

# The Way Through the Thicket in 'Gutierrez v. Saenz'

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**O**n Feb. 24, the U.S. Supreme Court heard arguments in *Gutierrez v. Saenz*. As the National Law Journal explained, the court is considering whether Ruben Gutierrez, a Texas death-row inmate, has standing to argue that Texas' statute governing post-conviction DNA testing, Article 64 of the Code of Criminal Procedure, violates due process.

The narrowest, most straightforward answer to that question is that Gutierrez has standing for the same reasons Rodney Reed has standing: Gutierrez's merits arguments, if successful, would negate all the reasons that district attorney Luis Saenz has pointed to for denying DNA testing. Thus, an order would redress Gutierrez's injury by precluding Saenz from relying on those justifications and making it substantially more likely that Saenz will allow Gutierrez to conduct testing.

To explain: Gutierrez alleges that Article 64 violates due process because it denies capital prisoners constitutionally fair procedures for obtaining DNA testing that could help prove that they are ineligible for the death penalty. He seeks an order declaring that Saenz may not deny DNA



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testing based on an unconstitutional version of Article 64, but must instead look to Article 64 shorn of its constitutional defects. Under the Supreme Court's 2009 DNA-testing decision in *District Attorney's Office for the Third Judicial District v. Osborne*, if a state gives a prisoner a life or liberty interest in proving his innocence or ineligibility for the death penalty under state law or the Eighth Amendment, the state's DNA-testing procedures violate the due process clause "if they are fundamentally inadequate to vindicate the substantive rights provided." Put another way, if

state law gives prisoners a liberty or life interest in proving their innocence or ineligibility for the death penalty (as Texas law does), then the procedures that state law provides to vindicate that interest must “comport with fundamental fairness.” Here, as Gutierrez explains, the Texas Court of Criminal Appeals (Texas’s high court for criminal cases) has interpreted the state’s DNA-testing statute to allow testing only for prisoners trying to prove they are innocent of their crime of conviction, but not for prisoners trying to prove they are ineligible for a death sentence. The result, Gutierrez says, is that Texas with one hand gives prisoners a right to assert they were wrongly sentenced to death, but with the other takes away the procedures needed to vindicate that right.

Before even disagreeing on the merits, Saenz, who opposes Gutierrez’s testing request, says Gutierrez lacks standing to bring his federal lawsuit in the first place. Saenz does not dispute Gutierrez’s injury—just as in *Reed*, “denial of access to the requested evidence.” Nor does Saenz dispute that, just as in *Reed*, the district attorney (here, Saenz) “denied access to the evidence and thereby caused [that] injury.” Instead, Saenz argues that even if Gutierrez wins his lawsuit, that won’t redress his injury, because Saenz will go on denying testing just the same. Thus, Saenz asserts that, unlike *Reed*, where success in the suit would result in “a change in a legal status,” and thus “a significant increase in the likelihood that the state prosecutor would grant access to the requested evidence,” victory for Gutierrez would remove one of just several constitutional justifications for denying Gutierrez testing.

The simple answer here is that Gutierrez’s case is just like *Reed*’s. That’s because Gutierrez’s merits arguments—which the federal courts must accept as meritorious for purposes of the standing analysis—would negate all the justifications Saenz

has offered for continuing to deny testing. And that is all *Reed* requires for redressability and thus standing, assuming the merits of the prisoner’s arguments: that the resulting “court order would eliminate the state prosecutor’s justification for denying DNA testing.”

In *Reed*, the court focused on *Reed*’s lead due process argument, that a noncontamination requirement that the Texas Court of Criminal Appeals read into Article 64 violates due process—an argument particularly relevant for the merits question presented about when the statute of limitations begins to run. But *Reed* also challenged the district attorney’s two other justifications for denying testing. Specifically, *Reed* assailed as unconstitutional the scope of the exculpatory-evidence inquiry under Article 64 as well as the unreasonable-delay inquiry—the two other grounds the district attorney invoked for denying testing.

Here, in response to a question from Justice Amy Coney Barrett, the Texas deputy solicitor general representing Saenz did not dispute that the district attorney is “going to comply with a court order,” and assess whether the prisoner is entitled to evidence under a constitutional version of Article 64, as the court order requires. And if the answer is yes, the district attorney will turn over the evidence. In short, if the court order finds unconstitutional all of Saenz’s reasons for denying testing, then it will redress Gutierrez’s lack of access to DNA testing by substantially increasing the likelihood that Saenz will permit that testing.

Saenz doesn’t dispute these principles, which flow from the court’s decision in *Reed*. Instead, he claims that even if Gutierrez wins his lawsuit, Saenz will still have reasons to deny testing. But that isn’t the case, and that is all the Court needs to find to rule that Gutierrez has standing, without extending its ruling in *Reed*.

Saenz's primary argument is that the Texas Court of Criminal Appeals earlier opined that Gutierrez would remain death-eligible—and so his Article 64 testing request would fail—even if Article 64 generally allowed inmates to obtain DNA testing to show they were not eligible for the death penalty. Thus, Saenz's argument goes, a federal court order declaring unconstitutional Article 64's restriction to challenging convictions only (and not reaching challenges to death sentences) would be purely advisory, because Gutierrez would still be death-eligible, no matter what the DNA testing might show. Thus, Saenz says, the district attorney could constitutionally deny testing on that basis.

That reasoning is wrong because it ignores what Gutierrez is claiming on the merits—arguments that the court must assume will succeed for purposes of the standing inquiry. Gutierrez's merits argument *also* knocks out the Texas Court of Criminal Appeals' reasoning—on which Saenz relies—because it challenges the limits Article 64 (as construed by the Court of Criminal Appeals) imposes on the *non-DNA evidence* an inmate can use to show he is entitled to *DNA evidence*, which he will likely need to challenge his death sentence. In brief, the Texas court and Saenz have restricted the non-DNA evidence to trial evidence, but Gutierrez claims that the inquiry must consider evidence developed after trial as well—and that the trial-evidence-only limitation itself violates due process. And if Saenz or a Texas court considered all of that evidence, Gutierrez argues, it would find that he is entitled to DNA testing.

Saenz throws out some other reasons he claims he could rely on to deny testing even if a federal

court issues an order agreeing with Gutierrez on the merits. But Gutierrez's merits arguments negate each of those reasons. For example, the notion that identity was not at issue in the case likewise depends, in Gutierrez's view, on an unconstitutional reading of Article 64. Nor can Saenz claim that he will be able to justify denying testing based on Gutierrez's delay in seeking testing. For one thing, Gutierrez has been diligently seeking testing. For another, the unreasonable-delay inquiry is a motion- and circumstance-specific inquiry, and certainly not one the court can resolve against Gutierrez without findings of fact on remand on a proper record.

The upshot is that, at least on this record and assuming the merits of Gutierrez's arguments, Saenz doesn't have any constitutional justifications for denying DNA testing. And that means this case is just like *Reed's*: a court order agreeing with Gutierrez on the merits, in the words of *Reed*, "would eliminate the state prosecutor's justification for denying DNA testing." Gutierrez thus has standing to bring his federal lawsuit, and the court need not go beyond what it said in *Reed* to say so.

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