Nos. 19-8695, 19A1052

IN THE

Supreme Court of the United States

RUBEN GUTIERREZ,
Plaintiff-Appellant,

v.

BRYAN COLLIER, et al.,
Defendants-Appellees.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit
and Application for a Stay of Execution

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari in a case raising only unexhausted and meritless challenges to the state's execution protocol that does not impinge upon any religious exercise, is reasonably related to the prison system's obvious and compelling interest in security, and was enacted with a secular purpose and in response to guidance from this Court?

2. Should this Court grant a stay of execution where the lower court properly found there was no substantial likelihood of success on the merits and where the equities favor the state?

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BRIEF IN OPPOSITION

The Defendants-Appellees respectfully submit this brief in opposition to the petition for a writ of certiorari and application for a stay of execution filed by Ruben Gutierrez.

Plaintiff-Appellant Ruben Gutierrez was convicted and sentenced to death twenty-one years ago for the murder of eighty-five-year-old Escolastica Harrison. Gutierrez is scheduled to be executed after 6:00 p.m. (Central Time) on June 16, 2020. Gutierrez has repeatedly and unsuccessfully challenged his conviction and sentence in state and federal court. He has exhausted his postconviction remedies, including twice unsuccessfully seeking postconviction DNA testing in state court.

Gutierrez filed an amended civil-rights complaint in the district court alleging that Texas's postconviction DNA testing procedures facially and as authoritatively construed by the Texas Court of Criminal Appeals (CCA) violate procedural due process—his DNA claims. ROA.598–611.[1] Gutierrez also alleged that the Texas Department of Criminal Justice's (TDCJ) revised execution protocol violates his constitutional and statutory rights because it permits only TDCJ security personnel, not chaplains, inside the execution room—his Chaplain claims. ROA.611–15.

[1] "ROA" refers to the record on appeal filed in the court below.

The Defendants-Appellees moved to dismiss Gutierrez's amended complaint, ROA.619–706, and the district court granted the motion in part and denied it in part. ROA.802–32. Thereafter, the district court granted Gutierrez a stay of execution, although it was entirely unclear which claim the district court found would likely succeed. ROA.991–93. As the Fifth Circuit properly held, the district court abused its discretion in doing so. *Gutierrez v. Saenz*, No. 20-70009, slip op. 1–8 (5th Cir. June 12, 2020).

Relevant here,[2] the district court granted a stay of execution as to Gutierrez's Chaplain claims. ROA.993. In doing so, the district court elided the fact that several jurists have opined that TDCJ's current execution-room protocol resolved the prior protocol's infirmity, and it did not identify any aspect of the Chaplain claims that were likely meritorious. The Fifth Circuit properly concluded the district court abused its discretion in granting a stay of execution because none of Gutierrez's challenges to TDCJ's revised execution protocol were likely to succeed on the merits. *Gutierrez v. Saenz*, slip op. at 6–8. In particular, the Fifth Circuit found that the guidance given to TDCJ by Justice Kavanaugh accurately appraised the issues surrounding claims like Gutierrez's. *Id.* at 7. The Fifth Circuit also concluded Gutierrez was not

[2] Gutierrez has waived his challenge to Texas's postconviction DNA testing statute.

entitled to a stay because the balance of equities weighed against such relief. *Id*. at 8.

Gutierrez now challenges the Fifth Circuit's opinion and requests a stay of execution. Gutierrez fails to identify any error in the Fifth Circuit's opinion, and he fails to satisfy his burden to justify a stay of execution.

STATEMENT OF THE CASE

I. Facts Concerning Gutierrez's Murder of Escolastica Harrison and the Finding of Guilt

> The evidence shows that the [eighty-five]-year-old victim kept approximately $600,000 in cash in her home which also served as an office for a mobile home park she owned and managed. The victim had befriended [Gutierrez] and [Gutierrez] knew the victim kept a lot of cash in her home office.
>
> [Gutierrez] developed a plan to steal the victim's money. On September 5, 1998, the [twenty-one]-year-old [Gutierrez] and an accomplice, whom the victim did not know, went into the victim's home/office to carry out the plan. When [Gutierrez] and the accomplice left with the victim's money, the victim was dead. She had been beaten and stabbed numerous times.
>
> [Gutierrez] claimed in his third statement to the police that "we" (he and the accomplice) had two different types of screwdrivers when they entered the victim's home/office to steal her money. [Gutierrez] also claimed that the initial plan was for the accomplice to lure the victim out of her home/office through the front by some innocent means at which time [Gutierrez] would go in through the back and take the victim's money without the victim seeing him. This plan was frustrated when the victim saw [Gutierrez] enter through the front door while the accomplice was still inside with her. [Gutierrez] claims that soon after this, the accomplice began to beat, kick, and stab the victim with a screwdriver while [Gutierrez] got her money. [Gutierrez] did nothing to prevent the accomplice from attacking the victim.

> The medical examiner testified that the victim suffered various defensive wounds indicating that she struggled for her life and tried to "ward off blows or attacks of some sort." The medical examiner also testified that the victim suffered approximately thirteen stab wounds, caused by two different instruments—one "almost certainly" a flat head screwdriver and the other possibly a Phillips head screwdriver. The victim died from "massive blows to the left side of the face."

Gutierrez v. State, No. AP-73,462, slip op. at 2–3 (Tex. Crim. App. Jan. 16, 2002).

II. Facts Relevant to Punishment and the Sentencing Phase of Trial

A. The State's evidence

> At punishment, the prosecution presented evidence of [Gutierrez's] involvement with the criminal justice system since he was 14-years old. As a juvenile, [Gutierrez] committed several burglaries, he assaulted a police officer, and he threatened to kill a teacher and a security officer. Attempts to rehabilitate [Gutierrez] in various juvenile detention facilities were unsuccessful. [Gutierrez] was a disciplinary problem in these facilities and he often escaped from them.
>
> As an adult, [Gutierrez] committed various misdemeanor offenses. He also was convicted of forgery. While doing time in Cameron County Jail on this state jail conviction, [Gutierrez] instigated an "almost riot" because county jail employees would not give him any Kool-Aid. Shortly thereafter [Gutierrez] complained about cold coffee and threw it at a guard.
>
> While awaiting trial for this offense, [Gutierrez] was assigned to the "high risk" area of the Cameron County Jail from where [Gutierrez], the accomplice, and another individual attempted an escape during which [Gutierrez] told a guard not to interfere or he would be "shanked." Immediately following the jury's guilt/innocence verdict in the instant case, [Gutierrez] said that he might kill an assistant district attorney.

Id. at 6.

B. Gutierrez's evidence

Dr. Jonathan Sorenson, an expert on future dangerousness, testified regarding the actuarial method of assessing an inmate's potential for future danger. 24 RR 4–15. He stated that data indicates that murderers make the best inmates and that inmates incarcerated for homicide had a very low likelihood of committing another one. 24 RR 17, 19–22. Moreover, Dr. Sorenson testified that an inmate's age was the best predictor of future dangerousness and that a twenty-one-year-old inmate with a prior criminal record was not more than likely to commit violent acts in the future. 24 RR 27.

The defense also presented the testimony of Gutierrez's aunt, Hilda Garcia who testified that Gutierrez was easy-going and a responsible husband and father. 24 RR 49–56. She also testified that Gutierrez was lovable, caring, and helpful to people who needed assistance. 24 RR 57. After considering this evidence, and "based on the jury's findings at the punishment phase, the trial judge sentenced [Gutierrez] to death." *Ex parte Gutierrez*, 337 S.W.3d at 888.

III. Course of State and Federal Proceedings

Gutierrez's conviction was affirmed on direct appeal by the CCA. *Gutierrez v. State*, slip op. 1–21. The CCA thereafter denied Gutierrez state habeas relief. *Ex parte Gutierrez*, No. WR-59,552-01, 2008 WL 2059277, at *1 (Tex. Crim. App. May 14, 2008).

Gutierrez then filed a federal habeas petition. Petition 1–25, *Gutierrez v. Stephens*, No. 1:09-CV-22 (S.D. Tex. Jan. 26, 2009), ECF No. 1. Instead of ruling on Gutierrez's petition, the district court stayed the proceeding to allow Gutierrez to return to state court and pursue additional claims. Order, *Gutierrez v. Stephens*, No. 1:09-CV-22 (S.D. Tex. Apr. 28, 2009), ECF No. 12.

While back in state court, Gutierrez unsuccessfully sought postconviction DNA testing. *Ex parte Gutierrez*, 337 S.W.3d at 901–02. He also unsuccessfully sought state habeas relief; his subsequent application denied as abusive. Order, *Ex parte Gutierrez*, No. WR-59,552-02 (Tex. Crim. App. Aug. 24, 2011).

After the state litigation ended, the district court reopened the federal habeas proceeding and denied Gutierrez relief and a certificate of appealability (COA). Mem. Op. & Order 1–76, *Gutierrez v. Stephens*, No. 1:09-CV-22 (S.D. Tex. Oct. 3, 2013), ECF No. 44. Gutierrez then sought a COA from the United States Court of Appeals for the Fifth Circuit, but his request was denied. *Gutierrez v. Stephens*, 590 F. App'x 371, 384 (5th Cir. 2014). This Court later denied him certiorari review. *Gutierrez v. Stephens*, 136 S. Ct. 573 (2015).

The state trial court then set a date for Gutierrez's execution. Order Setting Execution, *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron County, Tex. Apr. 11, 2018). About a month and a half before this execution date, Gutierrez's federally-appointed counsel moved to withdraw

from the case. Mot. Withdraw & Appoint Substitute Counsel, *Gutierrez v. Davis*, No. 1:09-CV-22 (S.D. Tex. July 24, 2018), ECF No. 56. New counsel were appointed and a stay of execution entered to allow them time to gain familiarity with the case. Order, *Gutierrez v. Davis*, No. 1:09-CV-22 (S.D. Tex. Aug. 22, 2018), ECF No. 79. The Fifth Circuit refused to vacate the stay. *Gutierrez v. Davis*, No. 18-70028, slip op. 1–3 (5th Cir. Sept. 10, 2018).

After the federal stay expired, the state trial court again set an execution date for Gutierrez. Order Setting Execution, *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron County, Tex. May 1, 2019). The CCA stayed this execution date on state law matters concerning the warrant of execution. *In re Gutierrez*, No. WR-59,552-03, 2019 WL 5418389, at *1 (Tex. Crim. App. Oct. 22, 2019); *see also In re Gutierrez*, No. WR-59,552-03, 2020 WL 915300, at *1 (Tex. Crim. App. Feb. 26, 2020).

About a month and a half after the second execution date was set, Gutierrez again moved for postconviction DNA testing. Mot. Post-Conviction DNA Testing, *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron County, Tex. June 14, 2019). The trial court denied his request and the CCA affirmed. *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *9 (Tex. Crim. App. Feb. 26, 2020).

Once more, the state trial court set an execution date for Gutierrez. Order Setting Execution, *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct.,

Cameron County, Tex. Feb. 28, 2020). About two weeks before the latest execution date, Gutierrez moved to recall the execution order on state law grounds, but the request was denied. Order Deny Convict Gutierrez's Mot., *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron County, Tex. May 28, 2020). Gutierrez moved the CCA for a writ of mandamus to recall the execution order and a stay of execution. Pet. Writ Mandamus, *In re Gutierrez*, No. WR-59,552-04 (Tex. Crim. App. June 2, 2020); Mot. Stay Execution, *In re Gutierrez*, No. WR-59,552-04 (Tex. Crim. App. June 2, 2020). Gutierrez also moved the CCA for a stay of execution in light of the COVID-19 pandemic. The motions were denied.

About a week before his present execution date, Gutierrez filed yet another subsequent state habeas application. Subsequent Appl. Post-conviction Writ of Habeas Corpus, *Ex parte Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron County, Tex. June 8, 2020) (Sub. Appl.). He also moved the CCA to stay his execution based on this application. Mot. Stay Execution Pending Disposition of Subsequent Appl. Post-conviction Writ of Habeas Corpus, *Ex parte Gutierrez*, No. WR-59,552-04 (Tex. Crim. App. June 8, 2020). The CCA found that Gutierrez failed to "satisfy the requirements of Article 11.071 § 5 or Article 11.073 [of the Texas Code of Criminal Procedure]," so it "dismiss[ed] the application as an abuse of the writ without reviewing the

merits of the claims raised" and denied his motion for a stay.[3] Order, *Ex parte Gutierrez*, No. WR-59,552-04 (Tex. Crim. App. June 12, 2020).

REASONS FOR DENYING THE PETITION AND A STAY

Gutierrez's amended complaint generally raised two challenges. The first was to the constitutionality of Texas's postconviction DNA testing statute, Chapter 64 of the Texas Code of Criminal Procedure. ROA.598–611. Gutierrez no longer presses that challenge. The second challenge asked the district court to invalidate TDCJ's revised execution protocol and order that TDCJ permit the presence of a Christian chaplain in the execution room during Gutierrez's execution. ROA.611–15. The district court granted Gutierrez a stay of execution because it found he is likely to succeed as to either his DNA or Chaplain claims, though it did not find that any specific claim was likely to succeed. ROA.993. The Fifth Circuit properly held the district court abused its discretion in granting a stay because Gutierrez is plainly unlikely to succeed on any of his claims. *Gutierrez v. Saenz*, slip op. 1–8.

As to Gutierrez's Chaplain claims, the Fifth Circuit properly held the district court abused its discretion in granting a stay of execution because the claims are plainly unlikely to succeed on the merits. *Id.* at 5–8. In light of the

[3] Pending is Gutierrez's motion to intervene in another federal civil rights case concerning the Texas prisons' response to the COVID-19 pandemic, Polunsky Unit Pls's Mot. Intervene, *Valentine v. Collier*, No. 4:20-CV-1115 (S.D. Tex. May 1, 2020), ECF No. 76; *see also Valentine v. Collier*, 140 S. Ct. 1598, 1598–1601 (2020) (Sotomayor, J., respecting denial of application to vacate stay).

significant opportunities for Gutierrez to commune with a chaplain on the day of his execution, his challenge to TDCJ's revised protocol failed to show he is likely to succeed in demonstrating the protocol imposes a substantial burden on his religious exercise. In the courts below and here, Gutierrez framed the religious exercise he seeks to perform—administration of viaticum, i.e., last rites—a practice the revised protocol permits him to perform shortly before his execution. Cert. Pet. 22 (explaining participation of clergy allows the condemned "to repent and seek spiritual forgiveness before death"); *see, e.g.*, ROA.988.

Gutierrez also failed to show he is likely to succeed in proving that the revised protocol is not the least restrictive means of furthering TDCJ's indisputably compelling interest in security. This is especially true because courts are to give deference to prison administrators in establishing necessary regulations to maintain security. Moreover, Gutierrez failed to show he is likely to succeed on his Chaplain claims because, if granted the relief he seeks, the necessary accommodation would be far reaching and would entangle federal courts in TDCJ's management of its execution procedures. Additionally, the Fifth Circuit properly held the district court abused its discretion in not finding that the balance of equities weighed against a stay of execution. Gutierrez identifies no reason to disagree with the Fifth Circuit's conclusions.

ARGUMENT

I. The Standard Governing Stay Requests

"Filing an action that can proceed under § 1983 does not entitle [Gutierrez] 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)). Gutierrez must satisfy all 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 a stay of execution is requested, 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)). "In a capital case, the movant is not always required to show a probability of success on the merits, but he must present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities[,] i.e., the other three factors[,] weighs heavily in favor

of granting a stay." *Garcia v. Castillo*, 431 F. App'x 350, 355 (5th Cir. 2011) (cleaned up).

A federal court must also 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.

II. Gutierrez Is Not Entitled to a Petition for a Writ of Certiorari.

While primarily seeking a stay of execution, Gutierrez also seeks a writ of certiorari. To the extent that declining to issue a stay is a compelling reason for certiorari review, *see* Sup. Ct. R. 10, review of such a decision is deferential and should only be overturned "when the lower court[has] clearly abused [its] discretion." *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., dissenting). Notably, Gutierrez identifies no relevant split among the courts or any other reason amplifying the need for this Court's review. Sup. Ct. R. 14.1(h). As discussed below, Gutierrez is not entitled to a stay of execution. For the same reasons, he is not entitled to a writ of certiorari as to his meritless claims. His petition should be denied.

III. The Fifth Circuit Properly Held Gutierrez Failed to Make a Strong Showing that He Is Likely to Succeed on the Merits of His Chaplain Claims.

In his amended complaint, Gutierrez raised constitutional and statutory claims challenging TDCJ's revised execution protocol permitting only security personnel in the execution room during an execution.[4] ROA.63, 611–15. The district court granted a stay of execution, apparently finding that Gutierrez is likely to succeed on one of his Chaplain claims. ROA.993. As discussed below, the Fifth Circuit properly held the district court abused its discretion in granting a stay.

A. Background

In March 2019, this Court stayed the execution of Patrick Murphy based on his claims challenging TDCJ's refusal to permit a Buddhist spiritual advisor in the execution room while permitting Christian or Muslim chaplains to be present during an execution. *Murphy v. Collier*, 139 S. Ct. 1475 (2019). Writing separately, Justice Kavanaugh explained that while the State may not give special preferences to one religion over another, it may allow "inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not in the execution room" *Id.* (Kavanaugh, J., concurring in grant of

[4] Neither Gutierrez nor the district court addressed whether his Chaplain claims called for mandamus relief beyond a federal court's jurisdiction. *See Waters v. Texas*, 747 F. App'x 259, 260 (5th Cir. 2019).

stay). That is, while the State may not give some religions special access to the execution room, it may require that any religious advisor observe the execution from the viewing room. *Id*.

TDCJ took Justice Kavanaugh's advice. It changed its execution protocol such that chaplains are not permitted to be present in the execution room. ROA.63. 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." ROA.62. 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. ROA.62–63. Chaplains and an outside spiritual advisor may be present in the witness room immediately adjacent to the execution room. ROA.63. This policy does not give special preference to any religion or to religious practice.

B. Gutierrez's Chaplain claims are unexhausted.

Although Gutierrez asserts he filed a Step 1 grievance in August 2019, Cert. Pet. 8–9, TDCJ records indicated he filed only one grievance, in April 2020, regarding his Chaplain claim. ROA.71–74, 971–74. This grievance could not have satisfied exhaustion because it was filed during the pendency of his § 1983 lawsuit, not prior to filing. *Jones v. Bock*, 549 U.S. 199, 211 (2007).

Consequently, Gutierrez failed to exhaust his administrative remedies, and the district court abused its discretion in effectively presuming administrative remedies were not available to Gutierrez. *See Woodford v. Ngo*, 548 U.S 81, 85 (2006) (a prison must exhaust administrative remedies even where the relief sought "cannot be granted by the administrative process"). As the Defendants argued in their motion to dismiss and in the court below, Gutierrez's failure to exhaust his Chaplain claims required dismissal.

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*, 548 U.S. at 85); *Jones*, 549 U.S. at 211). The PLRA's exhaustion requirement applied to Gutierrez'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.").

Gutierrez's email correspondence with TDCJ General Counsel did not satisfy the mandatory exhaustion requirement under PLRA; he could 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). Because Plaintiff did not exhaust administrative remedies prior to bringing his Chaplain claims in federal court, PLRA mandates dismissal of the claims.

Gutierrez argued that this Court's stay of Patrick Murphy's execution implied that exhaustion of his Chaplain claims was either accomplished or unnecessary. ROA.730–31. However, in both the Fifth Circuit and this Court, the courts ruled only on the plaintiff's request for a stay.[5] *Murphy v. Collier*,

[5] Notably, neither the Fifth Circuit nor the district court explicitly addressed prior to this Court's stay of Murphy's execution the issue of exhaustion of

139 S. Ct. at 1475; *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). This 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*. Gutierrez offered 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.

Importantly, Gutierrez's failure to attempt exhaustion prior to filing his complaint relinquished his opportunity to raise, and deprived TDCJ the

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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 (S.D. Tex. 2019).

opportunity to respond to, any questions he might have had seeking to clarify the extent of his ability to exercise his religious practice—receiving last rites—on the day of his execution. To the extent there is any lack of clarity in these proceedings, it is attributable to Gutierrez, not the Defendants. Gutierrez's Chaplain claims are unexhausted. Consequently, he cannot succeed on the merits of the claims and is not entitled to a stay of execution.

C. The Religious Land Use and Institutionalized Persons Act (RLUIPA) claim

To justify a stay based on his RLUIPA claim, Gutierrez was required to show he is likely to succeed in showing 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 Holt v. Hobbs*, 574 U.S. 352, 361 (2015); *Adkins v. Kaspar*, 393 F.3d 559, 569–70 (5th Cir. 2004) (a "substantial burden" is one that truly pressures the adherent to substantially modify his or her religious behavior). TDCJ's policy permitting Gutierrez significant opportunities to commune with a chaplain in the days and hours before his execution and permitting chaplains and spiritual advisors to attend an execution in the witness room rather than inside the execution room is not a substantial burden on Gutierrez's religious exercise, i.e., receiving his last rites from a chaplain. ROA.988 (describing the religious exercise he seeks to

practice as the "longstanding practice of administering viaticum to those facing death"). The Fifth Circuit properly held Gutierrez failed to make a strong showing that he is likely to succeed on the merits of this claim.

Gutierrez provided no support for his assertion that TDCJ's protocol providing him opportunities to speak with a chaplain shortly before his execution and permitting the presence of a chaplain in the witness room—rather than the execution room—is a substantial burden on his exercise of his religion. ROA.614–15. Gutierrez stated that he wishes to have a chaplain present in the execution room during the execution "to guide him to the afterlife." ROA.789. He explained the purpose of the chaplain's presence as being necessary to administer last rites, i.e., viaticum. ROA.789; Cert. Pet. 12. But, again, he has not explained why that rite cannot be performed during the many opportunities he will have to commune with a TDCJ chaplain in the days and hours before his execution or how speaking with a chaplain from the holding cell will prevent him from doing so.[6] ROA.62–63; *see Murphy*, 942 F.3d at 706 ("The policy, however, does not place any limitation on visits by TDCJ-employed clergy, who appear to have access to an inmate until the moment he

[6] Gutierrez asserts the Fifth Circuit improperly told him what his religion is and what practice is important to it. Cert. Pet. 19. Not so. As discussed above, the Fifth Circuit appropriately determined Gutierrez failed to satisfy his burden under RLUIPA of demonstrating TDCJ's protocol imposes a substantial burden on his religious exercise. *Gutierrez v. Saenz*, slip op. 7–8.

enters the execution chamber."); *see also* Cert. Pet. 6 (asserting the interest in having clergy available to "hear a person's confession and offer reconciliation" up to the moment of death).

In *Holt*, this Court found a prison grooming policy that *completely* prevented the petitioner from exercising an act dictated by his faith—wearing a beard—was a substantial burden on his religious exercise and, therefore, violated RLUIPA. 574 U.S. at 361. Here, TDCJ's revised execution protocol will not prevent Gutierrez from engaging in the religious exercise he wishes to—communing with a chaplain and receiving his last rites. ROA.62–63 (TDCJ's revised protocol providing for visits with a chaplain or spiritual advisor on the day of, and shortly before, the execution); *Murphy*, 942 F.3d at 706. The protocol does not require Gutierrez to, instead, "engage [only] in other *forms* of religious exercise." *Holt*, 574 U.S. at 362 (holding that district court erred in concluding prison's grooming policy did not substantially burden the plaintiff's religious exercise because he was permitted to engage in other forms of religious exercise, e.g., use of a prayer rug and observance of religious holidays) (emphasis added). Instead, under the revised protocol, Gutierrez may engage in the *same* religious exercise shortly before his execution.

Gutierrez suggests that his religion dictates that inmates facing execution receive last rites as they are executed because clergy have historically participated in executions. Cert. Pet. 23. Gutierrez's argument

ignores that a chaplain will participate in his execution. His argument also conflates historical practice with the dictates of his religion. Cert. Pet. 23. That condemned inmates have been provided clergy—*as Gutierrez will be*—does not shine any light on whether Gutierrez's religion requires administration of last rites to individuals as they are dying, not shortly before. Such an assertion would appear baseless, as countless Catholics have not been afforded the opportunity to exercise that religious practice before their death.

Gutierrez relies on Establishment Clause precedent for the proposition that a chaplain must be permitted to be present in the execution room during his execution because such a practice is historically rooted. Cert. Pet. 23 (quoting *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 603 (2014) (Alito, J., concurring)). But whether historical practice, e.g., holding prayer during a city meeting, is probative of whether government action can be interpreted as compelling a religious practice does not help Gutierrez to show that the religious exercise he wishes to practice is required under the Constitution or his religion to be permitted in the way he asserts it must be. Again, Gutierrez will be permitted to exercise the religious practice he wishes to. The protocol does not prevent him from doing so. *See Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) ("This isn't a situation where the claimant is left with some

degree of choice in the matter and we have to inquire into the degree of the government's coercive influence on that choice.").[7]

Gutierrez also asserts the Fifth Circuit improperly focused on whether he has alternative means for exercising his religious practice. Cert. Pet. 21. But, as discussed above, the Fifth Circuit did not do so. Instead, the court appropriately concluded—consistently with *Holt*—that the same religious exercise Gutierrez seeks to practice can be performed shortly before his execution. *Gutierrez v. Saenz*, slip op. 7–8. It did not hold that Gutierrez must accept an alternative.

Consequently, Gutierrez failed to satisfy his burden of showing he is likely to succeed in demonstrating that TDCJ's policy imposes a substantial burden on his religious exercise or will truly force him to substantially modify his religious behavior. *See Murphy*, 139 S. Ct. at 1484 ("[N]ot every religion would draw a distinction between meeting with a clergyman shortly before death and one precisely at the moment of death.") (Alito, J., dissenting from grant of stay); *Holt*, 574 U.S. at 361–62; *Adkins*, 393 F.3d at 570. This is evident, as several jurists have opined that the change to TDCJ's prior protocol resolved its infirmity. *Murphy*, 139 S. Ct. at 1476–77 (Kavanaugh, J., joined

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[7] The Tenth Circuit's holding in *Yellowbear* is congruent with *Holt* in that each case addressed prison policies that *completely* prevented an inmate from performing a religious exercise. As discussed above, Gutierrez will not be prevented from communing with, and receiving his last rites from, a chaplain.

by Roberts, C.J., statement respecting grant of stay) ("[T]he State has a compelling interest in controlling access to the execution room which means an inmate likely cannot prevail on a RLUIPA or free exercise claim to have a religious minister in the execution room, as opposed to the viewing room."); *Murphy*, 942 F.3d at 711 (Elrod, J., dissenting); *Murphy v. Collier*, 423 F. Supp. 3d 355, 361 (S.D. Tex. Nov. 7, 2019). Therefore, Gutierrez failed to justify a stay of execution as to his RLUIPA claim.[8]

Even if Gutierrez's allegation suffices to demonstrate TDCJ's current protocol imposes a substantial burden on his religious exercise, he failed to make a strong showing that he is likely to succeed on the basis that the protocol is not the least restrictive means of furthering TDCJ's indisputably compelling interest in maintaining institutional security. *Murphy*, 139 S. Ct. at 1476 (TDCJ's interest in controlling access to the execution room is compelling) (Kavanaugh, J., statement respecting grant of stay). It is also evident, as this 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,

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[8] For the same reason, the district court was incorrect to rely on the recent stay in *Murphy* as "raising a similar execution-chamber claim" as Gutierrez's. ROA.993 (citing *Murphy*, 942 F.3d at 709). Murphy was most recently granted a stay as to his pre-execution holding-area claim—a claim Gutierrez does not make. *Murphy*, 942 F.3d at 708. To the extent Murphy's litigation does bear on Gutierrez's Chaplain claims, it reveals the significant likelihood that his execution-room claims will not succeed on the merits, as noted above.

security and discipline, consistent with consideration of costs and limited resources." *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). In that respect, this case is also unlike *Holt* where the Court declined to give "unquestioning deference" to the prison administrator's "hard to swallow" justification—preventing inmates from hiding contraband in a short beard—for the grooming policy. 574 U.S. at 364. Here, the prison has a clearly compelling interest "in tightly controlling access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions," and Gutierrez provides no valid reason to doubt the legitimacy of the purpose of the revised protocol. *See Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring).

To grant a stay would be to grant every prisoner an inalienable right to demand his preferred spiritual advisor's access to the execution room. And it would impose on every State's prison system the obligation to accommodate any such request, notwithstanding any logistical or practical limitations. *Holt*, 574 U.S. at 363 (RLUIPA requires a court to scrutinize the asserted harm of granting exemptions to a religious claimant and to look to the marginal interest in enforcing the challenged government action). The relief is unworkable on its face, which is why this Court has never before endorsed the obligation Gutierrez seeks to impose on TDCJ. That TDCJ chose to follow Justice Kavanaugh's advice is not a basis on which to disregard the significant

deference owed to prison administrators. *See Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., statement respecting grant of stay); *see also 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.").

Moreover, such an accommodation would almost surely entangle federal courts in TDCJ's screening and approval of requested spiritual advisors, e.g., in the event TDCJ determines a particular spiritual advisor does not meet its criteria. *See Cutter*, 544 U.S. at 726; *Lewis v. Casey*, 518 U.S. 343, 362 (1996) (federal courts are not to become "enmeshed in the minutiae of prison operations"); *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004) (federal courts "are not to micromanage state prisons."); *cf. Udey v. Kastner*, 805 F.2d 1218, 1221 (5th Cir. 1986) ("We believe that the probable proliferation of claims, and the concomitant entanglement with religion that processing *multiple* claims would require, does constitute a problem that the state has a good reason to avoid.") (emphasis in original).[9] Again, TDCJ's choice to permit Gutierrez significant opportunities to commune with a chaplain in the time leading up to his execution and to allow chaplains and spiritual advisors in the witness room

[9] For the same reasons, Gutierrez 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).

cannot be the basis of disregarding the deference owed to the prison system. *See Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., statement respecting grant of stay). Gutierrez failed to make a strong showing that he is likely to succeed in overcoming that deference.

Gutierrez asserts the Defendants have not proven that the revised protocol is not the least restrictive means of satisfying TDCJ's security concerns.[10] Cert. Pet. 21–22. As this Court is aware, TDCJ's security concerns are manifold. *See Murphy*, 139 S. Ct. at 1476 (referencing affidavit of the Director of TDCJ's Correctional Institutions Division detailing the compelling interests in controlling access to the execution room); Def.s-Appellants' App'x 4, at 64–65, 80–81, *Murphy v. Collier*, No. 19-70020 (5th Cir. Nov. 8, 2019) (the Director's explanation of the security risks that allowing non-TDCJ personnel would create, including ensuring that individuals who attend an execution in the execution room are able "to conduct themselves in a stressful situation with control, professionalism and good judgment" and explaining that approving personnel for that purpose "cannot be duplicated to consider a person who is not a TDCJ employee").[11] Gutierrez is flatly wrong that the Defendants have

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[10] It is not the Defendants burden to disprove Gutierrez's entitlement to a stay. It is his burden to show that his claims are likely to succeed on the merits.

[11] Additionally, TDCJ's security interests include maintaining the anonymity of the execution team, which could be jeopardized by the presence of an outsider during the execution process. Def.s-Appellants' App'x 4, at 64–65, 80–81, *Murphy v. Collier*, No. 19-70020 (5th Cir. Nov. 8, 2019)

only identified one reason—denying Patrick Murphy a spiritual advisor in the execution room—justifying its revised protocol. Such an argument ignores the plain text of the protocol and the obvious reason—explained by Justice Kavanaugh—for its revision. The protocol explains that "[o]nly TDCJ *security personnel* shall be permitted in the execution chamber." ROA.63. As Justice Kavanaugh aptly explained, because TDCJ has a compelling interest in controlling access to the execution room, a remedy for that concern "would be to allow religious advisers only into the viewing room." *Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., concurring). It is exceedingly disingenuous to suggest TDCJ revised its protocol for the sole purpose of depriving Patrick Murphy of the presence of his spiritual advisor as opposed to the obvious reason—creating a protocol that would be permissible in response to this Court's action and guidance.

TDCJ has—consistent with guidance from this Court—designed the least restrictive means of furthering its obvious and compelling interest in security, which has been signaled as resolving the infirmity in TDCJ's prior protocol. *Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring); *id*. at 1476 (Kavanaugh, J., statement respecting grant of stay). Gutierrez's request concerns the weighty process of carrying out an execution. RLUIPA does not elevate accommodation of religious observances over a prison's need to maintain order and safety, especially in the absence of any evidence that

Gutierrez's religious rite cannot be performed with a chaplain in the days and hours prior to his execution. *Cutter*, 544 U.S. at 722; *Murphy*, 942 F.3d at 706. The Fifth Circuit properly held the district court abused its discretion in not holding Gutierrez to his burden of making the requisite showing under RLUIPA and in holding he is not entitled to a stay of execution. *Gutierrez v. Saenz*, slip op. 7–8.

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No State provides more robust protections to religious liberty than does Texas, and Texas treats among its highest interests its solemn obligations to safeguard the free exercise of religion. *E.g.,* Tex. Civ. Prac. & Rem. Code 110.001 (*et seq*.) (Texas Religious Freedom Restoration Act). Texas further has a compelling interest in the security and integrity of its capital punishment procedures. Neither the Constitution nor RLUIPA requires Texas to overlook that interest—particularly where, as here, Texas's procedures protect the free exercise of religion, and Gutierrez does not point to any infringement on the free exercise of religion.

D. The Free Exercise Clause claim

Gutierrez also claims TDCJ's revised protocol violates his rights under the Free Exercise Clause. As the Fifth Circuit properly held, he failed to justify a stay as to this claim because it is unlikely to succeed. *Gutierrez v. Saenz*, slip op. 6–7.

Free Exercise claims that challenge prison policies are reviewed under the deferential standard of *Turner v. Safley*, 482 U.S. 78, 89–90 (1987).[12] *See Murphy*, 139 S. Ct. at 1482–83 (Alito, J., dissenting from stay). The *Turner* reasonableness test includes the following factors:

> First, is there a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"? Second, are there "alternative means of exercising the right that remain open to prison inmates"? Third, what "impact" will "accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally"? And, fourth, are "ready alternatives" for furthering the governmental interest available?

Beard v. Banks, 548 U.S. 521, 529 (2006) (quoting *Turner*, 482 U.S. at 89–90). The Fifth Circuit properly found TDCJ's revised policy permissible under *Turner*. *Gutierrez v. Saenz*, slip op. 6.

Gutierrez alleged that TDCJ's revised execution protocol prevents him from exercising his religion by receiving last rites from a chaplain. ROA.611–13. This claim plainly failed to satisfy *Turner*. First, Gutierrez failed to show he is likely to establish that TDCJ's revised protocol is not rationally connected to its obvious interest in security. *See Turner*, 482 U.S. at 89; *Gutierrez v. Saenz*, slip op. 6. As discussed above, the revised protocol is clearly connected to its compelling interest in controlling access to the execution room, and any

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[12] Gutierrez disputes that *Turner* applies to his Free Exercise Clause claim, but his assertion is foreclosed. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (applying *Turner* to a Free Exercise Clause claim in the prison context).

suggestion that it is not blinks reality. *Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring). And, again, if Gutierrez were granted the relief he seeks, TDCJ would be forced to either revert to its prior, impermissible, protocol or allow spiritual advisors from any and all conceivable denominations to attend executions in the execution room. TDCJ has a valid interest—and a compelling one—in not allowing outsiders into such a highly-charged environment. Def.s-Appellants' App. 4, at 64–65, 80–81, *Murphy v. Collier*, No. 19-70020 (5th Cir. Nov. 8, 2019). Gutierrez's refusal to recognize that obvious interest reflected by the protocol does not satisfy his burden under *Turner*.

Second, he failed to show he is likely to establish that there are no alternative means for him to exercise his rights (i.e., administration of last rites), as discussed above. ROA.63. Indeed, Gutierrez is not forced to accept an alternative means. He will be allowed to speak with a chaplain shortly before his execution. That is, he has been, and will continue be given, the "opportunity to repent and seek spiritual forgiveness." Cert. Pet. 22.

Third, Gutierrez failed to show he is likely to succeed on the merits considering the impact the accommodation—i.e., the "ripple effect"—would have on prison resources discussed above. *Turner*, 482 U.S. at 90.

Lastly, as discussed above, Gutierrez failed to show he is likely to succeed in showing the existence of a readily available alternative to its revised procedure, which would require a potentially hastened approval process for

outside spiritual advisors of any and all denominations and would potentially jeopardize the execution process. *See Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring); Def.s-Appellants' App. 4, at 64–65, 80–81, *Murphy v. Collier*, No. 19-70020 (5th Cir. Nov. 8, 2019). And again, historical practice does not provide insight into whether Gutierrez's religion or the Constitution require him to receive his last rites in the execution room as opposed to shortly before his execution. *See Yellowbear*, 741 F.3d at 56.

Even if strict scrutiny applies, Gutierrez cannot make a strong showing that he is likely to succeed on the merits. Again, this appears evident, as several jurists have opined that TDCJ's change to its execution protocol resolved the prior protocol's constitutional infirmity. *Murphy v. Collier*, 139 S. Ct. at 1475–76 (Kavanaugh, J., statement respecting grant of stay); *Murphy v. Collier*, 942 F.3d at 711 (Elrod, J., dissenting); *Murphy v. Collier*, 423 F. Supp. 3d at 361. TDCJ's revised protocol has a secular purpose—it was enacted shortly after this Court Court stayed Patrick Murphy's execution. The district court noted "it appear[ed] that TDCJ acted" with an obvious secular motivation in revising the protocol. ROA.827. Indeed, Gutierrez certainly failed to make a strong showing that he is likely to succeed in establishing that the revision to the protocol arose, instead, spontaneously out of an invidious hostility toward

religion and only coincidentally after this Court found the prior policy impermissible.[13] Such an assertion would, again, blink reality.

For much the same reasons discussed, *supra*, Section III(C), Gutierrez cannot show a strong likelihood that his Free Exercise Clause claim would succeed on the merits even under a strict scrutiny analysis. *See Johnson v. California*, 543 U.S. 499, 505 (2005). The district court acknowledged TDCJ's interest in security is compelling. ROA.830. And for the reasons discussed above, Gutierrez is not likely to show that TDCJ's revised policy is not narrowly tailored to meet that obviously compelling interest. *Supra*, Section III(C). The Fifth Circuit properly concluded Gutierrez was not entitled to a stay of execution as to his Free Exercise Clause claim. *Gutierrez v. Saenz*, slip op. 5–6.

As discussed above, TDCJ's protocol is rationally related to its legitimate penological interest in security and an orderly execution process. TDCJ's protocol allows Gutierrez many opportunities to meet with a chaplain shortly before the execution, and it permits a chaplain to be present in the witness room. ROA.63. Additionally, Gutierrez failed to show he will be forced to choose

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[13] For the same reason, Gutierrez cannot establish an Establishment Clause violation under *American Legion*, by showing TDCJ's protocol revision was motivated by discriminatory intent or was motivated to "scrub[ ] away any reference to the divine," rather than a secular motivation. *Am. Legion v. Am. Humanist Assoc.*, 139 S. Ct. 2067, 2085–87 (2019) (plurality op.).

between his religious exercise and some benefit. *See Locke v. Davey*, 540 U.S. 712, 720 (2004). The incidental effect of a chaplain's presence in the witness room rather than in the execution room will not cause Gutierrez to substantially alter his religious exercise, especially in light of his many opportunities to exercise his religious practice with a chaplain shortly before his execution. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). For the reasons discussed above, the Fifth Circuit properly held Gutierrez failed to establish he is likely to succeed on the merits. *Gutierrez v. Saenz*, slip op. 6–7.

IV. A Stay of Execution Would Further Delay Enforcement of a Long-Final Judgment.

Lastly, the Fifth Circuit properly found Gutierrez failed to justify a stay that would further delay enforcement of a long-final judgment. *Gutierrez v. Saenz*, slip op. 8. Indeed, Gutierrez failed to show the Defendants and the victims would not be substantially harmed by a stay, that the public interest favors a stay, or that the balance of equities tilts in his favor.

Gutierrez has failed to show his Chaplain claims are likely to succeed or that he would be irreparably injured absent a stay regarding his Chaplain claims. As discussed above, TDCJ will—consistent with its protocol—permit Gutierrez to visit with a chaplain on the day of the execution, and a chaplain may be present during the execution in the witness room. ROA.63. Gutierrez

has not explained why the religious rite he wishes to receive cannot be received in the time shortly before his execution. He will have significant opportunities to exercise his religious rite with a chaplain shortly before his execution, unlike eighty-five-year-old Escolastica Harrison. Consequently, the potential harm has been significantly 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. For the same reasons, Gutierrez fails to show that a stay is in the public interest.

Notably, while Gutierrez asserts he diligently pursued his Chaplain claims, he did not exhaust them. And, as he acknowledges, he sought to stay his proceedings in the district court to await the state court's decision in his DNA appeal, which delayed resolution of his Chaplain claims. The Fifth Circuit properly rejected Gutierrez's request for a stay.

CONCLUSION

Gutierrez fails to identify any error in the Fifth Circuit's opinion. Gutierrez's petition and application for a stay of execution should be denied.

Respectfully submitted,

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