IN THE

Supreme Court of the United States

ALI NASSER,
Petitioner,

vs.

JEDIDIAH ISAAC MURPHY,
Respondent.

APPENDIX TO EMERGENCY APPLICATION TO VACATE STAY OF EXECUTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Jedidiah Murphy,	:	
Plaintiff,	:	
	:	**THIS IS A CAPITAL CASE**
v.	:	
	:	**EXECUTION SET FOR**
Alexander Jones, Chief of Police,	:	**OCTOBER 10, 2023**
Arlington, Texas	:	
	:	
	:	Case Number 1:23-CV-1170
	:	
Ali Nasser, Assistant Attorney	:	
General, District Attorney Pro Tem,	:	
	:	
Defendants.	:	

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

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INTRODUCTION

1. Jedediah Murphy is scheduled to be executed on October 10, 2023. A 2001 Dallas County, Texas, jury convicted him of murdering Mrs. Bertie Cunningham while robbing and kidnapping her. Mr. Murphy's death sentence was based on a finding of "future dangerousness" by the same jury.

2. Mr. Murphy seeks postconviction DNA testing of evidence in the State's possession, which would demonstrate grave error in the jury's "future dangerousness" finding by acquitting him of the State's primary evidence at sentencing: an allegation of a highly-aggravated, unadjudicated past crime. He would use this favorable evidence to raise a new postconviction writ in state court; and to support a clemency application. Although Texas law maintains both procedural pathways for Mr. Murphy, it fails to provide for the threshold DNA testing he would need in order to actually traverse them.

3. Mr. Murphy accordingly brings this civil rights action, seeking access to the DNA testing he desperately needs.

JURISDICTION

4. This Court has jurisdiction pursuant to 28 United States Code §§ 1331, 1343(a)(3)&(4), 2201(a), 42 United States Code § 1983, and *Skinner v. Switzer*, 562 U.S. 521, 534 (2011) (postconviction state prisoner may enforce state DNA testing

statutes through § 1983 action in federal court). *See also Reed v. Goertz*, 143 S. Ct. 955 (2022) (same).[1]

VENUE

5. Venue is properly in this Court because Defendant Nassir's official office address is in the Western District of Texas.

PARTIES

6. Plaintiff Jedidiah Murphy is a United States citizen who resides in the State of Texas, incarcerated in the Allan B. Polunsky Unit of the Texas Department of Criminal Justice in Livingston, Texas, and under a sentence of death imposed by the 194th District Court of Texas. He is scheduled to be executed on October 10, 2023.

7. Defendant Alexander Jones is the Chief of the Arlington, Texas, Police Department. Defendant Jones, sued here in his official capacity, has custody of the evidence at issue in this complaint.

8. Defendant Ali Nasser is an Assistant Attorney General, for the State of Texas; and is serving by Order of the 194th District Court of Dallas County, Texas, as "prosecutor pro tem" in this matter. As "prosecutor pro tem," Defendant Nassir has control of the DNA evidence that is the subject of this action; and opposed Mr. Murphy's motion to conduct DNA testing. He is sued in his official capacity.[2]

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[1] Given the above jurisdictional grants, this Court has additional authority under 28 United States Code § 1651(a), the "All Writs Act," by which Congress vested this Court with the authority to "issue all writs necessary or appropriate in aid of [its] jurisdiction[.]"

[2] The United States Supreme Court has recognized that district attorneys who oppose DNA testing are proper defendants in civil actions like this one. *See Reed v. Goertz*, 143 S. Ct. 955, 959 & 960 (2023) ("the state prosecutor, respondent Bryan Goertz,

PERTINENT BACKGROUND AND PROCEDURAL HISTORY

9. To secure a death sentence for Mr. Murphy, the State had to prove beyond a reasonable doubt not only that he was guilty of Mrs. Cunningham's murder, but also that, beyond a reasonable doubt, "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071 §2(b)(1) ("future dangerousness").

10. The State's evidence of "future dangerousness" tied Mr. Murphy to two unadjudicated violent crimes from a single day some years prior: a kidnapping and a robbery of two women in other Texas cities, both previously-unsolved. The kidnapping victim gave Mr. Murphy's jury a graphic account of her traumatizing experience (including her terror of death and the serious injuries she received while escaping from a moving car). She further testified that after seeing Mr. Murphy's arrest and photograph on TV for Mrs. Cunningham's murder years later, she determined that he was the perpetrator of her kidnapping as well.

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agreed to test several pieces of evidence, but otherwise opposed the motion and refused to test most of the evidence. . . . The state prosecutor, who is the named defendant, denied access to the evidence and thereby caused Reed's injury."). Justice Kavanaugh's majority opinion in *Reed* rejected the dissenting Justice Thomas's view that the district attorney was the wrong party, and that Reed was merely trying to mask a challenge to the Texas Court of Criminal Appeals's holding against DNA testing. *Id.* at 967 (Thomas, J., dissenting) ("While his complaint purports to bring an original action against the district attorney, in reality, it seeks appellate review to redress an alleged injury inflicted by the CCA's adverse decision . . . . The gravemen of Reed's claim – made clear again and again throughout his complaint – is that the CCA violated his due process rights through its reasoning in his case.").

11. Mr. Murphy tried to raise doubt about the kidnapping victim's identification through psychological testimony about memory; and an imperfect alibi. But the victim's identification and testimony about the aggravated ordeal was powerful.

12. Unlike most capital murder penalty trials in Texas, particularly from this timeframe, the State did not present any expert testimony in support of "future dangerousness"; nor did they present any victim impact testimony concerning Mrs. Cunningham. As a result, the testifying kidnapping victim's testimony largely carried the State's burden of proof as to "future dangerousness."

13. Years after his trial, Mr. Murphy learned new information that cast more doubt on the reliability of the kidnapping victim's identification: the victim had expressed uncertainty about her identification to the lead investigator and to her mother; and the same lead investigator had his own significant doubts about the link to Mr. Murphy. Mr. Murphy attempted to get postconviction relief from these revelations; but to no avail.

14. Mr. Murphy's state habeas litigation ended in March 2012;[3] and his federal habeas litigation ended in February 2019.[4] Both jurisdictions procedurally barred his claim concerning exculpatory evidence in the unadjudicated crimes.[5]

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[3] *Ex parte Murphy*, No. WR-70832-02 (Tex. Crim. App. March 21, 2012) (per curiam).This was an attempted subsequent state postconviction writ. Mr. Murphy's initial state postconviction litigation ended in March 2009. *Ex parte Murphy*, No. WR-70,832-01, 2009 Tex. Crim. App. Unpub. LEXIS 227 (Mar. 25, 2009). His direct appeal had ended in 2003. *Murphy v. State*, 112 S.W.3d 592 (Tex. Crim. App. 2003).

[4] *Murphy v. Davis*, 901 F.3d 578 (5th Cir. 2018), *cert. denied*, 139 S.Ct. 1263 (2019).

[5] *Supra, footnotes 3 & 4;* 3:10-cv-163N, Dkt. No. 37 (adopting Docket Entry 35).

15. Mr. Murphy and his then-counsel terminated their representation agreement in May 2019. Upon receiving notice in November 2022 that the State wished to set a date for Mr. Murphy's execution, the District Court of Dallas County appointed Mr. Murphy new counsel.[6]

16. On March 24, 2023, Mr. Murphy's new state counsel filed a Motion for Post Conviction Forensic DNA Testing in the District Court of Dallas. The motion sought "touch DNA" testing of evidence collected in the unadjudicated crimes which could have contained such biological evidence.[7]

17. Chapter 64 of the Texas Code of Criminal Procedure provides for the State's release of evidence for postconviction DNA testing upon a showing of "a reasonable likelihood of containing biological material," Art. 64.01(a-1), which was "secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but . . . was not previously subjected to DNA testing[.]" Art. 64.01(b) & (b)(1). The statute creates a right to testing if a convicted person can establish: reasonable likelihood of biological material

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[6] Prior counsel had represented Mr. Murphy in both state and federal court; thus, their representation of Mr. Murphy in federal court ended in May 2019 as well. The Federal District Court for the Northern District of Texas, Dallas Division, appointed Mr. Murphy new federal habeas counsel in June 2023. *See Murphy v. Davis*, 3:10-cv-163-N, Dkt. No. 56 (NDTX June 26, 2023).

[7] The kidnapping occurred in Arlington, Texas, and perpetrator fled with the victim's car. The same perpetrator then committed a robbery of another woman in Wichita Falls, Texas; and the Arlington victim's car was also found broken-down and abandoned in Wichita Falls. After the car was returned to the Arlington victim, she located physical property in the car that did not belong to her, and that property was collected by the Arlington Police Department. Biological evidence from the true perpetrator — at minimum "touch DNA" – likely would have been left on that property.

suitable for testing; that "identity was or is an issue in the case"; and that, by a preponderance of evidence, "the person would not have been convicted if exculpatory results had been obtained through DNA testing." Art.64.03(a)(1)&(a)(2). *See also* Art. 64.03(c) (upon the above showing, the court "shall" order testing). If an unidentified DNA profile is developed from the evidence, the State is further required to run it through the FBI's CODIS Database, and a Texas DNA database. Art. 64.035. The Chapter finally requires the state court, after testing is complete, to "hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted." Art. 64.04.

18. Consistent with established Texas caselaw interpreting Chapter 64,[8] the District Court denied Mr. Murphy's Chapter 64 Motion "as a matter of law because he seeks to test only punishment-related evidence." *State v. Murphy*, No. F00-02323-NM (Dist. Ct. Dallas Apr. 25, 2023). The court also found that Mr. Murphy had not shown by a preponderance of evidence that the Motion was not filed for purposes of delay. *Id*. Mr. Murphy appealed the trial court's denial to the Texas Court of Criminal Appeals, which has not yet ruled. *Murphy v. State*, No. AP-77,112 (TCCA).

FIRST AND SECOND CLAIM FOR RELIEF

19. Mr. Murphy incorporates by reference each statement and allegation set forth throughout this Complaint as if fully set forth herein.

[8] *See Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011).

20. Claims One and Two raise a facial procedural due process challenge to Texas's postconviction and DNA testing procedures. Mr. Murphy's procedural due process rights are being violated with respect to two legal processes in which he has a substantive right: the right to use new DNA evidence to raise a subsequent postconviction claim in state court that he is "innocent of the death penalty" (**Claim One**); and the right to present the same evidence in a clemency petition (**Claim Two**).

21. Chapter 64 of the Texas Code of Criminal Procedure grants convicted persons like Mr. Murphy a statutory right to DNA testing. *See Paragraph 17, supra.*

22. A convicted person under sentence of death may then use new exculpatory DNA results to raise a subsequent postconviction claim that he is "innocent of the death penalty," *i.e.* if the jury would not have found "future dangerousness" as a result.[9] Art. 11.071 §5(a)(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[.]").[10]

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[9] *See Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) ("Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met.").

[10] *See Rocha v. Thaler*, 626 F.3d 815, 823 (5th Cir. 2010) ("The Texas legislature incorporated in §5(a)(3) both *Sawyer's* definition of 'actual innocence of the death penalty' and *Sawyer*'s clear-and-convincing standard of proof for such a claim."); *Ex parte Blue*, 230 S.W.3d 151, 162 (Tex. Crim. App. 2007) (Texas Legislature "apparently intended to codify, more or less, the doctrine found in *Sawyer v. Whitley*.").

23. Together, Chapter 64 and Article 11.071 §5(a)(3) create a liberty interest in demonstrating "innocence of the death penalty" with new DNA evidence. This is a "substantive right" created by the State of Texas.[11]

24. However, Chapter 64, as interpreted by the Texas Court of Criminal Appeals, contains a significant limitation: Article 64.03(a) expressly guarantees DNA testing of evidence proving innocence of the offense of conviction; but it does not extend to evidence proving "innocence of the death penalty."

25. Thus, although the State of Texas provides Mr. Murphy a theoretical process to challenge his death sentence based on the DNA testing he seeks, it precludes him from actually doing so. The Texas statutory scheme thus violates due process because the State has granted a liberty interest in demonstrating "innocence of the death penalty" with new DNA evidence via postconviction procedures; but Chapter 64 is inadequate to vindicate those procedures.[12] (**Claim One**.)

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[11] *See Gutierrez v. Saenz et al.*, No. 1:19-cv-185, Dkt. No. 141, p.23 (S.D.Tx. Mar. 23, 2021) ("Texas has also established a substantive right to bring a subsequent habeas petition for a person convicted of the death penalty when that person can show 'by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury….'") (quoting Art. 11.071 §5(a)(3)); *Emerson v. Thaler*, 544 F. App'x 325, 327-28 (5th Cir. 2013) (unpub.) ("Texas has created a right to post-conviction DNA testing in Article 64 of the Texas Code of Criminal Procedure. Thus, while there is no freestanding right for a convicted defendant to obtain evidence for postconviction DNA testing, Texas has created such a right, and, as a result, the state-provided procedures must be adequate to protect the substantive rights provided.") (internal quotations and brackets omitted) (quoting *Elam v. Lykos*, 470 F. App'x 275, 276 (5th Cir. 2012) (unpub.)).

[12] *See Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (concluding that federal courts may disturb state postconviction procedures if they are "fundamentally inadequate to vindicate the substantive rights provided"); *Emerson*, 544 F. App'x at 327 ("Although states are under no obligation to provide

26. The Federal District Court for the Southern District of Texas has issued a declaratory judgment stating just that. *Gutierrez v. Saenz et al.*, No. 1:19-cv-185, Dkt. No. 141, p.23 (S.D.Tx. Mar. 23, 2021). It explained that Article 11.071 §5(a)(3) is "irreconcilable" with Chapter 64, because the former "grants the substantive right to file a second habeas petition with a clear and convincing showing of innocence of the death penalty in Article 11.071," yet Chapter 64 "denies the petitioner access to DNA evidence by which a person can avail himself of that right." *Gutierrez*, No. 1:19-cv-185, Dkt. No. 141, at 24. Thus, the "bar on Chapter 64 DNA testing to demonstrate innocence of the death penalty renders Article 11.071 §5(a)(3) illusory." *Id*. In other words, "Texas procedure creates a process which gives a person sentenced to death the substantive right to bring a subsequent habeas action under Article 11.071 §5(1)(3), but then barricades the primary avenue for him to make use of that right." *Id*. at 24-25. Thus, Chapter 64 "denies a habeas petitioner sentenced to death his rights granted by the State of Texas and protected under the Due Process Clause of the Constitution." *Id*. at 25, citing *Osborne*, 557 U.S. at 69.

27. Mr. Murphy also raises a claim that the same provision of Chapter 64 (limiting DNA testing to evidence relevant to innocence of the crime) unconstitutionally limits his ability to seek executive clemency. The Texas Court of Criminal Appeals has recognized that clemency is a legitimate goal for which to seek DNA testing under

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mechanisms for postconviction relief, when they choose to do so, the procedures they create must comport with due process and provide litigants with a fair opportunity to assert their state-created rights.").

Chapter 64.[13] The Due Process Clause provides baseline constitutional safeguards to the clemency process,[14] and can be violated when the state inhibits an individual's ability to present his evidence in support.[15] Mr. Murphy seeks to develop DNA evidence relevant to his "innocence of the death penalty" to present as powerful support of his clemency petition, but the state has blocked his ability to do so. This, too, violates his procedural due process rights. (**Claim Two**.)

THIRD AND FOURTH CLAIMs FOR RELIEF

28. Mr. Murphy incorporates by reference each statement and allegation set forth throughout this Complaint as if fully set forth herein.

29. Under the First and Fourteenth Amendments, inmates have a right to "adequate, effective and meaningful" access to the courts.[16] This includes requiring "States to shoulder affirmative obligations to assure all prisoners meaningful access

[13] *Routier v. State*, 273 S.W.3d 241, 259 n.76 (Tex. Crim. App. 2008) (even if the requested DNA results would not ultimately establish factual innocence to a high enough degree of certainty to warrant postconviction relief from the court, "that does not render the DNA testing useless to her. She may still present such evidence to the executive branch of state government in the form of a clemency petition."). *See also State v. Holloway*, 360 S.W.3d 480, 489 n.58 (Tex. Crim. App. 2012) ("If the *Elizondo* actual-innocence standard cannot be met by a habeas applicant following favorable DNA results pursuant to a Chapter 64 motion, however, he or she may yet have an additional avenue of relief in the form of a state clemency petition."), *overruled on other grounds, Whitfield v. State*, 430 S.W.3d 405, 409 (Tex. Crim. App. 2014).

[14] *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288-89 (1998) (O'Connor, J., concurring).

[15] *See, e.g., Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000).

[16] *Bounds v. Smith*, 430 U.S. 817, 822 (1977), *abrogated in part by Lewis v. Casey*, 518 U.S. 343 (1996).

to the courts."[17] "[I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid."[18] (**Claim Three**.)

30. In addition, 18 U.S.C. § 3599(e) entitles Mr. Murphy to representation through "all available post-conviction process," including applications for stays of execution and clemency proceedings.[19] Available information indicates that Mr. Murphy's jury found his "future dangerousness" on the basis of false allegations. Counsel has an obligation to raise this strong claim in "all available post-conviction process" and clemency proceedings; but new DNA evidence establishing this "innocence of the death penalty" claim is essential to doing so. (**Claim Four**.)

31. By virtue of the above stated facts, Defendants have therefore deprived Mr. Murphy of his First and Fourteenth Amendment right to access the courts, and his statutory right to counsel, by obstructing his ability to obtain evidence for use in court and clemency proceedings.

REQUEST FOR RELIEF

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[17] *Id.* at 824.

[18] *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

[19] *Wilkins v. Davis*, 832 F.3d 547, 557–58 (5th Cir. 2016). *See also Harbison v. Bell*, 556 U.S. 180, 194 (2009) ("In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system.") (citing *Herrera v. Collins*, 506 U.S. 390, 415 (1993)).

32. Both declaratory and injunctive relief are warranted and authorized by law. *See Reed*, 143 S. Ct. at 960-61 (2023) (plaintiff's 1983 suit raising a procedural due process claim about Texas's Chapter 64 proceedings was properly brought, for both declaratory and injunctive relief, without offending Texas's sovereign immunity or the *Rooker-Feldman* doctrine).

33. Mr. Murphy seeks declaratory judgment that:

i. Texas's Article 64.03(a)(2)'s[20] limitation of postconviction DNA testing to evidence exculpating a movant of his crime of conviction – and not including evidence of "innocence of the death penalty" – violates the Constitution's guarantee of procedural due process;

and

ii. Defendants' enforcement of that unconstitutional provision of Article 64.03(a)(2) further violates the Constitution's guarantee of procedural due process.

34. Mr. Murphy also seeks injunctive relief ordering:

i. Defendant Nassir not to enforce the above-described unconstitutional limitation in Article 64.03(a)(2), such as by opposing further requests from Mr. Murphy on that basis;

and

ii. Defendant Jones not to enforce the above-described unconstitutional limitation in Article 64.03(a)(2), such as by declining to produce physical evidence for testing on that basis.

[20] As interpreted by the Texas Court of Criminal Appeals in binding state-court precedent. *Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011).

35. Mr. Murphy further seeks any other necessary and appropriate relief pursuant to the All Writs Act, to aid in this Court's exercise of jurisdiction in this action in general. 28 U.S.C. § 1651(a).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the 26th day of September, 2023, I served the foregoing pleading on the following persons by ECF filing and first class mail:

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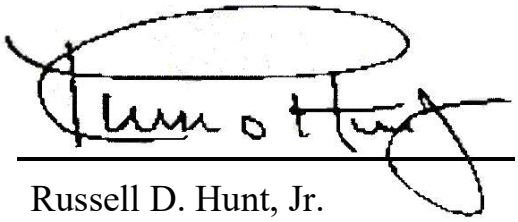

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Jedidiah Murphy, Plaintiff,	:	**THIS IS A CAPITAL CASE**
v.	:	**EXECUTION SET FOR OCTOBER 10, 2023**
Alexander Jones, Chief of Police, Arlington, Texas	:	Case No. 1:23-cv-01170-RP
Ali Nasser, Assistant Attorney General, District Attorney *Pro Tem*,	:	
Defendants.	:	

MOTION FOR STAY OF EXECUTION

Jedidiah Murphy, a prisoner on Texas's death row who has a 42 U.S.C. § 1983 action pending concerning the State of Texas's interference with his ability to obtain DNA testing, respectfully moves this Honorable Court to stay his October 10th, 2023 execution.

A stay of execution is sometimes necessary to allow adjudication of pending litigation, including § 1983 actions just like Mr. Murphy's. *See, e.g., Skinner v. Switzer*, 559 U.S. 1033 (2010) (granting stay of execution to permit adjudication of Section 1983 complaint concerning the same postconviction testing procedures); *Young v. Gutierrez*, 895 F.3d 829, 830-31 (5th Cir. 2018) (applying *Skinner* to rule

District Court has jurisdiction to issue stay of execution for Section 1983 action against Board of Pardons and Paroles concerning clemency procedures).

Authority For and Propriety of a Stay

A stay of execution is a matter of equity, and is considered in light of the following factors: 1) whether the stay applicant is likely to succeed on the merits of his suit; 2) whether he will be irreparably injured without a stay; 3) whether the other interested parties will be substantially injured by a stay; and 4) the public interest. *Young*, 895 F.3d at 831 (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

Mr. Murphy satisfies the first factor, as United States District Court for the Southern District of Texas has already held that the very same Texas practice violates the federal constitution for precisely the same reasons. *Gutierrez v. Saenz et al.*, No. 1:19-cv-185, Dkt. No. 141 (S.D.Tx. Mar. 23, 2021). This factor does not require a showing of "probability of success on the merits," but rather "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 the favor of granting a stay*." *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (emphasis and brackets in original; internal quotations omitted). Here, the District Court's ruling in *Gutierrez* demonstrates at minimum a "substantial case on the merits"; and the balance of equities also weigh in favor of a stay.

Mr. Murphy satisfies the second factor because death is irreparable. "In a capital case, the possibility of irreparable injury weighs heavily in the movant's favor. . . . we must be particularly certain that the legal issues 'have been sufficiently

litigated,' and the criminal defendant accorded all the protections guaranteed him by the Constitution of the United States." *O'Bryan*, 681 F.2d at 708 (quoting *Evans v. Bennett*, 440 U.S. 1301, 1303 (1979) (Rehnquist, J., granting a stay of execution)). The balance of harm between Mr. Murphy and the State of Texas (the party interested in carrying out Mr. Murphy's execution), as well as the public interest, weigh in favor of a stay for the same reason. The pending legal issues have simply not been sufficiently litigated at this point in time.

As to any harm to the State, represented by the Office of the Attorney General as prosecution *pro tem* in this case, prosecutors are meant to "seek justice within the bounds of the law, not merely to convict." In this way, the "prosecutor serves the public interest[.]" American Bar Association, Criminal Justice Standards for the Prosecution Function, 4th Ed. (2017), Standard 3-1.2, Functions and Duties of the Prosecutor; American Bar Association, Model Rules of Professional Conduct, Rule 3.8 (Special Responsibilities of a Prosecutor), cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice[.]"). *See also Berger* v. *United States*, 295 U.S. 78, 88 (1935) (prosecutor's "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

For these reasons, a stay of execution is proper, equitable, and necessary.

Alternative Authority to Issue a Stay of Execution in this Case

In the alternative to the above authority, this Court has the power to stay Mr. Murphy's execution under 28 United States Code § 1651(a), the "All Writs Act," by

which Congress vested this Court with the authority to "issue all writs necessary or appropriate in aid of [its] jurisdiction[.]" Here, this Court has jurisdiction to hear Mr. Murphy's civil rights action; and thus has authority to act in aid of that jurisdiction.

Mr. Murphy further has a federal statutory right to counsel to pursue his petition for executive clemency; and to pursue stays of execution. 18 U.S.C. § 3599(e); *Wilkins v. Davis*, 832 F.3d 547, 557–58 (5th Cir. 2016). And once the § 3599 right to counsel is triggered, District Courts possess authority to issue stays "where necessary to give effect to that statutory right." *McFarland v. Scott*, 512 U.S. 849, 859 (1994). Although *MacFarland* concerned the statutory right to counsel for purposes of filing a federal habeas petition under 28 U.S.C. § 2254, the Court has since made it clear that the same statute provides counsel for purposes of clemency, as well as pursuing stays of execution. *Harbison v. Bell*, 556 U.S. 180, 194 (2009) ("In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system.").

CONCLUSION AND PRAYER FOR RELIEF

In reliance on the above authorities and arguments, Mr. Murphy respectfully requests a stay of his October 10th, 2023 execution date, until this Court resolves his above-captioned action.

Respectfully Submitted,

/s/ Katherine Froyen Black

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CERTIFICATE OF CONFERENCE PURSUANT TO LOCAL RULE CV-7(h)

On the 28th day of September, 2023, the undersigned counsel conferred with opposing counsel concerning the relief sought in this Motion, and was advised that opposing counsel opposed this Motion. Opposing counsel intends to file an opposition stating their grounds.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the 28th day of September, 2023, I served the foregoing pleading on the following persons by electronic mail at: Ali.Nasser@oag.texas.gov (Ali Nasser) and CityAttorneysOffice@arlingtontx.gov (Alexander Jones).

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Counsel for Jedidiah Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JEDIDIAH MURPHY,	§	
Plaintiff,	§	
	§	No. 1:23-CV-1170-RP-SH
	§	(Death Penalty Case)
	§	
ALEXANDER JONES, et al.,	§	Execution Set for
Defendants.	§	October 10, 2023

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR STAY OF EXECUTION WITH BRIEF IN SUPPORT

Plaintiff Jedidiah Murphy is a Texas death row inmate who is currently scheduled to be executed after 6:00 p.m. (CDT) on October 10, 2023. Plaintiff has filed a civil-rights complaint asserting a denial of his rights under the due process clause of the Sixth Amendment. *See generally* Pl.'s Compl. (Compl.). Defendants have waived service and have not yet answered the complaint. Defendants' deadline for answering will not come until after Plaintiff's scheduled execution. *See* Fed. R. Civ. P. (a)(1)(A)(ii). Plaintiff now moves for a stay of execution so that he can litigate his present civil rights claim. Pl.'s Mot. for Stay (Mot.). For the reasons discussed below, Plaintiff is not entitled to a stay of execution.

BRIEF STATEMENT OF THE CASE

Plaintiff does not dispute that he was properly convicted of the capital murder of Bertie Cunningham in 2001:

> After robbing 80-year-old Bertie Cunningham at gunpoint, Jedidiah Isaac Murphy forced her into the trunk of her own car and shot her in the head. He then drove around with her body in the trunk, using her ATM card and credit cards to buy beer and liquor. Murphy was soon

> arrested. He admitted to the shooting and led police to the creek where he had dumped Cunningham's body. Later at the police station, he wrote and signed a statement claiming that he accidentally shot Cunningham while forcing her into her own trunk.

Murphy v. Davis, 901 F.3d 578, 583 (5th Cir. 2018).

At punishment, the State argued that Plaintiff would be a future danger, offering in support evidence that Plaintiff kidnapped Sheryl Wilhelm in August 1997:

> Along with this, the State tried to implicate Murphy in a three-year-old kidnapping case. Sheryl Wilhelm testified for the State that, three years before the Cunningham killing, a man briefly kidnapped her and then stole her car. After seeing a TV news report on Cunningham's murder featuring Murphy's photo, Wilhelm called the police to report Murphy as her kidnapper. She identified Murphy during a pretrial hearing and then again at trial. Wilhelm also testified at trial that she identified Murphy in a police-constructed photo lineup. The detective who conducted the photo lineup testified that Wilhelm's "was one of the better photo" identifications he ever had. According to the detective, Wilhelm said "she was virtually sure that that was the guy who abducted her."
>
> Murphy attacked Wilhelm's identification in a few ways. He called a psychologist who testified that Wilhelm's memory was tainted by the photo of Murphy she saw on the news. The psychologist also pointed out prominent differences between a composite sketch, made just a week after the kidnapping, and the press-released photo of Murphy. And the psychologist added that the photo lineup was unfairly constructed; obvious differences between the mugshots reduced the odds of selection from one-in-six to one-in-three. Murphy also put on an alibi defense. Wilhelm said she had been kidnapped, escaped, and had her car stolen at 11:30 a.m. in Arlington, Texas. The day after her kidnapping, Wilhelm's car was found in Wichita Falls, Texas. In the car, the police found documents belonging to another woman [named Marjorie Ellis]. That woman had been assaulted and had her purse stolen in Wichita Falls at 8:24 p.m. on the day of Wilhelm's kidnapping. Also on the same day, Murphy clocked in for his night shift at 11:54 p.m. in Terrell, Texas. Murphy's counsel argued that Murphy did not have

> time to kidnap Wilhelm in Arlington, rob the other woman in Wichita Falls, and make it to work in Terrell.

Id. at 583–84. The jury found a reasonable probability that Plaintiff would be a future danger.

Plaintiff still maintains that he never committed the Wilhelm kidnapping. In March 24, 2023, Plaintiff moved for touch DNA testing of physical property belonging to Ellis, which was recovered from Wilhelm's car in Wichita Falls the next day. *Murphy v. State*, No. AP-77,112, 2023 WL 6241994, at *5. (Tex. Crim. App. Sep. 26, 2023); *see also* Tex. Code Crim. Proc. art. 64.03 (statute permitting DNA testing). The trial court denied testing on the grounds that Chapter 64 of the Texas Code of Criminal Procedure does not permit testing of evidence that only relates to the punishment phase of trial. *Murphy*, 2023 WL 6241994, at *3. It held alternatively that Plaintiff also failed to meet the requirements of article 64.03 because Plaintiff failed to show "that his motion is not filed for purposes of delaying execution of sentence or the administration of justice." *Id.*; *see also* Tex. Code Crim. Proc. art. 64.03(a)(2)(B). The Texas Court of Criminal Appeals (CCA) affirmed the judgment of the trial court, finding that both grounds for denial were not error. *Murphy*, 2023 WL 6241994, at *3–4.

Plaintiff has now filed a lawsuit under 42 U.S.C. § 1983 claiming that the CCA's interpretation of Chapter 64—that Chapter 64 DNA testing does not extend to punishment-related evidence—violates the Due Process Clause, his right to clemency, his right to access of courts, and his statutory right to counsel under 18 U.S.C. § 3599. *See generally* Compl. Plaintiff now moves for a stay of execution to

resolve this pending lawsuit. *See* Mot. Defendant, the district attorney pro tem, opposes.

ARGUMENT

After two decades of litigation, Plaintiff only moved for DNA testing once the trial court ordered a hearing on the State's motion to set an execution date. The trial court denied the motion for testing, and the CCA affirmed on *two* grounds: (1) Chapter 64 does not permit testing of punishment-related evidence and (2) Plaintiff failed to show his testing motion was not filed for the purpose of unreasonably delaying his sentence. It is undisputed that the merits of this lawsuit could never vitiate the latter ground for denying testing. Thus, Plaintiff will never be afforded the DNA testing he seeks even if his lawsuit is meritorious. Staying execution after two decades to wait on the outcome of an immaterial and purposefully dilatory lawsuit runs counter to the equitable principles at play here.

I. Standard of review

"Filing an action that can proceed under § 1983 does not entitle the [plaintiff] to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Rather, a "stay of execution is an equitable remedy and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from federal courts." *Id*. When the requested relief is a stay of execution, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will

> substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Battaglia v. Stephens*, 824 F.3d 470, 473 (5th Cir. 2016) (applying *Nken* factors in context of request for stay of execution).

II. A Brief Overview of Plaintiff's Lawsuit

Plaintiff argues that Chapter 64 of the Texas Code of Criminal Procedure, which affords court-ordered DNA testing in limited circumstances, violates due process, his right to clemency, his access to courts, and his statutory right to postconviction counsel under 18 U.S.C. § 3599. Complaint at 7–11.

Article 64.03 only affords DNA testing where exculpatory results might undermine confidence in a conviction. Tex. Code Crim. Proc. art. 64.03. The CCA has interpreted this language to mean that "[t]he statute does not authorize testing when exculpatory testing results might affect only the *punishment or sentence* that he received." *Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011) (emphasis added). Moreover, under Texas law, a capital inmate can challenge his sentence through a subsequent application by showing that, but for a constitutional violation, no rational juror would have found a probability that he would be a future danger.[1] Tex. Code Crim. Proc. art. 11.071 §5(a)(3).

Plaintiff argues that this right to challenge his sentence through a subsequent application is violated by the *Gutierrez* rule. He claims that, based on the CCA's

[1] Before imposition of a death sentence, a Texas jury is required to find "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* art. 37.071 § 2(b)(1).

interpretation that Chapter 64 does not apply to punishment-related evidence, that Chapter is "inadequate to vindicate" his right to meet his burden under § 5(a)(3). Compl. at 10. He also argues that this interpretation of the statute violates his right to clemency, right to access of courts, and right to statutory counsel under § 3599. Compl. at 10–12.

III. Plaintiff Cannot Make a Strong Showing that He Is Likely to Succeed on the Merits of His Claims.

At the outset, all four grounds presented by Plaintiff lack merit. Turning first to his procedural due process ground, Plaintiff cannot show that the Texas statute on its face violates due process. The Supreme Court recognized a procedural due process right to DNA testing statutes enacted by the states. *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 68 (2009). But the Court has stressed just how narrow this right is: "*Osborne* severely limits the federal action a state prisoner may bring for DNA testing [and] "left slim room for the prisoner to show that the governing state law denies him procedural due process." *Cromartie v. Shealy*, 941 F.3d 1244, 1252 (11th Cir. 2019) (quoting *Skinner v. Switzer*, 562 U.S. 521, 525 (2011)). In fact, "every court of appeals to have applied the *Osborne* test to a state's procedure for postconviction DNA testing has upheld the constitutionality of it." *Id.*

Moreover, Plaintiff raises a facial challenge to the statute. Compl. at 8. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiff cannot make this showing, as applicants may certainly avail

themselves of their rights under § 5(a)(3) without DNA testing.[2] *See Ex parte Blue*, 230 S.W.3d 151, 162-63 (Tex. Crim. App. 2007) (holding § 5(a)(3) does not require clear and convincing evidence *at the threshold* that no rational factfinder would answer at least one of the special issues in the State's favor; instead, only a threshold presentation of facts that, if true, would be sufficient to show innocence of the death penalty is required to be allowed to be proceed to the merits). In fact, Plaintiff is currently doing so in a contemporaneously filed subsequent habeas application challenging his death sentence under § 5(a)(3). *Ex parte Murphy,* No. WR-70,832-05 (Tex. Crim. App.) (filed Sept. 27, 2023). Therein, Plaintiff raises ineffective assistance of trial counsel, false testimony, suppression of exculpatory evidence, and Eighth Amendment claims under § 5(a)(3). Thus, Plaintiff's facial challenge fails.[3]

Plaintiff also argues that denying him DNA testing on punishment-related evidence violates his right to seek executive clemency. Compl. at 10–11. But "pardon and commutation decisions are not traditionally the business of courts." *Faulder v.*

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[2] In 2021, a sister district court issued a declaratory judgment that Chapter 64 was unconstitutional for the reasons Plaintiff argues here. *Gutierrez v. Saenz*, Civ. No. 1:19-cv-15, 565 F. Supp.3d 892, 911 (S.D. Tex. Mar. 23, 2021). That decision is pending on appeal. *Gutierrez v. Saenz*, No. 21-70009 (5th Cir.). Moreover, the district court's opinion is not binding on this Court.

[3] Plaintiff may not argue that the statute operates unconstitutionally as applied to him, as that would violate the *Rooker/Feldman* doctrine. "That doctrine prohibits federal courts from adjudicating cases brought by state-court losing parties challenging state-court judgments." *Reed v. Goertz*, 598 U.S. 230, 235 (2023) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). For this Court to have original jurisdiction over this matter, Plaintiff must be targeting only the Texas statute, not the CCA's decision itself. *Id*.

Texas Bd. of Pardons & Paroles, 178 F.3d 343, 344 (5th Cir. 1999). Thus, while there may be some minimal due process rights afforded such a proceeding, judicial intervention into such a proceeding is exceptionally rare. *See Roach v. Quarterman*, 220 F. App'x 270, 275 (5th Cir. 2007) (denying a certificate of appealability where petitioner failed to provide evidence that he was denied access to the clemency process or that a clemency decision would be made arbitrarily).

Unsurprisingly, Plaintiff cannot point to any case in which the denial of DNA testing violated an inmate's due process right to present a clemency claim. To the contrary other courts have denied similar claims. *Cromartie*, 941 F.3d at 1258 (denying claim that denying an inmate DNA testing restricted his right to present evidence in support of executive clemency); *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) (per curiam) (finding that, where the state would not let a capital inmate undergo a brain scan procedure in support of a brain-damage-clemency claim, "we cannot say that the process was so arbitrary as to be unconstitutional or that the state prohibited Mr. Noel from using the procedure that it had established"); *see also Osborne*, 557 U.S. at 74 ("If we extended substantive due process to this area, we would cast these statutes into constitutional doubt and be forced to take over the issue of DNA access ourselves. We are reluctant to enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA.").

In his third claim, Plaintiff argues the denial of DNA testing denies his "right of access to courts. Compl. at 11–12. But while a state inmate has a "right of access to the courts," that right does not encompass the ability "to *discover* grievances, and

to *litigate effectively* once in court." *Lewis v. Casey*, 518 U.S. 343, 350, 354 (1996) (emphasis removed from initial quotation). "One is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation." *Whitaker v. Collier*, 862 F.3d 490, 501 (5th Cir. 2017) (quoting *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013)). Thus, Plaintiff's claim that DNA testing *could* allow him to discover a speculative and hypothetical claim in the future necessarily fails to state a claim for relief. *Alvarez v. Attorney General for Fla.*, 679 F.3d 1257, 1265–66 (11th Cir. 2012) (finding access to courts was not violated by denial of postconviction DNA testing). It must therefore be dismissed.

Finally, Plaintiff argues that he has a right under 18 U.S.C. § 3599 for § 3599 counsel to pursue a clemency application and stays of execution. Compl. at 12. He contends that the denial of DNA testing violates that right. *Id.* But several circuits, including this one, "are in uniform agreement that section 3599's authorization for funding does not imply an additional grant of jurisdiction to directly oversee the provision of counsel and related services." *Beatty v. Lumpkin*, 52 F.4th 632, 637 (5th Cir. 2022); *accord Baze v. Parker*, 632 F.3d 338, 342–45 (6th Cir. 2011) (holding that § 3599 did not authorize a federal court to compel third-party compliance with § 3599 counsel's investigators so that they could gather evidence for state clemency proceedings); *Leavitt v. Arave*, 682 F.3d 1138, 1141 (9th Cir. 2012) (denying a request for a federal court to order blood testing under § 3599 for purposes of a clemency

petition). Simply put, § 3599 only authorizes funding; it does not give an inmate any rights to pursue certain claims that would be stymied by the denial of DNA testing.[4]

For these reasons, Plaintiff cannot show a strong likelihood of success on the merits.

IV. Plaintiff Will Not Suffer Irreparable Harm.

To warrant a stay, Plaintiff must show a "likelihood that irreparable harm will result if that decision is not stayed." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Plaintiff argues that he will suffer irreparable injury because he will not be able to litigate his § 1983 claim. Mot. at 2. But even if Plaintiff wins his lawsuit he will still ultimately be denied DNA testing because the CCA's judgment will stand on the unchallenged ground that Plaintiff's DNA motion was filed for the purpose of delay. Moreover, even if Plaintiff were to obtain DNA results, he would not be able to meet his burden under § 5(a)(3).

A. Plaintiff cannot show that the relief he seeks would lead to access to DNA testing.

Plaintiff asks for two forms of relief: (1) a declaratory judgment that Texas's interpretation of Chapter 64 as not extending to punishment-related evidence (the *Gutierrez* Rule) and Defendants' enforcement of that interpretation violates

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[4] And even if § 3599 did create such a procedural right to file certain claims, that right would not extend to a state-court motion for postconviction DNA testing. *See Gary v. Warden, Georgia Diagnostic Prison*, 686 F.3d 1261, 1275 (11th Cir. 2012) (denying funds for DNA expert to assist petitioner in moving the state court for DNA testing because DNA testing is not a subsequent proceeding contemplated by § 3599); *Crutsinger v. Davis*, No. 4:07-cv-00703, 2017 WL 2418635, at *3–4 (N.D. Tex. Jun. 5, 2017) ("The Court concludes . . . that § 3599(a)(2) and (e) do not contemplate the provision of federal counsel in post-petition DNA proceedings.").

procedural due process and (2) injunctive relief enjoining Defendants from opposing requests for DNA testing and declining to produce physical evidence for testing by relying on the *Gutierrez* Rule. Compl. at 13.[5]

As an initial matter, even if this Court issued this type of relief, it is unclear if that would entitle Plaintiff to the DNA testing he seeks. Plaintiff is prevented from obtaining DNA testing related to the Wilhelm/Ellis crimes by the trial court's judgment denying testing, as affirmed by the CCA. *See Reed*, 598 U.S. at 249 (Thomas, J., dissenting) ("[A]ny due process injury that Chapter 64 has caused Reed is traceable to the CCA's judicial application of that law in his case, not to any executive acts or omissions of the district attorney."). If this Court grants Plaintiff his requested relief—declaratory judgment and injunction against the district attorney and Arlington Police Chief—the CCA's judgment affirming the denial of DNA testing "would remain untouched." *Id.* (Thomas, J., dissenting).[6]

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[5] It is unclear if this Court even has the authority to issue injunctive relief against Defendants to not oppose his request for DNA testing and not decline to produce physical evidence for testing. *See Ramirez v. McCraw*, 715 F. App'x 347, 350 (5th Cir. 2017) (finding the district court "accurately analyzed" the plaintiff's request for "an injunction requiring the defendants to release the biological material on which he asks for DNA testing" as tantamount to an impermissible writ of mandamus); *see also Reed*, 598 U.S. at 249–50 (Thomas, J., dissenting) (noting that the majority fails to explain "what change in conduct would be legally required of" the district attorney if a DNA litigant prevailed in a § 1983 lawsuit).

[6] Obviously, the majority in *Reed* rejected Justice Thomas's argument to the extent that it applied to Article III standing. *Reed*, 598 U.S. at 234. But it still did not articulate just what form actual declaratory and injunctive relief would take where the state-court judgment denying relief remains undisturbed. *See id.* at 249–50 (Thomas, J., dissenting) ("But the district attorney has made clear that he does not understand Reed's requested relief to 'require any change in conduct' from him and that it is not 'likely to bring about such change.' Brief for Respondent 38–39. If the

But, even if Plaintiff could somehow disturb the state-court's judgment through his lawsuit,[7] he would still not be entitled to testing. In such an event, the state-court judgment would still stand on a ground independent of the merits of this lawsuit—the CCA's finding that Plaintiff failed to show his motion was not made for the purposes of unreasonable delay. *Murphy*, 2023 WL 6241994, at *5. And for the same reason, even assuming Plaintiff could obtain the relief he seeks—that Defendants not apply the *Gutierrez* Rule to deny him access to DNA testing—Defendants would still be free to apply Chapter 64's unreasonable delay prong against him. Tex. Code Crim. Proc. art. 64.03(a)(1)(B) (requiring movants to show that their request for DNA testing is "not made to unreasonable delay the execution of sentence or administration of justice").

majority thinks the district attorney is wrong about that, it would only be fair to explain exactly what change in conduct would be legally required of him if Reed prevailed on his due process claim. The majority fails to do so."). For purposes of showing injury as a *practical* matter, and not just a theoretical exercise, it is unclear how Plaintiff would obtain DNA testing if he prevails.

[7] It seems beyond dispute that this Court *cannot* disturb the CCA's Chapter 64 judgment, as it has no appellate jurisdiction to do so. *See Reed*, 598 U.S. at 249 (Thomas, J., dissenting) ("Suppose that the District Court accepted Reed's due process arguments and issued his requested relief: an abstract declaration that the interpretation of Chapter 64 that the CCA applied in his case is unconstitutional. How, exactly, would that redress Reed's injury of not having the evidence tested? The CCA's Chapter 64 judgment would remain untouched; Reed would have obtained an opinion disapproving its reasoning, but without any appellate 'revis[ion] and correct[ion]' to disturb its finality."). Rather, Plaintiff's remedy to challenge this judgment would have to be made through a petition for writ of certiorari to the United States Supreme Court. 28 U.S.C. § 1257.

Thus, even if Plaintiff wins this lawsuit, he will not be entitled to DNA testing under state law. Depriving him of such a hollow "victory" cannot be called injury, in any sense.

B. Plaintiff cannot show DNA testing would show is innocent of the Wilhelm kidnapping.

Plaintiff claims that he is being denied a procedural due process right to meet his subsequent-application burden under § 5(a)(3), which he would prove through his innocence of the Wilhelm kidnapping. Compl. at 9–11. The Fifth Circuit has previously held that, where DNA results would not lead to relief, a pending § 1983 claim attacking a DNA-testing statute is not ground for a stay of execution. *Gutierrez v. Saenz*, 818 F. App'x 309, 312–13 (5th Cir. 2020), *vacated on other grounds by Gutierrez v. Saenz*, 131 S. Ct. 1260, 1261 (2021).[8]

It is unclear what Plaintiff's exculpatory theory is. He obliquely suggests that "biological evidence from the true perpetrator—at a minimum 'touch DNA'—would have been left on the property." Compl at 6. But the presence of another's DNA on the items would not be exculpatory, given the "ubiquity" of touch DNA. *Reed v. State*, 541 S.W.3d 759, 771 (Tex. Crim. App. 2017). DNA from the victims or innocent third parties is just as likely to be present, and Plaintiff offers no rationale with which to distinguish it from any "true" perpetrator. Moreover, Applicant fails to explain how the lack of his touch-DNA being on the property would be exculpatory. Many

[8] In *Gutierrez*, the Supreme Court explicitly vacated the order of the Fifth Circuit and remanded for consideration of Gutierrez's spiritual advisor claims, *not* his DNA-testing challenge. *Gutierrez*, 141 S. Ct. at 1261.

perpetrators wear gloves or wipe down items in an effort to avoid detection. The implication of his argument—that if he were the perpetrator his touch DNA must be found on this property—is conclusory.

C. Plaintiff cannot show that, even if he could disprove that he committed the Wilhelm Kidnapping, he could show he could meet his burden under article § 5(a)(3).

Even if Plaintiff could obtain DNA evidence showing he did not commit the Wilhelm kidnapping, such evidence still would not meet the § 5(a)(3) standard. First, this Circuit has intimated that § 5(a)(3) only permits claims that one is "ineligible for the death penalty" such as those who are intellectually disabled or were under eighteen years old at the time of the capital offense. *Rocha v. Thaler*, 626 F.3d 815, 826–27 (5th Cir. 2010). In *Rocha*, the Fifth Circuit explained that, for this reason, a claim premised on the mitigating evidence the jury did not hear due to trial counsel's ineffectiveness did not amount to a gateway claim under § 5(a)(3). *Id.* Similarly, the future-dangerousness finding is a matter of jury discretion, not categorical eligibility for the death penalty. Tex. Code Crim. Proc. art. 37.071 § 2(b)(1); *see also Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988) (explaining that the future danger special issue allows "the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion."). Thus, a claim premised on attacking an extraneous offense presented in support of the future-dangerousness special issue would not meet the requirements of § 5(a)(3) under this Circuit's precedent, regardless of the existence or nonexistence of DNA evidence.

But even assuming that a claim rebutting an extraneous offense could theoretically meet the requirements of § 5(a)(3), Plaintiff could not do so solely by rebutting the Wilhelm kidnapping. The Fifth Circuit summarized the aggravating evidence against Plaintiff at trial:

> In particular, the severity of Murphy's history of violence was a point of contention. To demonstrate he had such a history, the State submitted Murphy's record of theft convictions. A responding officer also testified for the State about a domestic-abuse call involving Murphy and his girlfriend. The officer said that when he entered Murphy's home, the girlfriend had a bloody nose and Murphy had a knife. The officer subdued Murphy with pepper spray. Another State witness said that Murphy pulled a gun on her at a high school party. He put the gun to her head, asked if she was afraid to die, and held it there for a minute. One of Murphy's coworkers also testified for the State. She claimed that Murphy talked about having access to guns, bragged about shooting people, and threatened to "knock [her] fucking head off." The woman was so frightened that she quit her job and reported Murphy to the police.

Murphy, 901 F.3d at 583. Moreover, Applicant's results on the Minnesota Multiphasic Personality Inventory-II (MMPI-2) test, presented in mitigation, revealed aggravating evidence of future danger as well:

> The State proceeded to read off some of the MMPI-2 interpretative report's unfavorable hypotheses, referring to them as Dr. Butcher's "statements." Per the State, Dr. Butcher stated that Murphy exaggerated his symptoms and responded to the last section of the MMPI-2 "either carelessly, randomly, or deceitfully, thereby invalidating that portion of the test." The State continued, reading off that Murphy "has serious problems controlling his impulses and temper," "loses control easily," and may be "assaultive." Murphy, according to the parts read aloud, "manipulates people" and lacks "genuine interpersonal warmth." According to the report, Murphy matches the profile of a Megargee Type H offender, a seriously disturbed

> inmate type. Inmates with Murphy's profile will, per the report, "not seek psychological treatment on their own" and are "poor candidates for psychotherapy."

Id. at 585. And, of course, Applicant's senseless and callous murder of defenseless eighty-year-old Bertie Cunningham was the most aggravating evidence of all. *Id*. at 583. Under Texas law, the facts of the crime alone can be enough to "support an affirmative finding to the future dangerousness special issue." *Guevara v. State*, 97 S.W.3d 579, 581 (Tex. Crim. App. 2003).

Thus, even if Plaintiff could get DNA testing, and even if that testing rebutted the Wilhelm kidnapping, it would still come up short of showing, by clear and convincing evidence, that *no rational juror* could have ever found a probability that Plaintiff would be a future danger. *See* Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). In resolving a claim related to the Wilhelm kidnapping, the Fifth Circuit suggested that, even if Plaintiff could rebut the Wilhelm kidnapping, he could still not even show a reasonable probability that his sentence would have changed. *See Murphy*, 901 F.3d at 598 ("Finally, as we detailed on Murphy's ineffectiveness claim, the State put on significant other evidence to show Murphy's future dangerousness besides the Wilhelm kidnapping."). It therefore follows that rebutting the offense would fall far short of the much higher standard under § 5(a)(3).

Thus, Plaintiff cannot show (1) that winning his lawsuit will lead to the DNA testing he seeks, (2) that DNA results would be exculpatory, and (3) that exculpatory results would ever permit him to avail himself of Texas's § 5(a)(3) exception to the abuse-of-the-writ bar. Thus, he cannot show injury if his execution is not stayed.

V. The State and the Public Have a Strong Interest in Seeing the State Court Judgment Carried Out.

The State and crime victims have a "powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citation omitted). And "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [death] sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (quotation omitted); *see Nelson v. Campbell*, 541 U.S. 637, 648 (2004) ("a State retains a significant interest in meting out a sentence of death in a timely fashion"); *Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) ("[e]quity must take into consideration the State's strong interest in proceeding with its judgment"). Once post-conviction proceedings "have run their course . . . finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon*, 523 U.S. at 556.

Here, the public's interest lies in executing sentences duly assessed. For over two decades, Plaintiff has passed through the state and federal collateral review process. The public's interest is not advanced by postponing Plaintiff's execution any further, and the State opposes any action that would cause further delay. *Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.") (emphasis in original). Two decades after Plaintiff murdered Bertie Cunningham, justice should no longer be denied. *See United States v. Vialva*, 976 F.3d 458, 462 (5th Cir. 2020).

Moreover, it is no surprise that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). So, also unsurprisingly, "last-minute claims arising from long-known facts, and other 'attempt[s] at manipulation' can provide a sound basis for denying equitable relief in capital cases." *Ramirez v. Collier*, 595 U.S. 411, 434 (2022) (quoting *Gomez*, 503 U.S. at 654). In fact, a "court considering a stay must also apply 'a strong equitable 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.'" *Hill*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650).

This presumption applies with full force here. Plaintiff has denied the Wilhelm kidnapping since trial. *Murphy*, 901 F.3d at 583–84. Moreover, "Chapter 64, authorizing motions for DNA testing, has been in effect since April 2001." *Murphy*, 2023 WL 6241994, at *5 (citing *Thacker*, 177 S.W.3d 926, 927 (Tex. Crim. App. 2005)). Yet, Plaintiff did not move for DNA testing until March 2023, after the trial court set a hearing on the State's motion to set an execution date. *Id*. And then he did not file his federal lawsuit in this court until September 27, 2023, less than two weeks from his execution. *See generally* Compl.

As such, this lawsuit—belatedly filed less than two weeks before the execution—is precisely the sort of "dilatory tactic" that presumptively weighs against the issuance of a stay.

CONCLUSION

For these reasons, Plaintiff's request for a stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do herby certify that on October 4, 2023, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Western District of Texas, using the electronic case-filing system of the Court. The electronic case-filing system sent a "Notice of Electronic Filing" (NEF) to the following counsel of record, who consented in writing to accept the NEF as service of this document by electronic means:

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District Attorney Pro Tem
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JEDIDIAH MURPHY, *Plaintiff*,	§	
	§	No. 1:23-CV-1170-RP-SH
	§	(Death Penalty Case)
ALEXANDER JONES, et al., *Defendants*.	§	

ORDER

Having considered the parties' briefs, Plaintiff's motion for a stay of execution is hereby DENIED.

It is so ORDERED.

SIGNED on this the _____ day of _____, 2023.

_____
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Jedidiah Murphy, Plaintiff,	:	**THIS IS A CAPITAL CASE**
v.	:	**EXECUTION SET FOR OCTOBER 10, 2023**
Alexander Jones, Chief of Police, Arlington, Texas	:	Case No. 1:23-cv-01170-RP
Ali Nasser, Assistant Attorney General, District Attorney *Pro Tem*, Defendants.	:	

DEFENDANT CHIEF OF POLICE ALEXANDER JONES RESPONSE TO MOTION FOR STAY OF EXECUTION

Defendant Chief of Police Alexander Jones, sued in his official capacity, waives his right to file a written response to Plaintiff's Motion for Stay of Execution and informs the Court that the City of Arlington takes no position on Plaintiff's Motion.

Respectfully Submitted,

/s/ Joshua Neal Humphreys

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I do herby certify that on October 5, 2023, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court, Western District of Texas, using the electronic case-filing system of the Court. The electronic case-filing system sent a "Notice of Electronic Filing" (NEF) to the following counsel of record, who consented in writing to accept the NEF as service of this document by electronic means:

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Counsel for Alexander Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Jedidiah Murphy, Plaintiff,	:	
	:	**THIS IS A CAPITAL CASE**
v.	:	
	:	**EXECUTION SET FOR OCTOBER 10, 2023**
Alexander Jones, Chief of Police, Arlington, Texas	:	
	:	Case No. 1:23-cv-01170-RP
Ali Nasser, Assistant Attorney General, District Attorney Pro Tem, Defendants.	:	

REPLY IN SUPPORT OF MOTION FOR STAY OF EXECUTION

Jedidiah Murphy, a prisoner on Texas's death row, is scheduled to be executed on October 10, 2023. On September 26, 2023, through undersigned counsel, he filed a 42 U.S.C. § 1983 action concerning the State's interference with his ability to obtain DNA testing (Docket No. 6). He also moved for a stay of execution, because the Defendants have not yet answered the complaint, and their deadline for answering will come after Mr. Murphy's scheduled execution (Docket No. 9). Defendant Nassir responded in opposition to Mr. Murphy's motion for a stay (Docket No. 12). Defendant Jones took no position regarding the motion (Docket No. 13).

The primary reason this Court should grant the stay of execution and allow Mr. Murphy to proceed with his § 1983 complaint is that the important issues his

complaint alleges are currently under consideration in the Fifth Circuit Court of Appeals, which could decide them in his favor. *See Gutierrez v. Saenz*, No. 21-70009.

The factors this Court should consider with respect to Mr. Murphy's request for a stay of execution are:

> (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 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)).

As explained below and in his Motion for a Stay of Execution, Mr. Murphy has made a strong showing that he is likely to succeed on the merits of his § 1983 claim and that he will suffer irreparable injury if the State is allowed to proceed with his execution without permitting him to litigate his § 1983 claim. Further, the State will not suffer substantial injury if his execution is delayed until his § 1983 claim is resolved, and the State–in addition to the public–has an interest in the adjudication of the rights Mr. Murphy seeks to vindicate through his § 1983 action, because they pertain to exculpatory evidence that could show that Mr. Murphy did not commit a serious extraneous offense – a kidnapping – that was introduced against him at his capital trial.

Mr. Murphy Has Made a Strong Showing That He Is Likely to Succeed on the Merits of His § 1983 Claim.

First and foremost, Mr. Murphy is entitled to a stay because he can demonstrate a high likelihood of success on the merits of his § 1983 claim. Courts describe the movant's burden as requiring a "strong" or "substantial" likelihood of success. *See In re Garcia*, 756 F.App'x. 391, 396 (5th Cir. 2018); *Sells v. Livingston*, 561 F. App'x. 342, 343 (5th Cir. 2014); *Sepulvado v. Jindal*, 729 F. 3d 413, 417 (5th Cir. 2013). The likelihood of success factor weighs in Murphy's favor.

Mr. Murphy has made a strong showing that he has a high likelihood of success in his claims because, as noted in Defendant's Response In Opposition to Mr. Murphy's motion, a sister district court has issued a declaratory judgment that Chapter 64 is unconstitutional for the exact reasons that Murphy argues. The United States District Court for the Southern District of Texas has already held that the very same Texas practice violates the federal constitution for precisely the reasons Murphy alleges in his complaint. *Gutierrez v. Saenz et al.*, No. 1:19-cv-185, Dkt. No. 141 (S.D.Tx. Mar. 23, 2021). Although the opinion of the Southern District court in *Gutierrez* is not binding on this Court, a decision of the Fifth Circuit Court of Appeals that has taken up the issue, which was argued before a three-judge panel on September 20, 2023, would be.

Mr. Murphy Has Also Made a Strong Showing That He Would Suffer Irreparable Harm Absent a Stay, That the State Would Not Suffer Substantial Harm, and That the Public Interest Is Best Served By a Stay

The remaining *Nken* factors do not tip the scales toward allowing the scheduled execution to go forward. In a capital case, "the possibility of irreparable injury weighs

heavily in the movant's favor, especially when his claim has some merit." *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016) (quotation omitted); *see also Gutierrez v. Saenz*, 818 F.App'x. 309, 314 (5th Cir. 2020).

A stay of execution in this case also serves the public interest. The public has an interest in seeing the State enforce its judgments, to be sure; but the public interest is not merely in seeing the execution carried out, but "in having a just judgment." *Arizona v. Washington*, 434 U.S. 497, 512 (1978). And the public's confidence in the criminal justice system is undermined when the State carries out executions that violate our constitutional norms. The public, as well as Mr. Murphy, has an interest in the issues that Mr. Murphy's claim invokes. The Arlington/Wichita Falls crimes that the State introduced as aggravators at the punishment phase of his trial were never charged, and no one was ever convicted of them. Mr. Murphy has steadfastly maintained his innocence of these crimes and already uncovered further exculpatory evidence that tends to prove he did not commit them. In addition to further exonerating Mr. Murphy of these uncharged crimes, the touch DNA evidence Murphy sought through postconviction DNA testing could shed light on the actual perpetrator of these crimes and help bring them to justice.

The DNA Testing to Which Mr. Murphy Seeks Access is Not "Immaterial" and Mr. Murphy Meets the "Injury" Prong of *Nken*

At the punishment phase of Mr. Murphy's trial, Sheryl Wilhelm's testimony about the uncharged kidnapping was more than just a piece of State's evidence in support of his supposed continuing threat to society. Ms. Wilhelm's vivid account of her terrifying abduction at gunpoint in her vehicle was the most highly-charged and

inflammatory testimony given in the whole of Mr. Murphy's trial. That kidnapping was the crux of the State's case for future dangerousness. Combined with an instruction that Mr. Murphy would be eligible for parole in 40 years if sentenced to life in prison, Ms. Wilhelm's testimony virtually assured a death sentence for Mr. Murphy, in spite of his partial alibi and the fact that Ms. Wilhelm's faulty out-of-court identification of him occurred three years after the fact. Additional evidence that exculpated Mr. Murphy, in the form of "touch DNA" testing results that showed another person's DNA on the evidence from the crime, is far from immaterial to the issue of Mr. Murphy's innocence of the death penalty.

Defendant Nassir argues that this supposed "immateriality" of the sought DNA testing undercuts Mr. Murphy's claim of irreparable injury absent a stay. But the Fifth Circuit has made clear that a claim of irreparable injury need not be taken so far into the weeds. "In a capital case, the possibility of irreparable injury weighs heavily in the movant's favor. . . . we must be particularly certain that the legal issues 'have been sufficiently litigated,' and the criminal defendant accorded all the protections guaranteed him by the Constitution of the United States." *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (quoting *Evans v. Bennett*, 440 U.S. 1301, 1303 (1979) (Rehnquist, J., granting a stay of execution)).

Preliminarily, Defendant Nassir erroneously assumes that Mr. Murphy would attempt to reverse the result of his previous state-court Chapter 64 litigation. That is not possible, nor is it what Mr. Murphy seeks with the present lawsuit. If Defendant Nassir's arguments were taken to mean that Mr. Murphy could not win a

new Chapter 64 motion, such argument is highly speculative and likely wrong. Mr. Murphy requests in this suit an injunction against Defendants from invoking the unconstitutional statute to oppose him in a future court proceeding. Furthermore, Mr. Murphy seeks to enjoin Defendants from opposing his DNA testing on that basis in any forum, including in response to an informal request. As the Supreme Court noted in *Reed v. Goertz*, 143 S. Ct. 955, 959 (2023), Texas prosecutors have the authority to agree to test evidence even without court action, and Defendant Jones also possesses discretion to release evidence in his department's possession. Either or both may agree to a future request for DNA testing, should this Court rule in Mr. Murphy's favor.

Beyond that, Defendant Nassir goes to great lengths speculating how and why Mr. Murphy would ultimately fail in a subsequent state habeas writ, even if the DNA results do exculpate him. But that is not the issue before the Court in deciding whether to grant Mr. Murphy a stay. And Mr. Murphy could use exculpatory DNA results not only in future state court litigation, but also in a persuasive application for executive clemency – an independent due process claim in his complaint.

All speculation aside, this Court's inquiry is not whether Mr. Murphy is likely to succeed in ultimately vacating or commuting his death sentence; nor is it whether, after winning the present federal action, Mr. Murphy may ultimately end up executed one day nonetheless. The pertinent question under the "injury" prong of *Nken*, 556 U.S. at 434, is whether, *absent* a stay, he will be irreparably injured. The single answer to that question is indisputable: yes, because – as recognized and given

significant weight by the Fifth Circuit in *O'Bryan*, absent a stay he will be executed in a matter of days.

The § 1983 Action Is Not "Purposefully Dilatory"

Further, counsel did not engage in dilatory tactics in bringing a request for DNA testing of this punishment-phase evidence under Chapter 64. Undersigned counsel were appointed to represent Mr. Murphy in November 2022 (Attorney Bernhard) and on June 26, 2023 (Attorney Black). Prior to the appointment of undersigned counsel, Mr. Murphy was unrepresented for nearly four years. Ms. Bernhard brought the Motion for Post Conviction Forensic DNA Testing in the District Court of Dallas in March 2023. The trial court denied the motion on April 25, 2023; Mr. Murphy appealed the denial of the motion on May 2, 2023, and the CCA affirmed the trial court's denial of the motion on September 26, 2023. Through counsel, Mr. Murphy filed his 1983 action in this Court the same day – September 26, 2023.

In Addition to this Court's Equitable Authority under *Nken* to Stay Mr. Murphy's Execution, the All Writs Act Empowers this Court to Do the Same in Aid of its 1983 Jurisdiction

Defendant's Opposition does not address an alternative to the above authority, which is that this Court has the power to stay Mr. Murphy's execution under 28 United States Code § 1651(a), the "All Writs Act," by which Congress vested this Court with the authority to "issue all writs necessary or appropriate in aid of [its]

jurisdiction[.]" Here, this Court has jurisdiction to hear Mr. Murphy's civil rights action and thus has authority to act in aid of that jurisdiction.[1]

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, and given the high stakes involved, the balance of the equities weighs clearly in favor of staying Mr. Murphy's execution.

Respectfully Submitted,

_/s/_____
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[1] This Court's authority under the All Writs Act to aid in its authority to hear Mr. Murphy's civil rights action exists independent of whether this Court possesses separate authority under 18 U.S.C. 3599, *McFarland v. Scott*, 512 U.S. 849, 459 (1994), and *Harbison v. Bell*, 556 U.S. 180, 194 (2009). The State disputed the latter in its Opposition but did not address the former.

CERTIFICATE OF SERVICE

I hereby certify that on this date, the 6th of October, I served the foregoing pleading on the following persons by e-mail and/or ECF filing:

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_____/s/_____
Katherine Froyen Black

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JEDIDIAH MURPHY,	§	
TDCJ No. 999392,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL NO. A-23-cv-01170-RP**
	§	
ALEXANDER JONES,	§	
Chief of Police, Arlington, Texas; and	§	*** CAPITAL CASE ***
	§	
ALI NASSAR,	§	**EXECUTION SET FOR**
Assistant Attorney General,	§	**OCTOBER 10, 2023**
District Attorney Pro Tem,	§	
	§	
Defendants.	§	

ORDER ON MOTION TO STAY EXECUTION

Plaintiff Jedidiah Murphy, a Texas death-row inmate, is scheduled to be executed on October 10, 2023. Two weeks before his scheduled execution, Murphy filed a civil-rights complaint under 42 U.S.C. § 1983, arguing that the denial of his motion for DNA testing in state court denied him the right to due process of law, access to the courts, and his statutory right to counsel. (ECF No. 6). Murphy also filed a motion for stay of execution. (ECF No. 9). Defendant Nassar opposed Murphy's stay request but has not yet answered the complaint. (ECF No. 12). Defendant Jones took no position regarding the motion to stay. (ECF No. 13). For the reasons discussed below, the Court will grant Murphy's motion to stay.

I. Background

In June 2001, Murphy was convicted and sentenced to death by a Texas jury for the capital murder of 80-year-old Bertie Cunningham. During the punishment phase of trial, the State presented evidence showing that Murphy allegedly engaged in a number of acts of violence and thievery prior to committing the instant offense, including the robbery and kidnapping of Sherryl

Wilhelm and the robbery of Marjorie Ellis.[1] After hearing the evidence, the jury convicted Murphy of capital murder and answered the punishment questions in a manner that required the trial court to sentence Murphy to death. Both the Texas Court of Criminal Appeals (TCCA) and the United States Supreme Court affirmed Murphy's conviction and sentence on direct appeal. *Murphy v. State*, 112 S.W.3d 592 (Tex. Crim. App. 2003); *Murphy v. Texas*, 541 U.S. 940 (2004). Thereafter, Murphy unsuccessfully sought state and federal habeas corpus relief, culminating in the Supreme Court's denial of his petition for certiorari review on February 25, 2019. *Murphy v. Davis*, 139 S. Ct. 1263 (2019).

In February 2023, the State moved the trial court to set Murphy's execution date. A little over a month later, Murphy filed a motion with the trial court, pursuant to Chapter 64 of the Texas Code of Criminal Procedure, seeking to have post-conviction DNA testing performed on a number of items relevant to the punishment phase of his trial, including:

> any and all evidence collected in the Wilhelm/Ellis robberies, including, but not limited to, any receipts, checkbooks, or paperwork recovered in these offenses. This evidence contains biological material that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense.

Murphy v. State, 2023 WL 6241994, at *3 (Tex. Crim. App. Sept. 26, 2023).

On April 21, 2023, the trial court held a hearing on both motions. Following the hearing, the trial court denied Murphy's DNA motion, finding that: (1) Murphy's request failed as a matter of law because he sought to test only punishment-related evidence, which Chapter 64 does not provide for, and (2) Murphy failed to show by a preponderance of the evidence that the motion was not filed for purposes of delay. *Id*. The trial court also issued an order setting Murphy's execution date for October 10, 2023.

[1] Murphy was not convicted of any crime involving Wilhelm or Ellis.

On appeal, the TCCA affirmed the trial court's denial of DNA testing on September 26, 2023. *Id*. Specifically, the court found Murphy failed to satisfy the requirements set forth by Chapter 64, including Article 64.03(a)(2)(A) (requiring applicant to establish by a preponderance of the evidence he would not have been convicted if exculpatory results had been obtained through DNA testing) and Article 64.03(a)(2)(B) (requiring applicant to establish by a preponderance of the evidence his DNA motion was not made to unreasonably delay the execution of his sentence). *Id*.

II. Murphy's § 1983 Complaint

On September 26, 2023, Murphy filed a civil-rights action under 42 U.S.C. § 1983 challenging the constitutionality of Texas's post-conviction and DNA testing procedures. Under Article 64.03(a)(2)(A), Murphy cannot obtain post-conviction DNA testing regarding the punishment phase of his trial. But Article 11.071 provides for challenges to the evidence used in the punishment phase of capital trials. Murphy asserts that Article 64.03, as interpreted by the TCCA, violates his procedural due process rights by only allowing DNA testing of evidence that may undermine confidence in the conviction, and not evidence related to the punishment phase of trial. Murphy argues this interpretation effectively precludes him from challenging his sentence of death in a subsequent state habeas corpus application under Article 11.071 § 5(a)(3) of the Texas Code of Criminal Procedure. Murphy also alleges that it deprives him of his rights to clemency, access to courts, and his statutory right to counsel under 18 U.S.C. § 3599. Murphy has asked this Court to stay his upcoming execution date pending a resolution of his civil-rights action.

III. Analysis

Under 28 U.S.C. § 2251(a)(1), a federal court has inherent discretion when deciding whether to stay an execution. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). However, "a stay of

execution is an equitable remedy, and an inmate is not entitled to a stay of execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006); *Murphy v. Collier*, 919 F.3d 913, 915 (5th Cir. 2019). In deciding whether to stay an execution, a court must consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other party interested in the proceeding; and (4) where the public interest lies. *Nken*, 556 U.S. at 425-26. As explained below, these factors support a stay of execution.

Murphy contends that his right to challenge his sentence through a subsequent state habeas application is violated by Chapter 64, which precludes DNA testing of evidence that would only be relevant to the punishment phase of trial. While there is no freestanding constitutional right for a convicted defendant to obtain evidence for post-conviction DNA testing or to challenge a conviction in a subsequent state habeas application, Texas has created such rights. *See* Tex. Code. Crim. Pro. art. 64.03(a)(2)(A);[2] Tex. Code. Crim. Pro. art. 11.071 §5(a)(3).[3] As a result, the state-provided procedures must be adequate to protect the substantive rights provided. *Skinner v. Switzer*, 562 U.S. 521, 525 (2011); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). If these procedures were "fundamentally inadequate" to protect Murphy's right to seek post-conviction DNA testing and state habeas relief, offending "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," they would be unconstitutional. *Osborne*, 557 U.S. at 69.

---

[2] Article 64.03(a)(1) allows for post-conviction DNA testing of evidence if the state trial court finds: (1) the unaltered evidence is available for testing; (2) identity was an issue in the case; (3) the convicted person establishes by a preponderance of the evidence that he would not have been convicted if DNA testing provided exculpatory results; and (4) the motion is not made to delay the execution of a sentence. *See Emerson v. Thaler*, 544 F. App'x 325, 328 (5th Cir. 2013) (unpublished).

[3] Article 11.071, §5(a)(3) allows a capital inmate to challenge his sentence through a subsequent application by showing that, but for a constitutional violation, no rational juror would have answered one or more of the punishment phase special issues in the State's favor.

Murphy has shown the requisite likelihood of success. The merits issues in Murphy's complaint is currently before the Fifth Circuit Court of Appeals, and was the subject of oral argument just over two weeks ago. *See Gutierrez v. Saenz*, No. 21-70009 (5th Cir. 2023). In *Gutierrez*, the United States District Court for the Southern District of Texas issued a declaratory judgment holding that "granting a right to a subsequent habeas proceeding for innocence of the death penalty but then denying DNA testing for a movant to avail himself of that right creates a system which is fundamentally inadequate to vindicate the substantive rights the State of Texas provides." *See Gutierrez v. Saenz, et al.*, No. 1:19-cv-185, Dkt. No. 141 (S.D. Tex. Mar. 23, 2021). Therefore, the district court "conclud[ed] that giving a defendant the right to a successive habeas petition for innocence of the death penalty under Texas Code of Criminal Procedure Article 11.071§5(a)(3) but then denying him DNA testing under Article 64.03(a)(2)(A) unless he can demonstrate innocence of the crime is fundamentally unfair and offends procedural due process." According to the court, denying a movant access to DNA testing of punishment-related evidence renders "illusory" the right to challenge the results of the punishment phase in a subsequent writ pursuant to Article 11.071. *Id*.

In addition to the fact that a sister court has recently issued a declaratory judgment on the very claims before this Court, which are now a live issue before the Fifth Circuit Court of Appeals, the evidence at issue in this writ pertains to what might be regarded as the State's strongest evidence of future dangerousness. As such, it is difficult for the Court to conclude that the negation of this evidence would not have affected the jury's decision in the punishment phase. Therefore, this Court concludes Murphy has made the requisite showing of a likelihood of success. *Nken*, 556 U.S. at 425-26.

Furthermore, in a capital case, the second *Nken* factor—the possibility of irreparable injury—"weighs heavily in the movant's favor." *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (per curiam). This is especially true when "his claim has some merit." *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016) (quotation omitted). And while the Court is aware of the State's "strong interest in enforcing its criminal judgments without undue interference from the federal courts," *Crutsinger v. Davis,* 930 F.3d 705, 709 (5th Cir. 2019), the Court also believes that the public interest will best be served by allowing time for the fair adjudication of the important issues raised in Murphy's complaint, given the irrevocable harm that would result if this live issue were not first adjudicated by the courts.

Thus, weighing all of these factors, the Court concludes that a stay is warranted in the case to allow the Fifth Circuit adequate time to resolve the unique and serious legal issues raised in both *Gutierrez* and the instant complaint. *See Murphy v. Collier*, 942 F.3d 704, 709 (5th Cir. 2019) (declining to "rush the inquiry" and staying the execution of an inmate "to explore and resolve serious factual concerns[.]").

IV. Conclusion and Order

The Court finds that Murphy has met the requirements for a stay of execution. Accordingly, it is therefore **ORDERED** that Murphy's Motion to Stay Execution, filed September 28, 2023 (ECF No. 9), is **GRANTED**. Murphy's execution, scheduled for October 10, 2023, is **STAYED** pending resolution of the underlying civil-rights complaint.

SIGNED this the 6th day of October, 2023.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

NO. F00-02424-M

STATE OF TEXAS	*	IN THE 194th JUDICIAL
VS.	*	DISTRICT COURT
JEDIDIAH MURPHY	*	DALLAS COUNTY, TEXAS

MOTION FOR POST CONVICTION FORENSIC DNA TESTING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Jedidiah Murphy, Movant in the above-styled and numbered cause, by and through his attorney of record, and files this Motion for Post Conviction Forensic DNA Testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure. In support of said motion Movant would show:

I.

HISTORY OF THE CASE

Movant pled not guilty to capital murder in cause number F00-02424-M in the 194th Judicial District Court. A jury convicted him, and based on its answers to the special issues, the court sentenced him to death on June 30, 2001. The Court of Criminal Appeals affirmed movant's conviction in a published opinion on June 25, 2003. The United States Supreme Court

denied certiorari on March 22, 2004. Murphy v. State, 112 S.W.3d 592 (Tex. Crim. App. 2003), cert. denied, 541 U.S. 940 (2004). Movant's first state writ was filed on May 12, 2003, and denied by the Court of Criminal Appeals on March 25, 2009. Ex parte Murphy, No. WR-70,832-01 (Tex. Crim. App. March 25, 2009). On January 28, 2010, Movant filed his writ petition in federal court. At Movant's request, the federal proceedings were stayed and abated so that Movant could return to state court to exhaust some claims. A second state writ was filed July 13, 2010. All of the claims in this second writ were ultimately dismissed as an abuse of the writ on March 21, 2012. Ex parte Murphy, No. WR-70,832-02 (Tex. Crim. App. March 21, 2012). His federal petition was dismissed with prejudice on January 23, 2017. Murphy v. Davis, No. 3:10-CV-163-N (N.D.Tex. 2017). The judgment was affirmed on appeal. The United States Supreme Court denied certiorari on February 25, 2019. Murphy v. Davis, 901 F.3d 578 (5th Cir. 2018), cert. denied, 139 S.Ct. 1263 (2019).

III.

STATEMENT OF FACTS

Movant would request that the Court take judicial notice of the testimony presented at movant's trial. By way of a summary of such testimony, movant would show the following:

A. The Guilt-Innocence Stage

Eighty-year-old Bertie Cunningham left her home in Garland in her car to go shopping on the afternoon of October 4, 2000. (XLVII R.R. at 24-26). She used her sister Frances Connor's credit card to make a purchase at J.C. Penney's at 2:55 P.M. (XLVII R.R. at 43-47). When she did not return home at the expected time, her sister Evelyn Shelton called the police and reported her missing. (XLVII R.R. at 30-33).

Movant had two drinks at a bar in Garland about 1:30 P.M. that day. He told the bartender that he left his wallet in a cab, and he left the bar without paying for the second drink. (XLVII R.R. at 48-5).

Movant picked up Zach Mamot at his home in Richardson about 5:30 P.M. (XLVII R.R. at 70-75). Movant said that his girlfriend had given him the car he was driving and two credit cards. (XLVII R.R. at 89, 93-94). They went to a store where movant used one of Cunningham's credit cards to buy three Go-Peds about 6:45 P.M. (XLVII R.R. at 122-26, 134). Movant told the clerk that the card belonged to his mother. (XLVII R.R. at 98-99). Movant took Zach home, displayed a gun, and said that he was "wanted" and was going to Key West with his girlfriend. (XLVII R.R. at 102, 104).

Someone attempted to use Cunningham's credit card to make a withdrawal at an ATM machine in the late afternoon and evening of October 4 and in the early morning of October 5 but could not do so without the PIN number. (XLVII R.R. at 148-52).

Movant went to the home of Treshod Tarrant's grandmother in Edgewood on October 5. (XLVII R.R. at 164-67, 201). He had Cunningham's car, told Tarrant about his new girlfriend, Bertie; and showed him two credit cards – one in the name of Bertie Cunningham. (XLVII R.R. at 202, 204-05). Movant and Tarrant went out, and movant used a card to make purchases at a liquor store, restaurant, and gas station. (XLVII R.R. at 152-53, 158-59, 207-12).

The police arrested Movant at Tarrant's grandmother's home on the morning of October 6 and advised him of his rights. (XLVII R.R. at 12-73; 221; XLVIII R.R. at 78-79). The police saw blood on the rear bumper of Cunningham's car, opened the trunk, and smelled a pungent odor. (XLVIII R.R. at 82-83). Officer Jason Bonham, who knew Movant from high school, persuaded him to take them to Cunningham's body. (L R.R. At 62, 70-71). Movant told Bonham, "It just went off, it was an accident." (L R.R. at 74). Movant directed the officers to a creek two or three miles away, where they found her body wrapped in a duffle bag.

(XLVIII R.R. at 86, 90-91). A justice of the peace advised Movant of his rights. (XLVIII R.R. at 21, 25-31).

The police found property belonging to Cunningham and Movant in her car. (XLIX R.R. at 88-95). They did not find her watch and two rings, which she always wore. (XLVII R.R. at 37-38). She died as a result of a "loose contact" gunshot wound to the forehead. (XLIX R.R. at 39, 42, 44, 50).

Movant signed a statement at the police station at 11:30 A.M. (XLVIII R.R. at 174-81). He said that he was hitchhiking; Cunningham gave him a ride; he told her to pull into a parking lot and get into the trunk; and she complied. (XLVIII R.R. at 182-83). As he transferred the gun from his right hand to his left hand and reached for the trunk lid, the gun discharged unintentionally. (XLVIII R.R. at 183-84). He alluded to a lack of feeling in his left hand. (XLVIII R.R. at 183).

Shirly Bard and Harlan Bailey, who previously worked with Movant, testified that he used both hands as a welder and did not mention a problem with his left hand. (XLIX R.R. at 178-84, 186-89). Bailey testified that Movant injured his left thumb at work on June 22, 2000, had surgery, and thereafter said that he had no feeling in his thumb. (XLIX R.R. at 189-91). Doctor William Vandiver, an orthopedic surgeon,

testified that he successfully repaired a ruptured ulnar collateral ligament in Movant's left thumb in June of 2000. (XLIX R.R. at 192-97). Movant told Dr. Vandiver in July and August that he was unable to weld because of numbness; but nerve conduction studies in September did not conclusively show any damage. (XLIX R.R. at 197-201).

Dr. John Krusz, a neurologist, examined Movant's left hand after his arrest. (LI R.R. at 7-9). Nerve testing revealed severe neuropathy below the wrist, a loss of sensation, and numbness in the fingers and thumb that could cause difficulty in manipulating fine objects. (LI R.R. at 21-23). Ed Hueske, a consulting forensic scientist, testified about how a firearm can discharge unintentionally. (L R.R. at 90-95).

The court instructed the jury on capital murder, murder, and manslaughter (I C.R. at 181-83). Defense counsel argued that the jury should convict Movant of murder or manslaughter because he did not intentionally kill Cunningham. (LII R.R. at 31-36). The prosecutor acknowledged that intent to kill was the only disputed issue and argued that Movant needed money, abducted Cunningham, and killed her to eliminate a witness. (LII R.R. at 42-44). Movant's conduct in leaving her body in a creek and using her credit cards was inconsistent with an

accidental killing. (LII R.R. at 45-47). The jury convicted him of capital murder.

B. The Punishment State

Mandy Kirl testified that she and Movant left a high school graduation party to obtain firewood in 1993. (LIV R.R. at 4, 6-7). They drove to a wooded area where he put a gun to her head and asked if she was afraid to die. (LIV R.R. at 9, 11). She said "No". (LIV R.R. at 11). She said that she was ready to go back and they returned to the party. (LIV R.R. at 13). She did not report this to the police because she was underage and drinking. She told Treshod Tarrant about the incident and he brought prosecutors to her home several weeks before she testified. (LIV R.R. at 17-18).

Movant stole cash and jewelry from an unlocked safe at a friend's home on April 5, 1994, when he was 18 years old. (LIII R.R. at 8-9, 11-15, 19). He pled guilty to burglary of a habitation and was placed on probation for ten years (LIII R.R. at 54-55; LXII R.R. SX 128).

Movant participated in stealing property from a car on May 26, 1994. (LIII R.R. at 21-24, 37-38). He pled guilty to burglary of a motor vehicle and was placed on probation for ten years. (LIII R.R. at 2-5; LXII R.R. at 128).

Movant was a passenger in a stolen truck that was stopped by the police on August 30, 1995. (LIII R.R. at 57-65). He pled guilty to auto theft and was placed on probation for five years. (LIII R.R. at 56; LXII R.R. SX 129).

A police officer stopped a car driven by Movant because of a traffic violation and found a bag of marijuana on March 14, 1995. (LIII R.R. at 67-76). He pled guilty to misdemeanor possession of marijuana and was sentenced to two days in jail and a $500 fine. (LXII R.R. SX 130).

An officer responding to a call regarding a disturbance at a trailer park on August 17, 1997, took a knife from Movant and arrested him for assaulting his girlfriend, Chelsea Willis, and her friend, Jean Evans. (LIII R.R. at 78-94. The charges were dismissed. (LIII R.R. at 88, 90, 94).

Sheryll Wilhelm testified that a man forced her into her car in the parking lot of Arlington Memorial Hospital in Arlington on August 26, 1997, at 11:30 A.M. (LIII R.R. at 126-32). He choked her, made her get on the floor, and drove away. (LIII R.R. at 136-40). She jumped out of the car on the highway, and the man kept driving. (LIII R.R. at 142-43). She described the man to the police as a white male; 20-25 years old; dark hair, short on top, and shaved around the back and sides; an “after

five" beard; 5'10"; thin; and wearing a hoop earring. (LIII R.R. at 133, 144-45).

A man attacked 69-year-old Marjorie Ellis and stole her purse during a struggle outside Braum's Ice Cream Shop in Wichita Falls shortly before 8:30 P.M. on August 26, 1997. (LVII R.R. at 13-16, 32). Felix Ozuna chased the man a short distance before stopping. (LVII R.R. at 20). Ellis and Ozuna described the man to the police as a tall, slender, Hispanic or white male with an olive complexion. (LVII R.R. at 22, 31).

Wilhelm's car, containing property belonging to Ellis, was found abandoned on the side of a highway in Wichita Falls on the morning of August 27, 1997. (LVII R.R. at 17, 24, 32). Wilhelm worked with Detective Doug Ligon of the Arlington Police Department to make a composite sketch of her assailant on September 4, 1997. (LIII R.R. at 18, 166, 208-14; LXII R.R. SX 141).

Over three years later, Wilhelm saw Movant on a televised news account of his arrest for kidnapping and killing Cunningham. (LIII R.R. at 150). She read a newspaper article about his arrest, researched him on the internet, and spoke to her mother, who told her that he looked like the man in her composite sketch. (LIII R.R. at 1551, 194).

Detective Stanton showed Wilhelm a photospread containing six photos on November 3, 2000. (LIII R.R. at 178, 195-96). She selected Movant's photo. (LIII R.R. at 179, 197-98). She testified that she had no doubt that Movant was her assailant when she identified him in the photospread and in court. (LIII R.R. at 179). Stanton testified that her identification was one of the better ones he had seen in 16 years as a detective. (LIII R.R. at 197).

Shirley Bard, who previously worked with Movant, testified that he cursed and threatened to kill her during an argument in 2000. (LIX R.R. at 190-203). He subsequently apologized to her. (LIX R.R. at 208).

The defense presented testimony regarding Movant's troubled childhood. His father was an alcoholic who spanked him with a belt and beat his mother in front of him. (LVII R.R. at 39, 72-73, 169-70, 229-31, 239-40). When his parents divorced, they abandoned their six children. (LVII R.R. at 38-39). He lived with his paternal grandparents, went to an orphanage, and returned to his grandparents. (LVII R.R. at 39-40). The Tolar family adopted him when he was seven or eight years old. (LVII R.R. at 41). Mr. Tolar was violent and mean, and his adoptive brothers beat him. (LVII R.R. at 43-44, 75, 77). He next lived in a children's

shelter. (LVII R.R. at 44). The Murphy family then adopted him. (LVII R.R. at 45). Mr. Murphy had a bad temper, abused his wife, and was strict with Movant. (LIX R.R. at 134-36). When the Murphy's marriage failed, they used Movant as a "pawn" in their divorce. (LIX R.R. at 137).

Movant had long-standing problems with alcohol, marijuana, and pills (LVII R.R. at 113, 147). He was hospitalized in several psychiatric facilities as a teenager. (LVII R.R. at 67, 80, 85, 124, 237-38; LXIII R.R. SX 145; LXIV R.R. SX 146-47).

Movant was smart, funny, popular, and made good grades in school. (LIV R.R. at 126, 131; LVII R.R. at 103). He was remorseful and apologetic after he mistreated his girlfriend, Willis. (LVII R.R. at 127-28). He was a good father to his daughter, born in 1997, and to Willis' other child. (LVII R.R. at 115-16, 121-22, 219-20).

Movant demonstrated remorse when the police questioned him about Cunningham's murder. (LIX R.R. at 103-04). In an apparent suicide attempt, he cut his neck and wrist with a razor blade in the Dallas County Jail while awaiting trial. (LIV R.R. at 75-82, 85).

Mary Connell, a psychologist, testified that Movant engaged in intermittent violence associated with drinking but was otherwise warm, outgoing, and loving. (LVIII R.R. at 51). He had six different placements

during childhood, was abused emotionally, and became chronically depressed. (LVIII R.R. at 21, 48-49, 67). He felt abandoned by people close to him, perceived himself as unworthy of love, and became self-destructive. (LVIII R.R. at 51-52).

Jaye Crowder, a psychiatrist, testified that Movant was chronically depressed, dependent on alcohol, narcissistic, and had a borderline personality disorder with anti-social features. (LVIII R.R. at 135-36). He had a genetic predisposition to depression because of mental illness and alcohol abuse in his family. (LVIII R.R. at 137). He was abandoned by his parents and constantly displaced during childhood, which led to an insecure sense of self and a poorly formed identity, resulting in chronic instability during early adulthood with episodes of emotional and impulsive lack of control. (LVIII R.R. at 137, 141, 146-47). He probably would not be dangerous in prison but might be on the outside. (LVIII R.R. at 199, 201).

Gilda Kessner, a clinical and forensic psychologist, testified that Movant would not be dangerous in the future because he had not committed any assaults while confined, was amenable to mental health treatment, and had family support. (LIX R.R. at 50, 57-58). He could be

placed in closed custody, administrative segregation, or a "supermax" facility. (LIX R.R. at 52-53).

IV.

This motion is accompanied by the attached affidavit of Movant wherein Movant swears that the statement of facts contained in this motion is true and that Movant did not commit the Wilhelm/Ellis offenses for which he was convicted when he was sentenced in the above styled and numbered case.

V.

Movant Jedidiah Murphy hereby requests forensic DNA testing of any and all evidence collected in the Wilhelm/Ellis robberies, including, but not limited to, any receipts, checkbooks, or paperwork recovered in these offenses. This evidence contains biological material that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense.

VI.

This evidence was not previously subjected to DNA testing because DNA testing was not available; or available but not technologically capable of providing probative results. Movant's trial took place in 2000. Since that

time, DNA testing has evolved to now include touch or handler DNA. See What is Touch DNA?, SCI. AM. (Aug. 8, 2008), http://www.scientificamerican.com/article/experts-touch-dna-jonbenet-ramsey/[https://perma.cc/F8GN-PADM]. Furthermore, it was through no fault of movant that DNA testing was not conducted, and the interests of justice now require DNA testing.

VII.

After hearing from the State on this issue, Movant would ask the Court to find that the evidence still exists and is in a condition making DNA testing possible, and has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect.

VIII.

Movant would ask the Court to find that identity of the perpetrator of the Wilhelm/Ellis robberies was and is an issue in the case.

IX.

Movant would show by a preponderance of the evidence that movant would not have been convicted if exculpatory results had been obtained through DNA testing. Movant is aware of prior case law holding that post-conviction testing pursuant to Chapter 64 is not available for evidence used

in sentencing. See Torres v. State, 104 S.W.3d 638 (Tex. App. – Houston [1st Dist.] 2003, pet. ref'd). However, Torres based its reasoning on the decision in Kutzner v. State, 75 S.W.3d 427 (Tex. Crim. App. 2002). Specifically, the court in Torres stated:

> We are aided by the decision of the Court of Criminal Appeals in Kutzner in which, in another context, the Court considered two possible meanings of the phrase "a reasonable probability exists that [the defendant] would have been prosecuted or convicted if exculpatory results had been obtained through DNA testing." See id., 75 S.W.3d at 437. In Kutzner, the Court was called upon to decide the meaning of the above phrase to determine the defendant's burden of proof before obtaining DNA testing. See id. The Court stated that (1) the statute could mean that a convicted person must show by a reasonable probability that favorable DNA results would prove his innocence or (2) the statute could mean only that favorable DNA results would have resulted in a different outcome, unrelated to the person's guilt or innocence, such as a modification in the assessment of punishment. Id. After looking at the plain meaning and legislative history of the statute, the Court chose the former meaning. Id. at 438-39. Therefore, the Kutzner Court has already found the language "would not have been prosecuted or convicted" to be synonymous with "innocent". Id. at 439.

Torres, 104 S.W.3d at 642. It was based on this reasoning in Kutzner that the Torres court concluded that a defendant could not seek DNA testing for the purpose of affecting the punishment assessed.

However, in 2003, the legislature amened Chapter 64 so that instead of the defendant having to prove that he would not have been "prosecuted or convicted" if exculpatory results had been obtained through DNA testing,

the statute now just required a defendant to show he would not have been "convicted" if exculpatory results were obtained.

In Smith v. State, 165 S.W.3d 361 (Tex. Crim. App. 2005), the Court of Criminal Appeals addressed how this amendment of the statute altered the holding from Kutzner:

> In Kutzner v. State, we considered the legislative intent of Article 64.03(a)(2(a) and determined that the statute requires convicted persons to "show a reasonable probability exists that exculpatory DNA tests would prove their innocence." 75 S.W.3d 427, 439 (Tex. Crim. App. 2002). In response to this opinion, the Legislature amended and clarified Article 64.03. The bill analysis states:
>
> a. The bill clarifies that the standard of proof with regard to getting a DNA test is 'preponderance of the evidence'. By taking out the 'reasonable probability' language, the intent is to clarify that the defendant does not have to meet two burdens. Despite the reasoning in Kutzner, the Legislature did not intend for the defendant to have to prove 'actual innocence' (a principle under habeas law) in order to meet his burden to have the test done. The defendant must prove that, had the results of the DNA test been available at trial, there is a 51% chance that the defendant would not have been convicted.
> b. The bill further clarifies that the defendant does not have to meet a two-prong test of not having been prosecuted or convicted. Rather, the intent was that the person would have to prove by a preponderance of the evidence that he would not have been convicted. Accordingly, the bill strikes the "prosecuted or' language.
>
> House Criminal Jurisprudence Committee, Bill Analysis , Tex. H.B. 1011 78the Leg., R.S. (2003).

Smith, 165 S.W.3d at 363-64.

In Torres the defendant had argued that the court should take a more expansive view of "convicted" – urging the court "to interpret 'convicted' broadly to encompass the dual nature of conviction and punishment assessment that is inherent in a bifurcated system." Torres, 104 S.W.3d at 642. The Torres court rejected this interpretation based on the Kutzner court's determination that a defendant must prove his innocence to be entitled to testing. However, the subsequent amendment of the statute and the disavowal of the Kutzner emphasis on proving innocence, should cause a reconsideration of the meaning of "convicted" as used in the statute. Defendant would urge the adoption of the second statutory interpretation considered and rejected in Kutzner – namely that "the statute could mean only that favorable DNA results would have resulted in a different outcome, unrelated to the person's guilt or innocence, such as a modification in the assessment of punishment." Kutzner at 437. In this case, if exculpatory DNA results were obtained from the evidence collected in the Wilhelm/Ellis robberies, there is no doubt that the punishment assessed would have been different.

X.

Movant would show by a preponderance of the evidence that this request is not made to unreasonably delay the execution of sentence or administration of justice.

WHEREFORE, PREMISES CONSIDERED, Movant would respectfully pray that this court order the requested DNA testing to be done. Movant prays for such other and further relief as to which he may be entitled.

Respectfully submitted,

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fax – 972-421-1604
cbernhard@sbcglobal.net
State Bar No. 02216575

ATTORNEY FOR MOVANT

AFFIDAVIT

I , Jedidiah Murphy, No. 999392, have read the above motion and hereby declare that all factual statements contained in this motion are true and correct. Identity was, and is, an issue in the Wilhelm/Ellis robberies, as I did not commit those offenses. They contributed to my conviction and sentence in the above case. I am currently confined in the Polunsky Unit of the Texas Department of Criminal Justice and declare under penalty of perjury that the foregoing statements are true and correct.

Jedidiah L Murphy

Jedidiah Murphy

3/20/23

Date

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing motion was served on the District Attorney Pro Tem by service through the court's electronic filing system to ali.nasser@oag.texas.gov on March 24, 2023.

Catherine Clare Bernhard

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Catherine Bernhard
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Envelope ID: 73991237
Filing Code Description: Motion
Filing Description:
Status as of 3/24/2023 3:12 PM CST

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Ali Nasser		ali.nasser@oag.texas.gov	3/24/2023 12:51:44 PM	SENT

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 9, 2023
Lyle W. Cayce
Clerk

No. 23-70005

JEDIDIAH ISAAC MURPHY,

Plaintiff—Appellee,

versus

ALI MUSTAPHA NASSER,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-1170

Before SMITH, SOUTHWICK, and GRAVES, *Circuit Judges*.

LESLIE H. SOUTHWICK: *Circuit Judge*:

Before us is an emergency appeal by the State of Texas seeking to vacate a stay of execution entered by the district court. The issue on which the district court decided to enter a stay is whether the inmate is entitled to have DNA testing performed on certain evidence. The district court granted a stay because similar issues were pending before this court in a case brought by a different Texas prisoner. That related case is fully briefed and has been orally argued, and a decision in the case is pending. We agree with the district court that a stay is appropriate at least until a decision in that case. At that time, this court will order additional briefing.

Before we discuss why we leave the stay in place at this time, we need to explain our jurisdiction. The dissent's alternative opinion contains the same analysis, and we restate much of it here. The inmate, Jedidiah Murphy, somewhat surprisingly argues that we do not have jurisdiction to consider whether to leave the stay of execution in place. This circuit and others have said previously that we have jurisdiction to review a stay of execution on interlocutory appeal. Indeed, as defendants remind us, the practice is so commonplace that we have a circuit rule governing it. 5th Cir. R. 8. We discuss here why the practice is commonplace.

The State brought this appeal asserting jurisdiction under 28 U.S.C. § 1292(a)(1). Generally, that section allows appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing" to enter such orders. *Id.* As our quotation reveals, Section 1292(a)(1) explicitly refers to injunctions. Nonetheless, the Supreme Court stated that it had "not allowed district courts to 'shield [their] orders from appellate review' by avoiding the label 'injunction.'" *Abbott v. Perez*, 138 S. Ct. 2305, 2320 (2018) (quoting *Sampson v. Murray*, 415 U.S. 61, 87 (1974)). That means "where an order has the practical effect of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Id.* at 2319.

To explain, the Court stated that when "an interlocutory injunction is improperly granted or denied, much harm can occur before the final decision in the district court." *Id.* Orders are "effectively injunctions" when they "barred" conduct at issue in the litigation. *Id.* A "stay" is more aptly applied to a court order that "operates upon the judicial proceeding itself, either by halting or postponing some portion of it, or by temporarily divesting an order of enforceability." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

Here, the district court order bars Texas officials from carrying out "lawful and important conduct" because it prevents them from performing

Murphy's execution. *See Abbott*, 138 S. Ct. at 2319. Moreover, the district court's order does not operate on the judicial proceeding but restricts the actions of specific defendants. That is the function of an injunction. We reject Murphy's arguments that the defendants here, a police chief and prosecutor, are not in a position to cause or stop the execution from being carried out. The purpose and effect of the stay were to stop the execution.

Consequently, we have jurisdiction to review the district court's grant of a stay of execution. We have no cause to believe the district court was seeking to shield his order by calling it a stay, as that court likely recognized our jurisdiction to review. Now, to the request by the State to vacate.

The background is that Jedidiah Murphy was convicted of the 2000 murder of an 80-year-old woman, Bertie Cunningham. After the jury found him to be guilty of the offense, evidence of his future dangerousness was offered at sentencing. Among the evidence was testimony from the victim of another vicious crime who identified Murphy as her attacker. Murphy was not tried for that offense. Murphy is now seeking DNA testing of evidence from that other crime that he argues could exonerate him.

One problem with this request is that the evidence that Murphy wants tested would not prove him innocent of the capital offense. It might undermine the specific testimony relevant to future dangerousness. The Texas Court of Criminal Appeals, including in a recent decision involving Murphy, has made clear that the relevant statute providing for DNA testing "does not authorize testing when exculpatory testing results might affect only the punishment or sentence that [a defendant] received." *Murphy v. State*, 2023 WL 6241994 at * 4 (Tex. Crim. App. Sept. 26, 2023) (quoting *Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim App. 2011). Instead, such evidence can be sought only to show that the inmate would not have been found guilty of the offense. *Id.*

Murphy challenges the limitation of testing to evidence affecting guilt. A different district court agreed with a similar argument and declared that Texas must provide testing if a sufficient basis is shown that it would have affected sentencing and not just the finding of guilt. *See Gutierrez v. Saenz*, 565 F. Supp. 3d 892, 911 (S.D. Tex. 2021). A Fifth Circuit panel heard oral argument in that case on September 20, 2023, and a decision on that appeal is pending. *See Gutierrez v. Saenz*, No. 21-70009.

The district court relied on the pendency of a decision in *Gutierrez* as a reason to grant Murphy a stay of execution. *See Murphy v. Jones*, No. A-23-cv-01170-RP, slip op. at 5-6 (W.D. Tex. Oct. 6, 2023). Certainly, that appeal has similar issues that could affect the proper resolution in this case. Waiting for that decision is not required by any general procedural rule or by rules of this court. Nonetheless, in light of the fact that complete briefing and argument has occurred in *Gutierrez*, unlike the emergency-necessitated accelerated consideration here, we conclude we should wait for that decision unless there is some basis to distinguish the present appeal.

A possible distinction concerns Murphy's delay in filing for DNA testing. Nonetheless, delay also is a live issue in *Gutierrez*. Given that delay is a concern in both cases, and both Murphy and Gutierrez make the same constitutional challenge, we will consider all issues regarding the stay after the release of the opinion in *Gutierrez*.

We enter no ruling on the motion to vacate the stay at this time. Therefore, the stay of execution will remain in effect. Once the opinion of this court issues in *Gutierrez*, we will order additional briefing on whether the stay should be vacated.

JUDGE GRAVES concurs in not making a ruling on the motion to vacate the stay at this time. A concurring opinion will be filed.

Jerry E. Smith, Circuit Judge, dissenting:

The majority opinion is grave error. It succumbs to a vapid last-minute attempt to stay an execution that should have occurred decades ago.

In the interest of time, instead of penning a long dissent pointing to the panel majority's and district court's myriad mistakes, I attach the Fifth Circuit panel opinion that should have been issued.

I respectfully dissent.

No. 23-70005

Attachment to Dissent

United States Court of Appeals for the Fifth Circuit

No. 23-70005

JEDIDIAH ISAAC MURPHY,

Plaintiff—Appellee,

versus

ALI MUSTAPHA NASSER,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:23-CV-1170

Before SMITH, SOUTHWICK, and GRAVES, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge.*

Jedidiah Murphy is a prisoner on Texas death row who is scheduled to be executed on October 10, 2023. He has filed two eleventh-hour civil rights complaints under 42 U.S.C. § 1983 in the Western District of Texas, one on October 4, 2023 ("the October complaint"), and the other on September 26, 2023 ("the September complaint"). Each filing was

accompanied by a motion for stay of execution to allow the litigation of these claims (the "September motion" and "October motion" respectively). The district court denied the October motion but granted the September motion and stayed the execution. Texas appeals and asks us to vacate the stay. As of this writing, Murphy has not appealed the denial of the October motion. For the reasons that follow, the district court abused its discretion in granting the September motion to stay execution because Murphy has failed to demonstrate that he is likely to succeed on the merits of any claim in the September complaint, and no other equitable factors weigh in his favor.

Accordingly, we VACATE the stay of execution in No. 1:23-cv-1170.

I.

Murphy's journey through the federal and state judicial systems has lasted over twenty years and is well documented in numerous opinions. *See e.g.*, *Murphy v. Davis*, 901 F.3d 578 (5th Cir. 2018) (denying one of Murphy's federal habeas corpus petitions). What follows is a brief recitation of the facts and procedural history needed to understand Murphy's current § 1983 actions and motions to stay his execution.

In 2001, a jury convicted Murphy of capital murder, and Texas sought the death penalty. The jury could not impose the death penalty unless it found that "there [was] a probability that [Murphy] would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. art. 37.071(b)(1). One way—among many others—by which Texas attempted to show Murphy's "future dangerousness" was to implicate him in a kidnapping case. The alleged victim of the kidnapping gave detailed testimony and identified Murphy as the perpetrator. Murphy attacked the credibility of the alleged victim and the reliability of her testimony, but the jury—after hearing additional evidence of future dangerousness—found that Murphy was a continuing threat to society and

imposed the death penalty. The Texas Court of Criminal Appeals ("CCA") affirmed on direct appeal. *See Murphy v. State*, 112 S.W.3d 592 (Tex. Crim. App. 2003). Thus began a decades-long post-conviction journey.

Murphy first sought state habeas relief based on new evidence that allegedly cast more doubt on the kidnapping victim's identification; that litigation ended in 2012. Murphy then sought federal habeas relief on numerous grounds; that litigation ended in 2019. Murphy remained on death row.

On March 24, 2023, Murphy filed a motion for post-conviction forensic DNA testing in state court. The trial court denied that motion, and the CCA affirmed on September 26, 2023, though Murphy contends that the mandate in that case has not yet issued. One day later, Murphy filed another state habeas petition accompanied by a motion to withdraw or modify his execution date. The trial court denied the motion to stay execution, and the CCA affirmed on October 5, 2023.[1]

Concurrently with this flurry of state court activity, Murphy filed two separate civil rights actions in the Western District of Texas under § 1983. The September complaint was filed on September 26, 2023. That complaint asserted four violations of Murphy's federal rights. First, Murphy contended that Texas law has created a right to demonstrate innocence of the death penalty and that the state has violated the federal Constitution's procedural due process protections by denying him access to DNA evidence that he could use to exercise that right. Second, Murphy posited that the restrictions on his access to DNA evidence unconstitutionally limit his ability to seek executive clemency. Third, Murphy averred that he has been deprived meaningful access to the courts. Fourth, and finally, Murphy alleged that

[1] We do not know whether the mandate has issued for that decision.

18 U.S.C. § 3599(e) preempts the state-law restrictions on access to DNA evidence.

Murphy's October complaint was filed on October 4, 2023. It alleged four violations of his federal rights. First, he alleged a violation of his Fourteenth Amendment rights because Texas supposedly intends to execute him via lethal injection with expired drugs that have been damaged. Second, Murphy alleged that Texas is violating the due process and the equal protection clauses of the U.S. Constitution by violating state pharmaceutical laws concerning the storage of the lethal injection drugs.[2] Claims three and four of the October complaint mirror the September complaint's allegations regarding deprivation of procedural due process and access to the courts.[3]

Murphy filed motions to stay his execution concurrently with each complaint. He asked the Western District of Texas to stay his execution to allow adjudication of his pending § 1983 claims. On October 6, 2023, the district court granted the September motion for stay, finding that Murphy's procedural due process claim challenging Texas's restrictions on DNA evidence was likely to succeed on the merits. Also on October 6, the district court denied the October motion for stay, holding that all claims asserted in the October complaint were unlikely to be successful. Texas timely appealed the grant of the September motion. As of this writing Murphy has not appealed the denial of the October motion.

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[2] This allegation is confusingly pled. The above is our own attempt to summarize what Murphy is pleading.

[3] The October complaint includes a fifth "claim," but that claim consists only of broadly worded statements that Murphy's federal constitutional rights are being violated and that the federal courts must accordingly provide a remedy.

II.

"We review a district court's grant of a stay of execution for abuse of discretion." *Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012). A "stay of execution is an equitable remedy" and "is not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "The party requesting a stay bears the burden of showing that the circumstances can justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). In deciding whether to grant a stay of execution, courts must consider four factors:

> (1) [W]hether 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.

Id. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).[4]

III.

We start, where we always must, with jurisdiction. Defendants contend that we have jurisdiction to review the stay of execution under 28 U.S.C. § 1292(a). Murphy responds that, because the district court entered a stay and not an injunction, the order is not immediately appealable, and we do not have jurisdiction to review it.

As a general matter, "only final decisions of the federal district courts [are] reviewable on appeal." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83

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[4] Murphy cites *O'Bryan v. Estelle* to contend that we must apply a more lenient standard where we ask only whether he can show "a substantial case on the merits when a serious legal question is involved." 691 F.2d 706, 708 (5th Cir. 1982) (per curiam). But *O'Brian* pre-dated *Nken*, so its standard is inapplicable. *Cf. Diaz v. Stephens*, 731 F.3d 370, 379 (2013) (applying the *Nken* factors when evaluating a motion to stay execution).

(1981). But Congress has created exceptions to this general rule. One of these exceptions gives courts of appeals jurisdiction over "[i]nterlocutory orders of the district courts" that "grant[], continu[e], modify[], refus[e] or dissolv[e] injunctions." 28 U.S.C. § 1292(a)(1). Though the text of § 1292(a)(1) refers expressly to injunctions, the Supreme Court has made clear that "district courts [cannot] shield [their] orders from appellate review by avoiding the label 'injunction.'" *Abbott v. Perez*, 138 S. Ct. 2305, 2320 (2018) (cleaned up). That means "where an order has the practical effect of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction." *Id.* at 2319.

An order has the "practical effect" of an injunction if it would cause "lawful and important conduct [to] be barred." *Id.* That stands in contrast to stays that "'operate[] upon the judicial proceeding itself,' [but] not on the conduct of a particular actor." *All. For Hippocratic Med. v. Food & Drug Admin.*, No. 23-10362, 2023 WL 2913725, at *4 (5th Cir. Apr. 12, 2023) (unpublished order) (quoting *Nken*, 556 U.S. at 434).

Altho0ugh the district court used the word "stay" in its opinion, the order undoubtably has the practical effect of an injunction. The order bars Texas officials from carrying out "lawful and important conduct" because it prevents them from performing Murphy's execution. *See Perez*, 138 S. Ct. at 2319. Moreover, the purported "stay" operates not on the judicial proceeding, but to restrict the actions of specific defendants.[5] That is

[5] *Cf. All. For Hippocratic Med. v. Food & Drug Admin.*, 78 F.4th 210, 254 (5th Cir. 2023) ("[U]nlike a preliminary injunction, a stay does not actively prohibit conduct."), *petition for cert. filed* (U.S. Sept. 12, 2013) (No. 23-235), *and petition for cert. filed* (U.S. Sept. 12, 2013) (No. 23-236). Murphy contends that the district court's order was not an injunction because the defendants in this case—the Arlington police chief and the prosecutor—are not among those who could be effectively enjoined from carrying out an execution in Texas. The question under *Perez*, however, is not whether the order *was* an

quintessentially the function of an injunction. Therefore, as our circuit and others have said previously, we have jurisdiction to review a stay of execution on interlocutory appeal.[6] Indeed, as defendants aptly point out, the practice is so commonplace that we have a circuit rule governing it. 5TH CIR. R. 8. *See also Adams*, 679 F.3d at 314, 323 (vacating a stay of execution two days after it was issued). Consequently, we have jurisdiction to review the district court's stay of execution.

IV.

We start with the September complaint, because the district court granted a stay of execution to allow Murphy to litigate the procedural due process claims raised in this complaint. Murphy contends that Chapter 64 of the Texas Code of Criminal Procedure is facially unconstitutional. He claims the State of Texas unconstitutionally violated his state-created right to challenge his death penalty conviction using DNA evidence. As we explain below, the district court abused its discretion in finding that Murphy's procedural due process claim is likely to succeed on the merits.

Texas grants convicted defendants the right to seek relief through "a subsequent application for a writ of habeas corpus" upon a showing of "sufficient specific facts establishing . . . by clear and convincing evidence [that], but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071,

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injunction, but whether it had the *practical effect* of an injunction. The order was a stay, but since that stay had the practical effect of an injunction, we have jurisdiction to review it.

[6] *Cf. Cooey v. Strickland*, 588 F.3d 921, 922–23 (6th Cir. 2009) (holding that a stay of execution had the "practical effect" of an injunction); *Howard v. Dretke*, 157 F. App'x 667, 670 (5th Cir. 2005) (same); *Mines v. Dretke*, 118 F. App'x 806, 812 n.27 (5th Cir. 2007) (same).

37.0711, or 37.072." TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(3).

One way a defendant may satisfy Article 11.071's requirements is with the use of DNA testing evidence. While there is no freestanding right for a convicted defendant to obtain evidence for post-conviction DNA testing, *Dist. Atty's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 72 (2009), states may create such a right. And that is the case for Texas. Under Chapter 64 of the Texas Code of Criminal Procedure, a defendant may move for post-conviction DNA testing of evidence. TEX. CODE CRIM. PROC. art. 64.01. To do so, Chapter 64 requires a "convicted person [to] establish[] by a preponderance of the evidence that . . . the person would not have been convicted if the exculpatory results had been obtained through DNA testing." *Id.* art. 64.03(a)(2)(A).

By creating a right to obtain evidence for post-conviction DNA testing, Texas must provide convicted defendants with adequate procedures to vindicate that right. *Osborne*, 557 U.S. at 72–74. Given that a defendant has "already been found guilty at a fair trial," he "has only a limited interest in postconviction relief." *Id.* at 69. So "'when a state chooses to offer help to those seeking relief from convictions,' due process does not 'dictate the exact form such assistance must assume.'" *Id.* (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987)) (cleaned up). Texas's procedures for postconviction relief do not violate due process rights if the procedure it offers does not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgress[] any recognized principle of fundamental fairness in operation." *Id.* (internal quotations omitted).

Murphy asserts Chapter 64 facially violates defendants' procedural due process rights. Specifically, he theorizes that Article 11.07 section 5(a)(3) is rendered illusory because Chapter 64 bars the use of DNA testing to

demonstrate a defendant is innocent of the death penalty. The district court determined that claim is likely to succeed on the merits because a district court in the Southern District of Texas had ruled in a prisoner's favor on a similar issue and that case is currently on appeal with our court. That conclusion was an abuse of discretion for three reasons:

First, Murphy's procedural due process claim falters at the starting line because he fails to make the necessary showing successfully to mount a facial challenge to the statute. To prevail on a facial challenge, a challenger "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, Murphy must demonstrate that Article 11.071 § 5(a)(3) does not allow any criminal defendant to show he or she is innocent of the death penalty. Murphy cannot meet this burden. The CCA regularly considers—and grants merits review of—applications under Article 11.071 in which a defendant claims he is ineligible for the death penalty.[7] Indeed, Murphy's *own* subsequent habeas petitions fatally wound his instant facial challenge: By raising ineffective assistance of trial counsel, false testimony, suppression of exculpatory evidence, and Eighth Amendment claims under Article 11.071 § 5(a)(3), he has affirmatively demonstrated that section 5(a)(3) provides ample avenues for defendants to show they are innocent of the death penalty. Consequently, Murphy's facial challenge fails as a matter of law.

Second, Murphy fails to meet his burden to establish that Article 11.071 creates a substantive right to challenge a death penalty conviction with evidence that might persuade a jury to decline to impose the death penalty. Murphy asserts Article 11.071 codifies "the doctrine found in *Sawyer v.*

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[7] *See, e.g., Ex parte Milam*, No. WR-79,322-04, 2021 WL 197088, at *1 (Tex. Crim. App. Jan. 15, 2021) (per curiam); *Ex parte Weathers*, No. WR-64,302-02, 2012 WL 1378105, at *1 (Tex. Crim. App. Apr. 18, 2012) (per curiam).

Whitley."[8] But *Ex parte Blue*—the very case Murphy cites—contradicts his assertion: There, the CCA expressly declined to interpret Article 11.071 unequivocally to incorporate *Sawyer* in all its particulars.[9]

Regardless, assuming *arguendo* that Article 11.071 fully codifies *Sawyer* still does Murphy's claim no good. "Evidence that might have persuaded the jury to decline to impose the death penalty is irrelevant under *Sawyer*" because it "has no bearing on [a criminal defendant's] claim of actual innocence of the death penalty." *Rocha v. Thaler*, 626 F.3d 815, 825–26 (5th Cir. 2010). Murphy seeks to use DNA evidence solely for the purpose of showing that he did not commit an extraneous offense the state presented in support of the future-dangerousness special issue. But that claim—even if supported by the DNA evidence—would not have changed Murphy's eligibility for the death penalty; at best, it would only make the death penalty a *less suitable* punishment.

The state presented multiple independent pieces of aggravating evidence from which the jury found a probability that Murphy would be a future danger. That aggregating evidence includes Murphy's record of theft convictions, testimony about a domestic-abuse call involving him and his girlfriend, a witness who testified that he pulled a gun on her at a high school party, testimony from one of his former coworkers, the results of his Minnesota Multiphasic Personality Inventory-II test, and his murder of

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[8] The Court in *Sawyer* defined the term "innocent of the death penalty" to include both "innocence of the capital crime itself" and "a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." 505 U.S. 333, 345 (1992).

[9] *Ex parte Blue*, 230 S.W.3d at 160 n.42 ("We hesitate to declare that Article 11.071, Section 5(a)(3) wholly codifies the Supreme Court's doctrine of 'actual innocence of the death penalty,' even inasmuch as it has tied the exception to the bar on subsequent writs to the statutory criteria for the death penalty under Article 37.071.").

eighty-year-old Bertie Cunningham.[10] Thus, even under his erroneous interpretation of Article 11.071, Murphy still fails to show the DNA testing he seeks would make him innocent of the death penalty.[11]

Third, Murphy misapplies Chapter 64 to Article 11.071. His claim—that Chapter 64 precludes him from challenging his death sentence by denying the DNA testing he seeks—is belied by the text and structure of the statute. Chapter 64 allows a convicted person to "submit to the convicting court a motion for forensic DNA testing of evidence," TEX. CODE CRIM. PROC. art. 64.01, which would, in turn, allow the convicting court to "order forensic DNA testing" provided certain statutory conditions are met, *id.* art. 64.03(a).

The statute thus creates an additional mechanism by which a defendant can obtain potentially exculpatory DNA test results. DNA testing results obtained through Chapter 64 *could* be used as part of a defendant's Article 11.071 application to show there are "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 under Article 37.071, 37.0711, or 37.072." *Id.* art. 11.071 § 5(a)(3).

But Article 11.071 certainly doesn't require that DNA test results come exclusively from a defendant's Chapter 64 motion. Section 5(a)

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[10] *Davis*, 901 F.3d at 583, 585; *see also Guevara v. State*, 97 S.W.3d 579, 581 (Tex. Crim. App. 2003) (noting that "[t]he facts of the crime alone can be sufficient to support the affirmative finding to the future dangerousness special issue").

[11] *See Rocha*, 626 F.3d at 825 ("The quality of the mitigation evidence the petitioner would have introduced at sentencing has no bearing on his claim of actual innocence of the death penalty.").

requires that a subsequent habeas application "contain[] sufficient specific facts," and that neither favors nor disfavors Chapter 64 DNA test results over DNA test results obtained through other means. In sum, Chapter 64—contrary to Murphy's assertion—*expands* the available sources of evidence convicted defendants may use in their subsequent habeas petitions. Consequently, Murphy has failed to identify any facial constitutional infirmity.

The district court ignored all this authority and instead relied solely on *Gutierrez v. Saenz*, 565 F. Supp. 3d 892 (S.D. Tex. 2021). The court in *Gutierrez* first observed that Article 11.071 "grants the substantive right to file a second habeas petition with a clear and convincing showing of innocence of the death penalty." *Id.* at 910. It then found that "Chapter 64 denies the petitioner access to DNA evidence by which a person can avail himself of that right" and violates a petitioner's procedural due process rights. *Id.* at 910–11.

The district court abused its discretion in relying exclusively on *Gutierrez*. That case cites *Rocha* for the proposition that the CCA construed "Article 11.071 . . . to mean that petitioners must make a threshold showing that the applicant is actually innocent of the death penalty." *Id.* But *Rocha* obligates us "to construe and apply section 5(a)(3) as the [CCA] construes and applies it." 626 F.3d at 822. *Gutierrez* disregards that command; it fails to cite any case in which the CCA has held that Article 11.071 creates a substantive right to challenge a death penalty conviction with evidence that might persuade a jury to decline to impose the death penalty. Thus, the district court could not have relied on Gutierrez's reasoning to conclude that Murphy had met his burden of showing a cognizable liberty or property interest—as is necessary for a procedural due process claim. *See Richardson v. Hughs*, 978 F.3d 220, 229 (5th Cir. 2020).

Furthermore, the defendant in *Gutierrez* sought DNA evidence under Chapter 64 to demonstrate innocence of the death penalty by casting doubt on whether he had committed the underlying crime for which he was convicted.[12] He wanted DNA evidence to show that he was not in the home of the victim at the time of the murder. That means the DNA evidence sought in *Gutierrez* would provide evidence directly relevant to the degree of culpability of the crime for which he was being sentenced. Here, in contrast, Murphy seeks DNA evidence not to challenge his guilt of the underlying crime, but to show that he did not commit an extraneous offense the state presented in support of the future-dangerousness special issue.

That factual distinction makes all the difference: As we explained above, "[e]vidence that might have persuaded the jury to decline to impose the death penalty . . . has no bearing on [a criminal defendant's] claim of actual innocence of the death penalty." *Rocha*, 626 F.3d at 825–26. Therefore, even if *Gutierrez* was correctly decided, it is not applicable to Murphy's situation because Murphy is not attempting to demonstrate innocence of the death penalty by attacking his underlying conviction. Rather, the DNA evidence he seeks is relevant to the special issue on future dangerousness, which encompasses a much broader category of potential evidence.

Despite *Gutierrez*'s non-binding nature as an opinion from a district court, and further despite its questionable reasoning and inapplicability to our facts, the district court *à quo* used *Gutierrez* to conclude that Murphy has shown a likelihood of success on the merits because the issue Murphy seeks

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[12] *See Ex parte Gutierrez*, 337 S.W.3d 883, 888 (Tex. Crim. App. 2011) (noting Gutierrez's argument that "exculpatory DNA test results . . . would show, by a preponderance of the evidence, that he would not have been convicted of capital murder.").

a stay of execution to litigate is now on appeal before our court. Rank speculation about the potential outcome of a case pending appeal does not support the district court's finding of a likelihood of success on the merits.[13] The district court abused its discretion by relying on the fact that *Gutierrez* is pending on appeal to grant a stay of execution.

Even if our precedent allowed the district court to rely on a pending appeal, the unique procedural history of *Gutierrez* counsels strongly against doing so in this case. In 2020, Gutierrez sought a stay of execution so he could litigate "the constitutionality of Chapter 64 of the Texas Code of Criminal Procedure" and Texas's "policy refusing to allow chaplains to accompany inmates into the execution chamber itself." *Gutierrez v. Saenz*, 818 Fed. App'x 309, 311 (5th Cir. 2020). The district court granted a stay of execution, but our court reversed. *Id.* at 313. We rejected Gutierrez's facial and as-applied procedural due process challenges to Chapter 64 as well as his spiritual-advisor claim. *Id.* at 312. The Supreme Court then granted certiorari, vacated, and remanded for further consideration of the spiritual-advisor claim. *See Gutierrez v. Saenz*, 141 S. Ct. 1260, 1260 (2021).

On remand, *Gutierrez* again challenged Chapter 64, and the district court again ruled in his favor. *Gutierrez*, 565 F. Supp. 3d at 908. The *Gutierrez* district court distinguished our earlier reasoning on the sole basis that Gutierrez's new Chapter 64 claim was "legally distinct" from the one we had rejected because the new claim challenged Chapter 64's denial of

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[13] *Cf. Wicker v. McCotter,* 798 F.2d 155, 158 (5th Cir. 1986) ("In the absence of a declaration by the [higher court] that the executions should be stayed in cases presenting the issue raised by [Murphy], we must follow our circuit's precedents and deny . . . a stay of execution on this issue."); *Moreno v. Collins*, No. 94-50026, 1994 U.S. App. LEXIS 41477, at *3 (5th Cir. Jan. 17, 1994) (per curiam) ("[T]he grant of certiorari by the United States Supreme Court to review an issue settled in this circuit does not itself require a stay of execution.").

evidence "that would demonstrate he is innocent of the death penalty," whereas the claim we had ruled on previously challenged Chapter 64's denial of evidence that would "demonstrate innocence of capital murder." *See id.*

We do not, and cannot, know how our court will ultimately resolve *Gutierrez*. But the difference between Gutierrez's rejected Chapter 64 claim and his current one is so small that it cannot be fairly said that the pending appeal gives Murphy a likelihood of success in this case.

Finally, the district court also determined that the possibility of irreparable harm weighs heavily in Murphy's favor. It is true that this factor typically favors the movant in a capital case. *See O'Bryan*, 691 F.2d at 708. However, the procedural posture of this case is unique. The CCA denied Murphy's request for DNA testing both because Chapter 64 bars it as a matter of law and because Murphy had unreasonably delayed in requesting DNA testing. *See Murphy v. State*, No. AP-77,112, 2023 WL 6241994, at *4–5 (Tex. Crim. App. Sept. 26, 2023). This second holding is crucial because, even if the application of Chapter 64 violates Murphy's procedural due process rights, he still would not be entitled to the DNA testing he seeks under the state court's alternative holding of unreasonable delay.

Therefore, the district court erred in concluding that Murphy would suffer irreparable harm in not being able to pursue his procedural due process claims. Rather, the balance of equities weighs against granting Murphy's motion for stay of execution: Both the state and victims of crime have a "powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (internal quotations omitted). And "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [death] sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (internal quotations omitted). Even apart from the likelihood-of-success inquiry, the district court abused its discretion in

concluding the balance of equities weighs in favor of granting Murphy's motion for stay of execution.

V.

It does not appear that the district court relied on any other claim in Murphy's September complaint when granting the stay of execution. To the extent that it did, it abused its discretion because none of Murphy's other claims is likely to succeed.

First, Murphy contends Chapter 64 unconstitutionally limits his ability to seek executive clemency. Problematically for him, Murphy's claim is premised on his assumption that Chapter 64 facially violates defendants' procedural due process rights under Article 11.071. But as we have already explained, that assumption holds no water. If anything, Chapter 64 makes it *easier* for convicted defendants to seek executive clemency since it *expands* the avenues by which a defendant may obtain DNA test results. Furthermore, Murphy fails to cite any case in which the denial of DNA testing violated a defendant's procedural due process right to present a clemency claim.[14] Murphy has therefore failed to bear his burden of proving that any procedural due process violation exists.[15]

Next, Murphy contends the denial of DNA testing deprives him of his right to adequate, effective, and meaningful access to the courts. That contention lacks merit. The right of access to the courts does not include the

[14] Nor is there a substantive due process right to executive clemency. *See Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981).

[15] *See Richardson*, 978 F.3d at 229 (noting plaintiff bears the burden of establishing a cognizable liberty or property interest to state a procedural due process claim).

ability "to *discover* grievances[] and to *litigate effectively* once in court."[16] Murphy seeks to compel the state to provide DNA testing on the mere hope that its results would support some speculative and hypothetical claim in the future. That is nothing more than an attempt "to discover grievances." *Casey*, 518 U.S. at 354 (emphasis removed).

A request for DNA testing, by itself, does not tend to prove or disprove Murphy's claim that he is innocent of the death penalty. The DNA testing "may prove exculpatory, inculpatory, or inconclusive. In no event will a judgment that simply orders DNA tests necessarily impl[y] the unlawfulness of the State's custody." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (internal quotations omitted). As a result, Murphy fails to show he has been denied his right of access to the courts.

Finally, Murphy contends 18 U.S.C. § 3599(e) entitles him to representation through all available post-conviction process, including applications for stays of execution and clemency proceedings. There is no merit to Murphy's final theory. That statute "authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is 'financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.'" *Ayestas v. Davis*, 138 S. Ct. 1080, 1092 (2018) (quoting 18 U.S.C. § 3599(a)(1)). It is merely a funding law and "not a law that grants federal courts authority to oversee the scope and nature of federally funded legal representation." *Beatty v. Lumpkin*, 52 F.4th 632, 634 (5th Cir.) (per curiam), *cert. denied*, 143 S. Ct. 416 (2022).

For these reasons, Murphy has failed to show a likelihood of success

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[16] *Lewis v. Casey*, 518 U.S. 343, 354 (1996); *see Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013) (per curiam) ("One is not entitled to access the courts merely to argue that there might be some remote possibility of some constitutional violation.").

on the merits on any claim in his September complaint. To the extent the district court relied on any claim other that the Chapter 64 challenge in granting the September motion to stay, it abused its discretion.

* * * * *

Accordingly, the district court abused its discretion in granting Murphy's September motion to stay execution. Accordingly, we VACATE the stay of execution entered in No. 1:23-cv-1170. The mandate shall issue forthwith.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
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NEW ORLEANS, LA 70130

October 09, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-70005 Murphy v. Nasser
USDC No. 1:23-CV-1170

Enclosed is the opinion entered in the case captioned above.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

Ms. Catherine Clare Bernhard
Ms. Katherine Froyen Black
Mr. Philip Devlin
Mr. Russell David Hunt Jr.
Mr. Ali Mustapha Nasser