Nos. 23-7809, 23A1160

IN THE

Supreme Court of the United States

RUBEN GUTIERREZ,
Petitioner,

v.

LUIS V. SAENZ, District Attorney; FELIX SAUCEDA, Chief, Brownsville Police Department,
Respondents.

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

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

WILL TREVINO
Office of the City Attorney,
City of Brownsville
1001 E. Elizabeth St.
Brownsville, Texas 78520

JEFFERSON CLENDENIN
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
jay.clendenin@oag.texas.gov

EDWARD SANDOVAL
First Assistant District Attorney
Cameron County, Texas
964 E. Harrison St.
Brownsville, Texas 78520

Counsel for Respondents

CAPITAL CASE

QUESTION PRESENTED

1. Should this Court grant review and a stay of execution where Petitioner challenges a straightforward application of a properly stated rule of law and where he has exhaustively, repeatedly, and unsuccessfully litigated challenges to his decades-old capital murder conviction and death sentence?

LIST OF PROCEEDINGS

State v. Gutierrez, No. 98-CR-1391-A (107th Dist. Ct., Cameron Cnty., Tex.) (convicted and sentenced to death May 12, 1999)

Gutierrez v. State, No. AP-73,462 (Tex. Crim. App. Jan. 16, 2002) (affirming conviction and sentence)

Ex parte Gutierrez, No. WR-59,552-01 (Tex. Crim. App. May 14, 2008) (denying initial state habeas application)

Ex parte Gutierrez, No. 98-CR-1391-A (107th Dist. Ct., Cameron Cnty., Tex. May 29, 2009) (denying motion for appointment of counsel for postconviction DNA testing)

Gutierrez v. State, 307 S.W.3d 318 (Tex. Crim. App. 2010) (dismissing appeal of denial of motion for appointment of counsel)

Gutierrez v. State, No. 98-CR-1391-A (107th Dist. Ct., Cameron Cnty., Tex. July 27, 2010) (denying motion for postconviction DNA testing)

Ex parte Gutierrez, 337 S.W.3d 883 (Tex. Crim. App. 2011) (affirming denial of motion for postconviction DNA testing)

Ex parte Gutierrez, No. WR-59,552-02 (Tex. Crim. App. Aug. 24, 2011) (dismissing subsequent application for a writ of habeas corpus)

Gutierrez v. Stephens, No. 1:09-CV-22 (S.D. Tex. Oct. 3, 2013) (denying federal habeas petition

Gutierrez v. Stephens, 590 F. App'x 371 (5th Cir. 2014) (denying a certificate of appealability)

Gutierrez v. Stephens, 577 U.S. 829 (Oct. 5, 2015) (denying petition for a writ of certiorari on federal habeas)

Gutierrez v. Davis, No. 1:09-CV-22 (S.D. Tex. Aug. 22, 2018) (order staying execution)

Gutierrez v. Davis, No. 18-70028 (5th Cir. Sept. 10, 2018) (order denying motion to vacate stay of execution)

In re Gutierrez, No. WR-59,552-03 (Tex. Crim. App. Feb. 26, 2020) (dismissing motion for leave to file application for a writ of mandamus)

Gutierrez v. State, No. AP-77,089 (Tex. Crim. App. Feb. 26, 2020) (affirming denial of motion for postconviction DNA testing)

Ex parte Gutierrez, No. WR-59,552-04 (Tex. Crim. App. June 12, 2020) (denying motion for leave to file petition for a writ of mandamus)

Ex parte Gutierrez, No. WR-59,552-05 (Tex. Crim. App. June 12, 2020) (dismissing subsequent application for a writ of habeas corpus)

Gutierrez v. Saenz, et al., No. 1:19-CV-185 (S.D. Tex. June 9, 2020) (granting stay of execution)

Gutierrez v. Saenz, et al., 818 F. App'x 309 (5th Cir. June 12, 2020) (vacating stay of execution)

Gutierrez v. Saenz, et al., No. 19-8695 (June 16, 2020) (order staying execution)

Gutierrez v. Saenz, et al., 141 S. Ct. 1260 (Jan. 25, 2021) (granting certiorari, vacating order, and remanding for further proceedings on spiritual advisor claims)

Gutierrez v. Saenz, et al., No. 1:19-CV-185 (S.D. Tex. Mar. 23, 2021) (order granting declaratory judgment on DNA claims)

Gutierrez v. Saenz, et al., No. 21-70002 (5th Cir. June 24, 2021) (order dismissing appeal for lack of jurisdiction)

In re Gutierrez, No. 98-CR-1391-A (107th Dist. Ct., Cameron Cnty., Tex. July 8, 2021) (order dismissing motion for postconviction DNA testing)

Gutierrez v. Saenz, et al., No. 1:19-CV-185 (S.D. Tex. Dec. 8, 2021) (partial final judgment as to DNA claims)

Gutierrez v. State, 663 S.W.3d 128 (Tex. Crim. App. 2022) (vacating order dismissing motion for postconviction DNA testing)

In re Gutierrez, No. 98-CR-1391-A (107th Dist. Ct., Cameron Cnty., Tex. May 26, 2022) (order denying motion for postconviction DNA testing)

Gutierrez v. Saenz, et al., No. 1:19-CV-185 (S.D. Tex. Mar. 10, 2023) (order dismissing spiritual advisor claims)

Gutierrez v. Saenz, et al., 93 F.4th 267 (5th Cir. 2024) (vacating and remanding order granting declaratory judgment)

Gutierrez v. Saenz, et al., No. 21-70009 (5th Cir. May 29, 2024) (order denying petition for rehearing)

Gutierrez v. Saenz, et al., No. 21-70009 (5th Cir. June 7, 2024) (order denying motion to stay mandate)

Gutierrez v. Saenz, et al., No. 1:19-CV-185 (S.D. Tex. June 18, 2024) (order dismissing complaint)

Gutierrez v. State, No. AP-77,108 (Tex. Crim. App. June 27, 2024) (affirming denial of motion for postconviction DNA testing)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

BRIEF IN OPPOSITION

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

More than twenty-five years ago, Petitioner Ruben Gutierrez and two others robbed Escolastica Harrison of nearly $600,000 and beat and stabbed her to death. This appeal involves one of a multitude of challenges Gutierrez has raised following his capital murder conviction and death sentence. *See Gutierrez v. Saenz*, 93 F.4th 267, 269–71 (5th Cir. 2024) (summarizing the "decades-long postconviction proceedings").

In one of the most recent iterations of Gutierrez's serial challenges to his long-final state court conviction, the Fifth Circuit vacated a declaratory judgment entered by the district court, holding Gutierrez did not have standing to challenge the constitutionality of a provision of Texas's postconviction DNA testing statute, Texas Code of Criminal Procedure Article 64 (Chapter 64), that permits testing affecting an inmate's conviction but not his punishment. *Id.* at 275. In another, the Texas Court of Criminal Appeals (TCCA) denied Gutierrez's *third* motion for postconviction DNA testing, reiterating what the court had held twice before—Gutierrez would not be entitled to DNA testing *even if* Chapter 64 provided for testing for the purpose of affecting one's

punishment. *Gutierrez v. State*, No. AP-77,108, 2024 WL 3220514, at *4 (Tex. Crim. App. June 27, 2024).

Gutierrez is scheduled to be executed after 6:00 p.m. (Central Time) July 16, 2024. He now seeks review of the Fifth Circuit's judgment and yet another stay of execution. But Gutierrez's petition and application for a stay of execution are based on nothing more than his disagreement with the Fifth Circuit's straightforward application of this Court's holding in *Reed v. Goertz*, 598 U.S. 230, 234 (2023). His overwrought interpretation of that straightforward application presents nothing worthy of this Court's attention. This Court should deny the petition for a writ of certiorari and application for a stay of execution.

STATEMENT OF THE CASE

I. Facts Concerning Gutierrez's Murder of Escolastica Harrison

> The evidence shows that the [eighty-five]-year-old victim kept approximately $600,000 in cash in her home which also served as an office for a mobile home park she owned and managed. The victim had befriended [Gutierrez] and [Gutierrez] knew the victim kept a lot of cash in her home office.
>
> [Gutierrez] developed a plan to steal the victim's money. On September 5, 1998, the [twenty-one]-year-old [Gutierrez] and an accomplice, whom the victim did not know, went into the victim's home/office to carry out the plan. When [Gutierrez] and the accomplice left with the victim's money, the victim was dead. She had been beaten and stabbed numerous times.
>
> [Gutierrez] claimed in his third statement to the police that "we" (he and the accomplice) had two different types of

> screwdrivers when they entered the victim's home/office to steal her money. [Gutierrez] also claimed that the initial plan was for the accomplice to lure the victim out of her home/office through the front by some innocent means at which time [Gutierrez] would go in through the back and take the victim's money without the victim seeing him. This plan was frustrated when the victim saw [Gutierrez] enter through the front door while the accomplice was still inside with her. [Gutierrez] claims that soon after this, the accomplice began to beat, kick, and stab the victim with a screwdriver while [Gutierrez] got her money. [Gutierrez] did nothing to prevent the accomplice from attacking the victim.
>
> The medical examiner testified that the victim suffered various defensive wounds indicating that she struggled for her life and tried to "ward off blows or attacks of some sort." The medical examiner also testified that the victim suffered approximately thirteen stab wounds, caused by two different instruments—one "almost certainly" a flat head screwdriver and the other possibly a Phillips head screwdriver. The victim died from "massive blows to the left side of the face."

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

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

A. The State's evidence

> At punishment, the prosecution presented evidence of [Gutierrez's] involvement with the criminal justice system since he was [fourteen]-years old. As a juvenile, [Gutierrez] committed several burglaries, he assaulted a police officer, and he threatened to kill a teacher and a security officer. Attempts to rehabilitate [Gutierrez] in various juvenile detention facilities were unsuccessful. [Gutierrez] was a disciplinary problem in these facilities and he often escaped from them.
>
> As an adult, [Gutierrez] committed various misdemeanor offenses. He also was convicted of forgery. While doing time in Cameron County Jail on this state jail conviction, [Gutierrez]

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

Id. at 6.

B. Gutierrez's evidence

Dr. Jonathan Sorenson, an expert on future dangerousness, testified regarding the actuarial method of assessing an inmate's potential for future danger. 24 RR 4–15.[1] He stated data indicates that murderers make the best inmates and inmates incarcerated for homicide had a very low likelihood of committing another one. 24 RR 17, 19–22. Moreover, Dr. Sorenson testified that an inmate's age was the best predictor of future dangerousness and a twenty-one-year-old inmate with a prior criminal record was not more than likely to commit violent acts in the future. 24 RR 27.

The defense also presented the testimony of Gutierrez's aunt, Hilda Garcia who testified that Gutierrez was easy-going and a responsible husband and father. 24 RR 49–56. She also testified that Gutierrez was lovable, caring,

---

[1] "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by the volume number and followed by the cited page number(s).

and helpful to people who needed assistance. 24 RR 57. After considering this evidence, and "based on the jury's findings at the punishment phase, the trial judge sentenced [Gutierrez] to death." *Ex parte Gutierrez*, 337 S.W.3d 883, 888 (Tex. Crim. App. 2011).

III. Course of State and Federal Proceedings

Gutierrez's conviction was affirmed on direct appeal by the TCCA. *Gutierrez v. State*, No. AP-73,462, slip op. at 21. The TCCA thereafter denied Gutierrez state habeas relief. *Ex parte Gutierrez*, No. WR-59,552-01, 2008 WL 2059277, at *1 (Tex. Crim. App. May 14, 2008).

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

While back in state court, Gutierrez unsuccessfully sought postconviction DNA testing. *Ex parte Gutierrez*, 337 S.W.3d at 901–02; *Gutierrez v. State*, 307 S.W.3d 318, 323 (Tex. Crim. App. 2010) (dismissing appeal of denial of request for appointment of counsel). He also unsuccessfully sought state habeas relief; his subsequent application dismissed as abusive. Order, *Ex parte Gutierrez*, No. WR-59,552-02 (Tex. Crim. App. Aug. 24, 2011).

After the state litigation ended, the district court reopened the federal habeas proceeding and denied Gutierrez relief and a certificate of appealability (COA). Mem. Op. & Order, *Gutierrez v. Stephens*, No. 1:09-CV-22 (S.D. Tex. Oct. 3, 2013), ECF No. 44. Gutierrez then sought a COA from the Fifth Circuit, but his request was denied. *Gutierrez v. Stephens*, 590 F. App'x 371, 384 (5th Cir. 2014). This Court later denied him certiorari review. *Gutierrez v. Stephens*, 577 U.S. 829 (2015).

The state trial court then set a date for Gutierrez's execution. Order Setting Execution, *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron Cnty., Tex. Apr. 11, 2018). About a month and a half before this execution date, Gutierrez's federally appointed counsel moved to withdraw from the case. Mot. Withdraw & Appoint Substitute Counsel, *Gutierrez v. Davis*, No. 1:09-CV-22 (S.D. Tex. July 24, 2018), ECF No. 56. New counsel were appointed and a stay of execution entered to allow them time to gain familiarity with the case. Order, *Gutierrez v. Davis*, No. 1:09-CV-22 (S.D. Tex. Aug. 22, 2018), ECF No. 79. The Fifth Circuit refused to vacate the stay. Order, *Gutierrez v. Davis*, No. 18-70028 (5th Cir. Sept. 10, 2018).

After the federal stay expired, the state trial court again set an execution date. Order Setting Execution, *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron Cnty., Tex. June 28, 2019). The TCCA stayed this execution date on state law matters concerning the warrant of execution. *In re Gutierrez*, No.

WR-59,552-03, 2019 WL 5418389, at *1 (Tex. Crim. App. Oct. 22, 2019); *see also In re Gutierrez*, No. WR-59,552-03, 2020 WL 915300, at *1 (Tex. Crim. App. Feb. 26, 2020).

About a month after the second execution date was initially set,[2] Gutierrez filed his second motion for postconviction DNA testing. Mot. Post-Conviction DNA Testing, *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron Cnty., Tex. June 14, 2019). The trial court denied his motion and the TCCA affirmed. *Gutierrez v. State*, No. AP-77,089, 2020 WL 918669, at *9 (Tex. Crim. App. Feb. 26, 2020).

Once more, the state trial court set an execution date for Gutierrez. Order Setting Execution, *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron Cnty., Tex. Feb. 28, 2020). About two weeks before that execution date, Gutierrez moved to recall the execution order on state law grounds, but the request was denied. Order Deny Convict Gutierrez's Mot., *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron Cnty., Tex. May 28, 2020). Gutierrez moved the TCCA for leave to file a petition for a writ of mandamus to recall the execution order and a stay of execution. Pet. Writ Mandamus, *In re Gutierrez*, No. WR-59,552-04 (Tex. Crim. App. June 2, 2020);

---

[2] The trial court initially set an execution date with an order signed May 1, 2019, but that execution date was later withdrawn. *See* Order Setting Execution Date, *State v. Gutierrez*, No. 98-CV-1391 (107th Dist. Ct., Cameron Cnty., Tex. May 1, 2019).

Mot. Stay Execution, *In re Gutierrez*, No. WR-59,552-04 (Tex. Crim. App. June 2, 2020). Gutierrez also moved the TCCA for a stay of execution in light of the COVID-19 pandemic. The motions were denied. Notice, *In re Gutierrez*, No. WR-59,552-04 (Tex. Crim. App. June 12, 2020).

About a week before the 2020 execution date, Gutierrez filed yet another subsequent state habeas application. Subsequent Appl. Post-conviction Writ of Habeas Corpus, *Ex parte Gutierrez*, No. 98-CR-1391 (107th Dist. Ct., Cameron Cnty., Tex. June 8, 2020). He also moved the TCCA to stay his execution based on this application. Mot. Stay Execution Pending Disposition of Subsequent Appl. Post-conviction Writ of Habeas Corpus, *Ex parte Gutierrez*, No. WR-59,552-05 (Tex. Crim. App. June 8, 2020). The TCCA found Gutierrez failed to "satisfy the requirements of Article 11.071 § 5 or Article 11.073 [of the Texas Code of Criminal Procedure]," so it "dismiss[ed] the application as an abuse of the writ without reviewing the merits of the claims raised" and denied his motion for a stay. *Ex parte Gutierrez*, No. WR-59,552-05, 2020 WL 3118514, at *1 (Tex. Crim. App. June 12, 2020).

Gutierrez also filed a federal civil rights lawsuit challenging as unconstitutional, among other things, the absence in Chapter 64 for punishment-related DNA testing.[3] Amended Compl., *Gutierrez v. Saenz, et al.*,

[3] Gutierrez's complaint also challenged the Texas Department of Criminal Justice's (TDCJ) then-existing policy excluding from the execution room outside

No. 1:19-CV-185 (S.D. Tex. Apr. 22, 2020), ECF No. 45. The Defendants filed a motion to dismiss the complaint, which the district court granted as to many of Gutierrez's claims but denied as to the claims that raised cognizable challenges to the constitutionality of Chapter 64. Mem. & Order, *Gutierrez v. Saenz*, No. 1:19-CV-185 (S.D. Tex. June 2, 2020), ECF No. 48. The district court later granted Gutierrez a stay of execution. Order, *Gutierrez v. Saenz*, No. 1:19-CV-185 (S.D. Tex. June 9, 2020), ECF No. 57. The Fifth Circuit vacated the stay. *Gutierrez v. Saenz, et al.*, 818 F. App'x 309, 315 (5th Cir. 2020). This Court granted Gutierrez's petition for a writ of certiorari (which raised only spiritual-advisor claims), vacated the Fifth Circuit's order, and remanded for consideration of the spiritual-advisor claims.[4] *Gutierrez v. Saenz*, 141 S. Ct. 1260, 1260–61 (2021).

On remand, the district court rejected Gutierrez's primary challenge to Chapter 64's materiality standard, but it granted a declaratory judgment as to

---

spiritual advisors. Those claims were ultimately dismissed as moot after the policy was changed. Order of Dismissal, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Mar. 10, 2023), ECF No. 213.

[4] Gutierrez was set to be executed in October 2021, but the execution date was withdrawn due to litigation in another case raising spiritual-advisor claims similar to Gutierrez's. Order Vacating Order, *State v. Gutierrez*, No. 98-CR-1391 (107th Dist. Ct. Cameron Cnty., Sept. 21, 2015); *see Ramirez v. Collier*, No. 21-5592, 2021 WL 4129220, at *1 (Sept. 10, 2021).

the absence in Chapter 64 of a provision for punishment-related DNA testing.[5] Mem. & Order, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Mar. 23, 2021), ECF No. 141. The district court later entered a partial final judgment as to Gutierrez's DNA claims, which dismissed or denied all of Gutierrez's challenges to Chapter 64 other than the one as to which the court granted a declaratory judgment. Order 4, *Gutierrez v. Saenz*, No. 1:19-CV-185 (S.D. Tex. Dec. 8, 2021), ECF No. 188. Respondents appealed the district court's declaratory judgment.

On appeal, the Fifth Circuit held Gutierrez lacked standing to seek the declaratory judgment the district court granted. *Gutierrez v. Saenz, et al.*, 93 F.4th at 275. The Fifth Circuit vacated the district court's judgment and remanded the case for the complaint to be dismissed. *Id*. The Fifth Circuit denied Gutierrez's petition for rehearing and his motion to stay issuance of mandate.[6] Order, *Gutierrez v. Saenz, et al*, No. 21-70009 (5th Cir. June 7, 2024), ECF No. 148-2; On Petition for Rehearing and Rehearing En Banc, *Gutierrez v. Saenz, et al.*, No. 21-70009 (5th Cir. May 29, 2024), ECF No. 138-

---

[5] Respondents appealed the district court's declaratory judgment, but the appeal was dismissed for lack of jurisdiction. Order, *Gutierrez v. Saenz, et al.*, No. 21-70002 (5th Cir. June 24, 2021).

[6] The district court has since dismissed Gutierrez's complaint. Order, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. June 18, 2024).

1. Gutierrez then filed a petition for a writ of certiorari and an application for a stay of execution. The instant brief in opposition follows.

During the pendency of his civil-rights lawsuit, Gutierrez filed a third motion for postconviction DNA testing. The trial court initially dismissed it for lack of jurisdiction, Order Granting State's Plea to the J., *In re Gutierrez*, No. 98-CR-1391-A (107th Dist. Ct. Cameron Cnty., July 8, 2021), but the TCCA vacated that order. *Gutierrez v. State*, 663 S.W.3d 128, 132 (Tex. Crim. App. 2022). The trial court then denied Gutierrez's third motion for postconviction DNA testing on the merits. Order Denying, *In re Gutierrez*, No. 98-CR-1391-A (107th Dist. Ct., Cameron Cnty., Tex. May 26, 2022). The TCCA affirmed the denial of Gutierrez's motion. *Gutierrez v. State*, 2024 WL 3220514, at *5.

REASONS FOR DENYING CERTIORARI AND A STAY

Gutierrez has sought DNA testing three times over the course of fifteen years. Each time his request has been rejected because, among other things, Chapter 64 does not provide for postconviction DNA testing to show innocence of the death penalty and, *even if it did*, Gutierrez would not be entitled to it. *Gutierrez v. State*, 2024 WL 3220514, at *4. Stated another way, even assuming a constitutional infirmity existed in Chapter 64 by virtue of the absence of a provision for punishment-related testing, and assuming that infirmity was *cured*, the TCCA has held Gutierrez would not be entitled to an order requiring Respondents to release evidence for DNA testing. *Id.*

The Fifth Circuit held that because the state court has already spoken on the very defect purportedly redressed by the district court's declaratory judgment, Gutierrez lacked standing to seek the declaratory judgment. *Gutierrez v. Saenz, et al.*, 93 F.4th at 273–74. In reaching that conclusion, the Fifth Circuit straightforwardly applied the test this Court articulated in *Reed*. *Id*. In arguing the Fifth Circuit erred in holding he lacked standing, Gutierrez relies solely on the fact that the state court rejected his request for DNA testing. And he asks this Court to make the standing analysis a rote exercise and a foregone conclusion in every case involving a challenge to the constitutionality of a state's postconviction DNA testing procedures. Gutierrez doesn't identify any other area of law in which the standing inquiry is so preordained. Indeed, Gutierrez's argument is contrary to this Court's precedent. The Court should decline Gutierrez's attempt to drastically expand its standing jurisprudence. Gutierrez's petition for a writ of certiorari and application for a stay of execution should be denied.

ARGUMENT

I. Gutierrez Provides No Compelling Reason for Further Review.

The Court requires those seeking a writ of certiorari to provide "[a] direct and concise argument *amplifying* the reasons relied on for allowance of the writ." Sup. Ct. R. 14.1(h) (emphasis added). Gutierrez argues the Court should grant review to resolve a circuit split between the Fifth Circuit and the Eighth

Circuit and because the Fifth Circuit's holding conflicts with *Reed*. Pet. 11–19. But as discussed below, Gutierrez's true complaint is that the court below misapplied a properly stated rule of law, a plainly insufficient reason to grant review. Sup. Ct. R. 10. Indeed, the Fifth Circuit correctly identified the holding of *Reed* and straightforwardly applied it to the facts of Gutierrez's case. *Gutierrez v. Saenz, et al.*, 93 F.4th at 273–74 ("The *Reed* question here is would a Texas prosecutor, having in hand a federal court's opinion that a DNA testing requirement violated federal law and also an earlier [TCCA] opinion that this particular prisoner was not injured by that specific violation, *likely* order the DNA testing?"). Gutierrez's bare disagreement with the Fifth Circuit's answer does not justify this Court's attention.

Gutierrez "amplifies" his request for review, pointing to the Eighth Circuit's application last year of *Reed*'s holding in one case.[7] Pet. 10–12 (citing *Johnson v. Griffin*, 69 F.4th 506 (8th Cir. 2023)). Indeed, Gutierrez admits "*Johnson* is the only other federal appellate opinion to apply *Reed* in the context of a prisoner challenging a state post-conviction DNA statute as unconstitutional[.]" Pet. 12. But "[t]his Court mostly does not even grant

[7] Gutierrez also points to the Ninth Circuit's decision in *Redd v. Guerrero*, 84 F.4th 874 (9th Cir. 2023), a case that did not involve a challenge to a state's postconviction DNA testing statute. Instead, the case involved a habeas petitioner's challenge to the state's failure to appoint him counsel to litigate his habeas case. *Id.* at 881.

certiorari on one-year-old, one-to-one Circuit splits, because . . . a bit of disagreement is an inevitable part of our legal system." *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 392–93 (2022) (Breyer, J., dissenting); *see Calvert v. Texas*, 141 S. Ct. 1605, 1606 (2021) (Statement of Sotomayor, J., respecting the denial of certiorari) ("The legal question Calvert presents is complex and would benefit from further percolation in the lower courts prior to this Court granting review."). On its face, then, the petition identifies no compelling reason warranting this Court's attention.

Moreover, as discussed below, the Fifth Circuit's holding in this case does not conflict with the Eighth Circuit's holding in *Johnson*. The Fifth Circuit simply applied this Court's holding in *Reed* to a different set of facts, and its straightforward application of that holding in a factually distinct context does not call for this Court's intervention. Underneath Gutierrez's hyperbole about the Fifth Circuit's opinion is nothing but his bare disagreement with the outcome in his case. This Court should not grant certiorari to resolve a nonexistent circuit split.

II. The Lower Court's Straightforward Application of *Reed* Does Not Warrant this Court's Review.

Gutierrez assails the Fifth Circuit's holding that he lacked standing to bring suit, arguing the court misapplied this Court's holding in *Reed* and calling the Fifth Circuit's holding "wrong and pernicious." Pet. 11. He also

argues the holding conflicts with the Eighth Circuit's opinion in *Johnson*. Pet 12–13. In effect, Gutierrez argues that, since this Court found the plaintiff in *Reed* had standing, the Fifth Circuit was *obligated* to find he had standing too.[8] But the *Reed* holding does not render the standing analysis a foregone conclusion in every civil rights challenge to a state's postconviction DNA testing statute.

A. Background

Gutierrez first sought postconviction DNA testing under Chapter 64 more than fifteen years ago. *See Ex parte Gutierrez*, No. 98-CR-1391-A, 2009 WL 8537247 (107th Dist. Ct. Cameron Cnty., May 18, 2009) (order denying appointment of counsel under Chapter 64). The TCCA rejected the request because identity was not an issue in Gutierrez's case and exculpatory results would not demonstrate his innocence. *Ex parte Gutierrez*, 337 S.W.3d at 899–902. The TCCA also found Gutierrez purposefully forewent DNA testing at his trial in 1999. *Id*. at 896–97. Gutierrez has now leveraged that strategic decision

[8] The dissent in the court below refused to consider the facts of Gutierrez's case and instead said, "[b]ecause the standing analysis of *Reed* applies here, Gutierrez, *also facing execution*, has standing to bring suit." *Gutierrez v. Saenz, et al.*, 93 F.4th at 276 (Higginson, J., dissenting) (emphasis added). In addition to failing to engage with the specifics of Gutierrez's case, the dissent relied on the fact that both Reed and Gutierrez are "facing execution," a fact that is *entirely* irrelevant to the standing analysis.

for decades.[9] Moreover, the TCCA held—more than *thirteen years ago*—that Chapter 64 does not "authorize testing when exculpatory testing results might affect only the punishment or sentence that he received." *Id*. at 901. The TCCA has twice reiterated to Gutierrez that plain holding. *Gutierrez v. State*, 2024 WL 3220514, at *2–3.

Gutierrez's civil-rights lawsuit alleged Chapter 64 is unconstitutional in several ways. Amended Compl. 19–30, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Apr. 22, 2020). The district court rejected all the challenges except for Gutierrez's claim that the absence of a provision for punishment-related DNA testing was unconstitutional because it rendered a portion of

---

[9] Gutierrez has now filed three unsuccessful motions for postconviction DNA testing. *See Gutierrez v. State*, 2024 WL 3220514, at *2–3. He obtained a stay of his federal habeas proceedings while he litigated his first request for postconviction DNA testing and a subsequent state habeas application. Order, *Gutierrez v. Quarterman*, No. 1:09-CV-22 (S.D. Tex. Apr. 29, 2009). He requested the federal habeas court to grant "discovery" by way of DNA testing. Pet. 92–95, *Gutierrez v. Quarterman*, 1:09-CV-22 (S.D. Tex. May 1, 2012). He obtained new counsel and a stay of his first scheduled execution date in 2018 to file a civil rights lawsuit regarding the denial of DNA testing—then failed to file such a lawsuit for more than a year until he was scheduled to be executed in October 2019. *See* Mot. to Withdraw and for Appointment of Sub. Counsel 4, *Gutierrez v. Stephens*, No. 1:09-CV-22 (S.D. Tex. July 24, 2018); Complaint, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Sept. 26, 2019). And he repeatedly sought to delay the district court's resolution of his civil rights lawsuit. Order, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Jan. 7, 2020) (order staying proceedings pending TCCA's resolution of Gutierrez's second Chapter 64 appeal); Order, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. June 9, 2020) (order staying execution); Pl.'s Br. in Opp. to Defs.' Mot. for Entry of Partial Final J., *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Apr. 6, 2021); Pl.'s Br. in Opp. to Defs.' Mot. for Entry of Partial Final J., *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Dec. 6, 2021).

Texas's abuse of the writ statute, Tex. Code Crim. Proc. art. 11.071 § 5(a)(3), illusory, and it accordingly granted Gutierrez a declaratory judgment. Order, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Dec. 8, 2021). The problem for Gutierrez, however, was that the TCCA had already spoken on that issue, holding that Gutierrez would not be entitled to DNA testing *even if* such a provision existed. *See Gutierrez v. State*, 2024 WL 3220514, at *2–3.

B. This Court's precedent.

In *District Attorney's Office for Third Judicial District v. Osborne*, this Court held there is no substantive due process right to DNA testing. 557 U.S. 52, 72–73 (2009). Rather, an inmate can only demonstrate a constitutional violation by showing a "State's procedures for postconviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Id*. at 69 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). The Court otherwise left the task of "how to harness DNA's power to prove innocence" to the legislatures. *Id*. at 62.

This Court later held in *Skinner v. Switzer* that a procedural due process challenge to a state's postconviction DNA testing statute may be pursued under 42 U.S.C. § 1983. 562 U.S. 521, 525 (2011). But the Court recognized *Osborne* "left slim room for the prisoner to show that the governing state law

denies him procedural due process." *Id*. The Court assured that fears of a vast expansion of federal jurisdiction were "unwarranted." *Id*. at 534–35.

As to standing, this Court requires a plaintiff to adequately allege (1) an injury, (2) that is fairly traceable to the defendant's conduct, and (3) would likely be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The plaintiff bears the burden of establishing these elements, which are "indispensable" parts of a lawsuit and must be proven rather than merely pled. *Id*. at 561.

In *Reed*, this Court held the plaintiff had standing to sue a district attorney to seek a declaratory judgment as to the constitutionality of Chapter 64 because the plaintiff suffered an injury (denial of access to evidence for DNA testing), and the district attorney denied him that access. 598 U.S. at 234. The Court found an order declaring the challenged statutory procedures violated due process would "eliminate" the district attorney's justification for denying DNA testing, i.e., it was substantially likely the district attorney "would abide by such a court order." *Id*. However, this Court has also held that an action seeking a declaratory judgment "must be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *California v. Texas*, 593 U.S. 659, 672 (2021) (cleaned up). And "a declaration that the statutory provision [the plaintiffs] attack is unconstitutional . . . is the

very kind of relief that cannot alone supply jurisdiction otherwise absent."[10] *Id*. at 673.

In *Utah v. Evans*, Utah alleged the Census Bureau's method of counting the population violated federal statute and the Constitution. 536 U.S. 452, 459 (2002). The state sought an injunction compelling a change in the census results. *Id*. The Court, relying on its prior holding in a materially indistinguishable case, held Utah had standing to seek such an injunction because a court could order the Secretary of Commerce to recalculate its numbers and recertify the census result. *Id*. at 459–64 (discussing *Franklin v. Massachusetts*, 505 U.S. 788, 807 (1992)). In doing so, the Court conducted a detailed assessment of the facts and applicable federal statutes and found an injunction requiring issuance of a new census report "would bring about" the relief Utah sought, i.e., new congressional apportionment. *Id*.

Recently, this Court emphasized standing's limits. *See FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 380–81 (2024). In holding the plaintiffs

---

[10] As the district court explained, it had jurisdiction only to grant a declaratory judgment as to the constitutionality of Chapter 64, not to compel state officials to release evidence for DNA testing. Order 11–12, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. June 2, 2020); *see Moye v. Clerk, Dekalb Cnty. Superior Court*, 474 F.2d 1275, 1276 (5th Cir. 1973). Gutierrez did not complain on appeal in the court below, nor does he maintain in his Petition for a Writ of Certiorari, that the district court's holding in that regard was error. Any such argument would, therefore, be waived. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *California*, 593 U.S. at 674 (declining to consider argument not presented to the circuit court and not raised at the certiorari stage).

in *Alliance for Hippocratic Medicine* lacked standing, the Court explained that some legal questions are left "to the political and democratic processes." 602 U.S. at 396. The Court also emphasized that it has long rejected an "if not us, who?" argument for standing. *Id*. Moreover, the Court explained that standing can be absent based on the redressability element, alone, where a plaintiff suffers an injury caused by the government that is not "of the kind 'traditionally redressable in federal court.'" *Id*. at 381 n.1. And while causation and redressability are often flip sides of the same coin, the causation element cannot be proven by speculation. *Id*. at 381, 384. Indeed, "the causation inquiry can be heavily fact-dependent and a 'question of degree[.]'" *Id*. at 383. Critically here, "standing is not dispensed in gross." *Murthy v. Missouri*, --- S. Ct. ---, 2024 WL 3165801, at *9 (June 26, 2024) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)). Rather, a plaintiff must demonstrate standing *for each claim* and for each form of relief he seeks. *Id*.

C. The lower court properly applied this Court's precedent.

As discussed above, in *Reed*, the plaintiff sought and was denied in state court access to evidence for DNA testing, in part because he failed to satisfy Chapter 64's chain-of-custody requirement. 598 U.S. at 233. He later filed a civil rights action against the local prosecutor, alleging Chapter 64's chain-of-custody requirement was unconstitutional. *Id*. The lawsuit was dismissed on limitations grounds. *Id*. at 233–34. This Court reversed, first holding the

plaintiff had standing to bring suit. *Id.* at 234. The Court held the plaintiff sufficiently alleged an injury in fact: denial of access to evidence for DNA testing. *Id*. The Court also found a causal connection between the defendant's conduct and the injury: the defendant denied the plaintiff access to the evidence. *Id*. And the Court found the injury was redressable through the civil rights action because a federal court judgment that Chapter 64's procedures were unconstitutional "would *eliminate* the state prosecutor's justification for denying DNA testing," would result in a change in legal status, and would significantly increase the likelihood the defendant would grant access to the evidence for testing. *Id*. (emphasis added).

In doing so, the Court articulated a test for determining whether a plaintiff in such an action has standing—it did not hold that every unsuccessful state court litigant will have standing to seek a judgment declaring his state's postconviction DNA testing procedures unconstitutional. *See id*. This necessarily raises the question of which litigants lack standing. *See Murthy*, 2024 WL 3165801, at *16 n.11.

Here, Gutierrez twice sought DNA testing via Chapter 64 before filing his civil rights lawsuit. *See Gutierrez v. Saenz*, 93 F.4th at 269–70. Gutierrez's requests were based, in part, on his assertion that the results of DNA testing would show he was innocent of the death penalty. *See id*. On both occasions, the TCCA held Gutierrez was not entitled to testing because Chapter 64 did

not contain a provision for testing when the results would affect only the inmate's punishment. *See id*. at 269–70. But, critically, the TCCA also found Gutierrez would not have been entitled to the testing he sought *even if* Chapter 64 contained such a provision. *Gutierrez v. State*, 2020 WL 918669, at *8.

Gutierrez then turned to federal court where his civil rights action alleged, among other things, that the absence of a provision in Chapter 64 for punishment-related DNA testing violated his right to due process. *See Gutierrez v. Saenz*, 93 F.4th at 270–71. The district court agreed and entered a declaratory judgment to that effect.[11] *See id*. On appeal, the Fifth Circuit held Gutierrez's civil rights action should have been dismissed because he lacked standing to challenge the absence of a provision in Chapter 64 for punishment-related testing where the TCCA "already held" what the effect of such a declaratory judgment would be. *Id*. at 275.

In reaching its conclusion, the Fifth Circuit simply applied the test from *Reed*. As explained above, this Court found the plaintiff in *Reed* had standing because a favorable judgment would *eliminate* the defendant's justification for refusing access to evidence, would result in a change in legal status, and would significantly increase the likelihood the defendant would grant access to the

[11] As discussed above, the district court denied all of Gutierrez's other challenges to Chapter 64. Order 14, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Aug. 19, 2021).

evidence. *Reed*, 598 U.S. at 234. The Fifth Circuit appropriately summarized the relevant question from *Reed* as applied to the facts of this case: "would a Texas prosecutor, having in hand a federal court's opinion that a DNA testing requirement violated federal law and also an earlier [TCCA] opinion that this particular prisoner was not injured by that specific violation, *likely* order the DNA testing?" *Gutierrez v. Saenz*, 93 F.4th at 273–74 (emphasis in original).

The court's answer to the question was appropriately no. *Id*. The district court's declaratory judgment in this case did not *eliminate* Respondents' justification for refusing access to the evidence. *Id*. The TCCA's finding that Gutierrez would not be entitled to punishment-related DNA testing because it would not help him show he is innocent of the death penalty remains untouched by the declaratory judgment, and the finding provides an ongoing, independent justification for Respondents not to agree to testing despite the alleged constitutional infirmity in Chapter 64. Indeed, Respondents declined to release evidence for DNA testing and the TCCA reiterated its holding a third time *after* the district court entered its declaratory judgment. *Gutierrez v. State*, 2024 WL 3220514, at *4. The declaratory judgment effected *no* change in legal status, and it plainly did not increase the likelihood Respondents would grant Gutierrez access to the evidence for testing. In this respect, the lack of standing in this case does not merely come down to a "question of degree."

Alliance for Hippocratic Medicine, 602 U.S. at 384. Redressability has been *disproven* here.

As noted above, this Court did not hold or suggest in *Reed* that every inmate has standing to challenge a state's postconviction DNA testing statute simply because he was unsuccessful in state court. *Reed*, 598 U.S. at 234; *see Murthy*, 2024 WL 3165801, at *9 (standing is not dispensed in gross); *cf. Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974) ("The assumption that if [plaintiff has] no standing to sue, no one would have standing, is not a reason to find standing."). And if this Court's articulation in *Reed* of the test for standing is to be taken at face value, then the lower court properly found some litigants will fail to meet it. *See Murthy*, 2024 WL 3165801, at *16 n.11 (holding an injunction was unlikely to provide plaintiffs redress).

Importantly, the Fifth Circuit properly understood this Court's precedent to require a fact- and claim-specific assessment of whether a favorable judgment would likely affect the defendant. *Gutierrez v. Saenz*, 93 F.4th at 274 (citing *Utah*, 536 U.S. at 460–61); *see TransUnion LLC*, 594 U.S. at 431. This was consistent not only with this Court's opinion in *Reed*, 598 U.S. at 234, but also with the Court's long line of standing jurisprudence, *see, e.g., Lujan*, 504 U.S. at 561–62 (the plaintiff bears the burden of proving standing—an indispensable part of the plaintiff's case—which must be supported in the

same way as any other matter the plaintiff must prove). Indeed, the Court has long held that it must not be merely speculative that an injury will be redressed by a favorable decision by the federal court. *Lujan*, 504 U.S. at 561. As discussed above, the Court has also held a declaratory judgment cannot alone confer standing. *California*, 593 U.S. at 673. And if, depending on the facts of the case, it may be "substantially likely" that a defendant would change course in light of a federal court's declaratory judgment, it stands to reason there will be cases where it is unlikely a defendant would do so. *See Murthy*, 2024 WL 3165801, at *16 n.11; *Reed*, 598 U.S. at 234. Considering that the TCCA has already spoken on the issue here *three times*, effectively redressing the alleged constitutional defect in Chapter 64 and providing Respondents an independent justification for declining to agree to DNA testing, Gutierrez's case clearly fell in the latter category. The Fifth Circuit's holding was plainly in keeping with this Court's precedent.

Contrary to Gutierrez's argument, the Fifth Circuit's opinion does not require a parsing analysis of a plaintiff's arguments in state court or a "pre-jurisdictional mini-trial." Pet. 11. Instead, the Fifth Circuit recognized a rather obvious distinction between Gutierrez's facts and *Reed*'s—the TCCA had already spoken as to whether, if an alleged constitutional infirmity was cured, Gutierrez would be entitled to DNA testing and found he would not. *Gutierrez v. Saenz*, 93 F.4th at 275. And the only "scour[ing]" the Fifth Circuit did of the

state court record was to read the parties' state court briefs and the TCCA's opinion in Reed's case, a rather simple task.[12] *Gutierrez v. Saenz*, 93 F.4th at 275 n.4. And recognition of this distinction does not mean the court grafted onto the *Reed* test any onerous requirements. As discussed above, standing must be maintained as to each claim. *See TransUnion LLC*, 594 U.S. at 431. The Fifth Circuit's analysis is quite simple and straightforward, particularly in the context of a challenge to a state's postconviction DNA testing statute. As the court put it, "a state prosecutor is quite likely to follow what his state's highest criminal court has already held should be the effect" of a decision that a particular procedure violated federal law. *Gutierrez v. Saenz, et al.*, 93 F.4th at 274. That's all.

By way of example, Gutierrez raised in his civil rights complaint several additional grounds alleging constitutional infirmities in Chapter 64. *See Gutierrez v. Saenz, et al.*, No. 1:19-CV-185, 2020 WL 12771965, at *2 (S.D. Tex. June 2, 2020) (summarizing Gutierrez's claims). One of those claims was that Chapter 64's materiality standard is too burdensome. *Id*. Gutierrez argued in state court that his Chapter 64 motion satisfied the materiality standard, but the TCCA did not opine on whether Gutierrez would be entitled to DNA testing

[12] To the extent the Fifth Circuit went "beyond" this Court's holding in *Reed*, Pet. 15, it was merely to confirm whether the distinction it drew was consistent with the facts of *Reed*. This does not show "pernicious" disregard for this Court, Pet. 11, but rather attentiveness.

even if the materiality standard was lower. *Gutierrez v. State*, 2020 WL 918669, at *6–9; *Ex parte Gutierrez*, 337 S.W.3d at 900–02. Under *Reed*, then, Gutierrez would likely have standing to raise a procedural due process challenge to Chapter 64's materiality standard because a federal court judgment that the standard violated federal law would severely undermine, if not eliminate, the justification for refusing access to evidence for testing on that basis.[13] *Reed*, 598 U.S. at 234.

Again, the TCCA's repeated holding that Gutierrez would not be entitled to punishment-related DNA testing even if Chapter 64 provided for it is a meaningful distinction, one that prevents Gutierrez from showing a declaratory judgment would have any effect on the likelihood Respondents would agree to DNA testing. Far from a "pernicious" holding that requires scouring the record, Pet. 11, 15, the Fifth Circuit simply recognized there can be no redress in federal court where the state court has already provided it as to the very claim the plaintiff raises. *Gutierrez v. Saenz, et al.*, 93 F.4th at 274; *see Murthy*, 2024 WL 3165801, at *16 n.11 (explaining the Court did not apply an elevated standard for redressability that required a "certainty" of redress but rather simply concluded "an injunction against the Government

[13] The district court denied Gutierrez's challenge to Chapter 64's "preponderance of the evidence" materiality standard. Order 21–22, *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Mar. 23, 2021). Gutierrez did not appeal that decision.

defendants [was] *unlikely* to stop the platforms from suppressing the plaintiffs' speech").

Gutierrez argues this distinction between his case and *Reed*'s is wrong. Pet. 19. He argues the prosecutor in *Reed* could still have relied on the TCCA's holding that the plaintiff unreasonably delayed bringing his Chapter 64 motion as a reason to refuse access to evidence, but this Court nonetheless found he had standing to challenge Chapter 64's chain-of-custody requirement. Pet. 19. Gutierrez's argument elides that standing operates claim-by-claim and is often "a question of degree." *Alliance for Hippocratic Medicine*, 602 U.S. at 384; *see TransUnion LLC*, 594 U.S. at 431.

In *Reed*, the TCCA did not provide alternative holdings as to the challenged provisions by assuming an infirmity existed in Chapter 64 but finding he would still not be entitled to testing if that infirmity was cured. *Reed v. State*, 541 S.W.3d 759, 769–72, 777–80; *see Gutierrez v. Saenz, et al.*, 93 F. 4th at 274 n.4. Moreover, in addition to alleging the chain-of-custody requirement violated procedural due process, the plaintiff in *Reed* also raised in federal court a constitutional challenge to Chapter 64's unreasonable delay provision. *See Reed v. Goertz*, No. A-19-CV-794, 2019 WL 12073901, at *6 n.6 (W.D. Tex. Nov. 15, 2019). If Reed succeeds on appeal in showing both the chain-of-custody requirement and the unreasonable delay provisions are unconstitutional, the defendant would have nothing to fall back on, i.e.,

alternative holdings by the state court that Reed would not be entitled to testing even if the infirmities in those provisions were cured. *Reed*, 598 U.S. at 234 ("[I]f a federal court concludes that Texas's post-conviction *procedures* violate due process, that court order would eliminate the state prosecutor's justification for denying DNA testing." (emphasis added)).

Again, the district court denied all of Gutierrez's challenges to Chapter 64 other than his challenge to the absence of a provision for punishment-related testing. Gutierrez has abandoned the rejected challenges by failing to appeal the district court's judgment. Therefore, the district court's declaratory judgment as to Gutierrez's singular remaining claim provides no redress because the TCCA has already spoken on the issue, and Gutierrez cannot eliminate Respondents' justification for refusing access to the evidence. *See TransUnion LLC*, 594 U.S. at 431 ("Plaintiffs must maintain their personal interest in the dispute at all stages of litigation.").

The distinction the Fifth Circuit drew between this case and *Reed* highlights the sense in requiring a plaintiff to demonstrate standing for each statutory challenge. Where, as here, the state court has already effectively provided a remedy for a particular claim by construing the challenged statutory provision in the very way the plaintiff asserts it must be to comply with procedural due process, the plaintiff cannot show a prosecutor would be moved in any way to agree to release evidence for testing. *Gutierrez v. Saenz,*

et al., 93 F.4th at 274. Indeed, a federal court's declaratory judgment would be entirely superfluous in such a case, as the district court's judgment here was, and the only conceivable "remedy" would be a political one, i.e., a naked appeal to a prosecutor as a political officer to agree to testing. But even such "crucial decisions" are appropriately left "to the political processes." *Alliance for Hippocratic Medicine*, 602 U.S. at 380.

Relatedly, Gutierrez bemoans that the Fifth Circuit's holding "individualize[s]" the standing inquiry. Pet. 13, 18. But standing *is* individualized, and it must be adequately alleged and then proven. *See Utah*, 536 U.S. at 459–64; *Lujan*, 504 U.S. at 561; *id.* at 562–71 (extensively conducting a detailed standing analysis). Gutierrez's complaint about the Fifth Circuit's holding, at bottom, is merely his preference that he have no burden to demonstrate standing other than to show he lost in state court. This Court's precedent does not countenance such a generalized and low bar to invoking federal court jurisdiction. *See TransUnion LLC*, 594 U.S. at 431 (standing is not dispensed in gross); *Skinner*, 562 U.S. at 535 (assuring that fears of a vast expansion of federal jurisdiction were unwarranted).

For the same reasons, the Eighth Circuit's opinion in *Johnson* does not reflect a circuit split this Court must now resolve. Indeed, nothing in the *Johnson* opinion indicates that its facts resemble those here. The plaintiff in *Johnson* was denied testing in state court because the DNA testing he

requested would not advance his claim of innocence, i.e., his request did not satisfy the state law's requirement that he show the new testing results would be material. 69 F.4th at 509; *Johnson v. Rutledge*, No. 4:21-CV-373, 2022 WL 990277, at *8 (E.D. Ark. Mar. 31, 2022); *Johnson v. State*, 591 S.W.3d 265, 270–72 (Ark. 2019). The plaintiff alleged in federal court that Arkansas's postconviction DNA testing statute, as authoritatively construed, violated his constitutional rights because it imposed too high a materiality standard. *Johnson v. Griffin*, 69 F.4th at 509, 509 n.6; *Johnson v. Rutledge*, 2022 WL 990277, at *8 (describing the plaintiff's procedural due process claim). But in rejecting the request for testing, the state court did not assume the materiality standard was too high and find, applying a lower materiality standard, the plaintiff would still have not been entitled to testing. *Johnson v. State*, 591 S.W.3d at 270–72. Therefore, a favorable judgment in federal court would have, in fact, eliminated the defendant's justification for refusing access to evidence for testing based on the challenged provision of state law. *See id*. at 272 ("We need not consider the remaining claims given Johnson's failure to make this predicate showing."). Stated another way, the state court had not already effectively provided a remedy, as the TCCA did here, and find the plaintiff would not be entitled to testing even if the alleged constitutional infirmity in the statute was cured.

As discussed above, the TCCA's finding that Gutierrez would be disentitled to testing even if Chapter 64 provided for the type of testing he requested means Respondents still have an independent reason—one that does not rely on another allegedly unconstitutional provision in the statute—to refuse Gutierrez access to evidence for testing. Indeed, the TCCA's holding that Gutierrez would not be entitled to punishment-related DNA testing even if Chapter 64 provided for it acts breaks the causation chain here because it effectively provided a remedy by interpreting Chapter 64 in a way to cure what Gutierrez alleged was a constitutional infirmity. This entirely distinguishes Gutierrez's case from *Johnson*.

Gutierrez also argues the lower court's holding conflicts with the Ninth Circuit's holding in *Redd*. Pet. 13–14. As discussed above, *Redd* did not involve a challenge to a state's postconviction DNA testing statute. Nonetheless, it does not help Gutierrez. Nothing in the Ninth Circuit's opinion indicates it resembles the facts here, i.e., where a state court has already opined on the alleged constitutional infirmity and found the plaintiff would not be entitled to relief even if that infirmity were cured. *Redd* is simply inapposite. And to the extent Gutierrez argues the Fifth Circuit undertook an "individualized standing analysis" unlike the Ninth Circuit, he fails to show the Fifth Circuit erred when *Reed* quite literally requires such an analysis. *Reed*, 598 U.S. at 234.

In effect, Gutierrez seeks to jettison any requirement for an unsuccessful state court litigant to satisfy the elements of standing when raising a procedural due process challenge to a state's postconviction DNA testing scheme. He fails to justify such a drastic departure from this Court's standing jurisprudence. This Court's precedent required Gutierrez to adequately allege a declaratory judgment would "significantly increase" the likelihood Respondents would agree to DNA testing for the purpose of permitting Gutierrez to show his innocence of the death penalty. *See Reed*, 598 U.S. at 234. Given that Respondents still have an independent and adequate reason not to agree to the testing, Gutierrez simply could not maintain standing to bring this particular claim in federal court. The Fifth Circuit's holding in that regard is entirely consistent with *Reed* and this Court's standing jurisprudence. Gutierrez's petition for a writ of certiorari should be denied.

III. Gutierrez Does Not Deserve Another Stay of Execution.

A. The stay standard

A stay of execution "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). Gutierrez must satisfy all the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id*. (citing *Barefoot*

v. Estelle, 463 U.S. 880, 895–96 (1983)). When a stay of execution is requested, a court must consider:

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

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be 'better than negligible.'" *Id.* (citation omitted) The first factor is met in this context by showing "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

A federal court must also consider "the State's strong interest in proceeding with its judgment" and "attempt[s] at manipulation," as well as "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 649–50. Indeed, "there is a strong presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 650. "Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence," and courts "must be sensitive to the State's

strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584.

B. Gutierrez fails to show likely success on the merits.

As explained above, Gutierrez cannot show he is likely to succeed in obtaining review and reversal of the lower court's judgment. Additionally, Gutierrez's procedural due process claim is time barred and meritless.

As to the time bar, this Court held in *Reed* that the two-year limitations period to raise a procedural due process challenge to a state's postconviction DNA testing statute accrues "when the state litigation ended and deprived [the plaintiff] of his asserted liberty interest in DNA testing." 598 U.S. at 236. The litigation in this case ended when the TCCA said in *2011* that Chapter 64 does not provide for postconviction DNA testing for the purpose of affecting punishment. *See Ex parte Gutierrez*, 337 S.W.3d at 901. Gutierrez's procedural due process claim was complete at that time,[14] and he should have raised the claim at the latest by May 2013. He did not file his civil rights complaint until 2019. Therefore, even if Gutierrez had standing to seek the declaratory judgment he obtained, he did so many years too late. Gutierrez's assertion in the court below that his serial filing of Chapter 64 motions reinitiates his

[14] Gutierrez did not file a motion for rehearing or a petition for a writ of certiorari following the TCCA's 2011 opinion.

limitations period finds no support in this Court's precedent.[15] Indeed, Gutierrez cannot create new accruals simply by asking the TCCA to tell him again that he is not entitled to DNA testing to show he is innocent of the death penalty. Therefore, the Court should decline to stay Gutierrez's execution where his claim is plainly time barred.

Lastly, Gutierrez's claim challenging the absence in Chapter 64 of a provision for punishment-related testing is simply meritless. "[E]very court of appeals to have applied the *Osborne* test to a state's procedure for postconviction DNA testing has upheld the constitutionality of it." *Cromartie v. Shealy*, 941 F.3d 1244, 1252 (11th Cir. 2019). And Gutierrez's facial challenge to Chapter 64 is "the most difficult challenge to mount successfully, since [he] 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). Gutierrez is not entitled to a stay of execution where he has failed to demonstrate the merit of his claim.

---

[15] Gutierrez has also argued his claim is not time barred because an entirely separate provision of Chapter 64—the "no fault" provision—was removed from the statute in 2011. He failed entirely to show an irrelevant amendment to a statute resurrected the accrual date for challenges to all other provisions of the statute. *See Whitaker v. Collier*, 862 F.3d 490, 495 (5th Cir. 2017). Similarly, Gutierrez's request for equitable tolling failed for many reasons, most importantly his failure to file suit until *eight years* after the TCCA authoritatively construed Chapter 64 in the way he now alleges violates procedural due process. *See Wallace v. Kato*, 549 U.S. 384, 396 (2007) ("Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.").

Notably, this Court recently vacated a stay of execution in *Nasser v. Murphy*, 144 S. Ct. 324 (2023), in which the plaintiff raised essentially the same claim regarding Chapter 64 as Gutierrez, *Murphy v. Nasser*, 84 F.4th 288, 290 (5th Cir. 2023) ("Murphy challenges the limitation of testing to evidence affecting guilt.").[16] As in that case, Gutierrez is not entitled to a stay of execution to litigate a meritless claim. *See Murphy*, 84 F.4th at 298–99 (Smith, J., dissenting) (explaining that the district court's order granting a stay of execution based on the declaratory judgment in this case was an abuse of discretion).

Importantly, there is no due process right to collateral proceedings at all. *See Murray v. Giarratano*, 492 U.S. 1, 7–8 (1989). And as Judge Smith explained in his dissent in *Murphy*, the absence of a provision for punishment related DNA testing does not render Texas's abuse of the writ statute illusory. *Murphy*, 84 F.4th at 298–99. Moreover, the TCCA has declined to interpret its abuse of the writ bar as fully incorporating this Court's "innocence-of-the-death-penalty" doctrine. *Id.* at 299 (citing *Ex parte Blue*, 230 S.W.3d 151, 160 n.42 (Tex. Crim. App. 2007)). And inmates like Gutierrez can make use of Texas's abuse of the writ statute by means other than DNA testing. *Id.* at 300.

---

[16] The district court granted a stay of execution, and the majority opinion in *Murphy* did not rule on the defendant's motion to vacate the stay. *Murphy*, 84 F.4th at 291.

Although Judge Smith stated the DNA evidence Gutierrez seeks is relevant to the degree of his culpability as a principal or party for his crime of conviction, *id.* at 301, Gutierrez has never shown Texas's anti-parties special issue falls within the ambit of Article 11.071 § 5. In any event, Gutierrez's claim confuses the concepts of ineligibility for the death penalty and unsuitability for it, and DNA testing results that would only affect suitability does not show innocence of the death penalty. *See Rocha v. Thaler*, 626 F.3d 815, 825–26 (5th Cir. 2010).

Gutierrez is not entitled to a stay of execution to litigate his time barred and meritless claim. The Court should deny his application for a stay of execution.

C. Gutierrez fails to prove irreparable injury.

Gutierrez has litigated and re-litigated his challenges to his conviction and sentence for more than two decades. He has failed to identify any error. His procedural due process claim failed to show he was denied any process, and he has repeatedly failed to show he is entitled to postconviction DNA testing. Thus, his punishment is just, and his execution will be constitutional. Therefore, Gutierrez fails to demonstrate any injury, let alone an irreparable one.

D. The equities heavily favor Respondents.

"[T]he State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. As discussed above,

Gutierrez purposefully forewent DNA testing at his trial in 1999, *Ex parte Gutierrez*, 337 S.W.3d at 896–97, and he has leveraged that strategic decision for the last twenty years to delay enforcement of his sentence, *supra* note 9. Respondents' and Ms. Harrison's family's interest in seeing Gutierrez's sentence enforced far outweigh Gutierrez's interest in further capitalizing on his decision to forego requesting DNA testing when he should have.

Gutierrez seems to appeal to equity by asserting he "maintains that he neither entered [Ms.] Harrison's home nor knew anyone would be harmed[.]" Pet. 5. But that is undermined by his own words. *Gutierrez v. State*, 2024 WL 3220514, at *2 (summarizing Gutierrez's second statement to the police in which he admitted planning the "rip off" of Ms. Harrison, and his third statement in which he admitted to having lied to the police previously and explained that he was inside Ms. Harrison's home when she was killed and that he gathered Ms. Harrison's cash).

Lastly, Gutierrez waited *eight years* after losing in state court in 2011 before bringing suit in 2019 when he was scheduled to be executed. Gutierrez should not be permitted to capitalize again on his decision not to request DNA testing at his trial, and his dilatory tactics preclude him from showing that equity favors a stay of execution. *See Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) ("This claim could have been

brought more than a decade ago. There is no good reason for this abusive delay[.]"). The Court should deny his application for a stay.

CONCLUSION

Gutierrez's petition for a writ of certiorari and his application for a stay of execution should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jay Clendenin
JAY CLENDENIN
Assistant Attorney General
State Bar No. 24059589

Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
jay.clendenin@oag.texas.gov

Edward Sandoval
First Assistant District Attorney
Cameron County, Texas
964 E. Harrison St.
Brownsville, Texas 78520

Counsel for Defendant–Appellant Luis V. Saenz

Will Trevino
City Attorney
Office of the City Attorney,
City of Brownsville

Lena Chaisson-Munoz
Assistant City Attorney
Office of the City Attorney,
City of Brownsville
1001 E. Elizabeth St.
Brownsville, Texas 78520

Counsel for Defendant–Appellant Felix Sauceda