CAPITAL CASE
No. 17-1093

In the Supreme Court of the United States

RODNEY REED,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

One expects the State to defend a ruling for which it has vigorously advocated. However, the state court's denial of DNA testing and the Texas Attorney General's efforts to avoid review to preclude Petitioner, who has spent twenty years on death row, from conducting forensic DNA testing on the murder weapon and other previously untested trial evidence that could exonerate him and identify the perpetrator, should shock the Court. The State's opposition brief ("Opposition") proves that direction from this Court is imperative to preserve Petitioner's liberty interest in accessing the Texas statutory procedure to conduct such testing to prove his innocence.

This Petition does not concern the Texas Court of Criminal Appeals' ("CCA") misapplication of the facts to Chapter 64 of the Texas Code of Criminal Procedure. At issue are constitutional violations that flow from the extra-statutory conditions that the CCA layered onto Chapter 64's chain of custody and unreasonable delay elements that effectively preclude postconviction testing absent State consent. As the Brief of Amici Curiae Texas Exonerees Michael Morton and Anthony Graves, the Innocence Network, and Justice 360 in Support of Petitioner shows, under the CCA's ruling, several exonerees would not be free today. Because many states have enacted postconviction DNA testing statutes similar to Chapter 64, the ramifications of the CCA's ruling are of national constitutional significance.

Petitioner, a black man, is sentenced to be executed for the 1996 murder of a white woman in rural Texas. The killer gripped the murder weapon, a belt, in his hands and strangled the victim with such

force that it broke in two pieces. That belt and other crime scene evidence *has never been tested*. Given DNA analyses' unique ability to identify the perpetrator, the CCA's adoption of non-statutory criteria to preclude Petitioner from testing key trial evidence in its possession to prove his innocence violates the fundamental notions of fairness upon which our system of justice relies for its existence.

In the State's zeal to prevent review, it distorts the record, makes unsupported legal arguments, and touts as true forensic testimony that was used to convict Petitioner, even though it is unquestionably false and could not be used today. The question remains: why does the State oppose DNA analysis of previously untested trial evidence that could exonerate (or inculpate) Petitioner and confirm whether the victim's fiancé carried out his threat to strangle her with a belt if she was unfaithful? The answer is simple: the State does not want to know the truth.

First, the State's suggestion that this Court lacks jurisdiction over due process claims involving state statutes is contrary to the 14th Amendment.

Second, the State's opposition to postconviction analyses of untested trial evidence within its possession and at no cost to the State based on a novel chain of custody standard that is contrary to the standard applied in every other context is troubling enough. Worse, the State further justifies its opposition by repeating critical trial evidence known to be scientifically false, together with a misleading rehash of unadjudicated allegations of extraneous offenses that the State represents as proven facts to

portray Petitioner as a bad person worthy of execution, even if he is innocent of a capital crime.

Third, the State's contention that Petitioner does not raise issues of constitutional import overlooks the issues specifically identified and left open in *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009), and *Skinner v. Switzer*, 562 U.S. 521 (2011).

Direction from this Court is critical because DNA analysis often provides the sole path to postconviction exoneration, particularly in older cases. Texas leads the nation in executions, and its hostility to postconviction DNA testing notwithstanding, Texas also leads the nation in DNA exonerations (due largely to conviction integrity units in a few counties where prosecutors agree to reinvestigate innocence claims in a non-adversarial context). (Petition-25.) Exonerations may erode confidence in the integrity of the criminal justice system, especially in older cases where local law enforcement often failed to adhere to current professional standards, but the continued incarceration (or execution) of innocent people is far more corrosive. *See Schlup v. Delo*, 513 U.S. 298, 325 (1995) ("Concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."). The State's desire for finality cannot justify preventing a legitimate search for truth, much less executing an innocent person. *See Osborne*, 557 U.S. at 98 ("[F]inality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens.") (Stevens, J. dissenting). The CCA's promotion of finality over justice by judicially grafting barriers onto Chapter 64 has deprived Petitioner of his liberty

interest in proving his innocence with new evidence under state law. *See Osborne*, 557 U.S. at 68; *Skinner*, 562 U.S. at 524.

The time and case are right for this Court to clarify the standard for evaluating whether a state's application of postconviction DNA testing procedures violates a prisoner's liberty interests under *Medina v. California*, 505 U.S. 437, 446, 448 (1992).

I. THIS COURT HAS JURISDICTION TO REVIEW CONSTITUTIONAL VIOLATIONS BY THE STATE.

The State first seeks to avoid review by suggesting that whether federal due process has been afforded under a state statute is exclusively a matter of state law. (Opposition-1,16.) This argument ignores the 14th Amendment and, if accepted, would give state courts autonomy over matters of constitutional importance. *See* U.S. Const., Amend. XIV, § 1 ("Nor shall any state deprive any person of life, liberty, or property, without due process of law."); *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (liberty interest "may arise from an expectation or interest created by state laws"); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (state must "act in accord with the dictates of the Constitution").

Second, the State's argument that this Court lacks jurisdiction because the constitutional questions were not raised below ignores the record. (Opposition-17.) Petitioner raised them in his motion for rehearing, which was his first opportunity to do so given the procedural irregularities below. (App.-263a-265a.) The trial court denied Petitioner's Chapter 64 motion without making any ruling on chain of custody, and

then signed *verbatim* the findings of fact and conclusions of law submitted *ex parte* by the State. (App.-83a.) On appeal, the CCA directed the district court to make additional findings, including concerning chain of custody. The trial judge thereafter signed and docketed *both* the findings and conclusions proposed by the State *and* Petitioner, which contained contrary findings on chain of custody and other Chapter 64 elements. (App.-42a, 53a.) The CCA ruled without permitting additional briefing or argument, and Petitioner promptly moved for rehearing raising the constitutional infirmities presented here. (App.-263a-265a.) The CCA summarily denied Petitioner's rehearing motion. (App.-231a.)

Third, any purported failure to thoroughly raise constitutional issues below presents prudential considerations, not a jurisdictional bar. (Opposition-17.) *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) ("recent cases clearly view the [not pressed or passed upon] rule as merely a prudential restriction"). In noting that the "[r]ules of practice and procedure are devised to promote the ends of justice, not defeat them," this Court recognized long ago that there may always be "particular circumstances which will prompt a reviewing or appellate court, which injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court" below. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). When, as here, irregular judicial procedures denied Petitioner a meaningful opportunity to present his constitutional arguments until after the CCA's ruling, the Court should reject the State's invitation to avoid review.

II. THE STATE'S RELIANCE ON FALSE FORENSIC TESTIMONY AND UNADJUDICATED ALLEGATIONS DEMONSTRATES THAT THE STATE'S HOSTILITY TO DNA TESTING HAS TRANSGRESSED CONSTITUTIONAL LIMITS.

False trial evidence cannot be used to procure a conviction. *See Miller v. Pate*, 386 U.S. 1, 7 (1967) ("[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."). The CCA nonetheless relied upon known false trial testimony to establish the baseline for assessing the materiality of exculpatory evidence, a fundamentally unfair approach that the State defends here. (Opposition-32.)

Petitioner has presented unrefuted evidence from world-renowned forensic pathologists (and even the medical examiner who testified for the State at Petitioner's trial) that the State's theory of the case against him is medically and scientifically impossible. (Petition-7-12.) This proof includes evidence that: (i) Stites was murdered before midnight, when her fiancé claims she was home with him, (ii) Stites was not sexually assaulted, and (iii) Petitioner's sperm was not deposited when Stites was killed.

The State dismisses this proof as immaterial because at Petitioner's 1998 trial, a DPS investigator (and a LabCorp technician) opined that "sperm remains whole within the vaginal cavity for usually no longer than twenty-six hours." (Opposition-3.) At trial and to this day, the State (and the CCA) claims that this testimony conclusively proves that the donor of the sperm was the killer, and establishes the barometer against which all new evidence must be tested.

It is scientific fact that sperm can survive intact much longer than twenty-six hours. (*See* Petition 10-12.) Incredibly, the Opposition repeats as true the false trial testimony on this point (Opposition-3), but ignores LabCorp's own formal disavowal of its technician's testimony. (App.-409a.) Even the medical examiner who testified for the State submitted a postconviction affidavit that the State's trial evidence on this issue was unfounded when offered: "If the prosecuting attorneys had advised me that they intended to present testimony that spermatozoa cannot remain intact in the vaginal cavity for more than 26 hours, and argue that Ms. Stites died within 24 hours of the spermatozoa being deposited, ***I would have advised them that neither the testimony nor the argument was medically or scientifically supported***." (App.-217a.) (emphasis added).

The CCA affirmed Petitioner's conviction on direct appeal based on the testimony that sex had to have occurred at the time of death. (App.-6a, 124a.) By promoting a known forensic fiction as fact, the State has successfully prevented Petitioner from obtaining postconviction relief, including DNA testing, even though there is *no other evidence* suggesting that Petitioner was present at or involved in Stites's death.

Under the CCA's opinion, if an eyewitness who identified a defendant at trial as the perpetrator of a crime is later proven to have been blind, such false testimony nonetheless should form the baseline against which the materiality of any new or previously hidden evidence is evaluated. The CCA's postconviction reliance on false testimony is both improper and similar to the State's practice of using

outmoded "facts" and theories rejected in *Moore v. Texas*, 137 S. Ct. 1039 (2017).

The Opposition distorts the record in other ways too. It contains an extensive discussion of the punishment phase of Petitioner's trial to persuade this Court to deny certiorari by portraying Petitioner as a bad person. (Opposition-7-10.) The State repeats unadjudicated allegations of extraneous sexual assaults as though they were proven facts, including uncharged allegations and an acquittal. (Opposition-8.) The State's misleading recitation of unproven extraneous offense allegations is irrelevant to the constitutional issues presented, but highlights indefensibility of the CCA's opinion.

III. THE CCA'S NOVEL CHAIN OF CUSTODY BARRIER WILL PREVENT POSTCONVICTION EXONERATION OF THE INNOCENT.

The Opposition shows how the CCA's novel chain of custody standard will operate to deny access to evidence under Chapter 64 as a means to demonstrate innocence. Chapter 64 requires a trial court to make a finding that the evidence sought to be tested has been subjected to a chain of custody "sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect." (App.-242a.) In other proceedings, courts uniformly interpret the standard chain of custody language to require a finding that the evidence is what it purports to be. The State agrees, but claims that Petitioner "offered no rationale" for why this raises due process concerns, thereby overlooking Petitioner's discussion of that point. (Opposition-23; Petition-31-32.)

First, in *Moore v. Texas*, this Court rejected the CCA's practice of using one standard to assess intellectual disability in capital cases when the State uniformly applied different definitions in every other context. 137 S. Ct. 1039, 1052 (2017) ("Texas cannot satisfactorily explain why it applies current medical standards … in other contexts, yet clings to superseded standards when an individual's life is at stake."). The State fails to acknowledge *Moore*, even though the case exemplifies Texas's efforts to deprive the convicted of their remaining liberty interests by deliberately deviating from established standards in postconviction cases.

Second, Petitioner's case does not present an isolated incident that is unlikely to reoccur. (Opposition-24 n.11.) This is not the first time Texas has prevented postconviction DNA testing based on the State's (mis)handling of evidence. *See Pruett v. State*, 2017 WL 1245431, at *12 (Tex. Crim. App. Apr. 5, 2017) (affirming trial court's reversal of prior finding that metal rod satisfied chain of custody after State introduced testimony that rod was handled with ungloved hands).

Third, the Opposition shows that the CCA's judicially-grafted "no contamination" requirement enables courts to deny postconviction access to evidence anytime the State claims it was handled or comingled before or after commission of the crime. That is the premise of the CCA's disregard of Petitioner's unrebutted expert testimony that probative results could be obtained irrespective of whether prosecutors and jurors handled the evidence. Indeed, the State goes so far as to claim that because Petitioner proved one element—that the items he

sought to test contained biological material suitable for DNA testing—he is "estopped" from claiming chain of custody is met. (Opposition-25-26: "By proving that biological material was on the items he sought to DNA test, he also proved that the items had been tampered with or altered."). This adds another non-existent and impossible-to-meet element to Chapter 64, *i.e.*, that evidence includes only biological evidence indisputably related to the crime.

According to the State, because Locard's Exchange Principle "'maintains [that] skin cells and DNA deposits remain on an item every time it is touched,'" the evidence is contaminated, thereby precluding a chain of custody finding. (Opposition-25.) By the State's own admission, the CCA's "no contamination" requirement allows the State to preclude access to evidence under Chapter 64 if the DNA profile of evidence is changed, irrespective of its ability to exonerate.

Even when evidence is secured at a crime scene and thereafter, its DNA profile will never remain static. As a result, it is true that "numerous DNA profiles could be on the evidence" Petitioner sought to test. Because crimes are rarely committed under sterile conditions, that will always be true. This extreme position demonstrates the extent to which the CCA's non-statutory hurdles will deprive convicted persons of their liberty interest in accessing evidence to demonstrate their innocence.

IV. THOSE MOST LIKELY TO BE EXONERATED BY DNA TESTING WILL BE DENIED ACCESS.

The CCA reshaped Chapter 64's requirement that a motion is "not made to unreasonably delay the

execution of sentence or the administration of justice" so as to deny access to those most likely to be exonerated by advances in DNA technology. (App.-243a.) *See Glossip v. Gross*, 135 S. Ct. 2726, 2757-59 (2015) (Breyer, J. dissenting) (discussing DNA exonerations in decades-old cases and flawed forensic testimony).

The State readily admits that "Reed has vigorously challenged his conviction since its imposition," including describing his persistence to prove his innocence over the last twenty years as a "fervent attack." (Opposition-1.) The State also acknowledges that Petitioner's request to conduct DNA testing was not, like the cases it cited and upon which the CCA relied, an attempt to delay a pending execution; no execution date had been set and counsel had been seeking the State's consent to defense-funded testing for months. (Opposition-29, 31.) Nor does the State dispute that Petitioner supported his second request to conduct DNA testing (his first request was denied in 1999) with expert testimony based on "newly available" DNA analysis. (App.-16a.)

Instead, the State justifies the CCA's ruling by claiming Petitioner's Chapter 64 motion was intended to "unreasonably delay the administration of justice" because, if one ignores scientific advancements in DNA testing that can produce probative results not previously available, there did "not appear to be any factual or legal impediments that prevented Reed from availing himself of post-conviction DNA testing earlier." (Opposition-29, 31.) Under this formulation, any passage of time between conviction and the application for postconviction DNA testing will *always* be intended to unreasonably delay the administration

of justice (*i.e.*, finality), even when (as here) such application is supported by accepted expert testimony that new DNA testing technologies have emerged with the potential to yield probative identification results. The CCA's formulation of this element places access to postconviction DNA testing solely in the hands of the State, and cannot be squared with Petitioner's rights to due process in accessing evidence to prove his innocence.

Direction from this Court on the constitutional requirements applicable to postconviction access to DNA testing to prove innocence is sorely needed in this case and nationwide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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