

No. 25-1246

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does 28 U.S.C. § 2244(b)(2)(B)(i)'s reasonable diligence standard take into consideration that a petitioner was represented by counsel throughout his postconviction proceedings and, if so, is a petitioner exempt from that standard if his attorneys allegedly committed egregious misconduct or if the result is that no court would hear the claim's merits?
2. Are purportedly newly discovered suppression-of-evidence and false-testimony claims subject to the successive petition bar under § 2244(b)?
3. Does due process require that federal courts determine who has authority to speak for an inmate's custodian in habeas proceedings or that they defer to concessions made by parties not before it?

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INTRODUCTION

Richard Vasquez is a Texas inmate convicted of capital murder and sentenced to death for the beating and sexual assault of four-year-old Miranda Lopez. Over a decade after his initial federal habeas proceedings terminated, Vasquez was given authorization to file a successive petition raising a single ineffective-assistance-of-trial-counsel (IATC) claim related to evidence that Miranda had a potentially lethal dose of cocaine in her system. *See* App.84a. On second-gateway review, the district court dismissed Vasquez’s petition for failing to surmount the successiveness-bar, and the Fifth Circuit affirmed, holding Vasquez failed to meet either prong of 28 U.S.C. § 2244(b)(2)(B): he was neither diligent in discovering his IATC claim’s facts nor would those facts clearly and convincingly show his innocence. *See* App.1a–19a.

Vasquez now seeks certiorari review of the Fifth Circuit’s decision, along with two other issues: First, he challenges the Fifth Circuit’s interpretation and application of § 2244(b)(2)(B)(i)’s diligence standard, claiming he should not be held accountable for his prior attorneys’ actions. Second, he asks whether suppression-of-evidence and false-testimony claims are “second or successive” within § 2244(b). Third, he asks this Court to resolve an alleged dispute over which Texas agency can represent his custodian in federal-habeas proceedings and what level of deference is owed to competing viewpoints on his claims.

These questions are not review worthy. Vasquez provides no compelling reason for the Court to exercise its discretion—none of his questions are important or recurring, and his allegation of a circuit split is illusory. Regarding his first question, the Fifth Circuit correctly held Vasquez was not diligent in discovering his IATC claim when the evidence underlying it has been available since trial. His case, moreover, presents a host of vehicle problems: he does not challenge the Fifth Circuit’s alternative and sufficient holding that he failed to demonstrate his innocence with clear and convincing evidence, and his latter two questions were not adequately raised in the lower courts. There is also no live dispute regarding who should represent the State—the Director is Vasquez’s custodian and therefore the proper respondent, and the Nueces County District Attorney (DA) has said nothing on his own behalf in these proceedings. Further, to the extent Vasquez’s authority dispute centers on Texas law, the Court does not have jurisdiction to resolve it. Certiorari should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

On the morning of March 5, 1998, Vasquez injected himself with heroin and soon thereafter drove his girlfriend, Brenda Lopez, to work. 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. 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.

...

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.” 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.^[FN2] 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.^[FN3]

^[FN2]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.

^[FN3]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.

App.2a–5a (footnote omitted) (citations omitted).

II. Course of Proceedings

A. Initial postconviction proceedings

Vasquez was convicted of capital murder and sentenced to death. ROA.7034–36. Vasquez unsuccessfully appealed, *see* ROA.12488, and sought both state and federal postconviction relief, *see* ROA.12499; *Vasquez v. Quarterman*, No. CC-55-059, 2008 WL 859147 (S.D. Tex. Mar. 28, 2008); *Vasquez v. Thaler*, 389 F. App'x 419 (5th Cir. 2010). Vasquez did not raise a claim concerning the cocaine evidence in these proceedings.

B. Subsequent state habeas proceedings

Vasquez was scheduled to be executed in 2015, but before that date he filed a subsequent state habeas application, raising three state-law claims related to Miranda's head trauma. *See* ROA.18986. The Texas Court of Criminal Appeals (TCCA) stayed Vasquez's execution, *see* ROA.18912, and remanded the claims to the trial court for merits consideration, *Ex parte Vasquez*, No. WR-59,201-03, 2016 WL 8808823 (Tex. Crim. App. Mar. 23, 2016).

While preparing for an evidentiary hearing, Vasquez's counsel—his current federal habeas attorneys—hired an independent toxicologist. *See* ROA.6110. That expert, Dr. Jimmie Valentine, flagged an inconsistency on the face of the toxicology report:

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.

App.6a. Arguing that the inconsistency made the cocaine testimony false, Vasquez obtained and proffered declarations from Drs. Backer and White. ROA.1750–51; ROA.1793–95. Backer averred that the report's results

“represent an irreconcilable conflict” between the two tests, rendering the toxicology report on its face “not reliable evidence.” ROA.1750. Backer stated the conflict could not be resolved “absent a review of the underlying laboratory data,” but such records were no longer available. *Id.* White averred that, if he had been aware of the inconsistency in the report, he “would have insisted on a second toxicology report, and [he] would have taken steps to independently verify its accuracy, before including any mention of cocaine in [his] autopsy report or findings.” ROA.1794.

At the evidentiary hearing, Vasquez abandoned one of his claims and announced that the then-DA had conceded relief was warranted. *See* ROA.13601, 18986–87. Vasquez then presented his case, including the cocaine-related evidence he developed during his postconviction investigation. *See* ROA.13646–47, 13654.

The state trial court rejected the State’s concession because it had offered “no reasons or facts or law” in support. ROA.13678. The court then issued eighty-three pages of findings of fact and conclusions of law recommending denial of Vasquez’s remaining claims. ROA.13597–679. Though Vasquez did not raise an independent claim regarding the cocaine evidence, the trial court also entered numerous findings addressing it. ROA.13646–56. Specifically, the court found the toxicology report, “although certainly conflicting” and “rais[ing] concern,” was “not necessarily irreconcilable.” ROA.13654. The court found Vasquez had offered “no evidence that the results of the subsequent test were not true other than the entry of ‘Negative’” for the screening

test on the toxicology report. ROA.13655. And “even if the screen[ing] test result was negative, the fact remains that the subsequent testing did occur and the result showed the presence of cocaine in Miranda’s blood.” ROA.13654. More pointedly, if it’s true that a specific result on the confirmation test should have also been associated with a positive screening test result, then it is just as likely, if not more so, that “the screen test result was false and the confirmation result was true.” ROA.13655. Simply put, “because the [confirmation] results were positive indicating a combined concentration for cocaine and its metabolite, then the screen test was false.” ROA.13655.

Thus, “in light of the lack of any evidence that the results of the subsequent or confirmation tests were not true and the overwhelming evidence that . . . [they] were true,” the state habeas court found the mostly likely explanation for the “negative” “Drugs of Abuse” result was simply “clerical error.” ROA.13655. Implicitly finding Valentine not credible, ROA.13651, the court found: “the entry of a negative finding [on the screening test] is not true.” ROA.13655. Consequently, the trial testimony that Miranda had cocaine in her system was “reliable and credible evidence.” ROA.13655.

The TCCA adopted the trial court’s findings, dismissed the abandoned claim, and denied relief on the remaining two. *See* ROA.18987.

Six months later, Vasquez filed his fourth state habeas application, this time squarely presenting the cocaine evidence claims, including the authorized IATC

claim at issue here. *Ex parte Vasquez*, No. WR-59,201-04, 2022 WL 17660560 (Tex. Crim. App. Dec. 14, 2022). With it, Vasquez proffered declarations from himself, his trial counsel John Gilmore, his state habeas counsel Nicholas Trenticosta, and his current counsel Thomas Farrell. *See* ROA.19036.

The gist of these declarations was that nobody had subjective knowledge of the inconsistent reported results. *See* ROA.19037, 19041–42, 19048. Instead, trial counsel explained that he strategically chose to attack that Vasquez administered cocaine to Miranda, rather than attack the reported levels of cocaine in her system. ROA.19042. Both trial and state habeas counsel opined that their actions were reasonable. ROA.19042, 19048–49. Neither attorney hired an independent toxicologist. ROA.19042, 19049. Current counsel Farrell averred that “without the benefit of hindsight,” trial counsel’s decision to focus “on the manner in which the cocaine entered Miranda’s system” rather than attacking the accuracy of the report “was a reasonable strategy.” ROA.19054. Farrell also averred his opinion that trial counsel’s decision not to retain a toxicologist was “reasonable.” *Id.*

The TCCA dismissed Vasquez’s fourth writ as abusive without reaching its merits. *Ex parte Vasquez*, 2022 WL 17660560.

C. Successive federal habeas proceedings

While his fourth state writ was pending, Vasquez returned to federal district court and attempted to

reopen his initial proceedings. *See Vasquez v. Lumpkin*, No. 22-70009, 2023 WL 2238995 (5th Cir. Feb. 24, 2023). The district court denied Vasquez’s post-judgment motion as an unauthorized successive petition. *Id.* Vasquez unsuccessfully appealed, *id.* at *3, but simultaneously sought successive petition authorization, App.82a.

Vasquez sought authorization for nine claims, including actual innocence, suppression-of evidence and false-testimony under *Brady* and *Napue*,¹ and IATC for failure to discover the cocaine evidence’s falsity. App.82a–83a. Vasquez argued he made a prima facie showing of diligence under the Fifth Circuit’s “objective” test which “ask[s] in essence whether a reasonable attorney exercising due diligence would have discovered the factual predicate by the time the first federal habeas petition had been filed.” Reply Br. 12, *In re Vasquez*, No. 23-40079, slip op. (5th Cir. June 23, 2023).²

¹ *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

² As to his *Brady/Napue* claims, Vasquez argued diligence by relying on a prosecutor’s work product notes from a pre-trial interview with toxicologist Donna Trautman (“Trautman notes”) to suggest the State knew, and withheld, that the toxicology report was false and unreliable. *See* Reply Br. 10–11, *In re Vasquez*, No. 23-40079, slip op. (5th Cir. June 23, 2023); *see also* Pet.7. The notes said that “the initial screening” tests “just show[] positive or negative for drugs,” and the confirmatory test, i.e., the “chromatography,” “identifies the drug” and “the amount of drug in a compound.” ROA.6214. This was identical to Backer’s testimony at trial, *see* ROA.11431–32, except with *less* detail.

The Fifth Circuit authorized Vasquez’s instant IATC claim and the actual innocence claims “insofar as they provide a ‘gateway’ for the” IATC claim. App.83a & n.2. Vasquez, however, was denied authorization to file successive *Brady/Napue* claims. *Id.* at 84a.

Vasquez then filed his successive petition in district court. *See* ROA.8–65, ROA.387–441. To show diligence, he obtained and proffered four new declarations—three updated declarations from himself, Trenticosta, and Farrell, and the last, a new affidavit from one of his initial federal habeas attorneys. *See* ROA.443–689.

Where Trenticosta previously defended himself, his three-year-later declaration now averred that he chose not to investigate the cocaine evidence or hire an independent expert based on speculation and anecdotal knowledge that “Vasquez may have injected cocaine into Miranda in an effort to revive her after she had become unconscious.” ROA.444. He stated “[t]he failure to hire an independent toxicologist or to further investigate the cocaine issue is entirely attributable to [him], and was not the product of any informed decision-making by Mr. Vasquez.” *Id.* Initial federal habeas counsel explained that they did not investigate or raise any cocaine-related claims because they believed themselves limited to raising exhausted claims in federal court. *See* ROA.451.

The district court dismissed Vasquez’s petition as successive because he failed to show diligence, but it did not then analyze whether Vasquez proved his innocence under § 2244(b)(2)(B)(ii). App.71a–76a. But it granted Vasquez a COA. App.76a–77a.

On appeal, the Fifth Circuit affirmed, holding that Vasquez had proven neither diligence nor actual innocence by clear and convincing evidence. *See* App.10a–19a. Vasquez now seeks certiorari review.³ This response follows.

REASONS FOR DENYING THE WRIT

I. Vasquez Provides No Compelling Reason to Grant Review on the First Question Presented.

In Vasquez’s first question, he attacks the Fifth Circuit’s interpretation and application of the diligence

³ While these proceedings have been pending, Vasquez filed another successive petition in federal district court—a “protective” petition raising the *Brady/Napue* claims the Fifth Circuit already declined to authorize. *See* Pet. 2, *Vasquez v. Guerrero*, No. 4:26-CV-2253 (S.D. Tex. May 4, 2026), ECF No. 1. Vasquez calls the petition “protective” because it is meant to preserve his appellate remedies on his instant *Brady/Napue* claims, should this Court find them not adequately preserved. *Id.* At Vasquez’s request, *id.* at 3–4, the district court dismissed the petition without prejudice, Order 9, *Vasquez v. Guerrero*, No. 4:26-CV-2253 (S.D. Tex. May 4, 2026), ECF No. 8, and Vasquez has appealed, that proceeding running parallel to this one, *see* Br. Ltr., *Vasquez v. Guerrero*, No. 26-70008 (5th Cir. June 5, 2026).

Also parallel was a mandamus petition in the Texas Supreme Court seeking a declaratory judgment that the Attorney General of Texas (OAG) lacks authority to represent Vasquez’s custodian and present Respondent, the Director, in federal habeas litigation. *See* Pet., *In re Richard Vasquez*, No. 25-1143 (Tex. Dec. 23, 2025). The Texas Supreme Court recently denied Vasquez’s mandamus request. Order, *In re Richard Vasquez*, No. 25-1143 (Tex. June 19, 2026).

standard in § 2244(b)(2)(B)(i). Pet.24–33. He asks this Court to decide whose diligence is measured—his or his attorney’s—and presents this as a binary question upon which the circuits have split. *See id.* at 24–27. He does so because he effectively conceded in the lower courts that “there is overwhelming evidence’ that his habeas attorneys could have ‘uncover[ed] the falsity of the cocaine evidence’ sooner. *See* App.71a (quoting ROA.418). “In other words, Vasquez essentially admits that a reasonable attorney could have discovered the basis for his *Strickland*[*v. Washington*, 466 U.S. 668 (1984),] claim.” App.71a. Vasquez thus argues—as he must—that the objectively reasonable “person” whose diligence should be measured ought to be a hypothetical inmate with his exact background and characteristics, irrespective of whether he was represented by counsel. *See* Pet.26–27. Under that metric, Vasquez believes himself diligent. *Id.* at 27–29.

Vasquez provides no compelling reason to expend limited judicial resources on this question. The Fifth Circuit is aligned with other circuits, and with this Court, in holding that diligence is a fact-specific inquiry that *includes* whether the petitioner was represented by counsel; thus, Vasquez’s circuit split is illusory. And the Fifth Circuit’s determination that there are no exceptions to the successiveness-bar is consistent with this Court’s precedent. The Fifth Circuit’s straightforward application of § 2244(b)(2)(B)(i) to find Vasquez not diligent is correct. But even if not, this is a poor vehicle to review the question because the Fifth Circuit found his petition successive on an independent and alternative basis—failing to prove innocence—

meaning a decision in his favor would be essentially advisory. Certiorari should be denied.

A. The Fifth Circuit is not in conflict with other circuits or this Court.

Vasquez argues that the Fifth Circuit imposes a “reasonable lawyer” standard, bar none, when analyzing whether a petitioner was diligent under § 2244(b)(2)(B)(i). Pet.24. Vasquez says this puts the Fifth and Eleventh Circuits in conflict with seven others that “assess[] due diligence from the applicant’s perspective, without regard to facts a reasonably diligent lawyer could have discovered.” *Id.* at 25–26. Vasquez also argues that the Fifth and Eleventh Circuits’ standards conflict with *Johnson v. United States*, 544 U.S. 295, 307 (2005), which similarly applies “a reasonable-applicant standard” when interpreting 28 U.S.C. § 2255(f)(4). *See* Pet.28. Vasquez’s allegation of conflict relies on a faulty premise: that the reasonable-attorney and reasonable-applicant standards are mutually exclusive, and that the Fifth Circuit applies *only* the former, while almost all other circuits apply *only* the latter. That is not what the Fifth Circuit said or what other circuits do.

The Fifth Circuit held that “[w]hen 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). App.14a (emphasis added). It did so because its prior precedent “often looked to whether a ‘reasonable attorney’ could have discovered or was on notice of the factual predicate for

the petitioner’s new claim.” App.10a–11a (quoting *Johnson v. Dretke*, 442 F.3d 901, 908 (5th Cir. 2006)). And that prior precedent took direction from *Williams v. Taylor*, 529 U.S. 420 (2000), where the Court analyzed § 2254(e)(2)’s diligence requirement vis-a-vis *Brady* claims. See App.12a. The *Williams* 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.” App.12a (citing *Williams*, 529 U.S. at 442). If *Williams* recognized a separation between *Brady* claims and diligence under § 2254(e)(2), then § 2244(b)’s harsher jurisdictional standard should, too. See *Johnson*, 442 F.3d at 910–11. Thus, “the information a reasonable attorney would have been on notice of could be relevant to the” diligence analysis. App.12a.

The Fifth Circuit did not say that diligence is *always* or *solely* determined by what a reasonable attorney could have known or discovered. And it certainly did not say it would apply that standard even where a petitioner was *not* represented by counsel at the relevant time periods, though Vasquez hyperbolically suggests otherwise. See Pet.28. To the contrary, the Fifth Circuit specifically noted that questions often “arise about who is responsible for exercising due diligence—a reasonable attorney, petitioner, person, or some combination—and [its] cases have [taken] somewhat different approaches.” App.11a n.9. Here, in this fact-specific diligence inquiry, the Fifth Circuit held that one relevant fact is that Vasquez was represented by counsel; thus, the question is when that presumptively reasonable attorney would have been on notice of the claims. See App.14a.

When the Fifth Circuit’s opinion is properly framed, it’s clear Vasquez’s circuit split is manufactured. Nearly all the cases Vasquez cites (at 25–26) dealt with pro se inmates. *See, e.g., Clark v. Warden*, 934 F.3d 483, 489–90, 495 (6th Cir. 2019); *Ayers v. Ohio Dep’t of Rehab.*, 113 F.4th 665, 672 (6th Cir. 2024); *see also Johnson*, 544 U.S. at 300–01. Many of the cases addressed *Brady* claims. *See, e.g., In re Wogenstahl*, 902 F.3d 621, 629 (6th Cir. 2018); *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 278–79 (3d Cir. 2021). Those cases thus had no need to address any distinction between what an inmate versus his attorney could have reasonably noticed, much less hold that an attorney’s knowledge was entirely irrelevant. *See also Clark*, 934 F.3d at 491; *Wogenstahl*, 902 F.3d at 629. And none of those cases addressed the facts here: where the petitioner effectively concedes that his attorneys could have uncovered the evidence sooner. *See App.71a.*

Importantly, the circuits agree that diligence is a fact dependent inquiry, and that those facts can include the “unique resources” available to a petitioner. *Ford v. Gonzalez*, 683 F.3d 1230, 1236 (9th Cir. 2012). Indeed, several of Vasquez’s cited cases presume the relevance of prior representation. In *Bracey*, the Third Circuit applied its *Brady* precedent to the diligence required for § 2244(d)(1)(D), the statute of limitations. *See* 986 F.3d at 278–79. In doing so, it specifically *agreed* with the Fifth Circuit’s decision in *Johnson*, noting that nothing in its precedent “stands in the way of any of the consequences that AEDPA attaches to a lack of due diligence” “where the record demonstrates that the

defendant *or defense counsel* was aware of the potential *Brady* material but failed to pursue investigation of that ultimate claim.” *Id.* (quoting *Johnson*, 442 F.3d at 910) (emphasis added).

Similarly, the Ninth Circuit in *Ford* considered the petitioner’s “unique resources,” concluding Ford was not diligent because “[a]t the very least, Ford *and his trial counsel* were aware” of the facts underlying his claim. 683 F.3d at 1236 (emphasis added). And though the court didn’t squarely address “whether this knowledge is attributed to Ford,” it certainly did not say it was *irrelevant* to the decision. *See id.* (citing *Wood v. Spencer*, 487 F.3d 1, 5 (1st Cir. 2007)⁴). Ford, like Vasquez, was also alleging an IATC claim. *See id.* at 1234.

Indeed, though Vasquez cherry-picks (at 25) Sixth Circuit cases he believes take the “opposite approach” from the Fifth, he’s wrong—in *Moreland v. Robinson*, the Sixth Circuit found a death row inmate not diligent under § 2244(b)(2)(B)(i) in discovering a successive IATC claim based on similar logic to the Fifth Circuit. *See* 813 F.3d 315, 326 (6th Cir. 2016). Namely, “[b]y accusing counsel of ineffectiveness in not presenting these claims in trial-level state post-conviction proceedings, [the petitioner] is necessarily acknowledging that, with due diligence, the evidence in support could have been presented then—before he ever got to federal court.” *Id.*

⁴ In *Wood*, the First Circuit held there was no diligence when the petitioner “though his attorney” had notice that a conversation had occurred. 487 F.3d at 5.

Certiorari is not warranted where the Fifth Circuit is in alignment with other circuits and this Court.

B. This Court’s precedent forecloses the extension Vasquez seeks.

Failing a genuine split, Vasquez turns to equity. Vasquez is unclear on exactly *how* equity should impact the § 2244(b)(2)(B)(i) analysis—a reason itself to deny review. *See* Sup. Ct. R. 14.4. Vasquez’s apparent request for an exception to § 2244(b)(2)(B)(i)’s plain language is dressed up in three ways: 1) purported current case law, Pet.28–29, 31–32; 2) purported statutory interpretation, Pet.28–29; and 3) purported constitutional right, Pet.29–31. This Court has foreclosed each argument.

1. Vasquez argues there should be an exception to the diligence requirement for cases like his, where prior counsel’s actions should not be imputed to him because every attorney who previously represented him was constitutionally inadequate.⁵ Pet.28, 31–32. He claims

⁵ In his authorization proceedings, Vasquez argued to the Fifth Circuit that, under the reasonable-attorney standard he now complains of, his prior postconviction attorneys were reasonable in not discovering the importance of the inconsistent toxicology findings sooner. *See supra* Statement of the Case II.C. That was also the argument he made to the state courts when he sought to file a subsequent writ there too. *See supra id.* II.B. He even offered evidence—declarations signed by those counsel and his current attorney under penalty of perjury—in support of the arguments in both courts. *See id.* II.B–C. It was not until he was authorized to proceed on *only* his IATC claim that he changed his tune, claiming every attorney he’s ever had (except his current one) was constitutionally ineffective. Vasquez’s flip-flopping is yet another vehicle problem.

the Fifth Circuit’s rejection of this argument relied on an “untenable premise”: that general agency rules apply but their exceptions do not. *Id.* at 28. The Fifth Circuit “badly miss[ed] the point” when it relied on the tenet that there is no right to postconviction counsel to hold Vasquez could not escape the diligence requirement by disclaiming all responsibility for his attorneys’ actions. *Id.* Citing no law for his agency-exception argument, *see id.* at 28, 31–32, Vasquez essentially asks this Court to extend the equitable ineffective-assistance exception for procedural defaulted claims, *see Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413 (2013), to the successiveness diligence standard.

This argument is foreclosed. “In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation[.]” *Coleman v. Thompson*, 501 U.S. 722, 754 (1991). This is because “the attorney is the petitioner’s agent when acting, or failing to act, in furtherance of the [habeas] litigation[.]” *Id.* When procedural default has been excused on grounds of ineffectiveness, it’s “not because a constitutional error ‘is so bad that the lawyer ceases to be an agent’ of the prisoner, but rather because a violation of the right to counsel ‘must be seen as an external factor’ to the prisoner’s defense.” *Shinn v. Martinez Ramirez*, 596 U.S. 366, 380 (2022) (quoting *Coleman*, 501 U.S. at 754). So unless counsel’s ineffectiveness reaches constitutional dimension, “well-settled principles of agency law” dictate that the petitioner bears the risk. *Id.*

The Fifth Circuit correctly held there is no constitutional violation concerning postconviction counsel's ineffectiveness because there's no constitutional right to postconviction counsel in the first place. *See* App.16a. And while *Coleman* "surmised that a hypothetical constitutional right to initial-review postconviction counsel could give rise to a corresponding claim for cause," "[s]ince then," this Court has "repeatedly affirmed" that no such right exists. *Martinez Ramirez*, 596 U.S. at 396. And neither does it exist for federal postconviction proceedings. *See, e.g.*, § 2254(i). Absent constitutional ineffectiveness, Vasquez is imputed with, and responsible for, his counsel's actions. *See* App.16a.

Accordingly, Vasquez is left with attempting to extend *Martinez's* equitable rationale to § 2244(b). *See* Pet.30–31. But this Court has foreclosed that argument too: "the justifications that permit courts to recognize equitable exceptions are inapplicable in the context of AEDPA's demanding statutory requirements." App.16a; *see also Martinez Ramirez*, 596 U.S. at 382, 384. Courts "have no authority to amend" statutes. *Martinez Ramirez*, 596 U.S. at 385. "Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect." *Id.*

Vasquez's extension argument has other issues too: 1) *Coleman* "d[id] not argue . . . that federal review of his claims [was] necessary to prevent a fundamental miscarriage of justice," *see Coleman*, 501 U.S. at 757, so *Coleman* says nothing about when a miscarriage does or does not occur, despite Vasquez's characterization (at 30); and 2) *one* of the *Martinez* Court's many

considerations was that ineffective assistance at the state level might prevent a substantial IATC claim from being heard in federal court, *see Martinez*, 566 U.S. at 9–10, but *Martinez* created no freestanding right to review. *Martinez* was chiefly concerned with an IATC claim escaping “review in a State that required prisoners to bring the claim for the first time in state postconviction proceedings rather than direct appeal.” *Davila v. Davis*, 582 U.S. 521, 529 (2017). Thus, the Court was willing to make a “narrow exception” to the general exhaustion rule but only when certain, “unique” procedural quirks of a state’s postconviction system effectively impeded a petitioner’s ability to raise an IATC claim. *See id.* at 521, 534.

Such an exception makes sense when it is also the petitioner’s first *federal* proceeding. But this isn’t Vasquez’s first—it’s his second, and “the road gets rockier” by design. *Banister v. Davis*, 590 U.S. 504, 509 (2020). Moreover, no systematic quirk prevented Vasquez from raising his IATC claim sooner; it was his own actions that did that, precisely the outcome the successiveness-bar is designed to foreclose. *See* § 2244(b)(2)(B)(i). Vasquez’s caselaw does not support his extension of the rationale he’s divined from it, and this Court should not encourage such a misreading.

2. Vasquez next justifies an exception by pretending at statutory interpretation: he argues the statute says “applicant,” not “lawyers,” and reading the latter into it would effectuate closing the door on a class of petitioners Congress did not intend. Pet.27, 29. He asserts this is so because if the statute requires petitioners to prove their diligence on an IATC claim with respect to what a

reasonable lawyer would do, then they'd either never get successive review or they'd lose on the merits. *Id.* at 29. This, he says, amounts to “a categorical ban” on successive IATC claims. *Id.*

Vasquez's first point is a nonstarter—§ 2254(e)(2) also says “applicant,” and yet the “applicant” is imputed with his agent's actions, too. *See Martinez Ramirez*, 596 U.S. at 384. Vasquez's second point concerning a “class” of prisoners, i.e., prisoners trying to raise successive IATC claims, is also a nonstarter: “Nothing in . . . AEDPA supports applying a different standard based on the *type* of claim asserted.” App.13a. “Indeed, § 2244(b)(2)(B)(i) demands diligence ‘without limitation to any specific claim.’” *Id.* (quoting *Martinez Ramirez*, 596 U.S. at 386).

Castro v. United States is inapposite. Its dicta did not define the “class” of prisoners by looking at the substantive claim they wanted to raise, but by party. *See* 540 U.S. 375, 380–81 (2003). Here, Congress intended—through the plain language of the statute—that diligence is shown *regardless* of the type of claim raised. *See Martinez Ramirez*, 596 U.S. at 386.

“It is well established that ‘when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’” *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000)). That successive IATC claims may either not be heard because they were available all along or can't

win because they weren't, *see Strickland*, 466 U.S. at 689, is not absurd. It might be harsh, but that is by design. *See Jones v. Hendrix*, 599 U.S. 465, 480 (2023). Vasquez's policy and equity concerns don't justify a judicial rewrite. *See Dodd v. United States*, 545 U.S. 353, 359 (2005).

3. Vasquez's finally argues that an exception must be made because no court has heard his "substantial" IATC claim, an alleged violation of the Sixth and Fourteenth Amendments. *See* Question Presented ii; Pet.2, 29–32. Vasquez cites no law to support how these amendments could be violated by a petitioner not receiving review of a successive IATC, or any, claim that could've been raised earlier but wasn't. Instead, he offers a stack of presumptions: 1) he presumes success on the merits of his IATC claim; 2) he presumes the Sixth Amendment provides a right of access to the courts; and 3) he presumes that this right entitles him to unfettered, unencumbered review.

His first argument puts the cart before the horse—it would require courts to predetermine an IATC claim's likelihood of success *before* determining whether to subject it to § 2244(b), something the federal courts are jurisdictionally prohibited from doing. *See* § 2244(b)(4). His second and third arguments are just wrong: the Sixth Amendment does not provide a right of access to the courts; the First Amendment does that, and it simply guarantees access, not a favorable outcome. *See Lewis v. Casey*, 518 U.S. 343, 354 (1996). Certiorari is not warranted on a constitutional right that does not exist.

C. The Fifth Circuit correctly held Vasquez was not diligent.

Appropriately interpreting and applying § 2244(b)(2)(B)(i), the Fifth Circuit rightly determined Vasquez was not diligent. *See* App.14a–15a.

Vasquez effectively concedes that his prior attorneys could have discovered his IATC claim’s facts—the toxicology report’s inconsistent results—sooner. That implicit concession was correct: the factual predicate of the claim was available by the end of his trial. Trial counsel unquestionably possessed the toxicology report before trial, and it was admitted as evidence. *See supra* Statement of the Case I. The report discussed only one screening test, “the Drugs of Abuse Screen,” and that test reported only one result: “negative.” ROA.6706. That cocaine—a toxin—would be included under the umbrella term “Drugs of Abuse” is self-evident. The discrepancy between the “Drugs of Abuse” result and the “confirmed GC/MS” result was thus obvious on the report’s face and was sufficient to have put a reasonable attorney on notice of Vasquez’s IATC claim. *See* App.15a.

Any lingering confusion about what drugs of abuse meant was cleared up at trial: Backer testified that the Drugs of Abuse test screened for common illicit drugs, including cocaine. *See* ROA.11431–32. Backer also testified about the relationship between the screening test and the confirmation test—that it’s a two-step process only proceeding to confirmation if a reaction is detected on the screening test. *See id.* From this, trial

counsel, and all Vasquez’s attorneys thereafter, had the “building blocks” necessary to conclude that the face of the report was conflicting and to investigate that conflict if so inclined. *See* App.14a.

Importantly, “[t]he available evidence did not change from the time of Vasquez’s trial to when his habeas counsel hired a toxicologist” in 2019. App.14a; ROA.886. “[N]othing prevented his prior federal habeas [or state habeas] counsel from likewise investigating the cocaine evidence” in this way. App.15a. This is especially true given Vasquez’s insistence that he did not give or inject Miranda with cocaine. *See* ROA.887–88.⁶ Vasquez’s prior attorneys may have reasonably chosen to do otherwise. Those choices don’t make him diligent.

By any metric, “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.” App.75a (quoting *In re Will*, 970 F.3d 536, 541 (5th Cir. 2020)). This is precisely why the TCCA implicitly determined that Vasquez could have discovered his IATC claim sooner, *see* Statement of the Case II.B, a presumptively correct finding in this forum. *See* § 2254(e)(1); *Kinsel v. Cain*, 647 F.3d 265, 270

⁶ Even if Vasquez’s personal diligence is considered, it is hard to square his testimony that he had no cocaine in the house, *see* ROA.11615–16, with the high amounts of cocaine in Miranda’s system that Backer and White testified to. Perhaps Vasquez could not appreciate the scientific implications of the test-results conflict (as unlikely as that may be), but Vasquez was on notice that his attorneys had not challenged what, per his account, was an impossible amount of cocaine in Miranda’s system.

(5th Cir. 2011). The Fifth Circuit’s straightforward and correct determination that Vasquez wasn’t diligent does not warrant this Court’s review.

D. A favorable ruling would not benefit Vasquez.

Even if this Court reversed the Fifth Circuit’s diligence ruling, Vasquez’s position below would not change. Under § 2244(b)(2)(B), petitioners must show that they were diligent *and* that they are actually innocent. The Fifth Circuit held Vasquez failed both, *see* App.14a–19a, but Vasquez does not mention the actual innocence holding once. Because Vasquez does not ask this Court to review that holding,⁷ an opinion that the Fifth Circuit erred on diligence would have no effect on the outcome of Vasquez’s case: he would still be successive. The Court’s opinion would be essentially advisory, *cf. Lambrix v. Singletary*, 520 U.S. 518, 523 (1997), or at the very least, the question is unimportant in Vasquez’s case and any others since the lower court’s opinion is unpublished.

Regardless, the Fifth Circuit correctly held that Vasquez failed to prove innocence under § 2244(b)(2)(B)(ii). Vasquez emphasizes the alleged significance of the cocaine evidence, calling it the “most important evidence against him,” Pet.30, and saying it’s “impossible to overstate the role that cocaine played at

⁷ Any attempt by Vasquez to challenge the Fifth Circuit’s actual innocence holding in his reply should be considered waived. *See Irvine v. California*, 347 U.S. 128, 129 (1954); Sup. Ct. R. 14.1(a).

trial,” *id.* at 9. Vasquez has done what he claims impossible: far overstated the role cocaine played.

Vasquez was charged with intentionally or *knowingly* causing four-year-old Miranda’s death, not by injecting with her cocaine, but by striking her on the head repeatedly with his hand. ROA.6296. The State could thus prove intent by showing either that Vasquez acted with a “conscious objective or desire” to kill her or was at least “aware that his conduct [was] reasonably certain” to cause that result. *See* Tex. Penal Code § 6.03(a), (b). The State’s mens rea case fell into four general areas.

First was evidence regarding the immense force—“equivalent to [that] caused by a 65-m.p.h. car crash,” *see Vasquez*, 2008 WL 859147, at *7—involved in killing Miranda. Vasquez admitted to hitting her multiple times when he was the only adult in the house, and there “at least 20 to 30” contusions all over her body. *See* ROA.11466. The blows were forceful enough that, as the state court found, Miranda “was brain dead either when [Vasquez] stopped hitting her or by the time she arrived at the hospital.” ROA.13672. “[I]t 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.” App.18a.

Second was evidence that Miranda had been sexually assaulted. The State’s expert testified that Miranda’s case was one of the worst sexual assault cases he’d seen. ROA.11408. Miranda had a one-inch-deep tear in her

perineum area that could have only been caused by severe force. ROA.11401–03. Such “severe sexual assault provides a strong motive to silence a child.” App.18a.

Third was Vasquez’s lack of credibility. Vasquez lied numerous times, presenting contradictory stories about Miranda’s death. Pre-trial, he said she fell backwards off a stool in the hallway bathroom while brushing her teeth. ROA.13621. At trial, Vasquez testified that she fell *forwards* into the sink while brushing her teeth. ROA.13621. Yet no toothpaste was found in Miranda’s mouth, and there was no stool in the hallway bathroom. *See* ROA.10902, 10927, 11100, 11257. As the state court found, there was no credible evidence providing an alternative, innocent explanation for Miranda’s death. ROA.13622.

Fourth, last and least in the mens rea puzzle, was the cocaine, which though not alleged in the indictment, was offered “because it [gave the jury] the opportunity to look at the totality of the crime.” *See* ROA.11763.

Adding Vasquez’s “new” evidence does not clearly and convincingly show that *no* reasonable juror would have convicted Vasquez. Vasquez’s claim rests on the premise that the report’s inconsistency necessarily means Miranda had *no* cocaine in her system. *See* Question Presented i. But that premise is faulty, and his evidence does not show, clearly and convincingly, that the cocaine evidence was truly false. The state court found: it was more likely that the confirmation results were true while the reported screening results were a

clerical error. ROA.13655. Lacking evidence to the contrary, the state court found the testimony that Miranda had cocaine in her system was true, “reliable[,] and credible” evidence. ROA.13655. These findings are presumptively correct. § 2254(e)(1).

Vasquez cannot show, clearly and convincingly, that his “new” evidence would have had any effect on the jury’s determination, let alone that no reasonable juror would have voted to convict. At best, Vasquez proves that the toxicology report was internally inconsistent, but muddying the waters does not rise to the level of clear and convincing evidence. And even if the cocaine evidence was removed entirely from trial, its absence would not have mattered in terms of mens rea, as the repeated and forceful blows to Miranda’s head, her severe sexual assault, and Vasquez’s lack of credibility remain. Vasquez fails to prove his innocence.

Because the Fifth Circuit correctly found Vasquez’s claim successive on this independent, alternative basis, the Court should not grant certiorari to do make work.

II. Vasquez’s Second Question Suffers Vehicle Problems, and This Court Is Jurisdictionally Barred from Reaching it.

Vasquez next asks this Court to take up whether *Brady/Napue* claims are “second or successive” within § 2244(b). Pet.33–36.

1. This question suffers a significant vehicle problem: Vasquez never raised it in the lower court, in

the district court, or on authorization. In a preemptive self-defense, Vasquez argues he “never conceded that he was required to get first-gate authorization,” and after he was denied authorization, he preserved “at every opportunity” “his right to seek further review.” *See* Pet.34–35.

The former is ostensibly true: he never *explicitly* conceded he needed authorization. But he sought authorization regardless and never suggested it was under protest. Indeed, when his Rule 60(b) motion was kicked as successive, he did not argue that he should be permitted to proceed with his *Brady/Napue* claims because they were exempt from the successiveness bar, *see, e.g., Vasquez*, 2023 WL 2238995, *2–3; he instead sought authorization, *see* App.82a. And he could have “preserved” his disagreement with the Fifth Circuit’s authorization requirement for *Brady* claims.⁸ *Cf. United States v. Scruggs*, 714 F.3d 258, 264 (5th Cir. 2013). He did not.

And as to his latter point—that he preserved his rights *after* authorization was denied, *see* Pet.35—his petition is devoid of any record cite in support because none exists. The *most* Vasquez ever said in the lower courts about the denial of authorization for his *Brady/Napue* claims was a generic appellate-right reservation. *See* ROA.18 n.2; *see also* Appellant’s Br. 29,

⁸ Or he could have filed the petition in district court and then appealed its successiveness characterization, just as he’s done while these proceedings have been pending. *See supra* Statement of the Case II.C. This filing is an implicit concession the issue is not properly before the Court.

Vasquez v. Guerrero, No. 25-70005, 2025 WL 3488844 (5th Cir. Dec. 4, 2025), ECF No. 26. But these unadorned appellate-right-reservation statements were insufficient to preserve anything—they did not put either the district court or Fifth Circuit on notice of his arguments. *See Penn. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998).

If anything can be gleaned from these statements, it was that the Fifth Circuit erred in *denying* authorization, not that Vasquez didn’t need its permission in the first place. Vasquez’s argument is therefore forfeited. *Meyer v. Holley*, 537 U.S. 280, 292 (2003).

2. The only thing Vasquez even conceivably preserved was that “he should have been given permission to file his *Brady* and *Napue*[] claims.” *See* Appellant’s Br. 29, *Vasquez v. Guerrero*, No. 25-70005, 2025 WL 3488844 (5th Cir. Dec. 4, 2025). Denial of authorization is indeed the only Fifth Circuit ruling on these claims that exists, making it the “subject” of this petition. *See Castro*, 540 U.S. at 380. But the problem is, as Vasquez acknowledges (at 35), this Court cannot hear appeals from a circuit court’s denial of authorization. *See* § 2244(b)(3)(E); *see also Bowe v. United States*, 607 U.S. 13, 31 (2026). This Court lacks jurisdiction to hear Vasquez’s backdoor appeal of the Fifth Circuit’s authorization denial.

3. This question is nonetheless unworthy of review as no compelling circumstances justify a grant—Vasquez identifies no circuit split, no conflict with this

Court's precedent, and no important question. The most he musters is two opinions respecting or dissenting from the denial of certiorari. *See* Pet.34. Respectfully, single-justice concurrences or dissents in preliminary stage proceedings are not sufficient to establish a conflict warranting certiorari review. *See* Sup. Ct. 10(c).

Pivoting, Vasquez argues for another extension dressed up as conflict: he suggests the logic of *Panetti v. Quarterman*, 551 U.S. 930 (2007), should apply, as he lacked “actual awareness” of his *Brady/Napue* claims when he filed his first petition, so they were not ripe. Pet.34. But competency-to-be-executed claims are not ripe until an execution date is set because no violation occurs until that point. *See* *Burton v. Stewart*, 549 U.S. 147, 155 (2007). And that, “as a general matter,” does not occur “until after the time has run to file a first federal habeas petition,” so a petitioner cannot truly raise the claim then. *See* *Panetti*, 551 U.S. at 943. “Congress did not intend the provisions of AEDPA addressing ‘second or successive’ petitions to govern a filing in the unusual posture presented [t]here: a § 2254 application raising [an incompetency-to-be-executed] claim filed as soon as that claim is ripe.” *Id.* at 945.

This reasoning is inapplicable here. Vasquez’s “claims were not unripe at the time he filed his initial petition because the purported *Brady* violations . . . had already occurred when he filed his petition, although [Vasquez] was unaware of these facts.” *Wogenstahl*, 902 F.3d at 627–28; *see also* *Tompkins v. Sec’y, Dep’t of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009). “Instead, [Vasquez]’s claims fall within the scenario contemplated

by § 2244(b)(2).” *Wogenstahl*, 902 F.3d at 28; *see also Brown v. Muniz*, 889 F.3d 661, 671 (9th Cir. 2018). Certiorari is not warranted here.

4. Vasquez’s claims also lack merit. Vasquez’s *Brady* claim primarily relies on the Trautman notes, *see supra* Footnote 2, and Vasquez argues the State “concedes that [he] accurately interprets the notes” “to reflect Trautman having explained to the prosecutors that a positive [confirmation] result cannot be squared with a negative result from a drugs-of-abuse screen.” Pet.8. Not true. The Trautman notes say nothing about a negative result nor do they say anything regarding the confirmatory test being contingent on a positive screening result. *See* ROA.6214. Backer said those things *at trial*, so if Vasquez believes these facts enough to establish State knowledge, *see* Pet.8, they establish that trial counsel and Vasquez had knowledge too, meaning there was no suppression and, ergo, no *Brady* violation.

As to *Napue*, the state court found Vasquez has never proven that the evidence that Miranda had cocaine in her blood was truly false. ROA.13655. Given the high amounts found via the confirmatory test, it is just as, if not more, likely that the screening test results were clerical error, meaning Miranda *did* have cocaine in her blood. *Id.* Regardless, no amount of quibbling over the cocaine testing would undermine the significant and “compelling,” App.18a, evidence that Vasquez knew repeatedly beating a tiny four-year-old girl on the head could kill her. Thus, Vasquez does not prove that any

materially false testimony was given. Certiorari should be denied.

III. Certiorari Should Be Denied on Vasquez's Third Question.

Vasquez lastly asks this Court to resolve made-up disputes regarding who should speak for his custodian in federal habeas proceedings and what deference is owed a State's concession. Pet.36–38.

1. Vasquez did not appropriately raise his proper-party argument in the lower courts. Vasquez only twice mentioned it in the district court: once in a certificate of conference “not conceded[ing] that the [OAG] is authorized to represent the State's interest,” ROA.304; and once in a reply brief footnote where he “reserve[d] the right to press it further, through a show-cause motion or other appropriate vehicle,” ROA.792. Neither preserved the issue for the Fifth Circuit. *See Bradley v. Allstate Ins. Co.*, 620 F.3d 509, 519 n.5 (5th Cir. 2010).

He did not cure the deficiency in the Fifth Circuit either. Instead, he attempted a stealth expansion of the record by attaching, without leave, a statement from the new DA to his appellant's brief. *See* Ltr. 1, *Vasquez v. Guerrero*, No. 25-70005 (5th Cir. Dec. 4, 2025). After moving for leave, the Fifth Circuit denied the request as moot, *see* App.19a, so that document (that Vasquez included at App.97a–98a) is not properly in the current record.

Then, after the parties filed their principal briefing, Vasquez belatedly requested that the Fifth Circuit issue a show cause order to the OAG, requiring it to show its right to respond. *See* Mot. for Issuance of Show-Cause Order, *Vasquez v. Guerrero*, No. 25-70005 (5th Cir. Dec. 4, 2025). The Fifth Circuit denied this motion too. Accordingly, neither procedural mechanism adequately preserved review for this Court. At the very least, Vasquez’s litigation tactics make the case a poor vehicle to address his question.

2. Vasquez suggests there is allegedly recurring question regarding “the path to follow when two purportedly authorized representatives of the State advocate conflicting positions.” Pet.37. But that doesn’t exist here. The DA has said nothing in these proceedings—he has never asked to participate in them, never sought to intervene, and never asked any federal court to defer to his position over the Director’s. The *only* indication of the DA’s view is the statement Vasquez attempted to improperly inject into the proceedings. There is thus no live dispute for the Court to resolve, and Vasquez does not have standing to assert a third-party’s supposed rights on his behalf. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

Nor is the question of how to handle such disputes open. Take, for example, the Bobby Moore case. In that case, the OAG sought leave to intervene as respondent, and this Court denied the motion but treated the OAG’s brief as an amicus brief instead. Order, *Moore v. Texas*, No. 18-443 (U.S. Feb. 19, 2019). The other cases Vasquez cites proceeded similarly, if any dispute made it to this

Court at all. *Compare Saldano v. State*, 70 S.W.3d 873, 883 (Tex. Crim. App. 2002), *with* Br. Amicus Curiae of Tex. Dep’t of Crim. Justice, *Escobar v. Texas*, No. 23-934 (U.S. Apr. 18, 2024), *and* Br. Amicus Curiae of Victim Family Members, *Glossip v. Oklahoma*, No. 22-7466 (U.S. June 5, 2023). These “disputes” are not recurring, so they require no further clarification. Pet.37.

3. Vasquez suggests the Court has “inherent authority to require the lawyers and parties before [it] to demonstrate their authority.” Pet.37 (citing *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927)). But *Pueblo* addressed an *attorney’s* authority “to bring and maintain a[] suit” when the plaintiff never authorized it. 273 U.S. at 317. *Pueblo* is inapposite—the Director has not brought any suit here; Vasquez did. The Director defends against that suit as required under federal law. *See* R. Gov’g § 2254 Cases R.2(a). And the only Texas entity with authority to represent an executive agency like the Texas Department of Criminal Justice is the OAG. *See Saldano v. Roach*, 363 F.3d 545, 551–52 (5th Cir. 2004).

Vasquez challenges that interpretation of Texas law, *see* Pet.37–38, but to the extent he asks the Court to determine whether the OAG is properly representing the Director *under* state law, the Court does not have jurisdiction to wade into such matters.

4. Vasquez finally argues this Court should “clarify” how courts should treat alleged concessions by the State. Pet.36–37. He admits the Court has “generally established that great weight should be given to a

State's confession of error," but argues that the "parameters of the deference remain fuzzy." *Id.* (citing *Sibron v. New York*, 392 U.S. 40 (1968); *Young v. United States*, 315 U.S. 257 (1942)).

He's wrong. First, because Vasquez did not properly add the DA's statement to the record below, and because the DA has not otherwise said anything in these proceedings, there *is* no concession to review. Second, Vasquez downplays *Young's* import: *Young* has long established that "administration of the criminal law cannot be left merely to the stipulation of parties." 315 U.S. at 259. Rather, while "[t]he considered judgment of law enforcement officers that reversible error has been committed is entitled to great weight," "judicial obligations" nonetheless compel independent review. *Id.* at 258–59. Thus, though Vasquez asserts that swapping the OAG for the DA may "well determine the outcome of this case," Pet.38, the courts would still be required to independently review any concession, especially where the issue is one of subject matter jurisdiction where "consent of the parties is irrelevant," *see Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Certiorari review is not warranted on a question that has long been answered.

CONCLUSION

For the forgoing reasons, Vasquez's petition for a writ of certiorari should be denied.

Respectfully submitted,

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