No. _____

In the
Supreme Court of the United States

RICHARD VASQUEZ,

Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 29, 2026

CAPITAL CASE

QUESTIONS PRESENTED

To date, no court has reviewed the merits of Petitioner's claim that, when his trial lawyers failed to investigate and expose a fatal flaw in the most critical evidence against him, he was denied his Sixth Amendment right to the effective assistance of counsel. The Fifth Circuit foreclosed any review of this claim based on its reading of a "due diligence" requirement of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) applicable to "successive" applications for habeas relief. The Fifth Circuit construed the AEDPA's due-diligence test to require the imputation to Petitioner of all information that a reasonable attorney, by the relevant date, could have discovered, even though Petitioner's actual attorneys engaged in egregious misconduct that prevented Petitioner from discovering and asserting the claim. In urging that result, the State of Texas effectively admitted that it was aware at the time of trial that the evidence at issue was false yet failed to disclose that fact to Petitioner. The District Attorney whose office procured Petitioner's conviction agrees that he is entitled to relief, but the courts below gave no deference to that position.

The questions presented are:

1. Does 28 U.S.C. § 2244(b)(2)(B)(i) impose a "reasonable attorney" or a "reasonable applicant" test for due diligence? If the former, are there exceptions to account for egregious misconduct by an applicant's lawyer?

2. Would construing the AEDPA to bar merits review in a capital case of a substantial IAC claim, one not previously reviewed on the merits by any court, violate the Sixth and Fourteenth Amendments?

3. When an applicant is unaware of the relevant facts when he files a first-in-time application for habeas relief, are later-filed *Brady* and *Napue/Giglio* claim "second or successive"?

4. Is a court reviewing a federal habeas application, as a matter of due process or otherwise, required to resolve disputes over authority to speak for the State? What level of deference is owed to the State's position expressed by an authorized representative?

PARTIES TO THE PROCEEDINGS BELOW

Richard Vasquez, Petitioner/Appellant.

Eric Guerro, Director, Correctional Institutions Division, Respondent/Appellee.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporation was a party in the Fifth Circuit.

RELATED PROCEEDINGS

The following proceedings are related under Rule 14.1(b)(iii):

- *State of Texas v. Vasquez*, No. 98-CR-0730-E (148th Judicial District Court, Nueces County June 22, 1999) (judgment of conviction and death sentence).
- *Vasquez v. State of Texas*, No. 73,461 (Tex. Ct. Crim. App. Oct. 3. 2001) (affirming conviction and sentence on direct appeal).
- *Ex Parte Richard Vasquez*, No. 98-CR-0730-E (148th Judicial District Court, Nueces County May 19, 2004) (findings of fact, conclusions of law, and recommendation to deny first and second applications for state habeas relief).
- *Ex Parte Richard Vasquez*, No. WR 59,201 and -02 (Tex. Ct. Crim. App. Jan. 26, 2005) (adopting district court's findings, conclusions, and recommendation and denying first and second applications for state habeas relief).

- *Vasquez v. Quarterman*, No. CC-05-059 (S.D. Tex. Mar. 28, 2008) (granting State's motion for summary judgment and denying first application for federal habeas relief).
- *Vasquez v. Thaler*, No. 08-70034 (5th Cir. Aug. 11. 2010) (affirming order denying first application for federal relief).
- *Vasquez v. Thaler*, No. 10-8666 (U.S. May 20, 2011) (order denying petition for writ of certiorari).
- *Ex Parte Richard Vasquez,* No. 98-CR-0730 (148th Judicial District Court of Nueces County Feb. 26, 2021) (findings of fact, conclusions of law, and recommendation to deny third application for state habeas relief).
- *Ex Parte Richard Vasquez*, WR 59,201-3 (Tex. Ct. Crim. App. Aug. 25, 2021) (adopting district court's findings, conclusions, and recommendation and denying third application for state habeas relief).
- *Vasquez v. Collier*, No. C-22-12 (S.D. Tex. July 8, 2022) (order granting motion to dismiss procedural due-process claim under 42 U.S.C. § 1983).
- *Vasquez v. Lumpkin*, No. C-05-59 (S. D. Tex. July 22, 2022) (order denying motion under Rule 60(b) with respect to denial of first application for federal habeas relief).

- *Ex Parte Vasquez*, WR 59,201-4 (Tex. Ct. Crim. App. Dec. 14, 2022) (order dismissing fourth application for state habeas relief).
- *Vasquez v. Lumpkin*, No. 22-7009 (5th Cir. Feb. 24, 2023) (order denying COA from the order denying relief under Rule 60(b)).
- *In re Richard Vasquez*, No. 23-40079 (5th Cir. June 23, 2023) (order authorizing filing of successive application for federal habeas relief).
- *Vasquez v. Guerrero*, No. 2:23-CV-168 (S.D. Tex. Feb. 11, 2025) (order dismissing successive application for federal habeas relief).
- *Vasquez v. Guerrero*, No. 25-70005 (5th Cir. Dec. 4, 2025) (affirming dismissal of successive application for habeas relief).
- *In re Richard Vasquez*, No. 23-40079 (5th Cir. Dec. 20. 2025) (order dismissing suggestion for *sua sponte* reconsideration of denial of authorization to assert by successive application claims for *Brady* and *Napue/Giglio* violations).

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The Fifth Circuit's opinion, App.1-19, and the District Court's opinion, App. 22-78, are reproduced in the Appendix.

JURISDICTION

The Fifth Circuit opinion issued on December 4, 2025. Rehearing petitions were denied on December 30, 2025. On March 23, 2026, Justice Samuel Alito extended the time for filing a petition for writ of certiorari until April 29, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the Appendix. App.87-92.

INTRODUCTION

The critical issue at Vasquez's trial was whether he acted with the requisite *mens rea*. The critical evidence on *mens rea* was a toxicological report purporting to show that the victim had cocaine in her system. Everyone now acknowledges that there is a fundamental flaw in the toxicological report that renders it unreliable as evidence, but no one on Vasquez's behalf raised that issue until years after he filed his first habeas application. The courts below have so far denied Vasquez's current request for relief because, in their view, the flaw in the toxicological report was obvious on its face, rendering too late the challenge Vasquez now asserts.

From the premise that the defect in the toxicological report is obvious, another obvious point follows: everyone involved—prosecutors, defense lawyers, witnesses, and judges—could and should have prevented cocaine from being used to obtain or uphold Vasquez's conviction. For twenty years, while Vasquez languished on death row, not one of these actors said a word, reflecting a stunning breakdown in the system.

The courts below have effectively held that Vasquez, the one least able to discern evidentiary flaws in scientific evidence, must pay with his life for this systemic failure. To get there, they read into the AEDPA a legal fiction not mandated by the text, and they created a split with other circuits on how to apply the "due diligence" test in 28 U.S.C. § 2244(b)(2)(B)(i).

In so doing, they interpreted the AEDPA to allow a result that the Sixth and Fourteenth Amendments should forbid: putting a man to death without at least one court having reviewed on the merits a substantial claim of ineffective assistance of counsel at trial. *See Coleman v. Thompson*, 501 U.S. 722, 755 (1991); *Martinez v. Ryan*, 566 U.S. 1, 9-10 (2012); *Trevino v. Thaler*, 569 U.S. 413, 423 (2013); *Davila v. Davis*, 582 U.S. 521, 532 (2017). They also ignored this Court's precedents requiring that great weight be given to the State's position. *See, e.g.*, *Sibron v. New York*, 392 U.S. 40, 58 (1968); *Young v. United States*, 315 U.S. 257, 258 (1942) (same).

Inexplicably, the courts below also failed to address the *Brady* and *Napue/Giglio* violations that, through their resolution of Vasquez's IAC claim, they confirmed to have occurred. *See Brady v. Maryland*, 373 U.S. 83 (1963) (duty to disclose exculpatory evidence); *Giglio v.*

United States, 405 U.S. 150 (1972) (ban on knowing reliance on false evidence); *Napue v. Illinois*, 360 U.S. 264 (1959) (same).

STATEMENT OF THE CASE

I. Legal Background

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court is governed by 28 U.S.C. § 2254. The AEDPA requires that a person seeking to file a "second or successive" application under section 2254 "move in the appropriate court of appeals for an order authorizing the district court to consider the application." *Id.* § 2244(b)(3)(A). "The court of appeals may authorize the filing of a second or successive application only if it determines that the applicant makes a prima facie showing that the application satisfies the requirements of this subsection." *Id.* § 2244(b)(3)(C). This assessment is called "first gate" review. *In re Davila*, 888 F.3d 179, 183 (5th Cir. 2018).

If the court of appeals finds on first-gate review that the applicant has made a prima facie case, the district court, before reaching the merits, must make its own determination of whether the applicant has met the requirements for filing a successive application. 28 U.S.C. § 2244(b)(4). This is known as "second gate" review. *Will v. Davis*, 970 F.3d 536, 543 (5th Cir. 2020).

Here, Vasquez sought authorization to file a successive application under § 2244(b)(2)(B), which requires a showing that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence."

Congress did not identify in the statute the perspective from which diligence should be assessed. The text says nothing about whether the inquiry is subjective (asking what the particular applicant before the court could have discovered) or is instead objective (asking what a hypothetical, reasonable applicant could have learned). The text is also silent on the relevance, if any, of facts that could have been discovered by the applicant's lawyer or by a hypothetical, reasonable lawyer.

For an applicant alleging ineffective assistance of counsel at trial, the questions left unanswered by the text are particularly important. To prove that his trial lawyer was ineffective (by, for example, failing to expose unreliable evidence), the applicant would have to show that a reasonable trial lawyer could have identified the issue. Without that showing, the claim would fail on the merits. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (IAC claim requires that "counsel's representation fell below an objective standard of reasonableness"). Yet, to make that merits-based showing, the applicant would have to admit, on the (b)(2)(B) question, that a reasonable habeas lawyer exercising due diligence could have herself "previously" discovered the "factual predicate for the claim."

Thus, a (b)(2)(B) due-diligence test that turns on facts knowable to a reasonable lawyer would amount to a categorical ban on asserting, in a successive application, a claim of ineffective assistance by trial counsel. And it could lead, in a capital case, to an execution without any court having ever reviewed a substantial Sixth Amendment claim.

II. Procedural and Factual Background

In 1998, Vasquez was 18 years old and severely addicted to heroin. ROA.6045. On March 5, Vasquez was at home minding Miranda Lopez, his girlfriend's four-year-old daughter. No other adult was present. ROA.6046.

That morning, while high on heroin, Vasquez admittedly got angry with Miranda and hit her in the head. But, as he consistently recounted to first responders and investigators, Miranda also hit her head that morning in a fall from a bathroom stool while brushing her teeth. ROA.1380-1463.

After Vasquez called 911, Miranda was transported to the hospital with serious brain injuries. Dr. Michael Burke operated on Miranda's brain but was unable to save her. ROA.1464-89. The Nueces County Medical Examiner (Dr. Lloyd White) performed an autopsy from which he concluded that Miranda died from "blunt force injuries of the head and brain" and that her death was a "homicide." ROA.1373-78.

Dr. White also commissioned a toxicological report, reproduced at App.93-94, that reads in pertinent part:

Drugs of Abuse Blood	Negative
Confirmed GC/MS Blood Parent cocaine	0.18 mg/L

Based on the report's reference to "blood parent cocaine," Dr. White listed "cocaine intoxication" as a "contributing condition" to Miranda's death. ROA.1373.

Vasquez was indicted for capital murder. The indictment alleged that he "intentionally or knowingly" caused Miranda's death by "striking her with his hand." ROA.1450. The State was thus required to prove that, when Vasquez struck Miranda, he had "the conscious objective or desire" to kill her or was actually "aware" that his conduct was "reasonably certain" to cause her death. *See* TEX. PENAL CODE §§ 6.03(a), 6.03(b), 19.02(b)(1).

The indictment did *not* charge that Vasquez had administered cocaine to Miranda. Nevertheless, the State gave notice before trial of its intent to rely on cocaine intoxication to prove *mens rea*. From the toxicological report, the State theorized that Vasquez used a needle to inject Miranda with "twice the amount [of cocaine] it would take to kill an adult." ROA.1496. From this, the State posited that, when Vasquez hit Miranda, he must have intended to kill her.

This *mens rea* theory had two underpinnings: (a) Miranda had cocaine in her system and (b) the cocaine was administered by Vasquez. The State had no evidence on the second point. Dr. White acknowledged that he did not "have any way of knowing how the cocaine got into her body" and that the amount "was consistent" with Miranda having "eaten" it on her own. ROA.1347, 1367. Dr. Backer (the principal author of the toxicological report) similarly acknowledged that he "[could not] tell how the [cocaine] got into the blood." ROA.1742.

To obscure this evidentiary gap, the State focused its efforts on proving the first point—that there was a staggeringly high dose of cocaine in Miranda's blood. ROA.1496. Presumably, in the State's mind, a jury

convinced of this would simply assume, even without evidence, that Vasquez was responsible for the cocaine being there.

A. The State's Investigation

Before trial, the parties took dramatically different approaches to addressing the cocaine evidence. The State researched the admissibility of the toxicological report and initially planned (but later declined) to introduce it at trial in conjunction with Dr. Backer's testimony. ROA.6207-13. The State also interviewed Donna Trautman, a senior toxicologist who co-signed Dr. Backer's report. ROA.6214-16.

From Trautman, as confirmed by interview notes the State concealed for more than twenty years, the State learned that there are two steps to identifying drugs in a blood sample. First, the lab performs an "initial screening" for "drugs of abuse." Then, *if* this initial screen is positive, the lab runs the blood through a GC/MS instrument to identify the type and quantity of drug that triggered the initial screen's positive result. ROA.6214-16.

Thus, as Trautman explained, a toxicological report that reflects positive findings from a GC/MS instrument (step two) would necessarily have to be positive for drugs of abuse (step one). A negative step-one result would irreconcilably conflict with a positive step-two result. ROA.6214-16.

With this information conveyed by Trautman, the State knew there was a fatal flaw in the report on Miranda's blood. That report contains a *negative* finding

from an initial screen for drugs of abuse and *positive* findings from a GC/MS analysis. App.93.

Both cannot be accurate. To the extent Miranda's blood really had 0.18 mg/L of cocaine, as reported under the "Confirmed GC/MS" heading, the initial screen for drugs of abuse would necessarily have been positive. The negative finding under drugs of abuse cannot be reconciled with the positive GC/MS results. ROA.6108-78.

The State, moreover, concedes that Vasquez accurately interprets the notes of the Trautman interview. That concession came in response to Vasquez's motion in the Fifth Circuit for authorization to file a successive application. In opposing Vasquez's motion, the State read the interview notes exactly as Vasquez reads them: to reflect Trautman having explained to the prosecutors that a positive GC/MS result cannot be squared with a negative result from a drugs-of-abuse screen. The point of the concession was to show that, since the prosecutors learned of this inconsistency before trial, Vasquez or his lawyers should also have discovered it before trial. *See* Opp. to Mot. for Authorization to File a Successive Pet. at 21-22, 31-32, *In re Vasquez*, No. 23-40079 (5th Cir. Mar. 27, 2013), Dkt. No. 25.

Notably, by making this argument, the State effectively admitted that, at Vasquez's trial, the State committed a *Brady* violation (by failing to disclose the inconsistency in the report) and a *Napue/Giglio* violation (by knowingly sponsoring false testimony that there was reliable evidence of cocaine in Miranda's system).

B. The Defense's Investigation

The defense took a very different approach. Vasquez repeatedly informed his lawyers that he had *not* administered cocaine to Miranda and that, if she really had cocaine in her system, he was *not* responsible for it being there. ROA.545 ¶ 7. Vasquez, moreover, instructed his lawyers to do everything possible to refute the claim that he gave Miranda cocaine. ROA.545 ¶ 10.

In response, Vasquez's lawyers did essentially nothing. They did *not* seek to interview Backer, Trautman, or anyone else at the lab. They did *not* consult an independent toxicologist. They did *not* conduct any research on the toxicology process or the relationship between drugs-of-abuse screenings and subsequent GC/MS analyses. And, if they even noticed the discrepancy in the report, they did *not* do anything to investigate it. ROA.443 ¶ 4, 451 ¶ 9, 545 ¶ 3. Instead, they accepted the GC/MS results as gospel.

Despite this utter lack of investigation, Vasquez's trial lawyers reported to him that they had done their due diligence, that the toxicological results were unassailable, and that the defense could do no more than suggest that Miranda must have herself ingested cocaine on her own. ROA.545 ¶¶ 3-5,10. Unbeknownst to Vasquez at the time, these representations were false.

C. The Use of Cocaine at Trial

It is impossible to overstate the role that cocaine played at trial. The State used cocaine as the crescendo of its opening statement, telling the jury there would be evidence that Miranda's blood had "twice the amount [of cocaine] it would take to kill an adult," which would prove

that "Vasquez intentionally and knowingly caused the death of Miranda, a four-year old child." ROA.1496.

Then, the State had Dr. Backer testify that his lab performed the GC/MS analysis because and only after the initial screen for drugs of abuse came back positive. ROA.1728-49. The State further had Dr. Backer testify that his lab confirmed cocaine in Miranda's blood to "a reasonable degree of scientific certainty." ROA.1744.

In what appears to have been a calculated tactic based on the Trautman interview, the State abandoned its original plan to introduce the toxicological report as a stand-alone exhibit. Instead, Vasquez's prosecutors elicited Dr. Backer's testimony without showing him (or the jury) his actual report, thereby obscuring the fact that the entry for drugs of abuse is actually negative. ROA.1728-49.

The State then had Dr. White, the medical examiner, confirm that Miranda had cocaine in her system. Dr. White explained to the jury, at the State's behest, that he had a reliable basis for determining that Miranda had cocaine in her system and for concluding that "cocaine intoxication" contributed to her death. ROA.1335-72. As with Dr. Backer, the State elicited this testimony without displaying the report itself.

With the stage thus set, and despite the lack of any evidence showing how cocaine got into Miranda's system, the State then touted cocaine as the most compelling proof on intent to kill. In its initial closing argument, the State highlighted that Miranda's blood supposedly had "twice the amount of cocaine it would take to kill an adult" and argued that the cocaine evidence "proves that the

Defendant intentionally or knowingly killed Miranda, a four-year-old little girl." ROA.1507.

Later, in response to the defense closing, the State doubled down:

> And, the cocaine, yes, it's not in the indictment. Yet it's ***so important***, because it gives you the totality of the entire crime.
>
> * * *
>
> So you say, "Why would he inject her with cocaine? Why?" and I suggest to you, well, it will stop her from struggling, it will stop her from screaming, stop her from escaping . . . He knew that giving a large amount to a little person or someone not used to it would be lethal . . . So why? I suggest to you that, like they say, ***it's the straw that breaks the camel's back***. That way he would know for sure that she wouldn't be able to talk. She wouldn't be able to testify. She would surely be dead.

ROA.1516-18 (emphasis added).

The strategy to make cocaine the centerpiece of the *mens-rea* theory worked. During deliberations, the jury made just one request: to rehear Dr. Backer's testimony. ROA.5808-21. Less than 15 minutes after it was read back, the jury returned its guilty verdict. ROA.11791-92.

D. The Failure to Address Cocaine in Vasquez's Initial Applications

The trial court appointed Nicholas Trenticosta to prosecute a state-habeas application. Vasquez told Trenticosta that he had *not* administered cocaine to Miranda and instructed Trenticosta to leave no stone unturned in challenging his conviction. ROA.545.

Trenticosta was acutely aware of the critical role that cocaine played at trial. ROA.442-48. He nevertheless failed to perform any investigation of the cocaine evidence. ROA.443.

Like the lawyers who preceded him, Trenticosta declined to interview the toxicologists, failed to consult an independent toxicologist, conducted no investigation of the discrepancy between the drugs-of-abuse result and the GC/MS findings, and raised no issue or claim regarding the cocaine evidence. ROA.443.

As Trenticosta has admitted, he made these decisions on his own, without ever informing Vasquez. In Trenticosta's own words:

> I made that decision [to ignore the cocaine evidence] based on my own ***speculation*** that Mr. Vasquez may have injected cocaine into Miranda in an effort to revive her after she had become unconscious. I ***speculated*** that could have happened here based solely on my anecdotal knowledge that drug users sometimes administer cocaine in an effort to revive people who have overdosed or are otherwise unconscious.

* * *

> I had no knowledge that Mr. Vasquez had in fact injected Miranda with cocaine. There was, moreover, no evidence in the record to demonstrate that injection was the mode in which any cocaine was introduced into Miranda's system. Mr. Vasquez had denied at trial injecting cocaine into Miranda and, in our communications about the habeas petition, he never wavered from that position.
>
> * * *
>
> I did not communicate to Mr. Vasquez my ***speculation*** that he may have injected cocaine into Miranda, nor did I explain to him that it was that ***speculation*** that had led me to omit any challenge to the cocaine evidence from his state habeas petition. I decided on my own, based on this ***speculation***, to refrain from attacking the cocaine evidence. I did not inform Mr. Vasquez of the thought process that led to that decision. The failure to hire an independent toxicologist to further investigate the cocaine issue is entirely attributable to me, and was not the product of any informed decision-making by Mr. Vasquez.

ROA.444 (emphasis added).

And, like his predecessors, Trenticosta affirmatively misled Vasquez. Trenticosta told Vasquez that he had

investigated the cocaine issue (he had not) and that there was no basis on which to challenge the cocaine evidence (there was). ROA.544-46.

In short, Trenticosta directly violated Vasquez's clear instructions and lied to him. With respect to cocaine, Vasquez, during his first attempt at habeas relief in state court, effectively had no lawyer at all.

The situation did not improve when Vasquez got to federal court. After Vasquez was denied state relief, the United States District Court for the Southern District of Texas appointed Andrew Edison (now a United States Magistrate Judge) to file a federal application. ROA.659.

Vasquez repeated to Edison what he had told Trenticosta: he had *not* administered cocaine to Miranda, and he wanted Edison to investigate *all* avenues for relief. ROA.544-46.

Edison—like Trenticosta before him—ignored Vasquez's instructions and declined, without Vasquez's knowledge, to investigate the cocaine evidence. Instead, Edison filed a federal application that did little more than copy the claims from Trenticosta's state writ. The application did not raise any claim with respect to the cocaine evidence. ROA.457-536.

One of Edison's co-counsel has recently revealed the thinking behind this omission. Although they recognized cocaine's devastating impact, Edison and his team concluded that the order appointing them precluded pursuit of any issue not previously raised in state court. ROA.450-51.

Accordingly, in the words of Edison's colleague, "[g]iven that our representation was limited to asserting in federal court claims that had previously been raised in state court, we did not retain an independent toxicologist to review the Toxicology Report, nor did we recommend to Mr. Vasquez that we raise any claims in the federal petition related to the evidence that Miranda Lopez had cocaine in her system at the time of her death." ROA.451.

This interpretation of their appointment order was egregiously misguided. The text of the order imposes no limitation on the scope of Edison's representation and nowhere hints at the prohibition Edison read into it. ROA.659. As the District Court found, Edison's decision to limit his investigation to issues exhausted in the state application ran afoul of a "vast corpus of federal jurisprudence." App.73. Under that jurisprudence, counsel representing death-row inmates are required to investigate *all* colorable claims, whether exhausted or not and whether subject to procedural bars or not. ROA.674-88.

Moreover, once Edison decided to follow this self-imposed limitation on his representation, he became duty bound to explain the limitation—and its consequences—to Vasquez. Edison breached that duty. He instead led Vasquez to believe, as had his prior lawyers, that the toxicological results had been investigated (not true) and had been determined to be unassailable (not true). ROA.544-46. Edison, like Trenticosta, affirmatively misled Vasquez and, on this critical issue, left him essentially unrepresented.

E. Discovery of the Conflict

The federal application filed by Edison was denied in 2008. The Fifth Circuit affirmed that denial in 2010. Thereafter, in 2013, the Texas legislature enacted a statute authorizing habeas relief based on the development of new scientific evidence that, had it been available at trial, would have affected the outcome. TEX. CODE CRIM. PRO. art. 11.073.

In 2015, Vasquez filed a state-court application under this new statute. The application was based on new scientific principles of biomechanics and pediatric head trauma. Vasquez asserted that, because this new science debunked the State's evidence regarding the force of the impact to Miranda's brain, it would have dramatically affected the jury's view of *mens rea*. ROA.66-61.

The Texas Court of Criminal Appeals remanded Vasquez's application to the trial court for an evidentiary hearing that was ultimately scheduled for June 2019. ROA.162-63. By this time, the undersigned has appeared to take over Vasquez's representation.

The undersigned expected the State to vigorously oppose Vasquez's application by using the claim that Vasquez had injected Miranda with cocaine to suggest that the new science cited by Vasquez would not have changed the trial result. ROA.6180-81.

To prepare for that argument, and even though Vasquez's application did not raise any stand-alone claim related to cocaine, the undersigned consulted an independent toxicologist (Dr. Jimmie Valentine). The hope was to find some new angle on which to discredit the

State's position on when and how cocaine could have gotten into Miranda's system. ROA.6179-85.

After his review, Dr. Valentine reported the more basic problem outlined above: the toxicological report is at war with itself, with a "negative" result for drugs of abuse (*i.e.*, no cocaine) that cannot possibly be squared with the positive GC/MS findings. ROA.1759-60, 1549.

Dr. Valentine's report represents the first time anyone on Vasquez's team acquired actual knowledge of the fatal flaw in the toxicological report. ROA.6179-85.

After getting Dr. Valentine's report, Vasquez's counsel tracked down Drs. Backer and White, both of whom were then retired. Dr. Backer immediately recognized the "irreconcilable conflict" in the toxicological report and readily acknowledged that it robbed his testimony of any validity. ROA.1750. In a sworn declaration, Dr. Backer recanted his trial testimony, confirming that his report and testimony were "not reliable." ROA.1750-52.

Dr. White similarly recanted, acknowledging that he should never have listed cocaine as a contributing cause of death, nor should he have ever testified to cocaine in Miranda's system. ROA.1793-95.

F. The State's Joinder in Vasquez's Request

With these recantations in hand, the undersigned previewed for the Nueces County District Attorney (Mark Gonzalez) the evidence and proposed findings and conclusions Vasquez intended to offer at the June 2019 hearing. ROA.170, 6183-84.

After reviewing the evidence, Gonzalez determined to withdraw the State's opposition to Vasquez's application and to join in Vasquez's request for relief. ROA.170-74, 232. At the hearing, a prosecutor from Gonzalez's office informed the court that "the State of Texas" agreed that "a new trial would be appropriate" and "concur[red]" with all of the findings of fact and conclusions of law proposed by Vasquez, including that the toxicological report was unreliable and that there was no competent evidence of cocaine in Miranda's system. ROA.164-237.

Notwithstanding the State's affirmative joinder in Vasquez's request for a new trial, the trial court recommended that Vasquez be denied relief. The Texas Court of Criminal Appeals accepted that recommendation and, without any substantive discussion, denied Vasquez's application. ROA.6105-07.

G. The Filing of Vasquez's Third State Habeas Application

As noted, the operative claims for relief in Vasquez's new-science writ focused solely on scientific principles of biomechanics and pediatric head trauma. The flaw in the cocaine evidence was raised, not as an independent basis for relief, but to rebut a potential defense to the new-science claims.

On January 12, 2022, Vasquez filed a subsequent state application that for the first time asserted stand-alone claims based on flaws in the cocaine evidence. ROA.6217-81. Vasquez alleged: trial counsel rendered ineffective assistance in failing to unmask the falsity of the cocaine evidence; the State committed a *Brady*

violation in failing to disclose exculpatory evidence of the toxicological report's irreconcilable conflict; and the State committed a *Napue/Giglio* violation by knowingly proffering false evidence.

Consistent with the position taken in 2019, the Nueces County District Attorney did not oppose, and effectively agreed to, the relief sought in this cocaine-based application. Nevertheless, on December 14, 2022, the Texas Court of Criminal Appeals dismissed the application "without considering the merits." ROA.6282-84.

H. First-Gate Authorization

On February 28, 2023, as required by 28 U.S.C. § 2244(b)(3)(A), Vasquez filed in the Fifth Circuit a motion for authorization to file a second federal application with various clams related to the cocaine evidence.

Over the objection of the Texas Attorney General's Office, the Fifth Circuit granted Vasquez's motion in part. Vasquez was granted authorization to pursue an IAC claim. He was denied permission to assert B*rady* and *Napue/Giglio* claims. App.81-84.

I. The State's Renewed Joinder in Vasquez's Request

Shortly after Vasquez sought leave to file his application, the Nueces County District Attorney (still Mark Gonzalez) learned that the Texas Attorney General was purporting to override his judgment that Vasquez was entitled to relief. To set the record straight, Gonzalez, on April 19, 2023, signed a written statement

for filing in the Fifth Circuit. In that statement, Gonzalez reiterated his 2019 conclusion, made "on behalf of the State of Texas," that Vasquez's claims are "meritorious." App.95-96.

He specifically noted the State's continuing agreement with all of the proposed findings Vasquez had submitted in 2019, including that the cocaine evidence was "inaccurate," that there was a "fatal inconsistency" in the toxicological report, and that the Backer/White testimony on cocaine was "not reliable evidence." ROA.5955-58.

Gonzalez also asserted the position of his office (on behalf of the State) that, with respect to the federal application now at issue, "Mr. Vasquez is entitled to habeas relief" and "[i]n the interest of justice, Mr. Vasquez's conviction and sentence should be set aside." ROA.6285.

J. Second-Gate Dismissal

As authorized by the Fifth Circuit, Vasquez filed his cocaine-based application on June 30, 2023. The application asserted an IAC claim as authorized by the Fifth Circuit and preserved all rights with respect to Vasquez's *Brady* and *Napue/Giglio* claims.

The Texas Attorney General, purporting to act for the State, and with no regard for the position of the Nueces County DA, moved to dismiss the application. ROA.708-78. The AG's motion asserted that Vasquez had not satisfied the requirements of 28 U.S.C. § 2244(b)(2)(B)(i) applicable to his IAC claim.

On February 11, 2025, the District Court granted the motion and dismissed the case with prejudice. App.22-78.

The District Court recognized that Vasquez had asserted "important" issues "worthy of serious review." It nevertheless found that the factual predicate for Vasquez's IAC claim could have been discovered previously (*i.e.*, by the date on which Edison filed Vasquez's first federal application) through the exercise of due diligence. App.73-74.

The District Court applied a "reasonable attorney" standard discerned from Fifth Circuit precedent. App.57-61. Under that standard, the District Court determined that a reasonable attorney representing Vasquez should have known, by the time of his first federal application, that trial counsel had unreasonably failed to address the cocaine evidence. App.73-74.

To reach this result, the District Court borrowed a legal fiction from agency law under which information that could have been discovered by an agent (here, Vasquez's first-round habeas lawyer) is imputed to the principal (here, Vasquez).

The District Court applied this fiction in the face of undisputed evidence that: (a) neither Vasquez nor anyone else on his team had actual knowledge before 2019 that the cocaine evidence was unreliable; (b) Vasquez himself had done everything that could reasonably be expected of someone in his position to identify grounds for challenging his conviction; (c) Vasquez's agents had acted so far against his interests as to make inapplicable the rule from agency law that imputes an agent's knowledge to the principal; and (d) the defect in the cocaine evidence went undiscovered until 2019 despite Vasquez's best efforts and through no fault of his own.

K. The State's Reiterated Joinder in Vasquez's Request for Relief

On March 4, 2025, Vasquez filed a timely notice of appeal. ROA.892-93.

By that time, James Granberry had replaced Mark Gonzalez as Nueces County District Attorney. On May 25, 2025, Granberry provided his own written statement regarding the Vasquez case for filing with the Fifth Circuit.

Granberry's statement, consistent with the views of his predecessor, expresses "substantial doubt" that there is any validity to Vasquez's conviction and his view that—with the jury having never heard about the fatal flaws in the toxicological report—Vasquez's sentence should not be carried out. App.97-98.

L. The Fifth Circuit's Opinion

In the Fifth Circuit, Vasquez demonstrated multiple grounds for reversal. Most fundamentally, Vasquez showed that reversal was required to avoid a constitutionally proscribed result: Vasquez's execution with no court having ever reviewed his substantial claim that his trial lawyers were constitutionally ineffective.

Vasquez also showed that the District Court's use of a "reasonable attorney" standard had no support in statutory text or in Fifth Circuit precedent and was directly at odds with the test applied in other circuits. Vasquez further demonstrated that, though the District Court grounded its analysis in common-law principles of agency law, it erroneously failed to apply the rules from agency law that, on these facts, preclude

imputing to Vasquez any facts known or knowable to his lawyers.

Vasquez also established that applying a "reasonable attorney" standard under (b)(2)(B) would effectively erect a categorical ban on asserting IAC claims in successive applications, even though there is no indication that Congress intended any such ban.

Finally, Vasquez preserved his argument that he is entitled to merits review of his *Brady* and *Napue/Giglio* claims.

On December 4, 2025, the Fifth Circuit issued an opinion ignoring most of Vasquez's arguments and affirming the dismissal of his application. App.1-19. Vasquez's petitions for panel and *en banc* rehearing were denied on December 30, 2025. App.85-86.

M. The Refusal Below to Address a Critical Question

From 2019 through today, the office of the Nueces County District Attorney has expressed unwavering support for Vasquez's efforts to obtain habeas relief, concluding that, in the interests of justice, his conviction should be set aside.

The Texas Attorney General's Office has nevertheless purported, since Vasquez's efforts at relief shifted to federal court, to appear for the State and to urge that the position of the Nueces County DA be ignored. The AG seeks to clear the path for Vasquez's execution even though the office that procured Vasquez's conviction no longer wants his sentence carried out.

Vasquez repeatedly asserted below that the Texas Attorney General was not and is not authorized to speak for the State on these matters and that substantial deference should be afforded to the position of the Nueces County District Attorney. Vasquez even filed a motion for a show-cause order that would have required the Texas Attorney General to demonstrate his constitutional and statutory authority, if any, to speak for the State.

The District Court and the Fifth Circuit nevertheless ignored the question. The Fifth Circuit denied Vasquez's motion for a show-cause order, assumed without analysis that the AG had the exclusive right to assert the State's position, and ignored altogether the position of two Nueces County DAs that Vasquez is entitled to relief. App.1-19; 95-98.

REASONS TO GRANT THE PETITION

I. The Decision Below Deepens a Circuit Split

A successive habeas application based on new evidence cannot be considered on the merits absent a showing by the "applicant" that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). The term "previously" refers to the date on which the applicant filed his first request for habeas relief in federal court. *See In re Medina*, 109 F.3d 1556, 1566 (11th Cir. 1997).

Although the text is silent on this point, the Fifth Circuit interpreted (b)(2)(B)(i) to impose a "reasonable lawyer" standard under which an applicant is automatically charged with the imputed knowledge of all facts that a reasonable lawyer representing him could

have discovered. Under this standard, the fact that an applicant's actual lawyers failed to discover the relevant factual predicate and affirmatively prevented the applicant from discovering it on his own is irrelevant.

The Fifth Circuit's opinion deepens an existing circuit split.

The Eleventh Circuit appears to take an approach similar to the Fifth Circuit. *See In re Boshears*, 110 F.3d 1538, 1541 (11th Cir. 1997) ((b)(2)(B)(i) test not satisfied since a reasonable investigation by applicant's attorney would have revealed factual predicate).

The Sixth Circuit takes the opposite approach, assessing due diligence from the applicant's perspective, without regard to facts a reasonably diligent lawyer could have discovered. *See Clark v. Warden*, 934 F.3d 483, 495 (6th Cir. 2019) (applicant must show "he has done as much as could reasonably be expected from someone in his circumstances," no assessment of what a reasonable lawyer could have discovered); *In re Wogenstahl*, 902 F.3d 621, 629 (6th Cir. 2018) (same).

Several other circuits have effectively aligned themselves against the Fifth Circuit's approach by virtue of their interpretation of the due-diligence standard applicable to the AEDPA's statute of limitations, which mirrors nearly word-for-word the language of (b)(2)(B)(i). *See* 28 U.S.C. § 2244(d)(1)(D) (limitations runs from date on which "the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence").

In *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274 (3d Cir. 2021), the Third Circuit, after setting forth a

helpful survey of the case law, concluded that "a due diligence requirement like the one in (d)(1)(D) [and (b)(2)(B)((i)] demands a highly fact-and-context-specific inquiry, one that depends on the characteristics and reasonable expectations of someone in the petitioner's shoes" considering "who he is, what facts he knows, what claims he seeks to bring, and what he can reasonably expect in view of his circumstances and the nature of that particular claim." *Id.* at 279, 285. This is the antithesis of the Fifth Circuit's "reasonable lawyer" approach.

Each of the Second, Seventh, Eighth, Ninth, and Tenth Circuits has interpreted (d)(1)(D) in like fashion, assessing due diligence based on the applicant's circumstances and without regard to the information that a reasonable lawyer could have discovered. *See Wims v. United States*, 225 F.3d 186, 190-91 (2d Cir. 2000) (considering "conditions of [applicant's] confinement"); *Wilson v. Beard*, 426 F.3d 653, 661-62 (3d Cir. 2005) ("context-specific" analysis considering applicant's circumstances); *Ayers v. Ohio Dep't of Rehab.*, 113 F.4th 665, 672-74 (6th Cir. 2024) (considering applicant's indigency, realities of prison system, and status as layperson); *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004) (considering that "prisoners are limited by their physical confinement"); *Anjulo-Lopez v. United States*, 541 F.3d 814, 817-18 (8th Cir. 2008) (considering "duly diligent person in petitioner's circumstances" would have discovered predicate); *Ford v. Gonzalez*, 683 F.3d 1230, 1235-36 (9th Cir. 2012) (considering "petitioner's particular circumstances," conditions of confinement, and familial assistance); *Easterwood v. Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000) (considering "reality of the prison system").

This case presents an appropriate vehicle to resolve the circuit split. The evidence clearly establishes that, under a reasonable-applicant standard, Vasquez would have prevailed. Dr. White (an experienced medical examiner who had commissioned hundreds of toxicological reports) did not appreciate the relationship between the negative screen for drugs of abuse and the positive GC/MS results. ROA.1793-95. It is thus folly to expect that a reasonable applicant in Vasquez's position, unaided by counsel, would have on his own appreciated and investigated the issue.

The competing views of (b)(2)(B)(i) are thus squarely in play. Under the approach taken by at least seven circuits, Vasquez would at least get to present for judicial review, on the merits, the claim that he was denied his Sixth Amendment right to effective counsel. Under the approach taken by the Fifth and Eleventh Circuits, Vasquez dies without any such review. With Vasquez's life in the balance, this petition should be granted.

II. The Decision Below is Plainly Wrong

The Fifth Circuit's interpretation of the statute is plainly wrong, which further counsels in favor of granting this petition.

First, had Congress intended for the test to turn on what a reasonable lawyer could have discovered, it would have been easy to enough to say so. But, while the statute references "applicants" no fewer than seven times, it nowhere mentions "lawyers." There is no textual basis for the Fifth Circuit's adoption of a "reasonable lawyer" test.

Second, the Fifth Circuit's interpretation conflicts with *Johnson v. United States*, 544 U.S. 295, 307 (2005), which construed the substantially similar language of 28 U.S.C. § 2255 (which likewise does not mention "lawyers") to establish a reasonable-applicant standard.

Third, the Fifth Circuit's interpretation is largely based on an untenable premise: that Congress implicitly incorporated into (b)(2)(B)(i) the general rule from agency law that a principal is deemed to know the facts knowable to his agent, but without also incorporating the recognized exceptions to that rule that are essential to its fair application.

Fourth, the Fifth Circuit's partial reliance on the premise that there is no constitutional right to counsel in post-conviction proceedings badly misses the point. From that premise, it follows, as a matter of constitutional law, that the unreasonable failings of an applicant's habeas counsel are not automatically attributed to the State. *Cf. Davila*, 582 U.S. at 528-29 (ineffective assistance by counsel is necessarily attributed to the State, but only in proceedings where there is a Sixth Amendment right to counsel). It does *not* follow that Congress, without even mentioning lawyers, intended as a matter of statutory construction to erect a due-diligence test that turns on what a reasonable lawyer could have discovered.

To the contrary, since there is no right to counsel in post-conviction proceedings, and since many applicants are unrepresented when they seek habeas relief, it defies logic to suggest that Congress intended to adopt a "reasonable lawyer" test. Charging an applicant with knowledge that could have been discovered by a

reasonable lawyer in a proceeding in which the applicant has no right to a lawyer (and may be unrepresented) would make little sense.

Fifth, the Fifth Circuit's statutory interpretation is foreclosed by *Castro v. United States*, 540 U.S. 375 (2003). *Castro* precludes the "clos[ing] [of] our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Id.* at 381.

Here, the Fifth Circuit effectively closed the courthouse doors to applicants seeking review, by successive application, of IAC claims. Under the Fifth Circuit's standard, an applicant would have to prove, to get merits review of an IAC claim, that a reasonable *habeas* lawyer would have been unable, when the initial application was filed, to discern the relevant factual predicate. But that showing would also demonstrate that a reasonable *trial* lawyer would similarly have been unable to discern the issue, thus dooming the IAC claim to fail on the merits.

In other words, under the Fifth Circuit's construction, the price for obtaining merits review of a successive IAC claim is to admit that, substantively, the claim has no merit. That is a categorical ban. There is no indication that Congress intended (B)(i) to categorically ban successive IAC claims in this way.

III. The Decision Below Tees Up an Important Constitutional Question

The petition should be granted because the Fifth Circuit's approach, if uncorrected, will lead to an unconstitutional result.

Vasquez has a substantial IAC claim. His trial lawyers failed to expose a fatal flaw in the most important evidence against him. That flaw, as determined by the courts below, would have been obvious to any reasonable lawyer. Thus, on the merits, Vasquez can obviously show that the performance of his trial lawyers was objectively unreasonable.

To date, no court has ever reviewed the merits of this claim. Vasquez's prior habeas lawyers did not raise the claim. When his current habeas lawyers tried to assert it below, Vasquez was told that, under (b)(2)((B)(i), the claim was raised too late to be considered.

That interpretation of (b)(2)(B)(i), if left uncorrected, will send Vasquez to his grave without any court having reviewed whether his Sixth Amendment rights were violated.

This Court's precedents strongly suggest that the Constitution forbids that result. *See Coleman*, 501 U.S. at 750, 755 (no "fundamental miscarriage of justice" in denying federal review but only because "one state court has addressed Coleman's claims [of IAC at trial]"); *Martinez*, 566 U.S. at 11 (allowing federal review "when no [other] court has addressed the claim" and to avoid executing a prisoner with "no court" having ever reviewed the IAC claim); *Trevino*, 569 U.S. at 423 (procedural-default rules cannot be applied to "deprive a defendant of any review" of a claim of IAC at trial); *Davila*, 582 U.S. at 532 (critical importance of ensuring that substantial IAC claims "receive review by at least one state or federal court").

In two of these cases, this Court has indicated that, to prevent a prisoner's execution before at least one court has reviewed the merits of a substantial IAC claim, it might even be necessary to recognize a limited exception to the general rule that there is no right to counsel in post-conviction proceedings. *See Coleman*, 501 U.S. at 755 (ensuring review by at least one court of a substantial claim of IAC at trial may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings); *Martinez*, 566 U.S. at 9 (acknowledging, 20 years later, that it remains an "open" question whether the constitution requires review by at least one court of a substantial IAC claim).

The petition should be granted to clarify, as strongly suggested by *Coleman*, *Martinez*, *Trevino,* and *Davila,* that a State cannot constitutionally carry out an execution until at least one court has reviewed on the merits a substantial IAC claim.

This case presents an appropriate vehicle for providing that clarification since, on these facts, Vasquez himself cannot fairly be blamed for the delay in raising this claim. The courts below effectively said Vasquez was at fault for the delay but could only reach that conclusion by applying a legal fiction of imputed knowledge borrowed from agency law. That fiction, however, does not apply where (as here) the principal's agents acted against his interests and engaged in egregious misconduct far beyond garden-variety negligence.

Vasquez's lawyers told him: they had investigated the cocaine evidence; the cocaine evidence was unassailable; and there was literally nothing that could be done to challenge the toxicological report. None of that was true,

but its communication to Vasquez precludes attributing to Vasquez himself any responsibility for the delayed assertion of his IAC claim.

IV. The Proper Interpretation of (b)(2)(B)(i) is a Recurring Question Frequently Evading Review

This case presents a unique opportunity to review an important and recurring question that often evades review.

That the proper interpretation of 28 U.S.C. § 2244 is important can hardly be questioned. *See Bowe v. United States*, 146 S. Ct. 447 (2006) (certiorari granted to resolve how § 2244 applies to motions by federal inmates).

The courts of appeals, moreover, face this important issue on a regular basis. According to the Federal Judicial Caseload Statistics published by the Administrative Office of the U.S. Courts, the number of "second or successive motions for writs of habeas corpus" filed in the courts of appeal averaged 2,522 per year from 2020 to 2024, with a high of 4,387 filings and a low of 1,889. *Federal Judicial Caseload Statistics*, Administrative Office of the U.S. Courts, https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics.

Finally, there is a statutory impediment that has likely served to deprive this Court of the opportunity before now to resolve the circuit split described above. Two circumstances converge to create that impediment. First, motions in the court of appeals for authority to file successive applications are routinely denied. Second, when denied, the AEDPA precludes the losing applicant from filing a petition for certiorari. *See* 28 U.S.C. §

2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be . . . the subject of a petition for rehearing or for a writ of certiorari."). As a result, there is little opportunity for the issue presented here to reach this Court.

That impediment does not exist in this case. Here, Vasquez's motion in the court of appeals for authority to file a successive application was granted. The decision to deny Vasquez merits review of his successive claim only came later when the District Court, on second-gate review, determined that he had not met the (B)(i) test. The Fifth Circuit affirmed, but the affirmance of a second-gate assessment under (B)(i), unlike an initial assessment on first-gate review, is not immunized from certiorari review by 28 U.S.C. § 2244(b)(3)(E) or otherwise.

Since there is no statutory ban on reviewing second-gate assessments by writ of certiorari, this case provides an excellent vehicle to resolve a circuit split that, to date, has evaded review.

V. Review is Necessary to Resolve if and When *Brady* and *Napue*/*Giglio* Claims are "Second or Successive"

By 2023, Fifth Circuit precedent was clear that *Brady* and *Napue/Giglio* claims not raised in a first-in-time application are "second or successive" and cannot be asserted without advance authorization under 28 U.S.C. § 2244(b)(3). *See Will*, 970 F.3d at 540.

Vasquez thus had no choice but to include his *Brady* and *Napue/Giglio* claims in his motion for authorization

to file a successive application. Had he filed them directly in the District Court, without the Fifth Circuit's first-gate blessing, his application would have been dismissed or transferred to the Fifth Circuit for first-gate assessment. *See Storey v. Lumpkin*, 8 F.4th 382, 392 (5th Cir. 2021).

But, as Justice Sotomayor has outlined, there is substantial reason to doubt that *Brady* and *Napue/Giglio* claims can be properly construed as "second or successive," at least where (as here) the applicant was unaware when he filed his first-in-time application of the State's suppression and use of false evidence. *See Storey v. Lumpkin*, 142 S. Ct. 2576, 2577-78 (2022) (Sotomayor, J., statement respecting the denial of certiorari); *Bernard v. United States*, 141 S. Ct. 504, 506-07 (2020) (Sotomayor, J., dissenting from the denial of certiorari).

As Justice Sotomayor has explained, when an applicant lacks actual awareness of *Brady* and *Napue/Giglio* violations when he files his first-in-time application, there is a compelling argument, under *Panetti v. Quarterman*, 551 U.S. 930 (2007), that those claims are not "second or successive" when they later ripen and are later asserted. The Fifth Circuit's contrary interpretation has rightly been called "illogical." *See Bernard*, 141 S. Ct. at 506.

The petition should be granted to resolve whether the Fifth Circuit's treatment of *Brady* and *Napue/Giglio* as "second or successive" impermissibly conflicts with *Panetti v. Quarterman.*

There is no impediment to reaching that question. Vasquez has never conceded that he was required to get first-gate authorization to file his *Brady* and

Napue/Giglio claims and only requested that authorization because then-existing Fifth Circuit precedent required that he do so. And, after the Fifth Circuit denied authorization, Vasquez, at every opportunity, preserved his right to seek further review with respect to his *Brady* and *Napue/Giglio* claims, including on the issue of whether they were second or successive claims covered by 28 U.S.C. § 2244(b)(3)(A).

Further, 28 U.S.C. § 2244(b)(3)(E) does not deprive this Court of jurisdiction. The "subject" of this petition, as it relates to *Brady* and *Napue/Giglio* claims, is not whether the Fifth Circuit erred in denying Vasquez authorization. The "subject" Vasquez raises is rather whether the *Brady* and *Napue/Giglio* claims are "second or successive" in the first place. There is no statutory ban on review by certiorari of that subject matter.

Finally, the Fifth Circuit's treatment of Vasquez's IAC claim further supports granting this petition. To affirm the District Court's dismissal on second-gate review of the IAC claim, the Fifth Circuit effectively held that, by the date of Vasquez's trial, the fatal flaw in the toxicological report would have been obvious to any reasonable lawyer who bothered to review it. While that conclusion (in the Fifth Circuit's view) doomed Vasquez's IAC claim, it also served to confirm, as the State had already conceded, that Vasquez's prosecutors were aware, at the time of trial, that there was no competent evidence of cocaine in Miranda's blood.

The Fifth Circuit's opinion, in other words, establishes that the *Brady* and *Napue/Giglio* violations that Vasquez had been denied permission to assert had in fact occurred.

The fundamental unfairness is obvious. When the State can only avoid merits review of one constitutional violation by admitting that it committed two other constitutional violations, the AEDPA cannot reasonably be construed to preclude review of whether the two admitted violations entitle the applicant to relief.

VI. Review is Necessary to Resolve Recurring Questions Regarding the Deference Owed to the State's Position in Habeas Cases

The State does not always oppose habeas applications by state prisoners. With some frequency, the State agrees with the applicant that relief is appropriate and either confesses error, waives procedural defenses, or both. *See, e.g.*, *Saldano v. Texas*, 530 U.S. 1212 (2000) (GVR "in light of the confession of error by the Solicitor General of Texas); *Escobar v. Texas*, 143 S. Ct. 557 (2023) (GVR to consider State's confession of error); *Glossip v. Oklahoma*, 144 S. Ct. 691 (2024) (granting certiorari on whether due process requires reversal when the State no longer defends conviction).

So too has the Court seen situations where the State speaks with two voices, with one representative (a local prosecutor, for example) taking one position and another representative (the attorney general, for example) taking the opposite view. In *Escobar v. Texas*, No. 23-934, for example, the Travis County District Attorney confessed error, while the Texas Attorney General opposed relief.

While these situations have recurred in recent years, the Court has yet to provide clear guidance on how to deal with them. It is generally established that great weight should be given to a State's confession of error. *See*

Sibron, 392 U.S. at 58 (confession of error entitled to "great weight," especially from same State office that procured conviction); *Young*, 315 U.S. at 258 (same). But the parameters of the deference remain fuzzy.

Similarly, existing precedent does not definitively address the path to follow when two purportedly authorized representatives of the State advocate conflicting positions. Federal courts of course have inherent authority to require the lawyers and parties before them to demonstrate their authority. *See Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 320 (1927) There is, moreover, a strong argument that courts must exercise that authority and resolve the conflict when the underlying issue relates (as here) to the State's exercise of prosecutorial power and discretion. *See East v. Scott*, 55 F.3d 996, 1001 (5th Cir. 1995) ("prima facie due process violation" established by proof that a lawyer not authorized by law to act as a prosecutor on the State's behalf "effectively controlled" the prosecution). Yet, there is little guidance in existing precedent on how to approach these issues in a habeas case where the Attorney General and the District Attorney are at odds.

The petition should be granted to answer these recurring questions and to provide clarity on the level of deference owed to the State's position and whether and how a court must determine disputed issues over the authority of a State's purported representative to address whether a capital conviction should be upheld or overturned.

For at least two reasons, this case presents the right vehicle for resolving these recurring questions. First, the issue raised below concerning the Texas Attorney

General's authority, if any, to overrule the position of the Nueces County District Attorney is substantial. The Texas AG resides in the executive branch, but the Texas Constitution vests all prosecutorial power in local prosecutors in the judicial branch. *See State v. Stephens*, 663 S.W.3d 45, 55-57 (Tex. Crim. App. 2021). There is thus a compelling case to be made that the Texas AG's appearance and position in Vasquez's case violated the separation of powers. *Id.* at 55-57. And the Texas Attorney General has a history of stepping over this constitutional boundary and usurping prosecutorial authority vested in local officials. *See Saldano v. State*, 70 S.W.3d 873, 883 (Tex. Crim. App. 2002) (stopping, as unauthorized, the long-standing tradition of the Texas Attorney General appearing to represent the State in certiorari proceedings from State convictions).

Second, while courts presumably need not defer to the State's view on pure questions of law, Vasquez's application involves a host of fact issues and mixed questions on which deference to the views of authorized State prosecutors would be particularly appropriate. Accordingly, resolution of the internecine battle between the Texas AG and the local DA could well determine the outcome of this case. Since Vasquez's life may depend on the answer, the petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 4, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-70005

RICHARD VASQUEZ,

Petitioner—Appellant,

versus

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:23-CV-168

Filed December 4, 2025

Before HAYNES, ENGELHARDT, and WILSON, *Circuit Judges.*

PER CURIAM:*

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5

Appendix A

In 1999, Richard Vasquez was convicted and sentenced to death for the capital murder of his girlfriend's four-year-old daughter, Miranda. He now seeks to challenge his conviction and death sentence by way of a successive habeas petition.

Vasquez filed a prior federal habeas petition in 2006, but to no avail. Years later, in 2019, when preparing for a hearing in state court, a newly hired toxicologist discovered an inconsistency in the Toxicology Report discussed at trial. Vasquez later, in 2023, sought authorization to file a successive habeas petition, under 28 U.S.C. § 2244(b)(3)(A), raising new claims based in part on this discovery. We held that Vasquez made a prima facie showing of compliance with 28 U.S.C. § 2244(b)(2)(B) and allowed him to file his petition raising an ineffective assistance of counsel claim in the district court. Conducting its own independent review, as required by 28 U.S.C. § 2244(b)(4), the district court nonetheless concluded that Vasquez could not satisfy § 2244(b)(2)(B)'s due diligence requirement and granted the State's motion to dismiss without reaching the merits of Vasquez's claim. The district court granted a certificate of appealability on this issue sua sponte.

Finding no error, we AFFIRM the district court's dismissal of Vasquez's habeas petition.

I. Background

On the morning of March 5, 1998, Vasquez injected himself with heroin and soon thereafter drove his

girlfriend, Brenda Lopez, to work.[1] Vasquez and Brenda were both so seriously addicted to drugs at the time that they had ceased to care about much else. Vasquez, Brenda, and two children lived with Vasquez's parents. The two children were Meagan, their four-month-old child, and Miranda, Brenda's four-year-old daughter from a prior relationship. That morning, the children accompanied Vasquez to drop Brenda off; they rode in the backseat. While on the way, Vasquez became angry about having to watch the children while Brenda was at work and, as a result, being unable to obtain more drugs. After dropping Brenda off, Vasquez took the children back home. Only a few hours later, Vasquez called 911 and told authorities that Miranda was choking. When paramedics arrived, they saw that Miranda had a bump on her head, bruises on her back, and bruising around her eyes, indicating a possible head injury. She later died from her injuries.

Vasquez was charged with intentionally or knowingly causing Miranda's death by striking her on the head with his hand. Tex. Penal Code § 19.03(a)(8). As for mens rea, the State was required to prove that Vasquez acted with a conscious objective or desire to kill or was aware that his conduct was reasonably certain to cause Miranda's death. Tex. Penal Code §§ 6.03(a)–(b), 19.02(b)(1).

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1. The Texas Court of Criminal Appeals summarized the facts adduced at trial when it affirmed Vasquez's conviction on direct appeal, *Vasquez v. State*, No. 73,461 (Tex. Crim. App. Oct. 3, 2001) (affirming conviction upon direct appeal) (unpublished), and we have previously summarized these facts as they were relevant to Vasquez's first federal habeas petition. *Vasquez v. Thaler*, 389 F. App'x 419, 421–25 (5th Cir. 2010) (per curiam).

Appendix A

A. Trial

At trial, the circumstances surrounding Miranda's death were explained as follows. After Vasquez returned home with the children, he called Brenda to ask her where she had hidden the remainder of their drugs. When she refused to tell him, Vasquez became angry and unleashed his frustration on Miranda—striking her on the head, though he could not say how many times. Although he admitted to striking Miranda, he claimed that her fatal injuries came from falling off a stool. But evidence showed that there were "at least 20 to 30" "areas of contusion" on Miranda's body—around her face, head, trunk, "and so forth." ROA.11466. Evidence suggested that Miranda had been sexually assaulted, though Vasquez denied responsibility. Evidence was also admitted at trial demonstrating that Miranda had a lethal amount of cocaine in her system. But the medical examiner could not explain how the cocaine got into Miranda's system, and Vasquez denied giving Miranda drugs.

To demonstrate the requisite mens rea, the State relied on evidence that: Miranda had head injuries equivalent to a high-speed vehicular ejection; perineal injuries suggestive of sexual assault; and a lethal amount of cocaine in her system, administered by Vasquez. The cocaine evidence is the focus of his successive petition. That evidence came from three sources: Dr. Backer; Dr. White; and the Toxicology Report. Dr. Backer's laboratory performed the testing that resulted in the Toxicology Report. He explained that testing revealed that a toxic amount of cocaine was put in Miranda's system an hour

or two before she arrived at the hospital.[2] Dr. White, the Nueces County Medical Examiner, relied on the Toxicology Report and testified that he listed cocaine intoxication as contributing to Miranda's death in his autopsy report. The Toxicology Report was also admitted at trial.[3]

The jury found Vasquez guilty, and he was sentenced to death.

B. Post-Conviction Challenges and Discoveries

Vasquez's initial state and federal habeas actions did not raise any issues related to the cocaine evidence.[4] In April 2015, he filed another state habeas petition after Texas enacted Article 11.073 of the Texas Code of Criminal Procedure, which allows prisoners to seek relief in Texas state court based on new scientific evidence.[5]

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2. Dr. Backer also explained that his lab first conducts an initial screen to determine if drugs are present. Then, if drugs are present, the lab runs a confirmatory test to determine the quantity of drugs present.

3. Though Vasquez asserts that the State did not offer the report as a standalone exhibit, the record reveals that the report was admitted at trial as part of Miranda's medical records.

4. *See Ex parte Vasquez*, No. WR-59,201-01, 2004 Tex. Crim. App. Unpub. LEXIS 10, 2005 WL 287504, at *1 (Tex. Crim. App. Jan. 26, 2004) (per curiam); *Vasquez v. Quarterman*, No. CC-05-059, 2008 U.S. Dist. LEXIS 25047, 2008 WL 859147, at *15 (S.D. Tex. Mar. 28, 2008).

5. *Ex parte Vasquez*, No. WR-59,201-03, 2016 WL 8808823, at *1 (Tex. Crim. App. Mar. 23, 2016) (per curiam) (remanding for the trial court's review).

Though that petition focused primarily on evidence regarding Miranda's head trauma, Vasquez made a new discovery regarding the cocaine evidence, in April 2019, when preparing for the hearing at the trial court.

Vasquez's counsel retained a consulting toxicologist, Dr. Valentine, to review how cocaine could have gotten into Miranda's system. Upon review, Dr. Valentine discovered that the Toxicology Report discussed at trial was flawed. The preliminary screen for "drugs of abuse," which provides either a positive or negative result, was listed as "negative," ordinarily meaning that there are no drugs present. ROA.1759-60. Nonetheless, in Vasquez's case, the Toxicology Report indicated that further testing was conducted, and the testing revealed a high quantity of cocaine in Miranda's system.

Dr. Valentine's April 2019 discovery prompted Vasquez's counsel to go back to Dr. Backer and Dr. White to point out the conflict. Both Dr. Backer and Dr. White recanted their trial testimony. Dr. Backer said that the Toxicology Report and his trial testimony were "not reliable evidence," and Dr. White stated that he "would have insisted on a second toxicology report" to verify its accuracy.

C. Successive Federal Habeas Petition

After Vasquez's later state habeas application focusing on the cocaine evidence was dismissed,[6] he next sought

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6. *Ex parte Vasquez*, No. WR-59, 201-04, 2022 Tex. Crim. App. Unpub. LEXIS 590, 2022 WL 17660560, at *1 (Tex. Crim.

authorization from this court, in February 2023, to file a successive federal petition. Though his proposed petition asserted nine claims, we determined that he had made the requisite prima facie showing that he could satisfy the procedural requirements of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(b)(2)(B), as to only three of those claims—Claims 1, 2, and 6.[7] 28 U.S.C. § 2244(b)(3)(C). We clarified that the motion was granted relative to Claims 1 and 2 (actual innocence claims) only insofar as they provide a gateway for Claim 6—Vasquez's ineffective assistance of counsel claim based on his counsel's failure to discover the flaws in the cocaine evidence.

In the district court, the State filed a motion to dismiss the petition, arguing that Vasquez had failed to satisfy AEDPA's procedural requirements. The district court concluded that Vasquez could not satisfy § 2244(b)(2)(B)(i) because he failed to demonstrate that the factual predicate for his claim could not have been discovered previously through the exercise of due diligence. The district court then granted a certificate of appealability ("COA") on this issue. Vasquez promptly appealed.

II. Jurisdiction & Standard Of Review

We have jurisdiction under 28 U.S.C. § 2253(c)(1) because the district court granted Vasquez a COA in this

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App. Dec. 14, 2022) (per curiam) (dismissing application on procedural grounds).

7. *See generally In re Vasquez*, No. 23-40079 (5th Cir. June 23, 2023) (per curiam).

case. *Wallace v. Mississippi*, 43 F.4th 482, 492 (5th Cir. 2022).[8] We review a district court's findings of fact for clear error and its conclusions of law de novo. *Blackman v. Davis*, 909 F.3d 772, 777 (5th Cir. 2018) (citation omitted), *as revised* (Dec. 26, 2018). A district court's dismissal of a successive § 2254 petition on the grounds that the petitioner failed to satisfy AEDPA's conditions is a legal conclusion, which we review de novo. *Mathis v. Thaler*, 616 F.3d 461, 466 (5th Cir. 2010).

III. Discussion

AEDPA sets out "prerequisites for a petitioner seeking to present a successive habeas petition in federal court." *In re Davila*, 888 F.3d 179, 183 (5th Cir. 2018) (per curiam). AEDPA, in § 2244(b), "establish[es] two jurisdictional 'gates' through which a petitioner must proceed to have the merits of his successive habeas claim considered." *Id.* Vasquez passed through the first gate when we previously determined that he made the requisite prima facie showing of compliance with § 2244(b)(2)(B).

8. The State also contends that the district court's grant of a COA is invalid and should be vacated. The State says that the district court failed to make the required finding that jurists of reason would find debatable the constitutional issue Vasquez raises. But we need not linger on this issue because, even if the district court's COA is invalid, the COA's content is a mandatory but non-jurisdictional rule, *Wallace*, 43 F.4th at 493, and we conclude that it would be appropriate to issue a valid COA in its place. *United States v. Castro*, 30 F.4th 240, 247 (5th Cir. 2022) ("When we spot a defective COA . . . we can, in our discretion, consider issuing a valid COA.").

28 U.S.C. § 2244(b)(3)(C). But our authorization was only "tentative," *In re Davila*, 888 F.3d at 183 (citation omitted), because the district court was required, as it did here, to decide for itself whether Vasquez has satisfied § 2254(b)(2)'s requirements. 28 U.S.C. § 2244(b)(4).

At the second gate, Vasquez was required to show the district court that his new claim satisfies the following requirements:

> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. § 2244(b)(2)(B)(i)–(ii). Dismissal is appropriate when either of these requirements is not satisfied. *Id.* § 2244(b)(4).

Vasquez contends on appeal that the district court erred in concluding that he failed to satisfy the due diligence requirement set out in § 2244(b)(2)(B)(i). He argues that the district court applied the wrong standard. The district court considered as relevant what a "reasonable attorney" would have been aware of prior to the filing of Vasquez's first federal habeas petition.

But Vasquez says that, in his case, the proper inquiry is what a "reasonable petitioner" would have been aware of at the time. Under that standard, Vasquez contends that he can satisfy the due diligence requirement. But if he is wrong about the standard and its application, Vasquez alternatively asserts that an equitable exception to the due diligence requirement is necessary in his case.

The State disagrees at each step. The State argues that the district court applied the appropriate standard, and that under the appropriate standard, Vasquez cannot satisfy the due diligence requirement. The State last contends that, diligence aside, Vasquez failed to demonstrate his innocence by clear and convincing evidence as § 2244(b)(2)(B)(ii) requires. We address the parties' arguments in turn.

A. Due Diligence

With respect to § 2244(b)(2)(B)(i)'s due diligence requirement, we (1) discuss the applicable standard, (2) determine whether the district court correctly concluded that Vasquez failed to satisfy this requirement, and (3) briefly discuss Vasquez's assertion that an equitable exception is required in his case.

1. Appropriate Standard

We have analyzed § 2244(b)(2)(B)(i)'s due diligence requirement in detail and have often looked to whether a "reasonable attorney" could have discovered or was on notice of the factual predicate for the petitioner's new

claim. *See, e.g.*, *Johnson v. Dretke*, 442 F.3d 901, 908 (5th Cir. 2006).[9]

The diligence inquiry "asks whether due diligence at the *time of the first habeas petition* would have resulted in the discovery of the factual basis for the new claim such that it could have been included in the first petition." *In re Davila*, 888 F.3d at 184. Congress's use of the passive voice in § 2244(b)(2)(B)(i) indicates "that due diligence is measured against an objective standard, as opposed to the subjective diligence of the particular petitioner of record." *Johnson*, 442 F.3d at 908.

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9. Often questions arise about who is responsible for exercising due diligence—a reasonable attorney, petitioner, person, or some combination—and this circuit's cases have been somewhat different approaches. *See Johnson*, 442 F.3d at 908 (looking to "evidence that would have put a reasonable attorney on notice"); *In re Cantu*, 94 F.4th 462, 472 (5th Cir. 2024) (considering "whether an objectively diligent attorney could have conducted such an investigation during the initial habeas proceeding"); *In re Carty*, 824 F. App'x 271, 276 (5th Cir. 2020) (per curiam) ("AEDPA requires that [the petitioner] make a prima facie showing that she could not have discovered the factual basis for these affidavits through the exercise of due diligence before she began her initial federal habeas proceedings."); *In re Will*, 970 F.3d 536, 542 (5th Cir. 2020) (per curiam) (looking to "evidence that would have put a reasonable person on notice" of the factual predicate); *In re Davila*, 888 F.3d at 185 ("Davila fails to demonstrate how he was not reasonably on notice . . . . Davila's own knowledge aside, we are unpersuaded that his counsel was not also reasonably on notice . . . ."). Regardless, any different approaches do not matter, as Vasquez's petition fails under any of these standards.

In *Johnson*, we recognized that the information a reasonable attorney would have been on notice of could be relevant to the analysis. Johnson alleged in a successive petition that the prosecution committed a *Brady*[10] violation by allowing his accomplice to testify while also failing to disclose the accomplice's signed stipulation confessing to the murder Johnson was accused of committing. *Id.* at 906. We held that Johnson could not satisfy § 2244(b)(2)(B)(i)'s due diligence requirement because a reasonable attorney would have been put on notice of the accomplice's stipulation. *Id.* at 908-09. In reaching this conclusion, we relied on *Williams v. Taylor*, 529 U.S. 420, 441–42, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000) for the proposition that a reasonable attorney's awareness may be relevant to the analysis. *Johnson*, 442 F.3d at 909. There, when addressing diligence under a different AEDPA provision, the Supreme Court held that the petitioner was diligent, in part, because there was no evidence in the record that would have put a reasonable attorney on notice of the alleged misconduct. *Williams*, 529 U.S. at 442. Since *Johnson*, we have consistently applied this standard when analyzing § 2244(b)(2)(B)(i)'s due diligence requirement.[11]

Vasquez cannot avoid the application of this standard. He contends that this standard should not apply where a petitioner asserts a claim for ineffective assistance.

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10. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

11. *See, e.g.*, *Blackman*, 909 F.3d at 779; *In re Davila*, 888 F.3d at 185–86; *In re Swearingen*, 935 F.3d 415, 421 (5th Cir. 2019); *In re Will*, 970 F.3d at 542.

Because the cases in which we have looked to a reasonable attorney's awareness have focused on withholding material exculpatory evidence in violation of *Brady* or the presentation of false or misleading testimony in violation of *Giglio*[12] and *Napue*,[13] Vasquez says that we should treat ineffective assistance claims (*Strickland*[14] claims) differently. But we disagree.

We interpreted § 2244(b)(2)(B)'s plain text in *Johnson*, and our interpretation was in no way limited to *Brady* claims. *Johnson*, 442 F.3d at 908. Nothing in *Johnson* or AEDPA supports applying a different standard based on the *type* of claim asserted. Indeed, § 2244(b)(2)(B)(i) demands diligence "without limitation to any specific claim." *See Shinn v. Ramirez*, 596 U.S. 366, 386, 142 S. Ct. 1718, 212 L. Ed. 2d 713 (2022) (interpreting § 2254(e)(2)). We lack "equitable authority to amend a statute to address only a subset of claims." *See id.* What is more, we have acknowledged that § 2244(b)(2)(B) may well foreclose ineffective assistance claims in many cases. *In re Coleman*, 768 F.3d 367, 373 (5th Cir. 2014) (per curiam). With an ineffective assistance of counsel claim, both prongs of § 2244(b)(2)(B) often "cannot be true." *Id.*

Vasquez has not demonstrated that the district court erred by looking to what a reasonable attorney would have

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12. *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

13. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

14. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

been aware of when analyzing diligence. When a petitioner was represented at the relevant time, an attorney's awareness is relevant to determine whether a petitioner can satisfy § 2244(b)(2)(B)(i)'s due diligence requirement.

2. Due Diligence in Vasquez's Case

We must now decide whether the district court correctly determined that Vasquez could not satisfy § 2244(b)(2)(B)(i).[15] The district court concluded that he could not because the "building blocks" of Vasquez's successive "claim were easily available when he filed the initial federal habeas petition." We agree.

Vasquez cannot satisfy § 2244(b)(2)(B)(i)'s due diligence requirement. The available evidence did not change from the time of Vasquez's trial to when his habeas counsel hired a toxicologist. The factual basis of Vasquez's new ineffective assistance claim is the flawed Toxicology

15. On this point, Vasquez does not contend that a reasonable attorney, either at the time of trial or at the time of his first federal habeas petition, would not "have been put on notice of the existence of the" inconsistencies between the trial testimony and the Toxicology Report. *See Blackman*, 909 F.3d at 779 (citing *Johnson*, 442 F.3d at 908–09). Rather, Vasquez contends only that no reasonable petitioner would have been aware of the inconsistencies. But Vasquez was represented by counsel at trial and during his first federal habeas application, so, as discussed, a reasonable attorney's awareness is relevant to analyze diligence. The State asserts that Vasquez "concedes that his prior attorneys could have discovered the factual predicate of his claim." Nonetheless, we analyze Vasquez's diligence without deciding whether he has conceded this point.

Report and the conflicting trial testimony. But Vasquez's trial counsel was provided with a copy of the Toxicology Report before trial. Then, at trial, Dr. White testified that cocaine was detected in Miranda's blood. ROA.11461. He also listed cocaine intoxication as contributing to Miranda's death. ROA.11464. Dr. Backer explained that the initial toxicological testing "indicated the presence of cocaine," and further analysis revealed that there "was indeed cocaine in the blood." ROA.11433. This testimony, though, was in direct conflict with the Toxicology Report, which stated "negative" with respect to "Drugs of Abuse." ROA.6706. This conflict was readily discoverable during trial and of course thereafter, including at the time of Vasquez's first habeas petition. Though Vasquez's counsel only discovered the conflict after hiring an expert, nothing prevented his prior federal habeas counsel from likewise investigating the cocaine evidence. Indeed, a careful review of the record (especially considering Vasquez's assertion that he did not inject Miranda with cocaine) would have suggested the need for an inquiry into how trial counsel handled the cocaine evidence. "A reasonable attorney would have been put on notice" of the conflict between trial testimony and the Toxicology Report before Vasquez's prior federal habeas petition was filed. *Blackman*, 909 F.3d at 779. Also, notably, while there was a "negative" test there also was a subsequent test that did show a high quantity of cocaine, so it is not as if there is no evidence of cocaine.

3. AEDPA Does Not Permit Exceptions

Vasquez next contends that an exception to the due diligence requirement is necessary for cases like

his. Vasquez's primary argument on this point is that the district court "erred by assuming that imputation principles require charging a petitioner like Vasquez with any and all information a reasonable attorney could have discovered." We disagree. Vasquez has no way around AEDPA's due diligence requirement.

Vasquez is responsible for his counsel's failure to raise claims available at the time of his first federal habeas petition. This is because an "attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation." *Ramirez*, 596 U.S. at 380. In the contexts where attorney error is not considered to be the petitioner's fault, that is because "the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Id.* But because a prisoner has no constitutional right to counsel in postconviction proceedings, a prisoner must "bear responsibility for all attorney errors during those proceedings." *Id.* at 383 (citation modified); *see also Irving v. Hargett*, 59 F.3d 23, 26 (5th Cir. 1995).

Additionally, the justifications that permit courts to recognize equitable exceptions are inapplicable in the context of AEDPA's demanding statutory requirements. For instance, in *Martinez v. Ryan*, the Supreme Court recognized an equitable exception to the doctrine of procedural default where an ineffective assistance claim must be raised for the first time on initial collateral review. 566 U.S. 1, 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). But "Congress foreclosed" the expansion of *Martinez* into contexts such as this "when it passed AEDPA." *Ramirez*, 596 U.S. at 384. Unlike exceptions to the doctrine of

procedural default, § 2244(b)(2)(B)(i) is a statute that courts "have no authority to amend." *Id.* at 385. "Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect." *Id.* (citation omitted).

* * *

At bottom, the district court properly dismissed Vasquez's successive habeas petition because he failed to demonstrate that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," as § 2244(b)(2)(B)(i) demands.

B. Innocence Requirement

Though Vasquez failed to satisfy AEDPA's due diligence requirement, we will briefly discuss § 2244(b)(2)(B)(ii). In order to avoid dismissal, Vasquez must also demonstrate that the facts supporting his ineffective assistance claim "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii).

Vasquez's chief argument on this point is that, but for the cocaine evidence, no reasonable factfinder would have determined that he acted with the requisite mens rea. But that is not the case.

Significant additional evidence supports a conclusion that a reasonable jury could find Vasquez guilty beyond a

reasonable doubt. To establish mens rea, the State relied not only on the cocaine evidence, but also on evidence that Miranda had severe head injuries and perineal injuries suggestive of sexual assault.

This other evidence was compelling. As for Miranda's head injuries, Vasquez admitted that he hit Miranda. Miranda had numerous "areas of contusion" around her face, head, and other areas of her body. ROA.11466. No matter how the blows are described, they resulted in severe brain damage. It was explained at trial that she was "obviously" struck on the head "hard enough to produce a fatal injury." ROA.11467. As the State argues, it is quite difficult to imagine how an adult man repeatedly inflicting blows to the head and body of a three-foot-tall, 41-pound young girl was not at least aware that those blows could kill her. Then there is still the evidence of sexual assault, which the State argued supported Vasquez's intent to kill Miranda. The State's expert testified that Miranda's injuries were consistent with a child being restrained and sexually assaulted and that this was "really one of the most severe sexual assaults" she had seen. ROA.11408. The State asserts that such a severe sexual assault provides a motive to silence the child. Though Vasquez takes issue with the veracity and weight of this evidence, it was presented to the jury and was nonetheless more than sufficient to demonstrate that Vasquez possessed the requisite mens rea.

In the end, the facts supporting Vasquez's ineffective assistance claim do not prove clearly and convincingly

that a reasonable jury would have been swayed to acquit him.[16] Thus, he has not satisfied § 2244(b)(2)(B)(ii) either.

IV. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court dismissing Vasquez's successive habeas petition for failure to satisfy § 2244(b)(2)(B).

The motion carried with the case is DENIED AS MOOT.

16. What is more, the jury was provided with the flawed Toxicology Report. So, they had the opportunity to notice the conflict and may well have disregarded it.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 4, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-70005

RICHARD VASQUEZ,

Petitioner—Appellant,

versus

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:23-CV-168

Filed December 4, 2025

JUDGMENT

Before HAYNES, ENGELHARDT, and WILSON, *Circuit Judges*.

This cause was considered on the record on appeal and the briefs on file.

Appendix B

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See FED. R. APP. P. 41(B). The court may shorten or extend the time by order. See 5TH CIR. R. 41 I.O.P.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION, FILED FEBRUARY 11, 2025

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION NO. C-23-168

RICHARD VASQUEZ,

Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,[1]

Respondent.

MEMORANDUM AND ORDER

In 1999, Richard Vasquez stood trial in the 148th Judicial District Court, Nueces County Texas, for the beating death of his girlfriend's four-year-old daughter, Miranda Lopez. The jury found him guilty, and he received

1. Bobby Lumpkin was the previously named respondent in this action. Eric Guerrero succeeded Lumpkin as Director of the Texas Department of Criminal Justice, Correctional Institutions Division on December 19, 2024. Under Rule 25(d) of the Federal Rules of Civil Procedure, Guerrero is automatically substituted as a party.

a death sentence. Since that time, Vasquez has challenged his conviction and sentence in federal and state court. With relevance to the matters now before this Court, Vasquez filed a federal petition for a writ of habeas corpus in 2006. On March 28, 2008, Vasquez's petition was denied in a Memorandum and Order that addressed all his claims.[2] Now, Vasquez seeks permission to proceed on a second federal petition.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA") which places strict limits on federal habeas review. AEDPA's successive-petition provisions only allow inmates to litigate a second federal petition under limited circumstances. *See* 28 U.S.C. § 2244(b). The Fifth Circuit has tentatively authorized this Court to consider only one claim: whether trial counsel provided constitutionally ineffective representation regarding forensic evidence in this case. Vasquez's ability to litigate his successive petition turns on whether "the factual predicate" for his claim "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i).

Vasquez's case comes before the Court on Respondent Eric Guerrero's Motion to Dismiss. D.E. 30. Respondent's motion raises the limited procedural question of whether Vasquez has complied with AEDPA's successive-petition requirements. For the reasons discussed below, the Court **GRANTS** Respondent's motion.

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2. The Honorable United States District Judge Hayden Head presided over the adjudication of Vasquez's initial federal petition.

Appendix C

BACKGROUND

In 1998, nineteen-year-old Vasquez lived with his parents, his girlfriend Brenda Lopez, their baby, and Lopez's four-year-old daughter, Miranda. Vasquez and his girlfriend used drugs. He was unemployed. On March 5, 1998, Vasquez woke up angry, thinking he had missed a scheduled court appearance for two pending theft cases. He was also mad because he had bought drugs with the money with which he had intended to hire an attorney. After injecting heroin and driving his girlfriend to her job, Vasquez went home alone with the children.

At around 1:35 p.m., Vasquez called 911 and said that Miranda was choking. When police arrived, Miranda had labored breathing, blood on her face, and a knot on the back of her head. Vasquez said that Miranda had fallen off a stool while brushing her teeth. Paramedics soon arrived and observed signs of brain injury. An examination at the hospital revealed grave injuries—Miranda had bruises throughout her body, was in a coma, had serious brain damage, and showed signs of sexual assault. Miranda died from her injuries.

The State of Texas charged Vasquez with capital murder and sought a death sentence.[3] The indictment specified that Vasquez had "intentionally and knowingly cause[d] the death" of the victim who was "an individual

3. Attorneys John Gilmore, Joseph Collina, and Robert Bujanos represented Vasquez at trial. Unless necessary to identify one attorney by name, the Court will refer to members of the defense team collectively as "trial counsel."

younger than six years old" by "striking her with his hand. . . ." D.E. 31-1 at 6;[4] *see* Tex. Penal Code § 19.03(a)(10) (authorizing capital murder for the killing of a child). The State could only secure Vasquez's conviction by showing that he acted with a "conscious objective or desire" to kill or was "aware that his conduct [was] reasonably certain to cause the result." Tex. Penal Code § 6.03(a), (b). The evidence before the jury showed that Vasquez "became angry and unleashed his frustration on [the young victim]. She died as a result of severe brain injuries sustained when Vasquez, in a drug-fueled rage, struck her several times in the head." *Vasquez v. Thaler*, 389 F. App'x 419, 422 (5th Cir. 2010). The trial evidence revealed other tragic circumstances surrounding her death: "significant evidence emerged that [the victim] had also been severely sexually assaulted before she died, responsibility for which Vasquez denied. A toxicology report revealed cocaine levels in [her] blood that were double the lethal amount for an adult, although neither [a] doctor nor Vasquez could explain the presence of the drug in her blood." *Id.*

Vasquez testified at trial and admitted that he had struck the victim in the head, but "could not say how many times he hit her." *Vasquez v. State*, No. AP-73,461 at 5 (Tex. Crim. App. Oct. 3, 2001) (not designated for publication). Vasquez still maintained that the victim's fatal head injuries occurred when she fell from a stool. *See id.* The defense used Vasquez's account to argue that

4. For purposes of identification, all page numbers reference the pagination imprinted at the top of each docket entry by the court's electronic case filing ("ECF") system or the pagination of the pdf files.

"[h]e did something terribly wrong," but he "did not try to kill that little girl." D.E. 32-16 at 39.

With that conflict about what caused the victim's death, the State argued that her other injuries showed Vasquez's intent to kill. Relying on the forensic evidence, the State alleged that Vazquez "rape[d] [the] little girl," rip[ped] out clumps of her hair," "beat the living daylights out of her," and then "sh[ot] her up with cocaine, double the amount to kill . . . an adult." D.E. 32-16 at 41. Vasquez says that the State "tried to meet [its] heavy burden" to prove intent "with purported evidence that Vasquez injected Miranda with a lethal dose of cocaine (twice the amount that would have killed an adult) before savagely beating her to death with the same force she would have experienced if ejected from a speeding car. . . ." D.E. 23 at 1-2.

The only substantive claim in this lawsuit involves trial counsel's handling of evidence about the presence of cocaine in the victim's blood before she died. Determining whether Vasquez's claim may proceed requires a detailed review of what evidence the parties presented at trial, what evidence Vasquez developed afterwards, and how he has litigated his claims.

I. Trial Testimony and Evidence about Cocaine

Vasquez argues that trial counsel provided constitutionally deficient representation by "fai[ing] . . . to discover and expose the falsity of the cocaine evidence" presented at trial. D.E. 14 at 11. Vasquez alleges that an adequate investigation by his attorneys would have

revealed "a fatal conflict in the Toxicology Report" which would have proven it "unreliable" and shown that "Miranda had no cocaine in her system." D.E. 14 at 28, 51. Trial testimony and evidence about the presence of cocaine in the victim's system primarily came from four sources: (1) the Toxicology Report; (2) Dr. Ronald Backer; (3) Dr. Lloyd White; and (4) Vasquez himself.

A. The Toxicology Report

First, the State submitted into evidence an autopsy report prepared by the Nueces County Medical Examiner's Office. D.E. 32-19 at 149-55. The report concluded that the manner of death was "homicide" and that the victim died from "[b]lunt force injuries of the head and brain." D.E. 32-19 at 149. The report, however, also listed "[c]ocaine intoxication" as a "contributing condition." D.E. 32-19 at 149.

The autopsy report included a one-page laboratory report ("Toxicology Report") prepared by Universal Toxicology Laboratories in Midland, Texas. D.E. 32-19 at 155. The issues before this Court concern discrepancies between two sections of the Toxicology Report: the "Drugs of Abuse Screen" and "Confirmed GC/MS" sections. On successive habeas review, the state court described the discrepancy as follows:

> [T]he Toxicology report states that the screen test of Miranda's blood was negative for drugs of abuse. Following protocol, the testing should have stopped there. But, without explanation

> in the trial record, a confirmation test was done, and the result showed that her blood test was positive for cocaine and benzoylecgonine, a metabolite of cocaine, and that she had a significant amount of cocaine and its metabolite in her blood.

D.E. 33-3 at 209. In other words, on its face, the Toxicology Report included findings which were both negative and positive for cocaine. The parties, however, did not discuss any conflict at trial.

B. Dr. Backer's Trial Testimony

Second, the State presented testimony from Dr. Ronald Backer, a toxicologist employed at Universal Toxicology Laboratories. Dr. Backer's laboratory performed the testing on the victim's antemortem blood sample which resulted in the Toxicology Report. Dr. Backer described the two-step process his laboratory uses to perform a toxicology test. First, Dr. Backer described an initial screen for the presence of drugs:

> Well, when we receive a sample, . . . initially, *we do a screening test to see if there are any types of drugs of abuse or drugs*—the most common prescription drugs that would be available, and we actually extract the blood with an organic solvent and then subject that to what we call immunoassays, and immunoassays is a test based on an antibody antigen reaction.

> . . . this reaction, we can measure this in an instrument.
>
> So we measure the reaction to various drugs, such as marijuana, *cocaine*, amphetamine, opiates, PCP or phencyclidine.

D.E. 32-14 at 10 (emphasis added).[5] If the screening measures any reaction, then his laboratory "actually re-extract[s] another aliquot of the blood" for a confirmatory test "so that [they] can come up with a quantity of drug that is present." D.E. 32-14 at 10.

"Although Dr. Backer was not shown the Toxicology Report during his testimony at trial, he testified unequivocally about the test results set forth in that report." D.E. 14 at 18. In at least one area, Dr. Backer's trial testimony conflicted with the findings recorded in the Toxicology Report. Dr. Backer testified that "the screening indicated the presence of cocaine. . . ." D.E. 32-14 at 11. Neither party at trial pointed out the conflict between Dr. Backer's testimony and the results recorded in the Toxicology Report.

Dr. Backer provided extensive testimony about the confirmatory test results, particularly concerning the

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5. The parties have debated whether the way in which Dr. Backer answered the question indicated that the screening tested checked for the presence of cocaine. In essence, the parties debate whether Dr. Backer's clarification that he tested for "the most common prescription drugs that would be available" excluded any testing for illegal substances by modifying the entire phrase "drugs of abuse or drugs."

amount of cocaine and the timing of any cocaine ingestion. Dr. Backer explained: "[W]hen we did our analysis, we found that there was indeed cocaine in the blood. And also the metabolite or the body product of the cocaine was also found . . . in the blood of Miranda Lopez."

D.E. 32-14 at 11. Dr. Backer testified that the victim had "a very toxic dose" of cocaine in her blood which, "could have, but it would not have to absolutely necessarily be[,] to the point of causing this child to become brain dead or die." D.E. 32-14 at 24. Dr. Backer also estimated that "the child would have been given the cocaine" around "one to two hours" before "the time that the blood was drawn." D.E. 32-14 at 15; *see also* D.E. 32 at 18 (agreeing that "the drug would have been put in her body somewhere between one and two hours" before she "got to the hospital").

Trial counsel's cross-examination of Dr. Backer did not focus on the cocaine testing or point out any inconsistencies in the results. Instead, trial counsel asked questions attempting to show that Dr. Backer could not explain how the cocaine had gotten into the victim's bloodstream. Also, trial counsel's questioning attempted to downplay the effect of any cocaine because "it's obvious that the child was not [given] a lethal dose because [she] did not die until the next day. . . ." D.E. 32-14 at 23.

C. Dr. White's Testimony

The third source of testimony about the cocaine came through Dr. Lloyd White, the Nueces County Medical Examiner who performed the autopsy. Dr. White, who

was not a toxicologist, relied on the Toxicology Report in preparing his report and the death certificate. Dr. White assumed the correctness of the Toxicology Report's findings.

Dr. White testified that testing "detected and quantitated in the blood specimen from the decedent cocaine" and "the common metabolite" of cocaine. D.E. 32-14 at 39. Dr. White provided inconclusive testimony about the effects of cocaine on the young victim. Dr. White would not testify whether "the amount of cocaine that was in her body" was "lethal" or "what amount she had that could have killed her," but still opined that "the amount that was detected at this particular point could potentially have been lethal." D.E. 32-14 at 41. In his autopsy report, however, Dr. White had listed cocaine intoxication as a contributing factor to the victim's death. D.E. 32-14 at 41.

Trial counsel's questioning covered several areas of Dr. White's autopsy findings. Regarding the cocaine, trial counsel's cross-examination emphasized that there was not "any way to know with any degree of certainty how the cocaine had been obtained by the child. . . ." D.E. 32-14 at 59. Dr. White agreed that it "would be a possibility" that the victim had ingested the cocaine herself. D.E. 32-14 at 60. Dr. White, however, explicitly agreed that the victim "did not die of cocaine." D.E. 32-14 at 63.

D. Vasquez's Own Testimony

Fourth, the defense called Vasquez as a witness to counter the State's argument that he had administered

cocaine to the victim. Vasquez admitted that, on the week the victim died, he "had had cocaine," but had "already finished it." D.E. 32-15 at 90. Vasquez testified that he had "used all the cocaine" and did not give the victim any. D.E. 32-15 at 91, 122, 126. Still, Vasquez testified that the victim would have had access to cocaine and may have ingested it herself. D.E. 32-15 at 122. Vasquez, however, could not conclusively account for the presence of cocaine in the victim's system.

E. Closing Arguments and Verdict

In the end, the defense did not question the presence of cocaine in the victim's blood. "Vasquez's defense team assumed that the positive . . . findings on [cocaine] were accurate and that there was no basis on which to attack them at trial." D.E. 23 at 16. The State's closing arguments emphasized that the presence of cocaine in the victim's blood indicated his intent to kill. The State summed up its case:

> You've heard the facts, you've heard and seen the Defendant's confession. You've looked at the pictures of the bruising all over Miranda's little body, and you've seen the pictures of her ripped genitals. You've seen the clumps of hair that were ripped out from her head. *You heard that Miranda had a large amount of cocaine in her body. Dr. White told you it was twice the amount of cocaine it would take to kill an adult. The evidence proves that the Defendant intentionally or knowingly killed Miranda,*

> *a four-year-old little girl.* I ask you to follow the law, apply facts to the law, and hold the Defendant responsible for his actions.

D.E. 32-14 at 19) (emphasis added).

After retiring to deliberate, the jury sent out three notes. The third note said that the jury disagreed on the time estimates Dr. Backer gave concerning when the cocaine had entered the victim's system. D.E. 32-16 at 64. The court reporter read back that portion of Dr. Backer's testimony. D.E. 32-16 at 72-76. Shortly thereafter, the jury returned a verdict of guilty. A separate penalty hearing resulted in a death sentence.

II. Vasquez's 2015 State Habeas Proceedings

Vasquez did not raise any issue about the cocaine evidence on direct appeal, in his initial state habeas application, in the successive state habeas application which he filed in 2001, or in his initial federal proceedings.[6] The matter currently before this Court arose during successive state habeas proceedings which Vasquez filed in 2015.[7] Texas has created "a procedural scheme

6. Nicholas J. Trenticosta and Richard W. Rogers ("initial habeas counsel" or "state habeas counsel") represented Vasquez in his initial state habeas action. Andrew M. Edison and Eric B. Storm ("initial federal habeas counsel") served as counsel during Vasquez's first federal habeas proceedings.

7. Thomas Farrell represented Vasquez in his 2015 and 2022 habeas proceedings. Mr. Farrell also represents Vasquez in the instant action.

envisioning a single bite at the habeas apple that fully and finally resolves all habeas claims." *Ex parte Speckman*, 537 S.W.3d 49, 52 (Tex. Crim. App. 2017). Under Texas' successive-petition provisions, a habeas action will only proceed when (1) an inmate's "claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application" or (2) he is actually innocent. Tex. Code Crim. Pro. art. 11.071 § 5(a)(1), (2); *Ex parte Reed*, 670 S.W. 3d 689, 745 (Tex. Crim. App. 2023) (discussing section 5(a)(2) as an actual-innocence inquiry). In 2013, the Texas Legislature expanded its abuse-of-the-writ standards based "on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application . . . was filed." Tex. Code Crim. Pro. art. 11.073(c).

In 2015, Vasquez filed a successive habeas petition raising three claims relating to the victim's head injuries. D.E. 33-1 at 15-60. Vasquez relied on "intervening advancements in scientific knowledge regarding (1) Shaken Infant Syndrome, (2) deaths caused by short falls, (3) biomedianics, (4) and Second Impact Syndrome" to allege that "key elements of the State's case against him were flat wrong." D.E. 33-1 at 22. Vasquez's successive habeas petition did not include any issue relating to the cocaine evidence. On March 23, 2016, the Texas Court of Criminal Appeals "remanded [the application] to the trial court for a review on the merits." *Ex parte Vasquez*,

2016 WL 8808823, at *1 (Tex. Crim. App. 2016). The Nueces County District Attorneys' Office did not make a zealous defense in the lower court. In fact, the Nueces County District Attorney's Office explicitly stated on the record that "a new trial would be appropriate under the circumstances." D.E. 1-3, Exhibit C at 10.

At some point during the successive proceedings, Vasquez turned his attention toward the cocaine evidence from trial. Unlike the other claims at issue, Vasquez did not base his investigation on any scientific advance or change in the underlying evidence. Vasquez, nonetheless, developed significant evidence relating to the cocaine evidence during the 2015 state habeas proceedings.

A. Development of the Cocaine Issue

During the successive state habeas proceedings, Vasquez's attorneys consulted with an independent toxicologist, Dr. Jimmie L. Valentine. Dr. Valentine is a retired Professor of Pediatrics, Pharmacology and Myeloma Research at the University of Arkansas College of Medicine in Little Rock, Arkansas. Dr. Valentine did not perform any independent testing of the victim's blood samples or analyze the underlying testing conducted by Universal Toxicology Laboratories. Dr. Valentine confined his review to the toxicology report and the trial testimony.

In 2019, Dr. Valentine provided a report which recognized an "irreconcilable conflict" in the Toxicology Report "between the Initial Drug Screen Test of the decedent's blood, which tested negative for cocaine

metabolite, benzoylecaonine, and a subsequent confirmation test that detected the presence of and quantitated both cocaine and benzoylecgonine." D.E. 33-8 at 44. Dr. Valentine opined that the conflict meant that "[b]oth results . . . could not have been true and accurate at the same time. . . ." D.E. 33-8 at 44. Dr. Valentine also noted that "Dr. Backer provided false testimony at trial when he said the Initial Drug Screen Test 'indicated the presence of cocaine' when in fact the Toxicology Report indicated that [it] tested negative for cocaine." D.E. 33-8 at 44. Valentine concluded that the Toxicology Report "could not be scientifically used as the basis" of "Dr. White's and Dr. Backer's testimony that the descendant had cocaine in her system." D.E. 33-8 at 44. Thus, Dr. Valentine criticized the inclusion of "'cocaine intoxication' as a contributing condition to the death." D.E. 33-8 at 44.

After obtaining Dr. Valentine's report, Vasquez secured declarations from both Dr. Backer and Dr. White addressing their trial testimony. Looking only at the face of the Toxicology Report, Dr. Backer's 2019 declaration admitted that there was "an irreconcilable conflict between the Drug of Abuse Screen and the subsequent confirmation tests." D.E. 33-8 at 37. Dr. Backer explained that "[t]he only way to determine which, if either, of the above test results are accurate would be to review and analyze the underlying data associated with the tests. . . . Absent of a review of this underlying laboratory data, the Toxicology Report on its face is not reliable evidence . . . ." D.E. 33-8 at 37. Vasquez, however, did not have any expert review the underlying data to determine the validity of the positive cocaine finding.

Dr. White's 2019 declaration clarified that, because he is not a toxicologist, his testimony about cocaine relied only on the Toxicology Report. D.E. 33-8 at 80. Dr. White explained that he would not have understood the conflict in the report at the time of trial. Dr. White said that if he had known about the conflict in the Toxicology Report he "would not have listed cocaine intoxication as a contributing condition for [the victim's death] nor would [he] have testified about cocaine in her system at Mr. Vasquez's trial." D.E. 33-8 at 81.

In the end, neither Dr. Backer nor Dr. White made any attempt to reconcile the conflicting findings in the Toxicology Report. None of the experts have reviewed the underlying testing data to determine whether cocaine was present in the victim's blood. Instead, the experts' declarations acknowledged the conflict in the Toxicology Report without drawing any conclusion about what caused the error.

Vasquez did not move to amend his 2015 state habeas application to include any constitutional claim based on the conflict in the Toxicology Report. Vasquez, nonetheless, relied on his new evidence as a basis to overturn his conviction.

B. Evidentiary Hearing and Lower Court Action

Before Vasquez had developed his cocaine evidence, the trial-level habeas court designated issues needing resolution in the case. D.E. 33-2 at 90-91. The state court scheduled an evidentiary hearing to be held in 2019.

D.E. 33-5 at 10-11. Because the parties had reached an agreement concerning the presentation of evidence, the trial court conducted a paper hearing and considered Vasquez's newly developed evidence.

The trial court held oral argument on June 3, 2019. D.E. 33-5 at 8-9.[88] Prior to the hearing, Vasquez submitted evidence about the Toxicology Report. The parties discussed the conflicts in theToxicology Report during the hearing. In fact, Vasquez told the trial court that the State had agreed that the cocaine evidence was "within the scope" of what the trial court "should be considering. . . ." D.E. 33-5 at 61. During the hearing, Vasquez argued that: "what we have discovered[,] and the State now agrees[,] . . . is that th[e] toxicology report . . . is scientifically unreliable, and inherently not useable." D.E. 33-5 at 55. The trial court, however, questioned whether the evidence had provided any explanation for the discrepancy, such as recording the negative finding by "mistake." D.E. 33-5 at 57.

The Court of Criminal Appeals is the ultimate factfinder in habeas cases. *See Ex parte Lane*, 670 S.W.3d 662, 670 (Tex. Crim. App. 2023). The trial-level habeas court's role in Texas habeas proceedings is to enter proposed factual findings and legal conclusions which serve as a recommended disposition of the case. When, as here, the trial-level court holds an evidentiary hearing, the parties draft proposed findings and conclusions for judicial

8. At the start of the hearing, Vasquez withdrew consideration of his actual-innocence claim. D.E. 33-5 at 11.

review. *See* Tex. Code Crim. Pro. art. 11.071 § 9(e). The trial-level court then "make[s] written findings of fact that are necessary to resolve the previously unresolved facts and make[s] conclusions of law." *See id.* § 9(f)(1)(E). The lower court then forwards its findings and conclusions to the Texas Court of Criminal Appeals. *See id.* § 9(f).

Here, Vasquez submitted a proposal recommending that relief be granted and the State "concur[red] with the findings." D.E. 1-3, Exhibit C at 69; *see also* D.E. 33-5 at 11, 13-14. The trial-level habeas court, however, prepared its own findings and conclusions recommending that relief be denied. Aside from rejecting Vasquez's constitutional claims, the state court's findings extensively addressed the cocaine issue. To summarize, the lower court found that the "findings in the Toxicology Report" were "certainly conflicting" and "raise[] concern," but were not necessarily irreconcilable. D.E. 33-3 at 215. The trial court criticized Vasquez's assumption that the conflict meant that the confirmatory test (rather than the screening test) was in error; speculated that the negative entry was nothing more than a clerical error; highlighted that no evidence, other than the conflict, called the confirmatory results into question; and found that "the State's argument that [Vasquez] injected Miranda with cocaine prior to her death was based on a reasonable deduction of the evidence presented at the trial." D.E. 33-3 at 216. The lower court recommended that the Court of Criminal Appeals deny relief on Vasquez's claim. D.E. 33-3 at 240.

Pursuant to Texas habeas procedure, the district judge's recommendation was forwarded on to the Texas

Court of Criminal Appeals. Vasquez filed objections to the lower court's recommendation. D.E. 8-1 at 11. On August 21, 2021, the Court of Criminal Appeals adopted the lower court's findings of fact, conclusions of law, and recommendation. D.E. 36-17 at 3; *Ex parte Vasquez*, 2021 WL 3746008, at *1 (Tex. Crim. App. 2021).[9] Based on the lower court's recommendation, the Court of Criminal Appeals denied relief. D.E. 36-17 at 3.

III. Vasquez's 2022 State Habeas Application

On January 12, 2022, Vasquez filed a fourth state habeas application raising six claims. D.E. 37-1 at 42-43.[10]

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9. The trial court's findings are afforded a presumption of correctness under section 2254(e)(1), which would pose a significant concern for Vasquez if this Court could reach the merits. *See Williams v. Quarterman*, 551 F.3d 352, 358 (5th Cir. 2008) (finding that lower court findings are presumed correct unless "directly inconsistent" with the appellate court's decision).

10. Around that same time, Vasquez made two efforts at federal review. On January 24, 2022, Vasquez filed a federal civil-rights complaint under 42 U.S.C.§ 1983, alleging that the Texas courts violated his due-process rights when denying his 2015 habeas application. *Vasquez v. Collier*, No. 2:22-cv-12 (S.D. Tex). On July 8, 2022, this Court dismissed the complaint. On January 26, 2022, Vasquez also filed a Rule 60(b) motion in his original federal habeas action seeking to raise the same claims as in this lawsuit. *Vasquez v. Lumpkin*, 2:05-cv-59, D.E. 51. The Court construed Vasquez's motion as a successive federal petition and forwarded it to the Fifth Circuit. *Vasquez v. Lumpkin*, 2:05-cv-59, D.E. 60. The Fifth Circuit affirmed the Court's holding that Vasquez's Rule 60(b) motion was, in reality, a successive federal petition. *Vasquez v. Lumpkin*, No. 22-70009 (5th Cir. Feb. 24, 2023).

Vasquez focused his petition and briefing on his first four claims: the State unknowingly presented false evidence about cocaine (claim one); the State knowingly presented false evidence about cocaine (claim two); the State failed to disclose exculpatory evidence about the conflict in the Toxicology Report (claim three); and the conflict in the Toxicology Report rendered him actually innocent of capital murder (claim four). "In the alternative," Vasquez raised ineffective-assistance claims under *Strickland v. Washington*, 466 U.S. 558 (1984): trial counsel provided deficient representation for not discovering the alleged falsity of the cocaine evidence (claim five) and "Vasquez is entitled to relief because his prior habeas counsel provided ineffective assistance of counsel" (claim six). D.E. 37-1 at 6, 41.

Under Texas law, Vasquez's 2022 application could only proceed if he showed that the "factual basis of [his] claim [was] unavailable" because it "was not ascertainable through the exercise of reasonable diligence. . . ." Tex. Code Crim. Pro. art. 11.071 § 5(e). Regarding his first four claims, Vasquez argued that the conflict in the Toxicology Report was not discoverable "until just prior to Dr. Backer's execution of his Declaration on May 1, 2019." D.E. 37-1 at 40. Vasquez's 2022 application said: "Vasquez maintains—and can prove—that the circumstances showing the falsity of the State's cocaine evidence were not ascertainable through the exercise of reasonable diligence at any earlier point in time." D.E. 37-1 at 40.

Appendix C

Vasquez raised his ineffective-assistance claims "in the alternative to cover the possibility—however unlikely—of the court determining that Vasquez could and should have discovered that the cocaine evidence was false earlier than he did." D.E. 37-1 at 40-41. Vasquez continued:

> [a]ny . . . determination by the court . . . that Vasquez could and should have discovered and asserted this false-evidence issue before now . . . Would establish beyond question that Vasquez did not receive the effective assistance of counsel guaranteed to him under the United States Constitution. To the extent reasonable diligence would have uncovered this issue before 2019, the failure of Vasquez's trial lawyers to discover and raise it obviously "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

D.E. 37-1 at 40-41

In other words, Vasquez provided two pathways for the Court of Criminal Appeals' adjudication to travel. First, if any conflict in the Toxicology Report was not discoverable before Dr. Backer's affidavit in 2019, then the Court of Criminal Appeals should allow successive proceedings on his first four claims. Second, the Court of Criminal Appeals would only consider his ineffective-assistance claims after finding that the cocaine-conflict evidence was previously available. Vasquez did not provide any detailed

briefing on the question of whether his *Strickland* claims themselves were previously unavailable.[11]

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11. Vasquez submitted new affidavits in support of his 2022 habeas application, including:

- an affidavit from Thomas M. Farrell, the attorney who agreed to take over his representation during the process of his 2016 successive habeas application. Mr. Farrell described how, while developing evidence related to his short-fall claim, Vasquez's attorneys decided to "consult[] with a toxicologist to see if [they] could develop any further support for the proposition that cocaine could have gotten into Miranda's system without action by Vasquez." D.E. 8-4 at 4. Mr. Farrell's "work with a consulting toxicologist (Dr. Jimmie Valentine) ultimately led [them] to track down Dr. Ronald Backer." D.E. 8-4 at 4.
- an affidavit from trial counsel John Gilmore. Mr. Gilmore described preparing for trial by interviewing Dr. White who "did not reveal . . . that there was any issue or concern about the validity of the results reported in the Toxicology Report." D.E. 8-5 at 2. Mr. Gilmore opined that "the level of understanding" needed to discover the conflict was "not . . . typical of even highly trained and experienced criminal-defense lawyers." D.E. 8-5 at 4. In fact, Mr. Gilmore stated: "If Dr. White, as an experienced forensic pathologist and medical examiner, was unaware of any issue with the Toxicology Report, it is not reasonable to conclude that defense counsel would or should have had that awareness." D.E. 8-5 at 4.
- an affidavit from initial state habeas counsel Nicholas Trenticosta. Mr. Trenticosta conceded

Appendix C

On December 14, 2022, the Court of Criminal Appeals entered an order succinctly finding that Vasquez "failed to satisfy the requirements of Article 11.071, § 5(a)" and thus "dismiss[ed] the subsequent application as an abuse of the writ without considering the merits of the claims." *Ex parte Vasquez*, 2022 WL 17660560, at *2 (Tex. Crim. App. 2022).[12]

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that Vasquez's habeas attorneys did not know about the conflict in the toxicology report. D.E. 8-6 at 3. Using language which echoed Mr. Gilmore's affidavit, Mr. Trenticosta opined that the "level of understanding" necessary to understand the conflict "would not be typical of even highly trained and experienced criminal-defense and post-conviction lawyers." D.E. 8-6 at 3. Because the toxicology report "appeared valid on its face," he said "it would not be standard procedure to obtain independent review of [the] toxicology report. . . ." D.E. 8-6 at 3.

- an affidavit from Vasquez himself dated December 8, 2021, in which he attested that he "did not know that there was a conflict in the Toxicology report." D.E. 8-7 at 1.

12. AEDPA requires a federal court to defer to any factfindings made by a state court. *See* 28 U.S.C. § 2254(e)(1). "This deference extends not only to express findings of fact, but to the implicit findings of the state court. As long as there is some indication of the legal basis for the state court's denial of relief, the district court may infer the state court's factual findings even if they were not expressly made." *Ford v. Davis*, 910 F.3d 232, 234-35 (5th Cir. 2018) (internal quotation marks and citation omitted). The Court of Criminal Appeals found that Vasquez's 2022 application "failed to satisfy the requirements of Article

IV. Vasquez's Remaining Federal Claim

On February 8, 2023, Vasquez filed a motion in the Fifth Circuit seeking leave to proceed on a successive federal habeas petition. *In re Vasquez*, No. 23-40079. Vasquez included a draft habeas petition raising nine claims, including those from his 2022 state habeas application. Specifically, Vasquez sought leave to raise the following claims:

> (1) he is actually innocent of the crime of capital murder; (2) he is actually innocent of the death penalty; (3) the State committed *Brady* violations at his trial; (4) the State knowingly introduced false evidence at his trial; (5) the false evidence on cocaine materially affected

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11.071, § 5(a)." *Ex parte Vasquez*, 2022 WL 17660560, at *2 (Tex. Crim. App. 2022). In doing so, Respondent argues the Court of Criminal Appeals "implicitly determined that Vasquez did not diligently discover his cocaine-based claims. . . ." D.E. 30 at 39; *see also* D.E. 46 at 7-8. The Fifth Circuit has found in other cases that the Court of Criminal Appeals' successiveness determination amounts to "an implicit factual finding that [the petitioner] knew or could have reasonably known the factual predicate for his claim at the time he filed his initial state habeas application." *Romero v. Davis*, 813 F. App'x 930, 933 (5th Cir. 2020) (examining the issue under the similar provisions of Tex. Code Crim. Pro. art. 11.07); *see also Ford*, 910 F.3d at 235. Vasquez, however, counters that the Court of Criminal Appeals' December 14, 2022 order does not provide sufficient detail to establish that the state courts rejected his application based on the previous availability of his claims. The Court does not need to resolve this dispute because Vasquez has failed to meet the AEDPA standard under a de novo review.

> his capital conviction and death sentence in violation of the Due Process Clause; (6) his attorney rendered ineffective assistance of counsel when he failed to discover the falsity of the cocaine evidence; (7) the junk science evidence materially affected his capital conviction and death sentence in violation of the Due Process Clause; (8) his attorney rendered ineffective assistance of counsel when he failed to investigate and counter the evidence of sexual assault; and (9) his attorney rendered ineffective assistance of counsel in failing to investigate and present mitigating evidence.

In re Vasquez, No. 23-40079, slip op. at 2 (5th Cir. June 23, 2023) (footnote omitted).

A. AEDPA Successive Petition Standard – Circuit Court Review

AEDPA sets out a bifurcated procedure before conferring jurisdiction over an inmate's successive petition. An inmate wishing to file a successive federal petition "'must get through two gates before the merits of the motion can be considered.'" *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001) (quoting *Bennett v. United States*, 119 F.3d 468, 470 (7th Cir. 1997)). As the "first gate," AEDPA established a pre-authorization procedure where an inmate seeks initial approval from a three-judge panel of the circuit court. *See* 28 U.S.C. § 2244(3). A circuit court preliminarily authorizes the filing of a successive action if a petitioner shows that it

is "reasonably likely" that his successive petition meets AEDPA's "stringent requirements." *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003). But the circuit court's determination is "'tentative'"—it is only a prima facie assessment of a matter which the district court must conclusively decide. *Reyes-Requena*, 243 F.3d at 899 (5th Cir. 2001) (quoting *Bennett*, 119 F.3d at 469).

AEDPA's specific limitations on successive habeas review guide the question of whether a circuit court tentatively authorizes a petition to proceed. Section 2244(b)(2) sets out two paths to full federal review of a successive petition. Vasquez did not rely on the first, requiring a petitioner to "show[] that the claim relies on a new rule of constitutional law. . . ." 28 U.S.C. § 2244(b)(2)(A). Instead, Vasquez relied on 28 U.S.C. § 2244(b)(2)(B) under which his claim "shall be dismissed" unless he makes two showings:

> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

AEDPA sets out the predicate showing in the conjunctive; an inmate's failure to meet either prong is

fatal to successive review. The burden under this section falls on Vasquez. *See Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004) ("The applicant bears the burden of demonstrating that the petition does in fact comply with the statute. . . .").

B. Vasquez's Arguments in the Fifth Circuit

As he had in his 2022 state habeas application, Vasquez's proposed federal petition set forth alternative arguments about whether any conflict in the Toxicology Report could have been discovered previously. On one hand, Vasquez's proposed habeas petition argued that "the circumstances showing the falsity of the State's cocaine evidence were not ascertainable through the exercise of reasonable diligence" until his attorneys consulted with Dr. Valentine in 2019. *In re Vasquez*, No. 23-40079, Motion for Order Authorizing Consideration of a Subsequent Petition for Writ of Habeas Corpus, Ex. 1, at 63 (5th Cir. filed Feb. 8, 2023) ("Circuit Proposed Petition"). Vasquez assured the Fifth Circuit that he could not have discovered "the real factual predicate of his cocaine-related claims before January 2006" when he filed his initial federal petition. *In re Vasquez*, No. 23-40079, Reply Brief in Support of Motion for Authorization, at 16 (5th Cir. filed April 14, 2023) ("Circuit Reply Brief").

On the other hand, Vasquez also argued that, if the circuit court decided that he "could and should have discovered and asserted this false-evidence issue before" then, it "would establish beyond question that [he] did not

receive the effective assistance of counsel guaranteed to him under the United States Constitution." Circuit Proposed Petition at 63-64. In other words, if "reasonable diligence would have uncovered this issue before 2019," then he alternatively raised a *Strickland* claim. *Id*. at 64.

Vasquez's briefing set out the Fifth Circuit's standard for deciding whether his claim could have been discovered previously: "[t]he test [under section 2244(b)(2)(B)(i)] is an objective one, asking in essence *whether a reasonable attorney exercising due diligence* would have discovered the factual predicate by the time the first federal habeas had been filed." Circuit Reply Brief, at 16 (relying on *In re Will*, 970 F.3d 536, 541-42 (5th Cir. 2020) (emphasis added)). Vasquez relied on that interpretation of section 2244(b)(2)(B)(i) throughout his briefing in the Fifth Circuit. *See id*., at 12, 18.

C. Fifth Circuit Authorization

The circuit court held oral arguments on Vasquez's motion for authorization. On June 23, 2023, the Fifth Circuit entered an order tentatively authorizing only Vasquez's *Strickland* claim to proceed. Specifically, the Fifth Circuit described Vasquez's claim as follows: counsel "rendered ineffective assistance . . . when he failed to discover the falsity of the cocaine evidence." *In re Vasquez*, slip op. at 2. The Fifth Circuit's order, however, did not provide any discussion of how Vasquez's *Strickland* claim had passed through the first successive-petition gateway. The Fifth Circuit also allowed the federal petition to

proceed on claims one and two, but only to overcome any procedural bar. *Id*. at p. 3, n.2.[13]

THIS COURT'S SECOND GATEKEEPER REVIEW

Having passed through the circuit court's prima facie gateway, this Court must determine whether full federal review is available. Vasquez has filed a federal petition and an amended petition. D.E. 1, 14. Vasquez's federal petition raises only one substantive ground for relief: his claim that trial counsel provided deficient representation relating to the cocaine-conflict evidence. Vasquez argues:

> It would be impossible to overstate the role that the cocaine evidence played at Vasquez's trial. From the testimony of Dr. Backer and Dr. White that Miranda's blood had 0.18 mg/L of parent cocaine and 0.42 mg/L of a cocaine metabolite, the State spun for the jury a tale that Vasquez used a needle to inject into Miranda twice the amount of cocaine that would have killed an adult and that he did so, an hour

13. In doing so, the Fifth Circuit granted Vasquez's motion "relative to Claims 1 and 2 only insofar as they provide a 'gateway' for the ineffective assistance of counsel claim set forth in Claim 6." *In re Vasquez*, slip op. at 3. In habeas law, courts use the term "gateway" (1) to differentiate between the circuit and district court's roles in deciding whether to authorize successive proceedings, and (2) when describing the vehicle by which an inmate may litigate procedurally barred claims. In this context, the Fifth Circuit intended the term "gateway" to mean the actual-innocence safety valve for otherwise procedurally barred claims.

> or two before she was rushed to the hospital, to stop her from struggling as he tortured her to death. Parts of this fanciful story were invented from whole cloth, but all of it started with the false premise that the tests performed by Dr. Backer's lab reliably detected cocaine in Miranda's blood. And, as the trial record reveals, this was all part of a calculated effort to portray Vasquez as a depraved monster who must have acted with the *mens rea* required for a capital-murder conviction.

D.E. 14 at 21. Vasquez's briefing designates this as "claim six" in accordance with his briefing in the Fifth Circuit. D.E. 14 at 54. Vasquez's *Strickland* claim will require him to prove that a reasonable trial attorney could and should have discovered the conflict in the Toxicology Report. *See Druery v. Thaler*, 647 F.3d 535, 540 (5th Cir. 2011) ("*Strickland* directs courts to consider the conduct of defense counsel based on the objective standard of the reasonable attorney.") (citing *Strickland*, 466 U.S. at 688).

But Vasquez's *Strickland* claim is not yet available for adjudication. At this point, the question is not whether the cocaine evidence was false or whether trial counsel's handling of the evidence was ineffective. The Court's sole concern at this stage is a procedural one: whether Vasquez has complied with the statutory requirements for filing a successive federal habeas petition.

A district court's duty under AEDPA is stricter and more in-depth than the circuit court. *See* 28 U.S.C.

§ 2244(b)(4) ("A district court shall dismiss any claim" in a successive petition "unless the applicant shows that the claim satisfies the requirements of this section."). A district court "conduct[s] a 'thorough' review to determine if the [petition] 'conclusively' demonstrates that it does not meet AEDPA's second or successive motion requirements." *Reyes-Requena*, 243 F.3d at 898-99 (quoting *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000)); *see* 28 U.S.C. § 2244(b)(4). In doing so, the circuit court's prima facie decision carries no weight; the district court must decide the issues "fresh, or in the legal vernacular, *de novo*." *Jordan v. Sec'y, Dept. of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007). Vasquez must comply with section 2244(b)(2)(B) before the Court can reach the merits.

MOTION TO DISMISS

Respondent Eric Guerrero has filed a wide-ranging motion to dismiss. D.E. 30. Respondent argues that this Court does not have jurisdiction to consider many of the arguments in Vasquez's federal petition because they relate to the claims which the Fifth Circuit did not authorize for federal review. Respondent also contends that Vasquez has not met either of the requirements in section 2244(b)(2)(B): Vasquez "could have discovered the factual predicate of his claims as early as his trial" and he "does not demonstrate by clear and convincing evidence that he is actually innocent."D.E. 30 at 2-3.[14]

14. Additionally, Respondent argues that federal law limits the scope of what evidence this Court may consider in these habeas proceedings. D.E. 30 at 41-44. Vasquez's petition and

Because Vasquez maintains that his "trial lawyers could and should have discovered the falsity of the cocaine evidence prior to [his] trial," D.E. 14 at 55, Respondent argues that Vasquez's *Strickland* claim leads to a "Catch-22 of Vasquez's own creation" because the factual basis of his claim must have been previously discoverable. D.E. 30 at 46. Raising a *Strickland* claim in a successive petition places a petitioner in a difficult position. The Fifth Circuit has observed:

> [The petitioner's] only avenue for relief . . . is to show both that (1) the factual predicate for her claim could not have been discovered through due diligence, and (2) that the facts, taken as true, would have shown by clear and convincing evidence that but for the constitutional error, in this case, the ineffective assistance of her trial counsel, no reasonable factfinder would have found her guilty. . . .
>
> In an ineffective assistance of counsel claim, both conditions cannot be true. If the new

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subsequent briefing relies on evidence which he did not put before the state courts. Generally, courts cannot develop and consider new evidence on federal habeas review, unless an inmate makes a specific showing under 28 U.S.C. § 2254(e)(2). *See Shoop v. Twyford*, 596 U.S. 811, 819 (2022); *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022). Vasquez, however, argues that those strict limitations should not apply to the second-gateway review. For the limited purpose of the matters currently at issue, the Court will assume without deciding that all Vasquez's evidence is properly available for consideration.

> evidence . . . could not have been discovered earlier through due diligence, as the statute requires, then the trial counsel would not have been ineffective, as the Supreme Court, in *Strickland v. Washington*, requires that "counsel's performance [be] deficient." In that case, there would be no constitutional error, and [the petitioner] would fail section 2244(b)(2)(B)'s second prong. And if the evidence could have been discovered through due diligence, [the petitioner] would fail the first prong.

In re Coleman, 768 F.3d 367, 373-74 (5th Cir. 2014). In other words, an inmate's *Strickland* claim itself suggests a factual predicate that "could have been uncovered with due diligence before the initial petition was filed." *In re Wogenstahl*, 902 F.3d 621, 629 n.4 (6th Cir. 2018).

Even while acknowledging that tension exists between a *Strickland* claim and AEDPA's due-diligence inquiry, the Fifth Circuit has not held that *Strickland* claims are per se ineligible for authorization under section 2244(b)(2)(B)(i). Vasquez, nevertheless, emphasizes that the section 2244(b)(2)(B)(ii) inquiry is distinct from his substantive *Strickland* claim. Vasquez correctly recognizes: "Whether the falsity of the cocaine evidence could have been discovered through the exercise of diligence prior to the filing of Vasquez's initial federal application for habeas relief in 2006 is a different question from whether [he] could and should have discovered his cocaine-related claim for ineffective assistance of counsel prior to 2006." D.E. 14 at 55. In other words, the "factual predicate" of

Vasquez's claim is not necessarily on any conflict in the Toxicology Report, but is on when he should have known his trial attorneys acted deficiently regarding the cocaine evidence.

This is a fine distinction, but one consistent with AEDPA. Looking only at the information before trial counsel would "collapse[] . . . the [AEDPA] due diligence requirements" into the merits of a constitutional claim which the Court does not have jurisdiction to consider. *See Johnson v. Dretke*, 442 F.3d 901, 907 (5th Cir. 2006). The focus, therefore, is on when Vasquez's *Strickland* claim was previously discoverable under section 2244(b)(2)(B)(i).

SECTION 2244(B)(2)(B)(I)

Whether Vasquez's arguments pass through the second successive-petition gateway depends on the interpretation of section 2244(b)(2)(B)(i). Vasquez must show that "the factual predicate for [his successive *Strickland*] claim *could not have been discovered previously through the exercise of due diligence*." 28 U.S.C. § 2244(b)(2)(B)(i) (emphasis added).[15] In that inquiry, courts generally agree that the term "previously" focuses on when "the first federal habeas application was filed." *In re Medina*, 109 F.3d 1556, 1566 (11th Cir. 1997). The parties debate who

15. Vasquez also argues that he can meet the section 2244(b)(2)(B)(i) due-diligence requirement for claims one and two. The Fifth Circuit only tentatively authorized consideration of those two claims to overcome procedural barriers to federal review. The Court does not need to address those claims until Vasquez has met the initial showing of diligence on his *Strickland* claim.

section 2244(b)(2)(B)(i) focuses on. Section 2244(b)(2)(B)(i) does not specifically ask about any person's diligence, but instead sets out the standard in "the passive voice"—it does not specify *whose* diligence a court examines. *Johnson*, 442 F.3d at 908. Vasquez's ability to proceed in this case depends on to whom section 2244(b)(2)(B)(i) refers.

I. The Parties' Arguments

Vasquez argues that the language of section 2244(b)(2)(B)(i) asks whether "a hypothetical 'someone' could, through due diligence, have learned of [the factual] predicate" of the successive claim. D.E. 42 at 27. According to Vasquez, the statute "does not expressly say who that 'someone' is, but . . . that 'someone' could only be a hypothetical inmate seeking post-conviction relief similarly situated to the petitioner." *Id.* Despite the statute's objective focus, Vasquez argues that the hypothetical inmate should be one possessing his exact same background and resources. According to Vasquez, "[n]o other construction makes sense. . . ." *Id.*

Vasquez has not been consistent throughout this litigation in his interpretation of the statutory language. As previously discussed, Vasquez's briefing in the Fifth Circuit argued that the standard was "*whether a reasonable attorney exercising due diligence* would have discovered the factual predicate. . . ." Circuit Reply Brief, at 16 (relying on *Will*, 970 F.3d at 541-42 (emphasis added)). Vasquez now interprets section 2244(b)(2)(B)(i) differently. Vasquez has not pointed to any change in the law or other

development that would require reinterpretation of the legal standard. Vasquez's interpretation of the legal standard may stem from the fact that his only substantive claim remaining—the *Strickland* claim—presumes that a reasonable attorney could have uncovered the conflict in the toxicology evidence well before trial. To proceed in this action, Vasquez must draw section 2244(b)(2)(B)(i)'s attention away from what his prior attorneys could have discovered.

Respondent agrees with Vasquez's earlier interpretation of the statute and argues that "[t]he diligence inquiry of § 2244(b)(2)(B)(i) . . . turns on what *reasonable defense counsel* would have done based on the information available to them at the trial (and thereafter)." D.E. 30 at 19 (emphasis added). The parties, therefore, now debate whether section 2244(b)(2)(B)(i)'s focus is on an inmate or an objectively reasonable attorney.

II. Fifth Circuit Law

At least in those cases where an inmate has legal counsel during the initial federal proceedings,[16] the Fifth Circuit has set out the section 2244(b)(2)(B)(i) diligence requirement as asking whether "*a reasonable*

16. Many habeas petitioners come before a federal court without legal representation. Cases discussing the AEDPA's diligence inquiry often only refer to a "petitioner," a stylistic construction which makes sense because (1) unrepresented inmates often file successive petitions and (2) courts generally rely on agency principles to impute the actions of a habeas attorney to their clients.

attorney would have been put on notice" of a claim's factual predicate. *Blackman v. Davis*, 909 F.3d 772, 779 (5th Cir. 2018) (emphasis added). The Fifth Circuit established the reasonable-attorney standard in *Johnson*, 442 F. 3d at 908. *See also Blackman*, 909 F.3d at 779 (recognizing that the Fifth Circuit in *Johnson* set out the "reasonable attorney standard"). In *Johnson*, the inmate sought to raise a *Brady* claim in a successive habeas petition. He focused on his individual inability to discover material suppressed by the State; the respondent argued that the allegedly suppressed material was "available to anyone who sought it." *Johnson*, 442 F.3d at 907. The court first decided that "the plain language of the statute" measures due diligence "against an objective standard, as opposed to the subjective diligence of the particular petitioner of record." *Id*. at 907-08; *see also In re Will*, 970 F.3d at 542 (following the "objective standard" from *Johnson*); *In re Davila*, 888 F.3d 179, 185 (5th Cir. 2018) ("[O]ur due diligence inquiry under Section 2244(b)(2)(B) is objective. . . .").[17] Having framed the inquiry objectively, the *Johnson* court

17. The Fifth Circuit's use of an objective standard finds its roots in the "distinction in congressional language between the two paths by which a successive petition may be raised":

> AEDPA permits the filing of a successive petition when either "*the applicant* shows that the claim relies on a new rule of constitutional law . . . ," § 2244(b)(2)(A) (emphasis added), or when "the factual predicate for the claim *could not have been discovered* previously through the exercise of due diligence" and the petitioner establishes prejudice in the absence of successive review, § 2244(b)(2)(B) (emphasis added).

Johnson, 442 F.3d at 907-08.

turned to the question of diligence. In doing so, the fact that an attorney had represented the inmate throughout the proceedings became an important concern. The court asked whether a "reasonable attorney" would be "on notice" of the *Brady* claim's factual predicate. *Johnson*, 442 F.3d at 908.

The *Johnson* court found support for its reading counsel's due diligence into the section 2244(b)(2)(B) inquiry by referencing Supreme Court cases interpreting a nearly identical AEDPA provision. *Cf. Nijhawan v. Holder*, 557 U.S. 29, 39 (2009) ("Where, as here, Congress uses similar statutory language . . . in two adjoining provisions, it normally intends similar interpretations"). For example, even though the text of section 2254(e)(2) requires a subjective review of whether an inmate "has failed to develop the factual basis of a claim in State court proceedings," the Supreme Court still asks whether the record contains evidence "which would have put a reasonable attorney on notice" of an inmate's claims. *Williams v. Taylor*, 529 U.S. 420, 442 (2000). The Fifth Circuit relied on the *Williams* Court's interpretation of section 2254(e) when setting out a reasonable-attorney standard in *Johnson*. *See Johnson*, 442 F.3d at 908 (quoting *Williams*); *see also Will*, 670 F.3d at 541 (quoting *Williams* when deciding whether an attorney demonstrated diligence).

Since the *Johnson* case, the Fifth Circuit has consistently used the reasonable-attorney standard

when measuring diligence.[18] The Fifth Circuit focuses on whether "an *objectively diligent attorney* could have conducted such an investigation during the initial habeas proceeding" which would have led to the facts underlying the successive petition. *In re Cantu*, 94 F.4th 462, 472 (5th Cir. 2024) (emphasis added); *see also Will*, 970 F.3d at 541-42.

Vasquez relied on the Fifth Circuit's reasonable-attorney standard in his Fifth Circuit briefing. Vasquez's briefing, nonetheless, now champions an "objective inmate" standard which would assess diligence in the context of "a hypothetical inmate seeking post-conviction relief similarly situated to the petitioner." D.E. 42 at 27.

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18. Numerous Fifth Circuit cases have looked at section 2244(b)(2)(B)'s diligence requirement through the prism of a reasonable-attorney standard. *See In re Cantu*, 94 F.4th 462, 472 (5th Cir. 2024) (asking whether "an objectively diligent attorney could have conducted such an investigation during the initial habeas proceeding"); *In re Will*, 970 F.3d 536, 542 (5th Cir. 2020) ("[T]here was no reason for Will *or his counsel* to suspect that documents were being withheld or to do more than they did to uncover the withheld evidence."); *In re Davila*, 888 F.3d 179, 185 (5th Cir. 2018) (denying successive review because the court was "unpersuaded that his counsel was not also reasonably on notice" of the facts); *In re Carty*, 824 F. App'x 271, 278 (5th Cir. 2020) (discussing "her and her counsel's diligence"); *In re Swearingen*, 935 F.3d 415, 421 (5th Cir. 2019) (observing that the inmate's "attorneys were obviously aware at trial" of information which would have led to the factual basis for the inmate's successive claim); *Blackman v. Davis*, 909 F.3d 772, 779 (5th Cir. 2018) (asking whether "[a] reasonable attorney would have been put on notice" of the facts).

Vasquez has not identified any law adopting that specific standard. The Court lacks authority to reinterpret the Fifth Circuit's use of a reasonable-attorney standard.

Four of Vasquez's arguments, however, warrant additional discussion: (1) the Fifth Circuit would not have let his claim pass the first gateway review if it had followed its own law; (2) errors by counsel which amount to a constitutional violation should not be imputed to the inmate; (3) he is not responsible for any lack of diligence by his habeas attorneys; and (4) an inmate should not be responsible under agency principles for failures based on an attorney's constructive knowledge of facts. Because the viability of Vasquez's federal petition turns on the interpretation of section 2244(b)(2)(B)(i), the Court will discuss each argument below.

A. The First Gateway Review

Vasquez criticizes Respondent's argument that "the only relevant question under § 2244(b)(2)(B)(i) is whether Vasquez's lawyers could have previously (*i.e.*, before the filing of his first federal petition) discovered the factual predicate for his claims." D.E. 42 at 25. Vasquez disputes the application of a reasonable-attorney standard, arguing that "if the analysis were that simple, the Fifth Circuit would never have granted Vasquez permission to file" his successive claim. D.E. 42 at 25. The Fifth Circuit's cursory order provides little insight into why it found that Vasquez's *Strickland* claim had passed through the first AEDPA gateway. In that court, both parties briefed the section 2244(b)(2)(b)(i) inquiry under the Fifth Circuit's

reasonable-attorney standard. Vasquez did not ask the Fifth Circuit to apply a different standard and nothing in the record suggests that it did so. Given the Fifth Circuit's regular use of a reasonable-attorney standard, the Court will not assume it has rejected its precedent *sub silentio*. The Fifth Circuit's tentative authorization of Vasquez's *Strickland* claim does not itself represent a repudiation of its prior law.

B. No Constitutional Right to Effective Habeas Representation

Vasquez argues that a court should not hold an inmate responsible for his attorney's constitutional errors. Citing cases such as *Davila v. Davis*, 582 U.S. 521 (2017) and *Murray v. Carrier*, 477 U.S. 478 (1986), Vasquez says that "the Sixth Amendment to the United States Constitution precludes in this context imputing to a petitioner any actions or failures by counsel that fell below an objective standard of reasonable representation." D.E. 23 at 29. Vasquez's argument relies on "the cardinal rule that errors by trial counsel in a proceeding in which the client has a Sixth Amendment right to counsel are 'imputed to the State' and are 'external' to the client." D.E. 42 at 26 (quoting *Davila*, 582 U.S. at 528).

Vasquez's argument is correct, insofar as it goes. Courts attribute an attorney's error of constitutional magnitude to the State, not the attorney's client. *See Davila*, 582 U.S. at 528. Nevertheless, an individual does not have a constitutional right to effective representation at every stage of the legal process. A criminal defendant

enjoys a constitutional right to counsel both at trial and on appeal, but that right ends at the conclusion of a direct appeal. *See Shinn*, 596 U.S. at 386; *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007). Accordingly, the federal constitution does provide for effective legal representation on state or federal habeas review. *See Davila*, 582 U.S. at 530; *Ogan v. Cockrell*, 297 F.3d 349, 357 (5th Cir. 2002). In those proceedings, courts generally "attribute[] to the prisoner under 'well-settled principles of agency law'" any "[a]ttorney error that does not violate the Constitution " *Davila*, 582 U.S. at 528 (quoting *Coleman v. Thompson*, 501 U.S. 722, 754(1991)).

Section 2244(b)(2)(B)(i)'s requirements focus a court's attention on the filing of an initial federal petition, a period when an inmate has no constitutional right to counsel. Vasquez has not shown that any lack of diligence at that time should be attributed to the State.

C. *Martinez v. Ryan*

Vasquez focuses his argument on a "an objectively reasonable petitioner" standard "because, in this assessment, some actions or failures by a petitioner's lawyers may be imputable to the petitioner, but that is not true of all such actions or failures." D.E. 23 at 29. Vasquez's briefing repeatedly relies on *Martinez v. Ryan*, 566 U.S. 1 (2012), to exculpate him from any alleged deficient representation by his initial state or federal habeas attorneys. D.E. 23 at 32-34; D.E. 42 at 33. Vasquez specifically contends that "investigative failures of habeas counsel amounting to the sort of ineffective

assistance considered in *Martinez* are not attributable to the petitioner." D.E. 42 at 33.

In *Martinez*, the Supreme Court considered whether to recognize an equitable exception to the judicially created procedural-bar doctrine. Out of respect for independent and adequate state law, the procedural-bar doctrine generally forecloses federal consideration of claims which an inmate has defaulted in state court. The *Martinez* Court created an equitable exception when an inmate's state habeas counsel had defaulted an ineffective-assistance-of-trial-counsel claim. *See Allen v. Stephens*, 805 F.3d 617, 626 (5th Cir. 2015) (describing *Martinez*). It is unclear whether Vasquez requests an extension of *Martinez* into the successive-petition context or asks for an interpretation of the statute with *Martinez*'s equitable extension in mind. Either way, Vasquez argues that his "trial counsel and state habeas counsel were constitutionally ineffective, meaning, under *Martinez* . . . , that their failures are not imputed to Vasquez." D.E. 23 at 37.[19]

19. The Court pauses to note that the Court of Criminal Appeals' dismissal has placed Vasquez in a difficult posture given the various procedural hurdles he faces. Even if Vasquez passed through the AEDPA's successive-petition hurdle by meeting the requirements of section 2244(b)(2)(B), the state court's reliance on Texas Code of Criminal Procedure article 11.071 § 5(a)'s abuse-of-the-writ provisions could bar federal consideration of his underlying *Strickland* claim, unless Vasquez can overcome the procedural bar. *See Gutierrez v. Stephens*, 590 F. App'x 371, 383-84 (5th Cir. 2014). Vasquez says that he anticipates arguing under *Martinez v. Ryan*, 566 U.S. 1 (2012), that state habeas counsel provided deficient representation for not raising the

The Court does not need to decide whether Vasquez's earlier attorneys were ineffective under the *Martinez* framework. *Martinez* created a "narrow" exception to the procedural-bar doctrine which is "highly circumscribed" and available only in "limited circumstances." *Davila*, 582 U.S. at 531; *see also Speer v. Stephens*, 781 F.3d 784, 785 & n.4 (5th Cir. 2015) (noting the "limited nature" and "narrowness" of the *Martinez* exception). *Martinez* only exists to forgive the procedural bar of ineffective-assistance-of-trial-counsel claims. *See Davila*, 582 U.S. at 525; *see also Prystash v. Davis*, 854 F.3d 830, 836 (5th Cir. 2017). The Supreme Court has not extended *Martinez* beyond those narrow parameters, much less to section 2244(b)(2)(B)(i)'s diligence inquiry. The Supreme Court has specifically held that *Martinez* is not an exception to AEDPA's statutory requirements. For example, in *Shinn*, 596 U.S. 366, the Supreme Court recently refused to extend *Martinez* to a comparable AEDPA provision dealing with evidentiary development. In *Shinn*, the inmate "propose[d] extending *Martinez* so that ineffective assistance of postconviction counsel can excuse a prisoner's failure to develop the state-court record" under the comparable due-diligence provision of section

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toxicology-conflict issue during his initial state habeas action. *See* Circuit Proposed Petition, at 8 (filed April 21, 2023). Vasquez anticipates arguing that "the failure of [his] prior habeas counsel to raise that trial counsel was ineffective for not exposing that the cocaine evidence was false constitutes 'cause' to allow Vasquez to now pursue this claim for ineffective assistance at trial." *Id.* at 8. Tension exists between Vasquez's arguments under section 2244(b)(2)(B)—saying that his *Strickland* claim was not discoverable until 2019—and any *Martinez* argument.

2254(e)(2). *Shinn*, 596 U.S. at 384. *Shinn* specifically found that "Congress foreclosed [any] proposed expansion of *Martinez* when it passed AEDPA" because the courts "have no power to amend" statutory language. *Id.*

Vasquez seems to suggest that some difference exists between extending *Martinez* as an exception to AEDPA and relying on *Martinez* to interpret AEDPA. Vasquez argues that "it is not dispositive that Vasquez's state habeas lawyers, had they exercised greater diligence, could have discovered that the cocaine evidence was false and that Vasquez's trial lawyers had been ineffective in failing to expose that falsity," because under *Martinez*'s equitable exception, "that failure is *not* imputed to the petitioner." D.E. 23 at 32. Courts recognize equitable exceptions, such as in *Martinez*, to "judge-made rules" such as the procedural-bar doctrine under certain circumstances. Courts, however, have no latitude to create equitable exceptions when interpreting statutory language. *See Shinn*, 596 U.S. at 386-87 (finding that, "unlike for procedural default," federal courts "lack equitable authority to amend a statute"). The Supreme Court in *Shinn* rejected the inmate's "equitable rewrite" of the comparable diligence provision of section 2254(e)(2) based on an attorney's ineffectiveness. *Id.* at 386. The Court reviewed its pre-AEDPA and AEDPA cases which "made . . . clear" that "a state prisoner is responsible for counsel's negligent failure to develop the postconviction record" and "'must bea[r] responsibility' for all attorney errors during those proceedings." *Id.* at 383. This Court finds that *Martinez* does not authorize an equitable interpretation of section 2244(b)(2)(B)(i). *Martinez*

does not provide a basis to question the Fifth Circuit's interpretation of section 2244(b)(2)(B)(i).

D. Agency

Vasquez's *Martinez* argument creates a problem for him: "By accusing [habeas] counsel of ineffectiveness in not presenting [successive] claims in [earlier] proceedings, [an inmate] is necessarily acknowledging that, with due diligence, the evidence in support could have been presented . . . before he ever got to federal court." *Moreland v. Robinson*, 813 F.3d 315, 326 (6th Cir. 2016); *see also In re Hutton*, 2017 WL 6603596, at *3 (6th Cir. 2017) ("Hutton's claim that post-conviction counsel was ineffective for failing to obtain the alleged new evidence precludes the requisite showing of due diligence to be successful here."). Accordingly, Vasquez contends that traditional agency principles should not make him personally responsible for his attorneys' failure to raise the *Strickland* claim.[20]

Vasquez's briefing attempts to draw a distinction "between any actual knowledge gained by habeas counsel and any constructive knowledge they could have acquired, but failed to learn." D.E. 42 at 29. In Vasquez's view, agency principles should apply only to things the petitioner

20. Vasquez also argues that "there were no failures of federal habeas counsel to impute to Vasquez" because he could not include an unexhausted claim in his initial habeas petition. D.E. 23 at 35-36. Section 2244(b)(2)(B)(i)'s due-diligence standard does not ask whether a claim would have been procedurally actionable, only whether it was previously discoverable with due diligence.

knew himself but any "constructive knowledge" should not be "imputed to Vasquez . . . to show that [he], in the exercise of due diligence, could have discovered the factual predicate for his claims by 2006." D.E. 42 at 30. In other words, Vasquez essentially says that he should only be responsible for what his attorneys knew, not what they should have known.

The Fifth Circuit's use of an objective reasonable-attorney standard imputes to a client what his habeas attorney could have discovered. *See Carty*, 824 F. App'x at 278; *In re Swearingen*, 935 F.3d 415, 421 (5th Cir. 2019); *Blackman*, 909 F.3d at 779.[21] Generally, "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397 (1993). Even in habeas cases, "the attorney is the prisoner's agent" and "under well-settled principles of agency law, the principal bears the risk of negligent conduct on the part of his agent." *Maple v. Thomas*, 565 U.S. 266, 281 (2012); *see also Shinn*, 596 U.S. at 382 (finding an inmate "at fault"

21. In a pre-AEDPA case, the Fifth Circuit found under the former abuse-of-the-writ provisions of federal habeas law that an inmate defaulted consideration of his successive claims because he had been represented by counsel and the inmate "is chargeable with that awareness that a competent lawyer would have possessed." *Jones v. Estelle*, 722 F.2d 159, 169 (5th Cir. 1983); *see also Miller v. Bordenkircher*, 764 F.2d 245, 252 (4th Cir. 1985); *Daniels v. Blackburn*, 763 F.2d 705, 707 (5th Cir. 1985). The Fifth Circuit has labeled this a "presumption of constructive attribution" which makes a represented inmate "properly chargeable with the knowledge of his competent habeas counsel. . . ." *Hamilton v. McCotter*, 772 F.2d 171, 181 (5th Cir. 1985).

for his attorney's failure to develop habeas claims under the comparable provisions of section 2254(e)(2)); *Holland v. Jackson*, 542 U.S. 649, 653 (2004) ("Attorney negligence . . . is chargeable to the client."); *Williams*, 529 U.S. at 432 ("Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*.") (emphasis added). The Supreme Court has held that any "[a]ttorney error that does not violate the Constitution"—which includes any lack of diligence in preparing claims for a federal habeas petition—"is attributed to the prisoner under 'well-settled principles of agency law.'" *Davila*, 582 U.S. at 528 (quoting *Coleman*, 501 U.S. at 754). "[I]n the post-conviction context," this includes "the mistakes of counsel" which "are constructively attributable to the client. . . ." *Holland v. Florida*, 560 U.S. 631, 652 (2010) (Alito, J., concurring in part).

Vasquez has not identified any case drawing a distinction between actual and constructive knowledge under AEDPA's successive-petition provisions.[22] The

22. At one time, the Fifth Circuit drew a distinction between an inmate's actual and constructive knowledge of the facts underling a successive petition, but only in limited circumstances. "Pro se petitioners [were] held guilty of abus[ing the habeas writ] only if they had 'actual knowledge' of the facts and theories of the new claims when they filed earlier petitions." *Woods v. Whitley*, 933 F.2d 321, 324 n.6 (5th Cir. 1991). When an inmate "was represented by appointed counsel whose competency he [had] not questioned" in a successive proceeding, the inmate was "chargeable with that awareness that a competent lawyer would have possessed." *Jones v. Estelle*, 722

Fifth Circuit's long-standing objective approach to section 2244(b)(2)(B)(i) imputes both actual or constructive knowledge of the facts to an inmate. *See Johnson*, 442 F.3d at 908 ("[T]he plain text of § 2244(b)(2)(B) suggests that due diligence is measured against an objective standard, as opposed to the subjective diligence of the particular petitioner of record."). The Court finds that Vasquez has not shown that his attorneys' constructive knowledge of facts should not be attributable to him.

III. Conclusion of Section 2244(b)(2)(B)(i) Standard

"Under ordinary circumstances—and there is no room for the application of a different principle here—a lawyer's knowledge is attributed to [his] client." *Wood*, 487 F.3d at 4-5 (considering diligence under section 2244(d)(1)(d)). The Court finds that Vasquez has not called into question the Fifth Circuit's reliance on a "reasonable-attorney standard" in measuring diligence under section 2244(b)(2)(B)(i) when a counsel represents the inmate

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F.2d 159, 169 (5th Cir. 1983). Under that line of cases, however, the omission of a claim was insufficient to prove the incompetency of counsel. *See Daniels v. Blackburn*, 763 F.2d 705, 710 (5th Cir. 1985). The Fifth Circuit, however, found that the Supreme Court overruled that line of cases in *McCleskey v. Zant*, 499 U.S. 467, 498 (1991), by holding an inmate responsible for procedural defects in a claim which he "knew or reasonably should have known," regardless of whether he was represented by counsel or not. *See Saahir v. Collins*, 956 F.2d 115, 119 (5th Cir. 1992); *see also McCleskey*, 499 U.S. at 498 ("Abuse of the writ doctrine examines petitioner's conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process.").

during the initial state habeas proceeding. The Court will apply that standard to Vasquez's *Strickland* claim.

APPLICATION OF SECTION 2244(B)(2)(B)(I)

"Habeas petitioners must, regardless of the merits of their underlying . . . claims, exercise diligence in seeking out the factual predicate for a claim ahead of their initial habeas petition." *Carty*, 824 F. App'x at 277. This Court must decide "whether due diligence at the *time of the first habeas petition* would have resulted in the discovery of the factual basis for [Vasquez's] new claim such that it could have been included in the first petition." *Davila*, 888 F.3d at 184 (emphasis in original).

Vasquez must "articulate a reason why the evidence was not available earlier." *Carty*, 824 F. App'x at 276. Throughout his briefing, Vasquez has alleged layers of deficient legal representation relating to the cocaine testimony. Because Vasquez's briefing depends on his petitioner-centered interpretation of the section 2244(b)(2)(B)(i) standard, he essentially concedes that "there is overwhelming evidence" that his habeas attorneys could have "uncover[ed] the falsity of the cocaine evidence, which in turn led to their failure to raise the claim that trial counsel had ineffectively addressed the cocaine issue. . . ." D.E. 23 at 32. In other words, Vasquez essentially admits that a reasonable attorney could have discovered the basis for his *Strickland* claim. D.E. 23 at 32-34.

Aside from Vasquez's concession, the Court's own review confirms that the factual predicate for Vasquez's

Strickland claim could have been discoverable previously through the exercise of due diligence. The Toxicology Report has been available to Vasquez's attorneys since before trial. In their initial steps, Vasquez's trial attorneys investigated the alleged cocaine ingestion by interviewing the State's two trial experts, medical examiner Dr. White and toxicologist Dr. Backer. Through their investigation, trial counsel developed a defense which argued that the evidence did not prove that Vasquez had injected cocaine into the victim.

The attorneys who now represent Vasquez initially approached the cocaine evidence with the same focus as his trial attorneys: "to see if [they] could develop any further support for the proposition that cocaine could have gotten into Miranda's system without action by Vasquez . . . hoping to blunt the State's suggestion that Vasquez had injected Miranda with cocaine." D.E. 37-2 at 64. Their investigation, however, resulted in the discovery of the conflict in the Toxicology Report. Nothing about the state of the evidence had changed when the federal attorneys began their investigation into the cocaine. The basic evidentiary landscape was the same; no new facts came to light. Federal counsel apparently came upon the conflict simply because they had hired an expert, Dr. Valentine.

The key difference which resulted in the successive claim now before the Court was how the attorneys chose to investigate the cocaine evidence. Vasquez argues that "[w]ithout a detailed understanding of toxicology," a lay person" or "any lawyer" would not "have appreciated that a negative result on the Drugs of Abuse screen was

inconsistent with a positive . . . finding for cocaine." D.E. 14 at 28. "[D]iscovering that the cocaine evidence was false would have required consultation with a trained toxicologist." D.E. 14 at 29. The record confirms that the conflict in the Toxicology Report could have been discovered at trial or afterwards simply by hiring a toxicologist. *See* D.E. 23 at 35 (conceding that his initial federal habeas attorney "could conceivably have discovered the factual predicate for Claim 6" if they had "consult[ed] an independent toxicologist"). Nothing prevented the discovery of the conflict, had Vasquez's prior attorneys taken the same investigative approach to the evidence as his current attorneys.

A careful review of the trial record would suggest the need for post-conviction inquiry into how trial counsel had handled the cocaine evidence.[23] Dr. Backer's trial

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23. Vasquez now relies on an affidavit from one of his initial habeas attorneys explaining: "[W]e understood that we were limited to raising claims that had been previously raised in Mr. Vasquez's state habeas application. We did *not* understand that we had been appointed to, or had the ability to, assert new claims not previously raised in state court." D.E. 23-2 at 2-3. Vasquez's initial federal attorney continues: "Given that our representation was limited to asserting in federal court claims that had previously been raised in state court, we did not retain an independent toxicologist to review the Toxicology Report." *Id.* at 3. True, AEDPA preludes habeas relief on any issue not first presented to the state courts. *See* 28 U.S.C. § 2254(b)(1). Yet the vast corpus of federal jurisprudence dealing with the procedural-bar doctrine and the federal stay-and-abeyance process attests to the fact that, despite serious procedural barriers, federal petitioners regularly file claims for the first time in federal court. Vasquez has not pointed to any federal prohibition

testimony on its face could have signaled the need for inquiry. Both Vasquez's trial counsel and his initial state habeas counsel explained that an attorney would only understand that "there was a conflict in the report" if he "knew" or "understood" "that a screen for 'Drugs of Abuse' was designed to detect cocaine." D.E. 37-1 at 52; 37-1 at 59; *see also* D.E. 14 at 27-28. While perhaps somewhat unclear, Dr. Backer testified that the screening test "measured the reaction to various drugs," including "cocaine." D.E. 32-14 at 10. Vasquez now disputes the clarity of this testimony, but even so, the mention of cocaine when discussing the screening test could prompt investigation into Dr. Backer's testing.

Additionally, inconsistencies between Dr. Backer's trial testimony and the Toxicology Report could have signaled the need to investigate how trial counsel handled that evidence. Dr. Backer testified that the screening test came back "positive," a conflict with the findings recorded in the Toxicology Report. A careful reading of Dr. Backer's testimony provided a springboard for a post-conviction investigation into how counsel appropriately handled the cocaine-ingestion evidence.

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on federal habeas counsel investigating and raising new claims. The law only limits what review unexhausted claims may receive. Further, Vasquez has also not pointed to any place in the record where the Court limited his federal habeas attorneys' appointment only to raising exhausted claims. How Vasquez's initial federal attorneys may have understood their appointment does not alter how the Court will assess whether the facts of his successive claim were discoverable.

In the end, this is not a case where "the trial record contains no evidence which would have put a reasonable attorney on notice" of the factual basis for Vasquez's successive claim. *See Will*, 970 F.3d at 541 (quotation omitted). From either a review of the trial record or from seeking the assistance of a toxicologist, the building blocks for Vasquez's successive *Strickland* claim were easily available when he filed the initial federal habeas petition. Vasquez "by reasonable means could have obtained . . . a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process. . . ." *McCleskey v. Zant*, 499 U.S. 467, 498 (1991).

Vasquez fails to show "that the factual predicate for his new habeas claim could not have been discovered through the exercise of due diligence and thus could not have been included in his first federal petition." *Davila*, 888 F.3d at 186. The Court finds that Vasquez, therefore, cannot satisfy section 2244(b)(2)(B)(i) as it pertains to the only claim on which the Fifth Circuit tentatively authorized successive review. The Court will grant Respondent's motion to dismiss.

CERTIFICATE OF APPEALABILITY

Vasquez must receive a Certificate of Appealability ("COA") before the Fifth Circuit may consider any appeal from this Order. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); Rule 11(a) of the Rules Governing Sections 2254 Proceedings for the United States District Court. "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying

constitutional claim," as the Court has done in this case, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Vasquez has raised important constitutional questions which procedural law prevents from reaching full federal review. With the Fifth Circuit's tentative authorization of successive proceedings, and considering the serious issues raised by the successive petition, the Court grants a COA on the question of whether successive federal review is available for Vasquez's *Strickland* claim.

CONCLUSION

Vasquez has requested oral argument. D.E. 43. The parties' briefing has provided a sufficient basis for resolution of the legal questions before the Court. The Court finds that Vasquez has not met section 2244(b)(2)(B)'s first prong by showing that his *Strickland* claim—the only claim tentatively authorized for successive merits review by the Fifth Circuit—was not previously discoverable with due diligence. Because "the requirements of Section 2244(b)(2)(B) are conjunctive," the Court does not need to proceed to the question of whether he has shown his actual innocence. *See Davila*, 888 F.3d at 186. Vasquez's failure to comply with section 2244(b)(2)(B)(i) conclusively forecloses federal review of his claim.

Appendix C

Vasquez's successive petition raises important issues worthy of serious review, but ones which come before the Court in a manner constrained by statute. Procedure precludes addressing the substance of Vasquez's constitutional claims, no matter how serious they may be. With that in mind, the Court

> do[es] not suggest that in striving to both convict the guilty and free the innocent, criminal process can look away from exculpatory evidence with such potential explanatory power. Rather, we remind that this is a court of limited jurisdiction, only part of an entire system. We are persuaded that Congress has withheld jurisdiction from this court to grant the requested relief here. On the facts of this case, Petitioner must obtain his relief from other parts of this process, a process in which each player does his job.

In re McGinn, 213 F.3d 884, 885 (5th Cir. 2000).

The Court, therefore, **GRANTS** Respondent's Motion to Dismiss. (D.E. 30). The Court **DISMISSES** this case **WITH PREJUDICE**. The Court **GRANTS** a Certificate of Appealability on the question of whether Vasquez has met AEDPA's standards for successive review.

The Clerk will deliver a copy of this Order to the parties.

ORDERED on February 11, 2025.

/s/ Nelva Gonzales Ramos
NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

APPENDIX D — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION, FILED FEBRUARY 11, 2025

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION NO. C-23-168

RICHARD VASQUEZ,

Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

FINAL JUDGMENT

Pursuant to the Memorandum and Order entered this day, the Court **DISMISSES** this case **WITH PREJUDICE**.

This is a final judgment.

The Clerk will deliver a copy of this Order to the parties.

Appendix D

ORDERED on February 11, 2025.

/s/ Nelva Gonzales Ramos
NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

APPENDIX E — UNPUBLISHED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 23, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-40079

IN RE RICHARD VASQUEZ,

Movant.

On Motion for Authorization to File
Successive Petition for Writ of Habeas Corpus
in the United States District Court for the
Southern District of Texas

Filed June 23, 2023

UNPUBLISHED ORDER

Before HAYNES, ENGELHARDT, and WILSON, *Circuit Judges*.

PER CURIAM:

In June 1999, Richard Vasquez, a Texas prisoner, was convicted of capital murder and sentenced to death for killing his girlfriend's four-year-old-daughter, Miranda. During the guilt and penalty phases of trial, the state prosecutors (the "State") introduced testimony and presented arguments that Miranda: (1) was severely sexually assaulted before she died; (2) suffered blows

to the head that were equivalent in force to being in a 65-mile-per-hour car accident; and (3) had cocaine levels in her blood that were double the lethal amount for an adult.

1n 2006, Vasquez previously petitioned for federal habeas relief under 28 U.S.C. § 2254. The district court denied the requested relief but granted a COA on Vasquez's claim that he received ineffective assistance of counsel at trial and on appeal. We affirmed, and the Supreme Court denied certiorari review. *See Vasquez v. Thaler*, 389 F. App'x 419, 432 (5th Cir. 2010) (per curiam), *cert. denied*, 563 U.S. 991 (2011).

Vasquez has now filed a motion in this court seeking an order authorizing the filing of a second petition for writ of habeas corpus under 28 U.S.C. § 2244(6)(3)(A). His proposed petition asserts nine claims: (1) he is actually innocent of the crime of capital murder; (2) he is actually innocent of the death penalty; (3) the State committed *Brady*[1] violations at his trial; (4) the State knowingly introduced false evidence at his trial; (5) the false evidence on cocaine materially affected his capital conviction and death sentence in violation of the Due Process Clause; (6) his attorney rendered ineffective assistance of counsel when he failed to discover the falsity of the cocaine evidence; (7) the junk science evidence materially affected his capital conviction and death sentence in violation of the Due Process Clause; (8) his attorney rendered ineffective assistance of counsel when he failed to investigate and counter the evidence of sexual assault; and (9) his attorney

1. *Brady v. Maryland*, 373 U.S. 83 (1963).

rendered ineffective assistance of counsel in failing to investigate and present mitigating evidence.

Because Vasquez has already filed a federal habeas petition, he must receive authorization from this court to file another. *See* 28 U.S.C. § 2244(6)(3)(A); *In re Campbell*, 750 F.3d 523, 529-30 (5th Cir. 2014). For us to grant such authorization, Vasquez must make a prima facie showing of satisfying the requirements of § 2244(6)(2)(B). 28 U.S.C. § 2244(6)(3)(C); *In re Jones*, 998 F.3d 187, 188-89 (5th Cir. 2021). "A prima facie showing is simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Id.* at 189 (quotation omitted). Vasquez must show that: (1) the claims presented in the successive petition have not been presented previously in a prior application to this court, 28 U.S.C. § 2244(b)(1); (2) "the factual predicate for the claim[s] could not have been discovered previously through the exercise of due diligence," *id.* § 2244(b)(2)(B)(i); and (3) "the facts underlying the claim, if proven" would "be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Vasquez] guilty of the underlying offense," *id.* § 2244(b)(2)(B)(ii).

"At this stage, this court does not rule on the ultimate merits; it simply determines if" Vasquez's "habeas application deserves fuller review by the district court." *In re Will*, 970 F.3d 536, 541 (5th Cir. 2020). We conclude that Vasquez has made the requisite prima facie showing as to Claims 1, 2, and 6.[2] However, Vasquez fails to make

2. Claims 1 and 2 of Vasquez's proposed petition assert "actual innocence" claims "both as a gateway for consideration

a prima facie showing on Claims 3, 4, 5, and 7. Finally, Vasquez raised Claims 8 and 9 in his first federal habeas petition. Accordingly, we lack jurisdiction to consider them.

IT IS ORDERED that Vasquez's motion for authorization to file a successive habeas corpus petition is GRANTED as to Claims 1, 2, and 6,[3] and DENIED as to Claims 3, 4, 5, and 7. We DISMISS Vasquez's remaining claims—Claims 8 and 9—for lack of jurisdiction.

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of other constitutional claims and as . . . free-standing claim[s] that independently require[] relief." To be clear, this court "does not recognize freestanding claims of actual innocence on federal habeas review." *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009). "Instead, a successful actual-innocence claim provides a 'gateway' for the petitioner to proceed on the merits." *Floyd v. Vannoy*, 894 F.3d 143, 155 (5th Cir. 2018). Accordingly, the motion is granted relative to Claims 1 and 2 only insofar as they provide a "gateway" for the ineffective assistance of counsel claim set forth in Claim 6. *See id.*

3. We note that our grant here is only "tentative." *See id.* at 543. The district court is still tasked with "conduct[ing] its own thorough review to determine whether the requirements of § 2244(b)(2) have been satisfied." *Id.* (internal quotation marks and citation omitted). The district court "must dismiss the motion, without reaching the merits, if it determines that [Vasquez] ha[s] not met his burden." *Id.* Accordingly, we express no view on whether Vasquez will ultimately prevail on the merits—only that he has made a prima facie showing that Claims 1, 2, and 6 deserve fuller consideration.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 30, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 25-70005

RICHARD VASQUEZ,

Petitioner—Appellant,

versus

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:23-CV-168

Filed December 30, 2025

ON PETITION FOR REHEARING AND REHEARING EN BANC

Before HAYNES, ENGELHARDT, and WILSON, *Circuit Judges.*

*Judge Andrew S. Oldham, did not participate in the consideration of the rehearing en banc.

Appendix F

PER CURIAM:

IT IS ORDERED that Appellant's opposed motion to stay further proceedings in this Court is DENIED.

IT IS FURTHER ORDERED that the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5th CIR. R.40), the petition for rehearing en banc is DENIED.

APPENDIX G — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix G

Constitution of the United States

Fourteenth Amendment

Section 1

All persons born or naturalized in the United States, and subject t the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix G

28 U.S. Code § 2244 – Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(**4**) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(**c**) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear **in** such record by the exercise of reasonable diligence.

(d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

APPENDIX H — TOXICOLOGICAL LABORATORY REPORT, DATED MARCH 19, 1998

Universal Toxicology Laboratories, LLC.
l0210 Highway 80
Midland, TX. 79706
Tel: (915) 561-UTLI(8851)
FAX: (915) 561-5364

Toxicological Laboratory Report

Name: Miranda N Lopez
Medical Examiner: Dr. Lloyd White
Case Number: NC98-266
Company Name: Nueces Co. Medical Examiner

Drugs of Abuse Screen	
Blood	Negative
Confirmed GC/MS	
Blood Parent cocaine	0.18 mg/L
Blood Benzoylecgonine	0.42 mg/L
Blood Cocaethylene	Negative
Quantitative Tests	
Serum Alcohol, ethyl	Negative
Other Tests	
Blood Tricyclic Antidepressant screen	Negative
Blood Acetaminophen Screen	Negative

Test results are from antemortem specimens.

Appendix H

/s/ Donna Trautman
Donna Trautman
Sr. Toxicologist

/s/Patricia Berthold
Patricia Berthold
Forensic Chemist

/s/Ronald C. Backer
Ronald C. Backer, PhD., DABFT
President

March 19, 1998
Date

APPENDIX I — POSITION OF THE NUECES COUNTY DISTRICT ATTORNEY, DATED APRIL 19, 2023

Position of The Nueces County District Attorney

1. I am the District Attorney for Nueces County, Texas.

2. I understand that Richard Vasquez was convicted of capital murder and sentenced to death in Case No. 98-CR-0730-E in the 148th Judicial District Court of Nueces County, Texas.

3. In May 2019, I reviewed the circumstances surrounding Richard Vasquez's attempts to obtain post-conviction habeas relief from that conviction and death sentence. I determined, on behalf of the State of Texas, that the Subsequent Application for Post-Conviction Writ of Habeas Corpus that Mr. Vasquez filed on April 15, 2015, was meritorious and that Mr. Vasquez was entitled to relief.

4. Accordingly, at my direction, my office informed the Court at the hearing on Mr. Vasquez's application (June 3, 2019) that the State of Texas agreed to the Findings of Fact and Conclusions of Law proposed by Mr. Vasquez and further agreed that Mr. Vasquez's conviction and sentence should be set aside.

5. I understand that Mr. Vasquez is continuing to pursue relief from his conviction and sentence by filing certain new applications and motions. To the extent I

have authority to respond on behalf of the State of Texas to any such applications and motions, I hereby reiterate the position that Mr. Vasquez is entitled to habeas relief and that his conviction and sentence should be set aside.

6. In the interests of justice, Mr. Vasquez's conviction and sentence should be set aside.

/s/Mark A. Gonzalez
Mark A. Gonzalez

APPENDIX J — POSITION OF THE NUECES COUNTY DISTRICT ATTORNEY, DATED MAY 27, 2025

Position of The Nueces County District Attorney

1. My name is James Granberry. I am the District Attorney for Nueces County, Texas.

2. I was appointed to that office by Governor Abbott on October 6, 2023, to finish a term ending on December 31, 2024. In November 2024, l was elected by the voters of Nueces County to serve a four-year term that commenced on January 1, 2025.

3. I have been asked by counsel for Richard Vasquez to review his case. Mr. Vasquez was convicted of capital murder in Nueces County in 1999 and received the death penalty.

4. It is my understanding that Mr. Vasquez, through counsel, is pursuing a subsequent application for habeas relief in federal court. I further understand that the case is currently on appeal in the United States Court of Appeals for the Fiflh Circuit, Case No. 25-70005. The appeal is from an order of the United States District Court for the Southern District of Texas, Case No. 2:23-CV-168.

5. Based on my review of the affidavits of Dr. Lloyd White and Dr. Ronald C. Backer stating that they would change their testimony if they had been aware of the lab result enigma, I would agree that a jury asked to impose the ultimate sanction should have the benefit of this

evidence before doing so. I am convinced that Mr. Vasquez has raised serious issues that cast substantial doubt on the validity of his conviction and sentence.

Dated: May 27, 2025

/s/James D. Granberry
James D. Granberry
Nueces County District Attorney