to direct the custodians of that evidence to release it for testing." *Id.* Plaintiff's DNA claims are materially indistinguishable from the requests at issue in *Swearingen*. *See also Ramirez*, 715 F. App'x at 350 (finding the district court "accurately analyzed" the plaintiff's request for "an injunction requiring the defendants to release the biological material on which he asks for DNA testing" as tantamount to an impermissible writ of mandamus); *In re Moore*, 1990 WL 165776, at *1 (4th Cir. Nov. 1, 1990); *Davis v. Lansing*, 851 F.2d 72, 74 (2d Cir. 1988); *Mount v. Court of Criminal Appeals*, 2017 WL 6761860, at *2 (S.D. Tex. Nov. 20, 2017); *Pruett v. Choate*, 2017 WL 4277206, at *5 (S.D. Tex. Sept. 25, 2017).[9] Therefore, Plaintiff's DNA claims should be dismissed for lack of jurisdiction. Fed. R. Civ. P. 12(b)(1).

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9. The Fifth Circuit in *Pruett* described as "well-taken" the district court's conclusion that the plaintiff's "due-process arguments seem[ed] to be dressed-up allegations that the TCCA should be directed to apply Texas law properly." *Pruett*, 711 F. App'x at 206 n.9. Moreover, the Fifth Circuit stated that the plaintiff's "complaint, stripped of a meritorious due-process claim, [could] rest on nothing but a petition for mandamus." *Id.* at 206 n.10.

Plaintiff's Chaplain claims also improperly seek mandamus relief because he affirmatively seeks to compel state actors to behave in a particular manner. However, this Court lacks jurisdiction to compel TDCJ officials by writ of mandamus. *See*, *e.g.*, *Waters v. Texas*, 747 F. App'x 259, 260 (5th Cir. 2019) (affirming a jurisdictional dismissal where the plaintiff sought mandamus relief against "Texas state officials to deregister her as a Tier **I** sex offender"). Accordingly, dismissal of Plaintiff's Chaplain claims for want of jurisdiction is required.

IV. Plaintiff's Chaplain Claims Should Be Dismissed for Failure to Exhaust Administrative Remedies.

Plaintiff asserts that he filed a Step 1 prison grievance requesting that a TDCJ chaplain be present in the execution chamber during his execution. Pl.'s Amended Compl. 14-15; *see* Pl.'s App. 016-17. He also states that, while he has communicated with TDCJ General Counsel via email, he has not obtained a ruling through the grievance process. Pl.'s Amended Compl. 15. Consequently, his Chaplain claims must be dismissed for want of 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 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). Exhaustion is *mandatory* "irrespective of the forms of relief sought

and offered through administrative avenues." *Booth v. Churner*, 532 U.S. 731, 739, 740-40 n.6 (2001); *see Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) ("[T]here can be no doubt that pre-filing exhaustion of [the] prison grievance processes is mandatory." (citing *Woodford v. Ngo*, 548 U.S. 81 (2006)); *Jones v. Bock*, 549 U.S. 199 (2007)). The PLRA's exhaustion requirement applies to Plaintiff's challenge to TDCJ's execution procedure. *See Nelson*, 541 U.S. at 643 (concluding that a prisoner's complaint about the procedure used to find a vein during the execution process was a § 1983 civil rights complaint and subject to the PLRA exhaustion requirement); *Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016) ("Courts may not engraft an unwritten 'special circumstances' exception onto the PLRA's exhaustion requirement.").

Plaintiff's email correspondence with TDCJ General Counsel did not satisfy the mandatory exhaustion requirement under PLRA. *See*, *e.g.*, *Fegans v. Johnson*, 2010 WL 1425766, at *13 (S.D. Tex. Apr. 8, 2010) (concluding that a prisoner's attorney sending a notice of claims to the jail did not satisfy the PLRA exhaustion requirement). Plaintiff may only exhaust via TDCJ's grievance process. Tex. Gov't Code § 501.008 (West 2020); *see Dillon v. Rogers*, 596 F.3d 260, 268 (5th Cir. 2010) ("Under our strict approach, we have found that mere 'substantial compliance' with administrative remedy procedures does not satisfy exhaustion."). And to properly exhaust, a prisoner must "pursue the grievance remedy to conclusion." *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001). This requires completion of both steps of TDCJ's grievance process before a complaint may be filed.

Id.; but see Murphy v. Collier, 942 F.3d 704, 709 (5th Cir. 2019).[10] Because Plaintiff did not exhaust administrative remedies prior to bringing his Chaplain claims in federal court, PLRA mandates dismissal of the claims.

Plaintiff has argued that the Supreme Court's stay of Patrick Murphy's execution implies that exhaustion of his Chaplain claims was either accomplished or unnecessary. Pl.'s Resp. to Defs' Mot. to Dismiss 7-8 (citing *Murphy*,

10. In her dissent in *Murphy*, Judge Elrod explained that the Supreme Court has "not recognized a futility exception to the PLRA's exhaustion requirement." 942 F.3d at 714 (Elrod, J., dissenting); *see Booth*, 532 U.S. at 741 n.6. On the contrary, as noted above, the exhaustion requirement is mandatory. The district court's conclusion in *Murphy* that the plaintiff satisfied "the spirit" of the exhaustion rule without even engaging in TDCJ's grievance process is, therefore, untenable. *Murphy v. Collier*, 423 F. Supp. 3d 355, 359 n.1 (S.D. Tex. 2019). Nor does the district court's reasoning apply here. Plaintiff's execution was stayed on October 22, 2019, yet he made no further attempt to exhaust his administrative remedies regarding his Chaplain claims while his execution was not imminent. *See id.* (rejecting defendants' exhaustion argument, in part, because plaintiff's execution was imminent). And according to Plaintiff, TDCJ's response to his Step 1 grievance was due by September 28, 2019, more than one month prior to his previously-scheduled October 30, 2019 execution. Pl.'s Resp. to Defs' Mot. to Dismiss 9. Yet he did not file a Step 2 grievance after TDCJ did not respond. He did not, therefore, satisfy even the "spirit" of the exhaustion rule. Further, Plaintiff's Amended Complaint does not allege that the grievance process was unavailable to him. *See* Pl.'s Resp. to Defs' Mot. to Dismiss, Ex. 3 at 74 (TDCJ's Offender Orientation Handbook providing that inmates may grieve "[t]he interpretation or application of TDCJ policies, rules, regulations, and procedures").

942 F.3d at 709). However, in both the Fifth Circuit and Supreme Court, the courts ruled only on the plaintiff's request for a stay.[11] *Murphy v. Collier*, 139 S. Ct. 1475 (2019); *Murphy*, 942 F.3d at 709. And a stay of execution is an equitable remedy. *Nelson*, 541 U.S. at 649. As explained by Justice Kavanaugh, the Supreme Court's stay of Murphy's execution "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 (Kavanaugh, J., statement respecting grant of stay). The Supreme Court's order granting a stay should not be construed as silently overturning its long-standing precedent regarding exhaustion under the PLRA but rather as what the Court viewed as a necessary, equitable action taken regarding a newly-arisen challenge to Texas's execution protocol and in the interest of avoiding repetitious challenges to a policy it found impermissible. *See id.* Plaintiff offers no reason to conclude that challenges to a State's execution protocol as it relates to the presence of spiritual advisors—and only those challenges—are entirely exempt from the *mandatory* PLRA exhaustion requirement. *See Ross*, 136 S. Ct. at 1858; *Valentine v. Collier*, — F.3d —, 2020 WL 1934431, at *5-7 (5th Cir. Apr. 22, 2020) (vacating

11. Notably, neither the Fifth Circuit nor the district court explicitly addressed prior to the Supreme Court's stay of Murphy's execution the issue of exhaustion of administrative remedies but only the timeliness of his request for a stay. *Murphy v. Collier*, 919 F.3d 913, 916 (5th Cir. 2019); *Murphy v. Collier*, 376 F. Supp. 3d 734, 739 (5th Cir. 2019).

injunction against TDCJ, in part, because plaintiffs failed to exhaust under PLRA); *Murphy*, 942 F.3d at 713 (Elrod, J., dissenting).

Plaintiff has also argued previously that he should be deemed to have exhausted his administrative remedies because TDCJ did not respond to his first grievance. Pl.'s Resp. to Defs' Mot. to Dismiss 8-9 (quoting *Wilson v. Epps*, 776 F.3d 296, 301 (5th Cir. 2015)). However, in *Wilson*, the Fifth Circuit explained that the administrative-exhaustion requirement "does not fall by the wayside in the event that the prison fails to respond to the prisoner's grievance at some preliminary step in the grievance process." 776 F.3d at 301. Rather, "the prison's failure to respond simply entitles the prisoner to move on to the next step in the process."[12] *Id.* Indeed, the Fifth Circuit affirmed the district court's dismissal of the plaintiff's complaint where the complaint "made clear that he neither received a final-step response from the prison nor filed a final-step appeal and sued only after the prison failed to timely respond at that point." *Id.* at 302.

Here, Plaintiff has filed only an initial grievance; he has taken no further action either before his previously-scheduled execution or since. Pl.'s Amended Comp. 14-15. The lack of a response to Plaintiff's Step 1 grievance did not satisfy exhaustion or render his administrative remedies unavailable. *See Hicks v. Lingle*, 370 F. App'x

12. The Mississippi prison system's procedures explicitly provided that an inmate could proceed to the next step in the administrative process if no response was timely received. *Gates v. Cook*, 376 F.3d 323, 330 (5th Cir. 2004).

497, 499 (5th Cir. 2010) (affirming dismissal of complaint where plaintiff failed to exhaust jail's administrative remedies by not filing a second grievance after receiving no response to his first); *Johnson v. Cheney*, 313 F. App'x 732, 733 (5th Cir. 2009) (same as to TDCJ inmate); *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) (holding that TDCJ inmate exhausted his administrative remedies by filing a Step 1 and Step 2 grievance and filing his complaint after the time elapsed for the prison to respond to the Step 2 grievance); *Cantwell v. Sterling*, 2016 WL 7971768, at *3-5 (W.D. Tex. May 18, 2016) (granting summary judgment where plaintiff failed to exhaust TDCJ's administrative remedies because he filed a Step 1 grievance but did not file a Step 2 grievance after receiving no response); *Mesquiti v. Gallegos*, 2010 WL 2928168, at *2 (S.D. Tex. June 23, 2010); *Amir-Sharif v. Gonzalez*, 2007 WL 1411427, at *2 (N.D. Tex. May 14, 2007); *Jefferson v. Loftin*, 2005 WL 4541891, at *5 (N.D. Tex. March 16, 2005) (collecting cases). Therefore, *Wilson* requires dismissal of Plaintiff's Chaplain claims for lack of exhaustion.[13]

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13. Notably, the Fifth Circuit has held that a federal court is not to inquire as to whether the administrative remedies are adequate. *Alexander v. Tippah Co., Mississippi*, 351 F.3d 626, 630 (5th Cir. 2003). Rather, the only inquiry as to exhaustion is whether such remedies were available. *Id.* Further, Plaintiff previously relied on the Fifth Circuit's opinion in *Underwood v. Wilson*, 151 F.3d 292, 295 (5th Cir. 1998), to argue that he should be deemed to have exhausted his administrative remedies because TDCJ did not timely respond to his Step 1 grievance. Pl.'s Resp. to Defs' Mot. to Dismiss 8. However, the Fifth Circuit has overruled *Underwood*, holding that pre-filing exhaustion is mandatory. *Gonzalez*, 702 F.3d at 788. Moreover, *Underwood* is inapposite because the plaintiff in that case exhausted his administrative remedies by filing a

V. Plaintiff's Claims Should Be Dismissed for Lack of Subject Matter Jurisdiction.

The Court should dismiss Plaintiff's claims because Plaintiff cannot establish subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The burden of establishing federal jurisdiction rests on the party seeking the federal forum. *Stockman*, 138 F.3d at 151. For the reasons discussed below, Plaintiff has failed to satisfy his burden to establish subject matter jurisdiction.

A. Defendants are entitled to Eleventh Amendment immunity to the extent Plaintiff seeks anything beyond declaratory and injunctive relief.

Plaintiff states that he is suing each of the named Defendants in his or her official capacity. Pls. Amended Comp. 4-5. Each defendant must be dismissed from this suit because all claims against Defendants are barred by Eleventh Amendment immunity.

1. Eleventh Amendment immunity standard

The Eleventh Amendment bars a citizen from suing a state in federal court unless the state consents. U.S. Const. amend. XI; *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996). Absent a waiver of immunity by the State

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grievance and appeal at each step of the process. 151 F.3d at 295; *see Hicks*, 370 F. App'x at 499. As explained above, Plaintiff did not do so.

or through federal statute, the Eleventh Amendment bars citizens from bringing suit against the states in federal court, regardless of the nature of the remedy sought. U.S. Const. amend. XI; *see*, *e.g.*, *Pennhurst State Sch. & Hosp. v. Haldeman*, 465 U.S. 89, 100-02 (1984); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). "Federal courts are without jurisdiction over suits against a state, a state agency, or a state official in his [or her] official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. La. Bd. of Elementary and Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014); *see Warnoch v. Pecos*, 88 F.3d 341, 343 (5th Cir. 1996).

An official capacity suit is to be treated as a suit against the entity. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). It is undisputed that each of the defendants are state agencies. *See* Tex. Const. art. 5, § 5; *Carty v. Tex. Dep't of Pub. Safety*, 2006 WL 3332589, at *4 (E.D. Tex. 2006). The state agencies have not waived sovereign immunity. As employees of state agencies, as a matter of law, Defendants (sued in their official capacity) have immunity under the Eleventh Amendment. *See Cory v. White*, 457 U.S. 85, 89 (1982); *Moon v. City of El Paso*, 906 F.3d 352, 359-60 (5th Cir. 2018); *Vogt v. Board of Comm'rs, Orleans Levee Dist.*, 294 F.3d 684, 688 (5th Cir. 2002); *Martinez v. Tex. Dep't of Criminal Justice*, 300 F.3d 567, 574 (5th Cir. 2002). Consequently, Plaintiff's claims against Defendants must be dismissed because Plaintiff has not identified any exception to the Eleventh Amendment's bar.

2. Plaintiff fails to establish an exception to Defendants' Eleventh Amendment immunity.

The Supreme Court has recognized an exception to the Eleventh Amendment's bar, but the exception does not apply here. *See Ex parte Young,* 209 U.S. 123, 155-56 (1908). To overcome the Eleventh Amendment's bar, a plaintiff must demonstrate that the defendant has some connection with the enforcement of the disputed state statute. *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010).

Here, Plaintiff argues that the state courts' application in his case of Chapter 64 was improper. Pls. Amended Comp. 19-32. But Defendants have no connection with the state courts' construction of state law. *See Ex parte Young*, 209 U.S. at 157 (holding "neither of the state officers named held any relation to the particular statute alleged to be unconstitutional" because, in part, "[t]hey were not expressly directed to see its enforcement"). None of the defendants in this case have authority to direct or compel the state court in its interpretation or application of state law. *Okpalobi v. Foster*, 244 F.3d 404, 416-17 (5th Cir. 2001) (holding that, for the *Ex parte Young* exception to apply, the state official must have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty").

Under article 64.03, a state court "may order" DNA testing to be conducted. Following an order under article 64.03, a state court "shall order" any DNA profiles identified through the previously-ordered DNA testing to be compared with DNA profiles maintained by the

FBI and DPS. Tex. Code Crim. Proc. art. 64.035 (West 2020). Any duty to conduct such testing or comparison is contingent and arises only after a state court orders testing. Because Defendants have not been directed to take any additional action pursuant to Chapter 64, there is no connection between Plaintiff's claims and the enforcement of Chapter 64. *See Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1145 (8th Cir. 2005) (holding that plaintiffs failed to establish an exception under *Ex parte Young* where state law first required the governor to direct a state official to take action, and a state official had not been directed to take action). Moreover, as explained below, Plaintiff's amended complaint fails to identify any plausible constitutional violation. Consequently, Plaintiff has not adequately alleged that Defendants have committed a violation of federal law. Accordingly, Plaintiff's claims against Defendants should be dismissed.

Indeed, to the extent Plaintiff names Director Lorie Davis, Executive Director Bryan Collier, and Warden Bill Lewis as defendants, there is no doubt that they are not proper parties because they do "not have custody of the evidence and had no role in granting or denying [Plaintiff] the DNA testing he sought." *Emerson v. Thaler*, 544 F. App'x 325, 328 n.2 (5th Cir. 2013). Conversely, Defendants Saenz and Sauceda have no hand in TDCJ's execution protocol. To the extent Plaintiff seeks relief beyond what he has assigned to each defendant, the *Ex parte Young* exception does not apply, and they are exempt from suit. *See Air Evac EMS, Inc. v. Tex. Dep't of Ins.*, 851 F.3d 507, 516-19 (5th Cir. 2017).

B. Plaintiff's DNA claims are barred by the *Rooker-Feldman* doctrine.

The *Rooker-Feldman*[14] doctrine bars a federal court from entertaining collateral attacks on state court judgments. *United States v. Shepherd*, 23 F.3d 923, 924 (5th Cir. 1994). "If the district court is confronted with issues that are 'inextricably intertwined' with a state judgment, the court is 'in essence being called upon to review the state-court decision,' and the originality of the district court's jurisdiction precludes such a review." *Id.* (citing *Feldman*, 460 U.S. at 482 n.16). Thus, the *Rooker-Feldman* doctrine prohibits "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

Here, Plaintiff's DNA claims challenge the CCA's application of Chapter 64 to him. *See*, *e.g.*, Pl.'s Amended Compl. 31 ("[T]he CCA's unreasonable interpretation of Chapter 64 has prevented Mr. Gutierrez from gaining access to exculpatory evidence that could demonstrate that he is not guilty of murder, and that he is innocent of the death penalty."). Plaintiff's DNA claims allege that

14. *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 not authority to review final judgments of a state court in judicial proceedings).

the CCA erroneously concluded he could not establish by a preponderance of the evidence that he would not have been convicted with exculpatory DNA evidence and that he was not entitled to DNA testing for the purpose of showing he was not death eligible. Pl.'s Amended Compl. 19-31. The claims mirror his complaints in state court. *See Gutierrez v. State*, 2020 WL 918669, at *5; *Ex parte Gutierrez*, 337 S.W.3d at 899-902. Therefore, his DNA claims regarding the postconviction DNA proceedings amount only to a collateral attack against the state court judgment. Such an attack is impermissible. *See Steph v. Scott*, 840 F.2d 267, 270 (5th Cir. 1988) (holding that a federal court cannot entertain a collateral attack on a state court judgment unless the state court lacked jurisdiction, or the state court lacked the capacity to act as a court).

Unlike in *Skinner v. Switzer*, Plaintiff does not attack the statute providing for postconviction DNA testing but the CCA's interpretation of it. 562 U.S. 521, 532 (2011) (holding the *Rooker-Feldman* doctrine did not bar plaintiff's constitutional challenge to Chapter 64).[15] Indeed, the Court in *Skinner* acknowledged that "a state-court decision is not reviewable by lower federal courts." *Id.* at 532-33. Here, Plaintiff's DNA claims take issue only with the CCA's decisions, not the adequacy of Chapter 64. Accordingly, Plaintiff's DNA claims are barred by the *Rooker-Feldman* doctrine and must be dismissed. *See Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257, 1262-64 (11th Cir. 2012) (barring under the

15. The plaintiff in *Skinner* "clarified the gist of his claim—he did not challenge the CCA's decisions, but instead targeted Chapter 64 itself as unconstitutional. *Skinner*, 562 U.S. at 532.

Rooker-Feldman doctrine a "procedural due process challenge [that] boil[ed] down to a claim that the state court judgment itself caused him constitutional injury by arbitrarily denying him access to the physical evidence he seeks"); *see also Wade v. Monroe County Dist. Att'y*, 2020 WL 639207, at *3-4 (3d Cir. Feb. 11, 2020); *Cooper v. Ramos*, 704 F.3d 772, 781 (9th Cir. 2012); *McKithen v. Brown*, 626 F.3d 143, 154-55 (2d Cir. 2010); *In re Smith*, 349 F. App'x 12, 14-15 (6th Cir. 2009).

As in *Alvarez*, Plaintiff's as-applied procedural due process claim invites federal court review of a state court's judgment and, if successful, would "effectively nullify" the CCA's judgment and would succeed only to the extent that the CCA wrongly decided the issues. 679 F.3d at 1264; *see Cooper*, 704 F.3d at 780-81 (distinguishing *Skinner* and holding that plaintiff's claims challenging the state court's denial of his request for DNA testing were barred by the *Rooker-Feldman* doctrine because his complaint "explicitly attack[ed] both the prosecutor's conduct in his specific case and the state court's application in his specific case of the statutory factors governing entitlement to DNA testing"). Unlike in *Skinner*, Plaintiff's amended complaint does not assert that Chapter 64 was constitutionally inadequate as to any movant but only as to himself. *See Cooper*, 704 F.3d at 780. Consequently, Plaintiff's claims fall squarely within *Rooker-Feldman* and are subject to dismissal on that basis.

Moreover, Plaintiff's inability, discussed below, to identify any defect in Chapter 64's procedures reveals that his amended complaint does not mount a facial challenge to Chapter 64 but instead only raises complaints about the

CCA's decision in his case. Consequently, Plaintiff's DNA claims are barred by the *Rooker-Feldman* doctrine and should be dismissed for want of jurisdiction. *See Alvarez*, 679 F.3d at 1263-64.

VI. Plaintiff's Amended Complaint Should Be Dismissed for Failure to State a Claim.

Even assuming this Court has jurisdiction to consider Plaintiff's amended complaint, his claims are subject to dismissal because they fail to state a claim for relief. Fed. R. Civ. P. 12(b)(6). As discussed below, Plaintiff'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. Therefore, his complaint should be dismissed.

A. Plaintiff's DNA claims are barred by the applicable statute of limitations.

Claims brought via § 1983 are best characterized as personal injury actions and are therefore subject to a state's personal injury statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 279 (1985);[16] *Walker v. Epps*, 550 F.3d 407, 412-14 (5th Cir. 2008). Texas's limitations period is two years. Tex. Civ. Prac. & Rem. Code § 16.003(a) (West 2020).

16. Congress enacted 28 U.S.C. § 1658, which overturned *Wilson* by imposing a four-year statute of limitations for civil actions, but that limitations period applies only to causes of action that arise under Federal statutes that were enacted after December 1, 1990. *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83 (2004).

While state law provides the applicable limitations period, federal law determines when the limitation period accrues. *Willis v. Nelson*, 56 F.3d 1386, 1995 WL 337909, at *2 (5th Cir. 1995). Claims complaining of the denial of DNA testing accrue on the date when such request was *first* denied by a state court. *See Savory v. Lyons*, 469 F.3d 667, 673 (7th Cir. 2006); *cf. Gonzalez v. Wyatt*, 157 F.3d 1016, 1020 (5th Cir. 1998) (noting that a cause of action accrues, so that the two-year statute of limitations begins to run, when the plaintiff knows or has reason to know of the injury that is the basis of the action); *Russell v. Board 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.") (quotation marks and citation omitted). "A statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like." *Alexander v. Wells Fargo Bank, N.A.*, 867 F.3d 593, 597 (5th Cir. 2017).

The trial court first denied Plaintiff's DNA testing motion on July 27, 2010. Order, *Ex parte Gutierrez*, No. 98-CR-1391-A (107th Dist. Ct. Cameron County, Tex.). Even if the CCA's affirmance—on May 4, 2011—of the denial of DNA testing is the appropriate accrual date for Plaintiff's DNA claims, Plaintiff's lawsuit is more than six years untimely. *See Brookins v. Bristol Tp. Police Dept.*, 642 F. App'x 80, 81 (3d Cir. 2016) ("[Plaintiff's] 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*, 469 F.3d at 672-73); *Quinonez v. Texas*, No. H-16-0822, 2016 WL 2894920, at *1-2 (S.D. Tex. May 17, 2016) (dismissing as legally frivolous a § 1983 lawsuit challenging state court's denial of DNA testing where state court DNA appeal ended in 2012 and § 1983 action was filed in 2016); *Padilla v. Watkins*, No. 3:11-CV-2232-M, 2012 WL 1058143, at *3 (N.D. Tex. Feb. 2, 2012); *see also Moore v. Lockyer*, 2005 WL 2334350, at *5 (N.D. Cal. Sept. 23, 2005); *but see Pettway v. McCabe*, 510 F. App'x 879, 879-80 (11th Cir. 2013) (stating that the limitations period began at the end of the state litigation in which the inmate unsuccessfully sought access to evidence).

Any assertion that the trial court's most recent denial or the CCA's affirmance of that denial of Plaintiff's motion for DNA testing—in June 2019 and February 2020, respectively—is the appropriate accrual date should be rejected. *See Savory*, 469 F.3d at 673 ("[Plaintiff's] 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 [Defendant] first denied access to the evidence."). As the CCA's most recent opinion shows, Plaintiff's arguments as to the denial of DNA testing have remained almost unchanged since his prior unsuccessful attempt at DNA testing.[17] *Compare Gutierrez v. State*, 2020 WL 918669,

17. As noted above, any argument that Plaintiff's Motion for Miscellaneous Relief he filed in state court in November 2015 constitutes a new accrual date should be rejected. Plaintiff's motion was not a Chapter 64 motion. *See Skinner*, 484 S.W.3d at 437; *Marks*, 2010 WL 598459, at *1 n.2. Moreover, as Plaintiff

at *7-9, *with Ex parte Gutierrez*, 337 S.W.3d at 900-02. A contrary holding would plainly incentivize repeated, dilatory, and incremental requests for DNA testing. Therefore, Plaintiff's DNA claims should be dismissed because they are barred by limitations.

B. Defendant Saenz has absolute immunity from suit.

Although Plaintiff asserts that he is suing District Attorney Saenz in his official capacity and for only declaratory relief, Pl.'s Amended Compl. 4, to the extent that he challenges Saenz's actions as the Criminal District Attorney for Cameron County, Saenz is entitled to absolute prosecutorial immunity. *See Moon*, 906 F.3d at 569-60; *Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997). And to that extent, the claim fails as a matter of law and must be dismissed.

C. Plaintiff's due process claims are barred by the doctrine of issue preclusion.

Issue preclusion, or collateral estoppel, is a doctrine designed to preclude relitigation of claims already decided. The elements of issue preclusion under federal law require the movant establish three conditions: (1) that the issue at stake is identical to the one involved in the prior litigation; (2) that the issue was actually litigated in the

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acknowledges, Pl.'s Amended Compl. 11, the motion was denied in April 2018. He then made no efforts for more than a year to seek DNA testing.

prior litigation; and (3) that the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that earlier action. *Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc.*, 434 F.3d 320, 323 (5th Cir. 2005); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1166 (5th Cir. 1981).

Plaintiff alleges that he was denied due process during the 2011 and most recent postconviction DNA proceedings in state court. Pls. Amended Comp. 19-31. These complaints were resolved adversely to Plaintiff by the CCA. *Gutierrez v. State*, 2020 WL 918669, at *5-9; *Ex parte Gutierrez*, 337 S.W.3d at 899-902. Relitigation of those complaints is impermissible. *See Moore v. Brown*, 295 F. App'x 176, 177-78 (9th Cir. 2005). Consequently, Plaintiff is precluded from collaterally attacking the CCA's decisions, and his DNA claims necessarily fail to state a claim for relief.

D. Plaintiff's claims alleging that his execution would be unconstitutional are only cognizable in habeas corpus.

Plaintiff argues that his execution would constitute cruel and unusual punishment because he has viable claims of actual innocence of the crime and of the death penalty. Pl.'s Amended Comp. 31-32. These claims constitute a challenge to the validity of Plaintiff's conviction and sentence. Therefore, those claims are only cognizable in habeas corpus and do not state a claim for relief in these proceedings. *Skinner*, 562 U.S. at 534-36.

Appendix L

To the extent Plaintiff challenges the validity of his sentence, he does not seek DNA testing. *See* Pl.'s Amended Comp. 31-32. Rather, he seeks to obtain relief from his sentence based on his claims that he is actually innocent of the death penalty and that new mitigating evidence developed from DNA testing would change the sentencing verdict. Pl.'s Amended Comp. 31-32. These claims necessarily imply that his conviction and sentence are unconstitutional due to the State's actions. *Heck v. Humphrey*, 512 U.S. 477, 485-88 (1994). Indeed, Plaintiff explicitly seeks through these claims to avoid his sentence by obtaining what could only be construed as a permanent stay of execution. *See Emerson*, 544 F. App'x at 327 n.1 ("[T]hose claims of *Brady* violations, prosecutorial misconduct, and actual innocence, which necessarily imply the invalidity of his conviction are not cognizable under § 1983 but must be brought in a habeas petition."). A judgment favorable to Plaintiff would accomplish just that, a permanent stay. To the extent Plaintiff challenges the validity of his conviction and sentence, his complaint must be dismissed for failing to state a cognizable claim.

Additionally, Plaintiff's federal petition for a writ of habeas corpus was denied. *Gutierrez v. Stephens*, 590 F. App'x at 384. Therefore, Plaintiff's habeas claims are successive, and he must move first in the Fifth Circuit for an order authorizing this Court to consider the claims. 28 U.S.C. § 2244(b)(3)(A). Consequently, insofar as Plaintiff raises claims challenging his conviction and sentence, his complaint may be treated as a petition for a writ of habeas corpus and dismissed for want of jurisdiction. *See* Fed. R. Civ. P. 12(b)(1); *In re Pruett*, 784 F.3d 287, 290-91 (5th Cir. 2015); *see also Burton v. Stewart*, 549 U.S. 147, 152 (2007).

E. Plaintiff's DNA claims are patently meritless.

Plaintiff claims that Chapter 64 violates due process because the CCA erred in (1) concluding that the he failed to establish he would not have been convicted if exculpatory DNA results had been obtained and (2) affirming the denial of DNA testing on the ground that Chapter 64 does not provide for testing for the purpose of affecting punishment. Pl.'s Amended Compl. 19-30. Such claims do not allege that the procedures provided by Chapter 64 were inadequate so as to give rise to a procedural due process violation. Rather, such claims allege violations of a substantive right to due process, a right that does not exist in postconviction DNA proceedings. *Skinner*, 562 U.S. at 525. Additionally, Plaintiff's specific as-applied complaints regarding the CCA's decision—e.g., that the CCA erred in concluding that exculpatory results would not have changed the result of his trial, not addressing Plaintiff's proffered evidence of his innocence, and relying on Plaintiff's purportedly coerced confession—do not amount to a challenge to the constitutionality of Chapter 64 but rather only take issue with the state court's application of state law. Pl.'s Amended Comp. 24-25. Such claims necessarily fail to state a claim upon which relief may be granted. *See Cromartie v. Shealy*, 941 F.3d 1244, 1257-58 (11th Cir. 2019) ("[A] state court's misapplication of state law, without more, does not violate the federal Constitution."). Nonetheless, as discussed below, Chapter 64 is plainly adequate to protect an inmate's right to procedural due process and Plaintiff fails to show that the proceedings in his case were inadequate. Consequently, Plaintiff fails to state a claim upon which relief can be granted.

1. Texas's statutory framework adequately protects inmates' rights during postconviction DNA proceedings.

Convicted individuals have no constitutional right to postconviction DNA testing; but if a state provides such a right, the procedures must satisfy due process. *See Osborne*, 557 U.S. at 69, 72-74. However, a "criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *Id.* at 68. Thus, a state "has more flexibility in deciding what procedures are needed in the context of postconviction relief." *Id.* at 69. 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; *see Garcia*, 431 F. App'x at 353. *Osborne* "left slim room for the prisoner to show that the governing state law denies him procedural due process." *Skinner*, 562 U.S. at 525.

Texas law requires that, to obtain DNA testing, a convicted person move for "forensic DNA testing of evidence that has a reasonable likelihood of containing biological material" in the state trial court.[18] Tex. Code

18. Texas Code of Criminal Procedure article 38.43 (c)(1) required that evidence containing biological material be retained and preserved in a capital case until the inmate is executed, dies, or is released on parole. The requirement still exists. Tex. Code Crim. Proc. art. 38.43(c)(2)(A) (West 2020).

Crim. Proc. art. 64.01(a-1) (West 2020). The statute further requires that the evidence to be tested was in the possession of the State at the time of trial but was not previously subjected to DNA testing or could be "subjected to testing with newer techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test." Tex. Code Crim. Proc. art. 64.01(b)(1), (2)(A) (West 2020). The state trial court may order forensic DNA testing only if it finds the evidence still exists, can be subjected to DNA testing, and has been subjected to a sufficient chain of custody. Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(i), (ii) (West 2020). Most relevant here, the convicted person must also show, *inter alia*, by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. Tex. Code Crim. Proc. art. 64.03(a)(1)(B) (West 2020). After examining the results of DNA testing, the convicting court is required to "hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." Tex. Code Crim. Proc. art. 64.04 (West 2020). The convicted person may appeal the trial court's decision. Tex. Code Crim. Proc. art. 64.05. The Supreme Court in *Osborne* held that a similar state law framework was constitutionally adequate. 557 U.S. at 69-70.

Critically, the Texas state law framework for DNA testing permits testing if the convicted person establishes by a "preponderance of the evidence" that he would not have been convicted if exculpatory results had been obtained through DNA testing. Tex. Code Crim. Proc.

art. 64.03(a)(2); *see Garcia*, 431 F. App'x at 353 (explaining that a movant must show "there is a greater than fifty percent chance" he would not have been convicted if DNA testing provided exculpatory results).[19] 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 the testing "would likely be conclusive" on the issue of the convicted person's innocence. *Osborne*, 557 U.S. at 65, 68. The Supreme Court's approval of Alaska's procedures is diapositive of Plaintiff's challenge to Chapter 64's preponderance-of-the-evidence standard. Plaintiff, therefore, conclusively fails to state a viable claim regarding Texas's less onerous standard. *See Morrison v. Peterson*, 809 F.3d 1059, 1068-69 (9th Cir. 2015) (rejecting challenge to California's forensic testing statute because Alaska's framework at issue in *Osborne* was "more restrictive, not less restrictive" than California's reasonable probability standard); *Alvarez*, 679 F.3d at 1266 n.2 ("In short, inasmuch as Florida's DNA access procedures either mirror or are more applicant-friendly than the Alaska and federal statutes endorsed in *Osborne*, Florida's postconviction DNA access procedures plainly do not offend [due process]."); *Cunningham v. Dist.*

19. The district court in *Garcia* found that there is "nothing fundamentally unfair" about Texas's statutory preponderance-of-the-evidence standard. *Garcia v. Sanchez*, 793 F. Supp. 2d 866, 891 (W.D. Tex. 2011). Importantly, such a burden is analogous to the burden applied by the Supreme Court in determining whether a habeas petitioner can overcome a procedural default by a showing of actual innocence. *Id.* (citing *House v. Bell*, 547 U.S. 518, 536-37 (2006)).

Attorney's Office for Escambia County, 592 F.3d 1237, 1263 (11th Cir. 2010) ("Alabama's procedures pass muster if they compare favorably with Alaska's."); *McKithen*, 626 F.3d at 153-54 (holding that New York's statutory framework providing for DNA testing was adequate because its standards were less "restrictive and difficult to meet" than the Alaska standard at issue in *Osborne).*

That some states purportedly apply a burden lower than a preponderance of the evidence to requests for forensic testing, Pl.'s Amended Comp. 22 n.7, does not establish that procedural due process *requires* a more lenient standard.[20] Nor does it establish that a preponderance of the evidence is a "particularly high standard of proof." Pl.'s Amended Comp. 21. As Plaintiff acknowledges, several states apply standards similar to or more onerous than a preponderance of the evidence.[21] Pl.'s Amended Comp. 22 n.7. Virginia and New Hampshire

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20. By way of analogy, the Supreme Court has held that the intellectually disabled are exempt from capital punishment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). However, in doing so, the Court did not—and has not—mandated that states apply a particular burden of proof to *Atkins* claims. *Bobby v. Bies*, 556 U.S. 825, 831 (2009). Consequently, for purposes of habeas review, application of even a reasonable doubt standard to such claims does not violate due process. *See Raulerson v. Warden*, 928 F.3d 987, 1000-04 (11th Cir. 2019), *cert. denied*, 2020 WL 1496646 (March 30, 2020).

21. The Tenth Circuit has approved of Colorado's postconviction DNA testing statute, which imposes a preponderance-of-the-evidence burden. *McDaniel v. Suthers*, 335 F. App'x 734, 736 (10th Cir. 2009) (citing Colo. Rev. Stat. § 18-1-413).

require a movant to satisfy the statutory requirements for DNA testing by clear and convincing evidence. Va. Code Ann. § 19.2-327.1(A), (D); N.H. Rev. Stat. Ann. § 651-D:2(III). Plaintiff simply cannot show that application of a preponderance of the evidence burden of proof to a request for DNA testing constitutes a departure from a fundamental principle of justice. *See Osborne*, 557 U.S. at 69-71; *cf. Cromartie*, 941 F.3d at 1252 ("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.").

As noted above, federal courts will only intervene where the State's framework for providing access to DNA testing "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Osborne*, 557 U.S. at 69 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). At best, Plaintiff "provides many arguments as to why the []CCA was incorrect in its application of Chapter 64," but "there is nothing in the []CCA's opinion that 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Pruett*, 711 F. App'x at 206 (quoting *Osborne*, 557 U.S. at 69). "Instead, the []CCA carefully considered each of [Plaintiff's] contentions as to Chapter 64; it reviewed the evidence with due diligence, then found that [Plaintiff] was not entitled to . . . relief under Chapter 64." *Id.* at 206-07. Nonetheless, Defendants address Plaintiff's specific complaints individually.

2. The CCA's well-founded conclusion that Plaintiff failed to establish by a preponderance of the evidence that he would not have been convicted if exculpatory results were obtained does not offend fundamental fairness.

Plaintiff primarily challenges the CCA's decision that he failed to show by a preponderance of the evidence that he would not have been convicted if exculpatory results were obtained through DNA testing. Pl.'s Amended Compl. 23-25. He argues the CCA's opinion reflects a per se rule that DNA testing through Chapter 64 is not permitted if there is any evidence that the inmate is guilty as a principal or a party. Pl.'s Amended Comp. 25. He also argues the CCA erred in considering purportedly unreliable evidence and in failing to consider evidence of his innocence. Pl.'s Amended Comp. 25. Plaintiff fails to state a viable claim.

In attacking the CCA's conclusion that Plaintiff failed to satisfy his burden under Chapter 64, Plaintiff is attempting to constitutionalize what is truly a state law matter—a state court's interpretation of a state statute. But a "mere error of state law," the Supreme Court has noted, "is not a denial of due process." *Rivera v. Illinois*, 556 U.S. 148, 158 (2009) (quoting *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982)). And that is Plaintiff's complaint—that the CCA erroneously interpreted Chapter 64's materiality requirement. *See* Tex. Code Crim. Proc. art. 64.03(a)(2)(A) (West 2020). He has not briefed whether due process, in the form of fundamental fairness, has anything

to say about a state's postconviction DNA testing scheme vis-à-vis materiality, let alone *requiring* states to adopt his interpretation of that requirement lest their postconviction DNA procedures be declared constitutionally infirm. At base, he complains of the denial of DNA testing. More is needed to show a violation of due process.[22]

Plaintiff alleges that article 64.03(a)(2)'s materiality standard, which requires an inmate to show by a preponderance of the evidence that he or she would not have been convicted if exculpatory DNA results had been obtained, effectively precludes testing. Pl.'s Amended Compl. 23-26. But Plaintiff does not identify any support for the proposition that the CCA misapplied the evidentiary standard in article 64.03(a)(2)(A) or that due process requires a state court to employ a particular standard or method of review in making such an evidentiary evaluation.

"A requirement of demonstrating materiality is [a] common" feature in postconviction DNA testing schemes, *Osborne*, 557 U.S. at 63, and the requirement that the evidence "be sufficiently material" is not inconsistent with the "'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.'" *Id.* at 70 (quoting *Medina*, 505 U.S. at 446, 448). Plaintiff's inability to demonstrate that Chapter 64 violates due process by requiring him to show materiality of exculpatory

22. This critique is applicable to all elements of Plaintiff's due process claim. For brevity's sake, Defendants asks the Court to consider all of Plaintiff's due process complaints as nothing more than complaints of state law error and inadequately pled.

DNA results leaves him with nothing but a challenge to the CCA's application of the standard to his case. This transforms Plaintiff's claim from process to substance, essentially requiring DNA testing for all items in all cases. But "there is no such substantive due process right." *Id.* at 72.

Moreover, Plaintiff identifies no error in the CCA's limitation of its review in Chapter 64 proceedings. As the CCA has explained, a Chapter 64 proceeding "is not a retrial of the case." *Raby v. State*, 2015 WL 1874540, at *8 (Tex. Crim. App. Apr. 22, 2015). In determining materiality, the CCA "does not consider post-trial factual developments." *Reed v. State*, 541 S.W.3d 759, 774 (Tex. Crim. App. 2017). Instead, the court considers "whether exculpatory results 'would alter the landscape if added to the mix of evidence that was available at the time of trial.'" *Id.* (quoting *Holberg v. State*, 425 S.W.3d 282, 285 (Tex. Crim. App. 2014)). "Chapter 64 is simply a procedural vehicle for obtaining certain evidence 'which might then be used in a state or federal habeas proceeding.'" *Ex parte Gutierrez*, 337 S.W.3d at 890 (quoting *Thacker v. State,* 177 S.W.3d 926, 927 (Tex. Crim. App. 2005)).

The Constitution does not require a state to employ an expansive materiality review in postconviction DNA proceedings. Indeed, the Supreme Court in *Osborne* reversed the circuit court where that court framed the materiality analysis as an expansive "forward-looking" inquiry that required a court to consider "all the evidence, old and new, incriminating and exculpatory.'" *Osborne v. Dist. Attorney's Office for the Third Judicial*, 521 F.3d

1118, 1135 (9th Cir. 2008) (quoting *House*, 547 U.S. at 538); *id.* at 1140 ("[A]ll new evidence may be considered in assessing the potential materiality of further DNA testing."). Nothing in the Supreme Court's *Osborne* opinion mandates that a state court employ, as the circuit court did, a materiality analysis equivalent to that which would apply to a claim of actual innocence under *House*. *Id.* at 1140.

Indeed, due process does not mandate that states provide any postconviction review. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). When a state does, it need not provide an attorney, even in capital cases. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion). And due process does not even mandate inmate competence during the postconviction process. *Ryan v. Gonzales*, 568 U.S. 57, 67 (2013). There is simply no precedent to suggest that states must, as a constitutional matter, offer an open-ended factfinding venue when they enact postconviction DNA testing schemes. Direct appeal is generally limited to the record developed at trial even if new evidence arises during the pendency of review. *See*, *e.g.*, *Trevino v. Thaler*, 569 U.S. 413, 422 (2013). The same is true for federal habeas review. *See*, *e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011).

Plaintiff provides no briefing why a state cannot do what the federal courts do. *See Smith v. Phillips*, 455 U.S. 209, 218 (1982) ("It seems to us to follow 'as the night the day' that if in the federal system a post-trial hearing such as that conducted here is sufficient to decide allegations of juror partiality, the Due Process Clause of the Fourteenth

Amendment cannot possible require more of a state court system."). This is especially true as Texas provides a venue for Plaintiff to air his "new" evidence via its habeas corpus process. Plaintiff provides no support for the proposition that due process requires a state court reviewing a request for DNA testing to accept the movant's one-sided interpretation of any new evidence. Consequently, the CCA did not violate Plaintiff's constitutional rights by not accepting his argument that his confession was coerced—a claim that has been repeatedly rejected. *Gutierrez v. Stephens*, 590 F. App'x at 376-77; *Ex parte Gutierrez*, 337 S.W.3d at 892 n.23. Plaintiff's assertion that state courts must consider any and all postconviction factual developments—proven, unproven, or previously rejected—would require an unprecedented expansion of constitutional law. Plaintiff's new-evidence requirement would effectively cause a full-blown retrial with each Chapter 64 motion.

Moreover, the CCA's opinion does not reflect "a per se rule" that DNA testing is disallowed if there is "any" evidence of the inmate's guilt. Pl.'s Amended Comp. 24. Rather, the CCA properly determined that exculpatory DNA results *in this particular case* would not have changed the outcome of Plaintiff's trial where he was tried as a party and the evidence—four eyewitness identifications of Plaintiff and the statements of Plaintiff and his cohorts—"unequivocally" placed him inside Mrs. Harrison's home at the time she was killed.[23] *Gutierrez v.*

23. Plaintiff's argument is also belied by the instances in which Texas courts have granted testing. *See*, *e.g.*, *In re Morton*, 326 S.W.3d 634, 647-48 (Tex. Crim. App. 2010); *Routier v. State*,

State, 2020 WL 918669, at *7; *see Morrison*, 809 F.3d at 1068 (rejecting inmate's challenge to state's postconviction DNA statute's reasonable probability burden of proof because "it does not violate due process to evaluate what potential impact a negative DNA test could have").

In the same way, contrary to Plaintiff's assertion, the CCA did not use Plaintiff's confession as the sole basis for denying relief. Pl.'s Amended Comp. 25. It was the circumstances of the offense—an attack by multiple *known* actors and a defendant tried under the law of parties—that compelled the CCA's conclusion.[24] And the CCA's well-justified conclusions did not render Chapter 64 fundamentally inadequate. *See Cromartie*, 941 F.3d at 1256-57 (relying on *Osborne* to reject inmate's claim that state statute's materiality standard was improperly subjective and did not allow for assessment of weaknesses in the prosecution's evidence); *Campos v. Yenne*, 699 F. App'x 323, 323-24 (5th Cir. 2017); *Harris v. Lykos*, 556 F.

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273 S.W.3d 241, 259-60 (Tex. Crim. App. 2008); *Blacklock v. State*, 235 S.W.3d 231, 233 (Tex. Crim. App. 2007); *Smith v. State*, 165 S.W.3d 361, 365 (Tex. Crim. App. 2005); *Raby v. State*, 2005 WL 8154134, at *8 (Tex. Crim. App. 2005); *State v. Long*, 2015 WL 2353017, at *1 (Tex. App.—Waco, May 14, 2015); *see also Ex parte Pruett*, 458 S.W.3d 535, 536 (Tex. Crim. App. 2015).

24. Relatedly, Plaintiff argues that article 64.03(b) prohibits a court from relying "solely" on an inmate's confession or guilty plea to find that identity was not an issue at trial. Pl.'s Amended Comp. 25. He faults the CCA for relying "heavily" on his confession because doing so is inconsistent with the spirit of Chapter 64. Pl.'s Amended Comp. 25. But again, the CCA did not rely solely on Plaintiff's confession. *Gutierrez v. State*, 2020 WL 918669, at 6-8.

App'x 351 (5th Cir. 2014) (affirming dismissal of civil rights complaint because the incriminating evidence presented at trial supported the state court's conclusion that DNA evidence showing that another person was present at the crime scene would not have changed the outcome of the trial); *Thompson v. Rundle*, 393 F. App'x 675, 679 (11th Cir. 2010) ("If there is no possibility that DNA evidence could exonerate the prisoner, no procedural due process right has been violated."); *cf. United States v. Jordan*, 594 F.3d 1265, 1268 (10th Cir. 2010) (affirming the denial of DNA testing where the presence of a third party's DNA on the murder weapon would not exculpate the inmate because it would not "explain away" the evidence of his motive, his statements, or eyewitness testimony).

Importantly, Texas is not alone in limiting the evidence to be considered in a materiality review. *See, e.g.*, *Meinhard v. State*, 371 P.3d 37, 44 (Utah 2016) ("And other provisions of the code make clear that only DNA test results can establish factual innocence under Part 3 of the PCRA."); *Anderson v. State*, 831 A.2d 858, 867 (Del. 2003) ("When deciding whether evidence is materially relevant, the trial court must consider not only the exculpatory potential of a favorable DNA test result, but also the other evidence presented at trial."). And again, *Osborne* overturned the Ninth Circuit's opinion that criticized the Alaska Supreme Court's materiality review because it "focus[ed] only on the state of the evidence as it existed at trial and whether that trial record would lead one to question the integrity of that evidence." *Osborne*, 521 F.3d at 1135. Moreover, 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). Use of such a materiality review standard in a postconviction DNA testing scheme is not fundamentally unfair. *See Osborne*, 557 U.S. at 70.

Nonetheless, Plaintiff fails to demonstrate any error—much less constitutional error—in the CCA's decision. The CCA explained its inquiry this way: "Will this testing, if it shows that the biological material does not belong to the defendant, establish, by a preponderance of the evidence, that he did not commit the crime as either a principal or a party?" *Ex parte Gutierrez*, 337 S.W.3d at 900. The CCA concluded—twice—that because Plaintiff was undeniably a party to Mrs. Harrison's murder committed during the burglary that he planned, he could not satisfy article 64.03(a)(2)(A). *Id.* at 900-02; *Gutierrez v. State*, 2020 WL 918669, at *6-8.

Plaintiff complains that the CCA improperly speculated in its first opinion as to the likely results of his requested testing of Mrs. Harrison's fingernail scrapings rather than determining whether, assuming exculpatory results were obtained, he established by a preponderance of the evidence that he would not have been convicted with such results. Pl.'s Amended Compl. 23. But the CCA did not rest its decision on such speculation. Rather, the court determined that, "even if one accepted" the "implausible scenario" that Plaintiff was not at the murder scene at the time of the murder, exculpatory results "would not make it less probable that [Plaintiff] 'planned the ripoff' and was a party to Mrs. Harrison's murder." *Ex parte Gutierrez*,

337 S.W.3d at 901. The absence of Plaintiff's DNA "would, at best, show only that Gracia, rather than [Plaintiff], was the second stabber in the house." *Id.* But it would not render Plaintiff a non-party in light of his admission to masterminding the "rip-off" of Mrs. Harrison. *Id.* The CCA explained its reasoning plainly:

> [G]ranting DNA testing in this case would merely "muddy the waters." [Plaintiff] does not seek testing of biological evidence left by a lone assailant, and a third-party match to the requested biological evidence would not overcome the overwhelming evidence of his direct involvement in the multi-assailant murder.

Id. at 901-02. The CCA again considered the issue in its most recent opinion, concluding that exculpatory results would not have changed the outcome of Plaintiff's trial. *Gutierrez v. State*, 2020 WL 918669, at *6-8.

The CCA's decisions are firmly supported by the record: (1) Plaintiff admitted to planning the burglary of Mrs. Harrison's home,[25] (2) Garcia and Gracia each placed Plaintiff in Mrs. Harrison's home at the time of the murder, (3) Plaintiff knew Mrs. Harrison kept a large amount of cash in her home, (4) he was seen by several people near Mrs. Harrison's home on the day of the murder, (5) his

25. Plaintiff's admission came after identifying an alibi witness who soon contradicted Plaintiff's story. *Ex parte Gutierrez*, 337 S.W.3d at 886.

explanation that he and Garcia carried screwdrivers—one flathead and one Phillips-head—was consistent with the medical examiner's testimony that Mrs. Harrison's injuries were consistent with being caused by those types of screwdrivers, (6) Plaintiff gave a relative $50,000 for safekeeping after the murder, and (7) Plaintiff led the police directly to Mrs. Harrison's discarded suitcase that had held her money.[26] *Ex parte Gutierrez*, 337 S.W.3d at 886-88. Plaintiff's efforts to avoid the obvious import of that evidence is simply unavailing, and he cannot show that the CCA's denial of his request for DNA testing violated a fundamental principle of justice. *See Ramirez*, 715 F. App'x at 350 (denying a motion for a stay of execution in a civil rights action where DNA testing would not demonstrate the movant's innocence and he had led the police to the victim's body).

Plaintiff's claim represents a disagreement with the CCA as to the proper application of Chapter 64 to his

26. Notably, Plaintiff asserts that the medical examiner testified that Mrs. Harrison "struggled with her assailant(s) for at least a few minutes" and fought her attacker(s) with her hands. Pl.'s Amended Comp. 15-16. Not so. The medical examiner testified that Mrs. Harrison suffered defensive wounds (wounds suffered while "trying to ward off blows or attacks of some sort" or "dodging"). 19 RR 245-46. She had "some scrapes on her right wrist" and elbow and on one knuckle. 19 RR 245. The medical examiner testified that Mrs. Harrison "struggle[ed]," but he did not testify that she fought her attacker(s) or that she struggled with them for several minutes. 19 RR 247. The medical examiner also testified that Mrs. Harrison may have lived "at least for some minutes after the last injury was inflicted" but that she would not have been conscious after receiving the blows to her face. 19 RR 271-72.

case. His disagreement, however, does not satisfy his "heavy burden" to show that the CCA's decision "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Pruett*, 711 F. App'x at 206 (quoting *Osborne*, 557 U.S. at 69). As a matter of law, there is no due process violation and Plaintiff fails to state a claim for which relief may be granted.

It is also worth noting that Plaintiff suggests the DNA testing he requests would produce definitive results because DNA profiles obtained from the crime-scene evidence could be compared to DNA profiles of Avel Cuellar and Plaintiff's two co-defendants. Pl.'s Amended Compl 27. But Plaintiff does not explain whether any known reference samples from Cuellar, Rene Garcia, or Pedro Gracia exist or could be obtained. And, according to Plaintiff, Gracia absconded long ago. Pl.'s Amended Compl. 7. Consequently, it seems that Plaintiff vastly overstates the probative value of any possible DNA testing.

Moreover, Cuellar lived with Mrs. Harrison. *Gutierrez v. State*, 2020 WL 918669, at *7. As the CCA explained, the presence of his DNA in her home would be unsurprising. *Id.* Simply put, the touch DNA testing Plaintiff seeks "poses special problems because epithelial cells are ubiquitous on handled materials, because there is an uncertain connection between the DNA profile identified from the epithelial cells and the person who deposited them, and because touch DNA analysis cannot determine when an epithelial cell was deposited." *Dunning v. State*, 572 S.W.3d 685, 693 (Tex. Crim. App. 2019) (cleaned up);

see Hall v. State, 569 S.W.3d 646, 658 (Tex. Crim. App. 2019). And, notably, Plaintiff does not assert that Cuellar was seen bleeding by the paramedics or police officers who responded to the 911 call.[27] Further, the blood spatter pattern analysis that Plaintiff seeks, Pl.'s Amended Compl. 26, is outside the scope of Chapter 64. *See In re Morton*, 326 S.W.3d at 647 (holding that a request for fingerprint analysis was outside the scope of Chapter 64 because the inmate did not seek testing on blood or skin cells from the fingerprints). To that extent, Plaintiff requests that this Court require a type of testing that Chapter 64 does not provide for, and his request can be based on nothing other than a nonexistent substantive due process right.

Plaintiff also complains that the CCA prevented him from obtaining new DNA results to establish that he is ineligible for the death penalty. Pl.'s Amended Compl. 28-29. But because Chapter 64 does not authorize testing

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27. Plaintiff also seeks testing of a hair that was collected from Mrs. Harrison's hand and which he asserts his current counsel recently found among the evidence. Pl.'s Amended Compl. 27. Assuming the evidence reviewed by counsel is the same hair that was collected from Mrs. Harrison's hand, he cannot show he was entitled to testing of it. As the CCA determined regarding Mrs. Harrison's fingernail scrapings, the presence of a hair from a third-party would not exculpate Plaintiff. *Gutierrez v. State*, 2020 WL 918669, at *8. Even if the hair belonged to Gracia (a seemingly impossible conclusion given the absence of a reference sample for him), such evidence would not render Plaintiff a non-party to Mrs. Harrison's murder. *See Ex parte Gutierrez*, 337 S.W.3d at 901. And the presence of Cuellar's hair would not be exculpatory to Plaintiff since Cuellar lived in Mrs. Harrison's home.

for the purpose of affecting punishment,[28] Plaintiff was not entitled to testing to obtain results that would be only mitigating. *Ex parte Gutierrez*, 337 S.W.3d at 901. In this regard, Plaintiff's claim seeks to graft onto Chapter 64 a provision that does not exist, allowing for DNA testing where the results might only affect the inmate's sentence. Pl.'s Amended Comp. 28-29. As discussed above, to establish a due process violation, Plaintiff must show that the procedures provided in Chapter 64 are "fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69. But Plaintiff does not have a constitutional right to expand the scope of a state's postconviction DNA framework. *Cf. Dawson v. Suthers*, 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, Plaintiff's claim asserts a violation of a non-existent substantive right and fails to state a viable claim.

Nonetheless, the CCA assumed that Chapter 64 permitted such testing and concluded Plaintiff did not show an entitlement to it because exculpatory results would not have negated the requisite culpability for him to be death eligible. *Ex parte Gutierrez*, 337 S.W.3d at 901. He cannot show the CCA's decisions unconstitutionally deprived him of the ability to attempt to establish he

28. *Ex parte Gutierrez*, 337 S.W.3d at 901 n.59 (citing *Kutzner v. State*, 75 S.W.3d 427, 437-42 (Tex. Crim. App. 2002)).

was ineligible for the death penalty where the court *assumed the statute permitted such a claim* but found that Plaintiff's showing was insufficient. *Id.; Gutierrez v. State*, 2020 WL 918669, at *8.

Plaintiff simply cannot show that the CCA's decision "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Pruett*, 711 F. App'x at 206; *see Ramirez*, 715 F. App'x at 350; *Roughley v. Watkins*, 2014 WL 5313957, at *3 (N.D. Tex. Sept. 22, 2014) ("Because Plaintiff cannot meet the statutory requirements for obtaining post-conviction DNA testing, he cannot complain of the inadequacy of the State's procedures."). His complaint fails to state a claim to relief that is plausible on its face, and it should be dismissed. *See Elam v. Lykos*, 470 F. App'x 275, 275-76 (5th Cir. 2012); Order, *Swearingen*, Civ. Act. No. A-16-CV-1181 (W.D. Tex. July 7, 2017) ("Because no relief could be granted on Swearingen's claims even if his allegations were taken as true, he does not state a claim upon which relief may be granted."); *Burden v. Maness*, 2014 WL 4651609, at *2 (E.D. Tex. Sept. 17, 2014) (dismissing plaintiff's complaint for failing to state a claim because, "[w]hile plaintiff contends that the interpretation of Article 64.03 has led to an incorrect ruling in his case, he has not demonstrated that the procedures established by Article 64.03 are, in themselves, inadequate to protect a defendant's right to postconviction DNA testing").

3. Relief cannot be granted on Plaintiff's access-to-courts claim because it fails as a matter of law.

While a state inmate has a "right of access to the courts," that right does not encompass the ability "to *discover* grievances, and to *litigate effectively* once in court." *Lewis v. Casey*, 518 U.S. 343, 350, 354 (1996) (emphasis removed from initial quotation). "One is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation." *Whitaker v. Collier*, 862 F.3d 490, 501 (5th Cir. 2017) (quoting *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013)). If a litigant has "not met the pleadings standards for . . . their claims, their access-to-the-courts theory necessarily fails as well." *Id.* Because Plaintiff's due process claim fails, his access-to-courts claims does too. *See id; Alvarez*, 679 F.3d at 1265-66 (same as applied to a postconviction DNA testing challenge). It must therefore be dismissed.

Relatedly, Plaintiff makes a conclusory assertion that the CCA's denial of DNA testing prevented him from access to the state clemency process. Pl.'s Amended Comp. 31. But "pardon and commutation decisions are not traditionally the business of courts." *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999). Plaintiff's access-to-clemency claim—whether alleging a violation of due process or a right to access to the courts—is patently meritless.[29] *Osborne*, 557 U.S. at

29. Relatedly, the Fifth Circuit recently held that a plaintiff lacked standing to challenge Texas's clemency procedures

67-68; *Cromartie*, 941 F.3d at 1258; *McKithen*, 626 F.3d at 151-52.

4. Relief cannot be granted on Plaintiff's Eighth Amendment claim because it fails as a matter of law.

The Eighth Amendment applies primarily to "the trial stage of capital offense adjudication, where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment." *Giarratano*, 492 U.S. at 9 (plurality opinion). It does not apply to postconviction procedures. *See id.* at 9-10.[30] And it does not create a claim upon which relief can be granted as applied to postconviction DNA testing schemes. *See Alvarez*, 679 F.3d at 1265 ("We can discern no conceivable basis in this case, nor has Alvarez provided us with one, for attempting an end-run around the *Osborne* holding under the cloak of the Sixth or Eighth Amendments."); *McKithen*, 626 F.3d at 155. And because Plaintiff argues that the Eighth Amendment prohibits his execution, it is a challenge to

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because he filed his § 1983 lawsuit prior to filing his application for clemency. *Ochoa v. Collier*, 2020 WL 582397, at *2 (5th Cir. Feb. 4, 2020); *see Sepulvado v. Louisiana Bd. of Pardons and Parole*, 114 F. App'x 620, 621 (5th Cir. 2004). Consequently, Plaintiff's access-to-clemency claim is subject to dismissal for want of jurisdiction. Fed. R. Civ. P. 12(b)(1).

30. Although the Eighth Amendment prevents the execution of an incompetent individual, it does not "impose[] heightened procedural requirements" to determine competence. *Giarratano*, 492 U.S. at 10 (quoting *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (Powell, J., concurring)).

his sentence and is barred from a § 1983 suit under *Heck*. *See In re Pruett*, 784 F.3d at 290-91. The claim fails as a matter of law and it must be dismissed.

F. Plaintiff's Chaplain claims fail as a matter of law.

Plaintiff claims that TDCJ's refusal to allow a chaplain to be present in the execution chamber during Plaintiff's execution violates the Establishment Clause and Free Exercise Clause of the First Amendment and, under RLUIPA, substantially burdens his exercise of religion. Pl.'s Amended Compl. 32-36. Plaintiff's Chaplain claims should be dismissed because they fail to state a claim on which relief may be granted.

1. Background

In March 2019, the Supreme Court stayed the execution of Patrick Murphy based on his claims challenging TDCJ's refusal to permit a Buddhist spiritual advisor in the execution chamber while permitting Christian or Muslim chaplains to be present during an execution. *Murphy v. Collier*, 139 S. Ct. at 1475. Justice Kavanaugh explained that Murphy's claims could be mooted if TDCJ allowed "inmates to have a religious advis[o]r, including any state-employed chaplain, only in the viewing room, not in the execution room" *Id.* (Kavanaugh, J., concurring).

Afterward, TDCJ changed its execution protocol such that chaplains are not permitted to be present in the execution chamber. Pl.'s App. at 012. The protocol provides

that an inmate may, on the day of the execution, "have visits with a TDCJ Chaplain(s)[and] a Minister/Spiritual Advisor who has the appropriate credentials." Pl.'s App. at 011. An approved outside spiritual advisor (i.e., a member of the clergy or an individual approved in accordance with policy who serves the inmate in a religious capacity but is not a TDCJ employee) may visit the inmate from 3:00 to 4:00 p.m. on the day of the execution in a holding area at the Huntsville Unit. Pl.'s App. at 011-12. Chaplains and an outside spiritual advisor may also be present in the witness room immediately adjacent to the execution chamber. Pl.'s App. at 012.

2. The RLUIPA claim

To state a claim under RLUIPA, Plaintiff must show that the challenged government conduct substantially burdens his religious exercise. 42 U.S.C. § 2000cc-1(a) ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution."); *see Brown v. Collier*, 929 F.3d 218, 228-29 (5th Cir. 2019); *Adkins v. Kaspar*, 393 F.3d 559, 569-70 (5th Cir. 2004) (adopting the Supreme Court's interpretation of "substantial burden" as one that forces the person to choose between following the precepts of his religion or receiving some otherwise available benefit, and truly pressures the adherent to substantially modify his or her religious behavior) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)). TDCJ's policy permitting chaplains and spiritual advisors to attend an execution only in the witness room rather than inside the execution chamber is not a substantial burden on Plaintiff's religious exercise.

Appendix L

Plaintiff 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. Pl.'s Amended Compl. 35. He does not assert that the physical presence of a chaplain in the execution chamber is required for him to exercise his religion or to "guide[]" Plaintiff at the time of the execution. Pl.'s Amended Compl. 35-36. Plaintiff's religious behavior will be the same with a chaplain in the witness room. He fails to demonstrate that TDCJ's policy would truly force him to "substantially modify his religious behavior." *Adkins*, 393 F.3d at 570.

Moreover, "[i]ncidental effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs" are not a substantial burden within the meaning of RLUIPA. *Lyng v. Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 450-51 (1988). Plaintiff will not be forced to choose between his religious exercise and some benefit; the incidental effect of a chaplain's presence in the witness room rather than in the execution chamber will not cause Plaintiff to substantially alter his religious exercise. Because Plaintiff fails to identify a substantial burden on his religious exercise, the burden does not shift to Defendants to make any showing. *Brown*, 929 F.3d at 229. Consequently, even accepting Plaintiff's allegations as true, he fails to state a claim upon which relief can be granted. His complaint should be dismissed.

Even assuming Plaintiff's conclusory assertions identified a substantial burden on his religious exercise, it is indisputable that TDCJ's penological interest in security is a compelling interest. As Justice Kavanaugh explained,

> A State may choose a remedy in which it would allow religious advis[o]rs only into the viewing room and not the execution room because there are operational and security issues associated with an execution by lethal injection. Things can go wrong and sometimes do go wrong in executions, as they can go wrong and sometimes do go wrong in medical procedures. States therefore have a strong interest in tightly controlling access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions. The solution to that concern would be to allow religious advisors only into the viewing room.

Murphy, 139 S. Ct. at 1475-76 (Kavanaugh, J., concurring). Despite this, Plaintiff states that it "is unclear what interest" the protocol serves. Pl.'s Amended Compl. 33. The interest is self-evident. Indeed, the Supreme Court has instructed that in applying RLUIPA, courts are to give "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). RLUIPA does not prevent a prison from taking prophylactic measures or require them to wait for

a security breach before adopting prison policies. *See*, *e.g.*, *Whitley v. Albers*, 475 U.S. 312, 322 (1986).

Critically, Plaintiff's request to force TDCJ to allow its chaplains into the execution chamber would *create* the very statutory and constitutional violations he purports to solve. He purports to simply request that TDCJ's approved chaplains (as opposed to outside spiritual advisors) be permitted to be present in the execution chamber. Pl.'s Amended Compl. 35. But the relief could not and would not end there. That is, if TDCJ was forced to revert to its previous protocol and permit its chaplains into the execution chamber, TDCJ would be in the position it was *before* the Supreme Court stayed Patrick Murphy's execution. But the Supreme Court signaled that the earlier protocol was impermissible because spiritual advisors not employed by TDCJ could not be present in the execution chamber. *Murphy*, 139 S. Ct. at 1475. Only now, TDCJ would have only one option available to it—to accommodate every denomination. But doing so is plainly infeasible, and neither statute nor the Constitution require TDCJ to approve a spiritual advisor to accommodate every possible denomination. *See Brown*, 929 F.3d at 225 (noting evidence presented in another lawsuit that "there were 217 offender faith preferences represented in the TDCJ system"). And TDCJ's choice of Justice Kavanaugh's other solution—to permit chaplains and spiritual advisors in the witness room—can hardly be the basis of disregarding the deference owed to the prison system. *Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., statement respecting grant of stay) (stating that TDCJ's revised policy "likely passes muster under" RLUIPA).

While 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. Pl.'s Amended Compl. 33. The government's interest in maintaining an orderly execution process is indeed compelling. Yet the relief Plaintiff requests would thrust upon TDCJ the requirement that it permit spiritual advisors from any and all conceivable denominations, irrespective of TDCJ's ability to fully ensure they are all suited (i.e., of good judgment, professionalism, behavior, and discretion), trained, and prepared for the task of being present in the execution chamber. In short, Plaintiff's requested relief is unworkable on its face.[31] *See Cutter*, 544 U.S. at 726 ("Should inmate requests for religious accommodations . . . jeopardize the effective functioning of an institution, the facility would be free to resist the imposition."). Indeed, the Supreme Court has held that prison facilities are not required to provide "identical facilities or personnel" to "every religious sect or group within a prison." *Cruz v. Beto*, 405 U.S. 319, 325 n.2 (1972) ("A special chapel or place

31. For the same reason, Plaintiff is not entitled under the PLRA to the relief he seeks because "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A). "The Court shall not grant or approve any prospective relief unless the court finds such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.* Moreover, "[t]he Court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand.").

TDCJ has—consistent with guidance from the Supreme Court—designed the least restrictive means of furthering its obvious and compelling interest in security. *Murphy*, 139 S. Ct. at 1475-76 (Kavanaugh, J., concurring); *id.* at 1476 (Kavanaugh, J., statement respecting grant of stay). In fact, TDCJ allows more by permitting an inmate to visit with a chaplain or his or her spiritual advisor on the day of the execution. Pl.'s App. at 012. And an inmate may visit with TDCJ-employed clergy "until the moment he enters the execution chamber."[32] *Murphy*, 942 F.3d at 706. RLUIPA envisions that inmates' requests for religious accommodations will be scrutinized in the context of the prison environment and the paramount security concerns involved with incarcerated felons. *See Cutter*, 544 U.S. at 717, 722. Plaintiff's request concerns the weighty process of carrying out an execution. RLUIPA

32. Plaintiff does not allege any claim regarding his exercise of his religion while in the "holding area" prior to his execution, as Murphy alleged in his lawsuit. *See Murphy*, 942 F.3d 706-07. Consequently, the litigation in Murphy's case has little, if any, bearing on Plaintiff's Chaplain claim. *See id.* at 706 ("[T]he focus of the amended complaint shifted to the interaction an inmate has with his spiritual advisor before entering the execution chamber."). Indeed, Murphy's execution was most recently stayed because the Fifth Circuit found he had "a strong likelihood of success on the merits of his claim that the TDCJ policy violates his rights by allowing inmates who share the same faith as TDCJ-employed clergy greater access to a spiritual advisor in the death house." *Id.* at 708.

does not elevate accommodation of religious observances over a prison's need to maintain order and safety. *Id.* at 722. TDCJ's execution protocol is the least restrictive means of furthering its compelling governmental interest in security. *Murphy*, 139 S. Ct. at 1475-76 (Kavanaugh, J., concurring). Plaintiff fails to state a claim upon which relief can be granted, and his amended complaint should be dismissed.

3. The Establishment Clause claim

The Establishment Clause provides in relevant part that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. This clause applies to the states through the Fourteenth Amendment. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). Governmental action under the Establishment Clause is typically analyzed under a three-prong test: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) "the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Plaintiff alleges that TDCJ's execution protocol prohibiting chaplains from attending his execution favors the non-religious over the religious and thus violates the Establishment Clause. Pl.'s Amended Compl. 32-34. He argues that, because the protocol is not neutral between religion and non-religion, it may only withstand a First Amendment challenge if it is narrowly tailored to a compelling interest. Pl.'s Amended Comp. 33.

However, both the Supreme Court and the Fifth Circuit recently applied the "reasonableness test" rather than the *Lemon* test in Establishment Clause challenges. *Am. Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2087 (2019); *Brown*, 929 F.3d at 243.[33] The Fifth Circuit emphasized that, "to ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness test.'" *Brown*, 929 F.3d at 243 (citing *Turner v. Safley*, 482 U.S. 78, 86-87 (1987)). The Fifth Circuit declined to apply strict scrutiny to an inmate's Establishment Clause claim—implicating over 140,000 inmates and more than 200 faith groups—that alleged certain TDCJ religious policies favored some faiths over others. *Id.* at 246-47. Instead, the court applied the more deferential standard under *Turner* and stated that "prison officials must operate within a zone of reasonableness. *Id.* at 244; *see Murphy v. Collier*, 942 F.3d at 714 (Elrod, J., dissenting).

The right asserted by Plaintiff to have a TDCJ chaplain in the execution chamber with him rather than in the witness room "must necessarily be limited in the prison context." *Brown*, 929 F.3d at 246-47. And the deferential standard applied by the Supreme Court and

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33. Judge King did not concur in Part VI of the *Brown* opinion. However, Judge King specified she did not join Part VI only because she disagreed with the conclusion that TDCJ's housing policy did not violate the Establishment Clause. *Brown*, 929 F.3d at 254 (King, J., concurring in part). Part VI of the *Brown* opinion is cited only for the analysis with which Judge King did not take issue.

Fifth Circuit to Establishment Clause claims leads to the conclusion that TDCJ's protocol is plainly permissible.

First, as discussed above, TDCJ's protocol limiting who may be present in the execution chamber is rationally connected to its interest in maintaining security and ensuring an orderly execution process. Indeed, its interest is compelling. *See Murphy*, 139 S. Ct. at 1475-76 (Kavanaugh, J., concurring). Second, Plaintiff can practice his religion before and during his execution. He does not adequately allege any way in which he will be prevented from doing so. Third, as discussed above, the necessary consequence of the relief Plaintiff seeks is the compelling of TDCJ to permit spiritual advisors from any and all conceivable denominations, or else recreate the constitutional dilemma the Supreme Court addressed in *Murphy.* Such relief would require TDCJ to permit the attendance of potentially ill-suited individuals in the execution chamber. Fourth, there are no ready alternatives that would alleviate the security risks of allowing such an outsider into the execution chamber during an execution. *See Turner*, 482 U.S. at 90. Under *Turner*, there is no dispute that TDCJ's protocol is reasonably related to its legitimate interest in security.

Moreover, TDCJ's revision of its protocol regarding the presence of chaplains during an execution was in response to the Supreme Court's action in *Murphy.* 139 S. Ct. at 1476 (Kavanaugh, J., statement respecting grant of stay). Plaintiff can in no way show that the revision evinces hostility toward religion or was motivated by discriminatory intent or intent to exclude all religions rather than its obvious secular motivation of maintaining

a safe and orderly execution process. *See Am. Legion*, 139 S. Ct. at 2084-85. Therefore, Plaintiff fails to state a claim upon which relief can be granted, and his complaint should be dismissed.

4. The Free Exercise Clause claim.

As discussed above, TDCJ's protocol is rationally related to its legitimate penological interest in security and an orderly execution process. For much the same reason, Plaintiff's Free Exercise Clause claim does not identify a constitutional violation. TDCJ's protocol allows Plaintiff to meet with a chaplain on the day of the execution, and it permits the chaplain to be present in the witness room. Pl.'s App. at 012. As with Plaintiff's other Chaplain claims, the relief he seeks is untenable and would, in fact, create potential constitutional violations. Plaintiff's conclusory assertions, Pl.'s Amended Compl. at 34-35, cannot establish a viable claim and his complaint should be dismissed.

CONCLUSION

Plaintiff's amended complaint fails to establish that this Court has jurisdiction to consider it or that it alleges a claim for relief upon which relief can be granted. Plaintiff also fails to establish an entitlement to a stay of execution. Therefore, Defendants respectfully request that this Court dismiss the amended complaint and deny a stay of execution.

Respectfully submitted,

Appendix L

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Appendix L

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 Dismiss Plaintiff's Amended Complaint is hereby GRANTED and Plaintiff's claims in this case are DISMISSED.

It is so ORDERED.

SIGNED on this ____ the day of _____, 2020.

/s/_____
JUDGE PRESIDING

Appendix M – Amended Complaint Pursuant to 42 U.S.C. § 1983, United States District Court for the Southern District of Texas (April 22, 2020)

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

Civil Case No. l: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; FELIX SAUCEDA, JR., CHIEF, BROWNSVILLE POLICE DEPARTMENT; BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, HUNTSVILLE, TEXAS; LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, HUNTSVILLE, TEXAS; AND BILLY LEWIS, WARDEN, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, HUNTSVILLE UNIT, HUNTSVILLE, TEXAS,

Defendants.

Filed April 22, 2020

AMENDED COMPLAINT PURSUANT TO 42 U.S.C. § 1983

Appendix M

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INTRODUCTION

The DNA Claims

1. Plaintiff Ruben Gutierrez has been convicted of capital murder and is currently scheduled to be executed by the State of Texas on June 16, 2020. The State intends to carry out Mr. Gutierrez's death sentence in spite of the facts that physical evidence is available that has never been DNA tested, and that such testing could prove that Plaintiff was not a principal in the murder of Escolastica Harrison. This suit is brought to enjoin Defendants from violating Plaintiff's federal constitutional rights by denying him access to that evidence for purposes of forensic DNA testing.

2. The State of Texas collected physical evidence that could have been DNA tested at the time of trial. The State chose not to test that evidence.

3. "Modern DNA testing can provide powerful new evidence unlike anything known before." *Dist. Attorney's Office v. Osborne*, 557 U.S. 53, 62 (2009). Since he was convicted, Mr. Gutierrez has demanded that the evidence be tested to prove he did not commit the killing and identify another man as the murderer, but the State has opposed such testing (with one exception) and Texas courts have repeatedly denied requests for such testing.

4. The Texas legislature has recognized the utility of DNA evidence in the post-conviction context, and passed Chapter 64 of the Texas Code of Criminal Procedure in 2001 because prior laws relating to the use of biological evidence, "particularly evidence containing DNA, have been surpassed by developments in the science of biological evidence and other related technologies, unnecessarily inhibiting the use of such evidence." Tex. Bill Analysis, S.B. 3, Jan. 25, 2001.[1]

5. Mr. Gutierrez properly filed a motion for DNA testing under Chapter 64 of the Texas Code of Criminal Procedure ("Chapter 64") almost ten years ago, but his request was denied after lengthy proceedings—including two appeals to the Texas Court of Criminal Appeals ("CCA"). Following changes in Chapter 64, the development of advanced scientific testing techniques, and the disclosure of new exculpatory evidence, Mr. Gutierrez

1. When it passed the DNA testing legislation, Texas prospectively provided for mandatory DNA testing of all biological material recovered in capital cases. Tex. Art. Crim. Pro. 38.43. If Mr. Gutierrez were arrested today, testing of this biological material would be required.

again sought DNA testing earlier this year, but was again denied.

6. This action under 42 U.S.C. § 1983 ("Section 1983") challenges the constitutionality of Chapter 64 both on its face and as applied by the CCA. Given the unique ability of DNA evidence to identify the actual killer in this case, the State's refusal to allow Mr. Gutierrez to test key evidence in its possession denies him due process of law and access to the courts.

7. Defendants' refusal to release the biological evidence for testing violates Plaintiff's Fourteenth Amendment right to due process, his First Amendment right to access the courts, and his Eighth Amendment right to be free from cruel and unusual punishment. Plaintiff requests of this Court an order declaring that Defendants' continued withholding of the evidence violates Plaintiff's constitutional rights, and requiring that Defendants release the evidence to Plaintiff under a reasonable protocol regarding chain of custody and preservation of the evidence, in order that Plaintiff can have the evidence tested at his own expense. Relief is necessary here to preserve Plaintiff's liberty interest in accessing the Texas statutory procedure to conduct forensic DNA testing.

The First Amendment and Related Claims

8. Plaintiff Gutierrez is a Christian. On June 16, 2020, Mr. Gutierrez will be executed under conditions that violate the First Amendment's Free Exercise and

Establishment Clauses and substantially burden the exercise of his religious beliefs as protected by the Religions Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc-2000cc-5. Mr. Gutierrez's request for a reasonable accommodation to have a Christian chaplain in the execution chamber when he is executed has been denied. Relief is necessary to ensure that he is executed only in a manner that does not substantially burden the exercise of his religious beliefs, does not violate his rights under the Establishment Clause, and complies with RLUIPA.

JURISDICTION

9. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, 1651, 2201, and 2202, and under 42 U.S.C. § 1983. *See also Skinner v. Switzer*, 562 U.S. 521, 534 (2011) (convicted state prisoner may seek DNA testing of crime-scene evidence in § 1983 action).

VENUE

10. Venue lies in this Court under 28 U.S.C. § 1391 because Defendants reside in the Southern District of Texas. Venue is also proper because the execution will occur in this district.

PARTIES

11. Plaintiff Ruben Gutierrez is a United States citizen and resident of the State of Texas. He is currently incarcerated, under a sentence of death imposed by the

107th Judicial District Court of Texas (the "107th District Court"), at the Allan B. Polunsky Unit of the Texas Department of Criminal Justice ("TDCJ") in Livingston, Texas. He is scheduled to be executed on June 16, 2020.

12. Defendant Luis V. Saenz is the District Attorney for the 107th Judicial District of Texas, and maintains an office in that district in the city of Brownsville. He is being sued in his official capacity. Defendant Saenz has custody and/or control of the DNA evidence that is the subject of the DNA claim. Defendant Saenz has opposed Mr. Gutierrez's request to conduct DNA testing on the items of evidence at issue in this case. A district attorney who opposes DNA testing is a proper defendant in a § 1983 action seeking DNA testing. *Skinner*, *supra.*

13. Defendant Felix Sauceda, Jr., is the Chief of the Brownsville Police Department. Defendant Sauceda has custody of certain evidence designated below. Defendant Sauceda is sued in his official capacity.

14. Bryan Collier is the executive director of the TDCJ. He is being sued in his official capacity. He is responsible for the oversight and enforcement of policies and procedures generally applicable to all prisons and all prisoners and is responsible for carrying out Mr. Gutierrez's execution.

15. Lorie Davis is the director of the Correctional Institutions Division (the "CID") of the TDCJ. She is being sued in her official capacity. In her capacity as director of the CID, she adopted TDCJ's Execution Procedure,

effective April 2, 2019. Ms. Davis is also the person charged by the trial court's order to execute the judgment of death against Mr. Gutierrez.

16. Billy Lewis is the senior warden of the Huntsville Unit, the unit at which TDCJ executes inmates. He is being sued in his official capacity. As the warden of the Huntsville Unit, Mr. Lewis is the TDCJ official who supervises Texas executions.

PROCEDURAL BACKGROUND

The DNA Claims

17. Plaintiff was one of three men indicted for the robbery/murder of Escolastica Harrison: Ruben Gutierrez, Rene Garcia, and Pedro Gracia. Pedro Gracia was released on bond and disappeared. Rene Garcia pled guilty and was sentenced to life imprisonment. Ruben Gutierrez pled not guilty and his case was tried by a jury in the 107th District Court of Cameron County, Texas.

18. The State's main theory of the case at trial was that Mr. Gutierrez was a principal in the murder of Escolastica Harrison in order to prevent her from identifying him as one of the robbers. In opening statement the State argued to the jury:

> The evidence will show . . . without any statements, that Ruben and Rene killed Ms. Harrison. . . . Ruben's statements . . . show[] beyond a reasonable doubt that he's involved in

> killing Ms. Harrison and robbing Ms. Harrison, killed her in the course of a theft.

17 RR 33.[2]

19. In closing argument the State argued to the jury:

> [W]hat [Ruben] tells you in the confession, which you also need to be sure that you pay close attention to, is what he says is that, "We got two screwdrivers out of that toolbox, two screwdrivers out of that toolbox." Think about it and read between line[s], ladies and gentlemen. What he's telling you is that, "Rene had the flat tip, and we got two out, and I had the other one. I had the star shaped one."

20 RR 72.

20. On direct appeal, the State argued to the Court of Criminal Appeals: "Mrs. Harrison was attacked by two adult men. The two men were armed with screwdrivers." Appeal Brief at 19.

21. Under the State's theory of the case at trial, the two men present at the scene of the offense were Rene Garcia (who pled guilty) and Ruben Gutierrez. Pedro Gracia (who absconded) was the getaway driver. Avel Cuellar—the victim's nephew who resided with her and

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2. The trial testimony will be cited as volume number, followed by RR (Reporter's Record), followed by the page number.

"discovered" her body—was not, according to the State, involved in the crime.

22. Mr. Gutierrez maintained throughout trial proceedings that although he was aware of a burglary, he was not present at the scene of the offense, did not enter the victim's home, did not plan the victim's murder, did not participate in the victim's murder, did not know that his co-defendants intended to commit murder, and could not have reasonably anticipated that his co-defendants intended to commit murder.[3] The defense argued that the two men observed at the scene of the offense who went inside the victim's house were Rene Garcia and Pedro Gracia; because Mr. Gutierrez was not inside the home, he had no idea the robbery had resulted in Ms. Harrison's death.

23. In 1999, Plaintiff was convicted and sentenced to death by a jury in the 107th District Court for the murder of Ms. Harrison. The conviction and sentence were upheld by a divided Texas Court of Criminal Appeals ("CCA") on direct appeal, with one justice dissenting. *Gutierrez v. State*, No. 73,462 (Jan. 16, 2002) (unpublished).

24. On July 31, 2002, Plaintiff initiated state court habeas corpus proceedings pursuant to Art. 11.071 of the Texas Code of Criminal Procedure. After the state habeas court initially denied relief, the CCA affirmed the denial

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3. Mr. Gutierrez has maintained since before his trial that his third statement—referenced by the prosecutor in closing argument—was false and was obtained by coercion.

of all but two claims for relief and remanded the case to the trial court to supplement the record with affidavits from trial and appellate counsel. *Ex parte Gutierrez*, No. 59,552-01, 2004 WL 7330936, at *1 (Tex. Crim. App. Sept. 15, 2004) ("*Gutierrez-1*"). Following the remand and supplementation, the CCA denied the remaining claims. *Ex parte Gutierrez*, No. 59,552-01, 2008 WL 2059277, at *1 (Tex. Crim. App. May 14, 2008) ("*Gutierrez-2*").

25. On January 26, 2009, Mr. Gutierrez timely filed a federal petition for writ of habeas corpus with this Court. *See Gutierrez v. Stephens*, No. 1:09-cv-00022 (S.D. Tex.) (Doc. 1). Mr. Gutierrez was represented by attorney Margaret Schmucker. Mr. Gutierrez then sought, and this Court granted, a stay and abeyance so that Mr. Gutierrez could file a successive state writ to exhaust additional claims in accordance with *Rhines v. Weber*, 544 U.S. 269, 277 (2005). *Id.* (Doc. 10).

26. Upon returning to state court, Mr. Gutierrez sought the appointment of counsel and DNA testing pursuant to a version of Texas Code of Criminal Procedure Chapter 64 that was later superseded by amendment. The trial court initially denied only the motion for appointment of counsel and Mr. Gutierrez appealed. The CCA dismissed the appeal for lack of jurisdiction because the denial of counsel was found not to be an immediately appealable order. *Gutierrez v. State*, 307 S.W.3d 318, 319 (Tex. Crim. App. 2010) ("*Gutierrez-3*"). The trial court subsequently denied the motion for DNA testing under Chapter 64; Mr. Gutierrez then appealed the denial of counsel and post-conviction DNA testing. On May 4, 2011, the CCA affirmed, finding that Mr. Gutierrez was not entitled to the

appointment of counsel or to post-conviction DNA testing under Chapter 64. *Ex parte Gutierrez*, 337 S.W.3d 883, 886 (Tex. Crim. App. 2011) ("*Gutierrez-4*").

27. The CCA's affirmance was based in part on a finding that Mr. Gutierrez was at fault for not seeking DNA testing at trial. *Id.* at 895 (citing Tex. Crim. Proc. Code art. 64.01(b)(1)(B)), *repealed by* Acts 2011, 82nd Leg., ch. 366 (S.B. 122), § 1. The CCA also affirmed the lower court on the ground that Plaintiff had failed to show by a preponderance of the evidence that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing. *Gutierrez-4*, 337 S.W.3d at 901.

28. Mr. Gutierrez filed a successive state application for writ of habeas corpus. The writ was ultimately dismissed on procedural grounds as an abuse of the writ. *Ex parte Gutierrez*, WR-59,552-02 (Aug. 24, 2011) (per curiam).

29. Mr. Gutierrez returned to federal court and raised a claim under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), regarding the State's tardy disclosure to trial counsel that it was in sole possession of biological evidence collected from the victim and the scene of the offense. In the amended brief supporting his claim for federal habeas relief, Mr. Gutierrez specifically requested post-conviction DNA testing.

30. This Court issued a judgment denying federal habeas relief on procedural grounds. *Gutierrez v. Stephens*, No. 1:09-CV-22 (S.D. Tex. Oct. 3, 2013).

31. Mr. Gutierrez filed an application for certificate of appealability to the United States Court of Appeals for the Fifth Circuit, seeking review of the denial of the *Brady* claim. During oral argument, counsel for Mr. Gutierrez again argued that DNA testing would demonstrate that Mr. Gutierrez was not death eligible. The Fifth Circuit denied Mr. Gutierrez's request for a certificate of appealability on procedural grounds. *Gutierrez v. Stephens*, 590 F. App'x 371, 373 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 35 (2015).

32. 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 under *Brady.* In its response to this motion, filed on February 2, 2016, the State did not oppose Mr. Gutierrez's request for DNA testing. On April 11, 2018, however, the State presented and the court signed a proposed order denying the motion.

33. On April 18, 2018, without giving Plaintiff's attorneys any notice or an opportunity to be heard, the 107th District Court signed Mr. Gutierrez's warrant of execution, directing that he be executed by intravenous injection "at any time after the hour of 6:00 P.M. on September 12, 2018."

34. In the meantime, but unbeknownst to Mr. Gutierrez, appointed counsel Margaret Schmucker was removed from the Fifth Circuit's CJA appointment panel on December 15, 2017. *See Gutierrez v. Stephens*, No. 1:09-cv-00022 (S.D. Tex.) (Doc. 63). On July 24, 2018, Ms. Schmucker filed a motion seeking to be relieved as counsel in this case. *Id.* (Doc. 56). On August 6, 2018, this Court

granted the motion to withdraw and appointed Richard W. Rogers, III, as counsel. *Id.* (Doc. 63). On August 14, 2018, this Court appointed the FCDO as co-counsel. *Id.* (Doc. 71).

35. On August 15, 2018, Mr. Gutierrez filed a motion for stay of execution in this Court. *Id.* (Doc. 73). The State opposed the motion, arguing that this Court lacked jurisdiction and that Mr. Gutierrez was not entitled to a stay. *Id.* (Doc. 74). This Court granted the stay of execution on August 22, 2018. *Id.* (Doc. 79).

36. Following the stay, the FCDO sought records from the Brownsville Police Department, the Texas Department of Public Safety, and the Cameron County District Attorney's Office. While discussions about those requests were ongoing, on April 30, 2019, the Cameron County District Attorney's Office filed a motion to set a new execution date. That motion was granted on May 1, 2019.

37. On June 8, 2019, Mr. Gutierrez filed an "Agreed Upon Motion to Recall Order Setting Execution Date and Warrant of Execution," due to defects in the warrant. On June 14, 2019, after review of partial files made available by the Brownsville Police Department and the Cameron County District Attorney's Office, Mr. Gutierrez filed a renewed motion for post-conviction DNA testing pursuant to Chapter 64.

38. On June 20, 2019, the court granted the motion to recall the execution date, and granted the motion for

DNA testing. *Ex parte Gutierrez*, No. 98-CR-1391-A, Order (Tex. 107th Judicial Dist. Ct. June 20, 2019), A1-2.[4]

39. On June 21, 2019, the Cameron County District Attorney's Office moved to set a new execution date of October 30, 2019. On that same date, Mr. Gutierrez objected to the proposed new execution date and moved for a hearing.

40. On June 25, 2019, the State filed its opposition to the motion for DNA testing. On June 27, 2019, the 107th District Court granted the motion to set a new execution date of October 30, 2019, and denied the defense motions. The court signed without change the State's proposed orders (a) withdrawing the previous order granting DNA testing and (b) denying DNA testing. A3-4.

41. Mr. Gutierrez timely appealed. On February 26, 2020, the CCA affirmed the trial court order denying relief. *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *1 (Tex. Crim. App. Feb. 26, 2020) ("*Gutierrez-5*").

The First Amendment and Related Claims

42. On April 2, 2019, TDCJ adopted a revised execution procedure prohibiting any religious or spiritual advisers from entering the execution chamber at the time of an execution: "TDCJ Chaplains and Ministers/Spiritual

4. Plaintiff filed an Appendix of relevant documents with the original Complaint. Documents included in the Appendix are cited as "A" followed by the page number.

Advisors designated by the offender may observe the execution only from the witness rooms." Al2. The previous execution policy allowed TDCJ-approved chaplains in the execution chamber, consistent with longstanding tradition in Texas and nationwide.

43. The amendment appears to be in response to the Supreme Court's order granting a stay in *Murphy v. Collier*, 139 S. Ct. 1475, 1475 (2019). Indeed, the revised policy appears to adopt reasoning from Justice Kavanaugh's concurring statement. *See id.* at 1475-76.

44. On July 30, 2019, undersigned counsel informed Sharon Howell, general counsel of TDCJ, that Mr. Gutierrez was requesting a reasonable accommodation to have a Christian chaplain present in the execution chamber during his execution, and had submitted an 1-60 "Offender Request to Official" form. A 14-15. Mr. Gutierrez did not receive a written response to his 1-60, but when talking to a TDCJ chaplain on July 28, 2019, he was told that there would be no chaplain in the chamber, in accordance with the new TDCJ policy. Ms. Howell responded to undersigned counsel on July 31, 2019, stating that TDCJ could not accommodate Mr. Gutierrez's request as it would violate TDCJ policy. A14.

45. On August 19, 2019, months before his scheduled execution, Mr. Gutierrez filed an "Offender Grievance" form. A16-17. Mr. Gutierrez explained that having a Christian chaplain present in the chamber would help to ensure his path to the afterlife. He also noted that TDCJ's previous policy 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 had indicated that they were willing to be present in the chamber at his execution (but for TDCJ's April 2019 Execution Procedure).

46. TDCJ has not yet granted or denied Mr. Gutierrez's grievance. Mr. Gutierrez filed these claims originally in light of the fact that his execution was scheduled in little over a month, and particularly in light of Justice Kavanaugh's statement that a claim filed over a month before an execution is "sufficiently timely," *Murphy*, 139 S. Ct. at 1475, 1476 n.* (implying that a claim filed later likely would not be timely). Under the current warrant, Mr. Gutierrez's execution is a little under two months away, and there is no indication that TDCJ will take any additional action on Mr. Gutierrez's grievances.

FACTUAL BACKGROUND OF DNA CLAIM

47. The evidence presented at trial showed that the victim had suffered several puncture wounds, 19 RR 234-42, but had died from a blow to the head, 19 RR 224-25, 266-67. The medical examiner testified that the puncture wounds had been made by two screwdrivers. 19 RR 234-45. He did not estimate Ms. Harrison's time of death. 19 RR 215-82; SX 73 (autopsy report).[5]

48. The medical examiner testified that Ms. Harrison had struggled with her assailant(s) for at least

5. Exhibits introduced at trial by the State are cited as "SX." They are contained in volume 30 of the record.

a few minutes, during which time she sustained defensive wounds to her right wrist, right elbow, and right hand. 19 RR 245-247, 257, 263, 272. He stated that defensive wounds are "almost always found" on "the fingers of the hands, and the hands, and the forearms as they try to ward off blows." 19 RR 245. The medical examiner also testified that Ms. Harrison fought her attacker with her hands. *Id.*

49. The medical examiner testified at trial that biological material—namely scrapings taken from underneath Ms. Harrison's fingernails—was preserved as evidence. 19 RR 245. According to the medical examiner, the purpose of taking nail scrapings during an autopsy is to determine whether the victim had tissue under her nails from any other individual besides herself. 19 RR 264. Furthermore, when a person is attempting to defend themself, there is also a "distinct possibility" that the person would grab the assailant's hair and then have that hair on their hand. *Id.*

50. The medical examiner found a single loose hair around the third digit of Ms. Harrison's left hand. 19 RR 263.

51. The untested evidence in the possession of the State can not only prove Mr. Gutierrez was not in the victim's house, it can show who actually killed Ms. Harrison. Specifically, the untested evidence includes:

- 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. 19 RR 263.

52. DNA testing of the blood sample taken from the victim, Escolastica Harrison, is necessary to establish a known sample for purposes of including or excluding her as the source of biological evidence, according to standardized scientific DNA testing protocols.

53. "Touch DNA testing"—a new, advanced DNA testing procedure—of the decedent's nightgown is necessary because her assailant(s) likely touched the

nightgown, and thus such testing would likely reveal the identity of those assailant(s). *See* Aff. of Huma Nasir, A21-23; Decl. of Dr. Randall Libby, A38-39.

54. DNA testing of the shirt belonging to the victim's nephew and housemate is necessary to determine whether it was contaminated by biological evidence (blood) not belonging to himself or Ms. Harrison between the time he arrived home and discovered her body and the time police arrived, and, if so, whether it matches one, two, or all three of the co-defendants.

55. DNA testing of the nail scrapings taken from Ms. Harrison during the autopsy is necessary to determine whether, during the struggle with her assailant(s), she collected biological material from their skin under her fingernails, and, if so, whether it matches one or more of her assailants.

56. DNA testing of the blood samples collected from the bathroom, the raincoat, and the sofa is necessary to determine whether they matched just Ms. Harrison or whether they contained DNA from one or more of the co-defendants.

57. DNA testing of the loose hair is necessary to determine whether it matched just Ms. Harrison or whether it contained DNA from one of her assailants. With advanced new DNA testing procedures, including mitochondrial DNA testing, this can be done even if there is no root material attached to the hair. A22.

58. The jury, when deciding if Mr. Gutierrez was guilty of capital murder, never heard the results of

any testing of this forensic evidence. The jury, when it sentenced Mr. Gutierrez to die, never heard the results of any testing of this forensic evidence. This is because the State never tested this evidence, and has opposed Mr. Gutierrez's efforts to test it (with one brief exception).

59. Instead, the State assumed that blood found on Ms. Harrison's clothes and biological evidence collected during the autopsy—including fingernail scrapings—contained no DNA from Ms. Harrison's assailant(s), despite the medical examiner's testimony concerning the presence of defensive wounds on her body. It further assumed that blood found elsewhere in the house belonged to Ms. Harrison, despite the fact that fresh blood stains were found in areas of the house the victim could not have reached, and clearly did not go, either during or after the fatal assault.

60. No evidence submitted at trial proved that Mr. Gutierrez actually stabbed or laid a hand on Ms. Harrison. His conviction was based primarily on a photo identification of Mr. Gutierrez by an eyewitness (Julio Lopez), who claimed to have observed him outside the victim's house at the time the murder occurred but who, at trial, did not identify Mr. Gutierrez as the person he observed, 18 RR 72-94; testimony that Mr. Gutierrez led police to the location where his co-defendants showed him they had disposed of items taken from the victim's home, 18 RR 179-93; and statements by Mr. Gutierrez that were coerced by police, in which he admitted to planning a burglary (not a robbery and murder) and to being present at the scene, but not to any direct involvement in the victim's murder, SX 45.

Appendix M

CLAIMS FOR RELIEF

61. Mr. Gutierrez re-alleges and incorporates herein by reference all the allegations contained in the preceding paragraphs of this Amended Complaint.

First Claim for Relief: Denial of Due Process

62. Pursuant to Chapter 64, when an individual sentenced to death, such as Mr. Gutierrez, presents a motion that requests DNA testing of biological material that both still exists in a condition which makes testing possible and could yield exculpatory results, he or she is entitled to have the evidence tested. Tex. Code Crim. Proc. art. 64.03 (2017). If testing successfully produces an unidentified DNA profile, that profile must be compared to the FBI's CODIS database, and to the database established by the Department of Public Safety. Art. 64.035 (2011). Exculpatory results obtained under Chapter 64 are considered by the trial court.

63. Exculpatory DNA results are accepted under Texas law as evidence that can be used to prove a claim for habeas relief brought under Articles 11.071 and 11.073 of the Texas Code of Criminal Procedure, based on innocence, innocence of the death penalty, false or misleading testimony, and other constitutional violations. Exculpatory DNA results may also be considered by the Board of Pardons and Paroles and the Texas Governor in an available request for executive clemency. *See State v. Holloway*, 360 S.W.3d 480, 489 n.58 (Tex. Crim. App. 2012), *abrogated on other grounds, Whitfield v. State*, 430 S.W.3d 405, 409 (Tex. Crim. App. 2014).

64. Because the State of Texas has created a procedure through which convicted persons can obtain DNA testing and then utilize exculpatory results from that testing to secure habeas relief, executive clemency, and potentially other relief from their convictions and death sentences, the process employed by the State for obtaining access to DNA must not violate fundamental fairness. *See Osborne*, 557 U.S. at 69; *Skinner*, *supra*; *Elam v. Lykos*, 470 F. App'x 275, 276 (5th Cir. 2012) ("While 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 (5th Cir. 2013) ("Although states are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they create must comport with due process and provide litigants with a fair opportunity to assert their state-created rights.").

65. Chapter 64 on its face and as construed by the CCA violates fundamental fairness.[6] On its face and as

6. In its 2011 decision, the CCA ruled that Mr. Gutierrez had failed to show that the identity of the perpetrator was in issue, as required by Article 64.03(a)(1)(C). The CCA relied in its ruling on statements from Mr. Gutierrez's co-defendants, the third (allegedly coerced) statement by Mr. Gutierrez, and an identification from a photo array by Julio Lopez. *See Gutierrez-4*, 337 S.W.3d at 891-900. In the state court proceedings initiated in 2019, Mr. Gutierrez cast significant doubt on the identification by Mr. Lopez. *See* Compl. para. 67. In those proceedings, neither the trial court nor the CCA relied on a purported inability to show that the identity of the perpetrator was in issue. *See Gutierrez-5*,

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.[7] As construed by

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2020 WL 918669, at *6. Thus, it no longer appears that Texas is using the identity requirement as a basis to deny DNA testing, and we do not address it further. To the extent it remains relevant, the ruling on identity in *Gutierrez-4* had the same factual basis as the failure-to-show-a-different-outcome ruling in *Gutierrez-5*, aside from the reliance on the Lopez identification in *Gutierrez-4*.

7. The following statutes require testing when the prisoner makes a showing that meets a reasonable probability standard (with a number of variations in the precise wording): 18 U.S.C. § 3600(a)(8)(B); Ala. Code 1975, § 15-18-200(f)(2); Alaska Stat. Ann. § 12.73.020(9)(B) (West); Ariz. Rev. Stat. Ann. § 13-4240.B.1; Ark. Code Ann. § 16-112-202(9)(B) (West); Cal. Penal Code § 1405(g)(5) (West); Conn. Gen. Stat. Ann. § 54-102kk(b)(1) (West); D.C. Code Ann. § 22-4133(d) (West 2001); Fla. Stat. Ann. § 925.11(f)(3) (West 2006); Ga. Code Ann. § 5-5-41(c)(3)(D) (West 2012); Haw. Rev. Stat. Ann. § 844D-123 (West); Ind. Code Ann. § 35-38-7-7, sec. 8(4) (West); Iowa Code § 81.11(1)(e) (2019); Ky. Rev. Stat. Ann. § 422.285(5) (West 2013); La. Stat. Ann. § 926.1.C(1) (2014); Md. Code Ann. Crim. Proc. § 8-201(d)(1)(i) (West 2018); Miss. Code Ann. §§ 99-39-5(1)(f), 99-39-9, 99-39-11 (West) (petitioner entitled to testing on allegation DNA testing would provide reasonable probability of different outcome, unless pleading facially inadequate); Mo. Ann. Stat. § 547.035.2(5) (West); Mont. Code Ann. § 46-21-11(5)(d) (West 2015); Nev. Rev. Stat. Ann.

§ 176.09183.1(c) (West 2013); N.J. Stat. Ann. § 2A:84A-32a.d(5) (West 2016); N.M. Stat. Ann § 31-1A-2.C(5) (West 2010); N.Y. Crim. Proc. Law § 440.30.1-a.(a)(1) (McKinney 2020); N.C. Gen. Stat. Ann. § 15A-269(b)(2) (West); Okla. Stat. tit. 22, § 1373.4.A.1 (2013); Or. Rev. Stat. Ann. § 138.692(6)(b) (West); 42 Pa. C.S.A. § 9543.1(d)(2) (West); 10 R.I. Gen. Laws Ann § 10-9.1-12(a) (West); S.C. Code Ann. § 17-28-90(B)(5); Tenn. Code Ann. § 40-30-304(1) (West); Utah Code Ann. § 78B-9-301(2)(f) (West); Vt. Stat. Ann. tit. 13 § 5566(a)(1) (West); W. Va. Code Ann. § 15-2B-14(c)(1)(B) (West); Wis. Stat. Ann. § 947.07(7)(a)(2) (West 2011). Eight states require testing when the prisoner makes a showing of relevance or material relevance, i.e., a standard that is at least as movant-friendly as the reasonable probability standard: Del. Code Ann. tit. 11, § 4504(a)(5) (West) ("materially relevant"); Kan. Stat. Ann. § 21-2512(c) (West 2013) ("relevant"); Me. Rev. Stat. Ann. tit. 15, § 2138.4-A.E (2013) ("material"); Mass. Gen. Laws ch. 278A, § 7(b)(4) (West 2012) ("material"); Mich. Comp. Laws Ann. § 770.16(4)(a) (West 2015) ("material"); Minn. Stat. Ann. § 590.01(c)(2) (West 2005) ("materially relevant"); Neb. Rev. Stat. Ann. § 29-4120(5)(c) (West 2015) ("relevant"); N.D. Cent. Code Ann. § 29-32.1-15.3.b (West) ("materially relevant"). Illinois requires testing on a showing of either material relevance to an assertion of innocence or reasonable probability of acquittal. 725 Ill. Comp. Stat. Ann. 5/116-3(c)(1) (West 2014). In addition to Texas, six states require a showing of probable acquittal or some higher standard in order to obtain testing: Colo. Rev. Stat. Ann. § 18-1-413(1)(a) (West) (showing of actual innocence by a preponderance); Idaho Code Ann. § 19-4902(e)(1) (West 2014) (showing innocence more probable than not); N.H. Rev. Stat. Ann. § 651-D:2.III (2010) (material evidence that would exonerate the petitioner); Ohio Rev. Code Ann. § 2953.73(B)(1) (West 2010) (evidence that would have been outcome determinative at trial); S.D. Codified Laws § 23-5B-1(9) (showing that would establish actual innocence); Wash. Rev. Code Ann. § 10.73.170(3) (West) (show that innocence more probable than not). Finally, Wyoming provides that a court may order testing

the CCA, article 64.03(a)(2) effectively precludes testing to establish innocence, and further precludes testing to establish innocence of the death penalty.

67. The CCA previously acknowledged that a DNA match between the fingernail scrapings taken from Ms. Harrison during the autopsy and co-defendant Pedro Gracia would be potentially exculpatory. *Gutierrez-4*, 337 S.W.3d at 901. Nevertheless, the court construed Chapter 64 as precluding potentially exculpatory testing where an exculpatory result does not appear "plausible" to a reviewing court. *Id.* But a court's speculation as to the likelihood that testing *will* produce a particular result cannot reasonably be a basis for concluding that testing that *does* produce that result would not change the outcome at trial.

68. In its recent decision, the CCA relied totally on the statements from Mr. Gutierrez's co-defendants and Mr. Gutierrez's own third, allegedly coerced, statement to find that Mr. Gutierrez could not show that he would be acquitted if retried following exculpatory DNA testing. The CCA reasoned that, at a minimum, Mr. Gutierrez's third statement revealed that he had "plann[ed] 'the whole rip off,' showing his involvement as a party." *Gutierrez-5*, 2020 WL 918669, at *7. The court thus confirmed a per se rule that if there is *any* evidence that the defendant "commit[ted] the crime as either a principal or a party,"

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on a prima facie showing of actual innocence. Wyo. Stat. Ann. § 7-12-305. Thus, forty-two states and the federal government require testing to be performed based on a showing that is more movant-friendly than the Texas standard.

they cannot obtain DNA testing under the statute. *Id.* (citing *Gutierrez-4*, 337 S.W.3d at 900; *Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006)).

69. Realistically, this makes it virtually impossible for any defendant ever to obtain DNA testing under the Texas statute. If there were a complete absence of inculpatory evidence, presumably the defendant would never have been convicted in the first place. Here, in particular, the statements of Mr. Gutierrez's co-defendants implicating him would be excluded from consideration at trial because of their unreliability. *See Bruton v. United States*, 391 U.S. 123, 136 (1968) (discussing unreliability of such evidence). Moreover, Mr. Gutierrez has always contended his statement was coerced.[8]

70. Leaving aside the question of coercion, the CCA's decision renders important provisions in Article 64.03 a virtual nullity. Article 64.03(b) prohibits courts "from finding that identity was not an issue in the case solely on the basis of [a defendant's] . . . confession, or admission."

8. The CCA rejected newly proffered evidence of coercion, on the ground that it had previously rejected Mr. Gutierrez's claim, without the new evidence, commenting that the new evidence "does not overcome the prior court holdings." *See Gutierrez-5*, 2020 WL 918669, at *7 n.8. The question, however, should not be whether the CCA is convinced that the defendant is innocent or that his statement was coerced, but whether Mr. Gutierrez has shown that he would be acquitted by a jury that heard the exculpatory DNA evidence, as well as the new evidence casting doubt on his statement. The CCA's failure to address that question was arbitrary, and creates an insurmountable barrier for any defendant seeking DNA testing.

Relying so heavily on Mr. Gutierrez's third statement to deny DNA testing is inconsistent with at least the spirit of Article 64.03(b). It makes no sense to prohibit reliance on such evidence with respect to the identity requirement, but use it as virtually the sole basis for denying relief with respect to the different outcome requirement.

71. In any event, the CCA has applied the different outcome requirement so broadly that it can be used to deny virtually all requests for DNA testing. The CCA did not dispute that testing may show conclusively that Mr. Gutierrez did not enter the decedent's house or take part in her fatal stabbing. Instead, it simply asserted that such testing—even if it showed that an uncharged man, Avel Cuellar, did participate in the fatal assault—would not change the outcome of the trial. Even if it would still technically be possible to convict Mr. Gutierrez under the law of parties, however, exculpatory test results would so dramatically alter the evidence that a different outcome would be highly likely. The CCA's contrary ruling, in the face of the evidence outlined below, applied Article 64.03 in such a way that it is virtually impossible for anyone convicted under the law of parties to obtain DNA testing under the statute.

72. Avel Cuellar, the decedent's nephew, lived at Ms. Harrison's trailer and was the initial suspect in the crime. A DNA profile tying Mr. Cuellar to the crime would be especially likely to have changed the outcome of the trial. It is likely that if he was one of the people in the trailer who attacked Ms. Harrison, he would have been touched at some point by one of the co-assailants. That person could

have left touch DNA on his clothing. A21-23. Evidence that Rene Garcia's DNA, or Pedro Gracia's DNA, was deposited onto Mr. Cuellar's clothing would be consistent with one of them committing the murder with Mr. Cuellar, *id.*, and would likely have resulted in acquittal of Mr. Gutierrez.

73. Blood was found on Mr. Cuellar's shirt, and may also be present on his jeans. DNA testing could be conducted on the blood stains. Decl. of Prof. Timothy Palmbach, A26; A34. If the blood came from the decedent, and pattern interpretation shows that the blood was a spatter stain, that would be strong evidence that Mr. Cuellar committed the murder. *See* A22-23, 25.

74. Given that Ms. Harrison was stabbed, the assailant(s) would have needed to be very close to her. A21-22, 27. Simply by touching an item, individuals leave behind skin cells that can yield a DNA profile when tested. *Id.* As a result of recent advances in DNA technology, there is a reasonable likelihood of obtaining a DNA profile from touch DNA left on the victim's nightgown by the perpetrator(s). A20, 38. An exculpatory result from such testing almost certainly would have resulted in a different outcome at trial.

75. The Texas Department of Public Safety reported that "apparent blood was detected in the victim's fingernail scrapings." Crime Lab Report, A45. The presence of blood in these scrapings makes them particularly likely to contain probative biological evidence. *See* A21-22, 26. The presence of DNA in the fingernail scrapings from a person or persons other than Ms. Harrison and Mr. Gutierrez would be highly exculpatory.

76. Samples were collected from blood stains in a bathroom. Any profiles obtained from the blood could be compared to known samples of the victim, Avel Cuellar, Rene Garcia, Pedro Gracia, and Ruben Gutierrez. A22, 26. The presence of blood from any two people other than Ruben Gutierrez and the victim would further support the conclusion that Mr. Gutierrez was not the perpetrator.

77. A hair was collected from the decedent's hand. The forensic pathologist testified that the hair could well have come from the assailant. 19 RR 264. Even if the hair lacks a root, recent advances mean that mitochondrial DNA testing would likely reveal a genetic profile. A22, 26-27, 37. A DNA result for a person other than Mr. Gutierrez would likely have resulted in a different outcome.[9]

78. In summary, there is a plethora of biological evidence that, if tested and exculpatory, would have resulted in a different outcome at trial. Moreover, even if it is assumed that Mr. Gutierrez could still have been convicted of first degree murder under Texas's law of parties, *see Gutierrez-4*, 337 S.W.3d at 901; *Gutierrez-5*, 2020 WL 918669, at *7, the evidence would still support a determination that Mr. Gutierrez was not eligible for the death penalty under *Enmund v. Florida*, 458 U.S. 782, 797 (1982), and *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987).

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9. In its prior ruling, the CCA accepted a representation by the State that the hair had not been collected as evidence. *Gutierrez-4*, 337 S.W.3d at 897-98. The CCA now apparently accepts undersigned counsel's representation that the hair is available for testing. *See Gutierrez-5*, 2020 WL 918669, at *5 n.6.

79. The CCA has construed the statute as precluding "testing when exculpatory testing results might affect only the punishment or sentencing that [the defendant] received." *Gutierrez-4*, 337 S.W.3d at 901; *see Gutierrez-5*, 2020 WL 918669, at *8-9 (quoting and approving *Gutierrez-4*). This means, however, that 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 to which he has been sentenced." *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). The execution of a person who is innocent of the death penalty, however, would be a fundamental miscarriage of justice. *See id.* at 339 (actual innocence of crime or death penalty as a miscarriage of justice); *id.* at 345 (defining innocence of death penalty as a "showing that there was no aggravating circumstance or that some other condition of eligibility had not been met"). On its face and as construed by the CCA, Chapter 64 does not permit DNA testing to establish that a defendant is ineligible for the death penalty.

80. On its face and as construed by the CCA, Chapter 64 further does not permit DNA testing to establish that one or more of the aggravating circumstances are invalid, that mitigating circumstances exist, or that the death sentence is otherwise unjust or unwarranted.[10]

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10. A substantial number of state statutes expressly provide for DNA testing where the results would likely change the defendant's sentence, in all cases or at least in capital cases. *See* Cal. Penal Code § 1405(g)(5) (West) (providing for testing where results would raise reasonable probability of more favorable result as to conviction or sentence); Fla. Stat. Ann. § 925.11(f)(3) (West

81. By refusing to release the biological evidence for testing, and thereby preventing Plaintiff from gaining access to exculpatory evidence that could have led to his acquittal and/or demonstrated that he is not death eligible because he was not a principal in Ms. Harrison's murder, or established mitigating circumstances, Defendants have

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2006) (reasonable probability of acquittal or a lesser sentence); Haw. Rev. Stat. Ann. § 844D-123(b) (West) (reasonable probability of more favorable verdict or sentence); Ind. Code Ann. § 35-38-7-7 (West) (reasonable probability petitioner would not have received as severe a sentence); Kan. Stat. Ann. § 21-2512(c) (West 2013) (testing of evidence relevant to claim petitioner was wrongfully convicted or sentenced); Ky. Rev. Stat. Ann. § 422.285(6) (West 2013) (court may order testing if reasonable probability that verdict or sentence would have been more favorable); Md. Code Ann., Crim. Proc. § 8-201(6) (West 2018) (reasonable probability testing will produce evidence relevant to claim of wrongful conviction or sentencing); Miss. Code Ann. § 99-39-5(1)(f) (West) (reasonable probability petitioner would have received lesser sentence); Neb. Rev. Stat. Ann. § 29-4120(5)(c) (West 2015) (evidence relevant to claim petitioner was wrongfully sentenced); 42 Pa. C.S.A. § 9543.1(d)(2) (West) (evidence that in a capital case would establish innocence of an aggravating circumstance or would establish a mitigating circumstance); 10 R.I. Gen. Laws Ann § 10-9.1-12(b) (West) (discretionary testing where reasonable probability results would have reduced sentence); Tenn. Code Ann. § 40-30-305(1) (West) (discretionary testing if reasonable probability sentence would have been more favorable); Utah Code Ann. § 78B-9-301(2)(f) (West) (reasonable probability defendant would have received lesser sentence); Vt. Stat. Ann. tit. 13 § 5566(a)(1) (West) (same); W. Va. Code Ann. § 15-2B-14(c)(1)(B) (West) (reasonable probability verdict or sentence would be more favorable); Wyo. Stat. Ann. § 7-12-305(d)(ii) (prima facie showing in capital case of innocence of aggravating circumstance or establishing a mitigating circumstance).

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.

Second Claim for Relief: Access to Courts

82. Mr. Gutierrez has a fundamental right to access the courts, rooted in the First and Fourteenth Amendments, which requires that the states make available the tools necessary for prisoners to obtain meaningful access to available judicial remedies. State law must ensure that prisoners like Mr. Gutierrez have meaningful access to post-conviction remedies in order to vindicate this right. *Cf. Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that prison authorities are required to provide inmates meaningful legal assistance or resources to effectuate their constitutional right of access to courts).

83. As alleged above, Mr. Gutierrez has available remedies under Texas law for access to post-conviction DNA testing, to judicial relief from his conviction and death sentence, and to executive clemency, based on the exculpatory results of such testing. And, as alleged above, Texas's restrictive procedure for obtaining access to DNA testing under Article 64, and the CCA's interpretation thereof, is not adequate, meaningful, or effective.

84. Mr. Gutierrez incurred actual injury when the CCA denied his request for DNA testing that could potentially produce exculpatory evidence, and thus provide him with relief from his conviction and death sentence.

85. As stated above, the CCA's unreasonable interpretation of Article 64 has prevented Mr. Gutierrez from gaining access to exculpatory evidence that could demonstrate that he is not guilty of capital murder, and that he is innocent of the death penalty. These failures have deprived Mr. Gutierrez of his fundamental right to access the courts under the First and Fourteenth Amendments.

Third Claim for Relief: Cruel and Unusual Punishment

86. Mr. Gutierrez re-alleges and incorporates herein by reference all the allegations contained in the preceding paragraphs of this Amended Complaint.

87. The Eighth Amendment's prohibition on cruel and unusual punishment prevents the execution of a prisoner, like Mr. Gutierrez, who has viable claims of innocence of the death penalty, or seeks to establish mitigation related to the circumstances of the offense, without first affording the opportunity to prove innocence or mitigation. On its face and as construed by the CCA, Chapter 64 bars DNA testing where the evidence could change the outcome at capital sentencing, even if it did not also change the outcome at trial. Because Texas law does not allow for DNA testing under such circumstances, Article 64 violates the Eighth Amendment prohibition on cruel and unusual punishment.

Fourth Claim for Relief: Establishment Clause

88. The First Amendment of the United States Constitution commands that "Congress shall make no

law respecting an establishment of religion." U.S. Const. amend. I. This command is similarly binding on the states. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). It is well-settled that the Establishment Clause not only prohibits governmental entities from passing laws that prefer one or more religions over others, but also those that demonstrate a hostility toward religion. *See Larson v. Valente*, 456 U.S. 228, 246 (1982); *Zorach v. Clauson*, 343 U.S. 306, 313-15 (1952); *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.").

89. By precluding all chaplains and spiritual advisers from being present in the execution chamber, Defendants' amended policy violates the Establishment Clause, because it is not neutral between religion and non-religion and inhibits the practice of religious beliefs. *See Comm. for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) (noting that, to maintain an attitude of neutrality toward religion, government cannot "advance[]" or "inhibit[]" religion).

90. A law or policy that is not neutral between religion and non-religion, like TDCJ's amended policy, is inherently suspect. *See Larson*, 456 U.S. at 246. Such a law or policy may only be upheld if it passes strict scrutiny—in other words, if it is narrowly tailored to a compelling interest. *Id.* at 246-47. It is unclear what interest TDCJ believes this discriminatory policy serves.

91. Put in context of the Supreme Court's order in *Murphy v. Collier*, 139 S. Ct. 1475 (2019), Defendants' decision to prohibit all religious and spiritual advisers from entering the execution chamber demonstrates a hostility toward religion generally, particularly in light of the longstanding tradition of permitting clergy to be present with condemned prisoners at executions. Under the previous policy, Defendants followed a procedure to approve chaplains who were not a security threat to be present in the execution chamber. After the Supreme Court halted Patrick Murphy's execution on March 28, 2019, finding that the previous policy discriminated by denomination, Defendants chose not to apply that same process to approve spiritual advisers of other faiths, but instead to bar all religious and spiritual advisers from the execution chamber. This action was hostile to religion generally. By denying all religious inmates access to a spiritual adviser at the time they are dying and when many believe they will be entering some form of an afterlife, TDCJ's policy favors non-religious inmates.

Fifth Claim for Relief: Free Exercise of Religion

92. The First Amendment also commands that "Congress shall make no law . . . prohibiting the free exercise of religion". U.S. Const. amend. I. Like the Establishment Clause, the Free Exercise Clause's command is binding on the states. *See Cantwell*, 310 U.S. at 303.

93. TDCJ's policy will prohibit Mr. Gutierrez's free exercise of his Christian faith in the crucial moments

leading to his passage to the afterlife. The level of scrutiny to be applied when reviewing policies that hinder an individual's ability to freely 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 "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.*; *see also Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

94. TDCJ's policy is not neutral because it evinces a hostility toward religion and thereby favors non-religious inmates over religious inmates. Accordingly, the policy is permissible only if it can survive strict scrutiny. The policy cannot survive strict scrutiny, at least not in cases like Mr. Gutierrez's, where the TDCJ already has chaplains who have been approved to enter execution chambers, have been present in the chamber for past executions, and are willing to do so for Mr. Gutierrez's execution.

Sixth Claim for Relief: RLUIPA

95. If this Court finds that TDCJ's policy does not interfere with Mr. Gutierrez's rights pursuant to the Free Exercise Clause, it should nonetheless find that the policy violates RLUIPA.

96. "In RLUIPA, in an obvious effort to effect a complete separation from the First Amendment case law, Congress deleted 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 concludes that TDCJ's policy does not violate Mr. Gutierrez's rights pursuant to the Free Exercise Clause because the presence of a Christian chaplain at his death is not compelled by his religion, the Court should nevertheless find that TDCJ's policy violates RLUIPA. Prohibiting Mr. Gutierrez from being guided at the time of death by a Christian chaplain is an explicit and substantial burden on religious exercise. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (where prisoner shows exercise of religion "grounded in a sincerely held religious belief," enforced prohibition "substantially burdens his religious exercise").

Request for Injunctive Relief:
Release of Evidence for Testing

97. For the reasons stated above, the Constitution requires declaratory relief that the denial of DNA testing to Mr. Gutierrez violates the Constitution and that Mr. Gutierrez be afforded the opportunity to conduct DNA testing on the evidence identified in this Complaint. Further, Mr. Gutierrez requests injunctive relief compelling those Defendants who are custodians of the evidence identified in this Complaint to release the evidence designated below for DNA testing. Accordingly,

Appendix M

Mr. Gutierrez asks this Court to grant prospective injunctive relief compelling the Defendants to release the evidence identified in this Complaint so that the requested DNA testing can be accomplished.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court provide relief as follows:

1. A declaratory judgment that Article 64 of the Texas Code of Criminal Procedure, as applied by the CCA, is unconstitutional because:

   a. It imposes a fundamentally unfair limitation, in violation of due process and the First Amendment right of access to the courts, upon Plaintiff's access to statutory remedies available under Texas law, and deprives Plaintiff of adequate, effective and meaningful access to such remedies. Those remedies include: (1) the statutory right to access post-conviction DNA testing pursuant to Article 64; (2) the statutory right to habeas relief for constitutional violations pursuant to Articles 11.071 and 11.073 of the Texas Code of Criminal Procedure based on exculpatory DNA evidence; and (3) executive clemency based on exculpatory DNA results.

   b. It denies Plaintiff the protection of the Eighth Amendment of the Constitution, which requires that death sentences be reliable, and therefore guarantees persons facing the death penalty

access to test evidence where realistically possible exculpatory results can prove innocence of the crime, innocence of the death penalty, or relevant mitigating factors concerning the circumstances of the offense.

2. A preliminary and permanent injunction requiring Defendants to produce and release for DNA testing the evidence set forth below, pursuant to an appropriate protocol regarding chain of custody and preservation and return of such evidence after testing has been completed:

- blood sample taken from the victim Escolastica Harrison 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 the victim'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 taken from victim during an autopsy and submitted to Det. Hernandez as part of rape examination;

- 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 the victim's house; and

- a single loose hair found around the third digit of the victim's left hand recovered during an autopsy but never submitted to any lab for analysis.

3. A declaratory judgment that TDCJ's policy violates Mr. Gutierrez's rights under the First Amendment's Establishment and Free Exercise Clauses.

4. A declaratory judgment that TDCJ's policy violates RLIUPA.

5. A preliminary and permanent injunction prohibiting Defendants from executing Mr. Gutierrez until they can do so in a way that does not violate his rights.

Respectfully submitted,

/s/_____
PETER WALKER
ASSISTANT FEDERAL DEFENDER
FEDERAL COMMUNITY DEFENDER
OFFICE FOR THE EASTERN
DISTRICT OF PENNSYLVANIA
Philadelphia, PA

/s/_____
RICHARD W. ROGERS, III
Corpus Christi, TX

Counsel for the Plaintiff

Appendix N – Opinion of the Texas Court of Criminal Appeals on Direct Appeal from the Denial of Motion for Forensic DNA Testing (June 27, 2024)

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. AP-77,108

RUBEN GUTIERREZ,

Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM DENIAL OF MOTION FOR FORENSIC DNA TESTING IN CAUSE NO. 1998-CR-1391-A FROM THE 107TH JUDICIAL DISTRICT COURT CAMERON COUNTY

Per curiam.

OPINION

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

1. References to Chapters or Articles are to the Texas Code of Criminal Procedure unless otherwise specified.

items for which he sought testing in his first two motions, and the trial court has again denied his request. Appellant raises two points of error on appeal. After reviewing the issues, we find Appellant's points of error to be without merit. Consequently, we affirm the trial court's order denying testing.

I. Background

In the opinion regarding Appellant's first motion for DNA testing, we summarized the facts of the case as follows:

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

Appendix N

Appellant, then 21 years old, orchestrated a plan to steal her money. On September 5, 1998, he and an accomplice, Rene Garcia—whom Mrs. Harrison did not know—entered Mrs. Harrison's home to carry out this plan. A third accomplice, Pedro Gracia, was the driver. When appellant and Rene Garcia left with Mrs. Harrison's money, she was dead. Avel Cuellar found her body late that night—face down in a pool of blood. She had been severely beaten and stabbed numerous times. Mrs. Harrison's bedroom was in disarray, and her money was missing.

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

On September 8, 1998, detectives went to appellant's home. He was not there, but his mother said she would bring him to the police station. The next day, appellant voluntarily came to the police station to make a statement. He gave an alibi. He said he had seen Avel Cuellar and another friend, Ramiro Martinez, at the trailer park on the Friday before the murder, but on the Saturday of the murder, he drove

around with Joey Maldonaldo in Maldonaldo's Corvette all day long. They were nowhere near Mrs. Harrison's mobile-home park. When police asked him if he had his days mixed up, appellant cut off questioning. The alibi did not pan out. Joey Maldonaldo's statement did not mesh with appellant's.

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

but when the officers could not find the blue suitcase, appellant was allowed out of the car, and he walked straight to it.

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

dropped them off down a caliche road and appellant filled "up the little tool box with the money that was in the suitcase," while Rene Garcia filled up his shirt. They abandoned the suitcase, and Pedro Gracia picked them up and drove appellant home.

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

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

> punishment phase, the trial judge sentenced appellant to death.

Ex parte Gutierrez, 337 S.W.3d 883, 886-88 (Tex. Crim. App. 2011) (footnotes omitted). This Court affirmed Appellant's conviction and sentence. *Gutierrez v. State*, No. AP-73,462 (Tex. Crim. App. Jan. 16, 2002) (not designated for publication).

In April 2010, Appellant filed in the trial court his first Chapter 64 motion for DNA testing. In the motion, Appellant acknowledged that three men were involved in the Harrison robbery: himself, Rene Garcia, and Pedro Gracia. Relying on the premise that only two people entered the home, Appellant argued that exculpatory DNA test results would show that he would not have been convicted of capital murder or sentenced to death. Appellant alternatively attempted to show that Harrison's nephew, Avel Cuellar, was the true perpetrator of the offense. This Court upheld the trial court's denial of the testing, holding that favorable results would not have established by a preponderance of the evidence that Appellant would not have been *convicted*—a showing required by the statute. *See Ex parte Gutierrez*, 337 S.W.3d 883, 900-01 (Tex. Crim. App. 2011).

In June of 2019, Appellant filed his second Chapter 64 motion for post-conviction DNA testing. He sought testing of the same items that he requested testing on in his first DNA testing motion. Appellant argued that, had the jury learned of a third party profile on the items collected as evidence (implying that Cuellar was the

actual killer), it would not have convicted him or sentenced him to death. Again the trial court denied the request, holding in pertinent part that Appellant had not "shown by a preponderance of the evidence that a reasonable probability exists that defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing." This Court affirmed the trial court's denial of testing. *Gutierrez v. State*, No. AP-77,089, slip op. at 18-19 (Tex. Crim. App. Feb. 26, 2020) (not designated for publication).

Sometime after this Court affirmed the denial of Appellant's second motion for DNA testing, Appellant filed a civil rights action in federal district court under 42 U.S.C. Section 1983. *See Skinner v. Switzer*, 562 U.S. 521, 533-34 (2011) (stating that inmates may vindicate procedural due process rights, as they arise in the context of requests for post-conviction DNA testing under state statutes, through 42 U.S.C. § 1983 litigation). Article 64.03 requires a convicted person to show that he "would not have been *convicted* if exculpatory results had been obtained through DNA testing." Art. 64.03(a)(2)(A) (emphasis added). Appellant asserted that he should have had access to DNA testing to show that he would not have been sentenced to death. In March 2021, the federal district court granted Appellant 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.

Gutierrez v. Saenz, No. 1:19-CV-185, slip op. at 14-15 (S.D. Tex. Mar. 23, 2021). In other words, the federal district court held that due process requires that testing must be permitted not just when favorable test results would undermine the movant's *conviction*, but also when favorable test results would undermine the movant's *death sentence*, consistent with Article 11.071 § 5(a)(3).

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

Based on the federal district court's declaratory judgment, Appellant in July 2021 filed a third motion for DNA testing. In this motion, Appellant seeks to obtain DNA testing of the same items for which he twice previously sought testing. He argues that, should exculpatory DNA results be obtained, a jury would not answer the punishment special issues in a way that would require the judge to sentence Appellant to death. In other words, he argues that exculpatory results would show that he is "innocent of the death penalty." Finally, Appellant argues that the law of the case doctrine does not bar granting this DNA motion because the prior motions "were made under a version of the [DNA] statute that has since been declared unconstitutional by a federal judge."

Appendix N

In its initial response to Appellant's present DNA motion, the State filed a plea to the jurisdiction. Therein, the State argued that, because the federal district court had declared the statute unconstitutional, there was no legitimate statutory authority for DNA testing, no legal basis allowing Appellant to claim entitlement to it, and no jurisdiction in the trial court to grant it. The trial court granted the State's jurisdictional plea and dismissed Appellant's DNA motion for want of jurisdiction. Appellant appealed that ruling.

On appeal, this Court noted that state courts are not bound by the decisions of the lower federal courts. *Gutierrez v. State*, 663 S.W.3d 128, 131 (Tex. Crim. App. 2022). Further, we held that the federal court's opinion regarding Article 64.03's constitutionality did not divest the convicting court of jurisdiction to determine whether Appellant is entitled to the DNA testing he seeks.[2] *Id*. We vacated the convicting court's order and remanded the case to that court for further proceedings. On remand, the convicting court denied Appellant's third request for DNA testing, ruling that the request was "collaterally estopped, barred by the doctrine of res judicata, and barred by the doctrine of law of the case." Appellant now appeals this ruling.

2. The Court also found that nothing in the federal opinion purported, in any way, to invalidate what Chapter 64 already legitimately authorizes. *Id.*

Appendix N

III. Appellant's Arguments on Appeal and the Court's Analysis

On appeal, Appellant raises two points of error. In his first point, Appellant argues that the district court "wrongly concluded" that Appellant's Chapter 64 motion is collaterally estopped and barred by the doctrines of res judicata and law of the case. Appellant argues that the district court erred in its ruling because, before this motion, Appellant "has never filed a motion for DNA testing based on a federal judgment declaring Chapter 64 unconstitutional."

While Appellant may accurately state that he "has never filed a motion for DNA testing based on a federal judgment declaring Chapter 64 unconstitutional," he *has* previously argued that, by limiting Chapter 64 to innocence (a finding that he would not have been convicted), he was denied his due process rights. In fact, in both of his previous DNA motions and appeals, Appellant argued that: (1) he should have been able to have the biological evidence tested, not just to show that he would not have been convicted, but also to show that he was "innocent of the death penalty"; and (2) the failure to recognize this as a valid basis for DNA testing under the statute deprives him of due process. In both opinions on appeal, this Court rejected those arguments. *See Gutierrez*, 663 S.W.3d at 129 (referring to the rulings in the prior opinions).

Specifically, in our opinion affirming the trial court's denial of Appellant's first DNA motion, we stated:

> Chapter 64 deals only with testing evidence that could establish, by a preponderance of the evidence, that the person "would not have been *convicted* if exculpatory results" were obtained. The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received. In this case, even supposing that a DNA test result showed Gracia's DNA in the fingernail scrapings taken from Mrs. Harrison, this evidence would, at best, show only that Gracia, rather than Appellant, was the second stabber in the house. It would not establish that Appellant, who admittedly masterminded "the rip-off," was not a party to Mrs. Harrison's murder. And, even if Chapter 64 did apply to evidence that might affect the punishment stage as well as conviction, Appellant still would not be entitled to testing. Appellant would still have been death-eligible because the record facts satisfy the *Enmund/Tison*[3] culpability requirements that he played a major role in the underlying robbery and that his acts showed a reckless indifference to human life.

Gutierrez, 337 S.W.3d at 901 (footnotes omitted). We adopted this reasoning in the opinion affirming the denial

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

of his second DNA motion in which he raised a similar argument. *See Gutierrez*, No. AP-77,089, slip op. at 18-19. And this reasoning continues to apply here. *Even if* Chapter 64 applied to evidence affecting the punishment stage, given the evidence in this case, Appellant cannot show that the jury would have answered the punishment issues differently should he obtain exculpatory DNA results. Given the evidence presented, the statute did not operate unconstitutionally as to Appellant, and the trial court properly concluded that the merits of Appellant's argument have already been addressed and decided adversely to him. Appellant's first point of error is overruled.

In his second point of error, Appellant argues that the Court "should wait to rule on the merits of [Appellant's] appeal until the federal courts have finished the appellate process and determined whether the declaratory judgment on which this motion is based is still good law." Appellant concedes that the Fifth Circuit has reversed the federal district court's declaratory judgment. *See Gutierrez v. Saenz*, 93 F.4th 267, 269 (5th Cir. 2024). However, he asserts that he has filed a petition for rehearing en banc and a petition for panel rehearing.[4] In addition, Appellant asserts that he might also file a petition for a writ of certiorari in the United States Supreme Court. Thus, he contends, it would be premature for this Court to adjudicate the merits of his DNA motion now because the federal appeals could render this appeal moot.

4. As of this writing, it appears that the Section 1983 case has been dismissed with prejudice. *See Gutierrez v. Saenz*, No. 1:19-CV-185 (S.D. Tex. June 18, 2024) (order of dismissal and revised final judgment).

Appendix N

As we noted above and in a previous opinion issued in this case, state courts are not bound by the decisions of the lower federal courts. *Gutierrez*, 663 S.W.3d at 131 (*citing Johnson v. Williams*, 568 U.S. 289, 305 (2013)). Although we are obligated to follow a ruling from the United States Supreme Court, holding this case for the *possibility* that the Supreme Court might issue such a ruling is both speculative and inefficient. Plus, the fact that Appellant has an execution date set for July 16, 2024, makes it imperative that we timely resolve the issues currently before the Court. Appellant's second claim is overruled.

Having found no error, we affirm the convicting court's order denying the motion for forensic DNA testing pursuant to Chapter 64. No motions for rehearing will be entertained and the Clerk of this Court is instructed to issue mandate immediately.

Delivered: June 27, 2024
Do Not Publish

Appendix O – Opinion of the Texas Court of Criminal Appeals Vacating the Convicting Court's Order and Remanding for Cause (March 30, 2022)

IN THE COURT OF CRIMINAL
APPEALS OF TEXAS

No. AP-77,102

RUBEN GUTIERREZ,

Appellant,

VS.

THE STATE OF TEXAS,

Filed March 30, 2022

ON APPEAL FROM ORDER DISMISSING MOTION FOR DNA TESTING IN CAUSE NO. 1998-CR-1391-A IN THE 107TH DISTRICT COURT CAMERON COUNTY

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

This is a direct appeal from Appellant's third motion for postconviction DNA testing brought under Article 64.05 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 64.05. Because Appellant was convicted of capital murder and sentenced to death, his appeal is to this Court. *See id.* ("[I]f the convicted person was convicted in a capital case and was

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

I. Background

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

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

Appendix O

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

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

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

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

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

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").

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

In response to Appellant's third motion for DNA-testing, the State filed a motion styled a "Plea to the Jurisdiction," in which it asked the convicting court to dismiss Appellant's third DNA motion on the ground that the convicting court lacked jurisdiction to adjudicate it. Because the federal district court declared Article 64.03 to be unconstitutional, the State contended, there was no longer any legitimate statutory authority for DNA testing at all, and so there was no legal basis for Appellant to claim entitlement to such testing, and no "special" jurisdiction in

the convicting court to permit it. *See State v. Patrick*, 86 S.W.3d 592, 594 (Tex. Crim. App. 2002) (plurality opinion) ("When a conviction has been affirmed on appeal and the mandate has issued, general jurisdiction is not restored in the trial court. The trial court has special or limited jurisdiction to ensure that a higher court's mandate is carried out and to perform other functions specified by statute, such as finding facts in a habeas corpus setting, or as in this case determining entitlement to DNA testing."). The convicting court granted the State's motion and dismissed Appellant's motion for DNA testing "for want of jurisdiction." This appeal followed.

II. Analysis

Whatever jurisdiction the convicting court has to entertain Appellant's motion for post-conviction DNA testing must be derived from Chapter 64 of the Texas Code of Criminal Procedure. *Id.* Under Article 64.03(a)(2)(A), specifically, a convicting court may only order DNA testing for a defendant who "would not have been *convicted* if exculpatory results had been obtained through DNA testing[.]" Tex. Code Crim. Proc. art. 64.03(a)(2)(A) (emphasis added); *see Gutierrez*, 337 S.W.3d at 901 ("The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that [the defendant] received."). A federal district court judge has now opined, however, that Article 64.03(a)(2)(A) is constitutionally deficient because it fails to also authorize a convicting court to order DNA testing for a defendant for whom testing might establish that

they were "innocent of the death penalty" as well. *Gutierrez v. Saenz,* 2021 WL 5915452, at *15. And on the basis of that opinion, the state trial court in this case dismissed for want of jurisdiction Appellant's motion for DNA testing. But we do not believe the federal district court's opinion with respect to the constitutionality of Article 64.03(a)(2)(A) divests the convicting court in this case of its statutory jurisdiction to determine whether Appellant is entitled to the DNA testing he seeks.

It is worth noting that nothing about the federal district court's opinion in *Gutierrez v. Saenz* purported, in any way, to invalidate what the statute already legitimately authorizes.[4] It is also worth observing that the federal district court's decision in that case is not final, and that it is currently pending on appeal to the United States Court of Appeals for the Fifth Circuit. *Gutierrez v. Saenz,* No. 21-70009

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

(5th Cir. Dec. 13, 2021). But our resolution of this case turns first and foremost on the principle that state courts are not bound by decisions of the lower federal courts. *See Johnson v. Williams*, 568 U.S. 289, 305 (2013) ("[T]he views of the federal courts of appeals do not bind [a state court] when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law."); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("While [state] courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court."); Bryan A. Garner et al., THE LAW OF JUDICIAL PRECEDENT 691 (2016) ("[L]ower federal courts don't have appellate jurisdiction over state courts.").

The Supremacy Clause of the United States Constitution explains that the constitution, laws, and treaties of the United States are the "supreme law of the land," and state court judges are bound by them notwithstanding anything to the contrary that may be found in the constitution or laws of any state. U.S. CONST. ART. VI, Cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). But that does not

mean that state courts are bound by lower federal court decisions. This Court has described "both state and federal courts" as being "of parallel importance," even in when addressing questions involving the interpretation of federal constitutional law. *Pruett v. State,* 463 S.W.2d 191, 194 (Tex. Crim. App. 1970). "[Our state courts] are not required to follow [even] Fifth Circuit federal constitutional interpretations." *Reynolds v. State*, 4 S.W.3d 19, 20 n.17 (Tex. Crim. App. 1999) (citing to *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.")); *see also DeFreece v. State*, 848 S.W.2d 150, 155 (Tex. Crim. App. 1993) (in which this Court refused to follow the Fifth Circuit's holding with respect to a federal constitutional issue not yet resolved by the United States Supreme Court). However, both state and federal courts "answer to the Supreme Court on direct review." *Pruett,* 463 S.W.2d at 194.

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

(of Appellant's motion filed under Chapter 64 of the Texas Code of Criminal Procedure) outright.

III. Conclusion

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

DELIVERED: March 30, 2022
PUBLISH

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

Appendix P – Response to Gutierrez's Appeal of the District Court's Granting of the State's Plea to the Jurisdiction, Texas Court of Criminal Appeals (Oct. 22, 2021)

IN THE TEXAS COURT OF CRIMINAL APPEALS
IN AUSTIN, TEXAS

No. Ap-77,102

RUBEN GUTIERREZ,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

RESPONSE TO GUTIERREZ'S APPEAL OF THE DISTRICT COURT'S GRANTING OF THE STATE'S PLEA TO THE JURISDICTION

THIS IS A CAPITAL CASE

Filed October 28, 2021

Luis V. Saenz
COUNTY AND DISTRICT ATTORNEY
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Appendix P

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[6]STATEMENT OF THE CASE

Appellant was sentenced to death for the 1998 Capital Murder of Ms. Escolastica Cuellar Harrison. Appellant has on two previous occasions sought review of the denial of Motions for Post-Conviction DNA Testing. Appellant now seeks review of his most recent request for DNA Testing that was dismissed by the trial court for want of jurisdiction.

ORAL ARGUMENT

Oral arguments are not necessary in this matter, and the State requests it be determined on the filings of the parties. If the Court finds Oral Arguments are necessary, the State of Texas requests an opportunity to participate.

Appendix P

ISSUES PRESENTED

Issue 1: Did the District Court correctly deny Appellant's Third Chapter 64 Motion for Post-Conviction DNA Testing for want of jurisdiction?

Issue 2: May this court consider the substantive issues of the Appellant's Post-Conviction DNA Motion on first impression?

[7]FACTS OF THE CASE

Approximately 20 years ago, the Appellant was convicted by a jury in the 107th Judicial District Court and sentenced to death for the gruesome murder of elderly (85-year old) Brownsville citizen Escolastica Harrison. The Appellant had planned, and, along with co-conspirators, robbed Mrs. Harrison of approximately $600,000 in cash she had saved and stored in her home. In the course of the robbery, and in an effort to avoid the existence of witnesses, the Appellant stabbed Ms. Harrison to death with a screw driver that he brought with him to the robbery. Despite a confession, despite a co-conspirator's confession, and despite that during his trial the Appellant threatened to kill then Assistant District Attorney Rebecca Rubane "just like he killed Mrs. Harrison," the Appellant has never repented, and continues to deny responsibility for the murder, pain, and suffering he has caused.

On September 26, 2019, Gutierrez filed a federal lawsuit, seeking relief under 42 U.S.C. § 1983, against

Cameron County District Attorney Luis V. Saenz, Brownsville Police Chief Felix Sauceda, Jr., Texas Department of Criminal Justice Director Bryan Collier, Lorie Davis of the Department of Criminal Justice Correctional Institutions [8]Division, and Warden Billy Lewis of the Texas Department of Criminal Justice-Huntsville Unit.

On March 23, 2021, Senior United States District Judge Hilda Tagle issued an order granting Ruben Gutierrez a Declaratory Judgment, "concluding that giving the 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 procedure due process." Memorandum and Order, (DKT 141), No. 1:19-CV-00185, *Gutierrez v. Saenz, et al* (S. Dist. Tex., Mar. 23, 2021), s*ee* Appendix 1. Said declaratory judgment is a finding that Chapter 64 of the Code of Criminal Procedure, and, to some extent, Article 11.071 of the Code of Criminal Procedure are unconstitutional.

On July 7, 2021, Gutierrez filed a third motion/petition for Chapter 64 DNA Testing. On July 8th, 2021, the State filed a plea to the jurisdiction alleging the District Court was without jurisdiction to grant the relief sought by the Appellant. On July 8, 2021, the District [9]Court granted the State's plea to the jurisdiction. Appellant promptly filed a notice of appeal.

Appendix P

STANDARD OF REVIEW

A Plea to the Jurisdiction is subject to de novo appellate review. See *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

SUMMARY OF ARGUMENTS

The U.S. District Court's declaration that the application of Chapter 64 violates the U.S. Constitution makes relief under said Chapter unavailable to the Appellant as Chapter 64 is null and void. Therefore, the Texas District Court did not err in finding that it lacked jurisdiction to consider the relief sought by the Appellant. Furthermore, as the trial court did not take up and/or rule on the substantive issue of Applicant's Third Motion for DNA Testing, there is no substantive issue for this Honorable Court to consider beyond jurisdiction. Nevertheless, if this Honorable Court were to consider the merits of Appellant's claims, said claims are barred.

[10]ARGUMENTS

1. The 107th Judicial District Court does not have jurisdiction to grant the relief sought by the Applicant – namely an order pursuant to chapter 64 for post-conviction DNA Testing.

The 107th Judicial District Court did not err by granting the State of Texas' plea to the jurisdiction on Appellant's Third Application seeking Post Conviction Testing of DNA under Chapter 64. The Applicant freely

and without reservation sought for the U.S. District Court for the Southern District of Texas to find that Chapter 64 of the Code of Criminal Procedure was unconstitutional. *See* Memorandum and Order, (DKT 141), No. 1:19-CV-00185, *Gutierrez v. Saenz, et al* (S. Dist. Tex., Mar. 23, 2021) *and* Appellant's Brief, Pg. 46 (stating that Chapter 64 has been declared unconstitutional by a federal judge). And said Federal District Court obliged Appellant with the relief he sought. *Id.* "When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though **the government may no longer constitutionally enforce it**." *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n. 21 (Tex. 2017) (emphasis [11]added) (discussing the effect of *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) on Texas Marriage Laws); *see also Norton v. Shelby County*, 118 U.S. 425, 442, 6 S. Ct. 1121, 1125, 30 L. Ed. 178 (1886) (finding "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.")".

"The rule of the law of the case is a rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter." *Barrett v. Baylor*, 457 F.2d 119, 123 (7th Cir. 1972). "The unreversed decision on a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit." *Id*. When a federal district court has jurisdiction over the subject matter and the parties, subject only to the appellate process, its adjudication is the law of the case and is ***binding on***

all other courts. *Barrett*, 457 F.2d 123; *see also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 588 n. 8 (5th Cir. 2006) (emphasis added) (explaining that "[i] f a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances [12]where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances."); *cf. Hayes v. Pin Oak Petroleum, Inc.*, 798 S.W.2d 668, 672 n. 5 (Tex. App.—Austin 1990, writ denied) (stating that Texas Courts give respectful consideration to the rulings of the federal courts).

As Gutierrez secured the relief he sought from the Federal District Court, he should not be permitted to now take advantage of a privilege that he just had invalidated. Irrespective of this, if the constitutionality of Chapter 64 of Code of Criminal Procedure is as applied or on its face, the issue before the 107th Judicial District Court for Cameron County, Texas relates to the same parties and issues before the District Court for the Southern District of Texas (Gutierrez and the State of Texas, by and through her agent the District Attorney for Cameron County, Texas). As such, the finding of Chapter 64 of the Code of Criminal Procedure unconstitutional by the District Court for the Southern District of Texas is binding on 107th District Court. Therefore, the 107th Judicial District Court did not err when it dismissed/refused Applicant's Third Application for Chapter 64 DNA Testing for want of jurisdiction.

[13]The Applicant relies upon *Davis v. Passman*, 442 U.S. 228, 242, 99 S. Ct. 2264, 2275, 60 L. Ed. 2d 846 (1979),

for his position that "justiciable constitutional rights are to be enforced through the courts."[1]

> And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights.

Davis, 442 U.S. at 242. However, this authority is inapplicable to the Applicant's situation.

"There is no free-standing due-process right to DNA testing." *Ramirez v. State*, 621 S.W.3d 711, 717 (Tex. Crim. App. 2021) *citing Ex parte Gutierrez*, 337 S.W.3d 883, 889 (Tex. Crim. App. 2011). The Courts have not been given discretionary authority under Chapter 64 to order DNA testing when the conditions for compelling DNA

1. The appellant's brief may have failed to meet the standard for an appeal of a plea to the jurisdiction, as such Summary affirmance may be appropriate. *See Fox v. City of El Paso*, 292 S.W.3d 247, 248 (Tex. App.—El Paso 2009, pet. denied) (stating that the brief an appeal of the granting a plea to the jurisdiction must allege facts that affirmatively establish subject-matter jurisdiction, and if the case is dismissed on that basis, he must, on appeal, attack all independent grounds that fully support the adverse trial ruling.), *see also Harvel v. Tex. Dep't of Ins.-Div. of Workers' Comp.*, 511 S.W.3d 248, 253 (Tex. App.—Corpus Christi 2015, pet. denied). Appellant has not met this requirement.

testing were absent. *State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002). "[T]he task of fashioning rules to 'harness DNA's power to prove [14]innocence without unnecessarily overthrowing the established system of criminal justice' belongs 'primarily to the legislature." *Ramirez*, 621 S.W.3d at 717, *see also Patrick*, 86 S.W.3d at 595 (While the Legislature could have given this Honorable Court discretionary authority under Chapter 64 to order DNA testing when the conditions for compelling DNA testing were absent, but it has not done so).

Accordingly, the 107th Judicial District Court did not err when it dismissed/refused Applicant's Third Application for Chapter 64 DNA Testing for want of jurisdiction and this Honorable Court should affirm said dismissal.

2. There is no Ripe substantive issue for this Honorable Court to Review.

While glossing over the issue of jurisdiction, the Applicant has focused a majority of his brief on the substantive issue relating to granting/denying DNA Testing. *See* Appellant's Brief Page 6 – 47. The trial court has not ruled on the substance of the Appellant's Motion. Courts "adhere to the fundamental precept that a court must not proceed on the merits of a case until legitimate challenges to its jurisdiction have been decided." *Tex. Dep't of Parks & Wildlife v.* [15]*Miranda*, 133 S.W.3d 217, 228 (Tex. 2004), *see also City of Houston v. Boyle*, 148 S.W.3d 171, 176 (Tex. App.—Houston [1st Dist.] 2004, no pet.)(stating appellate courts "do not look to the merits of

the plaintiff's case in conducting our review."). The matter before this Honorable Court is jurisdictional. The issue of merits Appellant's claims would not be appealable or ripe for this Honorable Court's consideration until jurisdiction is established and the merits are ruled upon by the trial court. As this has not occurred, it is improper to move forward with ruling on the merits at this juncture.

Nevertheless, and irrespective of jurisdiction, the Appellant's claims are substantively barred. Applicant has twice before brought the issue of DNA Testing to this Honorable Court for consideration. In both instances this Honorable Court concluded:

> Chapter 64 deals only with testing evidence that could establish, by a preponderance of the evidence, that the person "would not have been *convicted* if exculpatory results" were obtained. The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received. In this case, even supposing that a DNA test result showed Gracia's DNA in the fingernail scrapings taken from Mrs. Harrison, this evidence would, at best, show only that Gracia, rather than appellant, was the second stabber in the house. It would not establish that appellant, who admittedly masterminded "the rip-off," was not a party to Mrs. Harrison's murder. And, even if [16]Chapter 64 did apply to evidence that might affect the punishment stage as well as conviction, appellant still would

> not be entitled to testing. Appellant would still have been death-eligible because the record facts satisfy the *Enmund/Tison* culpability requirements that he played a major role in the underlying robbery and that his acts showed a reckless indifference to human life.

Ex parte Gutierrez, 337 S.W.3d at 901–02 *and Gutierrez v. State*, AP-77,089, 2020 WL 918669, at *9 (Tex. Crim. App. Feb. 26, 2020)(not designated for publication)(per curium). As such, Appellant's current request for Post-Conviction DNA Testing under Chapter 64 is:

(1) Collaterally estoppelled. *State v. Stevens*, 261 S.W.3d 787, 790 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("Collateral estoppel means "'that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit relating to the same event or situation.");

(2) Barred by the doctrine of Res Judicata. *Barr v. Resolution Tr. Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992)("Res judicata, or claims preclusion, prevents the re-litigation of a claim or cause of action that has been finally [17] adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit."); and/or,

(3) Barred by the *law of the case doctrine*. *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003) ("Under the law of the case doctrine, a court of appeals is ordinarily bound by its initial decision if there is a subsequent appeal in the same case."), *see also*, *State v. Swearingen*, 478 S.W.3d 716, 720 (Tex. Crim. App. 2015)(stating Chapter 64 motions are also subject to the "law of the case" doctrine. . . . when the facts and legal issues are virtually identical, they should be controlled by an appellate court's previous resolution.").

The Appellant's claims have already been litigated, finally adjudicated, and subjected to appellate review. There is no new controversy for this Honorable Court to consider. Therefore, the claims are barred.

Appellant attempts to distinguish his current request for Chapter 64 Post-Conviction DNA Testing from his previous claims by pointing out that the U.S. District Court has now found Chapter 64 unconstitutional. However, to accept this argument by the Appellant is [18]to accept the State's jurisdictional argument, namely that chapter 64 has been found to be unconstitutional. The Appellant would have this Honorable Court, in lieu of Legislative change, construe Chapter 64 to conform to the Appellant's request. Such action is improper and has been repeatedly rejected by this Honorable Court. *See Ramirez*, 621 S.W.3d at 717 (directing that courts should defer to the Legislature to revise/modify chapter 64).

Consequently, as a substantive matter, Appellant's claim is barred and the relief he seeks should be denied.

Appendix P

CONCLUSION

The 107th District Court did not err in granting the State's Plea to the Jurisdiction, as such this Honorable Court should not consider the merits of the Appellant's underlying request for Chapter 64 testing, and if the court were to consider said merits, the Appellant's claim itself is barred. This Honorable Court should affirm the judgment of the trial court.

Respectfully submitted,

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Appendix P

APPENDIX 1

Memorandum and Order, (DKT 141), No. 1:19-CV-00185, *Gutierrez v. Saenz, et al* (S. Dist. Tex., Mar. 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.

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 P

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 P

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

On June 2, 2020, this Court granted in part and denied in part a motion to dismiss Gutierrez's complaint for failure to state a claim and lack of jurisdiction. Dkt. No. 48. On June 9, 2020, finding substantial factual and legal issues that were unresolved in this case, the Court stayed Gutierrez's execution that was scheduled for June 16, 2020. Dkt. No. 57. The Fifth Circuit vacated the stay of execution on June 12, 2020. *Gutierrez v. Saenz*, 818

F. App'x 309 (5th Cir. 2020). Gutierrez sought certiorari review of his execution chamber religion claims. *Gutierrez v. Saenz*, 19-8695, Petition for a Writ of Certiorari. The Supreme Court stayed Gutierrez execution on June 16, 2020. *Gutierrez v. Saenz*, 207 L. Ed. 2d 1075 (June 16, 2020); *see Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

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

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

III. Arguments

Gutierrez argues the Fifth Circuit's vacatur of the stay of execution focused solely on whether he had made a sufficient showing on the merits of the stay and did not rule on the ultimate merits of any of his DNA claims. Dkt. No. 118. Gutierrez argues that the question to be decided by the undersigned is whether Gutierrez has stated a claim on which relief can be granted. *Id.* He argues that the Fifth Circuit misconstrued the facts in *Osborne* and this case, and therefore the Fifth Circuit's opinion was legally erroneous when applying *Osborne* to his DNA claims and should not be relied on by this Court. *Id.* at 10-13. Gutierrez argues Chapter 64's standard requiring him to prove by a preponderance of the evidence that he would not have been convicted of capital murder has created an insurmountable barrier to obtaining DNA testing. Gutierrez further argues that Texas courts have construed that standard in a way that is "virtually impossible to meet." *Id.* at 9. Gutierrez also argues the standard which allows for assessment of evidence before it exists is an escape hatch that violates due process. *Id.* at 14. Additionally, he argues the procedures for DNA testing are fundamentally inadequate to vindicate the substantive rights the State of Texas provides. *Id.* Gutierrez argues the legal standard erects an impossibly high barrier to a defendant seeking to establish his innocence of a crime for which he was convicted. *Id.* at 14. Finally, Gutierrez argues the Chapter 64 standard precludes a defendant seeking to establish his innocence of the death penalty from receiving DNA testing, violating his rights under the Due Process Clause. *Id.* at 28-29.

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

IV. State Court DNA Proceedings

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

a. 2009 DNA Testing Motion

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

May 29, 2009 and the Texas Court of Criminal Appeals ("CCA") dismissed Gutierrez's appeal on March 24, 2010, concluding the denial of counsel was not appealable. *Gutierrez v. State*, 307 S.W.3d 318, 319 (Tex. Crim. App. 2010).

With assistance of his federal habeas counsel, Gutierrez moved for DNA testing under Chapter 64 on April 5, 2010. *State of Texas, v. Ruben Gutierrez*, 2010 WL 8231200 (Tex. Dist.). On August 27, 2010, Judge Euresti denied Gutierrez DNA testing under Chapter 64. Dkt. No. 45 at 9; Tex. Crim. Proc. Code art. 64. On May 4, 2011, the CCA affirmed the denial of the DNA testing motion. *Ex parte Gutierrez*, 337 S.W.3d 883, 886 (Tex. Crim. App. 2011). The CCA concluded Gutierrez was not entitled to appointment of counsel because "reasonable grounds" did not exist for filing a motion for post-conviction DNA testing. *Id.* at 890. The CCA upheld the trial court's decision that identity was not at issue in the case. *Id.* at 894. Finally, the CCA held that Gutierrez failed to establish that he would not have been convicted of capital murder if exculpatory evidence had been obtained through DNA testing. *Id.* at 899. It stated Gutierrez failed to show that potential exculpatory evidence obtained through DNA testing would create a greater than 50% chance that he would not have been convicted. *Id.* As an example, the court cited *Blacklock v. State* where the evidence fairly alleged "that the victim's lone attacker is the donor of the material for which appellant seeks DNA testing." *Id.* at 900; *see Blacklock v. State*, 235 S.W.3d 231, 232 (Tex. Crim. App. 2007). "In cases involving accomplices, the burden is more difficult because there is not a lone

offender whose DNA must have been left at the scene." *Id.* The ultimate question, the CCA wrote, is "[w]ill this testing, if it shows that the biological material does not belong to the defendant, establish, by a preponderance of the evidence, that he did not commit the crime as either a principal or a party." *Id.* at 900. The CCA held the testing of fingernail scrapings of Harrison would be exculpatory only if the results showed co-defendant Gracia's DNA. *Id.* at 901. Such an outcome defies common sense, the CCA decided, as "[t]he only conceivable 'exculpatory' result would be DNA from the third accomplice, Pedro Gracia, in the fingernail scrapings. But is this plausible? All three robbers agreed that Pedro Gracia was the driver and did not go inside Mrs. Harrison's home." *Id.* at 901.[1]

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

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

b. 2019 DNA Testing Motion

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

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

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

V. Federal Court Proceedings

a. District Court Proceedings

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

- Granted Defendants' motion to dismiss for lack of subject matter jurisdiction all claims which seek relief or relitigation of the CCA's denial of DNA testing as barred by the *Rooker-Feldman* doctrine.

- Granted Defendants' motion to dismiss Gutierrez's Eighth Amendment Claims for failure to state a claim upon which relief can be granted in a § 1983 action.

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

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

- Denied Defendants' motion to dismiss based on Eleventh Amendment immunity.

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

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

- Denied Defendants' motion to dismiss due to issue preclusion.

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

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

- Reserved its decision on Gutierrez's motion to stay execution.

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

b. Fifth Circuit Ruling

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

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

Safley, 482 U.S. 78 (1987)). The Fifth Circuit held that Gutierrez's impending death does not amount to a showing of irreparable injury, "given the extent of Gutierrez's litigation and re-litigation." *Id.* at 314. The Court concluded all four stay factors did not weigh in Gutierrez's favor and vacated the stay. *Id.*

c. Supreme Court GVR

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

On January 25, 2021, the Supreme Court granted Gutierrez's petition for a writ of certiorari, it vacated the Fifth Circuit's June 12, 2020 order granting the motion to vacate the stay of execution in this case, and remanded

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

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

VI. Post-Conviction Laws in Texas

a. Article 11.071

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

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

Id.

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

In *Sawyer v. Whitley*, the Court recognized the importance of being able to challenge the absence of aggravating factors in post-conviction proceedings to demonstrate a person's innocence of the sentence of death. *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992). "Sensible

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

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

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

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

b. Chapter 64

Chapter 64 grants a right to DNA testing. Tex. Code Crim. Proc. Ann. art. 64. The statute's motion

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

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

> (a) A convicting court may order forensic DNA testing under this chapter only if:
>
> (1) the court finds that:
>
> (A) the evidence:
>
> (i) still exists and is in a condition making DNA testing possible; and
>
> (ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;
>
> (B) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and

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

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

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

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

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

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

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

Appendix P

VII. Legal Standard

a. Reconsideration

Although a motion to reconsider is not explicitly provided for in the Federal Rules of Civil Procedure, under Rule 54 a Court may revise any of its orders or other decision before the entry of judgment adjudicating all the claims and rights of the parties. Fed. R. Civ. P. 54(b). Reconsideration of interlocutory orders are discretionary. *Zimzores v. Veterans Admin.*, 778 F.2d 264, 267 (5th Cir. 1985). The Court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981).

b. Law of the Case, Mandate Rule, GVR

"When a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper v. United States*, 562 U.S. 476, 506 (2011). The doctrine expresses the practice of courts to refuse to reopen what has been decided. *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016). Statute, law, and the nature of judicial hierarchy also binds lower courts to honor the mandate of a superior court. 28 U.S.C. § 2106; "The law of the case doctrine posits that ordinarily 'an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on subsequent appeal.'" *United States v. Lee*, 358 F.3d 315, 320 (5th Cir. 2004). The law of the case is not "inviolate" in three circumstances: 1) when

facts are later determined to be significantly different, 2) after an intervening change in law, and 3) the earlier decision is clearly erroneous. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). "The mandate rule [. . .] has the same exceptions as does the general doctrine of law of the case; these exceptions, if present, would permit a district court to exceed our mandate on remand." *Id.*

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

GVRs ("Grant, Vacate, Remand") are granted by the Supreme Court to conserve its resources and to assist "the court below by flagging a particular issue that it does not appear to have fully considered" and it helps the Supreme Court in obtaining the "benefit of the lower court's insight" before the Supreme Court rules on the merits. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). "A GVR 'does 'not amount to a final determination on the merits.'" *Kenemore v. Roy*, 690 F.3d 639, 642 (5th Cir. 2012). "A GVR does not bind the lower court to which the case is remanded; that court is free to determine whether its original decision is still correct in light of the changed circumstances or whether a different result is more appropriate." *Id.*

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

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

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

Appendix P

DNA testing is a powerful tool in the criminal justice system and states are experimenting with the challenges and opportunities posed by DNA evidence. *Osborne*, 557 U.S. 52, 62 (2009). The Supreme Court decided in *Osborne* to not constitutionalize the area of DNA testing so as to not "short-circuit what looks to be a prompt and considered legislative response" from the states in this fast-developing area of science and law. *Id.* Accordingly, there is no "freestanding" substantive due process right to access DNA evidence, and federal courts should not presume that state criminal procedures are inadequate to deal with DNA evidence. *Osborne*, 557 U.S. at 73-74. Post-conviction DNA testing claims are not "parallel" to a trial right and are not analyzed under the *Brady* framework. *Id.* at 69; *see Brady v. Maryland*, 373 U.S. 83 (1963). Yet, a state's DNA testing procedures must still comply with some baseline constitutional protections. *Osborne*, 557 U.S. at 69.

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

Appendix P

To determine if a procedure violates procedural due process a court looks to the standards of the common law as they existed at the time of adoption of the Fifth and Fourteenth Amendment. *Patterson v. New York*, 432 U.S. 197, 202 (1977). Additionally, a procedure should not offend a deeply rooted principle of justice of the American people. *Id.* Widespread acceptance or rejection among the states may indicate whether procedure is contrary to the conscience of the people. *Id.* The Court in *Osborne* found "nothing inadequate" with Alaska's postconviction relief in general or its DNA testing procedures. *Osborne*, 557 U.S. at 69-70. The Court noted that Alaska's procedures requiring evidence to be newly available, diligently pursued and sufficiently material are similar to federal law and the law of other states and are not inconsistent with the conscience of the people or fundamental fairness. *Id.* at 70. The Court held Alaska's constitutionally created right of DNA access provided additional protection to parties who may not be able to seek testing under statute. *Id.* The *Osborne* Court noted that exhaustion of a state law remedy is not required but can be useful to demonstrate that the procedures do not work in practice. *Id.* at 71.

Circuit courts addressing § 1983 DNA complaints have encountered facial and "as-applied" procedural Due Process claims. An as-applied challenge is not permissible if used to collaterally attack the state-court judgment. *McKithen v. Brown*, 481 F.3d 89, 98–99 (2d Cir. 2007) ("[B]y bringing an as-applied challenge, [Plaintiff] is asking the federal district court to review the validity of the state court judgment"); *Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257, 1263 (11th Cir. 2012) (holding

that the *Rooker-Feldman* doctrine bars Plaintiff's as applied procedural due process attack on the state court judgment); *Wade v. Monroe Cty. Dist. Attorney*, 800 F. App'x 114, 119 (3d Cir. 2020) (reversing because "the state court entered a ruling based upon Wade's situation, and made no broad pronouncement about how the statute should be construed in all cases"). Instead, an as-applied challenge is permissible so far as it illuminates the authoritative construction of a state law to determine constitutional adequacy. *Morrison v. Peterson*, 809 F.3d 1059, 1070 (9th Cir. 2015) (finding plaintiff's as-applied challenge is permissible and "merely argues a defect that is not apparent from the face of the statute"). The Second Circuit approved of a plaintiff's as-applied challenge and reinstated a jury verdict which determined plaintiff was deprived of procedural due process by the city's poor evidence handling system. *Newton v. City of New York*, 779 F.3d 140, 159 (2d Cir. 2015).

In unpublished opinions, the Fifth Circuit has repeatedly identified Article 64 of the Texas Code of Criminal Procedure as a substantive right created by the state for post-conviction DNA testing. "Texas has created a right to post-conviction DNA testing in Article 64 of the Texas Code of Criminal Procedure. Thus, '[w]hile there is no freestanding right for a convicted defendant to obtain evidence for postconviction DNA testing, Texas has created such a right, and, as a result, the state[-] provided procedures must be adequate to protect the substantive rights provided.'" *Emerson v. Thaler*, 544 F. App'x 325, 327-28 (5th Cir. 2013) (quoting *Elam v. Lykos*, 470 F. App'x. 275, 276 (5th Cir. 2012)).

d. Procedural Due Process and *Medina*

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

The historical and state consensus inquiries are often combined to determine if a procedure violates due process, with great deference being given to established historical practice. *Id.* Constitutionality is not established by cataloging the practices of the states; nor does it ignore basic principles of justice. *Martin v. Ohio*, 480 U.S. 228, 236 (1987); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). When a practice defies the structural prerequisites of the country's criminal justice system, due process is appropriately invoked. *Cooper v. Oklahoma*, 517 U.S. 348,

368 (1996). Fundamental fairness is not an easy rule to apply and a district court should be careful to not impose personal notions of fairness. *Dowling v. United States*, 493 U.S. 342, 353 (1990).

VIII. Analysis

a. Motion for Reconsideration

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

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

b. Fifth Circuit's Ruling

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

The Fifth Circuit's decision attempted to reach a conclusion on the merits of the DNA testing motion under Texas law. It concluded that Gutierrez failed to show "how the DNA testing he requests would be 'sufficiently material' to negate his guilt thus justifying the pursuit of DNA testing" under Chapter 64 of Texas law. *Gutierrez v. Saenz*, 818 F. App'x at 314-15. The Fifth Circuit determined that under Chapter 64, Gutierrez had not shown by a preponderance of the evidence that he would not have been convicted of the death penalty if exculpatory results were obtained, and therefore he cannot prevail. *Id.*

This conclusion about a fundamental issue is clearly erroneous as a matter of law. The Fifth Circuit did not

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).

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.
>
> (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.

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 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

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.

(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 Q – Opinion of the Texas Court of Criminal Appeals on Direct Appeal from the Denial of Motion for Forensic DNA Testing (February 26, 2020)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,089

RUBEN GUTIERREZ,

Appellant,

v.

THE STATE OF TEXAS.

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

Per curiam.

OPINION

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

1. References to Chapters or Articles are to the Texas Code of Criminal Procedure unless otherwise specified. Appellant also filed a motion to stay his execution pending resolution of this appeal. However, because we stayed appellant's execution in conjunction with appellant's pending motion for leave to file

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

I. Background

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

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

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

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a petition for a writ of mandamus, this motion is moot and it is dismissed. *See In re Ruben Gutierrez,* No. WR-59,552-03 (Tex. Crim. App. Oct. 22, 2019) (not designated for publication).

Appellant sometimes ran errands for Mrs. Harrison, and he borrowed money from her. Appellant, Avel, and others routinely gathered behind Mrs. Harrison's home to drink and visit.

Appellant, then 21 years old, orchestrated a plan to steal her money. On September 5, 1998, he and an accomplice, Rene Garcia-whom Mrs. Harrison did not know-entered Mrs. Harrison's home to carry out this plan. A third accomplice, Pedro Gracia, was the driver. When appellant and Rene Garcia left with Mrs. Harrison's money, she was dead. Avel Cuellar found her body late that night-face down in a pool of blood. She had been severely beaten and stabbed numerous times. Mrs. Harrison's bedroom was in disarray, and her money was missing.

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

On September 8, 1998, detectives went to appellant's home. He was not there, but his

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

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

Four days later, as a result of statements given by appellant's two accomplices, Rene Garcia and Pedro Gracia, and their own investigation, the police obtained an arrest warrant for appellant. He made a second statement. This time, he admitted that he had planned the "rip off," but said that he had waited at a park while Rene Garcia and Pedro Gracia did it. He said that when his two cohorts came to pick him up, Rene Garcia was holding a screwdriver covered in blood and said that he had killed Mrs. Harrison. Rene Garcia and Pedro Gracia had taken a blue suitcase and a tackle/tool box full of money. Appellant said, "There was no doubt about the fact that I planned the whole rip off but I never wanted for either one of them to kill Mrs. Harrison. When

I saw that Pedro was grabbing the money from the tackle/tool box and heard some crumbling plastic I decided that I did not want any money that they had just ripped off." Appellant told the police that his accomplices had told him where they had thrown the blue suitcase away. Appellant led the detectives to a remote area, but when the officers could not find the blue suitcase, appellant was allowed out of the car, and he walked straight to it.

The next day appellant made a third statement, admitting that he had lied in his previous one "about being dropped off in the park, about not being with Rene." He said Pedro Gracia drove the truck and dropped him and Rene Garcia off at Mrs. Harrison's home. The initial plan was for Rene Garcia to lure Mrs. Harrison out of her home by asking to see a trailer lot. Then appellant would come around from the back of her home, run in, and take the money without her seeing him. But when appellant ran around to the front, Rene Garcia and Mrs. Harrison were still inside the house. Appellant said Rene Garcia knocked out Mrs. Harrison by hitting her, and then he repeatedly stabbed her with a screwdriver. The screwdriver "had a clear handle with red, it was a standard screwdriver. We had got the screwdriver from the back of the truck in a tool box along with another screwdriver, a star type." Appellant gathered the money. "When

he started stabbing her, I pulled out the blue suitcase from the closet and the black tool box fell. It opened when it fell and I saw the money." Appellant tossed the tool box to Rene Garcia, and headed out the door with the blue suitcase. Rene Garcia followed, and Pedro Gracia pulled the truck around to pick them up. Pedro Gracia dropped them off down a caliche road and appellant filled "up the little tool box with the money that was in the suitcase," while Rene Garcia filled up his shirt. They abandoned the suitcase, and Pedro Gracia picked them up and drove appellant home.

Much of the money was recovered. Appellant's wife's cousin, Juan Pablo Campos, led police to $50,000 that appellant had given him to keep safe. The prosecution's theory at trial was that appellant, either as a principal or as a party, intentionally murdered Mrs. Harrison during a robbery. The prosecution emphasized (1) the medical examiner's testimony that two different instruments caused the stab wounds,[3] (2) appellant's admission that he and Rene Garcia went inside Mrs. Harrison's home office

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

> with two different screwdrivers, and (3) the fact that four different people-Avel Cuellar, Ramiro Martinez, and Crispin Villarreal from "the drinking group" and another passerby, Mr. Lopez, who did not know appellant-all saw him at the mobile-home park the day that Mrs. Harrison was killed.
>
> The jury was instructed that it could convict appellant of capital murder if it found that appellant "acting alone or as a party" with the accomplice intentionally caused the victim's death. The jury returned a general verdict of guilt, and, based on the jury's findings at the punishment phase, the trial judge sentenced appellant to death.

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

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

B. Prior Chapter 64 DNA Appeal and Subsequent Habeas Proceeding

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

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

Appendix Q

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

- appellant had the opportunity to have the evidence tested before trial, but did not avail himself of that opportunity;

- the single loose hair "does not exist because it was never recovered as evidence in the investigation of the case";

- the defendant failed to show that identity was an issue in the case considering his own statements, the statements of the co-defendants, and the statement of an eyewitness who connected him to the murder scene; and

- the defendant failed to establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing.[4]

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

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

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

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

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

Appellant requested access for DNA testing to the same items that he had previously requested in his Chapter 64 motion. The State did not oppose the request for testing, but neither did the State agree to the relief requested. The trial court ultimately denied the motion in April 2018. Slightly more than a year later, appellant filed his second Chapter 64 motion for post-conviction DNA testing, which is the subject of this appeal.

II. Chapter 64 and the Standard of Review

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

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

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

2. the evidence "has been subjected to a chain of custody sufficient to establish

> that it has not been substituted, tampered with, replaced, or altered in any material respect;"
>
> 3. "there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and"
>
> 4. "identity was or is an issue in the case[.]"

Art. 64.03(a)(l). Additionally, the convicted person must establish by a preponderance of the evidence that:

> 1. he "would not have been convicted if exculpatory results had been obtained through DNA testing; and"
>
> 2. "the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice."

Art. 64.03(a)(2).

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

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

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

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

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

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

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

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

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

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

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

Appendix Q

A. Article 64.03(a)(l) Requirements

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

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

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

trial court did not make an express finding regarding this requirement of Article 64.03(a)(l).

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

B. Article 64.03(a)(2) Requirements

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

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

According to the evidence presented, the eighty-five-year-old Harrison lived with her nephew (Cuellar) in a

trailer park that she owned. She did not trust banks, so she kept large sums of cash in her home/office, a fact that appellant knew. Harrison was killed in her home by what appeared to be two different weapons. She also suffered bruising and contusions. Four people had seen appellant in the trailer park on the day Harrison was killed. Three of those witnesses knew appellant.

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

Accomplice Gracia also gave a statement to the police. Gracia explained that appellant showed him a house appellant intended to burglarize. Appellant then pressured Gracia until he agreed to pick up appellant and another person after they finished the job. Gracia stated

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

that, soon after the burglary, he heard that the woman who owned the trailer park had been killed.

As a result of these statements and their own further investigation, the police arrested appellant. At this time, appellant gave a statement in which he admitted that he planned "the whole rip off," but he stated that he stayed at a park while Garcia and Gracia committed the offense. He also stated that he never wanted them to kill the victim. In a second statement, appellant repeated what he had said earlier, but added details about Cuellar. Appellant said that: Cuellar had stolen from Harrison a couple of months earlier, he was mean to her, she was going to kick him out, and he shot up heroin and smoked marijuana. Finally, in a third statement, appellant admitted that he lied in his earlier statements about not being in the house. He further admitted that he had been in Harrison's house during the offense and that he had found the money. But he stated that Garcia stabbed the victim multiple times. He also noted that Cuellar told him to "rip ... off' Harrison. Appellant later led the police to a remote area where he and his accomplices had thrown the suitcase that had contained money stolen from the house. Finally, sometime after the crime, appellant's wife's cousin led police to $50,000 that appellant had given him to keep safe.

Appellant now asserts that he should be allowed to DNA test the several items previously listed because exculpatory results will show by a preponderance of the evidence that he never would have been convicted. Appellant cannot make this showing. In appellant's prior DNA appeal, during the discussion of whether identity

was an issue, we recognized that this case was tried under the law of parties. We found that the combination of the following was highly probative of whether identity was, in fact, an issue: (1) appellant's third statement, placing him inside Harrison's home with a screwdriver; (2) Garcia's statement placing appellant inside Harrison's home and stabbing her; and (3) Gracia's statement placing appellant inside Harrison's home at the time of the murder. *Gutierrez,* 337 S.W.3d at 894-95.

Here, as in the 2010 DNA appeal, these three consistent statements unequivocally place appellant inside Harrison's home at the time of her murder. As they were probative of the identity issue in the prior appeal, these statements are also highly probative here. Specifically, they are highly probative of whether appellant can meet his burden to show that he would not have been convicted should DNA testing reveal exculpatory results.[8] *See id.* at 899. Appellant admitted planning "the whole rip off," showing his involvement as a party. In cases involving accomplices, a defendant can only meet his burden under

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

Article 64.03(a)(2)(A) if he can show that the testing, if exculpatory, will establish that he did not commit the crime as either a principal or a party. *Id.* at 900; *see also Wilson,* 185 S.W.3d at 485. We now turn to each of the items requested.

a Fingernail scrapings collected from the victim

Appellant asserts that, since the victim fought her attacker, DNA under her fingernails will show the killer's identity. We disagree. First, even though the medical examiner opined that the victim had "defensive wounds," there is no evidence in the record to suggest that the five-foot-four-inch, 105-pound, 85-year-old Harrison was able to hit or scratch her murderers as they attacked and stabbed her thirteen times in the face and neck. Second, even if DNA were found in the fingernail scrapings, it could just as easily have come from an accomplice. Notably, in his own statement, appellant accused Garcia of actually killing Harrison. Therefore, appellant's DNA might well not be present in the fingernail scrapings. Such a finding would not relieve him of liability as a party in the case.

Further, even if testing revealed the presence of DNA belonging to someone other than Garcia or appellant, it would not negate appellant's own admission in his statements that he planned "the whole rip off." Appellant asserts that a DNA profile tying Cuellar to the crime "would be especially likely to have changed the outcome of the trial." But one would expect to find Cuellar's DNA among the samples collected from the scene. Cuellar lived in the home and he found Harrison's body. Finding

Cuellar's DNA in the fingernail scrapings would not negate appellant's own admissions or other evidence placing appellant at the scene of the crime. Given the evidence, appellant simply cannot show a greater than 50% chance that a jury would not convict him if DNA results excluded him as a contributor of any material under Harrison's fingernails since appellant expressly admitted to planning "the whole rip off" and could have been convicted as a party. *See* Art. 64.03(a)(2).

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

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

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

c. A hair found in the victim's hand

Even if the hair found in Harrison's hand belonged to her attacker, appellant cannot show by a preponderance of

the evidence that the result of the trial would have been different if DNA results exculpated him as the contributor of the hair. By appellant's own statement, Garcia killed Harrison, not him. Therefore, one would not expect to find appellant's DNA on this item. An exculpatory result would not release appellant from party liability for the offense.

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

Again, by appellant's own statement, Garcia killed Harrison, not him. Further, appellant admitted involvement and Cuellar discovered Harrison's body. Regardless of whose DNA, if any, is found in these samples, no result would release appellant from party liability for the offense.

e. Clothing collected from Cuellar

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

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

f. General due process argument

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

> Chapter 64 deals only with testing evidence that could establish, by a preponderance of the evidence, that the person "would not have been *convicted* if exculpatory results" were obtained. The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received. In this case, even supposing that a DNA test result showed Gracia's DNA in the fingernail scrapings taken from Mrs. Harrison, this evidence would, at best, show only that Gracia, rather than appellant, was the second stabber in the house. It would not establish that appellant, who admittedly masterminded "the rip-off," was not a party to Mrs. Harrison's murder. And, even if Chapter 64 did apply to evidence that might affect the punishment stage as

> well as conviction, appellant still would not be entitled to testing. Appellant would still have been death-eligible because the record facts satisfy the *Enmund/Tison*[9] culpability requirements that he played a major role in the underlying robbery and that his acts showed a reckless indifference to human life.

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

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

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

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

the administration of justice. Appellant's second point of error is moot.

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

Delivered: February 26, 2020
Do Not Publish

Appendix R – Opinion of the Texas Court of Criminal Appeals Affirming Denial of DNA Testing (May 4, 2011)

COURT OF CRIMINAL APPEALS OF TEXAS

No. AP-76,406

EX PARTE RUBEN GUTIERREZ,

Appellant

May 4, 2011, Delivered;
May 4, 2011, Opinion Filed

OPINION

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

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

I.

Background

Appellant was convicted of capital murder and sentenced to death for his participation in the robbery and murder of eighty-five-year-old Escolastica Harrison.

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

Appellant, then 21 years old, orchestrated a plan to steal her money. On September 5, 1998, he and an accomplice, Rene Garcia—whom Mrs. Harrison did not know—entered Mrs. Harrison's home to carry out this plan. A third accomplice, Pedro Gracia, was the driver. When appellant and Rene Garcia left with Mrs. Harrison's money, she was dead. Avel Cuellar found her body late that night—face down in a pool of blood. She had been severely beaten and stabbed numerous times. Mrs. Harrison's bedroom was in disarray, and her money was missing.

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

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1. Mr. Lopez did not know appellant. The police showed him some "loose photos," and he picked out appellant in "a few seconds"

Appendix R

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

Four days later, as a result of statements given by appellant's two accomplices, Rene Garcia and Pedro Gracia, and their own investigation, the police obtained an arrest warrant for appellant. He made a second statement. This time, he admitted that he had planned the "rip off," but said that he had waited at a park while Rene Garcia and Pedro Gracia did it. He said that when his two cohorts came to pick him up, Rene Garcia was holding a screwdriver covered in blood and said that he had killed Mrs. Harrison. Rene Garcia and Pedro Gracia had taken a blue suitcase and a tackle/tool box full of money. Appellant said, "There was no doubt about the fact that I planned the whole rip off but I never wanted for either one of them to kill Mrs. Harrison. When I saw that Pedro was grabbing the money from the tackle/tool box and heard

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and was "absolutely positive" about that identification. But by the time of trial, Mr. Lopez was not able to identify appellant in person.

some crumbling plastic I decided that I did not want any money that they had just ripped off." Appellant told the police that his accomplices had told him where they had thrown the blue suitcase away. Appellant led the detectives to a remote area, but when the officers could not find the blue suitcase, appellant was allowed out of the car, and he walked straight to it.

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

money that was in the suitcase," while Rene Garcia filled up his shirt. They abandoned the suitcase, and Pedro Gracia picked them up and drove appellant home.

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

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

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

Appendix R

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

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

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

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

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

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

Appellant then filed a motion for post-conviction DNA testing. In it, he acknowledged that the three men involved in the robbery of Mrs. Harrison were himself, Rene Garcia, and Pedro Gracia. But he relies on the evidence that only two people entered the home to argue that exculpatory DNA test results (results that established that he was not one of those two) would show, by a preponderance of the evidence, that he would not have been convicted of capital

4. *See* Tex.Code Crim. Proc. art. 64.01(c).

5. Tex. R. App. P. 25.2(a).

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

murder or sentenced to death. The trial judge denied the request for testing because appellant (1) failed to meet the "no fault" provision of Chapter 64, and, alternatively, (2) failed to establish either that "identity was or is an issue in the case" or that it was more probable than not that he would not have been convicted if exculpatory results had been obtained through DNA testing.[7]

II.

Chapter 64 and the Standard of Review

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

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

(2) the evidence was either:

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

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

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

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

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

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

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

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

(7) the convicted person has established by a preponderance of the evidence that the request for DNA testing is not made to unreasonably

> delay the execution of sentence or administration of justice.[9]

An indigent convicted person intending to file a motion for post-conviction DNA testing now has a limited right to appointed counsel. That entitlement used to be absolute,[10] but it is now conditioned on the trial judge's finding "that reasonable grounds exist for the filing of a motion."[11] If all of the prerequisites set out above are met, the convicting court must order testing. Then, after "examining the results of testing under Article 64.03, the convicting court must hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted."[12] Exculpatory DNA testing results do

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9. *See* 43B George E. Dix & Robert O. Dawson, 43B Texas Practice: Criminal Practice and Procedure § 45.188 (2d ed. 2001 & 2008-09 Supp.) (setting out a summary of Articles 64.01(a)-(b) & 64.03(a)-(b)).

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

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

12. Article 64.04.

not, by themselves, result in relief from a conviction or sentence. Chapter 64 is simply a procedural vehicle for obtaining certain evidence "which might then be used in a state or federal habeas proceeding."[13]

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

III.

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

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

1. *Appellant's request for counsel.*

Appellant asserted that reasonable grounds exist for filing a motion for DNA testing because exculpatory

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

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

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

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

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

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

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

The statute does not define "reasonable grounds," but courts of appeals have developed some guiding principles. Though a convicted person need not prove entitlement (or a prima facie case of it) to DNA testing as a precondition for obtaining appointed counsel,[17] whether "reasonable grounds" exist for testing necessarily turns on what is required for testing. Basic requirements are that biological evidence exists, that evidence is in a condition that it can be tested, that the identity of the perpetrator is or was an issue, and that this is the type of case in which exculpatory DNA results would make a difference.[18] Courts have found that reasonable grounds for testing

17. *Lewis v. State*, 191 S.W.3d 225, 227-28 (Tex. App.—San Antonio 2005, pet. ref'd) (the statute requires only a showing of "reasonable grounds" for a motion to be filed, not the establishment of a "prima facie" case). *See In re Franklin*, No. 03-07-00563-CR, 2008 Tex. App. LEXIS 4545, 2008 WL 2468712 at *2 (Tex. App.—Austin June 19, 2008, no pet.) (not designated for publication) ("an indigent inmate need not prove his entitlement to testing as a precondition for obtaining appointed counsel to assist him in filing a testing motion.").

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

are not present if no biological evidence exists or if it has been destroyed,[19] or if identity was not or is not an issue.[20] Reasonable grounds are present when the facts stated in the request for counsel or otherwise known to

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

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

the convicting court reasonably suggest that a "valid" or "viable" argument for testing can be made.[21]

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

Alternatively, one could approach the "reasonable grounds" questions in the opposite direction. The trial judge could simply assume that the result of any proposed DNA testing is "exculpatory" in the sense that the test

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21. House Research Organization, Bill Analysis, Tex. H.B. 1011, 78th Leg., R.S. (2003) (Supporters Say) ("By requiring reasonable grounds before appointing an attorney for an indigent person seeking post-conviction DNA testing, HB 1011 would weed out frivolous claims while still ensuring a person with a valid claim access to testing. . . . When in doubt, a judge would err on the side of caution and appoint a lawyer in case the convicted person had a valid claim."). *See In re Franklin*, 2008 Tex. App. LEXIS 4545, 2008 WL 2468712 at *2 ("reasonable grounds for a testing motion are present when the facts stated in the request for counsel or otherwise known to the trial court reasonably suggest that a plausible argument for testing can be made. Conversely, reasonable grounds for a testing motion are not present if the record before the trial court shows that DNA testing is impossible or that no viable argument for testing can be made.").

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

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

Appellant argues that the trial judge's decision to deny his request for appointed counsel was outside the zone of reasonable disagreement because the identity of the murderer was at issue for purposes of Article 64.01. In making this argument, appellant asserts that the trial judge was not entitled to consider either appellant's third statement to police—because it was purportedly taken in violation of his right to remain silent[23]—or his accomplices' statements—because they were neither admissible nor admitted at trial and appellant has never had a chance to

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

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

confront and cross-examine those accomplices.[24] Appellant further argues that, even if these statements can be considered, they are irrelevant to whether the murderer's identity is an issue for purposes of DNA testing.

First, because a person's effort to secure testing under Chapter 64 does not involve any constitutional considerations, the trial judge could properly consider the accomplices' statements. Although evidence offered against a defendant at a criminal trial and challenged on constitutional grounds must be admissible to give adequate protection to the values that exclusionary rules are designed to serve, a Chapter 64 proceeding is not a "criminal trial."[25] Rather, it is an independent, collateral inquiry into the validity of the conviction, in which exclusionary rules have no place, and there are no constitutional considerations.[26] Article 64.03 does not

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

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

26. *Prible v. State*, 245 S.W.3d 466, 469 (Tex. Crim. App. 2008). *See*, *e.g.*, *Ex parte Mines*, 26 S.W.3d 910, 914 (Tex. Crim. App.

require any evidentiary hearing before the trial judge decides whether a convicted person is entitled to DNA testing.[27] And, if a hearing is held, the convicted person has no right to be present, no right to confront or cross-examine witnesses, and no right to have hearsay excluded or an affidavit considered.[28] The legislature has placed no

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2000) (criminal defendant enjoys a presumption of innocence and a constitutional right to be present at a pretrial or trial hearing; applicant for post-conviction writ of habeas corpus enjoys neither); Dix & Dawson, *supra*, note 9, § 45.181 (recognizing that this Court, in *Prible*, made it clear "that a convicted person's effort to secure testing to show that another person was involved in the offense involved no constitutional considerations").

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

28. *See Thompson*, 123 S.W.3d at 784-85 ("Unlike a criminal trial, a chapter 64 proceeding such as this one does not implicate an appellant's confrontation-clause rights because this type of proceeding does not necessarily involve any witnesses or accusations against the appellant. Rather, as set forth in chapter 64, the proceeding involves a motion made by the applicant followed by the State's non-accusatory response required under the statute. This type of proceeding is analogous to a habeas corpus proceeding in that it is an independent, collateral inquiry into the validity of the conviction. Therefore, as in a post-conviction writ of habeas corpus proceeding, an applicant for a post-conviction DNA analysis enjoys neither a presumption of innocence nor a constitutional right to be present at a hearing.") (citations omitted).

barriers to the type of relevant and reliable information that the trial judge may consider when determining if identity was or is an issue in the case. The information must be reliable, but it need not be admissible or previously admitted at trial.[29] In short, in a Chapter 64 proceeding, the constitution does not bar a judge from considering statements that were (or should have been) inadmissible at trial. The written statements made by appellant and his two accomplices, which were attached to the State's brief submitted to the trial judge, are as much a part of this record as the documents in appellant's appendix.[30]

Second, these statements are highly probative of whether the murderer's identity is an issue for purposes of DNA testing. Appellant properly notes that confessions

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

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

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

Furthermore, this is not a case in which testing of biological evidence left by a lone assailant is sought.[33] This case was tried under the law of parties, and the identity of the parties—appellant, Rene Garcia, and Pedro Gracia—was not an issue at trial, and it is not an issue now. This

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31. Tex. Code Crim. Proc. art. 64.03(b).

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

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

combination, of (1) appellant's third statement, placing him inside Mrs. Harrison's home with a screwdriver in his hand, (2) Rene Garcia's statement that places him inside Mrs. Harrison's home and stabbing her, and (3) Pedro Gracia's statement that places him inside Mrs. Harrison's home at the time of the murder, is highly probative of whether identity was or is an issue. The trial judge is the sole judge of the credibility of these three consistent statements, all of which clearly and unequivocally place appellant inside Mrs. Harrison's home at the time of her murder. Therefore, we adopt this factual finding.[34] Together with all the circumstantial evidence admitted at trial,[35] this information supports the trial judge's ultimate legal ruling that there are no "reasonable grounds" for a motion to be filed under Chapter 64.[36]

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

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

36. *See Rivera*, 89 S.W.3d at 59 ("[T]he ultimate question of whether a reasonable probability exists that exculpatory DNA tests would prove innocence is an application-of-law-to-fact

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

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

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

If DNA testing was not done at the time of trial, the convicted person must show that (a) DNA testing was

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question that does not turn on credibility and demeanor and is therefore reviewed *de novo*.").

37. Specifically, the court noted that:

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

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

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38. Tex. Code Crim. Proc. art. 64.01(b).

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

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

41. *Skinner v. State*, 293 S.W.3d 196, 202 (Tex. Crim. App. 2009) (Conversely, "evidence that counsel provided constitutionally

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

Appellant points out that, although the physical evidence was made available to the defense team for inspection, it was not made available until the Friday before the Monday trial. Appellant argues that this was too late because "a motion for a relatively lengthy continuance would have been pointless."[42] That is, he argues, the motion would have been denied, and that denial would have been affirmed on appeal.[43] But this is sheer speculation, unsupported by the record. The record reflects that appellant filed a pre-trial motion to inspect physical evidence on February 5, 1999, and the judge granted it on March 18, 1999.[44] After that inspection, the

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ineffective assistance in failing to seek DNA testing of certain items could be sufficient to show that the failure to test was not appellant's fault 'for reasons that are of a nature such that the interests of justice require DNA testing.' The reasoning behind permitting challenges to the effectiveness of a trial attorney's representation is that '[a]n accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair.'").

42. Appellant's Brief at 27.

43. *Id.*

44. The following colloquy occurred during the hearing.

> State: Okay. Motion to inspect, examine and test physical evidence, Judge, that's their—I'm not—I don't know if they want to do independent testing. That's not been brought to my attention. I'm not sure what the status of that is today. Once again, they can

defense never made any motion for independent testing of the evidence, for an appointment of an independent expert, or for a continuance. And no claim or showing of ineffective assistance has been made or is apparent here.

Although there is no explicit explanation from counsel why he did not ask for testing, counsel's strategy became clear at trial. Appellant used the fact that the Brownsville Police Department failed to test the evidence containing biological DNA evidence to argue the lack of investigation and the existence of reasonable doubt during the trial.

> look at it. If they want to do independent testing, I need to know because the lab in Austin—I mean, in McAllen will have to assist us in getting the evidence ready to ship somewhere.
>
> Defense: Judge, with this motion, we're asking for any type of physical evidence. For example, there was blood samples that were taken, fingerprints that might have been taken, fingerprint—I'm sorry, fingernail scrapings that were taken from the victim.

We're asking that, first of all, we be allowed to inspect them. I know that the Department of Public Safety still has them in their possession. And we're simply asking for us to be allowed to inspect them. If at that time we deem it necessary to have them examined by experts, then we would urge—we would require that at that time or ask for that at that time.

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

Appellant cross-examined the crime-scene investigator Juan Hernandez about the fingernail scrapings and the fact that they were not tested. Counsel asked similar questions about other apparent blood samples that were collected-blood on a raincoat, in bathrooms, on the screen door to the garage, and on the couch. During his closing argument, defense counsel repeatedly stated that the Brownsville Police fell down on the job.[45]

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45. Defense closing arguments included the following statements:

* "Escolastica Harrison had some—some scrapings on her fingertips. That—those scrapings would tell you who the killer is. Those scrapings, if they were tested, they would tell you who is the individual that killed Escolastica Harrison."

* "Besides the scrapings, she also had some hair. She had a hair on her fingernails also. Did they test this for you? No. That's the job of the D.A.'s Office. That's the job of the Brownsville Police Department. They need to go ahead and show you as much evidence as they have, as much evidence as they can."

* "But what did the Brownsville Police Department do? They don't do this. Why? Because in this type of case, probably in any other type of case, what their initial thing to do is to try to get a voluntary statement."

* "If they do not get a statement from any of the individuals, they need to do some work. They need to go ahead and send the scrapings to be tested. They need to do further investigation."

* "In this kind of case, they would probably—what they're doing is trying to go ahead and get the easy way out. The easy way out is to try to get a statement from the individuals."

Appendix R

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

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* "He also stated that there was a foot in the blood. Did they check into that? No. Did they bring you any information as to that? No. They just tell you there was something on there, but why check into it? They're going to get voluntary statements. Why check into it further?"

* "That's—as to the Brownsville Police Department, that's what mainly everybody does. They give voluntary statements. Why look for the scrapings? Why look for anything else? Why try to go ahead and investigate further? For what? We know that everybody's going to give a voluntary statement."

* "He also testified that there was blood in the toilet, on Ruben's toilet. He also testified that there was blood also on the doorknob and on the floor of the toilet. That's what the officers testified to. Did they check into that? No."

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

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

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

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

47. The trial judge specifically found the following:

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

17, 1999 report as being evidence submitted to it by the Brownsville Police Department."

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

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

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

Appellant argues that the State's assertion that the single loose hair "was never recovered" is contradicted by the autopsy report and Dr. Dahm's testimony. Thus, he argues that the judge's factfinding is not entitled to

48. Tex. Code Crim. Proc. art. 64.02.

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

deference, especially because the trial judge failed to conduct further inquiry given such direct contradiction by the medical examiner.

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

> Q. When you were conducting your autopsy, am I correct in stating that you found a piece of hair or loose-a single loose piece of hair around Escolastica Harrison's third digit upper left hand?
>
> A. I believe so, yes, sir.
>
> Q. And what is it that you did with that loose piece of hair?
>
> A. I believe it was submitted to the police.

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

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

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

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

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

his finding that the identity was and is not an issue and that appellant was directly involved in the murder of Mrs. Harrison.

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

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

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

Under Article 64.03, a convicted person is not entitled to DNA testing unless he first shows that there is "greater than a 50% chance that he would not have been convicted if DNA testing provided exculpatory results[.]"[52] The

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

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

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

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

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

establish, by a preponderance of the evidence, that he did not commit the crime as either a principal or a party?[56]

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

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

(1) A blood sample from Mrs. Harrison.

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

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

There is no reason to think that DNA from this shirt would belong to appellant or to the murderers. It should belong to Mrs. Harrison from when Mr. Cuellar discovered her body,

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

stepped in the pool of blood around her, and picked her up, getting blood on his shirt.

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

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

(4) Fingernail scrapings taken from Mrs. Harrison.

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

But a test showing that appellant's DNA was not in those scrapings would not establish his innocence. First, there is no evidence to suggest that the 85-year-old victim was able to hit or scratch her murderers with her fingernails as they attacked her and stabbed her thirteen times in the face and neck. Second, even if some DNA were found in Mrs. Harrison's fingernail scrapings, there is no way of knowing whether it came from one of her murderers. Third, any DNA from her murderers might just as likely have come from appellant's accomplice, Rene Garcia, and that would not exculpate appellant. The only conceivable "exculpatory" result would be DNA from the third accomplice, Pedro Gracia, in the fingernail scrapings. But is this plausible? All three robbers agreed that Pedro Gracia was the driver and did not go inside Mrs. Harrison's

home. Appellant, not Gracia, was seen running around the back of Mrs. Harrison's home the evening of the murder. And it defies common sense to think that appellant, who freely admitted that "I planned the whole ripoff," told his cohorts where Mrs. Harrison's secret stash of cash was hidden and then sent them, without supervision, off to rob her while he waited patiently for their return at a park far away. That scenario is not believable. And the trial judge was not required to believe it.[57]

But even if one accepted such an implausible scenario, exculpatory nail scrapings would not make it less probable that appellant "planned the ripoff" and was a party to Mrs. Harrison's murder. Chapter 64 deals only with testing evidence that could establish, by a preponderance of the evidence, that the person "would not have been *convicted* if exculpatory results" were obtained.[58] The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received.[59] In this case, even supposing that a DNA test

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

58. Tex. Code Crim. Proc. art. 64.03(a)(2)(A).

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

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

In sum, granting DNA testing in this case would "merely muddy the waters." Appellant does not seek testing of biological evidence left by a lone assailant, and a third-party match to the requested biological evidence would not overcome the overwhelming evidence

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

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

of his direct involvement in the multi-assailant murder. Having overruled all of appellant's points of error, we affirm the convicting court's orders denying the request for appointment of counsel and denying the motion for forensic DNA testing pursuant to Texas Code Criminal Procedure Chapter 64.

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

Appendix S – Order of the District Court of Cameron County, Texas Denying Chapter 64 DNA Testing (May 26, 2022)

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

CAUSE NO. 98-CR-1391-A

IN RE: RUBEN GUTIERREZ,

Filed May 27, 2022

ORDER DENYING

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

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

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

/s/ Benjamin Euresti, Jr.
Honorable Judge Presiding

Appendix T – Order of the District Court of Cameron County, Texas Granting the State's Plea to the Jurisdiction (July 9, 2021)

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

CAUSE NO. 98-CR-1391-A

IN RE: RUBEN GUTIERREZ

ORDER GRANTING THE STATE'S PLEA TO THE JURISDICITON

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

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

Entered on this 8th day of July, 2021.

/s/ Benjamin Euresti Jr.
Honorable Judge Presiding

Appendix U – The State of Texas's Plea to the Jurisdiction of Ruben Gutierrez's Petition/Motion for Post-Conviction DNA Testing, District Court of Cameron County (July 8, 2021)

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

CAUSE NO. 98-CR-1391

IN RE:

RUBEN GUTIERREZ

THE STATE OF TEXAS'S PLEA TO THE JURISDICTION OF RUBEN GUTIERREZ'S PETITION/MOTION FOR POST CONVICTION DNA TESTING PURSUANT TO CHAPTER 64 OF THE CODE OF CRIMINAL PROCEDURE

TO THE HONORABLE PRESIDING JUDGE:

NOW COMES THE STATE OF TEXAS, by and through her undersigned Assistant District Attorney, and files this Plea to the Jurisdiction of Ruben Gutierrez's Petition/Motion for Post-Conviction DNA Testing Pursuant to Chapter 64 of the Code of Criminal Procedure asking that said petition/motion be dismissed/denied for want of jurisdiction and respectfully would show this Honorable Court the following:

SUMMARY: Ruben Gutierrez, in Cause No. 1:19-CV-185, *Ruben Gutierrez v. Luis V. Saenz, et al.*, has secured a declaratory judgment from the United States District Court for

the Southern District of Texas, declaring Chapter 64 of the Code of Criminal Procedure unconstitutional. While the State disagrees with the finding made by said court, until said declaratory judgment is vacated and/or overturned on appeal or the Texas Legislature amends Chapter 64 of the Code of Criminal Procedure to remedy the purported constitutional infirmities, this Honorable Court is without jurisdiction to grant any relief under Chapter 64 of the Code of Criminal Procedure. Consequently, Gutierrez's petition/motion should be dismissed/denied for want of jurisdiction.

1. INTRODUCTION

1.1. Approximately 20 years ago, Ruben Gutierrez was convicted by a jury in this Honorable Court and sentenced to death for the gruesome capital murder of elderly (85-year old) Brownsville Citizen Escolastica Harrison.

1.2. Gutierrez planned, and, along with co-conspirators, robbed Mrs. Harrison of approximately $600,000 in cash which she had saved and stored in her home.

1.3. In the course of the robbery, and in an effort to avoid the existence of witnesses, Gutierrez stabbed Ms. Harrison to death with a screw driver that he brought with him to the robbery.

1.4. Despite a confession, despite a co-conspirator's confession, and despite that during his trial Gutierrez threatened to kill then Assistant District Attorney Rebecca Rubane "just like he killed Mrs. Harrison,"

Gutierrez has never repented, and continues to deny responsibility for the murder, pain, and suffering he has caused.

1.5. This Honorable Court has set his most recent date of execution for October 27, 2021.

1.6. On July 7, 2021, Gutierrez filed a Third Motion/ Petition for Chapter 64 DNA Testing.

i. This Honorable Court has twice denied Gutierrez's previous Motions/Petitions for Chapter 64 DNA Testing.

ii. On Gutierrez's appeal of this Honorable Court's previous denials of request for DNA, the Court of Criminal Appeals, in both instances, once in 2011,[1]

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1. "[E]ven if one accept[s].. [the] . . . implausible scenario [presented by Gutierrez], exculpatory nail scrapings would not make it less probable that appellant "planned the ripoff" and was a party to Mrs. Harrison's murder. Chapter 64 deals only with testing evidence that could establish, by a preponderance of the evidence, that the person 'would not have been *convicted* if exculpatory results' were obtained. The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received. In this case, even supposing that a DNA test result showed Gracia's DNA in the fingernail scrapings taken from Mrs. Harrison, this evidence would, at best, show only that Gracia, rather than appellant, was the second stabber in the house. ***It would not establish that appellant, who admittedly masterminded "the rip-off," was not a party to Mrs. Harrison's murder.*** And, even if Chapter 64 did apply to evidence that might affect the punishment stage as well as conviction, appellant still would not be entitled to testing. Appellant would still have been death-eligible because the record facts satisfy the *Enmund/Tison* culpability requirements that he played a major role in the underlying robbery and that his acts showed a reckless indifference to human life." *Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011)(emphasis added).

and again in 2020,[2] affirmed this Honorable Court's denials of Chapter 64 DNA Testing and ruled Gutierrez would not be entitled to testing for punishment-related purposes even if the statute allowed for it.

iii. These previous holdings by the Court of Criminal Appeals Control denying the Gutierrez's DNA Testing are controlling in this current motion as it is the "law of the case."[3]

1.7. This Honorable Court is without jurisdiction to grant the relief sought by said motion/petition. As such, this Honorable Court should deny/dismiss said petition/motion for want of jurisdiction.

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2. "[Gutierrez] has failed to establish that he would not have been convicted if exculpatory results had been obtained through DNA testing . . . [i]n 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*, AP-77,089, 2020 WL 918669, at *6-7 (Tex. Crim. App. Feb. 26, 2020).

3. "The 'law of the case' doctrine provides that an appellate court's resolution of questions of law in previous appeal are binding in subsequent appeals concerning the same issue. In other words, when the facts and legal issues are virtually identical, they should be controlled by an appellate court's previous resolution." *State v. Swearingen*, 424 S.W.3d 32, 37-38 (Tex. Crim. App. 2014); *see also Laron v. State*, 488 S.W.3d 413 (Tex. App. – Texarkana 2016, pet. ref'd).

Appendix U

2. GENERAL DENIAL

2.1. The State generally denies the allegations made by Gutierrez in his July 7, 2021 Petition/Motion for Chapter 64 DNA Testing.

2.2. The State respectfully reserves the right, if her plea to the jurisdiction that is made herein is denied, to file specific denials and responses to said July 7, 2021 Petition/Motion for Chapter 64 DNA Testing.

3. DECLARATORY JUDGMENT

3.1. On September 26, 2019, Gutierrez filed a federal lawsuit, seeking relief under 42 U.S.C. § 1983, against:

i. Cameron County District Attorney Luis V. Saenz;

ii. Brownsville Police Chief Felix Sauceda, Jr.;

iii. Texas Department of Criminal Justice Director Bryan Collier;

iv. Lorie Davis of the Department of Criminal Justice Correctional Institutions Division; and,

v. Warden Billy Lewis of the Texas Department of Criminal Justice-Huntsville Unit.

3.2. On March 23, 2021, Senior United States District Judge Hilda Tagle issued an order in Cause No. 1:19-CV-185, *Gutierrez v. Saenz, et al.*, granting Ruben Gutierrez a Declaratory Judgment, "concluding that giving the 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 procedure due process." *See* Attachment 1, Pg. 26, DKT 141, Cause No. 1:19-CV-00185, *Gutierrez v. Saenz, et al.*

3.3. Said declaratory judgment is a finding that the:

i. Chapter 64 of the Code of Criminal Procedure is unconstitutional; and,

ii. to some extent, Article 11.071 of the Code of Criminal Procedure is unconstitutional.

4. EFFECT OF DECLARATORY JUDGMENT – CAN NOT HAVE CAKE AND EAT IT TOO

4.1. Gutierrez freely and without reservation sought for the Federal District Court to find Chapter 64 of the Code of Criminal Procedure unconstitutional. And the Federal District Court has obliged him with the relief he has sought.

4.2. "When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer constitutionally enforce it." *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n. 21 (Tex. 2017) (discussing the effect of *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) on Texas Marriage Laws); *see also Norton v. Shelby County*, 118 U.S. 425, 442, 6 S. Ct. 1121, 1125, 30 L. Ed. 178 (1886) (finding [a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.")".

4.3. Gutierrez secured the relief he sought. He should not be permitted to take advantage of a privilege that he just had invalidated.

4.4. "The rule of the law of the case is a rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter." *Barrett v. Baylor*, 457 F.2d 119, 123 (7th Cir. 1972), *cf. Swearingen*, 424 S.W.3d 37-38.

4.5. "The unreversed decision on a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit." *Id.*

4.6. When a federal district court has jurisdiction over the subject matter and the parties, its adjudication is the law of the case and is ***binding on all other courts***,

subject only to the appellate process. *Barrett*, 457 F.2d 123; *see also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 588 n. 8 (5th Cir. 2006) (explaining that "[i]f a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances."); *cf. Hayes v. Pin Oak Petroleum, Inc.*, 798 S.W.2d 668, 672 n. 5 (Tex. App.—Austin 1990, writ denied) (stating that Texas Courts give respectful consideration to the rulings of the federal courts).

4.7. Irrespective of the unconstitutionality of Chapter 64 of Code of Criminal Procedure being *as applied* or *on its face*, the issue before this Honorable Court relates to the same parties and issues before the United States District Court for the Southern District of Texas.

4.8. As such, the finding of Chapter 64 of the Code of Criminal Procedure unconstitutional by the District Court for the Southern District of Texas is binding on this Honorable Court.

4.9. Therefore, this Honorable Court is without jurisdiction to consider Gutierrez's Third Petition/Motion for Chapter 64 DNA Testing.

Appendix U

5. PRAYER

WHEREFORE, the State of Texas respectfully prays that this Honorable Court **GRANT HER PLEA TO THE JURISDICTION** thereby **DENYING/DISMISSING GUTIERREZ'S MOTION/PETITION FOR DNA TESTING FOR WANT OF JURISDICTION.**

Respectfully submitted,
LUIS V. SAENZ
DISTRICT ATTORNEY

/s/ Edward Adrian Sandoval
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ADMINISTRATIVE FIRST ASSISTANT
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ATTORNEYS FOR THE STATE

Appendix U

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.

MEMORANDUM & ORDER

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

I. Jurisdiction

This action arises under 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343.

Additionally, the Supreme Court determined in *Skinner v. Switzer* that a § 1983 action is the proper vehicle for a suit challenging a state DNA testing statute. *Skinner v. Switzer*, 562 U.S. 521, 534 (2011).

II. Background

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

In this suit, Gutierrez has named as Defendants Luis V. Saenz ("Saenz"), District Attorney for the 107th Judicial District; Felix Sauceda, Jr. ("Sauceda"), Chief of the Brownsville Police Department; Bryan Collier (Collier"), Executive Director of the TDCJ; Lorie Davis ("Davis"), director of the Correctional Institutions Division of the TDCJ and Billy Lewis ("Lewis"), the senior warden of the Huntsville Unit where inmates are executed. Dkt. No. 45.

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

Gutierrez's action arises under 42 U.S.C. § 1983 and challenges the constitutionality of the DNA testing procedures in Chapter 64 of the Texas Code of Criminal Procedure, Motion for Forensic DNA Testing ("Chapter 64"). Dkt. No. 45 at 3; Tex. Crim. Proc. Code art. 64.

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

On June 2, 2020, this Court granted in part and denied in part a motion to dismiss Gutierrez's complaint for failure to state a claim and lack of jurisdiction. Dkt. No. 48. On June 9, 2020, finding substantial factual and legal issues that were unresolved in this case, the Court stayed Gutierrez's execution that was scheduled for June 16, 2020. Dkt. No. 57. The Fifth Circuit vacated the stay of execution on June 12, 2020. *Gutierrez v. Saenz*, 818 F. App'x 309 (5th Cir. 2020). Gutierrez sought certiorari review of his execution chamber religion claims. *Gutierrez v. Saenz*, 19-8695, Petition for a Writ of Certiorari. The Supreme Court stayed Gutierrez execution on June 16, 2020. *Gutierrez v. Saenz*, 207 L. Ed. 2d 1075 (June 16, 2020); *see Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

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

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

III. Arguments

Gutierrez argues the Fifth Circuit's vacatur of the stay of execution focused solely on whether he had made a sufficient showing on the merits of the stay and did not rule on the ultimate merits of any of his DNA claims. Dkt. No. 118. Gutierrez argues that the question to be decided by the undersigned is whether Gutierrez has stated a claim on which relief can be granted. *Id.* He argues that

the Fifth Circuit misconstrued the facts in *Osborne* and this case, and therefore the Fifth Circuit's opinion was legally erroneous when applying *Osborne* to his DNA claims and should not be relied on by this Court. *Id.* at 10-13. Gutierrez argues Chapter 64's standard requiring him to prove by a preponderance of the evidence that he would not have been convicted of capital murder has created an insurmountable barrier to obtaining DNA testing. Gutierrez further argues that Texas courts have construed that standard in a way that is "virtually impossible to meet." *Id.* at 9. Gutierrez also argues the standard which allows for assessment of evidence before it exists is an escape hatch that violates due process. *Id.* at 14. Additionally, he argues the procedures for DNA testing are fundamentally inadequate to vindicate the substantive rights the State of Texas provides. *Id.* Gutierrez argues the legal standard erects an impossibly high barrier to a defendant seeking to establish his innocence of a crime for which he was convicted. *Id.* at 14. Finally, Gutierrez argues the Chapter 64 standard precludes a defendant seeking to establish his innocence of the death penalty from receiving DNA testing, violating his rights under the Due Process Clause. *Id.* at 28-29.

Defendants' motion for reconsideration moves the Court to reconsider its prior order and dismiss Gutierrez's DNA claims because the Fifth Circuit concluded all of Gutierrez's claims are entirely without merit. Dkt. No. 119 at 8. Defendants then reassert the arguments they raised in the motion to dismiss regarding a time bar and a failure to state a claim. *Id.* Defendants argue the Fifth Circuit's ruling should be followed to dispose of all DNA

claims in this action. Dkt. No. 140. Gutierrez argues that the Fifth Circuit's ruling no longer has precedential effect and further that no court has reached the merits of his DNA claims in this case. Dkt. No. 139.

IV. State Court DNA Proceedings

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

a. 2009 DNA Testing Motion

While proceeding in the 107th District Court before Judge Benjamin Euresti, Jr. ("Judge Euresti"), Gutierrez made several motions related to DNA testing. Following a May 14, 2008 denial of a state habeas petition, Gutierrez made a pro se motion for appointment of counsel on May 8, 2009 for the purpose of requesting DNA testing under Chapter 64. The motion was denied by Judge Euresti on May 29, 2009 and the Texas Court of Criminal Appeals ("CCA") dismissed Gutierrez's appeal on March 24, 2010, concluding the denial of counsel was not appealable. *Gutierrez v. State*, 307 S.W.3d 318, 319 (Tex. Crim. App. 2010).

With assistance of his federal habeas counsel, Gutierrez moved for DNA testing under Chapter 64 on

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

at 901. Such an outcome defies common sense, the CCA decided, as "[t]he only conceivable 'exculpatory' result would be DNA from the third accomplice, Pedro Gracia, in the fingernail scrapings. But is this plausible? All three robbers agreed that Pedro Gracia was the driver and did not go inside Mrs. Harrison's home." *Id.* at 901.[1]

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

b. 2019 DNA Testing Motion

On June 14, 2019, Gutierrez again sought DNA testing under a revised version of Chapter 64.[2] Dkt. No. 45 at 12-13. Judge Euresti granted the request for DNA testing on June 20, 2019 and his order was filed by the Clerk of the Court at 9:09 a.m. On June 27, 2019, two orders were

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

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

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

Appendix U

V. Federal Court Proceedings

a. District Court Proceedings

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

- Granted Defendants' motion to dismiss for lack of subject matter jurisdiction all claims which seek relief or relitigation of the CCA's denial of DNA testing as barred by the *Rooker-Feldman* doctrine.

- Granted Defendants' motion to dismiss Gutierrez's Eighth Amendment Claims for failure to state a claim upon which relief can be granted in a § 1983 action.

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

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

- Denied Defendants' motion to dismiss based on Eleventh Amendment immunity.

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

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

- Denied Defendants' motion to dismiss due to issue preclusion.

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

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

- Reserved its decision on Gutierrez's motion to stay execution.

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

b. Fifth Circuit Ruling

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

Turning to the execution-chamber claims, the Fifth Circuit applied *Turner* to Gutierrez's Establishment Clause claim and concluded Gutierrez failed to make a strong showing of likelihood of success on the merits in establishing that TDCJ's execution policy is not reasonably related to legitimate penological interests. *Gutierrez v. Saenz*, 818 F. App'x at 313 (citing *Turner v. Safley*, 482 U.S. 78 (1987)). The Fifth Circuit held that Gutierrez's impending death does not amount to a showing of irreparable injury, "given the extent of Gutierrez's litigation and re-litigation." *Id.* at 314. The Court concluded all four stay factors did not weigh in Gutierrez's favor and vacated the stay. *Id.*

c. Supreme Court GVR

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

On January 25, 2021, the Supreme Court granted Gutierrez's petition for a writ of certiorari, it vacated the Fifth Circuit's June 12, 2020 order granting the motion to vacate the stay of execution in this case, and remanded to the Fifth Circuit with instructions to remand the case to the District Court for "for further and prompt consideration of the merits of petitioner's underlying claims regarding the presence of a spiritual advisor in the execution chamber in light of the District Court's November 24, 2020 findings of fact." *Gutierrez v. Saenz*, No. 19-8695, 2021 WL 231538, at *1 (U.S. Jan. 25, 2021). In

its order, the Supreme Court stated that "[a]lthough this Court's stay of execution shall terminate upon the sending down of the judgment of this Court, the disposition of the petition for a writ of certiorari is without prejudice to a renewed application regarding a stay of execution should petitioner's execution be rescheduled before resolution of his claims regarding the presence of a spiritual advisor in the execution chamber." *Id.*

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

VI. Post-Conviction Laws in Texas

a. Article 11.071

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

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

Appendix U

[. . .]

> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Id.

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

In *Sawyer v. Whitley*, the Court recognized the importance of being able to challenge the absence of aggravating factors in post-conviction proceedings to demonstrate a person's innocence of the sentence of death. *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992). "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Id.*

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

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

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

b. Chapter 64

Chapter 64 grants a right to DNA testing. Tex. Code Crim. Proc. Ann. art. 64. The statute's motion requirements allow for testing of biological material that was not previously subject to DNA testing or was subject to testing but can be subject to newer testing techniques. Tex. Code Crim. Proc. Ann. art. 64.01 Motion. After 2011, this section no longer included a no-fault requirement

for a defendant to move for DNA testing. *See* Tex. Code Crim. Proc. Ann. art. 64.01 (Effective: September 1, 2007 to August 31, 2011).

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

> (a) A convicting court may order forensic DNA testing under this chapter only if:
>
> (1) the court finds that:
>
> (A) the evidence:
>
> (i) still exists and is in a condition making DNA testing possible; and
>
> (ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;
>
> (B) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and
>
> (C) identity was or is an issue in the case; and
>
> (2) the convicted person establishes by a preponderance of the evidence that:

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

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

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

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

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

VII. Legal Standard

a. Reconsideration

Although a motion to reconsider is not explicitly provided for in the Federal Rules of Civil Procedure,

under Rule 54 a Court may revise any of its orders or other decision before the entry of judgment adjudicating all the claims and rights of the parties. Fed. R. Civ. P. 54(b). Reconsideration of interlocutory orders are discretionary. *Zimzores v. Veterans Admin.*, 778 F.2d 264, 267 (5th Cir. 1985). The Court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981).

b. Law of the Case, Mandate Rule, GVR

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

Appendix U

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

GVRs ("Grant, Vacate, Remand") are granted by the Supreme Court to conserve its resources and to assist "the court below by flagging a particular issue that it does not appear to have fully considered" and it helps the Supreme Court in obtaining the "benefit of the lower court's insight" before the Supreme Court rules on the merits. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). "A GVR 'does 'not amount to a final determination on the merits.'" *Kenemore v. Roy*, 690 F.3d 639, 642 (5th Cir. 2012). "A GVR does not bind the lower court to which the case is remanded; that court is free to determine whether its original decision is still correct in light of the changed circumstances or whether a different result is more appropriate." *Id.*

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

(5th Cir. 1987) (citing *Lebus v. Seafarer's International Union, Etc.*, 398 F.2d 281 (5th Cir.1968)).

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

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

DNA testing is a powerful tool in the criminal justice system and states are experimenting with the challenges and opportunities posed by DNA evidence. *Osborne*, 557 U.S. 52, 62 (2009). The Supreme Court decided in *Osborne* to not constitutionalize the area of DNA testing so as to not "short-circuit what looks to be a prompt and considered legislative response" from the states in this

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

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

To determine if a procedure violates procedural due process a court looks to the standards of the common law as they existed at the time of adoption of the Fifth and Fourteenth Amendment. *Patterson v. New York*, 432 U.S. 197, 202 (1977). Additionally, a procedure should not offend a deeply rooted principle of justice of the American people. *Id.* Widespread acceptance or rejection among the

states may indicate whether procedure is contrary to the conscience of the people. *Id.* The Court in *Osborne* found "nothing inadequate" with Alaska's postconviction relief in general or its DNA testing procedures. *Osborne*, 557 U.S. at 69-70. The Court noted that Alaska's procedures requiring evidence to be newly available, diligently pursued and sufficiently material are similar to federal law and the law of other states and are not inconsistent with the conscience of the people or fundamental fairness. *Id.* at 70. The Court held Alaska's constitutionally created right of DNA access provided additional protection to parties who may not be able to seek testing under statute. *Id.* The *Osborne* Court noted that exhaustion of a state law remedy is not required but can be useful to demonstrate that the procedures do not work in practice. *Id.* at 71.

Circuit courts addressing § 1983 DNA complaints have encountered facial and "as-applied" procedural Due Process claims. An as-applied challenge is not permissible if used to collaterally attack the state-court judgment. *McKithen v. Brown*, 481 F.3d 89, 98-99 (2d Cir. 2007) ("[B]y bringing an as-applied challenge, [Plaintiff] is asking the federal district court to review the validity of the state court judgment"); *Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257, 1263 (11th Cir. 2012) (holding that the *Rooker-Feldman* doctrine bars Plaintiff's as applied procedural due process attack on the state court judgment); *Wade v. Monroe Cty. Dist. Attorney*, 800 F. App'x 114, 119 (3d Cir. 2020) (reversing because "the state court entered a ruling based upon Wade's situation, and made no broad pronouncement about how the statute should be construed in all cases"). Instead, an as-applied

challenge is permissible so far as it illuminates the authoritative construction of a state law to determine constitutional adequacy. *Morrison v. Peterson*, 809 F.3d 1059, 1070 (9th Cir. 2015) (finding plaintiff's as-applied challenge is permissible and "merely argues a defect that is not apparent from the face of the statute"). The Second Circuit approved of a plaintiff's as-applied challenge and reinstated a jury verdict which determined plaintiff was deprived of procedural due process by the city's poor evidence handling system. *Newton v. City of New York*, 779 F.3d 140, 159 (2d Cir. 2015).

In unpublished opinions, the Fifth Circuit has repeatedly identified Article 64 of the Texas Code of Criminal Procedure as a substantive right created by the state for post-conviction DNA testing. "Texas has created a right to post-conviction DNA testing in Article 64 of the Texas Code of Criminal Procedure. Thus, '[w]hile there is no freestanding right for a convicted defendant to obtain evidence for postconviction DNA testing, Texas has created such a right, and, as a result, the state[-]provided procedures must be adequate to protect the substantive rights provided.'" *Emerson v. Thaler*, 544 F. App'x 325, 327-28 (5th Cir. 2013) (quoting *Elam v. Lykos*, 470 F. App'x. 275, 276 (5th Cir. 2012)).

d. Procedural Due Process and *Medina*

The protections of procedural due process have "limited operation" and the Supreme Court has construed the category of infractions that violate fundamental fairness "very narrowly." *Medina*, 505 U.S. at 443. The

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

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

VIII. Analysis

a. Motion for Reconsideration

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

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

b. Fifth Circuit's Ruling

In vacating this Court's stay of execution, the Fifth Circuit ruled that, as a matter of law, Chapter 64's

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

The Fifth Circuit's decision attempted to reach a conclusion on the merits of the DNA testing motion under Texas law. It concluded that Gutierrez failed to show "how the DNA testing he requests would be 'sufficiently material' to negate his guilt thus justifying the pursuit of DNA testing" under Chapter 64 of Texas law. *Gutierrez v. Saenz*, 818 F. App'x at 314-15. The Fifth Circuit determined that under Chapter 64, Gutierrez had not shown by a preponderance of the evidence that he would not have been convicted of the death penalty if exculpatory results were obtained, and therefore he cannot prevail. *Id.*

This conclusion about a fundamental issue is clearly erroneous as a matter of law. The Fifth Circuit did not have jurisdiction to rule on Gutierrez's DNA testing motion because Gutierrez's DNA testing motion reached a merits determination in the highest criminal court in the state of Texas. *See* Dkt. 48 at 11; *Gutierrez v.*

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).

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:

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

---

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

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

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

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

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.

Appendix U

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 U

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

CAUSE NO. 98-CR-1391-A

IN RE:

RUBEN GUTIERREZ

ORDER GRANTING THE STATE'S PLEA TO THE JURISDICITON

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

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

Entered on this _____ day of _____, 2021.

_____
Honorable Judge Presiding

Appendix V – Order of the District Court of Cameron County, Texas Denying Motion to Test Forensic DNA Evidence (June 27, 2019)

DISTRICT COURT OF TEXAS
107TH JUDICIAL DISTRICT
CAMERON COUNTY

Cause No. 98-CR-1391-A

EX PARTE
RUBEN GUTIERREZ

Filed June 27, 2019

ORDER DENYING MOTION TO TEST FORENSIC DNA EVIDENCE

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

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

Appendix V

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

Dated: June 27, 2019 .

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

Appendix W – Order of the District Court of Cameron County, Texas Withdrawing Previous Order Granting Motion to Test DNA Forensic Evidence (June 27, 2019)

DISTRICT COURT OF TEXAS
107TH JUDICIAL DISTRICT
CAMERON COUNTY

Cause No. 98-CR-1391-A

EX PARTE
RUBEN GUTIERREZ

Filed June 27, 2019

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

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

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

IT IS THEREFORE ORDERED that the previous ORDER granting Ruben Gutierrez Request for Forensic DNA Testing is hereby WITHDRAWN and it is further

ordered the parties may respond to the other parties requests and/or responses.

Dated: June 27, 2019 .

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

Appendix X – Order of the District Court of Cameron County, Texas Granting DNA Testing (June 20, 2019)

Cause No.-98-CR-1391-A

Ex parte Ruben Gutierrez, Applicant

ORDER

This Court hereby ORDERS:

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

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

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

Signed this 20th day of June, 2019

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

Appendix X

Filed 9:09 o'clock AM
ERIC GARZA - DISTRICT CLERK

DISTRICT COURT OF CAMERON
COUNTY, TEXAS
By /S/_____

Appendix Y – Motion for Post-Conviction DNA Testing Pursuant to Chapter 64, District Court of Cameron County (June 14, 2019)

IN THE 107TH DISTRICT COURT
OF CAMERON COUNTY, TEXAS

Cause No.–98–CR–1391–A

EX PARTE RUBEN GUTIERREZ,

Applicant.

Filed June 14, 2019

MOTION FOR POST-CONVICTION DNA TESTING PURSUANT TO CHAPTER 64

Pursuant to Chapter 64 of the Texas Code of Criminal Procedure, Ruben Gutierrez, through undersigned counsel, hereby moves for deoxyribonucleic acid ("DNA") testing of the fingernail scrapings collected from the victim in this case; the nightgown, robe, and slip collected from the victim; a hair found in the victim's hand; blood samples collected from the victim's bathroom, a raincoat located in Avel Cuellar's bedroom, and the sofa in the victim's living room; as well as clothing collected from Avel Cuellar by police in the course of their investigation. *See* Tex. Crim. Proc. Code. Ann. § 64.01-64.04 (West).[1]

1. As required by Article 64.01(a-1), an affidavit sworn to by Mr. Gutierrez containing a statement of fact in support of this motion is attached as Ex. A.

Appendix Y

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. DNA testing could identify the actual perpetrator(s) of this murder. Had exculpatory DNA evidence been presented to the jurors, they would not have convicted Mr. Gutierrez of this crime. None of the items collected during the investigation of this case have been subjected to DNA testing.

Mr. Gutierrez has been requesting DNA testing for nearly a decade. In the most recent litigation of this issue in 2016, the District Attorney did not oppose the request. In its response to Mr. Gutierrez's motion, the District Attorney stated "Because of the nature of the punishment assessed against the Defendant, and further because of the nature of the allegations in Defendant's Motion for Miscellaneous Relief, the State now will not oppose the request for testing, but neither does the State agree to said relief." State's Response to Defendant's Motion for Miscellaneous Relief (Feb 2, 2016). However, on April 11, 2018, this Court denied the request.

Mr. Gutierrez last requested DNA testing under Chapter 64 in 2010. Since then the Texas legislature amended Chapter 64 and eliminated the "at fault" provision which prohibited testing to someone who strategically chose not to test biological material at trial. Tex. Crim. Proc. Code. Ann. § 64.01-64.04 (West). The "at fault" provision was one of the main reasons the CCA denied Mr. Gutierrez relief on his prior motion. *Ex parte Gutierrez,* 337 S.W.3d 883, 895 (Tex. Crim. App. 2011).

Furthermore, as will be discussed at length, the current motion significantly changes Mr. Gutierrez's posture because it includes (1) a request to test new and additional items, combined with (2) new expert evidence regarding the probative value of the requested DNA testing and the unreliability of the witness identification in the case, as well as (3) new declarations from trial witnesses and the victim's family. The "law of the case" doctrine does not apply to Mr. Gutierrez's current motion because the issues presented in this motion are different from those in his previous motion, and the prior decision by the CCA was clearly erroneous in light of the new evidence and is inconsistent with the current Chapter 64 statute. Both the change in law and the new information make clear that Mr. Gutierrez is now entitled to testing under Chapter 64. As discussed below and in the attached supporting materials, all of the items Mr. Gutierrez seeks to have tested are sources of biological material that can yield a DNA profile or profiles that would exculpate him.

I. PRELIMINARY STATEMENT

In 1999, in the 107th Judicial District Court of Cameron County, Texas, Ruben Gutierrez was convicted and sentenced to death for the murder of Escolastica Harrison. No physical or forensic evidence connected Mr. Gutierrez to the murder and none of the crime scene evidence has ever been tested.

"Modern DNA testing can provide powerful new evidence unlike anything known before." *Dist. Attorney's Office v. Osborne,* 557 U.S. 53, 62 (2009). The Texas

legislature has recognized the utility of DNA evidence in the post-conviction context, and passed Chapter 64 in 2001 because prior laws relating to the use of biological evidence, "particularly evidence containing DNA, have been surpassed by developments in the science of biological evidence and other related technologies, unnecessarily inhibiting the use of such evidence." Tex. Bill Analysis, S.B. 3, Jan. 25, 2001.

Chapter 64.03 sets out the circumstances under which a court shall order 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.

Tex. Crim. Proc. Code. Ann. § 64.01-64.04 (West).

This motion is proper and should be granted. If there are questions regarding whether the evidence still exists and is in a condition making DNA testing possible, Mr. Gutierrez requests a hearing on those issues.

II. PROCEDURAL HISTORY

The jury found Mr. Gutierrez guilty of capital murder on April 15, 1999. On May 12, 1999, he was sentenced to death. In 2002, a divided Court of Criminal Appeals ("CCA") affirmed the conviction and sentence. *Gutierrez v. State,* No. 73,462 (Tex. Crim. App. Jan. 16, 2002). Mr. Gutierrez's direct appeal counsel did not seek certiorari.

Mr. Gutierrez sought state habeas relief in the Texas courts. After the trial court initially denied relief, the CCA denied all but two claims for relief and remanded the case to the trial court to supplement the record with affidavits from trial and appellate counsel. *Ex parte Gutierrez,* No. 59,552-01, 2004 WL 7330936, at *1 (Tex. Crim. App. Sept. 15, 2004). Following the remand and supplementation, the CCA denied the remaining claims. *Ex parte Gutierrez,* No. 59,552-01, 2008 WL 2059277, at *1 (Tex. Crim. App. May 14, 2008).

Mr. Gutierrez sought appointment of counsel and, on January 26, 2009, filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Texas. *See Gutierrez v. Stephens,* No. 1:09-cv-00022 (S.D. Tex.) (Docket No. 1). Mr. Gutierrez was represented by attorney Margaret Schmucker. Mr. Gutierrez then sought, and the court granted, a stay and

abeyance so that Mr. Gutierrez could file a successive state writ to exhaust additional claims. *Id.* (Docket No. 10).

Upon returning to state court, Mr. Gutierrez sought the appointment of counsel and DNA testing pursuant to an earlier version of Texas Code of Criminal Procedure Chapter 64. The State opposed. The trial court initially denied only the motion for appointment of counsel and Mr. Gutierrez appealed. The CCA dismissed the appeal for lack of jurisdiction because the denial of counsel was found not to be an immediately appealable order. *Gutierrez v. State,* 307 S.W.3d 318,319 (Tex. Crim. App. 2010). This Court subsequently denied the motion for DNA testing under Chapter 64 and Mr. Gutierrez appealed the denial of counsel and post-conviction DNA testing. The CCA affirmed, finding that Mr. Gutierrez was not entitled to the appointment of counsel nor to post-conviction DNA testing under Chapter 64. *Ex parte Gutierrez,* 337 S.W.3d 883, 886 (Tex. Crim. App. 2011).

The CCA's 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, has since been removed from the statute. *See* Tex. Crim. Proc. Code Ann. § 64 (West). Mr. Gutierrez has fought for nearly a decade to have the forensic evidence in his case DNA-tested – including fingernail scrapings, blood stains, and hair evidence. To date, none of it has been tested.

After the case returned to federal court, the district court granted the State's Motion for Summary Judgment

and dismissed the petition. *See Gutierrez v. Stephens,* No. 1:09-cv-00022 (S.D. Tex.) (Docket No. 44). On November 13, 2014, the Fifth Circuit denied Mr. Gutierrez's request for a certificate of appealability. *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 trial court seeking independent DNA testing of potentially exculpatory material under *Brady v. Maryland,* 373 U.S. 83, 87 (1963). In their Response to Defendant's Motion for Miscellaneous Relief filed on February 2, 2016, 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, 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. l:09-cv-00022 (S.D. Tex.) (Docket 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 in this case. *Id.* (Docket No. 56). On August 6, 2018, the district court granted the motion to withdraw and appointed Richard W. Rogers, III, as counsel. *Id.* (Docket No. 63). On August 14, 2018, the court appointed

the Federal Community Defender Office for the Eastern District of Pennsylvania as co-counsel. *Id.* (Docket No. 71).

On August 15, 2018, Mr. Gutierrez filed a motion for stay of execution in the district court. *Id.* (Docket No. 73). Respondent opposed the motion, arguing that the district court lacked jurisdiction and that Mr. Gutierrez was not entitled to a stay. *Id.* (Docket No. 74). The district court granted the stay of execution on August 22, 2018. *Id.* (Docket No. 79). The State appealed. The Fifth Circuit Court of Appeals denied the State's motion to vacate the stay on September 10, 2018.

On August 23, 2018, the day after the stay was granted and just over one week after the FCDO was appointed, the FCDO sent Public Information Act requests to the Brownsville Police Department, the Texas Department of Public Safety, and the Cameron County District Attorney's Office requesting all of the records, files, and evidence connected to this case. In October 2018, attorneys from the FCDO met with representatives from the Cameron County District Attorney's Office and followed up with this request, and was told that the Brownsville Police Department and Cameron County District Attorney's Office would follow up the FCDO to make these files and evidence available for their review. Having not heard anything from the Cameron County District Attorney's Office, the FCDO followed up with the request to view the files and evidence in March 2019.

On April 30, 2019, the Cameron County District Attorney's office filed a motion to set a new execution date

ninety-one days out, before any of the requested files and evidence were made available to the FCDO. That motion was granted by Judge Euresti on May 1, 2019.

The FCDO again followed up with the District Attorney's Office on May 1, 2019, and on May 21, 2019, the District Attorney's Office made several boxes available for the FCDO to review at the Brownsville Police Department and the Cameron County District Attorney's Office which were reviewed on that day. Based on the review of those materials and the information gathered, the FCDO was able to conduct additional investigation into several post-convictions matters, although several items requested remain outstanding, including the majority of the discovery from trial, the files from the assigned detectives, and the complete files of the pathologist. The present motion is filed just over three weeks after the FCDO was able to review the partial files that were made available by the Brownsville Police Department and the Cameron County District Attorney's Office.

On June 8, 2019, Mr. Gutierrez filed an "Agreed-Upon Motion to Recall Order Setting Execution Date and Warrant of Execution" due to defects in the warrant.

III. FACTUAL BACKGROUND

Ruben Gutierrez did not kill Escolastica Harrison, and since his arrest he has steadfastly denied participating in the assault on Ms. Harrison. Mr. Gutierrez was not inside Ms. Harrison's home the night of the murder, nor did he

know of any plan to assault or kill her. The identity of the real killer or killers remains at issue in this case.

There is evidence in the possession of the State that can prove who actually killed Ms. Harrison. The State's medical examiner testified at trial that Ms. Harrison fought her attacker with her hands, and that biological evidence—namely scrapings taken from underneath her fingernails—was preserved as evidence. 19 RR 245.[2] Additionally, the clothes Ms. Harrison wore that night, along with the bloody clothes taken from her nephew, Avel Cuellar, can be tested and can point to the person or persons who actually killed her. The blood stains recovered from the house can also identify the assailants.

The jurors, when deciding if Mr. Gutierrez was guilty of capital murder, never heard the results of any testing of this forensic evidence. This is because the State never tested this evidence.

The State presented the following evidence at trial. Avel Cuellar, Ramiro Martinez, Crispin Villarreal, Andres Villarreal, and Ruben Gutierrez were drinking buddies who regularly hung out at Mr. Cuellar's residence. 18 RR 17-18. Mr. Cuellar lived with his aunt, Escolastica Harrison, in the Harrison Mobile Home Park in Brownsville, Texas. *Id.* at 74-75. Mr. Cuellar often boasted about how much money Ms. Harrison had in the home in front of his friends after he had been drinking. *Id.* at 46. Ms. Harrison kept

2. The trial testimony will be cited as volume number, followed by RR (Reporter's Record) followed by the page number.

large sums of money in suitcases in her bedroom. *Id.* at 22-24, 51. Mr. Gutierrez knew Ms. Harrison through Mr. Cuellar and the two had an amicable relationship. 17 RR 91-92, 94.

At around 2:30 p.m. on Saturday, September 5, 1998, Mr. Cuellar and Mr. Martinez saw Mr. Gutierrez and a companion near the Cuellar/Harrison residence just as they were leaving for the VFW hall to drink. 17 RR 102, 107-08, 264. They spoke briefly. *Id.* at 109, 265. Mr. Gutierrez then left. Mr. Cuellar and Mr. Martinez stopped at a pawn shop and then proceeded to the VFW hall. *Id.* at 111.

According to Crispin Villarreal, at around 4:00 p.m. that same afternoon he saw Mr. Gutierrez near the Cuellar/Harrison residence. 18 RR 36-37, 53.[3] Around 6:00 p.m. that evening, Julio Lopez observed two men near the Cuellar/Harrison residence: one near the front entrance, and the other near the rear entrance. *Id.* at 69-71. Mr. Lopez did not know either of these men, although he saw the face of one of the men for about three seconds from approximately sixteen to twenty-three feet away. *Id.* at 83-87. Mr. Lopez picked Mr. Gutierrez out of a photo array six days later but was unable to make an in-court identification of Mr. Gutierrez, and actually identified

3. While Crispin Villareal testified that he saw Mr. Gutierrez by Ms. Harrison's house at trial, he has since changed his testimony, including when he allegedly saw Mr. Gutierrez and where he was located when he claims he saw him. Decl. of Rachel Primo, Ex. DD.

another man in the courtroom as the man he saw that day. *Id.* at 72, 77-78.[4]

Avel Cuellar testified that he telephoned Harrison from the VFW hall around 7:00 p.m., but did not receive an answer. 17 RR 112, 137, 154. Mr. Cuellar then left the VFW hall for an hour or so to visit some family who lived in a different area of town. *Id.* at 111. When he returned to the VFW hall, he gave the waitress a $100 bill as a tip. 19 RR 96. Mr. Cuellar's salary at the time was $150 per week. 17 RR 101.

From approximately 8:00 p.m. until 10:30 p.m. on the evening of the murder, Mr. Gutierrez was at home with Alex Angeles, George Trevino, Joey "Chuco" Maldonado, and Angie Gutierrez. 20 RR 8-9, 26, 33-35. Mr. Angeles and Mr. Trevino left to go to a nightclub, Pescadores, and Mr. Maldonado went home to change clothes. *Id.* at 9-10. Mr. Gutierrez arrived at the club around 11:30 p.m. accompanied by Maldonado. *Id.* Mr. Gutierrez had little or no money with him. *Id.* at 11, 23-24, 29.

Avel Cuellar claimed that he returned home from drinking sometime after 1:00 a.m. the following morning with a hamburger and coke for Harrison. 17 RR 113-16. The front door was unlocked, and Ms. Harrison was not in her bed. *Id.* Mr. Cuellar claimed that he began looking

4. As will be discussed in Section V.C.1 *infra,* identification expert Professor Jennifer Dysart casts doubt on Mr. Lopez's ability to make an accurate identification as well as the reliability of the photo array procedure used by the detectives at the time of Mr. Gutierrez's trial.

for Ms. Harrison. *Id.* He went to look for her at the home of a friend, Edilia Vento. *Id.* at 163-64. He said that he used the public address system for the mobile home park to call for her. *Id.* at 117. When Ms. Harrison did not return or respond, Mr. Cuellar stated that he looked in the house and found Ms. Harrison lying on her bedroom floor between the doorway and the bed. *Id.* at 114, 117. Mr. Cuellar called his Uncle Auggie and Aunt Judy, who called 911. *Id.* at 119-20. Police officers arrived a short time later. *Id.* at 121-22. Mr. Cuellar was waiting for them inside the trailer park office. *Id.* at 122.

Investigation of the crime revealed an unidentified footprint in blood, 19 RR 94-96, 107; an unidentified hair wrapped around a finger in Ms. Harrison's hand, *id.* at 263; and unidentified blood stains in a bathroom in the trailer, on the screen door to the back portion of the residence, and on the couch in the office, 18 RR 249-50. Ms. Harrison's bedroom was in disarray, but it was unclear whether this was normal or whether it had been ransacked. *Id.* at 106, 248-49. Ms. Harrison's money was missing. *Id.* at 263-64.

The medical examiner's autopsy revealed that Ms. Harrison had suffered several puncture wounds but had died from a blow to the head. 19 RR 224-42, 266-67. The medical examiner believed the puncture wounds had been made by a flat-head screwdriver and an unknown second object. *Id.* He did not estimate Ms. Harrison's time of death.

On September 9, 1998, Mr. Gutierrez voluntarily went to the police station to make a statement. He informed

police that he was with a friend on September 4, 1998, that he saw Mr. Cuellar and Mr. Martinez that afternoon, and that on September 5 he had been with friends. 18 RR306.

A few days later, police arrested Rene Garcia after he was observed spending unusually large sums of money. 19 RR 49-50. Police recovered cash and merchandise from Mr. Garcia, including over $50,000 buried under a relative's chicken coop. *Id.* Mr. Garcia gave police a statement.[5] 18 RR 284-86. Police also arrested a man named Pedro Gracia and recovered stolen cash and merchandise from his home. *Id.* Pedro Gracia also gave police a statement.[6] *Id.*

On September 13, police arrested Mr. Gutierrez. Immediately following his arrest, Mr. Gutierrez gave two consecutive statements to police. In both statements, Mr. Gutierrez denied killing Ms. Harrison and denied being in the home, stating only that he knew about the plan to steal Ms. Harrison's money, that he waited outside away from the property, and that he shared in the proceeds. *See* Police Statements 1 & 2 of Ruben Gutierrez (Sept. 13, 1998), Ex. B. In the second statement, he added the fact that Avel Cuellar had stolen from Ms. Harrison in the past,

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5. Rene Garcia gave a total of four statements to police after he was arrested. In the first two, he claimed he was the getaway driver, and in the third and fourth he said he was inside the house. None of his statements were introduced at Mr. Gutierrez's trial.

6. Pedro Gracia gave a statement to police claiming he was the getaway driver. His statement was not introduced at Mr. Gutierrez's trial.

and that Mr. Cuellar had conspired with Mr. Gutierrez to steal from her on September 5, 1998. *Id.* (statement 2). On September 14, Mr. Gutierrez made a third statement, again denying that he killed or touched Ms. Harrison in any way but stating that he was inside the house. Police Statement 3 of Ruben Gutierrez (Sept. 14, 1998), Ex. C.[7] Mr. Gutierrez later led police to a wooded area where they recovered a suitcase with money from Ms. Harrison's house. Police also recovered approximately $52,000 in cash from the home of Mr. Gutierrez's cousin-in-law, Juan Pablo Campos. 18 RR 183. Police did not recover a screwdriver or similar weapon alleged to have been used in the attack.

IV. THIS MOTION MEETS THE REQUIREMENTS OF ARTICLE 64.01.

Chapter 64 allows a convicted person to move for DNA testing of evidence only if it contains biological material, defined by the statute as "an item that is in possession of the state that contains blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing." Tex. Crim. Proc. Code Ann. 64.0l(a) (West). Additionally, the evidence must have been "secured in relation to the offense that is the basis of the challenged conviction," must have been in the possession of the State during trial, and must not have previously

7. As will be discussed in Section V.C.3 *infra,* Mr. Gutierrez has always maintained that these statements are false confessions and a product of coercion by police.

been subjected to DNA testing. Tex. Crim. Proc. Code Ann. § 64 (West).[8]

All of the evidence that Mr. Gutierrez is seeking to have tested was collected by one of the Brownsville detectives involved with Ms. Harrison's case, or the pathologist, Dr. Lawrence Dahm, who conducted the autopsy, within hours after the body was discovered. 19 RR 112, 218. The evidence was all properly preserved without being tested and then transferred to the Texas Department of Public Safety. *See* Texas Department of Public Safety Report ("DPS Report"), Ex. D. The materials were then returned to the Brownsville Police Department. Approximately three weeks ago, with the permission of the Cameron County District Attorney's Office, current counsel went to the Brownsville Police Department and viewed these items in their preserved state. Additionally, recent scientific advances in DNA extraction technology means that complete DNA profiles can be obtained even from old or degraded samples. Decl. of Huma Nasir, MS, F-ABC, Ex. AA, ¶ 14.

A. Escolastica Harrison's Clothing

At the autopsy, Detective Hernandez collected the victim's nightgown from Dr. Dahm. 19 RR 112. He also collected her undergarments and a slip. *Id.* at 127. In

8. Evidence previously subjected to DNA testing can be the subject of a Chapter 64 motion if such evidence "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 previous tests." Tex. Crim. Proc. Code Ann. § 64 (West).

his testimony, Detective Hernandez identified State's Exhibits 67, 68, and 69 as the items of clothing the victim was wearing on the night she died and which he collected from Dr. Dahm at the autopsy. *Id.* at 113. The State introduced this evidence at trial, and current counsel recently viewed this evidence at the Brownsville Police Department with the chain of custody undisturbed. *See* Photographs of Victim's Clothing, Ex. E.

In Mr. Gutierrez's previous motion for DNA testing, he did not request that Ms. Harrison's clothing items be tested, so the CCA did not consider the probative value of such testing. Ms. Harrison's clothes have a unique value for discovering the identity of the killer(s). Ms. Harrison died only after a struggle with her assailant(s), as indicated by the defensive wounds on her hands and arms. 19 RR 248. The prosecution's theory at trial was that her assailants stabbed her with two screwdrivers. Given the weapons used, the assailants would have needed to be very close to her. Decl. of Professor Timothy M. Palmbach, Ex. F, ¶ 10; Ex. AA, ¶ 22. Simply by touching an item, individuals leave behind skin cells that can yield a DNA profile when tested. *Id.* One type of biological evidence Chapter 64 contemplates as being suitable for testing consists of "skin tissue or cells." Tex. Crim. Proc. Code Ann. § 64.0l(a)(1) (West). DNA can be "recovered from epithelial (skin) cells left behind when a person makes contact with an object. During the commission of a crime, an assailant can leave touch DNA samples behind . . . on a victim's clothing or other items implicated in the crime." *Bean v. State,* 373 P.3d 372, 377 (Wyo. 2016); *see also Figueroa*

v. State, 480 S.W.3d 888, 891 (Ark. 2016) (reversing conviction because trial court refused adjournment to allow defendant to compare touch DNA profile found on victim's shirt to that of an alternate suspect).

Recent advances in DNA technology, including improved collection methods for removing skin cells from surfaces, have increased the likelihood of obtaining a profile from even a small amount of biological material. Decl. of Dr. R. Thomas Libby, Ex. G, ¶ 16; Ex. AA, ¶ 14. Thus, there is a reasonable likelihood of obtaining a DNA profile from touch DNA left on the victim's nightgown by the perpetrator(s), and that an examination of the nightgown would detect trace amounts of DNA left behind by the assailant(s). *Id.* A qualified laboratory could isolate any cells left behind by the assailant and develop a DNA profile of that assailant. *Id.*, ¶ 15; Ex. AA, ¶ 22.

B. The Fingernail Scrapings

While performing the autopsy, Dr. Dahm collected biological material underneath Ms. Harrison's fingernails and gave them to Detective Hernandez as part of the rape examination.[9] Final Pathology Report of Dr. Dahm, Ex. H, p.3. He did so because Ms. Harrison had defensive wounds on her hands and forearms, and the fingernail scrapings could determine the identity of the person or people who

9. A rape or sexual assault examination was conducted and biological material was collected and preserved, but no allegations of rape or sexual assault were made in this case.

attacked her. 19 RR 263-64. As the CCA recognized, the fingernail scrapings "might conceivably contain DNA from the murderers." *Gutierrez,* 337 S.W.3d at 900.

The State confirmed that the fingernail scrapings are in the possession of the Brownsville Police Department. State's Response to Motion for Miscellaneous Relief (Feb. 2, 2016). Current counsel has viewed the sexual assault kit which contains these fingernail scrapings at the Brownsville Police Department and can verify that the kit remains sealed and the chain of custody undisturbed. *See* Photographs of Sexual Assault Kit, Ex. I.

Significantly, a March 17, 1999 report from the Texas Department of Public Safety to Antonio Flores of the Brownsville Police Department states that "apparent blood was detected in the victim's fingernail scrapings." Ex. D at 3. While all fingernail scrapings in an assault case are potentially probative, the presence of blood in these scrapings makes them even more likely to contain probative biological evidence. *See* Ex. F, ¶ 8; Ex. AA, ¶ 22.

C. Avel Cuellar's Clothing

Detective David Garcia, the first officer on the scene of the crime, collected Avel Cuellar's clothing. 17 RR 64. The DPS Report lists Mr. Cuellar's jeans and shirt as having been "submitted under laboratory case# L3M-40583 on September 10, 1998, in person by Rey J. Pineda." Ex. D at 2. Current counsel recently viewed this evidence listed as belonging to suspect Avel Cuellar at the Brownsville

Police Department with the chain of custody undisturbed. *See* Photograph of Avel Cuellar's Clothing, Ex. J.

The DPS report indicates that Avel Cuellar's shirt contained "apparent blood" and that "no further testing was done." Ex. D at 2. DNA testing can be conducted on the blood stains found on Cuellar's shirt. Ex. F ¶ 7; Ex. G ¶10. Specifically, testing can be done to see if any touch DNA was deposited on to Mr. Cuellar's clothing by any of the co-assailants. Ex. AA, ¶ 25. Because it is unclear whether any testing of the evidence was done beyond a preliminary visual inspection, Mr. Gutierrez requests that his forensic expert be given access to the jeans to examine them for blood stains or other biological material. If such materials are detected, Mr. Gutierrez requests that they be subjected to DNA testing.

In denying Mr. Gutierrez's last motion for DNA testing, the CCA stated that there would be nothing probative about testing Avel Cuellar's clothing because there was no reason to believe any DNA from any of the murderers would be on his clothing. *Gutierrez,* 337 S.W.3d at 900. However, the CCA did not have before it the strong evidence presented in this motion that points to Avel Cuellar himself as the murderer, nor did the court consider the significance of how the blood appeared on his shirt. *See* Section V.C.4, *infra.*

DPS identified blood on the shirt Mr. 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 Mr. 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. Ex. F, ¶ 6; Ex. AA, ¶ 25. If the stains are spatter stains, that would provide support for the inference that Mr. Cuellar committed the murder.

D. The Blood Stains Collected from the Victim's House

When Detective Garcia arrived at the crime scene, he observed blood in the toilet in the rear of the house and blood stains next to the toilet. 17 RR 54-56. Detective Juan Hernandez, a crime scene investigator with the Brownsville Police Department, collected blood from "a raincoat in one of the bedrooms[,] . . . the lid of the water tank, also on the exterior side of the window screen." 19 RR 116. He also collected blood stains from the couch. *Id.* Current counsel recently viewed the envelopes containing the above-referenced blood samples at the Brownsville Police Department, which has maintained them without any disruption to the chain of custody. *See* Photographs of Preserved Blood Evidence, Ex. K.

Police in this case specifically sought out blood stains for collection. During trial, Avel Cuellar testified that the blood found in the bathroom was in Ms. Harrison's bathroom, not Mr. Cuellar's bathroom, and when he was asked if he knew how it got there, he answered, "It might

have been whoever killed my aunt." 17 RR 207-08. When the CCA denied Mr. Gutierrez's previous motion for DNA testing, the court incorrectly stated that the blood stains were found in Mr. Cuellar's bathroom, so they would have no probative value. *Gutierrez,* 337 S.W.3d at 900. As the trial testimony establishes, however, these blood stains were actually found in Ms. Harrison's bathroom. 17 RR 207-08.

The blood collected is biological evidence and suitable for DNA testing. Any profiles obtained from the blood could be compared to known samples of the victim, Avel Cuellar, Rene Garcia, Pedro Gracia, and Ruben Gutierrez. Ex. F, ¶ 7; Ex. AA, ¶ 23. The presence of any two persons' blood other than Ruben Gutierrez's would support the conclusion that Mr. Gutierrez was not inside Ms. Harrison's home that night.

E. The Hair in the Victim's Hand

While conducting the autopsy, Dr. Dahm found "a single loose piece of hair around Escolastica Harrison's third digit upper left hand." 19 RR 263. He turned that hair over to the police. *Id.* Dr. Dahm opined that the hair could be vital and that it was a "distinct possibility" a person who was defending herself "would maybe grab [the assailant's] hair and then have that hair on his or her hand." *Id.* at 264. Chapter 64 lists hair, like blood and fingernail scrapings, as an example of biological evidence suitable for DNA testing. Even if the hair lacks a root and is therefore not suitable for STR-DNA testing, mitochondrial DNA testing would reveal a genetic profile. Ex. F, ¶ 9; Ex. G, ¶ 15; Ex. AA, ¶ 24.

After Mr. Gutierrez filed his first Chapter 64 motion nearly a decade ago, the State "informed the trial judge that, after making inquiry and further review, it did not find that 'the single loose hair' was ever collected as evidence." *Gutierrez,* 337 S.W.3d at 897-98. This determination conflicts with the record. Dr. Dahm reported that the hair was collected as part of the sexual assault biological evidence. Ex. H, p. 3 ("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."). That evidence remains sealed and untouched at the Brownsville Police Department, *see* Ex. I, where counsel reviewed the sealed box containing it with the chain of custody undisturbed, and this explains why the State "did not find" the hair during the prior DNA motion proceedings.

V. THIS MOTION SATISFIES THE REQUIREMENTS OF ARTICLE 64.03(A)

A. The Evidence Sought to Be Tested Satisfies the Requirements Regarding Preservation and Chain of Custody.

This Court may order DNA testing pursuant to Chapter 64 if it finds that the evidence still exists in a condition making DNA testing possible and 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. Tex. Crim. Proc. Code Ann. § 64.03(a)(1)(A) (West). As discussed in detail in Section IV, each item Mr. Gutierrez seeks to test has a

pristine chain of custody established by the Brownsville Police Department.

When Mr. Gutierrez filed the motion for DNA testing under the previous version of Chapter 64, the State acknowledged that it was in possession of each of the items Mr. Gutierrez currently seeks to have tested, except for the single hair, which it did not locate. *See* State's Response to Defendant's Motion for Miscellaneous Relief (Feb. 22, 2016). The State did not raise any questions regarding the chain of custody. *Id.* In fact, the State did not oppose Mr. Gutierrez's request to have the items tested. *Id.* Current counsel have personally viewed this evidence within the past few weeks and it remains undisturbed at the Brownsville Police Department. *See* Exs. I, J, K. To the extent there are any questions about the existence, chain of custody, or condition of any of the items he seeks to test, Mr. Gutierrez requests discovery and an evidentiary hearing.

B. There Is a Reasonable Likelihood that the Evidence Contains Biological Material Suitable for DNA Testing.

To grant testing pursuant to Chapter 64, this Court must find that "there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing." Tex. Crim. Proc. Code Ann. § 64.03(a)(1)(B) (West). As discussed in detail in Section IV, Chapter 64.01 specifically names fingernail scrapings, hair, and blood as examples of biological evidence suitable for testing, as they are reasonably likely to contain biological material suitable for DNA testing.

C. Identity Is an Issue in This Case.

Chapter 64 also requires a court to find that identity is an issue before DNA testing can be ordered. Tex. Crim. Proc. Code Ann. § 64.03(a)(C) (West). One of the reasons the CCA denied Mr. Gutierrez's previous motions was that the court found that identity was not at issue based on the eyewitness identification made by Julio Lopez, Mr. Gutierrez's third statement, and the statements of Mr. Gutierrez's co-defendants.

New expert evidence casting doubt on Julio Lopez's identification, new revelations regarding deceptive conduct and misleading testimony by Detective Gilbert Garcia, a new statement from Avel Cuellar's nephew indicating Mr. Cuellar's involvement in this crime, unresolvable inconsistencies between Mr. Gutierrez's statement and the crime scene evidence, new witness statements casting doubt on the reliability of Mr. Gutierrez's statement, along with inconsistencies in the co-defendants' statements, all show that identity is indeed an issue in this case.

1. Julio Lopez's Identification Is Not Reliable.

In its opinion, the CCA credited Julio Lopez's identification of Ruben Gutierrez in a photo array as one of the main reasons identity was not an issue. *Gutierrez,* 337 S.W.3d at 894. However, there have been mistaken eyewitness identifications in over 70% of DNA Exonerations. Report of Professor Jennifer Dysart, Ex. L, p. 7. In his previous DNA motion, Mr. Gutierrez presented no expert testimony to challenge this identification, and instead

pointed to the fact that Mr. Lopez was not able to make an in-court identification of Mr. Gutierrez, but picked out someone from the gallery and a juror when asked to identify the person he saw that day. The State attempted to rehabilitate Mr. Lopez at the trial by establishing that Mr. Lopez did select Mr. Gutierrez's photo out of an array six days after the murder.

In his current motion, Mr. Gutierrez offers expert evidence to explain why Mr. Lopez's identification is not reliable. As identification expert Professor Jennifer Dysart explains:

> Over a period of decades, researchers have established that when we experience an important event, we do not simply record it in our memory as a video recorder would. The situation is much more complex. Most theoretical analyses of memory process divide it into three major stages. First, an event is perceived by a witness and information is entered into the memory system. Next, some time passes before a witness tries to remember the event. Finally, the witness tries to retrieve the information.

Id., p. 6.

In Mr. Lopez's case, he allegedly perceived the two men on September 5, 1998.[10] He did not observe anything

10. Detective Garcia actually wrote in his report that Julio and Veronica Lopez were walking home from the store and

unusual, other than one man jogging towards the back of the house, which he only later described as suspicious. There would be no reason, at that time, for Mr. Lopez to pay close attention to this or attach any significance to it in his memory. *Id.* at 9. It was not until five days later when Detective Gilbert Garcia was canvassing the neighborhood that he spoke to Mr. Lopez and Mr. Lopez attached significance to this viewing, and it was a full six days after the murder when Mr. Lopez looked at the photo array. Without knowing at the time that the event he was viewing was significant, Mr. Lopez would have no reason to record details of what he saw in his memory, undermining the reliability of the identification. *Id.*

Furthermore, Mr. Lopez had a limited opportunity to observe the two men, stating that he saw them only for "a few seconds." 18 RR 78. Although Mr. Lopez put his distance at about sixteen to twenty-three feet away, Professor Dysart explains that through investigation and the new information provided by Veronica Lopez, the sidewalk where Mr. Lopez placed himself and his sister may have been closer to sixty feet away.[11] Exhibit L, p. 9.

Scientific studies show that the duration of exposure to a person's face significantly affects eyewitness accuracy. *Id.* In one study, young adults between the ages of seventeen and twenty-five (the age of Julio Lopez at the

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observed the two men on September 6, 1998. It is unclear which day the Julio and Veronica Lopez actually saw the two men.

11. Veronica Lopez is Julio Lopez's sister and was with him at the time he allegedly saw the two men.

time) correctly identify a target in a photo array only 29% of the time when exposed to the target's face for a full twelve seconds. *Id.* They picked the wrong person 42% of the time, and were unable to pick anyone 29% of the time. *Id.* Significantly, when the target was absent from the photo array, those who viewed the target's face for 12 seconds picked someone out of the array as the target 90% of the time. *Id.* That means someone was misidentified as the target 90% of the time in the target-absent arrays. Julio Lopez was exposed to the men he saw for far less than twelve seconds according to his own testimony.

Additionally, eyewitness accuracy in a photo array selection corresponds to how accurate the description was of the person the witness saw in comparison to the person he selected in the photo array. *Id.* In this case, Mr. Lopez testified that the person he saw was about 5'6" – 5' 7". 18 RR 71-72. Mr. Lopez estimated this height because the person he saw was roughly the same height as he was. *Id.* ("About my size."). The other male was shorter than that. *Id.* Ruben Gutierrez is 5' 10" tall. *See* Prison Medical Report, Ex. M. In a 2011 academic study of DNAbased exonerations, among the 161 people who were exonerated after being mis-identified by an eyewitness, 61% of those eyewitnesses had a discrepancy between the description they gave and the wrongfully accused person who was selected in their identification procedure. *Id.*

This helps to explain why Mr. Lopez did not identify Mr. Gutierrez at trial. He had only picked a photo out of a photo array made up of head shots. *See* Photo Array, Ex. N. The photo of Mr. Gutierrez used in the array was

from 1994, when he was seventeen years old. Ex. L at p. 4. It is unsurprising that, when seeing the adult Mr. Gutierrez in real life, Mr. Lopez did not identify him as the person he saw on the day of the crime—despite the fact that Mr. Gutierrez was sitting at defense table, next to defense counsel.

Because there was no in-court identification, the State needed to rely on the photo array identification to even establish that Mr. Lopez had seen someone he identified as Ruben Gutierrez on the day of the murder. However, at that time, Texas used a photo array procedure that has since been abandoned because it was so unduly suggestive. *Id.* at 11. In 2011, Texas passed a law requiring that best practices be implemented for eyewitness identification, and that those best practices be reviewed and modified every two years by the Bill Blackwood Law Enforcement Management Institute of Texas (LEMIT). *Id.* Virtually all of the procedures Detective Gilbert Garcia used when showing Mr. Lopez the photo array have been abandoned because they are not reliable. *Id.* at 11-19.

Detective Garcia used a non-blind photo array rather than a double-blind photo array. *Id.* at 13. A double-blind photo array requires that the person administering the photo array have no idea who the suspect is, or if the subject is even present in the array, so that he or she does not consciously or subconsciously guide the witness. *Id.* "Decades of research show that people 'leak' information. Despite their best efforts, administrators who are not blind may inadvertently communicate information about the suspect. Although we typically are not aware of

subtle cues, even animals are able to pick up on these unintentional cues." *Id.* at 13-14. Detective Gilbert Garcia administered the photo array. Detective Garcia was not just involved in the case, he was the lead investigator. 19 RR 35-36. The non-blind administration casts doubt on the reliability of Julio Lopez's identification.

Mr. Lopez also testified that Detective Garcia told him to: "Pick out the guy you saw on the street that day." 18 RR 81. This is consistent with what Detective Garcia himself said he instructed, "I asked him to look at them and chose the one he saw that day." 19 RR 45. But informing a witness that police have a suspect, or failing to tell a witness that the actual perpetrator may or may not be present, implies that the perpetrator is present in the photo array. Ex. L at 16. In other words, Mr. Lopez was told, before even looking at the array, that one of the six people was the person he saw that day. LEMIT best practices, which Texas now uses, instruct the double-blind administrator to not only tell the witness that the perpetrator may or may not be present in the array, but to inform them that they (as the administrator) do not know if the person being investigated is present, and that police will continue to investigate the case whether or not an identification is made. *Id.* None of this was done with Mr. Lopez, casting further doubt on the reliability of his photo array identification, and showing that identity is indeed an issue in this case.

2. Detective Gilbert Garcia Gave False Testimony to Bolster Unreliable Identifications.

Detective Gilbert Garcia gave false testimony under oath on the witness stand during Mr. Gutierrez's trial on at least two different occasions in order to bolster unreliable identifications.[12] The falsity of this testimony was not presented to the trial court nor was it revealed to the CCA in Mr. Gutierrez's previous Motion for DNA testing.

a. Detective Garcia testified falsely about the time of death to make it appear that witnesses put Mr. Gutierrez on the scene at the time of the murder.

Detective Gilbert Garcia testified that he canvassed the neighborhood for witness several days after the murder. 19 RR 32. He stated that he "found several people that remembered seeing an individual there in the trailer park around the time that the pathologist estimated the time of death was." *Id.* at 40. He went on to say that the four people who saw Ruben Gutierrez that day were Avel Cuellar, Ramiro Martinez, Crispin Villareal, and Julio Lopez. *Id.* at 41-42.[13]

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12. Detective Gilbert Garcia also falsely stated in a police report that Avel Cuellar passed a polygraph test which he actually failed, discussed at length in Section V.C.4.e, *infra.*

13. In Section V.C.5 *infra,* Mr. Gutierrez discusses why each of these identifications is unreliable.

Appendix Y

Mr. Lopez testified that it was about 6 p.m. when he saw the two men run towards the trailer. 18 RR 69. Crispin Villereal testified that it was 4 p.m. *Id.* at 36. Avel Cuellar testified that he saw Mr. Gutierrez around 2:30 p.m. that day. 17 RR 110-11. Ramiro Martinez testified that he saw Mr. Gutierrez a little after 2:30pm that day. *Id.* at 264-65. If one were to believe the statements of the witnesses, Mr. Gutierrez and another man were hanging out at the scene of the crime, just waiting to be identified, from 2 p.m. to 6 p.m., for four straight hours, walking and running and acting suspicious, before they robbed and murdered Ms. Harrison. As indicated above, Detective Garcia testified that these witnesses put Ruben and another man on the scene "*around the time that the pathologist estimated the time of death was*." 19 RR 40 (emphasis added). It is clear that Detective Garcia wanted to make a connection between Mr. Gutierrez and another man being at the scene *when the crime occurred.*

Detective Garcia's testimony is false. The pathologist, Dr. Dahm, did not estimate, or even hint at, a time of death in his report. *See* Ex. H. This is consistent with Dr. Dahm's trial testimony, where he also did not estimate a time of death. *See* 19 RR 215-83. On the death certificate, the time of death is recorded at 1:45 a.m. on September 6, 1998. Death Certificate of Escolastica Harrison, Ex. O. The paramedics who first arrived on the scene and were the first to examine Ms. Harrison and gauge how much time had passed since she died estimated her time of death was somewhere between 7:30 p.m. and 9:30 p.m. Police Report of Officer Joe Villareal, Ex. P.

Appendix Y

Detective Gilbert Garcia was the lead investigator on the case. 19 RR 35-36. He would have known that the pathologist did not determine the time of death. He would have known that the first officer on the scene reported the estimated time of death much later in the evening, between 7:30 p.m. and 9:30 p.m., not at any time between 2 p.m. and 6 p.m. as he testified under oath. Detective Garcia himself wrote a police report on September 7, 1998, stating that he spoke to someone named "Mr. Sanchez" and that "Mr. Sanchez informed this officer that he had not heard anything but that his wife had spoken with the victim on 09-05-98 *at about 6:30pm*." Police Report pf Detective Gilbert Garcia dated September 7, 1998, Ex. Q (emphasis added). In his trial testimony, Detective Garcia failed to mention that the victim was still alive at 6:30 p.m. that evening.

Detective Gilbert Garcia, the lead investigator, knew that the evidence he had collected did not add up to placing Ruben Gutierrez at the scene at the time of the murder. This deception highlights the fact that identity is an issue in this case, and that the CCA was not presented with the relevant information in order to make such a determination.

b. Detective Garcia misrepresented Veronica Lopez's inability to make an identification, and the circumstances surrounding Julio Lopez's identification.

Detective Garcia testified that he showed Veronica Lopez a photo array with Ruben's picture, but that she

was unable to identify him. 19 RR 46. He also stated in his report that "Veronica Lopez was unable to identify Ruben as having been at the mobile home office." Police Report of Detective Gilbert Garcia dated September 11, 1998, Ex. R. He also stated in his police report dated September 11 that he "allowed Julio and Veronica to view the line up separately." *Id.*

However, according to Veronica Lopez, she did identify someone in the photo array shown to her by Detective Garcia. Veronica stated that she was shown four pages of mugshots, and she picked out the two people she believed were the men she saw that day. Decl. of Veronica Lopez, Ex. S. She told the detectives that she was sure of her identification. *Id.*

Ms. Lopez also states that she was shown the binder of mugshots and asked to pick out someone with Julio standing right next to her. *Id.* She stated that the detective then passed the book to Julio, and then he picked out someone different. *Id.* She was not asked to testify at trial. *Id.*

The misrepresentations by Detective Garcia, the lead detective, are significant. Ms. Lopez saw Ruben Gutierrez's picture, and she did not identify him. She affirmatively picked another suspect. The fact that Julio's sister, who was with him, who had exactly the same opportunity to observe, affirmatively identified someone else as present in the trailer park further undermines Julio Lopez's identification.

On top of this, Julio and Veronica Lopez were shown the photo array together, contrary to the misrepresentation by Detective Garcia that they were separated. Ex. R. Aside from violating the best practices established in 2011 by LEMIT, having two witness view a photo array together leads to unreliable and inaccurate identifications. Ex. L at 4. First, when two witnesses view a photo array together, the second person (Julio in this case) is able to learn from the first witness's choice. *Id.* Furthermore, scientific studies show that witnesses who interact with each other before making an identification, as Julio and Veronica did, produce less accurate accounts as the source of their memories become muddled. *Id.*

The CCA relied on the fact that Julio Lopez identified Ruben Gutierrez as one of the main reasons to conclude that identity was not at issue in this case. *Gutierrez,* 337 S.W.3d at 894. None of the above information from witnesses or experts was presented to either the trial court or the CCA. This new information reinforces the fact that, not only are there new issues presented in Mr. Gutierrez's current Motion for DNA testing, but that identity is very much at issue in this case.

3. None of the Statements in This Case Are Reliable or Accurate.

Ruben Gutierrez, in every statement he has given, has denied killing Ms. Harrison. All three co-defendants gave statements implicating the others to the police. In fact, between Pedro Gracia, Rene Garcia, and Ruben Gutierrez, nine different statements were given (eight in writing),

and none of those statements tells a consistent story with any other. *See* Ex. B; Ex. C; Statement 1 of Rene Garcia dated Sept. 12, 1998, Ex. T; Statement 2 of Rene Garcia dated Sept. 12, 1998, Ex. U; Statement of Rene Garcia dated Sept. 13, 1998, Ex. V; Statement of Pedro Gracia dated Sept. 13, 1998, Ex. W. All three co-defendants denied killing Ms. Harrison. *Id.* Each of the three co-defendants gave a statement putting himself outside the house. *Id.* None of the co-defendants' statements were introduced at trial nor did any of the co-defendants testify at trial.

In his first two written statements, Mr. Gutierrez absolutely denied knowing that either of his co-defendants had killed Ms. Harrison, or that they were going to kill Ms. Harrison. Ex. B. It is only in his third written statement on September 14, after he was in custody, that his "confession" contained incriminating statements that put him inside the house when the murder happened. Ex. C. It is this third statement about which the CCA adopted the trial court's finding that that the statement was credible. *Gutierrez,* 337 S.W.3d at 894.

Significantly, for over twenty years, since before his trial, Mr. Gutierrez has maintained that this third statement was neither voluntary nor true, and that he assented to it only after detectives threatened to arrest his wife and take away his children. 4 RR 152-75. Since Mr. Gutierrez filed his last motion for DNA testing, trial witness Erika Martinez has come forward to say that the State used similar coercive tactics on her, threating to take her unborn child away and give it to child protective

services if she did not "testify to what they wanted me to." Decl. of Erika Martinez, Ex. X. The fact that Ms. Martinez was subjected to the same coercion bolsters Mr. Gutierrez's claim that his statements were not voluntary or true.

Mr. Gutierrez's claims are also bolstered by the trial testimony of Avel Cuellar, who testified that when the police brought him in for questioning, they mistreated him, were aggressive with him, and physically assaulted him. 17 RR 209-10, 218-19. Mr. Gutierrez's reports of aggressive tactics by the police resulting in a false confession are reinforced by the reports of Erika Perales and Avel Cuellar.

As Mr. Gutierrez testified, he did not read over any of the statements typed up by the police before he was coerced into signing and initialing them. 4 RR 152-75. Mr. Gutierrez's third statement was taken under especially unreliable circumstances, after he was arrested and charged with capital murder, before he was allowed to get dressed or put in his contact lenses,[14] after he was told that both his co-defendants gave statements, and while an attorney was waiting at the police station trying to speak with him. *Id.* at 152-210.

In finding this statement credible, the CCA stated that "Mr. Lopez's testimony independently corroborates appellant's own statement concerning his actions."

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14. Prison records dated May 10, 1999, show Mr. Gutierrez's vision was 20/200 in both eyes without corrective lenses. *See* Ex. M.

Gutierrez, 337 S.W.3d at 894. The CCA was not presented with the fact, however, that Mr. Gutierrez's statement actually contradicts not only Mr. Lopez's testimony, but the facts of the crime itself.

Mr. Lopez testified that he saw two men, around 6 p.m., and one went to the back, and one went to the front of the trailer. 18 RR 69-74. Mr. Gutierrez's statement says that he was at the house and went into the house to observe Rene Garcia kill Ms. Harrison around "3 in the afternoon." This is three hours earlier than Mr. Lopez placed him at the scene; Ex. C; three and a half hours before the victim was seen alive, Ex. Q; and at least four and half hours before Ms. Harrison's time of death, as estimated by the paramedics who attended to her, Ex. P.

Additionally, Mr. Gutierrez's statement says that he saw Rene "drag[] her to the room by one hand on the hair and one hand on the blouse." Ex. C. Ms. Harrison was wearing a nightgown and robe when she was murdered, not a blouse. Ex. H. The statement also indicated that the money was found in a suitcase and tool box, with no mention of anyone finding money or searching for money in a hole under the floor. Ex. C. But Police reports indicate that money was missing from underneath the floor boards. Ex. Q. Significantly, Avel Cuellar told Detective Garcia that money was taken from the hole in the floor. *Id.*

In crediting this 14 statement of Mr. Gutierrez and the co-defendant statements, the CCA stated that there was "considerable circumstantial evidence and inferences from that evidence to bolster the reliability of

the statements." *Gutierrez*, 337 S.W.3d at 899. However, the statements themselves are so contradictory that there is no consistent story told that could be supported. While the statements from all three co-defendants contradict one another, forensic science could provide actual proof of who struggled with and killed Ms. Harrison.

4. Compelling Evidence Points to Avel Cuellar as the Killer.

When police began this investigation, for all the reasons stated above, Avel Cuellar was their prime suspect. Not only did they admit this at trial, 17 RR 54, they Mirandized Avel Cuellar before interrogating him, Ex. Q, and it is literally printed on all the evidence recovered. *See* Photographs of Property Receipts, Ex. Y. In the box for "victim" the police wrote "Escolastica Harrison" and in the box for "suspect" the police wrote "Avel Cuellar." *Id.* The reason they collected biological material from suspect Avel Cuellar, the victim, and the crime scene generally, was to prove through forensics that Avel Cuellar was the killer.

a. The physical evidence points to Avel Cuellar.

Avel Cuellar was found on the night of the murder with blood on his clothes. 17 RR 55-56. Police found blood in his living quarters. *Id.* The police collected Mr. Cuellar's bloody clothes as evidence. *Id.* at 64. Mr. Cuellar was drunk when he came home that night and had been seen earlier in the evening tipping a waitress with a $100 bill,

despite the fact that he claimed to have only $200 to last him for the week. 18 RR 101; 19 RR 96. Mr. Cuellar had stolen from Ms. Harrison before, and had approached Mr. Gutierrez about stealing from her again. 18 RR 269, 17 RR 66.

Furthermore, to this day, almost $500,000 of Ms. Harrison's money is unaccounted for. 18 RR 212. Detective Antonio Flores stated that he recovered $130,000 from Rene Garcia and family, Pedro Gracia, and Juan Campos, but the rest of the money is missing. *Id.* at 210. Mr. Cuellar was alone when he allegedly "found" Ms. Harrison dead in her home. He knew where the money was. He had ample opportunity to hide that money before the police arrived.

b. Avel Cuellar's nephew states that Mr. Cuellar approached him about committing this crime.

Avel Cuellar's nephew Fermin Cuellar considered Avel to be like a father to him. Decl. of Fermin Cuellar, Ex. FF, ¶ 2. Fermin Cuellar states that in the summer of 1998, before Ms. Harrison was killed, Avel Cuellar approached him about stealing "a lot" of money from his aunt. *Id.*, ¶ 7. Fermin turned him down. *Id.* Fermin Cuellar knew that Ms. Harrison was planning to kick Avel out of the house because he had stolen money from her in the past. *Id.,* at ¶ 19. At some point after Ms. Harrison was killed, Avel told his nephew that he had money buried in the trailer park. *Id.,* at ¶ 15. Neither the trial court nor the CCA was presented with any of this evidence tying Avel Cuellar to the crime.

c. Avel Cuellar had a motive and opportunity to kill his aunt.

Avel Cuellar had the motive and the means to commit this crime. Avel Cuellar knew his aunt had hundreds of thousands of dollars in her home. 17 RR 85. He lived with her and had access to the money. *Id.* at 45. He relied on her exclusively for money. *Id.* at 101. His aunt was on the verge of kicking him out of her house because he had stolen from her before. Ex. FF, ¶ 19. Crispin Villarreal testified that Ms. Harrison was afraid of Mr. Cuellar "because of violence," 18 RR 21, and that she even made Mr. Villareal sleep over at her house because she was so afraid of Mr. Cuellar. *Id.* at 20-21.

Ramiro Martinez testified that Ms. Harrison would get mad when Mr. Cuellar would ask her for money. 17 RR 262. Detective Antonio Flores testified that Edilia Vento, a friend of Ms. Harrison's, reported that Mr. Cuellar was acting strangely the night of Ms. Harrison's disappearance. 18 RR 250. Detective Flores also testified that Mr. Cuellar was causing such a disturbance at the funeral home, he had to physically remove Mr. Cuellar from the premises. *Id.* at 251-52. Detective David Garcia testified that he learned from Ramon Cuellar, Avel Cuellar's half-brother, that Avel Cuellar had threatened Ms. Harrison, that Ms. Harrison was afraid of Mr. Cuellar, and that Ramon suspected that Mr. Cuellar was the one who killed her. 17 RR 56-57, Police Statement of Detective David Garcia dated September 6, 1998, Ex. Z ("Abel always made threats to kill his aunt as they would argue all the

time. His aunt had said to him that she was afraid of the suspect [Abel Cuellar]. He felt that Abel had indeed killer her."). Detective Gilbert Garcia wrote in his September 7 report that he spoke to a neighbor, Mr. Humada, when canvassing the neighborhood, and that Mr. Humada told him that "the victim had several arguments with her nephew, Abel Cuellar." Ex. Q.

Aside from the testimony of his good friend and drinking buddy Ramiro Martinez, there was no evidence presented at trial to verify anything Mr. Cuellar said about his whereabouts that night. Moreover, Mr. Martinez's account of that evening did not match Mr. Cuellar's account. Mr. Martinez testified that Mr. Cuellar called him twice after he got home that evening, once at 12:30 a.m. and again at 1:30 a.m. 17 RR 288-89. However, Mr. Cuellar claims he never called Mr. Ramirez after he got home. *Id.* at 16-17. And, with little explanation, Mr. Martinez also testified that he stopped talking to Mr. Cuellar after the night of the murder. *Id.* at 297.

d. Avel Cuellar planted the idea of Ruben Gutierrez as a suspect to police.

It was Avel Cuellar who suggested to police that Ruben Gutierrez was a suspect. Detective Gilbert Garcia details that "this officer observed that Mr. Cuellar was visibly shaking and inquired as to why: "Mr. Cuellar informed this officer that he was very nervous. When asked why, he informed this officer that several people were accusing him of killing his aunt." Ex. Q. Detective Garcia went on to say Mr. Cuellar gave a statement denying any

involvement. *Id.* During that statement, Avel Cuellar first suggested Ruben Gutierrez as a suspect. In the very same paragraph Detective Garcia writes, "Mr. Cuellar did recall having seen a subject that he has known for some time, said subject being named Ruben Gutierrez." *Id.* Before this time, Ruben Gutierrez was not known to police as a suspect in the crime.

e. The logical explanation is that Avel Cuellar enlisted Rene Garcia and Pedro Gracia to help kill his aunt and blame it on Ruben Gutierrez.

The logical explanation is that Avel Cuellar, along with the help of Rene Garcia and Pedro Gracia, killed Ms. Harrison inside her home and took the money. It would make sense that neither Mr. Garcia nor Mr. Gracia would mention Avel Cuellar in their statements as their plan was to implicate Ruben Gutierrez. Pedro Gracia, an indigent unemployed young man, was somehow able to make bail on a capital murder case and is still wanted for this case twenty years later.

f. Detective Garcia falsely stated that polygraph results supported Mr. Cuellar's self-serving statements.

Despite Avel Cuellar being the main suspect, police had their own motives for moving on to the much easier targets of Mr. Gutierrez, Mr. Gutierrez, Mr. Garcia, and Mr. Gracia. As mentioned above, the police physically assaulted Avel when they interrogated him. 17 RR 209-10, 218-19. Avel testified that he told his uncle about this

assault and his uncle confronted the sergeant about the abuse. 17 RR 218-19. By eliminating him as a suspect, the State was able to use Mr. Cuellar as one of their most important witnesses. Mr. Cuellar testified for almost a full day to authenticate his aunt's handwriting, to implicate Ruben Gutierrez in the crime, to establish that his aunt had lots of money and that Ruben knew that, and to describe what he saw as the witness who "discovered" the body. 17 RR 74-223.

Once they had other people to blame, the police moved on from the logical, primary suspect, and affirmatively attempted to clear Mr. Cuellar. Avel Cuellar was given a polygraph test on September 15, 1998 after the police had statements from Ruben Gutierrez, Rene Garcia, and Pedro Gracia. Detective Gilbert Garcia wrote in his police report dated September 15 that "Sgt Capuchina [polygraph examiner] informed this officer that according to the results, Cuellar had passed in that he did not have any knowledge of his aunt's death, he did not partake in the murder of his aunt, and that he did not take any of her money the night of the murder." Police Report of Detective Gilbert Garcia dated September 15, 1998, Ex. BB.

That is not true. The polygraph report written by Sgt. Capuchina is clear: Avel Cuellar lied about his involvement in the crime. Polygraph Report of Avel Cuellar, Ex. CC. Sgt. Capuchina not only wrote "deception indicated," but detailed that "[e]valuation of this subject's polygrams did reveal to this examiner significant criteria that would indicate deception at questions pertaining to the knowledge and/or participation in this offense.

Subsequent to the polygraph examination, after deception was indicated, the subject made no admissions." Ex. CC. While this polygraph would not be admissible at a trial, as the CCA made clear, "A Chapter 64 proceeding is not a criminal trial." *Gutierrez,* 337 S.W.3d at 893.

Additionally, the police did not make any efforts to test the forensic crime scene evidence that would confirm or disprove Mr. Cuellar's involvement. Although they collected Mr. Cuellar's blood-spattered clothing that night as evidence, they did not test it. Police likewise did not press Mr. Cuellar on his explanations. For example, Mr. Cuellar explained that he had blood on his shirt because he tried to move the victim's body. The victim was lying on the floor and there was a large amount of blood present. However, reports show that Mr. Cuellar did *not* get blood on his pants, which would cast doubt on his explanation for the blood on his shirt.

Although the police collected blood specimens from the bathroom, blood from a raincoat found in Mr. Cuellar's portion of the house, and blood from a couch in the home, the police never tested any of it. 19 RR 126-33. Despite the fact that there was a footprint found in a puddle of blood on the scene, the police never even photographed that footprint for the purpose of comparing it to the footwear of any of the suspects. *Id.* at 94-95.

And of course, the biological material was left untested, despite having been sent to the crime lab: the scrapings underneath Ms. Harrison's fingernails, and her own clothing. *Id.* at 126-33. As discussed in Section IV,

supra, all of this forensic evidence is probative of who is guilty of this murder. The evidence compels a conclusion that the police did not want to muddy the waters by testing all the forensic evidence they recovered and risk undermining their case against Ruben Gutierrez. The CCA was not presented with any of this information in Mr. Gutierrez's previous DNA proceedings. This information changes the issues in the case and makes clear that identity is at issue.

5. The Additional Witness Testimony Is Unreliable and Biased.

The government presented four witnesses to put Ruben Gutierrez near Ms. Harrison's trailer on September 5. 20 RR 64. Each of those witnesses is biased and/or unreliable.

The first witness was Avel Cuellar. Avel Cuellar had a motive to lie about what he saw, because after Ms. Harrison was found, Avel Cuellar was a suspect in the case as discussed at length in the previous section.

The second witness was Ramiro Martinez. Mr. Martinez gave a statement to the police the day after the incident and did not say anything about seeing Mr. Gutierrez. 17 RR 273-76. Mr. Martinez mentioned seeing Mr. Gutierrez only in a second statement made three days later, after he had a chance to talk to others, including his best friend Avel Cuellar. *Id.*

The third witness the State used to place Gutierrez near the scene on the day of the murder was Crispin

Villarreal. Mr. Villarreal, like Avel Cuellar, was initially a suspect in this murder. 18 RR 31. Mr. Villarreal's testimony at trial was so internally inconsistent that the District Attorney had to impeach him with his own statement on several occasions in order to attempt to get him to establish a timeline that was more consistent with the prosecution's theory of the case. *Id.* at 30-33. Additionally, Mr. Gutierrez and Mr. Villarreal had a falling-out about a month earlier that destroyed their friendship. *Id.* at 41-42. Crispin Villareal has since recanted parts of his testimony. *See* Decl. of Rachel Primo, Ex. DD. At trial, Mr. Villareal claimed that he saw Mr. Gutierrez "beside [Ms. Harrison's] house" on the afternoon of the murder. *Id.* at 36. However, he recently told an investigator that he saw Mr. Gutierrez walking on Morningside Road, but that Mr. Gutierrez then walked behind some trees and he "could not see where Ruben went. I do not know if Ruben went up to Ms. Harrison's house." Ex. DD.

The final witness was Julio Lopez. As discussed at length in Section V.C.1, based on new expert testimony that was not previously presented to the trial court or the CCA, Julio Lopez was not a reliable witness.

6. Identity Is an Issue in This Case.

Mr. Gutierrez's previous DNA motion did not contain any of the above information. The trial court, and ultimately the CCA, were not able to consider any of the expert evidence regarding identification, they were not made aware of the inconsistencies in the statements, they did not know about the deception perpetrated by Gilbert

Garcia, the lead detective in the case, they did know that Avel Cuellar's nephew was solicited by Mr. Cuellar to steal from Ms. Harrison, and they did not know that Ms. Harrison was on the verge of kicking Avel Cuellar out of her house because she had stolen from him before. The trial court and the CCA did not know that after Ms. Harrison's death Avel Cuellar told his nephew that he had lots of money buried in the trailer park, and they did not know that Mr. Cuellar had failed a polygraph test and lied about his involvement in the crime. As the CCA made clear in its decision denying Mr. Gutierrez's initial DNA motion, "the legislature has placed no barriers to the type of relevant and reliable information that the trial judge may consider when determining if identity was or is an issue in this case. The information must be reliable, but it need not be admissible or previously admitted at trial." *Gutierrez,* 337 S.W.3d at 893-94. The new evidence presented in Mr. Gutierrez's current motion is reliable. Identity is an issue in this case and the Court should grant this motion.

D. DNA Testing Will Exonerate Ruben Gutierrez.

In order to obtain DNA testing pursuant to Chapter 64, Mr. Gutierrez must 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). In order to meet this requirement, the DNA testing must be able to determine the identity of the perpetrator or exculpate the accused. *Id.*

Appendix Y

1. DNA Testing Would Show By a Preponderance of the Evidence that Mr. Gutierrez Would Not Have Been Convicted.

The State's theory at trial was that three men had robbed Escolastica Harrison, but only two had participated in the murder. However, the State's own medical expert, Dr. Dahm, testified that three scenarios were possible regarding the wounds found on Ms. Harrison; two of those scenarios involve only one person killing Ms. Harrison. 20 RR 243. He stated that Ms. Harrison could have gotten her wounds because the sole person who assaulted her changed his position; or she could have gotten her wounds because the sole person who assaulted her could have reached around to attack Ms. Harrison on both sides of her head; or, in theory, there could have been two people present who simultaneously attacked her. *Id.*

Any DNA evidence that identified other individuals as being involved in the murder would have changed the outcome of the trial. Any DNA evidence that identifies two perpetrators and excludes Mr. Gutierrez would provide proof that Mr. Gutierrez was not involved in the murder. Any DNA evidence that identifies one perpetrator and excludes Mr. Gutierrez and Rene Garcia would also prove that Mr. Gutierrez was not involved in the murder.

A DNA profile tying Avel Cuellar to the crime would be especially likely to have changed the outcome of the trial. Mr. Cuellar's DNA should be available through CODIS as he was convicted of Aggravated Sexual Assault of a Child in 1999, less than a year after the

murder. *See* Criminal History of Avel Cuellar, Ex. EE. Mr. Cuellar was one of the prosecution's main witnesses. DPS 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 Mr. 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 Mr. Cuellar having been near the victim as she was stabbed and beaten. Ex. F, ¶ 6.

Furthermore, Avel Cuellar's clothing could be tested for touch DNA left by one of his coassailants. The State's theory of the crime was that two people simultaneously attacked Ms. Harrison at very close range, using their hands and sharp weapons. The trailer itself was small and a confined space, especially the area where the victim's body was found. *See* Photo of Inside Trailer, Ex. GG. It is likely that if Avel Cuellar was one of the people in the trailer who attacked Ms. Harrison, he would have been touched at some point by one of the co-assailants. That person could have left touch DNA on his clothing. Ex. AA, Jr 16, 25. Avel Cuellar was not alleged to have had any connection to Rene Garcia or Pedro Gracia. If jurors had heard that Rene Garcia's DNA, or Pedro Gracia's DNA, was deposited onto Avel Cuellar's clothing, that would be consistent with one of them committing the murder with Avel Cuellar. *Id.*

If the jurors had heard evidence that Mr. Cuellar's DNA had been found underneath the victim's fingernails

or on her nightgown, there is more than a 50% chance they would not have taken his testimony at face value. If they heard evidence that Mr. Cuellar had bled in the bathroom or on the couch, there is more than a 50% chance that they would have believed that he had been involved in a struggle with the victim. If they heard that Mr. Cuellar had the DNA of Rene Garcia and/or Pedro Gracia on his bloody clothing, there is more than a 50% chance that they would have believed it was Avel Cuellar, not Ruben Gutierrez, who was the mastermind of this crime and committed this crime. If they had heard evidence that the victim died holding a hair from his head, they would have rejected his testimony outright. And if they had heard that the blood stains on Mr. 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 Mr. Cuellar to the murder would have completely undermined his testimony and raised sufficient reasonable doubt to change the outcome of the case.

If DNA evidence had revealed DNA inculpating Mr. Cuellar on more than one of the tested items—if there was redundancy among the profiles—it is impossible to believe that the jury would have believed Mr. Cuellar' s claim that he was not involved in the murder. Mr. Cuellar's involvement would have destroyed the prosecution's trial theory—that Mr. Gutierrez and Rene Garcia, and those two alone, killed the victim, and that Avel Cuellar was just a grieving nephew.

Even if the DNA profiles on the items Mr. Gutierrez seeks to test are not consistent with Mr. Cuellar, results that showed two individuals at the scene, neither of whom was Mr. Gutierrez, 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. DNA from under a victim's fingernails is regularly relied upon by prosecutors to provide highly probative evidence of a defendant's guilt in cases of violent crime, 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. 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 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. *See* Ex. GG. There is a high likelihood that the assailants grabbed the victim's

nightgown as they tried to subdue her. Ex. F, ¶ 10; Ex. AA, ¶ 22. If a jury heard that two male profiles were found on the nightgown, one of which was consistent with Rene Garcia and the second of which was consistent with Pedro Gracia or another individual, especially Avel Cuellar, or the testing otherwise excluded Ruben Gutierrez, the jury would more likely than not have believed that Ruben Gutierrez was not involved in the murder.

Similarly, a foreign 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 and indicates that the victim may have grabbed an assailant's hair during the struggle. Any profile obtained from that hair would likely identify one of the perpetrators.

Given 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 not just had passing contact with the victim. Ex. F at ¶ 7; Ex. AA, ¶ 23. A single profile from these blood stains that matched neither Mr. Gutierrez nor Rene 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. Even more so if that blood matched Avel Cuellar.

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 Avel 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.

2. The "Law of Parties" Does Not Change the Fact that Mr. Gutierrez Would Not Have Been Convicted if DNA Testing Had Occurred.

The fact that Mr. Gutierrez was charged under the law of parties does not make it less likely that the jury would have acquitted if confronted with exculpatory DNA evidence. Under the law of parties, a person is criminally responsible for a felony committed by a coconspirator if "the offense was committed in furtherance of an unlawful purpose and was one that should have been anticipated as a result of carrying out the conspiracy." Tex. Penal Code Ann. § 7.02 (West). "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 Mr. Gutierrez's trial, the State argued that Mr. Gutierrez was an active participant in the murder.

In denying Mr. Gutierrez's previous Motion for DNA testing, the CCA found that DNA testing would not exculpate Mr. Gutierrez, because the four items Mr. Gutierrez had previously requested would not be probative of the identity of the actual killer. *Gutierrez,* 337 S.W.3d at 900. In his present motion, as detailed in Section IV, Mr. Gutierrez has established through expert testimony that the items he is currently requesting would indeed be probative of who killed Ms. Harrison.

The CCA did acknowledge that an "'exculpatory' result would be DNA from the third accomplice, Pedro Gracia, in the fingernail scrapings." *Id.* at 900-01. However, under the law of parties, the court found that because Mr. Gutierrez's statement indicates that he "planned the rip off," he would be on the hook for the murder either way. Mr. Gutierrez's current motion refutes that statement. In his current motion, Mr. Gutierrez presents new witness statements from Erika Martinez confirming police coercion, along with arguments showing that Mr. Gutierrez's statement did not comport with the actual facts of the case. Furthermore, Mr. Gutierrez's current motion presents evidence from Avel Cuellar's own nephew, which was not considered by the CCA in the previous motion, that points to Avel Cuellar, not Ruben Gutierrez, as the mastermind behind this crime.

In *Garcia v. State,* the 1st District Court of Appeals abated a case for appointment of new counsel where

assigned counsel had filed an *Anders* brief stating there was no basis for a DNA motion because the defendant had been convicted under the law of parties. *Garcia v. State,* No. 01-05-00718-CR, 2007 WL 441716, at *3 (Tex. App. Feb. 8, 2007) (unpublished). In finding there that DNA testing could arguably exculpate the defendant, the court held that

> the State's theory in this case was that two men, one of whom was appellant, were present at the scene of the crime. Therefore, if the DNA were tested, and two sources of DNA were recovered (in addition to the complainant's DNA), neither of which matched appellant, the evidence could arguably be exculpatory if it cast doubt on the State's evidence placing appellant at the scene of the crime.

Id. Here, too, if DNA profiles, neither of which are consistent with Mr. Gutierrez, are obtained from evidence collected from the scene of a crime that the State argued was committed by two men, such evidence would disprove the State's theory at trial, and the law of parties would not change that.

Finally, the CCA pointed out that Chapter 64 applies only to actual innocence, not innocence of the death penalty. *Gutierrez,* 337 S.W.3d at 901. The court further opined that even if Chapter 64 applied to the penalty phase, Mr. Gutierrez "would still have been death penalty 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." *Id.*

In light of the evidence proffered here, this case is distinguishable from *Tison v. Arizona,* 481 U.S. 137 (1987). 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. 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 get 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 likely will show that Mr. Gutierrez was not eligible for the death penalty.

Furthermore, even if Mr. Gutierrez were still eligible for the death penalty, scientific evidence that he did not participate in the actual assault on the decedent would unquestionably be mitigating. Had it been presented with such evidence, the jury would more likely than not have voted for life instead of death in this case. Accordingly, this Court should order the DNA testing on that basis as well.

E. This Request Is Not Made for the Purpose of Unreasonable Delay.

Mr. Gutierrez first moved for DNA testing in 2010, when he filed a motion for appointment of counsel to represent him in a Chapter 64 proceeding. He has been fighting for DNA testing for nearly a decade. Current counsel requested access to police and district attorney files one day after being appointed, and this motion is being filed just over three weeks after the Cameron County District Attorney's Office made items and files related to this case available for counsel to review. This request is not made for dilatory purposes.

DNA testing will identify Ms. Harrison's assailants and show that Ruben Gutierrez was not one of them. Mr. Gutierrez satisfies all of the requirements of Chapter 64 and the Court should grant his motion.

VI. THE LAW OF THE CASE DOCTRINE DOES NOT BAR GRANTING THIS DNA MOTION.

While the Court of Criminal Appeals affirmed a denial of Mr. Gutierrez's prior application for DNA testing based in part on a determination that identity was not at issue in this case, that decision should have no impact on Mr. Gutierrez's current motion. According to the law of the case doctrine, "an appellate court's resolution of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue." *State v. Swearingen,* 478 S.W.3d 716, 720 (Tex. Crim. App. 2015). The law of the case doctrine, however, "is required by neither constitution

nor statute . . . ; it is merely a court-made prudential doctrine designed to promote judicial consistency and efficiency. As such, it should be disregarded when compelling circumstances require." *Alexander v. State,* 866 S.W.2d 1, 2 (Tex. Crim. App. 1993) (citations omitted). Furthermore, there are exceptions to the law of the case doctrine—when the issues presented are not identical and where there is a clearly erroneous prior decision. Both of these exceptions apply here.

The law of the case doctrine "does not necessarily apply where the issues presented . . . are not identical." *Kropp v. Prather,* 526 S.W.2d 283,285 (Tex. Civ. App., Tyler, 1975). Here the issues Mr. Gutierrez raises are very different than those raised previously. First, in the current motion, Mr. Gutierrez raises the issue of Avel Cuellar as the actual doer, which casts a different light on the relevance of the DNA testing that is requested. In this motion, unlike his previous motion, new expert evidence, witness statements, and evidence of Avel Cuellar failing a lie detector test bolster this claim. The CCA was not presented with any of this information when it denied Mr. Gutierrez's previous motion.

Second, in the current motion, Mr. Gutierrez seeks testing of several additional items, including all of the victim's clothing, which was not previously requested. In *State v. Swearingen,* the CCA indicated that requesting new evidence to be tested could result in a subsequent Chapter 64 motion falling outside the law of the case. 478 S.W.3d at 721. In this case, the request that Ms. Harrison's clothes be tested for DNA puts this

case outside the law of the case. Identifying whose DNA is on the clothes Ms. Harrison was wearing when she was murdered is uniquely probative of who killed her. Modern advances in DNA extraction and technology since Mr. Gutierrez filed his last DNA motion make it possible to generate complete profiles in cases where the existing samples are in limited quantity or have been degraded. Ex. AA ¶ 17

The presence of DNA from two males on those clothes, especially with profiles that excluded Mr. Gutierrez and inculpated Rene Garcia, Pedro Gracia, Avel Cuellar, or an unknown male, would undercut the State's entire theory that Mr. Gutierrez is the one who stabbed Ms. Harrison so that she could not identify him as a witness. DNA evidence of this sort on her clothing would establish that it would be more likely than not that Mr. Gutierrez would not have been convicted.

Third, Fermin Cuellar, the nephew of Avel Cuellar, states that in the summer of 1998 Avel solicited him to rob Ms. Harrison, that Ms. Harrison was on the verge of kicking Avel out of her house, and that Avel told Fermin after the murder that he had money buried in the trailer park. This new evidence raises questions about the identity of the killer and the reliability of Avel Cuellar as the State's main witness.

Fourth, Crispin Villareal, one of the witnesses who placed Mr. Gutierrez at the crime scene, has recanted his trial testimony, which puts the case in a different light, as it weakens the case made against Mr. Gutierrez.

Fifth, in his current motion, Mr. Gutierrez has presented expert testimony eviscerating the reliability of witness Julio Lopez, along with the reliability of the identification procedure that was used by detectives in Mr. Lopez's photo array. Mr. Lopez's identification was a major factor in the CCA's denial of Mr. Gutierrez's previous DNA motion. *Gutierrez,* 337 S.W.3d at 894. Finally, Mr. Gutierrez has introduced the statement of Erika Martinez, who states that the State threatened to take her child away when coercing her to tell them what they wanted to hear, bolstering the claim of Mr. Gutierrez that his own statement is not true and was the product of the same coercive tactics by the detectives.

The law of the case doctrine also does not apply where the prior decision was clearly erroneous. *See Briscoe v. Goodmark Corp.,* 102 S.W.3d 714, 716 (Tex. 2003) (law of the case doctrine does not apply if prior decision was clearly erroneous because "our duty to administer justice under the law, as we conceive it, outweighs our duty to be consistent"). Here, this Court's prior decision was contrary to the plain reading of Chapter 64. Chapter 64 gives all convicted people the right to seek DNA testing, explicitly stating that

> [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.

Tex. Crim. Proc. Code Ann. § 64.03 (West). There was no physical evidence linking Mr. Gutierrez to the crime, and Julio Lopez, the only disinterested party who saw him near the scene, was not able to identify him in court, and made an unreliable identification through an unreliable procedure. *See* Section V.C, *supra.*

Other than Mr. Gutierrez's third statement to police, the only items of evidence placing him in the house were the statements of his co-defendants, which were not introduced at trial. The Supreme Court has held that "a confession given by an accomplice which incriminates a criminal defendant" is inherently unreliable. *Lilly v. Virginia,* 527 U.S. 116, 130-31. In fact, the Court has "over the years, 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.'" *Id.* at 131 (quoting *Lee v. Illinois,* 476 U.S. 530, 541 (1986)). This Court should not deny DNA testing in this case based on the inherently unreliable statements of co-conspirators, statements which the jury never heard. Given how thin the non-statement evidence was in this case, the fact that Mr. Gutierrez gave inculpatory statements to police does not negate the facts that identity was and is at issue here and that DNA could prove that he did not commit this murder. It would be inconsistent with the intention of the legislature to pin such a ruling solely on the defendant's statement, and the self-serving statements of his co-defendants.

Appendix Y

The Texas legislature had good reason to extend the right to post-conviction DNA testing to people who confessed or pleaded guilty. Various scholars have extensively documented the well-known role that false confessions play in wrongful convictions. *See, e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 906 (2004) (conducting a review of the literature and concluding that studies indicate that "the number of false confessions range from 8-25% of the total miscarriages of justices studied"); Clanitra Stewart Nejdl & Karl Pettitt, *Wrongful Convictions and Their Causes: An Annotated Bibliography,* 37 N. Ill. U. L. Rev. 401, 403-08 (2017) (summarizing eight scholarly articles written between 2010 and 2017 discussing the problem of false confessions); Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices,* 99 Mich. L. Rev. 1211, 1224 (2001) ("No one disputes that police-induced false confessions have resulted in wrongful convictions during the post-Miranda era.").

The National Registry of Exonerations, which provides information about all exonerations since 1989, including those not involving DNA, reports that 12% of all exoneration cases had false confessions as a contributing factor for conviction. *See* http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited June 10, 2019). Of the cases involving false confessions, 70% were murder cases. *See* National Registry of Exonerations, *Guilty Pleas and False Confessions,* Nov. 24, 2015, http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article4.pdf.

Appendix Y

Texas, which has had more exonerations than any other state, has seen three people exonerated by DNA after giving false self-incriminating statements. *See* Sam Lozano, *Exonerations in the US Rose Again in 2016,* Chi. Tribune, Mar. 7, 2017, http://www.chicagotribune.com/news/nationworld/ct-us-exonerations-20170307-story.html. One of these exonerees, Christopher Ochoa, was convicted in 1989 for the rape and murder of an Austin Pizza Hut employee. *See* National Registry of Exonerations, Chris Ochoa case summary, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3511 (last visited June 10, 2019) ("Ochoa case summary"). Police suspected Ochoa and his co-defendant because they had been seen a few days later at the restaurant where the victim was killed, acting suspiciously. *Id.* The men also purportedly had access to a master key to the restaurant. *Id.* Ochoa gave a detailed confession, pleaded guilty, and implicated himself when he testified at his co-defendant's trial. *Id.*; *see also* Henry Weinstein, *Freed Man Gives Lesson on False Confessions,* L.A. Times, http://articles.latimes.com/2006/jun/21/local/me-confess21. His codefendant was also convicted. *See* Ochoa case summary. In 1998, Achim Marino confessed to the crime. *See id.* Ochoa continued to maintain that the testimony he gave at trial was truthful. *Id.* In 2000, DNA testing revealed that sperm found in the victim's rape kit was consistent with Marino and not with Ochoa or his co-defendant. Ochoa was convicted in 1988, before Chapter 64 existed. Had this statute been in place in 1988, and had Ochoa chosen to exercise his right to trial, he probably would have lost his testing motion. While his confession was the primary evidence police had, prosecutors would have likely pointed to his behavior in the

days after the crime and his access to the area where the victim was killed to argue that his conviction did not rest solely on his confession and that therefore DNA testing should be denied. Here, had Mr. Gutierrez pleaded guilty, his inculpatory statements to police would in no way have barred him from getting access to DNA testing. It would defy logic to read Chapter 64 as favoring defendants who plead guilty while placing insurmountable bars against those who proceed to trial and maintain their innocence.

VIII. CONCLUSION

In view of the foregoing, petitioner Ruben Gutierrez requests that this Court:

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

a. fingernail scrapings collected from the victim,

b. the hair that was wrapped around the victim's fingers;

c. the victim's nightgown, slip, robe, and socks;

d. blood samples collected from the victim's home; and

e. clothing collected from Avel Cuellar;

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

Respectfully Submitted,

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Dated: June 14, 2019

Appendix Y

IN THE 107TH DISTRICT COURT
OF CAMERON COUNTY, TEXAS

Cause No.–98–CR–1391–A

EX PARTE RUBEN GUTIERREZ,

Applicant.

ORDER

This Court hereby ORDERS:

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

a. fingernail scrapings collected from the victim;

b. the victim's nightgown, slip, robe, and socks;

c. blood samples collected from the victim's home, and

d. clothing collected from Avel Cuellar;

e. the hair that was wrapped around the victim's finger

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

Signed this ____ day of _____, 2019.

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

Appendix Z – State's Response to Defendant's Motion for Miscellaneous Relief, District Court of Cameron County (February 2, 2016)

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

Cause No. 987-CR-1391-A

STATE OF TEXAS

VS.

RUBEN GUTIERREZ

Filed February 2, 2016

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR MISCELLANEOUS RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the **STATE OF TEXAS**, by and through the Cameron County District Attorney's Office, and files this Response to the Defendant's Motion for Miscellaneous Relief, and in support thereof, would show this Court as follows:

I.

Defendant has been found guilty of capital murder and sentenced to death. All appeals and writs have

been denied, to date.[1] On or about November 4, 2015, the Defendant herein filed a Motion for Miscellaneous Relief, wherein the Defendant requests the opportunity to conduct independent DNA tests on certain biological evidence.

This Court had previously denied Defendant's motion for Post-Conviction DNA testing, and this ruling was affirmed by the Court of Criminal Appeals. *Ex Parte Gutierrez,* 337 S.W.3d 883 (Tex. Crim. App. 2011). The Court of Criminal Appeals found that the Defendant made a considered decision to forego DNA testing at trial, and further that Defendant failed to establish, by a preponderance of the evidence, that he would not have been convicted if exculpatory results had been obtained through DNA testing of the victim's fingernail scrapings and other evidence. *Id.* at 896-97, 899-902. The present motion for miscellaneous relief appears to raise the identical issue raised in his Motion for Post-Conviction DNA testing and, further, seeks the same relief that was previously denied by this Court and affirmed by the Court of Criminal Appeals; however, Defendant now seeks said relief through a different procedural vehicle, a motion for miscellaneous relief.

Notwithstanding the fact that this Court has already denied the requested relief once before, Defendant

1. On January 11, 2016, the General Counsel of the Court of Criminal Appeals of Texas did inquire of this Court concerning the status of this case.

now urges this Court to grant the relief requested as the evidence at issue is potentially exculpatory *Brady* material. Because of the nature of the punishment assessed against the Defendant, and further because of the nature of the allegations in Defendant's Motion for Miscellaneous Relief, the State now will not oppose the request for testing, but neither does the State agree to said relief. Instead, the State will defer to this Court to consider the law and the facts alleged herein, and determine whether the interests of justice require the testing of said evidence.

More over, the State acknowledges that the Brownsville Police Department is in possession of the evidence requested to be tested, except that the Brownsville Police Department is NOT in possession of the head hair that was reportedly taken from the victim's hand. The Brownsville Police Department was not in possession of said single loose head hair in 2011, when this issue was previously raised, *id.*, at 897-98, and the Brownsville Police Department is still not in possession of said item, today. Therefore, should this Court determine that testing of the evidence is warranted, this Court should note that the State cannot produce the single loose head hair for testing, as the State is not in possession of said item.

CONCLUSION & PRAYER

WHEREAS, the **STATE OF TEXAS** prays that this Honorable Court will take this matter under

consideration and make such Order herein as this Court deems to be proper and in the interest of justice.

Respectfully Submitted,

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Appendix Z

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Appendix AA — Motion for Miscellaneous Relief with Brief in Support, District Court of Cameron County (November 10, 2015)

IN THE 107TH DISTRICT COURT
OF CAMERON COUNTY, TEXAS

98-CR-1391-A

STATE OF TEXAS,

Plaintiff,

v.

RUBEN GUTIERREZ,

Defendant.

Filed November 10, 2015

MOTION FOR MISCELLANEOUS RELIEF WITH BRIEF IN SUPPORT

Defendant Ruben Gutierrez requests a court order declaring that he has a constitutional due process right under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963), to conduct independent DNA tests on potentially exculpatory biological evidence in Plaintiff's custody or control and that Plaintiff, who is represented in this matter by the Cameron County District Attorney's Office, be ordered to release the evidence to Defendant under a reasonable protocol regarding chain of custody and preservation of the evidence, in order that Defendant can have the evidence tested at his own expense. In support whereof, the Defendant would state as follows:

Appendix AA

I. Jurisdiction

Defendant was one of three men indicted in the 107th District Court of Cameron County for the robbery/murder of Escolastica Harrison: Ruben Gutierrez, Rene Garcia, and Pedro Gracia. Pedro Gracia was released on bond and disappeared. Rene Garcia plead guilty and was sentenced to life imprisonment. Ruben Gutierrez plead not guilty, his case was tried by a jury in the 107th District Court of Cameron County, he was convicted, and following a separate hearing the jury answered the special issues so as to impose a sentence of death. Plaintiff intends to carry out Gutierrez's death sentence despite the fact that there is available potentially exculpatory DNA evidence that has never been tested.

"District Court jurisdiction consists of * * * original jurisdiction of all actions, proceedings, and remedies, except where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." Texas Const., Art. 5 § 8. District Courts thus have original jurisdiction over all felony cases. Texas Const. Art. V § 8; Tex. Code Crim. Proc. Art. 4.05. Capital murder is a felony. Tex. Penal Code.§ 19.03. When the indictment was returned and filed in the 107th District Court of Cameron County Texas, that court acquired jurisdiction to conduct "all proceedings" related thereto "except as otherwise provided by law." Tex. Const. Art. V § 7. Texas law does not specifically provide that jurisdiction for a post conviction *Brady* motion lies with any other court. Accordingly, by default, jurisdiction

lies with this Court. *See generally. Monroe v. Butler,* 690 F. Supp. 521,525 & n.4 (E.D. La.1988), *affd,* 883 F.2d 331 (5th Cir.), *cert. denied,* 487 U.S. 1247 (1988) (courts may order post-conviction disclosure of *Brady* material).

II. The Evidence

The victim, Escolastica Harrison, was robbed and murdered in her own home. It was undisputed that Gutierrez and Harrison knew each other through Harrison's nephew, Avel Cuellar. Gutierrez and Cuellar were friends. Cuellar lived with Harrison. Gutierrez had learned from Cuellar that Harrison kept large sums of cash in her house. Harrison had occasionally loaned Gutierrez money and the two had an amicable relationship.

According to the medical examiner's trial testimony, defensive wounds are "almost always found" on "the fingers of the hands, and the hands, and the forearms as they try to ward off blows" and are "occasionally" found on "the knees or feet," 19 RR 245,[1] and the purpose of taking nail scrapings during an autopsy is to determine whether the victim had tissue from any other individual besides herself, 19 RR 264. Also according to the medical examiner's testimony if a person was attempting to defend themselves, then there is a "distinct

1. "RR" stands for the Reporter's Record of trial proceedings and is preceded by the volume number and followed by the relevant page number(s). A copy of the cover page, table of contents, and specific pages cited herein are filed herewith as attachments for the Court's convenience.

possibility" that the person would grab the assailant's hair and then have that hair on his or her hand. 19 RR 264. The evidence presented at trial showed that the victim Escolastica Harrison had struggled with her assailant(s) for at least a few minutes during which time she sustained defensive wounds to her right wrist, right elbow, and right hand. 19 RR 245-247, 263.

The State collected physical evidence from the crime scene, from the victim, and from several suspects within a few days of the victim's murder, *see, e.g.* SX 98 (preliminary autopsy report dated September 6, 1998); DX 1 (evidence submitted to lab September 25, 1998). This included:

- blood sample taken from the victim Escolastica Harrison retained by the Texas DPS McAllen Laboratory pending pick up by the District Attorney;

- shirt belonging to the victim'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 victim during an autopsy and submitted to Det. Hernandez as part of rape examination;[2]

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2. In the "EXTERNAL EXAMINATION" portion of the report, the pathologist states: "Nail scrapings are taken and

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

- a single loose hair found around the third digit of the victim's left hand recovered during an autopsy and submitted to Det. Hernandez as part of rape examination.[3] 19 RR 263.

III. The Competing Theories of the Case Presented to the Jury

The Plaintiff's main theory of the case at trial was that Gutierrez was a principal in the murder of Harrison in order to prevent her from identifying him as one of the robbers. In opening argument the State argued to the jury:

> "[T]he evidence will show * * * that Ruben and Rene killed Ms. Harrison." and "Ruben's

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submitted to Det. Hernandez as part of the rape examination." Det. Juan Hernandez, Jr. Testified that he collected evidence from the autopsy, including the sexual assault kit which contained the nail scrapings. 19 RR 112-114.

3. In the "EXTERNAL EXAMINATION" portion of the report, the pathologist states: "A single loose hair is found around the third digit of the left hand. According to the medical examiner's testimony the hair was "turned over to police." 19 RR 263. Det. Juan Hernandez, Jr. testified that he collected evidence from the autopsy, including the sexual assault kit which contained the hair, 19 RR 112-113.

> statements* * * shows beyond a reasonable doubt that he's involved in killing Ms. Harrison and robbing Ms. Harrison, killed her in the course of a theft." 17 RR 33.

In closing argument the State argued to the jury:

> "What [Ruben] tells you in the confession, which you also need to be sure that you pay close attention to, is what he says is that, 'We got two screwdrivers out of that toolbox, two screwdrivers out of that toolbox. Think about it and read between line, ladies and gentlemen. What he's telling you is that, 'Rene had the flat tip, and we got two out, and I had the other one. I had the star shaped one.'" 20 RR 72.

On direct appeal the State argued to the Court of Criminal Appeals:

> "Mrs. Harrison was attacked by two adult men. The two men were armed with screwdrivers." Appeal Brief at 19.

Under the Plaintiff's theory of the case at trial, the two men inside the victim's house were Rene Garcia (who plead guilty) and Ruben Gutierrez (who asserted his right to jury trial), 17 RR 33, while Pedro Gracia was the getaway driver and did not go inside the victim's house. *See Ex parte Gutierrez,* 337 S.W.3d 883, 901 (Tex. Crim. App. 2001).[4] The Plaintiff neither attempted

4. The CCA's opinion states that "All three robbers agreed that Pedro Gracia was the driver and did not go inside Mrs.

to prove, nor argued to the jury, that if Defendant did not cause Escolastica Harrison's death, that he either intended for Rene Garcia and/or Pedro Gracia to kill her or anticipated that her life would be taken.[5]

Consistent with his original statement to police, Gutierrez maintained throughout trial proceedings that although he helped plan a burglary of Harrison's house, he was not present at the scene of the offense, did

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Harrison's home." However, Defendant only "agreed" to this in his third written statement to police which he has consistently claimed was involuntary in that it was obtained in violation of his right to remain silent, and repudiated. Defendant did not agree *at trial* that Pedro Garcia did not go inside the victim's house.

5. This Court should apply judicial estoppel to bar prosecutors from making arguments in response to this motion that are inconsistent with the theory of the case presented at trial. In other words, it should apply judicial estoppel to bar prosecutors from making arguments that Gutierrez is not entitled to DNA testing because even if he was not a principal he is guilty under the *Enmund/Tilson* law of parties and thus still death eligible. The purpose of judicial estoppel is to protect the integrity of the judicial process by "prohibiting parties from deliberately changing positions according to the exigencies of the moment." Ritter, *It's the Prosecution's Story, but They're Not Sticking To It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post Conviction DNA Testing Cases,* 74 Fordham L. Rev. 825, 838 (2005). To do otherwise subverts the role of the jury and deprives the defendant of due process in that it allows the court to convict the defendant and condemn him to death on a theory of the case that the prosecutor never argued to the jury and that it thus cannot be assumed to have been considered or decided.

not plan her murder, did not participate in her murder, did not know that his co-defendant's intended to commit murder, and could not have reasonably anticipated that his co-defendants intended to commit murder. Under Gutierrez's theory, Garcia and Gracia came to him looking for an easy score. Wanting to help Garcia and Gracia but not wanting Harrison to get hurt Gutierrez planned for Harrison to be lured away from her home so that Garcia and Gracia could effect a burglary (not a robbery) and Harrison would *not* be hurt. Gutierrez absented himself from the scene entirely in order to avoid any chance that Harrison might see him and be able to identify him. Thus the two men present at the scene of the offense and inside the house were Rene Garcia and Pedro Gracia.

III. The evidence at issue is potentially exculpatory ***Brady*** material.

Because Escolastica Harrison had defensive wounds on her right wrist, elbow, and hand from the struggle with her attacker(s), 19 RR 245-247, 263, and because there was a "distinct possibility" that she grabbed her assailant's hair during the attack, 19 RR 264, the blood and fiber under the victim's fingernails, blood elsewhere in the victim's house, and head hair in the victim's hand,[6] if

6. The District Attorney's office, under Armando Villalobos, has previously averred that the hair was never collected or is no longer available. While the CCA may be inclined to believe this, Gutierrez is unsatisfied by the prosecutor's explanation for its absence from the evidence and has submitted Open Records requests for chain of custody documents to the District

not her own, would potentially identify her attacker(s). DNA testing of blood samples taken from Escolastica Harrison, Renee Garcia, Pedro Gracia, and Avel Cuellar are necessary to establish known samples for purposes of including or excluding each as the source of biological evidence according to standardized scientific DNA testing protocols. DNA testing of the shirt belonging to Avel Cuellar is necessary to determine whether it was contaminated by biological evidence (blood) not belonging to Escolastica Harrison or himself between the time he arrived home and discovered her body and the time police arrived, and if so whether it matches one, or more of the co-defendants. DNA testing of the nail scrapings taken from Escolastica Harrison during the autopsy is necessary to determine whether, during the struggle with her assailant(s) which resulted in defensive wounds to her hands, she collected biological material from their skin under her fingernails and if so whether it matches one or more of the co-defendants. DNA testing of the blood samples collected from Avel Cuellar's bathroom, the raincoat, and the sofa is necessary to determine whether they contained DNA from one or more of the co-defendants in a mixture with DNA from Escolastica Harrison which would establish that it was deposited by the assailant(s) after the assault. DNA testing of the loose hair is necessary to determine whether it matched

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Attorney, the Brownsville Police Department, and the Texas Department of Public Safety. Defendant suggests that since the evidence at issue was placed in the "sexual assault kit" that it may have been mistakenly separated from other evidence of the murder and stored instead with evidence from other sexual assaults.

just Escolastica Harrison or whether it contained DNA from one of her assailants. Indeed, the medical examiner testified that given the evidence of a struggle this could provide "vital information" relevant to the case. 19 RR 263. If any such evidence proves that Pedro Gracia was inside the victim's house, it immediately and fully discredits the Plaintiff's theory of the case that he was *just* the getaway driver. It also discredits the Plaintiff's theory of the case that Defendant personally participated in the victim's murder in order to avoid identification. Again, according to the Plaintiff's theory of the case, there were two assailants. Rene Garcia plead guilty and admitted that he was the first assailant so if any such evidence proves that Pedro Gracia was the second assailant then Defendant did not personally participate in the victim's murder. At the same time it lends credibility to Gutierrez's theory of the case that he did not plan, did not intend or anticipate, was not present for, and did not personally participate in the victim's murder. This outcome is all the stronger if such evidence provides no match for Gutierrez whatsoever.

Defendant's trial counsel made multiple, timely pre-trial *Brady* motions for inspection of the State's evidence including, *inter alia,* a motion for discovery and inspection of evidence (including crime scene photographs and Petitioner's clothing) (I CR 37 *et seq.*), a motion to inspect, examine and test physical evidence (I CR 77 *et seq.*);[7] and a request to inspect, examine

7. Both motions were filed on February 5, 1999—more than three months before trial.

and test physical evidence, I CR 77 (filed February 5, 1999). The State provided Defendant's defense team with a list of such evidence on Wednesday March 17, 1999, 3 RR 10 (referring to DX 1 - DPS Crime Lab Report). The District Judge granted Defendant's *Brady* motion on Thursday, March 18, 1999, and ordered the biological evidence disclosed. *See* 3 RR 9. Additionally, during post-conviction proceedings, Defendant filed a motion under Article 64 of the Texas Code of Criminal Procedure seeking access to the foregoing evidence for purposes of conducting independent post-conviction DNA testing. Then-Cameron County District Attorney Armando Villalobos, through his office and assistants, opposed the motion.[8] On May 4, 2011, the CCA issued a decision in which it acknowledged that, even taking into consideration the evidence received at trial, the fingernail scrapings taken from Escolastica Harrison during the autopsy "might conceivably contain DNA from the murderers" and that a DNA match to co-defendant Pedro Gracia would be potentially exculpatory. *Ex parte Gutierrez,* 337 S.W.3d 883, 900-901 (2011).[9]

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8. Villalobos has since been convicted of federal RICO charges arising from his abuse of office to fix cases. He is succeeded in office by Luis V. Saenz. Counsel for Gutierrez has been advised that Saenz's office will take no position on a renewed request for post-conviction DNA testing until a request has been filed.

9. This factual determination notwithstanding, the CCA's order ultimately affirmed the District Judge's denial of the request for DNA testing under Article 64.03(a)(2)(A) because it deemed Gutierrez's theory of the case to be implausible. However, the *Brady* rule does not exclude "potentially exculpatory" evidence from mandatory disclosure because

IV. The State has an obligation under *Brady* to allow Defendant access potentially exculpatory evidence even after conviction.

Suppression by the prosecution of material evidence favorable to the accused after his request violates due process, irrespective of the good faith or bad faith of the prosecutor. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963), *Martinez v. Wainwright,* 621 F.2d 184 (5th Cir. 1980). Nothing in *Brady* or its progeny limits the doctrine of disclosure to the pre-conviction context. *Monroe v. Butler,* 690 F. Supp. 521, 525 & n.4 (E.D. La.1988), *affd,* 883 F.2d 331 (5th Cir.), *cert. denied,* 487 U.S. 1247 (1988). Indeed, the nondisclosure of *Brady* material equally taints a defendant's attempts to obtain post-conviction relief from his conviction and/or sentence. *Monroe,* 690 F.Supp. at 526.

Accordingly, even assuming, without agreeing, that the Texas Court of Criminal Appeals was correct that

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the State or the Court finds the defendant's theory of the case implausible—implausible is not the same as impossible.

The Defendant would remind the Court that the Plaintiff State (through the Williamson County District Attorney) raised similar arguments in regard to the 1987 conviction of Michael Morton for the murder of his wife. When post-conviction DNA testing was finally allowed in 2011, Morton was exonerated and released from prison while Morton's prosecutor (and later District Judge) Ken Anderson plead guilty to criminal contempt for concealing exculpatory evidence and permanently surrendered his law license. The situation in the instant case is even more dire as Defendant faces the death penalty whereas Morton did not.

Gutierrez's trial counsel "made a considered decision" to forgo DNA testing at trial due to its tardy disclosure, *Ex parte Gutierrez,* 337 S.W.3d 883, 896 (2011), this does not vitiate the State's obligation to allow access to, and independent testing of, potentially exculpatory DNA evidence. *See generally Ex parte Mowbray,* 943 S.W.2d 461, 465 (1996) (vigorous and professional defense of client did not vitiate *Brady* violation). The Plaintiff's continuing refusal to allow Defendant access to potentially exculpatory biological evidence in order to conduct DNA testing violates his right to due process and has now tainted his attempts at obtaining post-conviction relief. *Monroe,* 690 F.Supp. at 526. Furthermore, should the biological evidence prove what Defendant asserts it will prove, Plaintiff's continuing refusal to allow Defendant access and to instead execute him would result in a violation of his Eighth Amendment right to be free from cruel and unusual punishment.

WHEREFORE, Defendant respectfully requests that this Court conduct a hearing on this motion, grant it, and enter an order declaring that the Plaintiff's continued withholding of the evidence violates Defendant's constitutional rights and requiring that Plaintiff release the evidence to Defendant under a reasonable protocol regarding chain of custody and preservation of the evidence so that Defendant may have the evidence tested at his own expense. Defendant further requests that if Plaintiff cannot produce all of the evidence requested, that it be ordered to produce all documents demonstrating the chain of custody of any missing evidence and an affidavit of fact from each

custodian in the chain of custody as to its disposition or destruction and an affidavit from the last known custodian as to the extent of the search conducted for such evidence. Defendant further requests that exemplar DNA samples (or DNA records from exemplar DNA samples) previously collected from Rene Garcia, Pedro Gracia, Avel Cuellar, and himself also be released or, if no such previously collected examples (or DNA records) exist, that the Court enter an order that they be collected by the Plaintiff and released to Defendant under a reasonable protocol regarding chain of custody and preservation of evidence for purposes of DNA testing and comparison.

Respectfully Submitted,

/s/ Margaret Schmucker
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Appendix AA

ATTACHMENTS
TO
MOTION FOR MISCELLANEOUS RELIEF

Pathology Report (Preliminary and Final)

Crime Laboratory Report

Excerpts from Volume 17 of 32 (Opening Argument)

Excerpts from Volume 19 of 32 (Witness Testimony)

Excerpts from Volume 20 of 32 (Closing Argument)

Ex parte Gutierrez, 337 S.W.3d 883 (Tex. Crim. App. 2011)

Ritter, *It's the Prosecution's Story, But They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*
74 Fordham L. Rev. 825 (2005)

Appendix BB – Order of the District Court of Cameron County, Texas Dening Motion for Forensic DNA Testing (July 27, 2010)

DISTRICT COURT OF TEXAS
107TH JUDICIAL DISTRICT
CAMERON COUNTY

No. 98-CR-1391-A

STATE OF TEXAS,

v.

RUBEN GUTIERREZ.

Filed July 27, 2010

ORDER ON DEFENDANTS MOTION FOR FORENSIC DNA TESTING

Hon. Benjamin Euresti, Jr., Judge Presiding.

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

1. Defendant's Motion fails to comply with Texas Code Crim. Proc. Art. 64.01(b)(1)(B). Defendant did have the opportunity to inspect all physical evidence

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

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

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

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

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

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

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

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

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