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

BRIEF FOR PETITIONER

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CAPITAL CASE
QUESTION PRESENTED

Does Article III standing require a particularized determination of whether a specific state official will redress the plaintiff's injury by following a favorable declaratory judgment?

PARTIES TO THE PROCEEDING

Petitioner Ruben Gutierrez was the plaintiff in the district court and the respondent in the court of appeals. Respondent Luis Saenz, in his official capacity as the District Attorney of Cameron County, Texas, was a defendant in the district court, along with Felix Sauceda, Jr., in his official capacity as Chief of the Brownsville Police Department. Both Mr. Saenz and Mr. Sauceda were named as defendants because they are custodians of the biological evidence of which Petitioner seeks DNA testing. Both were listed as appellants in the court of appeals, and both are respondents before this Court.

Bryan Collier, Executive Director of Texas Department of Criminal Justice; Lorie Davis, Director of Texas Department of Criminal Justice; and Billy Lewis, Warden, Texas Department of Criminal Justice, were additional defendants in the district court because of their connection to Mr. Gutierrez's claim regarding allowing a spiritual advisor in the execution chamber. They are not parties to the appeal of the declaratory judgment at issue in this case.

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The memorandum and order of the United States District Court for the Southern District of Texas is reported at 565 F. Supp. 3d 892 and reproduced in the Joint Appendix at JA 23a–62a. The opinion of the Fifth Circuit Court of Appeals is reported at 93 F.4th 267 and reproduced in the Joint Appendix at JA 3a–22a.

Also relevant to these proceedings are the opinions of the Texas Court of Criminal Appeals. The 2011 opinion is reported at 337 S.W.3d 883 and reproduced in the Joint Appendix at JA 567a–604a. The 2020 opinion is not published but can be found at 2020 WL 918669 and is reproduced in the Joint Appendix at JA 542a–566a. The 2022 opinion is reported at 663 S.W.3d 128 and reproduced in the Joint Appendix at JA 481a–490a. The 2024 opinion is not published but can be found at 2024 WL 3220514 and is reproduced in the Joint Appendix at JA 467a–480a.

JURISDICTION

The court of appeals issued its opinion vacating the declaratory judgment on February 8, 2024. The court of appeals denied a petition for rehearing and rehearing en banc on May 29, 2024. Petitioner filed a timely petition for writ of certiorari on June 25, 2024, which was granted on October 4, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Title 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Article 64.03(a)(2)(A) of the Texas Code of Criminal Procedure provides, in pertinent part:

> A convicting court may order forensic DNA testing under this chapter only if the convicted person establishes by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained through DNA testing . . . .

Article 11.071 § 5(a)(3) of the Texas Code of Criminal Procedure provides, in pertinent part:

> 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 that application contains sufficient specific facts establishing that 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 . . . .

Article 37.071 § 2(b) of the Texas Code of Criminal Procedure provides, in pertinent part:

> On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> (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.

INTRODUCTION

In *Reed v. Goertz*, 598 U.S. 230, 234 (2023), this Court held that Rodney Reed had standing to pursue a declaratory judgment that Texas's post-conviction DNA statute was unconstitutional because "Reed sufficiently alleged an injury in fact," the named defendant "caused Reed's injury," and if a federal court concludes that Texas's statute violates due process, it is "'substantially likely' that the state prosecutor would abide by such a court order" (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)).

In this case, Ruben Gutierrez, like Reed, sought a declaratory judgment that Texas's post-conviction DNA statute is unconstitutional. For over ten years, Gutierrez, a death-sentenced prisoner, has sought DNA testing to prove that his limited culpability in the underlying offense renders him ineligible for the death penalty, both under Texas law and under this Court's Eighth Amendment jurisprudence. Gutierrez alleged that Texas's DNA testing statute—Texas Code of Criminal Procedure Article 64 ("Chapter 64")—violates due process by permitting DNA testing only where favorable results would go to the defendant's actual innocence, rather than his ineligibility for the death penalty, even though Texas law provides an avenue for state habeas relief on a death-ineligibility claim. The district court granted declaratory relief on that basis.

But on appeal, a divided panel of the United States Court of Appeals for the Fifth Circuit held that Gutierrez lacked standing to bring his claim. The

majority formulated its own novel test, under which a plaintiff's injury is not redressable unless the court makes a record-scouring, predictive determination that the defendants in a particular case will actually comply with a federal court's declaratory judgment. This test goes far beyond the analysis this Court conducted in *Reed*, and it allows state actors to defeat Article III standing simply by refusing to comply with a federal court's declaratory judgment.

The Fifth Circuit's reasoning rested heavily on a statement from an earlier Texas Court of Criminal Appeals (CCA) decision. In that 2011 decision, the CCA stated that the "record facts" from trial established that Gutierrez would still be death eligible even if he obtained favorable DNA results. Based on that statement, Respondents contended that they would not agree to DNA testing, notwithstanding a declaratory judgment against them. And the Fifth Circuit majority held that Respondents' steadfast refusal to comply on those grounds meant that Gutierrez lacked standing to pursue relief under § 1983.

The Fifth Circuit's analysis badly misapprehends the law of standing. Gutierrez seeks § 1983 relief against Respondents, namely, a declaration that Texas's statutory restrictions on DNA testing, on which Respondents rely, violate due process by foreclosing a death-eligibility claim that Texas law otherwise authorizes. The CCA's decision does not prevent Respondents from providing access to the evidence. Respondents are not constrained by the CCA's prior rulings and can grant access to the

requested evidence at any time. In this very case, Respondents have previously been unopposed to DNA testing notwithstanding what the CCA said about Gutierrez's death eligibility. And, more recently, Respondents characterized the federal court's declaratory judgment as "binding."

Gutierrez's injury is redressable by a declaration stating that the statutory basis for Respondents' refusal of access offends due process, just as in *Reed*. Respondents are free to argue in a later proceeding in state court that the DNA evidence does not entitle Gutierrez to relief on a state habeas claim, but whatever may happen in a future state case does not deprive Gutierrez of standing in this current federal one.

That conclusion is buttressed by the many decades of precedent from this Court holding that a litigant does not need to establish that he would obtain substantive relief if a procedural violation were remedied in order to have standing to bring that procedural challenge. *See Peralta v. Heights Med. Ctr.,* 485 U.S. 80, 86–87 (1988); *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915). As the Court recently put it in recounting the law governing procedural injuries, "the fact that the defendant might well come to the same decision after abiding by the contested procedural requirement does not deprive a plaintiff of standing." *Department of Education v. Brown*, 600 U.S. 551, 561–62 (2023). *Brown* involved the more typical scenario where the government actor alleged to have violated some procedural requirement is the same government

actor charged with deciding the merits of the underlying substantive claim. Even then, the federal plaintiff need not establish success on the substance of the claim to have standing to challenge a procedural violation. Gutierrez's standing to seek relief for his procedural due process injury—Respondents' failure to permit DNA testing to allow him to challenge his sentence—is even clearer because Respondents will not decide his ultimate claim for relief. Gutierrez has standing to seek relief from Respondents for his due process injury even if the CCA might ultimately deny relief.

More fundamentally, the Fifth Circuit's record-combing method invites all manner of errors because it premises the purely federal question of standing on subtleties of state law. Thus, without the benefit of formal briefing on either its new test or *Reed* itself, the Fifth Circuit erroneously presumed that the CCA's opinions in the Chapter 64 proceedings inevitably doom any post-DNA claim of death ineligibility. They do not. While the CCA has stated that DNA evidence alone, considered against the "record facts" of trial, would not alter Gutierrez's death eligibility, Gutierrez would be presenting DNA evidence alongside other evidence that the CCA has never considered. That includes evidence demonstrating that an alternate suspect masterminded the plot as well as evidence undermining eyewitness identifications of Gutierrez near the scene of the offense.

The CCA has never considered the import of this evidence in connection with favorable DNA results,

and this Court need not and should not predict the outcome of that state proceeding to decide this one. This case presents the narrow threshold question of whether Gutierrez has standing to challenge Texas's DNA testing statute. Because a favorable decision on that issue would improve his legal position vis-à-vis Respondents—as well as improve his position in his ultimate state court challenge—this Court should reverse the Fifth Circuit and hold that Gutierrez has standing to seek relief under § 1983 regardless of Respondents' intention not to comply with the declaration.

STATEMENT OF THE CASE

Ruben Gutierrez was convicted of capital murder and related offenses in the 1998 robbery and murder of Escolastica Harrison and was sentenced to death. The prosecution's theory at trial was that Gutierrez and two others planned to lure Ms. Harrison out of her mobile home, where she kept large amounts of cash, and then steal the cash from her empty dwelling. The evidence showed that, contrary to that plan, two men entered the mobile home and Ms. Harrison was stabbed to death with two screwdrivers. The prosecution argued that Gutierrez was one of the two killers.

For the last thirteen years, Gutierrez—who maintains that he neither entered Ms. Harrison's house nor knew anyone would be home, much less harmed—has been seeking DNA testing under Chapter 64 of items recovered from the crime scene, including a blood-stained shirt belonging to Ms. Harrison's nephew and housemate, scrapings from

underneath Ms. Harrison's fingernails, a loose hair wrapped around one of her fingers, and various blood samples from within the mobile home. These items were collected from the crime scene by detectives and continue to be preserved because they contain biological material that can reveal who was in Ms. Harrison's home during the crime. Yet this critical evidence has never been tested.

Gutierrez was prosecuted and convicted under Texas's expansive law of parties. Under Texas law, even those who do not actually kill, intend to kill, or anticipate someone would be killed can be guilty of capital murder as a result of their participation in the underlying felony. Tex. Penal Code § 7.01. Those convicted of capital murder are subject to either life imprisonment or the death penalty. Tex. Penal Code § 12.31. But not all who are guilty of capital murder under the law of parties are eligible for the death penalty. *See Johnson v. State*, 853 S.W.2d 527, 535 (Tex. Crim. App. 1992) ("The Texas capital murder scheme does not allow an individual to be put to death for merely being a party to a murder.").

In order to sentence a defendant to death, Texas jurors are required to answer "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." Tex. Code Crim. Proc. art. 37.071; *see also* 24 RR 129.[1] Moreover, the Eighth Amendment prohibits the death penalty for a

[1] Trial testimony is cited as volume number, followed by RR (Reporter's Record), followed by the page number.

participant in a felony murder unless his participation in the underlying felony was "major" and he acted with at least reckless indifference to human life. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Enmund v. Florida,* 458 U.S. 782 (1982). Gutierrez has fought for over a decade to test the biological evidence collected at the crime scene to establish that he did not actually kill, intend to kill, or anticipate someone would be killed, and that he did not act as a major participant in the underlying felony.

Texas statutes embrace the fact that "[m]odern DNA testing can provide powerful new evidence unlike anything known before." *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 62 (2009). Since the time of Gutierrez's trial, Texas has changed its DNA testing protocol to require mandatory testing of all items with biological material in capital cases where the State pursues the death penalty. Tex. Code Crim. Proc. Ann. art. 38.43. If this crime were committed today, DNA testing of these items already would have happened.

Trial evidence

Gutierrez was one of several men who frequently visited and drank with Ms. Harrison's nephew, Avel Cuellar, who lived with Ms. Harrison at a mobile home park. 18 RR 17–18. Ms. Harrison was found in her home beaten and stabbed to death with two screwdrivers. 19 RR 224–42. She kept a large amount of cash in her home; police estimated that approximately $600,000 had been stolen. 18 RR 109–10. The police recovered a substantial amount of physical evidence from the crime scene and during the

autopsy, but the State did not subject any of the evidence to DNA testing.

Police arrested Gutierrez's codefendants Rene Garcia and Pedro Gracia. Both codefendants gave statements implicating themselves and Gutierrez in the offense, but neither of their statements was introduced at trial. Both Garcia and Gracia were charged with killing Ms. Harrison. Gracia was released on bond and absconded; his whereabouts remain unknown today. Garcia pled guilty and was sentenced to life imprisonment.

Police arrested Gutierrez, and he gave three statements. The first and second statements indicated Gutierrez "planned the whole rip off," but that his plan was that they steal from Ms. Harrison's empty home and in no way contemplated that she would be injured or killed. 18 RR 165–78. The third statement put Gutierrez inside Ms. Harrison's house at the time of the murder, but he denied assaulting her and pointed to Cuellar as the mastermind of the crime. 19 RR 66–73. Gutierrez has maintained since before his trial that his third statement was false and was obtained by coercion.

The primary evidence at trial was Gutierrez's third statement. Additionally, while Gutierrez was known to frequent the mobile home park to visit friends who lived there, the lead detective, Gilbert Garcia, testified that several witnesses saw Gutierrez and another man near Ms. Harrison's home "around the time that the pathologist estimated the time of death was." 19 RR 40.

The State's theory of the case at trial was that Gutierrez personally murdered Ms. Harrison to prevent her from identifying him as one of the robbers. 17 RR 33; 20 RR 72. Under the State's theory, the two men present at the scene of the offense were Garcia (who pled guilty) and Gutierrez. Gracia (who absconded) was the getaway driver. Cuellar—the victim's nephew who resided with her and purportedly discovered her body—was not, according to the State, involved in the crime.

Cuellar relied on Ms. Harrison for money. 17 RR 76–77, 144. He was the initial suspect in her murder and frequently spoke about how much money Ms. Harrison kept in her home. 18 RR 46, 111. One neighbor told police that Ms. Harrison was afraid of Cuellar "because of violence." 18 RR 21. Another said Ms. Harrison would get mad when Cuellar would ask her for money. 17 RR 262. A friend of Ms. Harrison's reported to police that Cuellar was acting strangely the night of the murder. 18 RR 250. Cuellar's half-brother told a detective that Ms. Harrison was afraid of Cuellar, and that he suspected Cuellar killed her. 17 RR 56–57.

Cuellar testified at trial that he spent most of the afternoon and evening of the day Ms. Harrison was killed drinking at a VFW hall. 17 RR 111–12, 137, 154. After an absence from the VFW hall, he gave a waitress a $100 bill as a tip. 19 RR 96. Cuellar's salary at the time was $150 per week. 17 RR 282–83. He returned home at about 1:00 AM the next morning and claimed to have discovered his aunt's body in her bedroom, where she had been assaulted and killed. 17 RR 113–17.

Gutierrez maintained throughout the 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.

The jury returned a general verdict finding Gutierrez guilty of capital murder. At the sentencing phase, the jury was required to answer whether the State had proved "beyond a reasonable doubt that Ruben Gutierrez, the defendant himself, actually caused the death of Escolastica Harrison, . . . or, if he did not actually cause the deceased's death, that he intended to kill the deceased or that he anticipated that a human life would be taken." 24 RR 129. The jury answered yes, and Gutierrez was sentenced to death.

Gutierrez's appellate, state post-conviction, and federal habeas challenges were denied. *See Gutierrez v. Stephens*, 590 F. App'x 371, 373–75 (5th Cir. 2014).

Initial requests for DNA testing

Gutierrez's first attempt to get DNA testing of the biological material collected in his case was denied by the trial court and the CCA in 2011. JA 567a–604a. The CCA held that Gutierrez was "at fault" for not seeking DNA testing earlier, under a provision of Chapter 64, since repealed, that prohibited DNA testing to prisoners who failed to seek such testing at the time of trial. Based on representations by the State, the CCA also ruled that one of the pieces of

evidence he sought to test—the hair around the victim's finger—was not in State custody and could not be tested. JA 594a–596a.

The CCA also relied heavily on the law of parties. The court acknowledged that testing results showing Pedro Gracia's (the alleged getaway driver's) DNA in the victim's fingernail scrapings would be "conceivabl[y] 'exculpatory," but nevertheless held that even if Gutierrez proved that he did not participate in the assault on Ms. Harrison, there were no reasonable grounds for testing under Chapter 64 because, as one of the parties to the underlying burglary, he was still guilty of capital murder. JA 601a–602a. The court specifically explained why each piece of evidence Gutierrez sought to have tested could not show he was not involved in planning the burglary and therefore could not exculpate him from his capital murder conviction. *See, e.g.*, JA 602a ("[E]xculpatory nail scrapings would not make it less probable that appellant 'planned the ripoff' and was a party to Mrs. Harrison's murder.").

Finally, the court ruled that testing is not available under Chapter 64 to show that a death-sentenced prisoner is ineligible for the death penalty, and commented that, "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." JA 602a–603a. The court concluded that even with favorable DNA results, "Appellant would still have been death-eligible," but made clear that it based this conclusion only on the facts in the trial record. JA 603a ("*[T]he record facts* satisfy the *Enmund*/*Tison* culpability requirements." (emphasis

added)). The court provided no analysis for this cursory conclusion.

In 2015, 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 (1963). JA 735a–749a. Gutierrez explained in detail how exculpatory DNA results would impact his eligibility for the death penalty. Specifically, he explained, because the State's trial theory was that the two men who attacked and killed Ms. Harrison were Rene Garcia and Ruben Gutierrez, while Pedro Gracia acted as the getaway driver, DNA evidence placing Gracia, but not Gutierrez, inside the victim's home would lend critical support to Gutierrez's argument "that he did not plan, did not intend or participate, was not present for, and did not personally participate in the victim's murder." JA 744a.

Notwithstanding the CCA's prior ruling, the State initially did not oppose the request. The State explained that "[b]ecause of the nature of the punishment assessed against the Defendant, and further because of the nature of the allegations in Defendant's Motion[], the State now will not oppose the request for testing, but neither does the State agree to said relief." JA 732a.

In 2018, however, after the trial court failed to rule on the motion for over two years, the State moved the trial court to set an execution date for Gutierrez. The trial court granted the State's request for an execution date and denied Gutierrez's motion for DNA testing the same day.

The 2019 request for DNA testing

Following additional proceedings, newly appointed counsel in 2019 obtained access to files at the Cameron County District Attorney's Office. Counsel filed a new motion for DNA testing. Several factors distinguished this motion from previous efforts: (1) Texas had repealed the "no fault" provision of Chapter 64, eliminating that as a basis for denying testing; (2) habeas counsel located the hair recovered from the victim's hand, previously thought lost, in a sealed envelope in the District Attorney's files; and (3) advances in DNA testing now made it possible to obtain DNA from degraded samples and "touch" DNA from items with which a perpetrator has merely come into contact. JA 662a, 679a, 684a.

The 2019 motion also described additional evidence that, considered alongside the anticipated DNA results, would cast doubt on Gutierrez's role as a principal in the crime and thus his eligibility for the death penalty. For instance, Gutierrez demonstrated that the lead detective, Det. Garcia, testified falsely in several important respects. Det. Garcia claimed that the eyewitnesses placed Gutierrez near Ms. Harrison's home "around the time that the pathologist estimated the time of death was." 19 RR 40. In fact, the pathologist did not estimate a time of death at all. And although the eyewitnesses saw Gutierrez in the vicinity of Ms. Harrison's trailer around 6:00 PM at the latest, the paramedics who responded to the scene estimated her time of death as somewhere between 7:30 and 9:30 PM. Det. Garcia also failed to mention that another witness reported his wife had spoken on

the phone with Ms. Harrison at about 6:30 PM. JA 692a–694a.

Det. Garcia also testified that he showed eyewitness Veronica Lopez a photo array with Gutierrez's photo but she "was unable to identify Ruben as having been at the mobile home." 19 RR 46. In fact, Lopez identified a different person in the photo array as the man she saw at the crime scene that day, which Det. Garcia concealed from the jury. JA 695a.

That was not all that Det. Garcia concealed. Although he had falsely written in his police report that Ms. Harrison's nephew, Avel Cuellar, had passed a polygraph exam, the polygraph report in fact revealed "significant criteria" that "indicate[d] deception at questions pertaining to the knowledge and/or participation in this offense." JA 704a–706a. Gutierrez also adduced evidence that, the summer before the crime, Cuellar approached his own nephew (Fermin Cuellar) about stealing "a lot" of money from Ms. Harrison and that, at some point after she was killed, Cuellar told Fermin that he had money buried in the trailer park—and almost $500,000 of Ms. Harrison's money remains unaccounted for. JA 701a. The motion also explained that it was Cuellar, while "visibly shaking" during his interview with the police, who first suggested Gutierrez as a suspect. JA 703a–704a.

The motion urged that DNA testing could implicate Cuellar in the homicide, thus undermining the State's theory that Gutierrez and Garcia were in the house. Testing could also show that it was Gracia, the alleged getaway driver, who was in the house with

Garcia, again undermining the State's theory and supporting the defense that Gutierrez played no role in and had no knowledge of the killing. JA 709a–715a.

Notwithstanding the denials of Gutierrez's prior DNA motions, the trial court initially granted the 2019 motion. JA 659a. After the State filed an objection, however, the trial court reversed course and signed the State's proposed order denying DNA testing. JA 655a–658a. The CCA affirmed the denial of relief. JA 542a–566a. The court declined to consider Gutierrez's additional evidence casting doubt on his role as a principal, holding that the law of parties prevented Gutierrez from showing that he would have been acquitted if exculpatory DNA results had been obtained:

> [Gutierrez] conceded that this Court found in its opinion on his prior DNA appeal that identity was not an issue in this case. However, he argued that new evidence requires the Court to re-evaluate this holding. . . . [W]e 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.

JA 557a. The court again analyzed why each piece of evidence would not affect Gutierrez's party liability. *See, e.g.,* JA 561a (exculpatory fingernail scrapings "would not relieve him of liability as a party in the case"); JA 563a ("An exculpatory result" as to the hair "would not release appellant from party liability for the offense."); *id.* (as to blood samples collected from

the scene, "[r]egardless of whose DNA . . . is found in these samples, no result would release appellant from party liability for the offense").

The court then reiterated that testing is not available under Chapter 64 to show ineligibility for the death penalty and quoted its prior opinion verbatim that, "even if Chapter 64 did apply to evidence that might affect the punishment stage," Gutierrez "would still have been death-eligible because *the record facts* satisfy the *Enmund*/*Tison* culpability requirements." JA 564a–565a (emphasis added). The court did not address what effect the additional evidence would have on any future attack on Gutierrez's death eligibility.

Section 1983 proceedings

On April 22, 2020, Gutierrez filed an amended complaint under 42 U.S.C. § 1983 in the district court. The complaint challenged the constitutionality of Texas's post-conviction DNA testing procedures, as well as the constitutionality of Texas's execution protocol, which at the time did not allow a spiritual advisor to be in the execution chamber. JA 427a–466a.

Following a stay of execution and a remand from this Court on the spiritual advisor claim, *see Gutierrez v. Saenz*, 141 S. Ct. 1260, 1261 (2021), the district court issued a partial declaratory judgment in Gutierrez's favor on the DNA challenge. JA 23a–62a. Although the district court rejected many of Gutierrez's claims, it concluded that Chapter 64 violated Gutierrez's due process rights in one significant respect. The district court observed that Chapter 64 has been construed as allowing DNA

testing only to establish innocence of a crime, not ineligibility for the death penalty. JA 56a. At the same time, however, Article 11.071, Section 5(a)(3), of the Texas Code of Criminal Procedure grants death-sentenced prisoners the substantive right to file a successive post-conviction petition challenging their eligibility for the death penalty. JA 56a–57a. Specifically, section 5(a)(3) provides an avenue for subsequent habeas relief where an applicant demonstrates "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." To obtain merits review of a claim under section 5(a)(3), an applicant need make only "a threshold showing" of evidence sufficient to support the ultimate conclusion that the applicant is ineligible for the death penalty. *Ex Parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007).

The district court cited this Court's recognition that "[a] process which amounts to a 'meaningless ritual' is historically and contemporarily disproved of by the courts." JA 59a (citing *Douglas v. People of State of Cal.*, 372 U.S. 353, 358 (1963); *Burns v. United States*, 501 U.S. 129, 136 (1991); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956)). Granting the right to a successive habeas petition to show ineligibility for the death penalty while denying access to the evidence that could vindicate that right was found to be such an empty ritual. Accordingly, the district court held that Chapter 64, as construed by the CCA,

violated due process, JA 60a, and granted declaratory relief, JA 61a.

The 2021 request for DNA testing

Following the district court's ruling and based on the declaratory judgment, Gutierrez again filed a motion pursuant to Chapter 64 in state court seeking DNA testing to establish his ineligibility for the death penalty. In response, the State asked the state court to dismiss Gutierrez's motion for lack of jurisdiction. JA 607a–615a. The State took the position that "[b]ecause the federal district court declared Article 64.03 to be unconstitutional, . . . there was no longer any legitimate statutory authority for DNA testing at all." JA 485a. The State further contended that the federal court's judgment declaring Chapter 64 unconstitutional was "the law of the case and . . . *binding on all other courts*," and that the court therefore lacked jurisdiction to consider Gutierrez's Chapter 64 motion. JA 613a–614a (emphasis in original). The trial court granted the State's plea to jurisdiction and denied the motion. JA 606a.

On appeal, the CCA reversed the lower court's finding of no jurisdiction and remanded, concluding that the federal district court's ruling did not "divest[] the convicting court in this case of its statutory jurisdiction to determine whether Appellant is entitled to the DNA testing he seeks." JA 487a. On remand, the trial court ruled that the motion was collaterally estopped and barred by the doctrines of res judicata and law of the case. JA 605a. The CCA affirmed on appeal, quoting verbatim its 2011 opinion that "Appellant would still have been death-eligible

because *the record facts* satisfy the *Enmund*/*Tison* culpability requirements." JA 478a (emphasis added).

The State's appeal of the district court judgment

In the § 1983 litigation, the federal district court granted the State's motion for partial final judgment on the DNA claims. JA 63a–71a. The State appealed, and this Court issued its opinion in *Reed* while the appeal was pending.

On appeal, the State raised for the first time the redressability argument at issue here. Specifically, the State argued that a federal court declaratory judgment in Gutierrez's favor would not likely cause the prosecutor in this case to agree to DNA testing, in light of the CCA's prior conclusion that Gutierrez could not establish his ineligibility for the death penalty even with favorable DNA results. JA 12a.

A divided panel of the Fifth Circuit accepted the State's argument, reversing the district court's judgment and holding that Gutierrez lacks standing. JA 3a–22a. The panel majority grafted onto *Reed* an additional layer of standing analysis, scouring the state court record and speculating that Gutierrez's injury could not be redressed because the CCA "has already found that Gutierrez would have no right to DNA testing even if the statutory bar to testing for evidence about sentencing were held to be unconstitutional." JA 18a.

The panel majority recognized that it went well beyond the analysis this Court established in *Reed*: "It gives us some pause that the Supreme Court in *Reed* did not mention examining the state court's decision

for whether it might affect the prosecutor's likely actions . . . ." JA 16a–17a n.3. The majority justified its departure from *Reed* based on the principle that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided." *Id.* (quoting *Johnson v. Halstead*, 916 F.3d 410, 419 n.3 (5th Cir. 2019)).

Judge Higginson dissented, observing that *Reed* dictates that Gutierrez has standing:

> Instead of conducting a fact-specific inquiry and delving into what District Attorney Goertz himself would do, the Court determined that a declaratory judgment invalidating Texas's DNA testing procedure would significantly increase the likelihood that the state prosecutor would grant access to the requested DNA testing. Because the standing analysis of *Reed* applies here, Gutierrez, also facing execution, has standing to bring suit.

JA 21a–22a. After the Fifth Circuit denied rehearing, Gutierrez sought a stay of execution pending review in this Court. This Court granted a stay and subsequently granted certiorari.

SUMMARY OF ARGUMENT

In *Reed*, this Court determined that a prisoner has Article III standing to bring a constitutional challenge to state DNA statutes that limit access to potentially exculpatory evidence. In its decision, the Court stated the elements that were sufficient to establish Reed's standing:

> Reed sufficiently alleged an injury in fact: denial of access to the evidence. The state prosecutor, who is the named defendant, denied access to the evidence and thereby caused Reed's injury. And if a federal court concludes that Texas's post-conviction DNA testing procedures violate due process, that court order would eliminate the state prosecutor's justification for denying DNA testing. It is "substantially likely" that the state prosecutor would abide by such a court order.

Id. at 234 (quoting *Evans*, 536 U.S. at 464).

Petitioner Ruben Gutierrez sought such a declaratory judgment in the same manner as Rodney Reed had. Like Reed, Gutierrez is a death-sentenced prisoner, and he sought and was denied access to conduct DNA testing on the prosecution's evidence. Both men sued the custodians of the evidence under 42 U.S.C. § 1983, arguing that Texas's post-conviction DNA statute violated due process.

Reed should have controlled the question of standing. But the majority below instead concluded that Gutierrez lacked standing because it was not "*likely*" that Respondents would permit DNA testing even if a federal court declared unconstitutional the statutory basis of Respondents' refusal. JA 19a (emphasis in original). The panel majority premised that prediction on an earlier CCA decision stating that even favorable DNA test results would not prove Gutierrez ineligible for the death penalty in light of other evidence in the trial record. JA 14a–20a.

Therefore, the majority concluded, Gutierrez could not meet the redressability prong of Article III standing. JA 19a–20a.

The ruling below is wrong because the CCA decision does not deprive Gutierrez of standing to pursue his claim in federal court.

I.A. The Fifth Circuit was wrong when it premised standing on a prediction about what the state Respondents would do in the event that a declaration were entered against them. What matters is that Respondents are capable of providing relief in accordance with the declaration. To be sure, Respondents might well argue in a subsequent state proceeding that even favorable DNA evidence would not entitle Gutierrez to state habeas relief, but Respondents would not be compelled to make that argument. Respondents are wholly capable of redressing Gutierrez's procedural injury by providing him access to the evidence he seeks. That is enough to establish standing. And to the extent the majority below held that Gutierrez lacked standing simply because Respondents would not permit DNA testing, that wrongly allows standing to be determined by a defendant's recalcitrance. Because Respondents are capable of redressing Gutierrez's due process injury and are more likely to do so in the face of a declaratory judgment, it was error for the court below to hold that his injury was not redressable.

I.B. As this Court has explained many times, a litigant bringing a due process claim does not need to establish that he will prevail on the merits of his substantive claim in order to have standing to pursue

the procedural claim. All that is required—at most—is that the litigant have some chance of prevailing on the substantive claim, which is to say that the claim would be "open to some dispute," *Fuentes*, 407 U.S. at 87 n.17, or that "there remains at least the possibility" of relief, *Center for Biological Diversity v. EPA*, 861 F.3d 174, 185 (D.C. Cir. 2017), even if the court "might well come" to an adverse decision, *Brown*, 600 U.S. at 561–62. *Reed* itself illustrates this principle well. *Reed* did not inquire into the merits of Reed's state habeas claim to determine if he had standing to seek a declaratory judgment. Because the defendant state actors were capable of providing access to the DNA, a declaration would "order[] a change in a legal status" between the parties. *Reed*, 598 U.S. at 234.

II. The panel's decision is also wrong in concluding that Gutierrez lacked standing because the CCA already stated that favorable DNA evidence would not be sufficient to undermine his death eligibility. The CCA made that hypothetical assessment by comparing potential DNA evidence against the trial record. But Gutierrez would present to the CCA any favorable DNA evidence in conjunction with other exculpatory evidence proffered *after* the trial, including evidence that the lead detective on the case gave false testimony and that Avel Cuellar masterminded the underlying felony. *No* court, including the CCA, has ever assessed whether that evidence, in conjunction with favorable DNA evidence, would support a death-ineligibility claim on a successive state habeas petition. This Court need not and should not assess whether this evidence would entitle Gutierrez to relief under state law. It is

sufficient for Gutierrez's standing in his § 1983 action that he could prevail with the benefit of the DNA evidence. This Court should reject the Fifth Circuit's speculative approach to standing, which ignores Respondents' ability to unilaterally agree to testing and rests on a predictive judgment of what a state court would do in a hypothetical future proceeding.

ARGUMENT

I. PETITIONER HAS STANDING UNDER *REED*.

Reed did not scour the state court proceedings to predict what District Attorney Goertz might do following a declaratory judgment in Reed's favor. Nor did it examine the state court opinions to determine how DNA evidence might or might not ultimately affect the outcome of future proceedings. In premising its standing analysis on such predictions, the Fifth Circuit's opinion cannot be reconciled with *Reed*.

A. Gutierrez Has Standing to Bring His § 1983 Claim Under the Standard This Court Applied in *Reed*.

The requirement of standing serves to limit federal jurisdiction to "cases" and "controversies" under Article III. *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 151 (1970). To establish standing, a plaintiff must show that (i) he has suffered an injury in fact, (ii) the injury likely was caused by the defendant, and (iii) the injury likely would be redressed by the requested judicial relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The redressability requirement, in particular, enforces Article III's prohibition against "advisory

opinion[s] without the possibility of any judicial relief." *California v. Texas*, 593 U.S. 659, 673 (2021) (quoting *City of Los Angeles v. Lyon*s, 461 U.S. 95, 129 (1983) (Marshall, J., dissenting)).

Just last year, this Court held in *Reed* that a capital defendant had standing to bring a § 1983 claim alleging that Texas's post-conviction DNA testing procedures violated due process. 598 U.S. at 234. As this Court explained, Reed "sufficiently alleged an injury in fact: denial of access to the requested evidence" and properly brought the suit against the state prosecutor who "denied access to the evidence and thereby caused Reed's injury." *Id.* As this Court further explained, a court "conclud[ing] that Texas's post-conviction DNA testing procedures violate due process" would lead to a "'significant increase in the likelihood' that the state prosecutor would grant access to the requested evidence and that Reed therefore 'would obtain relief that directly redresses the injury suffered.'" *Id.* (quoting *Evans*, 536 U.S. at 464).

So too in this case.

First, as was true in *Reed*, the basis of Gutierrez's § 1983 claim is that he suffered an injury in fact: "denial of access to the requested [DNA] evidence." *Id.* Second, like Reed, Gutierrez filed suit against the appropriate local prosecutor. Third, as in *Reed*, the declaratory judgment that Gutierrez seeks would "order[] a change in a legal status" of the parties and thus "amount to a significant increase in the likelihood that the state local prosecutor would grant access to the requested evidence." *Id.* (quoting *Evans*,

536 U.S. at 464); *cf. Haaland v. Brackeen*, 599 U.S. 255, 293 (2023) (declaratory judgment has no such effect on non-parties and is "little more than an advisory opinion").

Reed is entirely consistent with this Court's precedents concerning redressability in the context of declaratory judgments. Just as the federal courts have "without deviation" refused to issue advisory opinions throughout our history, *see Flast v. Cohen*, 392 U.S. 83, 96, 96 n.14 (1968) (noting Chief Justice Jay's correspondence with President Washington), a declaratory judgment must "settl[e] . . . some dispute *which affects the behavior of the defendant towards the plaintiff*." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis in original). A declaratory judgment can redress an injury notwithstanding that "it is a much milder form of relief than an injunction." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) (quotation omitted). It has "the force and effect of a final judgment" even though its force "may be persuasive" rather than "ultimately coercive," and even though a party's noncompliance "may be inappropriate, but is not contempt." *Id.* (quotation omitted).

A court may grant declaratory relief, so understood, against a government official, even when damages and an injunction are unavailable. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Court found it "substantially likely" that the President and various officials "would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination." *Id.* at 803 (plurality opinion). The

Court adopted the same reasoning in *Evans*, concluding that the defendant-officials were "substantially likely" to comply with a declaratory judgment when conducting the census and apportioning congressional seats, such that a declaratory judgment "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." 536 U.S. at 463–64. *Reed* relied on the parallel assumption that state officials were "substantially likely" to comply with federal law as declared by a federal court. 598 U.S. at 234 (quoting *Evans*, 536 U.S. at 464). That assumption is sound, because state prosecutors' decisions are accorded the same "presumption of regularity" that extends to those of federal officials. *Nieves v. Bartlett*, 587 U.S. 391, 400 (2019).

The ruling below departs from these settled principles. The Fifth Circuit majority held that Gutierrez does not have standing because a declaratory judgment in his favor was not "*likely*" to "cause the prosecutor to order DNA testing." JA 19a–20a (emphasis in original). Texas made precisely the same argument in *Reed*, and this Court rejected it out of hand. Resp't Br. at 38–39, *Reed v. Goertz*, 598 U.S. 230 (2023) (stating that "the relief Reed seeks would not require any change in conduct from district attorney Goertz, nor is it likely to bring about such change"). Standing does not turn on whether the defendant represents that he will comply with a court order—that would allow obstinacy to defeat standing—but on whether a favorable result would "order[] a change in [the] legal status" between the

parties. *Reed*, 598 U.S. at 234. In "terms of . . . 'standing' precedent," "the practical consequence of that change would amount to a significant increase in the likelihood that the state prosecutor would grant access to the requested evidence." *Id.* (some internal quotation marks omitted). The Fifth Circuit majority's test would allow a state actor to foreclose declaratory relief, and defeat standing, simply by pledging non-compliance. That view of standing is no more correct here than it was in *Reed*.

The Fifth Circuit majority concluded that Gutierrez lacked standing because the CCA "has already found that [he] would have no right to DNA testing even if the statutory bar to testing for evidence about sentencing were held to be unconstitutional." JA 18a. According to the Fifth Circuit, "*Reed* is properly distinguished" because in Gutierrez's case, if "the limitation on DNA testing for evidence relevant only to conviction [were held] invalid, the facts in the trial record would prevent [him] from receiving the DNA testing because such evidence could not change the fact that he was death-eligible." *Id.* This conclusion is irreconcilable with *Reed*, which did not condition redressability on the ultimate success or failure of the prisoner's future litigation.

B. *Reed's* Holding Is Consistent with This Court's Treatment of Due Process and Procedural Rights Claims, Which Applies Equally Here.

If followed in other remedial contexts, the Fifth Circuit's speculative compliance-prediction requirement would call into question broad categories

of this Court's precedents. *Reed* was consistent with those precedents. The ruling below is not.

1. A due process violation is redressed by observance of the required procedure, regardless of whether the cured procedure will yield a different substantive result.

Aside from its misreading of *Reed*, the ruling below misapprehends the due process violation at issue, which protects the right to develop and assert a statutory claim rather than to prevail on it. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). As the district court explained in its declaratory judgment order, Chapter 64 violates due process because it forecloses a post-conviction proceeding that the State otherwise purports to provide. JA 58a–59a. On the one hand, Texas law allows a death-sentenced prisoner to bring a successive habeas corpus claim that he is ineligible for the death penalty. JA 59a–60a. On the other, Chapter 64 "barricades the primary avenue for him to make use of that right." *Id.* Chapter 64 makes the post-conviction remedy "illusory" by extinguishing a claim before Gutierrez and those similarly situated can even bring it. JA 59a.

In ruling that a declaratory judgment does not cure the infirmity, the Fifth Circuit relied on the "earlier Court of Criminal Appeals opinion that this particular prisoner was not injured by that specific violation." JA 15a–16a. Gutierrez has not been

injured, the Fifth Circuit explained, because the CCA has already found him unable to obtain DNA testing under a hypothetically amended version of Chapter 64 that would allow testing to challenge the prisoner's death eligibility. But those determinations by the CCA do not embrace the sentencing *claim* that Gutierrez seeks to develop and present, *see* Argument II, *infra*, and that the district court held was "barricaded" by the limitations of Chapter 64. The CCA opined that DNA results alone would not undermine the "record facts" from trial that allowed the jury to find him death eligible. JA 564a–565a. It expressly declined to consider additional non-DNA evidence calling into question the underlying "record facts," and thus, the state courts have not reviewed the broader and eventual death-eligibility claim that Respondents continue to stifle. JA 557a.

More fundamentally, the violation here is to Gutierrez's right to be heard, that is, his right to develop and assert his death-eligibility claim, regardless of the probability that a state court will ultimately sustain that claim. Because Gutierrez's constitutional injury does not depend on the eventual merits of his eventual claim, Respondents would cure that injury, and allow Gutierrez to be heard, by granting him access to the evidence needed to make a successive claim against his sentence. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). "He need not show that a favorable decision will relieve his *every* injury." *Id.*

This Court's precedents illustrate that a claim of constitutionally defective process does not require proof of factually winning substance. An owner of chattels is entitled to a hearing before a sheriff seizes the property by replevin. *Fuentes*, 407 U.S. at 83–84. It is "immaterial" whether the owner is behind on installment payments and has "no other valid defenses" to the creditors' claims, at least when "the right to continued possession of the goods was open to some dispute at a hearing." *Id.* at 87, 87 n.17. Similarly, a default judgment entered without notice and a hearing must be set aside, regardless of whether the defendant had a meritorious defense. *Peralta*, 485 U.S. at 86–87.

The violation at issue here undermines Gutierrez's right to pursue a state remedy rather than to win resentencing under that remedy. Respondents can redress the violation by allowing access to the evidence that they continue to "barricade" under color of state law. JA 59a–60a. It does not matter whether Respondents share the Fifth Circuit's view on Gutierrez's prospects for relief.

2. A procedural rights violation is redressed by observance of required procedures, regardless of whether the substantive result will be altered.

The Court's logic in procedural due process cases mirrors its approach in cases involving other procedural rights, including those litigated under the Administrative Procedure Act, 5 U.S.C. §§ 551–559. In this context too, "'procedural rights' are special:

The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan*, 504 U.S. at 572 n.7. By way of example, Justice Scalia explained, a person living adjacent to a proposed site for a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement "even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." *Id.*

In other words, a litigant who has suffered a procedural injury has standing "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *FEC v. Akins*, 524 U.S. 11, 25 (1998); *see also, e.g.*, *Clark Cnty., Nev. v. F.A.A.*, 522 F.3d 437, 440 (D.C. Cir. 2008) (Kavanaugh, J.) (argument against plaintiff-county's standing was "meritless" because the FAA on remand "*could* issue hazard determinations that would prevent construction" of wind turbines near the county's planned airport) (emphasis added); *Biological Diversity*, 861 F.3d at 185 (holding that the EPA could reach a different conclusion "notwithstanding the EPA's assertion that a 'serious possibility' exists that the . . . order would remain unchanged").

The "procedural injury" framework illuminates Gutierrez's standing in this case. Here, Article 11.071 § 5(a)(3) provides prisoners a procedural right to protect their concrete interest in seeking relief from their death sentences, but Chapter 64 "barricades"

Gutierrez from obtaining access to the very evidence needed to seek such relief. JA 59a–60a. The question is not whether Gutierrez will be ultimately successful in obtaining DNA testing, or, one step further, whether he will be successful in vacating his death sentence based on the testing. The more apt question is whether a favorable judgment may cause Respondents to "revisit[]" their decision, and thus whether "there remains at least the possibility that [they] could reach a different conclusion." *Biological Diversity*, 861 F.3d at 185.

More generally, "[a] plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered." *Sugar Cane Growers Cooperative of Fla. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002). "All that is necessary is to show that the procedural step was connected to the substantive result." *Id.* at 94–95. Gutierrez meets that threshold. Chapter 64's restrictive procedures are directly connected to Gutierrez's inability to procure DNA evidence upon which to pursue post-conviction relief. Gutierrez has standing to seek a declaratory judgment redressing that defect.

II. THE FIFTH CIRCUIT'S ATTEMPT TO DISTINGUISH *REED* MISREADS THE CCA'S DECISIONS AS STRICTLY PRECLUDING DNA TESTING AS WELL AS ANY FUTURE DEATH-ELIGIBILITY CLAIM BASED ON SUCH TESTING.

Aside from being inconsistent with *Reed*'s straightforward analysis, the Fifth Circuit's conclusion about the preclusive effect of the CCA's prior opinions erroneously conditions federal standing on issues of state law—issues that the Fifth Circuit got fundamentally wrong here. The history of this case evinces ample evidence that Respondents could agree to testing in light of a declaratory judgment. Moreover, the CCA opinions simply do not create the barriers that the Fifth Circuit ascribed to them.

The operative actors here are Respondents, not the CCA, and the CCA's prior opinions do not preclude Respondents from granting access to the evidence Gutierrez seeks. For instance, in *Skinner v. State*, No. AP–76,675, 2012 WL 2343616, at *1 (Tex. Crim. App. June 20, 2012), the State of Texas agreed to DNA testing on Skinner's third Chapter 64 motion even after the CCA had denied his first two motions.

Even in this case, the CCA's prior rulings have not dictated Respondents' position on DNA testing. In response to Gutierrez's 2015 Motion for Miscellaneous Relief, Respondent Saenz did not oppose Gutierrez's request for DNA testing to establish ineligibility for the death penalty, notwithstanding the CCA's prior opinion that Chapter 64 does not permit testing for that purpose and that, even if it did, Gutierrez would

not be able to make such a showing. *See* JA 731a–732a. Respondent Saenz explained that, "[b]ecause of the nature of the punishment assessed against the Defendant, and further because of the nature of the allegations in Defendant's Motion[], the State now will not oppose the request for testing." *Id.*

Similarly, the state trial court initially granted Gutierrez's 2019 motion for DNA testing despite the CCA's prior opinion, only to reverse course when Respondent Saenz stated his opposition. JA 655a–659a. And as for the district court's declaratory judgment, Respondent Saenz previously took the position that it was "the law of the case" and "*binding*." JA 613a–614a (emphasis in original). Thus, even if it were appropriate for courts to consider what an individual state actor might do in response to a federal court's declaratory judgment, the history of this case establishes that what the CCA has previously said does not preclude Respondents from granting access to the requested evidence, or even make it all that unlikely.

Regardless, the CCA's opinions on Gutierrez's prior Chapter 64 motions are not preclusive as to whether, armed with exculpatory DNA testing results, he could raise a colorable claim of death ineligibility in a successive habeas application under Article 11.071, section 5(a)(3). That statute provides an avenue for subsequent habeas relief where an applicant demonstrates "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." Moreover, to have a subsequent claim of innocence of the death penalty considered on the merits under section 5(a)(3), an applicant need make only "a *threshold* showing" of evidence sufficient to support the ultimate conclusion that the applicant is ineligible for the death penalty. *Ex Parte Blue*, 230 S.W.3d at 163 (emphasis in original).

Favorable DNA results, combined with additional evidence no court has ever considered, would allow Gutierrez to make this threshold showing that he did not "intend[] to kill the deceased or . . . anticipate[] that a human life would be taken." Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b)(2). In support of his 2019 Chapter 64 motion, Gutierrez adduced additional facts that significantly undermined the State's trial theory that he acted as a principal in Ms. Harrison's murder. Gutierrez presented evidence that the lead detective had lied about the decedent's time of death to place Gutierrez at the scene at the time of her murder. The detective also lied when he said that Avel Cuellar—the State's primary witness and potential suspect in the killing—passed a lie detector test that he actually failed. The same detective hid evidence from the jury that an eyewitness had actually identified another man as the suspect. Gutierrez also adduced evidence that Cuellar had approached his nephew about stealing "a lot" of money from his aunt shortly before she was killed and had told the same nephew after she died that he had money buried in the trailer park. JA 692a–706a.

The CCA made clear that it did not consider any of this additional evidence in reaching its conclusion that Gutierrez could not establish death ineligibility

under *Enmund*/*Tison* with exculpatory DNA results. *See* JA 557a. Indeed, its opinions upholding denial of the 2019 and 2021 DNA motions merely quoted its 2011 opinion, which long preceded Gutierrez's proffer of the additional evidence. *See* JA 477a–479a; JA 564a–565a; JA 602a–603a. Each time the CCA addressed the issue, it expressly considered Gutierrez's death eligibility only in light of "the record facts." JA 478a, 565a, 603a (Gutierrez "would still have been death-eligible because *the record facts* satisfy the *Enmund*/*Tison* culpability requirements" (emphasis added)). The CCA similarly explained that it "need not" consider the additional evidence with respect to Gutierrez's conviction because it would not undermine his liability as a party. JA 557a. The Fifth Circuit thus acknowledged that the CCA's opinions addressed only "the facts in the trial record." JA 19a.

Unlike the CCA's assessment of "the facts in the trial record" under Chapter 64, a viable claim of ineligibility for the death penalty in a successive habeas application under Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a)(3) would not be limited to the evidence presented at trial. Quite the opposite, section 5(a) is expressly designed to permit judicial consideration of new facts. *See* Tex. Code Crim. Proc. Ann. art. 11.071 § 5(a). In combination with exculpatory DNA results, Gutierrez's additional evidence would present a viable claim of ineligibility for the death penalty.

That is because, under both Texas and federal law, party liability is not sufficient for death eligibility, which requires personal culpability. *Johnson*, 853 S.W.2d at 535; *see also Tison*, 481 U.S. at 158. Here,

DNA evidence could establish that the two assailants were Garcia and Gracia, or that the assailants were Cuellar and either Garcia or Gracia. Such DNA results, in tandem with the additional evidence that the CCA has never considered, would alter the picture of Gutierrez's death eligibility. For instance, if DNA under the decedent's fingernails came from Cuellar, this evidence—combined with evidence that Cuellar propositioned his nephew to rob Ms. Harrison shortly before she was robbed and killed and then later lied to police when denying his involvement during a polygraph examination—would severely undercut the trial prosecution's theory that Gutierrez was present during the murder and masterminded the plot. Such evidence would also be considered alongside the falsity of Det. Garcia's trial testimony placing Gutierrez at the scene "around . . . the time of death." 19 RR 40. As for DNA testing results identifying codefendant Pedro Gracia's hair wrapped around Ms. Harrison's finger or his biological material under her fingernails, the CCA itself acknowledged such evidence would be "exculpatory" but merely found that this scenario was "implausible." JA 601a–602a.

The totality of DNA and non-DNA evidence would challenge not only whether Gutierrez "intended to kill the deceased or that he anticipated that a human life would be taken," Tex. Code Crim. Proc. art. 37.071 § 2(b)(2), but also whether his conduct amounted to "major participation in the felony committed." *Tison*, 481 U.S. at 158. Evidence that Cuellar had proposed the burglary to his own nephew and buried the money stolen in the crime, and that testimony placing Gutierrez at the scene near the time of the murder

was fabricated, indicates that Gutierrez was not a "major" participant as required for *Tison* culpability.

The CCA has never considered the impact that the totality of exculpatory DNA evidence, alongside additional evidence undermining the prosecution's theory, would have on Gutierrez's death eligibility. Certainly such evidence would present an entirely different evidentiary landscape from the "record facts" that the CCA considered in disposing of his Chapter 64 appeals. The Fifth Circuit treated the CCA's remark as preclusive as to whether Gutierrez would ever be able to obtain any relief, but an appellate determination of a defendant's death eligibility is not fixed for all time irrespective of changed evidence. Were the Fifth Circuit correct, section 5(a)(3) would be meaningless. But in *Ex parte Milam*, No. WR-79,322-04, 2021 WL 197088, at *1 (Tex. Crim. App. Jan. 15, 2021), for instance, the CCA found Milam had satisfied section 5(a)(3c)'s gateway to merits review of his intellectual disability claim despite having previously denied a claim that he was intellectually disabled.

The Fifth Circuit thus placed undue reliance on the CCA's rulings. This error may have been due in part to the absence of formal briefing in the Fifth Circuit addressing either *Reed* or the circuit's new standing inquiry. But any court applying the Fifth Circuit's test in the future would be encumbered by similarly nuanced questions of state law. That approach would both invite similar errors as a matter of course and distract from the principles of federal law upon which Article III standing should rightly depend, *see Phillips Petroleum Co. v. Shutts*, 472 U.S.

797, 804 (1985), and under which Gutierrez has standing to bring the declaratory judgment claim that the district court sustained.

CONCLUSION

The Court should reverse the judgment below and remand for further proceedings.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX — RELEVANT STATUTORY PROVISIONS

Vernon's Ann.Texas C.C.P. Art. 64.03
Art. 64.03. Requirements; Testing
Effective: June 15, 2017

(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). The court may order the test to be conducted by any laboratory that the court may order to conduct a test under Subsection (c).

(c) If the convicting court finds in the affirmative the issues listed in Subsection (a)(1) and the convicted person meets the requirements of Subsection (a)(2), the court shall order that the requested forensic DNA testing be conducted. The court may order the test to be conducted by:

(1) the Department of Public Safety;

(2) a laboratory operating under a contract with the department; or

(3) on the request of the convicted person, another laboratory if that laboratory is accredited under Article 38.01.

(d) If the convicting court orders that the forensic DNA testing be conducted by a laboratory other than a Department of Public Safety laboratory or a laboratory under contract with the department, the State of Texas is not liable for the cost of testing under this subsection unless good cause for payment of that cost has been shown. A political subdivision of the state is not liable for the cost of testing under this subsection, regardless of whether good cause for payment of that cost has been shown. If the court orders that the testing be conducted by a laboratory described by this subsection, the court shall include in the order requirements that:

(1) the DNA testing be conducted in a timely and efficient manner under reasonable conditions designed to protect the integrity of the evidence and the testing process;

(2) the DNA testing employ a scientific method sufficiently reliable and relevant to be admissible under Rule 702, Texas Rules of Evidence; and

(3) on completion of the DNA testing, the results of the testing and all data related to the testing required for an evaluation of the test results be immediately filed with the court and copies of the results and data be served on the convicted person and the attorney representing the state.

(e) The convicting court, not later than the 30th day after the conclusion of a proceeding under this chapter, shall forward the results to the Department of Public Safety.

Appendix

Vernon's Ann.Texas C.C.P. Art. 11.071
Art. 11.071. Procedure in death penalty case
Effective: September 1, 2015

* * *

Sec. 5. Subsequent Application

(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:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(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.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

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