APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-70022

RODNEY REED,
Plaintiff—Appellant,

versus

BRYAN GOERTZ, *Bastrop County District Attorney*;
STEVE MCCRAW, *Texas Department of Public Safety*;
SARA LOUCKS, *Bastrop County District Clerk*;
MAURICE COOK, *Bastrop County Sheriff*,
Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-794

Before JONES, ELROD, and HIGGINSON, *Circuit Judges.*

JENNIFER WALKER ELROD, *Circuit Judge:*

Rodney Reed was convicted of capital murder in 1998. Since then, he has sought various forms of post-conviction relief. This case arises from his motion for post-conviction DNA testing, which the Texas state courts denied. Reed brought this lawsuit against certain Texas officials under 42 U.S.C. § 1983. He

challenges the constitutionality of the Texas post-conviction DNA testing statute and seeks to compel the Texas officials to release the items he wishes to test. The district court dismissed his claim, and he now appeals. Because Reed's claim is barred by the statute of limitations, we AFFIRM the district court's judgment.

I.

Stacey Stites was reported missing on April 23, 1996 when she failed to show up for her morning shift at a local grocery store. *Reed v. State*, 541 S.W.3d 759, 762 (Tex. Crim. App. 2017). A passerby found her body later that day in the brush alongside a backroad in Bastrop County, Texas. *Ex Parte Reed*, 271 S.W.3d 698, 704 (Tex. Crim. App. 2008). Nearby, her shirt and a torn piece of her belt were also found. *Reed v. State*, 541 S.W.3d at 762.

At the time of her death, Stites was engaged to Jimmy Fennell, who was then a police officer in Giddings, Texas, and the two shared his red truck. *Id.* Fennell claimed that Stites had likely left their apartment in the truck at her usual hour of 3:00 a.m. to make it to her shift at work. The truck was later found in the parking lot of Bastrop High School. *Id.* The other half of Stites's belt lay outside the truck with the buckle intact. *Id.*

The medical examiner determined that Stites had been strangled with her own belt. *Id.* He also found intact sperm in Stites's vagina and, based on other medical evidence, concluded that Stites had likely been sexually assaulted prior to her death. *Id.* The police could not initially match the DNA of the sperm to anyone, however, and the investigation proceeded for nearly a year before they matched it to Rodney Reed's

genetic profile. *Reed v. Stephens*, 739 F.3d 753, 761 (5th Cir. 2014).

Reed was charged with capital murder. He defended himself on the theory that someone else, perhaps Stites's fiancé Fennell, was the murderer. *Reed v. State*, 541 S.W.3d at 775. He argued that his sperm was present not because he had sexually assaulted Stites but because the two had a longstanding sexual relationship that had been carried on in secret. *Id.* The jury rejected these defenses and convicted Reed of Stites's murder. *Id.* at 763.

Reed appealed his conviction and filed repeated habeas petitions in state court. After the Texas Court of Criminal Appeals rejected Reed's first two habeas petitions, Reed filed a habeas petition in federal court. *Reed v. Thaler*, No. A-02-CA-142, 2012 WL 2254216 (W.D. Tex. June 15, 2012). The district court permitted limited discovery and depositions and then stayed Reed's federal proceedings to allow him to return to state court and exhaust several arguments he had been unable to make up until that point. *Reed v. Stephens*, 739 F.3d at 763. Reed filed several more habeas petitions in state court and returned to federal court several years later to file an amended habeas petition asserting claims of actual innocence. *See id.* The district court granted summary judgment to the government on these claims, and the Fifth Circuit affirmed the district court's action on appeal. *See id.*

After Reed's federal habeas petition was denied, the state moved to set an execution date. *Reed v. State*, 541 S.W.3d at 764. Reed moved for post-conviction DNA testing of several items discovered on or near Stites's body and in Fennell's truck under Chapter 64 of the Texas Code of Criminal Procedure. *Id.* Chapter

64 allows a convicted person to obtain post-conviction DNA testing of biological material if the court finds that certain conditions are met. *See* Tex. Code Crim. Proc. Ann. § 64.03. The trial court denied Reed's Chapter 64 motion, and the Texas Court of Criminal Appeals ultimately affirmed that decision. *Id.* Reed sought certiorari from the Supreme Court of the United States, which was denied in June 2018, *see Reed v. Texas*, 138 S. Ct. 2675 (2018), and his execution was scheduled for November 20, 2019, *In re State ex rel. Goertz*, No. 90,124-02, 2019 WL 5955986, at *1 (Tex. Crim. App. Nov. 12, 2019). On November 11, 2019, Reed filed another state habeas petition, which is still pending review in state court. *See Ex Parte Reed*, No. 50,961-10, 2019 WL 6114891, at *1 (Tex. Crim. App. Nov. 15, 2019).

In August 2019, Reed filed a complaint under 42 U.S.C. § 1983 against Bryan Goertz, the Bastrop County district attorney, in the United States District Court for the Western District of Texas, which he later amended.[1] Reed's amended complaint challenges the constitutionality of Chapter 64, both on its face and as applied to him. Reed requested declaratory relief from the district court stating that Chapter 64 violates the First, Fourth, Fifth, and Eighth Amendments of the United States Constitution. Goertz moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The district court denied Goertz's 12(b)(1) motion but granted the 12(b)(6) motion. The court dismissed all of Reed's claims with prejudice. Reed now appeals the district court's decision.

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[1] Reed initially brought his § 1983 lawsuit against other custodians of physical evidence in Bastrop County, but dismissed his claims against them in his amended complaint.

II.

We review a district court's grant of a motion to dismiss *de novo*. *Waste Mgmt. of La., L.L.C. v. River Birch, Inc.*, 920 F.3d 958, 963 (5th Cir.), *cert denied* 140 S. Ct. 628 (2019). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). We must accept all facts as pleaded and construe them in "the light most favorable to the plaintiff." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)). We review a district court's jurisdictional determinations, including determinations regarding sovereign immunity, *de novo*. *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019).

III.

We first consider whether we have jurisdiction to hear this appeal. Goertz argues that we lack jurisdiction over this appeal because of the *Rooker-Feldman* doctrine.[2] Goertz is incorrect.

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[2] Goertz also asserts that we lack jurisdiction because of the Eleventh Amendment. He is incorrect. The Eleventh Amendment bars lawsuits against public officials when the state is the real party in interest. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–02 (1984). Because Goertz is being sued in his official capacity as a prosecutorial agent of the state of Texas, the Eleventh Amendment would normally bar a lawsuit unless immunity has been waived or abrogated, or if there is some exception. *Id.* at 99, 102. Here, the *Ex Parte Young* exception permits Reed to bring his claim against Goertz. Under this exception, a state official can be subject to a lawsuit if the lawsuit seeks only prospective relief from a continuing violation of federal law. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Contrary to Goertz's assertions, prospective

The *Rooker-Feldman* doctrine does not apply to this case. The *Rooker-Feldman* doctrine precludes federal courts other than the Supreme Court "from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, 546 U.S. 459, 463 (2006); *see also Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 416 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). It is a narrow doctrine applicable only to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp., v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

In this case, the district court correctly concluded that the doctrine is inapplicable to Reed's § 1983 claim because Reed challenged the constitutionality of Texas's post-conviction DNA statute. Reed did not attack the Court of Criminal Appeals' decision itself. Goertz contests that conclusion, arguing that Reed's amended complaint "challenged the [Court of Criminal Appeals'] application of Chapter 64 to him." Goertz

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relief can be either injunctive or declaratory. *See Aguilar v. Tex. Dep't of Crim. Just.*, 160 F.3d 1052, 1054 (5th Cir. 1998); *see also Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472–73 (5th Cir. 2020) (en banc). As Reed has asserted a claim for prospective declaratory relief, the *Ex Parte Young* exception permits him to bring his claim. Furthermore, taking the facts alleged as true, Goertz has the necessary connection to the enforcement of the statute. *See Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014). According to Reed's amended complaint, Goertz has "directed or otherwise caused each of the non-party custodians of the evidence [that Reed seeks] to refuse to allow Mr. Reed to conduct DNA testing" on such evidence and "has the power to control access" to that evidence. This is sufficient for *Ex Parte Young* at this stage.

argues that Reed's challenge "invited federal court review of a state court's judgment and, if successful, would 'effectively nullify' the [Court of Criminal Appeals'] judgment and would succeed only to the extent that the [Court of Criminal Appeals] wrongly decided the issues."

Goertz's argument, however, embraces an expansive version of the *Rooker-Feldman* doctrine that the Supreme Court has rejected. In *Skinner v. Switzer*, the Supreme Court considered the question of whether "a convicted state prisoner seeking DNA testing of crime-scene evidence" may "assert that claim in a civil rights action under 42 U.S.C. § 1983." 562 U.S. 521, 524 (2011). The Court held that the *Rooker-Feldman* doctrine did not apply to Skinner's claims because of the doctrine's narrow scope. *See id.* at 531. Both *Rooker* and *Feldman* involved cases where the plaintiffs, having lost in state court, asked the federal district courts to overturn a state-court decision. *Id.*; *Rooker*, 263 U.S. at 414; *Feldman*, 460 U.S. at 479–80. Skinner's situation was different, however, because his § 1983 claims did "not challenge the adverse [Court of Criminal Appeals'] decisions themselves; instead [they targeted] as unconstitutional the Texas statute [that the Court of Criminal Appeals' decisions] authoritatively construed." *Skinner*, 562 U.S. at 532. Thus, although a state-court decision may be reviewed only by the Supreme Court, "a statute or rule governing the decision may be challenged in a federal action." *Id.*

This case is no different than *Skinner*. In state court, Reed asserted that he was entitled to post-conviction DNA testing of certain evidence. *See Reed v. State*, 541 S.W.3d at 764. The Court of Criminal Appeals rejected Reed's request for post-conviction DNA

testing. In these proceedings, Reed challenges "the constitutionality of [Chapter] 64 both on its face and as interpreted, construed, and applied" by the state court. Like in *Skinner*, Reed does not challenge the Court of Criminal Appeals' decision itself. Instead, he targets "as unconstitutional the Texas statute [that the Court of Criminal Appeals' decision] authoritatively construed." *Skinner*, 562 U.S. at 532. If Reed were to succeed in his § 1983 claims, the Court of Criminal Appeals' decision would remain intact. Reed has therefore asserted an "independent claim" that would not necessarily affect the validity of the state-court decision. *Exxon*, 544 U.S. at 292–93 (quoting *GASH Assocs. v. Vill. of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993)); *see also Brown v. Taylor*, 677 F. App'x 924, 927 (5th Cir. 2017). The *Rooker-Feldman* doctrine does not apply.[3]

IV.

On appeal, Goertz also asserts that Reed's claims are barred by the applicable statute of limitations. Although the district court did not rule on this issue, we can "affirm the district court's judgment on any grounds supported by the record." *United States ex rel Farmer v. City of Houston*, 523 F.3d 333, 338 n.8 (5th Cir. 2008) (quoting *Sobranes Recovery Pool I, LLC v. Todd & Hughes Constr. Corp.*, 509 F.3d 216, 221 (5th Cir. 2007)). Section 1983 claims are subject to a state's personal injury statute of limitations. *See Walker v.*

[3] Goertz also asserts that he is entitled to absolute prosecutorial immunity. Prosecutorial immunity applies only in lawsuits for damages, not for prospective relief. *See Robinson v. Richardson*, 556 F.2d 332, 334 n.1 (5th Cir. 1977). Because this is a lawsuit brought for declaratory relief, Goertz is not entitled to absolute prosecutorial immunity.

Epps, 550 F.3d 407, 411 (5th Cir. 2008). In Texas, the statute of limitations for personal injury claims is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a). As such, Reed cannot assert any claims that accrued prior to August 2017.

"We determine the accrual date of a § 1983 action by reference to federal law." *Walker*, 550 F.3d at 414. Our court has not previously decided when the injury accrues in a denial of post-conviction DNA testing claim. However, we have explained that that the limitations period for a § 1983 claim "begins to run 'the moment the plaintiff becomes aware the he has suffered an injury or has sufficient information to know that he has been injured.'" *Russell v. Bd. Of Trustees*, 968 F.2d 489, 493 (5th Cir. 1992) (quoting *Rodriguez v. Holmes*, 963 F.2d 799, 803 (5th Cir. 1992)). The question in this case is when Reed had sufficient information to know of his alleged injury.

Reed alleges that he was denied access to the physical evidence that he wished to test. An injury accrues when a plaintiff *first* becomes aware, or should have become aware, that his right has been violated. *See Russell*, 968 F.2d at 493. Here, Reed first became aware that his right to access that evidence was allegedly being violated when the trial court denied his Chapter 64 motion in November 2014. Reed had the necessary information to know that his rights were allegedly being violated as soon as the trial court denied his motion for post-conviction relief.

Moreover, Reed did not need to wait until he had appealed the trial court's decision to bring his § 1983 claim. The Supreme Court has emphasized "that § 1983 contains no judicially imposed exhaustion requirement; absent some other bar to the suit, a claim

is either cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed." *Edwards v. Balisok*, 520 U.S. 641, 649 (1997) (citation omitted); *cf. Savory v. Lyons*, 469 F.3d 667, 674 (7th Cir. 2006) (citing *Edwards* and concluding that ongoing state proceedings do not toll the statute of limitations for a § 1983 claim for denial of post-conviction DNA testing). Reed could have brought his claim the moment the trial court denied his Chapter 64 motion because there was a "complete and present cause of action" at that time. *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (quoting *Bay Area Laundry and Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). Because Reed knew or should have known of his alleged injury in November 2014, five years before he brought his § 1983 claim, his claim is time-barred.

V.

For the foregoing reasons, we therefore AFFIRM the district court's dismissal of Reed's claims because they are not timely.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RODNEY REED, **PLAINTIFF**	§	
v.	§	**CIVIL NO. A-19-CV-0794-LY**
BRYAN GOERTZ, BASTROP COUNTY DISTRICT ATTORNEY, **DEFENDANT**	§	*** CAPITAL CASE ***

ORDER DISMISSING COMPLAINT

Plaintiff Rodney Reed, a Texas death-row inmate, is scheduled to be executed on November 20, 2019. On August 8, 2019, Reed filed a civil-rights complaint arguing that the denial of his motion for DNA testing in state court denied him, among other things, the right to due process of law and access to the courts. *See* 42 U.S.C. § 1983 ("Section 1983"). Reed later amended his complaint and filed a motion for stay of execution.[1] (Doc. #11). Defendant Goertz opposes both of these requests.

[1] Reed filed his initial complaint against the Director of the Texas Department of Public Safety, as well as the District Attorney, District Clerk, and Sheriff of Bastrop County, Texas. Following motions to dismiss filed by all Defendants, however, Reed amended his complaint and named only Bryan Goertz, the District Attorney of Bastrop County, as a defendant.

Currently pending before the court are Reed's Amended Complaint[2] (Doc. #10), Goertz's Motion to Dismiss (Doc. #22), and Reed's Opposition to the Motion to Dismiss (Doc. #25), as well as Reed's Motion to Stay Execution (Doc. #11), Goertz's opposition (Doc. #23), and Reed's reply (Doc. #27). Also before the court are Goertz's Motion to Stay Discovery (Doc. #24) and Reed's opposition (Doc. #26). For the reasons discussed below, Goertz's Motion to Dismiss will be granted and Reed's complaint will be dismissed for failing to state a claim upon which relief may be granted. In addition, Reed's motion to stay the execution will be denied and Goertz's motion to stay discovery dismissed.

I. Background

A. The Crime, Investigation, and Trial

Reed was convicted and sentenced to death for the 1996 abduction, rape, and murder of Stacey Lee Stites. The evidence introduced during Reed's capital-murder trial has been summarized in great detail by numerous courts, most comprehensively by the Texas Court of Criminal Appeals ("CCA") in an opinion following Reed's third state *habeas corpus* proceeding. *Ex parte Reed*, 271 S.W.3d 698, 702-12 (Tex. Crim. App. 2008). For purposes of this proceeding, however, the most relevant summary of the facts is from the CCA's 2017 opinion affirming the denial of Reed's DNA motion:

> [] Stacey Lee Stites's partially clothed body was found on the side of a back country road in Bastrop County on April 23, 1996. She

[2] For simplicity, Reed's Amended Complaint will hereinafter be referred to as the complaint.

was wearing only a black bra, underwear, undone blue jeans, socks, and a single tennis shoe, and her H.E.B. name tag was found in the crook of her knee. A white t-shirt, a piece of a brown woven belt without a buckle, and two beer cans were found nearby. Before Stites's murder, she was engaged to Jimmy Fennell, a Giddings police officer at the time, and the two shared Fennell's red pick-up truck. Stites worked the early-morning shift at H.E.B. and typically drove the truck to work. The truck was discovered in the Bastrop High School parking lot after Stites's disappearance. Among other things inside the truck, authorities found Stites's other shoe and broken pieces of a green plastic cup. Outside the truck, police found a piece of a brown woven belt with the buckle attached.

Department of Public Safety (DPS) crime scene investigators Karen Blakley, Wilson Young, and Terry Sandifer processed Stites's body, the truck, and the scene where Stites was found. Blakley testified at trial that the murder weapon was the belt "[b]ecause it matched the pattern that was on [Stites's] neck." Blakley also concluded that the two belt pieces matched and were torn, not cut. Because Stites was found partially clothed and with her pants ripped open, Blakley presumed a sexual assault preceded the murder. At the scene, Blakley further observed Stites's underwear was wet in the crotch and bunched around her hips, so she tested the crotch of the underwear for semen. Getting a positive result, Blakley collected DNA samples from

Stites's vagina and breasts. Blakley did not collect samples from Stites's rectum because rigor mortis had already set in. Blakley also observed scratches on Stites's arms and abdomen, a cigarette burn on her arm, and what appeared to be fire ant bites on her wrists. To preserve any DNA evidence under her fingernails, DPS investigators put plastic bags over Stites's hands.

Dr. Robert Bayardo, the Travis County Medical Examiner, conducted Stites's autopsy the day after her body was found. He determined that Stites died around 3:00 a.m. on April 23rd. He also concluded that the belt was the murder weapon and that Stites died of asphyxiation by strangulation. Like Blakley, Bayardo presumed Stites was sexually assaulted, took vaginal swabs, and found sperm with both heads and tails intact. He also took rectal swabs but found only sperm heads with no tails. He noted that her anus was dilated with superficial lacerations. Dr. Bayardo thought the presence of sperm in the anus was indicative of penile penetration, but noted that it may have been attributed to seepage from the vagina. He concluded that Stites's anal injuries occurred at or around the time of death and therefore were not acts of consensual sexual activity.

When Young and Sandifer processed the truck for evidence, neither found fingerprints, blood, or semen identifying the perpetrator. However, they and Ranger L.T. Wardlow, the lead investigator on the case, noted the

driver's seat position was reclined with the seatbelt fastened as if someone was pulled out of the seat while buckled in. Young, who stood six feet, two inches, also noticed that when he sat in the reclined driver's seat, he had a clear view out of the back window in the rearview mirror. Based on this, they concluded that someone who was six-foot-two or of similar height must have driven the truck.

Five days after Stites's body was found, a citizen reported finding some items they believed were connected to Stites's murder. The report, written by Officer Scoggins, stated that the citizen reported that a part of a shirt, two condoms, and part of a knife handle were found. At trial, Ranger Wardlow testified that he did not have personal knowledge about who brought in the condoms. However, he testified that he saw the condoms a short while after they were brought in and confirmed that the condoms "appeared to be old and cracked and worn out." These items were not tested for DNA evidence before trial.

Police investigated Stites's murder over the course of eleven months. During that time, police obtained twenty-eight biological samples from twenty-eight males. None of them matched the biological evidence found in and on Stites's body. After following several theories and lines of investigation—ruling out people Stites knew personally—police learned information about Reed that could make him a suspect. Reed was about the same height as Young, lived near the Bastrop High School,

> and frequently walked the area late at night. Police learned from DPS that Reed had an existing DNA sample on file and had DPS test it against the vaginal swabs taken by Blakley. Two different DNA tests of the samples concluded that Reed could not be excluded as a donor of the semen. Looking for more conclusive results, DPS forwarded the samples to LabCorp for additional testing. Again, the results could not exclude Reed and determined that the samples matched Reed's genetic profile. The LabCorp technician, as well as Blakley, testified that intact sperm did not live more than twenty-four hours after commission of a vaginal-sexual assault and sperm breaks down faster in the rectal area than in the vaginal vault.

Reed v. State, 541 S.W.3d 759, 762-63 (Tex. Crim. App. 2017).

Following the discovery that Reed's DNA matched the DNA recovered from Stites's body, police provided Reed with *Miranda*[3] warnings and interviewed him. Reed denied knowing Stites. In May 1997, Reed was charged with capital murder. At trial the following year, prosecutors presented the evidence discovered during the murder investigation, as well as the testimony of Dr. Bayardo, Blakley, and DNA analyst Meghan Clement. In response, Reed's defense team mounted a two-pronged challenge to the State's evidence. First, the defense attempted to show that someone else, possibly Stites's fiancé Jimmy Fennell, had committed the offense. Second, to explain the

[3] *Miranda v. Arizona*, 384 U. S. 436 (1966).

presence of Reed's semen in Stites's body, the defense attempted to establish that Reed had an ongoing romantic relationship with Stites and that the semen was the result of consensual intercourse. After weighing the evidence, the jury ultimately rejected Reed's defense and found him guilty of capital murder. Reed was sentenced to death after a separate punishment hearing, where the jury heard evidence that Reed had committed numerous other sexual assaults.

B. Reed's Post-Conviction Proceedings

Reed appealed his conviction on several grounds, including that the evidence was factually insufficient to support his conviction for capital murder. On December 6, 2000, the CCA rejected these claims, holding that "the strength of the DNA evidence connecting [Reed] to the sexual assault on [Stites] and the forensic evidence indicating that the person who sexually assaulted [her] was the person who killed her, a reasonable jury could find that [Reed] is guilty of the offense of capital murder." *Reed v. State*, No. AP-73,135 (Tex. Crim. App.) (unpublished).

Since then, Reed has repeatedly challenged the constitutionality of his conviction and sentence in state court, having filed ten *habeas corpus* applications raising numerous allegations for relief. Each of the applications by Reed includes claims that newly-discovered evidence supports his assertion that he is actually innocent and that the State's failure to disclose this evidence violated his due-process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). On these issues alone, Reed has, over a lengthy period of time, provided the state courts with a variety of evidence to support his allegations and has received no less than three evidentiary hearings on the matters.

To date, each of these applications has either been dismissed or denied, with neither the trial court nor the CCA ever seriously questioning the integrity of his conviction. *See, e.g., Ex parte Reed*, Nos. WR-50,961-08, WR-50,961-09, 2019 WL 2607452, at *1-3 (Tex. Crim. App. June 26, 2019).[4]

Reed has also challenged the constitutionality of his conviction and sentence in federal court, having sought federal *habeas corpus* relief from this court following the CCA's rejection of his first and second state *habeas corpus* applications. *See Reed v. Thaler*, No. 1:02-cv-142-LY (W.D. Tex). After permitting limited discovery and depositions, this court stayed Reed's federal proceedings to allow him to return to state court to exhaust claims that had not been presented to the state court in his previous state *habeas corpus* proceedings. Upon his return to federal court some six years later, Reed filed an amended petition raising, among other claims, a freestanding claim of actual innocence and a gateway claim of actual innocence to help overcome the procedural default of certain allegations. The State moved for summary judgment, and on June 15, 2012, a magistrate judge issued a comprehensive report and recommendation listing each of Reed's allegations and recommending their denial. A few months later, this court issued an order largely adopting the magistrate judge's recommendations and, relative to Reed's claims of actual innocence, finding there was no credible evidence to support the conclusions that Reed had a consensual relationship with Stites or that someone other than Reed murdered her. The decision was affirmed by the Fifth

[4] Reed's tenth state *habeas corpus* application, filed November 11, 2019, is currently pending in the CCA.

Circuit Court of Appeals in January 2014. *Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014).

C. Reed's Post-Conviction Motion for DNA Testing

In April 2014, the State moved the state trial court to set an execution date for Reed. At a July 2014 hearing on the matter, Reed moved the trial court, pursuant to Chapter 64 of the Texas Code of Criminal Procedure, Tex. Code Crim. Proc. § 64 ("Chapter 64"), to have post-conviction DNA testing performed on a large number of items, including: (1) items recovered from Stites's body or her clothing, (2) items found in or near Fennell's truck, and (3) items located near the site where Stites's body was found. The trial court held a hearing on the motion, at which Reed expanded his request for testing to include numerous additional items found near the crime scene. Reed also presented the testimony of John Paulucci, an expert in crime-scene investigation, and Deanna Lankford, an expert in DNA testing. The State presented the testimony of three witnesses: Sergeant Gerald Clough, an investigator with the Office of the Attorney General; Etta Wiley, a Bastrop County Deputy Clerk; and Lisa Tanner, the lead prosecutor at Reed's trial.

The trial court denied Reed's DNA motion and issued findings of fact and conclusions of law on the matter. On appeal, the CCA remanded the case for additional findings, which the trial court rendered. On subsequent appeal, the CCA affirmed the trial court's denial of DNA testing in an opinion delivered April 12, 2017. *Reed*, 541 S.W.3d at 759. Citing the requirements set forth by Chapter 64, both the trial court and the CCA found that Reed failed to demonstrate: (1) the evidence had been subjected to a chain of custody

sufficient to establish it had not been substituted, tampered with, replaced, or altered in any material respect; (2) he would not have been convicted if exculpatory results had been obtained through DNA testing; and (3) his DNA motion was not made to unreasonably delay the execution of his sentence. *Id.* at 769-79; *see* Tex. Code Crim. Proc. Article 64.03(a). Reed appealed the CCA's decision to the United States Supreme Court, which denied certiorari. *Reed v. Texas*, __ U.S. __, 138 S. Ct. 2675 (2018).

D. Reed's Civil Rights Complaint

On July 23, 2019, the trial court scheduled Reed to be executed on November 20, 2019. Two weeks later, Reed filed this civil-rights action challenging the constitutionality of Chapter 64 "both on its face and as interpreted, construed, and applied" by the CCA. Specifically, Reed asserts a due-process violation resulted from the CCA's imposition of "arbitrary" conditions on Chapter 64, which effectively precludes DNA testing in most cases and eviscerates the relief Chapter 64 was designed to provide. He also contends the CCA's interpretation of Chapter 64 has unconstitutionally deprived him of his rights under both the United States Constitution and the Texas Constitution to access the courts, to be free from cruel and unusual punishment, and to establish his innocence. Reed requests declaratory relief from this court stating that Chapter 64, as construed by the CCA, violates the First, Fifth, Eighth, and Fourteenth Amendments. *See* U.S. CONST. amend. I, V, VIII, and XIV. He also asks this court to stay his upcoming execution pending a resolution of this action.

II. Jurisdiction

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a federal court must dismiss a case for lack of subject-matter jurisdiction "when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc., v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). Reed has filed a Section 1983 complaint challenging the constitutionality of the Texas DNA statute—Chapter 64—as authoritatively construed by the state court. The Supreme Court has found that such challenges may be brought in a Section 1983 action. *See Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (holding "postconviction claim for DNA testing is properly pursued in a [Section] 1983 action."). This is so because success in this civil-rights action, unlike a petition for *habeas corpus* relief, would not "necessarily imply" the invalidity of Reed's conviction. *Id.* at 534 (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005)). In fact, DNA testing could potentially prove inconclusive or may even further incriminate Reed. Because Reed's complaint would not "necessarily spell speedier release," his suit is properly brought under Section 1983. *Young v. Gutierrez*, 895 F.3d 829, 831 (5th Cir. 2018) (citing *Skinner*, 562 U.S. at 534).

Nevertheless, Goertz requests dismissal of Reed's complaint under Rule 12(b)(1), arguing first that this court lacks subject-matter jurisdiction over the complaint under what is known as the *Rooker-Feldman* doctrine.[5] The doctrine is a jurisdictional rule that precludes the lower federal courts from reviewing

[5] The *Rooker-Feldman* doctrine derives from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

state-court judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291-92 (2005). The Supreme Court is the only federal court vested with authority to review a state court's judgment. *Id.; see* 28 U.S.C. § 1257(a) (providing, in relevant part, that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari" if they involve an issue of federal law). Given the "narrow ground" the doctrine occupies, however, the Supreme Court confined *Rooker-Feldman* "to cases ... brought by state-court losers ... inviting district court review and rejection of [a state court's] judgments." *Id.* at 283-84.

Reed's case does not fall within this narrow ground. Although it is true a state-court decision is not reviewable by a lower federal court under the *Rooker-Feldman* doctrine, the Supreme Court has clarified that "a statute or rule governing the decision may be challenged in a federal action." *Skinner*, 562 U.S. at 532 (citing *Exxon*, 544 U.S. at 284). Here, Reed's complaint specifically asserts that Reed is challenging "the constitutionality of [Chapter] 64 both on its face and as interpreted, construed, and applied" by the CCA. Because Reed is not challenging the adverse state-court decisions themselves but rather the validity of the Texas DNA statute they authoritatively construe, the *Rooker-Feldman* doctrine is inapplicable. *Skinner*, 562 U.S. at 530 (holding district court had jurisdiction to consider prisoner's Section 1983 case seeking DNA testing of evidence because case challenged "Texas' post-conviction DNA statute 'as construed' by the Texas courts" rather than challenging prior decisions denying requests for DNA testing through state-law procedures).

Goertz also asserts that dismissal of Reed's complaint is warranted under Rule 12(b)(1) because this court lacks subject-matter jurisdiction under the Eleventh Amendment. The Eleventh Amendment generally provides immunity to a State defendant against suits in federal court by a citizen of the State against the State or a state agency or department. U.S. CONST. amend. XI; *Saahir v. Estelle*, 47 F.3d 758, 760-61 (5th Cir. 1995) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97-99 (1984)). When only state officials have been sued, the suit is barred if "the [S]tate is the real, substantial party in interest." *Pennhurst*, 465 U.S. at 101.

Goertz argues that, as an agent of the State of Texas, the Eleventh Amendment provides him immunity from this suit because the State is the real party here.

However, there is a narrow exception to Eleventh Amendment immunity when a plaintiff sues state officials for an allegedly ongoing violation of federal law and seeks prospective, declaratory, or injunctive relief. *See Ex parte Young*, 209 U.S. 123, 155-56 (1908). The Supreme Court has held that enforcement of an unconstitutional law is not an official act, because a state cannot confer authority on its officers to violate the Constitution or federal law. *Pennhurst*, 465 U.S. at 102-03 (finding suit challenging constitutionality of state official's action is not one against the State and thus is not barred by Eleventh Amendment); *Aguilar v. Texas Dep't of Criminal Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998) (same) (citation omitted). To determine whether *Ex parte Young* applies, the court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation

of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation omitted). Because Reed alleges a violation of federal law by an individual acting in an official capacity as an agent of the State and seeks prospective declaratory relief in this lawsuit, his claims are not barred by sovereign immunity. *Aguilar*, 160 F.3d at 1054. Contrary to Goertz's assertions, therefore, the court does not lack subject-matter jurisdiction.

III. Standard of Review

Goertz also requests a dismissal of Reed's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A prisoner's civil-rights complaint should be dismissed if it is frivolous, malicious, or fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915A(b)(1); Fed. R. Civ. P. 12(b)(6). Although a complaint does not need detailed factual allegations, a plaintiff must allege sufficient facts to show more than a speculative right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Conclusory allegations and a formulaic recitation of the elements of a cause of action will not suffice to prevent dismissal for failure to state a claim. *Id.* To withstand dismissal for failure to state a claim, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678-79. This plausibility standard is not simply a "probability requirement," but imposes a standard

higher than "a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, a district court's dismissal of a complaint for failing to state a claim will be upheld if, "taking the plaintiff's allegations as true, it appears that no relief could be granted based on the plaintiff's alleged facts." *Samford v. Dretke*, 562 F.3d 674, 678 (5th Cir. 2009).

IV. Analysis

A. The Due-Process Claim

Goertz moves to dismiss Reed's Section 1983 claims for failing to state a claim upon which relief may be granted. To state a claim under Section 1983, a plaintiff must prove that: (1) the conduct in question was committed by a person acting under the color of state law, and (2) the conduct deprived the claimant of a constitutional right. *Kovacic v. Villarreal*, 628 F.3d 209, 213 (5th Cir. 2010). In his complaint, Reed contends that the Texas DNA statute, as construed by the CCA, violates procedural due process because it imposes "arbitrary" and extra-statutory conditions upon individuals seeking DNA testing.[6] While there is no freestanding right for a convicted defendant to obtain evidence for post-conviction DNA testing, Texas

[6] According to Reed, the CCA's interpretation of Chapter 64 violates fundamental fairness in several ways, including: (1) imposing a flawed chain-of-custody requirement; (2) improperly limiting the definition of "exculpatory" only to results excluding the convicted person as the donor of the material; (3) failing to consider post-trial factual developments in determining whether he would have been convicted in light of presumed exculpatory DNA results; and (4) erroneously finding "unreasonable delay" in bringing his DNA motion even though the "touch DNA" testing he requested did not become available under the statute until 2014.

has created such a right, and, as a result, the state-provided procedures must be adequate to protect the substantive rights provided. *Skinner v Switzer*, 562 U.S. 521, 525 (2011); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). In order for the procedures to be unconstitutional, the court would have to determine that the procedures are inadequate to protect Reed's right to seek post-conviction DNA testing and offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Skinner*, 562 U.S. at 525; *Osborne*, 557 U.S. at 69.

Chapter 64 permits a convicted defendant to move in the convicting court for post-conviction DNA testing of evidence. But Chapter 64 only allows the convicting state court to order testing if it finds that: (1) the evidence still exists and is in a condition that makes DNA testing possible; (2) the evidence has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; (3) identity was or is an issue in the case; (4) the convicted person establishes by a preponderance of the evidence that he would not have been convicted if DNA testing provided exculpatory results; and (5) the motion is not made to unreasonably delay the execution of a sentence. Tex, Code Crim. Proc. Art. 64.03(a). The CCA affirmed the denial of Reed's DNA motion because Reed could not establish the chain-of-custody requirement or prove "by a preponderance of the evidence that, in light of presumed exculpatory DNA results, he would not have been convicted," *Reed*, 541 S.W.3d at 774-78. The court also found that Reed failed to show that his motion was not made to unreasonably delay the execution of his sentence or the administration of justice. *Id.*

There is nothing so egregious in Chapter 64 that rises to the level of a procedural due-process violation. Reed has not met the heavy burden of showing that the procedures established by Chapter 64, as construed by the CCA, are inadequate to protect a defendant's right to post-conviction DNA testing. Considering Reed fully utilized the process enacted by the Texas Legislature to obtain DNA testing, all Reed has shown is that he disagrees with the state court's construction of Texas law. That is not enough.

After careful consideration, this court is unable to find any failure of the state's procedures that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" or that "transgress[es] any recognized principle of fundamental fairness in operation." *Moon v. City of El Paso*, 906 F.3d 352, 359 (5th Cir. 2018) (citing *Osborne,* 557 U.S. at 69). Indeed, there is simply "nothing inadequate about the procedures [Texas] has provided to vindicate its state right to postconviction relief in general," or anything "inadequate about how those procedures apply to those who seek access to DNA evidence." *Osborne*, 557 U.S at 70; *see also Pruett v. Choate*, 711 F. App'x 203, 206-07 (5th Cir. 2017) (unpublished) (finding plaintiff's assertions regarding CCA's interpretation of Chapter 64 "boil down to the bare claim that the CCA misapplied Texas law" and not a due-process violation).[7] In other words, Reed fails to establish that Chapter 64, as construed

[7] "An unpublished opinion issued after January I, 1996 is not controlling precedent, but may be persuasive authority. 5th Cir. R. 47.5.4." *Ballard v. Burton*, 444 F.3d 391, 401 & n.7 (5th Cir. 2006).

by the CCA, denies him procedural due process. *Skinner*, 562 U.S. at 525.

B. Access to Courts

Reed next contends that the CCA's interpretation of Chapter 64 prevents him from gaining access to potentially exculpatory information that could demonstrate his innocence. According to Reed, this lack of information interferes with his First and Fourteenth Amendment rights of access to the courts, as it prevents him from collecting evidence to support either a successive *habeas corpus* petition or an application for clemency. U.S. CONST. amend. I, XIV. This claim fails to state a claim upon which relief may be granted.

It is well established that prisoners have a constitutional right of access to the courts that is "adequate, effective, and meaningful." *Terry v. Hubert*, 609 F.3d 757, 761 (5th Cir. 2010) (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). That being said, "[o]ne is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation." *Whitaker v. Collier,* 862 F.3d 490, 501 (5th Cir. 2017) (quoting *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013)). Rather, a plaintiff must show an actual injury and an actual legal claim to establish a valid access-to-courts claim. *Lewis v. Casey*, 518 U.S. 343, 350-52 (1996); *see also Turner v. Epps*, 460 F. App'x. 322, 328 (5th Cir. 2012) (explaining that "an inmate who brings a § 1983 claim based upon his right of access to the courts must be able to show that the infringing act somehow defeated his ability to pursue a legal claim."). This requirement reflects the fact that "the very point of recognizing any access claim is to provide some effective vindication

for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002).

In addition to Reed's access-to-courts claim, Reed's civil-rights action alleges that Chapter 64—on its face and as construed by the CCA—violates his due-process rights, the Eighth Amendment, the Texas Constitution, and his right to establish his innocence. But Reed has presented nothing which permits this court to conclude that his rights under the United States Constitution or Texas Constitution are violated by Chapter 64. Reed thus cannot establish the necessary prerequisite of an "actual injury" to support his access-to-courts claim when he has no colorable claim to present to the court in the first place. "Plaintiffs must plead sufficient facts to state a cognizable legal claim." *Whitaker*, 732 F.3d at 467. Because Reed has not met the pleadings standards for the claims he raises, any access-to-the-courts theory fails as well.

Furthermore, although Reed argues the denial of his DNA motion impedes access to evidence he needs in order to pursue another actual-innocence claim in state court, the right of access to the courts does not encompass the ability "to *discover* grievances, and to *litigate effectively* once in court." *Lewis*, 518 U.S. at 354 (emphasis in original). Reed points to no actual claim that he was prevented from lodging in a court of law. Although Reed sought DNA testing to support a potential actual-innocence claim, his request was evaluated by the state trial court pursuant to the statutory process set forth in Chapter 64. *State v. Reed*, No. 8701 (21st Dist. Ct., Bastrop Cnty., Tex. Sept. 9, 2016) (Findings of Fact and Conclusions of Law). Reed also took advantage of the right to appeal the state

trial court's decision to the CCA as set forth in the statute. *See* Tex. Code Crim. Proc. Article 64.05. Considering Reed fully utilized the processes of Chapter 64, he has shown only that his state-court motion was denied. That is not enough to establish an "actual injury" to support a claim that his right of access to the courts was obstructed. Reed's claim therefore fails.

C. The Eighth Amendment

Reed argues that Chapter 64 violates the Eighth Amendment's prohibition on cruel-and-unusual punishment because the CCA has interpreted Chapter 64 to allow the denial of DNA testing even under circumstances where such testing has the capacity to prove innocence. *See* U.S. CONST. amend. VIII. Without the opportunity to establish his innocence with potentially exculpatory DNA results, Reed contends, his execution will constitute cruel-and-unusual punishment. Reed provides no argument to support this assertion, nor is the court aware of any precedent indicating the denial of DNA testing constitutes an Eighth Amendment violation. Indeed, Reed's argument essentially seeks to constitutionalize a right to DNA testing under the Eighth Amendment whenever such testing "has the capacity to prove innocence," a notion the Supreme Court unambiguously rejected in *Osborne*. 557 U.S. at 72 (rejecting invitation to recognize "a freestanding right to DNA evidence" and concluding there is no substantive due-process post-conviction right to obtain evidence for DNA testing purposes). As such, Reed fails to state a viable Eighth Amendment claim.

D. Actual Innocence

In a related allegation, Reed refers to an asserted constitutional right to prove his "actual innocence."

The State's refusal to allow DNA testing, Reed argues, deprives him of "the opportunity to make a conclusive showing that he is actually innocent . . . in violation of the Eighth Amendment, the right to access to courts, the right to a remedy, and the Due Process Clause of the Fourteenth Amendment[.]" But whether such a federal right exists is "an open question." *Osborne*, 557 U.S. at 71. Reed fails to provide this court with authority establishing such a right and does not state a claim upon which relief may be granted.

Further, like the previous Eighth Amendment claim, Reed's attempt to establish a right to demonstrate his actual innocence through DNA testing fails under *Osborne*. "One of the main reasons underlying the decision in *Osborne* is that it should be primarily up to the state and federal legislatures to fashion procedures that balance the powerful exonerating potential of DNA evidence with the need for maintaining the existing criminal justice framework and the finality of convictions and sentences." *See Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257, 1265 (11th Cir. 2012) (citing *Osborne*, 557 U.S. at 62-63, 72-74), Although Reed asks this court to establish a *right* to DNA testing under the Eighth Amendment, such a holding would squarely conflict with the Supreme Court's explicit rejection of the invitation "[t]o suddenly constitutionalize this area." *Osborne*, 557 U.S. at 73 ("We are reluctant to enlist the Federal Judiciary in creating a new constitutional code of rules for handling DNA."). Only the Supreme Court may expand the existing parameters set forth in *Osborne*.

E. Claims Under the Texas Constitution

The dismissal of the above allegations leaves Reed's corresponding claim that his rights under the

Texas Constitution were also violated. The Supreme Court has cautioned federal courts to avoid "[n]eedless decisions of state law" when, in situations such as this, the corresponding federal claims have been dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."). And the general rule in the Fifth Circuit "is to dismiss state claims when the federal claims to which they are pendent are dismissed." *Enochs v. Lampasas Cty.*, 641 F.3d 155, 161 (5th Cir. 2011) (citing *Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 585 (5th Cir. 1992)); *Brookshire Bros. Holding Inc. v. Dayco Products, Inc.*, 554 F.3d 595, 602 (5th Cir. 2009) (noting that "the general rule is that a court should decline to exercise jurisdiction over remaining state-law claims when all federal-law claims are eliminated before trial"). For these reasons, the court declines to exercise pendant jurisdiction over Reed's state-law claims.

V. Motion to Stay Execution

Reed asks this court to stay his upcoming execution to allow for more time to review the claims raised in his complaint. A federal court has inherent discretion when deciding whether to stay an execution. *See* 28 U.S.C. § 2251(a)(1); *Nken v. Holder*, 556 U.S. 418, 434 (2009). However, "a stay of execution is an equitable remedy, and an inmate is not entitled to a stay of execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006); *Murphy v. Collier*, 919 F.3d 913, 915 (5th Cir. 2019). In deciding whether to grant a stay of execution, a court must consider: (1) whether the stay applicant has made a

strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other party interested in the proceeding; and (4) where the public interest lies. *Nken*, 556 U.S. at 425-26.

The *Nken* factors support denying Reed's Motion to Stay Execution.[8] In particular, Reed fails to show a likelihood of success on the merits. Reed requests a stay of execution so that the court may consider the issues raised in his complaint: namely, whether Chapter 64, as interpreted by the state trial court and CCA, violates Reed's constitutional rights under both the United States and Texas Constitutions. Because the court rejects Reed's claims, he cannot demonstrate a likelihood of success on the merits. *See Diaz v. Stephens*, 731 F.3d 370, 379 (5th Cir. 2013) (affirming denial of stay when movant fails to establish likelihood of success on the merits).

Furthermore, equitable considerations weigh against granting Reed's Motion to Stay Execution. This court applies "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Murphy*, 919 F.3d at 915 (citing *Hill*, 547 U.S. at 584). Here, Reed waited until the trial court held a hearing on the State's motion to set an execution date before

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[8] The second *Nken* factor—the possibility of irreparable injury—"weighs heavily in the movant's favor." *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (per curiam). But an applicant is not entitled to a stay "[as] a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427 (internal quotation marks omitted).

seeking DNA testing under Chapter 64, despite the fact (1) he was convicted nearly 16 years previously, and (2) Chapter 64 had existed with only slight variations for over 13 years at the time Reed filed his motion. The CCA found that "there does not appear to be any factual or legal impediments that prevented Reed from availing himself of post-conviction DNA testing earlier." *Reed*, 541 S.W.3d at 779. Reed did not file this action until the state trial court scheduled his current execution date. Reed contends his state DNA proceedings "were marred by striking irregularities and delays requested by the State." But this does not explain the delay in filing this action over two years *after* the conclusion of Reed's state DNA proceedings. The court will deny the request for stay.

VI. Conclusion and Order

Contrary to arguments made by Goertz, neither the *Rooker-Feldman* doctrine nor the Eleventh Amendment divest this court of subject-matter jurisdiction over Reed's claims for relief. However, Reed's complaint fails to state a claim upon which relief may be granted because there is nothing inadequate about how Chapter 64's procedures apply to those who seek access to DNA evidence. *See* 28 U.S.C. § 1915A(b)(1); Fed. R. Civ. P. 12(b)(6).

It is therefore **ORDERED** that Goertz's Motion to Dismiss, filed October 15, 2019 (Doc. #22), is hereby **GRANTED**.

It is further **ORDERED** that Reed's Amended Complaint (Doc. #10) seeking declaratory relief is **DISMISSED WITH PREJUDICE** for failing to state a claim upon which relief may be granted. 28 U.S.C. § 1915A(b)(1); Fed. R. Civ. P. 12(b)(6).

It is further **ORDERED** that Reed's Motion to Stay Execution, filed October 1, 2019 (Doc. #11), is **DENIED**.

Finally, it is **ORDERED** that Goertz's Motion to Stay Discovery, filed October 15, 2019 (Doc. #24), is **DISMISSED**.

SIGNED this the 15th day of November, 2019.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,054

RODNEY REED, Appellant,

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM CAUSE NUMBER 8701 IN THE 21ST DISTRICT COURT BASTROP COUNTY

KEASLER, J., delivered the opinion of the Court in which KELLER, P.J., and HERVEY, ALCALA, RICHARDSON, YEARY, KEEL, and WALKER, JJ., joined. NEWELL, J., not participating.

OPINION

Rodney Reed sought post-conviction DNA testing of over forty items collected in the course of investigating Stacey Stites's sexual assault and murder. This investigation culminated in Reed's conviction and sentence of death for the capital murder of Stites. The trial judge denied the motion. Because Reed cannot establish that exculpatory DNA results would have resulted in his acquittal and his motion is not made for the purpose of unreasonable delay, we affirm the trial judge's denial.

I. Background

A. Trial

Because we detailed the case's factual background elsewhere,[1] only the facts relevant to Reed's current DNA appeal are included in this opinion. Stacey Lee Stites's partially clothed body was found on the side of a back country road in Bastrop County on April 23, 1996. She was wearing only a black bra, underwear, undone blue jeans, socks, and a single tennis shoe, and her H.E.B. name tag was found in the crook of her knee. A white t-shirt, a piece of a brown woven belt without a buckle, and two beer cans were found nearby. Before Stites's murder, she was engaged to Jimmy Fennell, a Giddings police officer at the time, and the two shared Fennell's red pick-up truck. Stites worked the early-morning shift at H.E.B. and typically drove the truck to work. The truck was discovered in the Bastrop High School parking lot after Stites's disappearance. Among other things inside the truck, authorities found Stites's other shoe and

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[1] *See Ex parte Reed*, 271 S.W.3d 698, 702–12 (Tex. Crim. App. 2008).

broken pieces of a green plastic cup. Outside the truck, police found a piece of a brown woven belt with the buckle attached.

Department of Public Safety (DPS) crime scene investigators Karen Blakley, Wilson Young, and Terry Sandifer processed Stites's body, the truck, and the scene where Stites was found. Blakley testified at trial that the murder weapon was the belt "[b]ecause it matched the pattern that was on [Stites's] neck." Blakley also concluded that the two belt pieces matched and were torn, not cut. Because Stites was found partially clothed and with her pants ripped open, Blakley presumed a sexual assault preceded the murder. At the scene, Blakley further observed Stites's underwear was wet in the crotch and bunched around her hips, so she tested the crotch of the underwear for semen. Getting a positive result, Blakley collected DNA samples from Stites's vagina and breasts. Blakley did not collect samples from Stites's rectum because rigor mortis had already set in. Blakley also observed scratches on Stites's arms and abdomen, a cigarette burn on her arm, and what appeared to be fire ant bites on her wrists. To preserve any DNA evidence under her fingernails, DPS investigators put plastic bags over Stites's hands.

Dr. Robert Bayardo, the Travis County Medical Examiner, conducted Stites's autopsy the day after her body was found. He determined that Stites died around 3:00 a.m. on April 23rd. He also concluded that the belt was the murder weapon and that Stites died of asphyxiation by strangulation. Like Blakley, Bayardo presumed Stites was sexually assaulted, took vaginal swabs, and found sperm with both heads and tails intact. He also took rectal swabs but found only

sperm heads with no tails. He noted that her anus was dilated with superficial lacerations. Dr. Bayardo thought the presence of sperm in the anus was indicative of penile penetration, but noted that it may have been attributed to seepage from the vagina. He concluded that Stites's anal injuries occurred at or around the time of death and therefore were not acts of consensual sexual activity.

When Young and Sandifer processed the truck for evidence, neither found fingerprints, blood, or semen identifying the perpetrator. However, they and Ranger L.T. Wardlow, the lead investigator on the case, noted the driver's seat position was reclined with the seatbelt fastened as if someone was pulled out of the seat while buckled in. Young, who stood six feet, two inches, also noticed that when he sat in the reclined driver's seat, he had a clear view out of the back window in the rearview mirror. Based on this, they concluded that someone who was six-foot-two or of similar height must have driven the truck.

Five days after Stites's body was found, a citizen reported finding some items they believed were connected to Stites's murder. The report, written by Officer Scoggins, stated that the citizen reported that a part of a shirt, two condoms, and part of a knife handle were found. At trial, Ranger Wardlow testified that he did not have personal knowledge about who brought in the condoms. However, he testified that he saw the condoms a short while after they were brought in and confirmed that the condoms "appeared to be old and cracked and worn out." These items were not tested for DNA evidence before trial.

Police investigated Stites's murder over the course of eleven months. During that time, police

obtained twenty-eight biological samples from twenty-eight males. None of them matched the biological evidence found in and on Stites's body. After following several theories and lines of investigation—ruling out people Stites knew personally—police learned information about Reed that could make him a suspect. Reed was about the same height as Young, lived near the Bastrop High School, and frequently walked the area late at night. Police learned from DPS that Reed had an existing DNA sample on file and had DPS test it against the vaginal swabs taken by Blakley. Two different DNA tests of the samples concluded that Reed could not be excluded as a donor of the semen. Looking for more conclusive results, DPS forwarded the samples to LabCorp for additional testing. Again, the results could not exclude Reed and determined that the samples matched Reed's genetic profile. The LabCorp technician, as well as Blakley, testified that intact sperm did not live more than twenty-four hours after commission of a vaginal-sexual assault and sperm breaks down faster in the rectal area than in the vaginal vault.

The jury found Reed guilty of capital murder and assessed a sentence of death.

B. Post–Conviction Procedural History

This case has an extensive post-conviction litigation history. After trial, Reed filed a direct appeal alleging insufficient evidence supporting his capital murder conviction which we denied based on the strength of the evidence presented at trial.[2] Our judgment relied on Reed's DNA found in and on Stites's

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[2] *Reed v. State*, No. AP–73,135 (Tex. Crim. App. Dec. 6, 2000) (not designated for publication).

body, expert testimony regarding how long sperm heads can survive in the vagina and anus, and expert testimony that the sexual assault occurred at or near the time of death.

Before this Court affirmed the conviction, Reed filed an initial application for writ of habeas corpus under Code of Criminal Procedure Article 11.071. Reed also filed a supplemental claim while the initial writ was pending. We denied his initial application and characterized the supplemental claim as a subsequent application and dismissed it.[3] Reed filed a federal habeas application which was stayed and held in abeyance until Reed exhausted all available state remedies.[4] Then in March 2005, Reed filed another subsequent application that this Court ultimately denied in part and dismissed in part.[5] Between 2007 and 2009, Reed filed three more subsequent applications that were dismissed as abusive for failing to satisfy Article 11.071, § 5.[6]

In August 2009, the federal court lifted the stay on Reed's federal writ application. In 2012, the federal district court judge denied Reed's application.[7] Reed then filed motions to alter and amend the court's judgment and for leave to amend his petition and abate

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[3] *Ex parte Reed*, Nos. WR–50,961–01 & WR–50,961–02 (Tex. Crim. App. Feb. 13, 2002) (not designated for publication)

[4] *Reed v. Stephens*, 739 F.3d 753, 763 (5th Cir. 2014).

[5] *Ex parte Reed*, 271 S.W.3d at 751.

[6] *Ex parte Reed*, Nos. WR–50,961–04 & WR–50,961–05, 2009 WL 97260 (Tex. Crim. App. Jan. 14, 2009) (not designated for publication); *Ex parte Reed*, No. 50–961–06, 2009 WL 1900364 (Tex. Crim. App. July 1, 2009) (not designated for publication).

[7] *Reed*, 739 F.3d at 763.

the proceeding. He asked "the district court to reopen his case, vacate its prior judgment, grant him leave to add an additional due process claim, and abate all further proceedings until he exhausted the due process claim in state court."[8] The judge denied the motions. And in January 2014, the Fifth Circuit denied a certificate of appealability, essentially affirming the denial.[9]

C. Reed's Request for Post–Conviction DNA Testing

In April 2014, the State requested an execution date be set. At a hearing held in July 2014, the trial judge set the execution date for January 14, 2015. On the day of the hearing, Reed filed his Chapter 64 motion requesting DNA testing of a large number of items. In reviewing Reed's pleadings, we note that Reed has not clearly or consistently identified items he seeks to test. At times, items discussed in the body of a pleading are not reflected on an appended chart purporting to be a comprehensive itemized list of the extent of Reed's motion. Consistent with the State's objections at the live evidentiary hearing, we note that some items Reed evidently seeks to test were not specifically listed in Reed's Chapter 64 motion or addendum, yet were discussed by Reed's expert witnesses at the hearing.

To group the items, we look to Reed's addendum to his latest proposed findings of fact and conclusions of law and follow, but do not adopt, Reed's categories dividing the items he seeks to have tested: (1) items recovered from Stites's body or her clothing, (2) items

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[8] *Id.*

[9] *Id.* at 790.

found in or near Fennell's truck, and (3) items found near the victim-recovery scene. Because the live hearing testimony covered additional items that do not neatly fall within Reed's categories, we add an "other" category. Out of an abundance of caution and because the trial judge entered findings and conclusions regarding all the pleaded and unpleaded items in denying DNA testing, we include them in this appeal.

1. Items recovered from Stites's body or her clothing:

- Pants
- Underwear
- Bra
- H.E.B. name tag
- White t-shirt
- Section of belt (no buckle)
- Section of belt (with buckle)
- Earring
- Right shoe
- Left shoe
- H.E.B. employee shirt
- Strands of hair from left sock, back of left leg, and back
- White flakes
- Tape lifts from pubic area
- Vaginal and rectal swabs

The State and Reed agreed to have the last three items listed tested outside of Chapter 64's parameters, and the judge entered an agreed order to that effect July 14, 2014. The record shows Reed

abandoned his Chapter 64 testing request in regard to these items.

2. In or near Fennell's truck:

- H.E.B pen
- Knife and metal cover
- Metal box cutter
- Pack of Big Red gum
- Piece of green plastic cup
- Brown planner/organizer
- Single hair from planner/organizer
- White paper napkin
- Carbon copies of checks
- Gas emergency book
- Latent fingerprint from passenger door
- Automatic teller receipt
- Bridal shop receipt
- Walmart receipt
- Business card
- Plastic bag
- Blue nylon rope
- Brown rope

3. Victim-recovery scene:

- Plastic bags placed over Stites's hands during investigation
- Used condoms
- Two Busch beer cans
- Swabs/samples taken from mouths of two Busch beer cans

• Extract samples from blue condom stored in coin envelope

• Piece of shirt

• Piece of knife

4. Other:

• Knee brace

• Back brace

• Green blanket

• White paper used under Stites's body during autopsy

B. Live Hearing Testimony

Reed's Chapter 64 motion largely hinges on the newly available analysis of touch DNA. Touch DNA is based on Locard's Principle that when a person touches something the person's epithelial, or skin, cells transfer to that object and then may be subjected to DNA analysis. But Reed also argued that items previously and successfully analyzed for DNA should be retested and subjected to more advanced and sensitive DNA analyses.

John Paolucci, a former detective and crime scene expert specializing in DNA cases, testified that scratches found on Stites's back and the back of her hand suggested that she was dragged. Paolucci expected that the person who dragged Stites would most likely deposit skin cells on the part of Stites's body or clothing the perpetrator grabbed to pull her body. Because the belt had a similar pattern to the markings found on Stites's throat and was most likely used to strangle Stites with pressure, Paolucci opined there would likely be a significant deposit of the perpetrator's skin cells on it. As to the items found in Fennell's

truck, and presumably the items found outside, Paolucci acknowledged he would presume that Fennell's DNA will be deposited on certain areas. Paolucci also noted that DNA testing would confirm or contradict accounts given by an alternate suspect. The commingling of a large number of the items Reed seeks to have tested in a box together would not, in Paolucci's opinion, make that evidence unsuitable for testing. In his opinion, even though the items are contaminated, Paolucci stated that if DNA profiles from contaminated and not contaminated items match, "you can start putting together evidence of an alternate suspect."

Deanna Lankord, an associate laboratory director at Cellmark Forensics, similarly testified that she would look for touch DNA, in addition to performing a more traditional DNA analysis of previously tested biological evidence using newer, more advanced techniques. She testified that, in her experience, she has tested pieces of evidence that have been commingled in a single container. And in her experience, her laboratory has "had many cases where [it] ... obtained probative results" even when evidence is stored in this manner. Based on the exchange principle, Lankford opined that all of the specified items contain some amount of DNA material. Without testing the items, however, she could not say for sure or give an opinion on the likelihood of discovering DNA to the extent of producing a DNA profile, or a person's identity based on testing deposited DNA.

Lankford conceded that there could be infinite possibilities of DNA combinations on the items stored in the box of evidence maintained by the Bastrop Clerk's Office because many people may have touched

the items. Lankford acknowledged compounded possibilities because, under the exchange principle, those handling the items could deposit others' DNA. Despite a conceivably infinite mix of DNA combinations, Lankford testified that properly handled and stored evidence could act as a control of sorts. She explained it thus:

> [I]f we were to obtain DNA—DNA information from an item from the box and it happened to match an item that we tested from a different location stored in, say, a more appropriate manner, we can compare the two and see if—I mean, if they match, then there's a different scenario there.
>
> * * *
>
> Well, that it wouldn't be a contaminant from someone handling the evidence, say a jury member or something.

Lankford testified similarly while addressing the potential of DNA being transferred from one item to another. She again focused on redundancy.

> If you think of an assailant handling certain areas of clothing or shoes or socks and you obtain DNA from those areas and they match and you test other areas of clothing maybe where an assailant wouldn't necessarily be grabbing or touching someone so they don't match those other areas, then you can kind of put two and two together.

Yet in a mixed sample when a major and minor contributor could not be identified, Lankford noted that there would be no way to separate the particular alleles discovered in subsequent testing and associate

them to a particular profile without reference samples from the different parties who potentially touched the items. And without these reference samples, the DNA test results would remain inconclusive.

The State presented testimony from three witnesses: Sergeant Gerald Clough, an Office of the Attorney General investigator; Etta Wiley, a Bastop County Deputy Clerk; and Lisa Tanner, the lead trial prosecutor at Reed's trial. According to his testimony, Clough investigated the existence of certain items introduced in Reed's trial and included in Reed's Chapter 64 motion. He discovered a number of items in two unsealed boxes maintained by the Bastrop County Clerk's office. The record contains the photos Clough took depicting how the items were stored. With the exception of one bagged item, the photos show that the evidence was simply placed in the box and was not separated into individual bags. Stites's clothing, a planner, both pieces of the belt, and videotapes, among other pieces of evidence, are clearly visible. The items are distinctly commingled and touching one another.

Bastrop County Deputy Clerk Etta Wiley testified that she is responsible for the exhibit closet for criminal matters. Wiley created an inventory list at the State's behest and testified about a number of paper trial exhibits maintained in a single manilla envelope at the clerk's office; specifically, the bridal shop receipt, a photographer's receipt, Reed's acknowledgment of statutory warnings, carbon copies of Fennell's checks, a utilities receipt, and Walmart receipts. Wiley testified that each trial exhibit was not individually wrapped and was commingled with the others in the manilla envelope. According to Wiley,

the exhibits were maintained under lock and key, and the evidence was not substituted, replaced, tampered with, or materially altered while in her care.

Lisa Tanner, the lead prosecutor at Reed's trial, testified that, after the forensic testing was completed before trial, a number of people handled the evidence at trial without gloves. Not only did she not use gloves at trial, but neither did the defense attorneys, court personnel, the court reporter, and presumably the district clerk. The list potentially included the twelve jurors. The admitted evidence was sent back with the jury to deliberate, and Tanner testified that she did not know if gloves were available for the jurors. According to Tanner, the evidence was not separately packaged when it was available to the jury.

After holding a live evidentiary hearing, the trial judge denied Reed's DNA testing request and issued findings of fact and conclusions of law. This direct appeal followed.[10] After remand, the judge made supplemental findings of fact and conclusions of law.

II. Analysis

A. Chapter 64's Requirements

When Reed filed his motion for Chapter 64 DNA testing, Texas Code of Criminal Procedure Article 64.01 stated that "[a] convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material."[11] At that time, to be eligible for post-conviction DNA testing of

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[10] *See* TEX. CODE CRIM. PROC. art. 64.05 (West Supp. 2016) (providing appeals to this Court when a person is sentenced to death).

[11] TEX. CODE CRIM. PROC. art. 64.01(a–1) (West Supp. 2014).

certain evidence, the evidence must have been secured in relation to the charged offense and been in the State's possession during the trial, "but: (1) was not previously subjected to DNA testing; or (2) although previously subjected to DNA testing, can be subjected to testing with newer techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test."[12]

Then-existing Article 64.03 provided that a court may order DNA testing under Chapter 64 only if it finds that:

> (1) the evidence still exists and is in a condition making DNA testing possible;
>
> (2) the evidence 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;
>
> (3) identity was or is an issue in the case;
>
> (4) the convicted person establishes by a preponderance of the evidence that the person would not have been convicted if exculpatory results has been obtained through DNA testing; and
>
> (5) the convicted person established by a preponderance of the evidence that the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.[13]

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[12] *Id.* art. 64.01(b).

[13] *Id.* art. 64.03.

Effective September 1, 2015, the Legislature amended Articles 64.01(a–1) and 64.03.[14] Article 64.01(a–1) now provides that a convicted person may seek forensic DNA testing of evidence "that has a reasonable likelihood of containing biological material."[15] The amendment also added a requirement to Article 64.03: the judge must find, in addition to the above requirements, that "there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing."[16]

B. Standard of Review

When reviewing a judge's ruling on a Chapter 64 motion, we use the familiar bifurcated standard of review articulated in *Guzman v. State*: we give almost total deference to the judge's resolution of historical fact issues supported by the record and applications-of-law-to-fact issues turning on witness credibility and demeanor.[17] But we review *de novo* all other application-of-law-to-fact questions.[18]

C. Findings of Fact and Conclusions of Law

There is no dispute that the items Reed seeks to have tested exist and are in a condition making DNA testing possible and that identity was or is an issue in this case. The judge accordingly concluded that these

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[14] Acts 2015, 84th Leg., ch. 70 (S.B. 487), § 1 (effective Sept. 1, 2015).

[15] TEX. CODE CRIM. PROC. art. 64.01(a–1) (West Supp. 2016).

[16] *Id.* art. 64.03(a)(1)(B).

[17] *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002) (referring to *Guzman v. State*, 955 S.W.2d 85,89 (Tex. Crim. App. 1997)); *Holberg v. State*, 425 S.W.3d 282, 284–85 (Tex. Crim. App. 2014).

[18] *Id.*

requirements were satisfied.[19] Further, the record and the parties' briefing also indicate that there is no dispute whether Reed satisfied Article 64.01(b)'s requirement that the items were either not tested for DNA or could be tested with newer technologies providing more accurate and probative results. However, the parties took differing positions on the balance of Article 64.03's requirements. We review the judge's remaining findings and conclusions in turn.

1. Is the evidence subject to chain of custody sufficient to establish that individual pieces of evidence have not been substituted, tampered with, replaced, or altered in any material respect?

The judge concluded that a significant number of the items do not satisfy this standard. The judge concluded that the following items connected to Stites's body or clothing have been contaminated, tampered with, or altered:

- Pants
- Underwear
- Socks
- Left shoe
- Right shoe
- Bra
- White t-shirt
- Section of belt (no buckle)
- Section of belt (with buckle)

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[19] See TEX. CODE CRIM. PROC. art. 64.03(a)(1)(A)(i), (1)(C).

- Earring
- H.E.B. employee shirt
- H.E.B. name tag

The judge concluded the following items recovered from or near Fennell's truck were contaminated, tampered with, or altered:

- Knife and metal cover
- Pieces of plastic cup
- Brown planner
- Bridal shop receipt
- Portrait receipt
- Carbon copies of checks
- Walmart receipt

Lastly, the judge's findings extended to the following items in the "other" category:

- Back brace
- Knee brace

Reed's argument for testing these items under Chapter 64 is the advancement in touch DNA, a relatively new DNA technique that can develop a DNA profile from epithelial cells left by those handling the item. The judge based his conclusion on the evidence presented at the evidentiary hearing and, as a result, focused on the testimony pertaining to the number of people who handled (or potentially handled) the items depositing DNA on them and the likelihood that deposited DNA itself could be transferred to other items. The judge found credible Tanner's testimony that the above items were handled by ungloved attorneys, court personnel, and possibly the jurors. The judge also found credible Clough's and Wiley's testimony

establishing that the evidence was not separately packaged, but instead commingled in a common repository. The judge credited Paolucci's testimony on cross-examination that there is "a good chance that [the items in the clerk's boxes are] contaminated evidence." The judge also credited Lankford's response to the State's hypothetical that handling evidence without gloves would tamper with the evidence. According to the judge, both assertions by Reed's witnesses were not contradicted.

We find the record supports the judge's findings and the conclusion on this requirement. The requirement at issue here necessitates a finding that the evidence "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."[20] Clough's and Wiley's combined testimony established that the items the judge deemed contaminated, tampered with, or altered were trial exhibits maintained by the Bastrop County Clerk's Office and not individually packaged. And based on Tanner's credited testimony, many people handled those exhibits without gloves. Reed's own witnesses conceded that the manner of the trial exhibits' handling contaminated or tampered with the evidence. The cumulative weight of the State's and Reed's witnesses demonstrates that the manner in which the evidence was handled and stored casts doubt on the evidence's integrity, especially for the specific testing Reed seeks. Reed's experts' testimony on a suggested approach to mitigate the effect of the evidence's alterations does not undermine the judge's

[20] *Id.* art. 64.03(a)(1)(A)(ii).

determination that certain items did not satisfy Article 64.03(a)(1)(ii).

The judge concluded that the remaining items that were not similarly handled and stored have been subject to a chain of custody sufficient to establish that they have not been substituted, tampered with, replaced, or altered in any material respect.

2. Does the evidence contain biological material suitable for DNA testing?

The judge found that there was not a reasonable likelihood that any of the items Reed sought tested listed above (and that were not withdrawn from his motion at the hearing) contain biological material suitable for DNA testing. This conclusion focused on the limitations of Paolucci's and Lankford's testimony about certain items.

The judge excluded all paper items under this criterion because Paolucci testified that, in his experience, he "didn't have much success in testing paper as a substrate." The judge further found that Paolucci necessarily did not know whether the white paper napkin, green blanket, driver's seat tape lift, and white paper sheet placed under Stites contained biological material because he testified that he would want to examine those items to determine whether they contained biological material. On the likelihood that touch DNA was present on the items, the judge found that Paolucci could not "say for sure where—where these items were touched." And specifically, the judge found that Paolucci admitted that he could not say that the perpetrator touched the white paper napkin, H.E.B. pen, knife with metal cover, or the brown planner. The judge further found that Paolucci did not testify whether biological material might be found on

any of the paper items, the latent fingerprint, plastic bag, blue rope, brown rope, pubic tape lift, piece of shirt, piece of knife, extracts from condom, and extracts from beer cans. The judge also found that Paolucci could not "'promise anybody that there's going to be DNA' on any particular item."

The judge likewise found limitations on Lankford's certainty whether any specific item was handled. The judge found that Lankford testified similarly to Paolucci, in that she would examine the green blanket, white paper sheet, and the driver's seat tape lift for trace evidence; an implicit opinion that she did not know whether those items in fact contain biological material. As with Paolucci's testimony, the judge found that Lankford did not discuss whether biological material would be found on certain items, specifically: any of the paper items; the earring; plastic bag; blue rope; brown rope; piece of shirt; piece of knife; extracts from condoms; extracts from beer cans; back brace; and knee brace. Regarding the presence of touch-DNA, the judge found that Lankford "admitted that she did not know whether any particular item was handled or that there is biological material in the supposedly handled item." Nor could Lankford "'say for sure' that DNA will be detected on the items for which [Reed] requests testing."

After our own independent review of the hearing testimony, we find many of the judge's findings unsupported by the record and therefore we will not afford near total deference. Many of the judge's findings improperly tie together the separate inquires of whether the items are reasonably likely to contain biological material suitable for DNA testing with whether testing would produce a DNA profile. The

statutory criterion is concerned only with the former. Both Paolucci's and Lankford's testimony centered on the exchange principle that maintains skin cells and DNA deposits remain on an item every time it is touched. Both witnesses testified to the ubiquity of touch DNA and both testified that, based on the exchange principle, they were one-hundred percent certain that certain items contained biological material. During Paolucci's testimony, the judge clearly understood the concept in this exchange on cross-examination:

> [State]: But you can tell with 100 percent certainty that there's DNA on this material? Yes or no? Yes—yes or no?
>
> [Paolucci]: It's such a—
>
> [Paolucci]: That would be misleading to answer that yes or no, Judge.
>
> THE COURT: Well, not really because there's going to be DNA on everything.
>
> [Paolucci]: There is DNA on everything.
>
> THE COURT: It may or may not have anything to do with this case, but there's DNA. That's basically what you're saying then?
>
> [Paolucci]: Yes, I mean it's so—
>
> THE COURT: Okay—
>
> [Paolucci]:—minuscule that, you know, we might not have the—we might not have the ability, the sensitivity of testing at this point but, you know, is there [sic] DNA present.

In her affidavit, Lankford expressed her opinion that, based on the exchange principle and to a reasonable degree of scientific certainty, the following items

(not waived at the hearing) contain biological material: the two pieces of the belt, pants, white t-shirt, condom, H.E.B. name tag, latent fingerprint found on Fennell's truck, white paper napkin, H.E.B. pen, and carbon copies of checks. Lankford conceded, however, that only through testing could one determine whether a DNA profile could be obtained. At the hearing she expanded the list of items she believed contained biological material to include underwear, socks, shoes, bra, earring, H.E.B. shirt, knife with the metal cover, the pieces of the plastic cup, planner, cigarette lighter, beer cans, package of gum, and metal box cutter. Paolucci's opinions were consistent with Lankford's. The State did not impeach Paolucci's and Lankford's applications of Locard's Principle supporting their opinions. Nor did the judge enter any adverse credibility finding on their testimony.

We note, like the judge did in his findings and conclusions, that the "reasonable likelihood" statutory standard became effective after Reed filed his Chapter 64 motion. When Reed filed his motion, Article 64.01(a-1) permitted a convicted person to request "DNA testing of evidence containing biological material."[21] We held that "[a] literal reading of [that] statute unequivocally mandates that all evidence to be tested must first be proven to contain biological material."[22] We further held that movants bear the burden to "*prove* biological material exists and not

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[21] TEX. CODE CRIM. PROC. art. 64.01(a–1) (West Supp. 2014).

[22] *Swearingen v. State*, 424 S.W.3d 32, 37 (Tex. Crim. App. 2014) (quoting *Swearingen v. State*, 303 S.W.3d 728, 732 (Tex. Crim. App. 2010)).

that it is merely probable."[23] Current Articles 64.01(a-1)'s and 64.03(a)1)(B)'s new language requiring merely a reasonable likelihood that the evidence contains biological material is decidedly less onerous. Nonetheless, the judge found that Reed could not satisfy either standard when he included in his findings that his conclusion on this criterion would stand applying either the 2013 or 2015 versions of Chapter 64.

Because the record does not fully support the judge's finding on whether Reed satisfied his burden on the presence of biological material, we cannot adopt the finding in its entirety. We do, however, find record support for the judge's finding that Reed's witnesses did not address whether a number of items are reasonably likely to contain biological material. Therefore, Reed failed to satisfy his burden as to those items. After reviewing the witnesses' testimony on what they did and did not conclude contained biological material, we find that Reed proved that either biological material exists or there is a reasonable likelihood that it exists on the following items:

- Both pieces of the belt
- Pants
- White t-shirt
- Condoms
- H.E.B. name tag
- Fingerprint found on Fennell's truck
- White paper napkin
- H.E.B. pen

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[23] *Id.* at 38 (emphasis in original); *Holberg*, 425 S.W.3d at 285.

- Carbon copies of checks
- Underwear
- Socks
- Right and left shoes
- Bra
- Earring
- H.E.B. shirt
- Knife with the metal cover
- Pieces of the plastic cup
- Planner
- Cigarette lighter
- Beer cans
- Package of gum
- Metal box cutter

3. Has Reed established by a preponderance of the evidence that he would not have been convicted if exculpatory results were obtained through DNA testing?

Addressing all of the items Reed moved to have tested, the judge concluded that Reed failed to prove by a preponderance of the evidence that he would not have been convicted in light of exculpatory results from DNA testing of all the evidence he requested to be tested. The judge found that "[t]he State's case on guilt-innocence was strong." The judge found that the evidence at trial demonstrated Reed's "presence" and that the sexual assault occurred contemporaneously with the murder. The judge highlighted two additional aspects of the evidence: Reed frequented the area of Stites's disappearance and Reed matched the

height of someone who would have fit the adjusted seat in the truck Stites was driving the night of her disappearance. Because many of the items Reed seeks to have tested were already before the jury and the jury knew they did not match Reed, the judge found that the items' potential exculpatory nature was already known to the jury. Further, the judge found that "none of the evidence was so integral to the State's case that the jury would have acquitted despite knowing that [Reed's] DNA was not on the item." In concluding that Reed failed to meet his burden, the judge found that the evidence's handling undermines its exculpatory value and "would muddy the waters, not prove by a preponderance that he would have been acquitted."

Before addressing the judge's findings on this criterion, we pause to summarize what evidence remains after our conclusions on the previous criteria thus far. Doing so marshals the evidence we must analyze to determine whether Reed has carried his burden that he would not have been convicted if exculpatory results were obtained through DNA testing. When we remove the items that are contaminated, tampered with, or altered in a material way from the items that we conclude contain biological evidence, we are left with the following items:

- Condoms
- Fingerprint found on Fennell's truck
- White paper napkin
- H.E.B. pen
- Cigarette lighter
- Beer cans
- Package of gum

• Metal box cutter

In his brief, Reed asserts that the judge erred in concluding that he did not satisfy his burden in this respect because the judge misapplied the law in two critical ways. First, the judge incorrectly weighed the strength of the State's case at trial and assumed the correctness of the State's theory at trial. Reed claims the judge failed to consider subsequent evidence submitted with his motion that disproves the State's timing theory. Second, citing this Court's opinion in *Routier v. State*,[24] Reed argues that the judge improperly narrowed the definition of "exculpatory result" by failing to presume results implicating an alternative known suspect and the possibility of finding the same third party DNA on separate items. Reed argues that he satisfied his burden that the jury would not have convicted him had the judge applied the correct legal standard and the jury was informed that Reed's DNA was not present on these items. The judge further erred, Reed asserts, by not considering the effect on the conviction had the jury been informed that a redundant DNA profile of a third party was found on other items that were handled by Stites's killer or particular items already tested.

To be entitled to Chapter 64 DNA testing of these items, Reed must show by a preponderance of the evidence—a greater than 50% likelihood—that he would not have been convicted if the proposed testing's exculpatory results were available at the time of his trial.[25] "For purposes of this inquiry we must assume

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[24] 273 S.W.3d 241, 259–60 (Tex. Crim. App. 2008).

[25] TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A) (West Supp. 2014); *Holberg*, 425 S.W.3d at 286–87.

(without deciding, of course) that the results of all of the post-conviction DNA testing to which [Reed] is entitled under Article 64.01(b) would prove favorable to him."[26] "Exculpatory results" means only results excluding the convicted person as the donor of this material.[27] Reed's brief on this point claims post-trial factual developments undermine the State's theory at trial, but our review in this context does not consider post-trial factual developments. Instead, we limit our review to whether exculpatory results "would alter the landscape if added to the mix of evidence that was available at the time of trial."[28]

We conclude that Reed fails to prove by a preponderance of the evidence that, in light of presumed exculpatory DNA results, he would not have been convicted. Both in the trial court and on appeal, Reed fails to articulate why the presumed exculpatory results of the items he wanted tested would result in the jury finding him not guilty, as opposed to merely "muddying the waters" as the trial judge concluded.[29] Assuming that the exculpatory results include finding the same DNA profile on the condoms, beer cans, fingerprint found on Fennell's truck, white paper napkin, H.E.B. pen, cigarette lighter, package of gum, and metal box cutter, Reed cannot establish that an exculpatory redundant profile would have, by a preponderance of the evidence, resulted in his acquittal. Our holding that Reed cannot meet his burden by

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[26] *Routier*, 273 S.W.3d at 257.

[27] *Holberg*, 425 S.W.3d at 287.

[28] *Id.* at 285; *see Kutzner v. State*, 75 S.W.3d 427, 439 (Tex. Crim. App. 2002).

[29] *See Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011).

aggregating the exculpatory results naturally includes a holding that Reed's showing fails as to each singular item.

First, Reed cannot establish that the condoms, beer cans, and the white paper napkin are connected to Stites's capital murder. According to the trial testimony, the two beer cans were collected by the latent-fingerprint examiner who found them located across the road from where Stites was discovered. Another member of the crime-scene examination team testified that finding beer cans on the side of a country road is not uncommon. Other than an effort to be thorough in collecting items relatively near the crime scene, there was nothing in particular that led law enforcement to believe that the beer cans were connected to the crime scene.

There was sparse trial testimony concerning the circumstances of the condoms' recovery. Ranger Wardlow testified that condoms were given to the sheriff's office, although he did not recall exactly who turned them in. The trial record makes no mention where the condoms were discovered and by whom. Even assuming they were discovered near where Stites's body was found, Ranger Wardlow testified that the condoms appeared to be old, cracked, and worn out, suggesting they had long predated Stites's death. Reed's own expert at the Chapter 64 hearing testified similarly concerning the condoms' condition.

Although the trial testimony indicates that the white paper napkin was collected from the ground near Fennell's truck parked at the high school, there is no testimony to suggest that the napkin came from Fennell's truck. While the statute requires that we presume exculpatory results of the putative testing, it

does not require us to presume an item's relevance to the question of the offender's identity. Reed provides little more than supposition to suggest that, because it was found on the ground outside of Fennell's truck, the napkin was connected to the murder. It is an ever bigger stretch to say that testing the napkin may identify Stites's murderer. The napkin was mentioned only twice over the course of the thirteen-volume record on guilt-innocence, and then merely in a list of items collected. Like the beer cans and condoms, Reed cannot demonstrate the relevance of the napkin, much less that its testing and the attending exculpatory result injects sufficient doubt into the evidentiary mix that a jury would acquit.

The items collected from Fennell's truck are only incrementally more likely to be connected to Stites's murder solely by virtue of the State's theory at trial that Reed assaulted Stites in the truck, dumped her body in the woods, and parked the truck in the high school parking lot. Yet Reed fails to demonstrate that the alternative murderer would have necessarily left the fingerprint found on Fennell's truck and handled the H.E.B. pen, cigarette lighter, package of gum, and metal box cutter. Other than their proximity to the murder's commission, the record fails to establish why these items are relevant to establishing Stites's murderer. Reed's experts recommended that these items be tested simply because a perpetrator could have touched them. We fail to see how even a presumed redundant profile on these items would have raised doubt sufficient enough to cause the jury to acquit Reed.

Second, Reed's counsel suggested his trial was "a case of competing stories," but he fails to explain why

exculpatory results makes his story at trial clearly more convincing than the State's "story." At trial, Reed raised a two-pronged defensive theory: First, Reed pointed to the possibility that another person, particularly Fennell or David Lawhon, committed the murder. Second, Reed had a secret romantic relationship with Stites and his semen was present as a result of consensual intercourse.

The State's theory at trial was that Reed's DNA profile found in the semen deposited in Stites's vagina and rectum and in the saliva on her breast clearly indicated that Reed had sex with Stites. And based on the injuries she suffered both pre- and post-mortem, the State argued that the sexual encounter was not consensual. Dr. Bayardo, the medical examiner, estimated that Stites died at 3:00 a.m., give or take a few hours. Because he observed fully intact sperm taken from the vaginal swabs, Dr. Bayardo concluded that the sperm was deposited "quite recently." Crime-scene investigator Karen Blakely testified that, based on a published study, sperm will remain intact inside the vaginal tract for as long as twenty-six hours. The medical examiner also found several sperm heads without visible tails from the rectal swabs and testified that sperm breaks down much faster in the rectum than it does in the vagina. During the sexual-assault exam, Dr. Bayardo noticed that Stites's anus was dilated and superficially lacerated. Dr. Bayardo concluded that the anal injury occurred at or near the time of her death. From the witnesses' testimony, the State argued to the jury that "whoever raped Stacey [Stites] also killed her."

The presumed redundant exculpatory results do nothing to undermine the State's case or alter the

evidentiary landscape at Reed's trial. The results do not affect the State's time line supporting its theory tying the murder to the rape, the argument the jury ultimately believed. The presumed redundant DNA profile exculpatory results also do not support Reed's consensual-relationship defense that the jury disregarded. It is on this latter point, among others, that Reed's case differs from that in *Ex parte Routier*, a case he argues the trial judge misapplied.

In *Ex parte Routier*, we examined each piece of evidence to determine whether each piece individually satisfied Chapter 64's requirements and, as a result, limited the items subjected to testing to a facial hair, a pubic hair, blood on a tube sock, a night shirt, and a blood sample on the door to the garage. We then set out to determine whether Routier could prove that she would not have been convicted had the jury known of the presumptively favorable test results.[30] At trial, Routier denied stabbing her two sons. She contended that "[s]he awoke to discover a stranger departing through the kitchen and utility room and out through the garage, leaving a bloody butcher knife from the kitchen behind on the utility room floor."[31] "The State presented circumstantial evidence suggesting that there was no intruder, that the crime scene had been 'staged,' that [Routier] had inflicted the wounds on herself, and that she had some pecuniary motive to murder her children."[32] Assuming a redundant DNA profile from a single unknown contributor on these items, we held that such results substantially

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[30] *Routier*, 273 S.W.3d at 256–59.

[31] *Id.* at 244.

[32] *Id.* at 244–45.

corroborated Routier's account by placing an unknown assailant at the scene who then fled the house through the garage.[33] We held this corroboration "would have a strong tendency to engender a reasonable doubt in an average juror's mind" and Routier was entitled to post-DNA testing.[34]

The circumstances surrounding the items subjected to post-conviction testing in *Routier* differ from those Reed seeks to test. The items Routier wanted tested were those that corroborated her defensive theory at trial. Second, and relatedly, those items, together with the presumptive redundant DNA profile, were significant because they were associated with the crime scene through Routier's own trial testimony and were recovered (with the exception of the tube sock) in her house, a place where only a reasonably limited number of hair and blood DNA contributors would be found. The same cannot be said of the remaining items in this case potentially subject to testing.

The presumptively exculpatory results in this case are decidedly weaker than in Routier. The presumptive redundant DNA profile does not sufficiently alter the evidentiary mix to a degree that would have a strong tendency to engender a reasonable doubt in an average juror's mind. The exculpatory results, even allowing a presumption that the redundant profile would be Fennell's, do not corroborate Reed's defensive theory that a consensual relationship existed between Stites and Reed nor do they strengthen the argument that Fennell murdered Stites. Again, even

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[33] *Id.* at 257–58.

[34] *Id.* at 258, 259–60.

allowing an overly expansive presumption that the exculpatory results would come back to Fennell, the jury would most likely not be surprised to learn that Fennell's profile was found on his own truck or on items found in his truck. And if we presume Fennell's DNA profile was found on the extracts taken from the condoms and beer cans, in light of their uncertain provenance or connection to the crime scene, we cannot say the jury would have found sufficient doubt that it would have acquitted Reed.

Moreover, any presumptive exculpatory results, including evidence of a redundant DNA profile, are relatively weak evidence because of the specific biological material Reed seeks to test. Reed's experts definitely opined that all of the items Reed identified have biological material because epithelial cells are ubiquitous on handled materials. According to the hearing testimony, testing technology has advanced to the degree that a small number of skin cells may yield a DNA profile. But as Reed's DNA experts explained the exchange principle, there is an uncertain connection between the DNA profile identified from the epithelial cells and the person who deposited them. Just as a person may deposit his own epithelial cells, he may deposit another's if those cells were exchanged to him by touching an item another has touched. So the exchange principle may support an equally persuasive argument that the DNA profile discovered from an epithelial cell was not deposited by the same person associated with the particular DNA profile.[35]

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[35] *Cf. Swearingen*, 424 S.W.3d at 38–39 (holding that discovering another's DNA under the victim's fingernails would not factually exclude Swearingen in light of the many ways another's DNA could have ended up there).

And as with all DNA testing generally, touch DNA analysis cannot determine when an epithelial cell was deposited. So in addition to being unable to definitively show who left the epithelial cell, it is unable to show when it was deposited. Reed's experts contradict his argument that touch DNA would prove the perpetrator's identity.

4. Has Reed established by a preponderance of the evidence that his request for DNA testing is not made to unreasonably delay the execution of his sentence or administration of justice?

The judge concluded that Reed failed to meet his burden on delay. In support of his conclusion, the judge found, among other things: (1) Reed failed to provide time estimates for the DNA testing he seeks; (2) Reed's filing his Chapter 64 motion on the day the State sought an execution date was a tactic designed to delay setting an execution date; (3) Reed had earlier opportunities to request Chapter 64 testing throughout his state and federal post-conviction litigation; (4) Reed initiated informal DNA-testing requests with the State only after the Fifth Circuit affirmed the district court's denial of his petition for habeas corpus, leaving little chance for future relief; (5) Reed has a history of filing untimely requests for testing in federal court, and this request is a continuation of this behavior; (6) Reed's claim that his request was delayed because he did not know of some evidence's existence until reading the State's response is not credible; and (7) Reed waited more than four months to obtain a subpoena for his own reference sample for

purposes of testing certain items the State and Reed agreed to test outside of Chapter 64.

Although Article 64.03(a)(2)(B) does not contain set criteria a court must consider in deciding whether a movant satisfied his burden that his request is not made to unreasonably delay a sentence's execution, various opinions flesh out the inquiry by considering the circumstances surrounding the request. Those circumstances may include the promptness of the request, the temporal proximity between the request and the sentence's execution, or the ability to request the testing earlier.[36] However, individual cases in this area turn on the discrete facts they presented and they offer no definitive criteria for answering this inherently fact-specific and subjective inquiry.

We hold that Reed failed to establish that his request is not made to unreasonably delay the execution of his sentence or the administration of justice. Reed's untimely request to test a significant number of items, including some items the State has agreed to test and others whose relevance to the crime are unknown, supports the conclusion that this motion was intended to delay his impending execution date. As chronicled earlier in this opinion, Reed engaged and continues to engage in protracted litigation since his conviction was affirmed in 2000. In 2002, this Court denied

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[36] *See, e.g.*, *Swearingen*, 303 S.W.3d at 736 (noting that movant could have requesting testing of materials earlier); *Thacker v. State*, 177 S.W.3d 926, 927 (Tex. Crim. App. 2005) (movant failed to satisfy his burden when he waited over fours years to file his motion less than a month before his execution); *State v. Patrick*, 86 S.W.3d 592, 598 (Tex. Crim. App. 2002) (Hervey, J., concurring).

Reed's initial application for habeas corpus.[37] We dismissed as abusive under Texas Code of Criminal Procedure Article 11.071, § 5 the other five applications Reed filed over the next seven years.[38] In our 2009 opinion dismissing Reed's third and fourth subsequent applications, we noted that Reed has taken a "piecemeal approach" in his post-conviction litigation.[39] Reed also sought habeas relief in the federal courts, but his claims were denied in 2012. Before the denial was affirmed on appeal in 2014, he sought post-judgment remedies to further delay final judgment by requesting leave to add additional claims and abatement to restart his state court habeas litigation.[40]

While seeking an agreement with the State to voluntarily submit items for DNA testing without litigation is laudable and generally should not be held against a movant, the record reveals that Reed initiated the negotiations only after the 5th Circuit Court of Appeals denied his request for a certificate of appealability approximately three days before. Reed claims that the State dragged out the negotiations for months. The record does not indicate one way or the other. But even if the expiration of five months is

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[37] *Ex parte Reed*, No. WR-50,961-01 (Tex. Crim. App. Feb. 13, 2002) (not designated for publication).

[38] *Ex parte Reed*, No. WR-50,961-02 (Tex. Crim. App. Feb. 13, 2002) (not designated for publication); *Ex parte Reed*, 271 S.W.3d at 698; *Ex parte Reed*, Nos. WR-50,961-04 & WR-50,961-05, 2009 WL 97260 (Tex. Crim. App. Jan. 14, 2009) (not designated for publication); *Ex parte Reed*, No. WR-50,961-06, 2009 WL 1900364 (Tex. Crim. App. Jul. 1, 2009) (not designated for publication).

[39] *Ex parte Reed*, Nos. WR-50,961-04 & WR-50,961-05, 2009 WL 97260, at *1.

[40] *Reed*, 739 F.3d at 763, 790.

attributable to the State, it is *de minimus* in light of Reed's lengthy post-conviction litigation. After Reed secured the State's agreement to test certain evidence, he took four months to even start the process of submitting his own reference sample. The timing of Reed's motion is even more suspect when we consider that it was filed on the same day the judge heard the State's motion to set an execution date filed three months earlier.

Chapter 64 had existed with only slight variations for over thirteen years at the time Reed filed his motion,[41] and there does not appear to be any factual or legal impediments that prevented Reed from availing himself of post-conviction DNA testing earlier. Reed argues that he cannot be faulted for his inaction since Chapter 64's enactment. He reasons that he could not have sought the type of forensic DNA testing he does now until the Legislature amended Article 64.01(a) in 2011 defining "biological material" to include, in relevant part, skin cells, fingernail scrapings, and other identifiable biological evidence that may be suitable for DNA testing. We disagree with Reed's argument that "[before] the 2011 amendments, a movant could not move to test items handled by a perpetrator for 'touch' DNA unless prior testing or analysis had already established the presence of blood, semen, hair, saliva, skin tissues or cells, bone, or bodily fluid."[42] In our 2010 *Swearingen* opinion, we addressed a Chapter 64 request to perform touch DNA analyses.[43] The statutory impediment to Swearingen's claim was not

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[41] Acts 2001, 77th Leg., ch. 2, § 2 (effective Apr. 5, 2001).

[42] Reed's Brief at 70.

[43] *Swearingen*, 303 S.W.3d at 732–33.

necessarily the definition of "biological material" but rather the article's language requiring a movant to prove evidence contained biological material.[44] Swearingen failed to satisfy this requirement because he "made[ ] only a general claim that biological material could be found from touching" and "relie[d] on conclusory statements."[45] Unlike Reed, Swearingen failed to present expert testimony to support the conclusion that DNA would necessarily be deposited.[46] And unlike in *Swearingen*, we have previously found that Reed presented sufficient expert testimony to establish certain evidence contained biological material. We therefore find no legally unavailable claim or legal impediment preventing Reed from seeking Chapter 64 testing at a much earlier time.

From the totality of circumstances surrounding Reed's motion, we hold that Reed is unable to establish by a preponderance of the evidence that his motion was not made for purposes of delay.

III. Conclusion

Because Reed failed to show by a preponderance of the evidence a reasonable probability that exculpatory DNA test results would change the outcome of his trial and that his request was not made to unreasonably delay the execution of his sentence or the administration of justice, we conclude that the trial judge did not err in denying Reed's Chapter 64 motion.

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[44] *See id.* at 732.

[45] *Id.*

[46] *Id.*

DELIVERED: April 12, 2017

PUBLISH

APPENDIX D

To: The Texas Court of Criminal Appeals

Re: No. AP-77,054 Rodney Reed, Appellant vs. the state of Texas

Dear Justices:

On September 9, 2016, I signed, adopted and submitted both Findings of Fact

and

Conclusions of Law, by State of Texas and Rodney Reed.

Signing of both was an inadvertent mistake, It was and is my intent to sign

and

adopt only the Findings of Fact and Conclusions of Law as proposed by the

State

of Texas.

I apologize to this Court and all parties for my mistake.

FILED IN
COURT OF CRIMINAL APPEALS
SEP 23 2016

Sincerely,

Doug Shaver, Senior Judge

APPENDIX E

Cause No. 8701

STATE OF TEXAS	§	IN THE 21ST DISTRICT
	§	COURT
v.	§	OF
	§	BASTROP COUNTY,
RODNEY REED	§	TEXAS

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

RELEVANT PROCEDURAL HISTORY

1. Reed filed a Chapter 64 motion on July 14, 2014, seeking to conduct DNA testing (the "Motion" or "Chapter 64 Motion").
2. On November 25, 2014, the Court held an evidentiary hearing on the Motion.
3. Crime-scene and forensics expert, John Paolucci, and DNA expert, Deanna Lankford, testified on behalf of Reed at the hearing. The State's witnesses were: Gerald Clough, an investigator with the Office of the Attorney General of Texas; Lisa Tanner, the special prosecutor in Reed's case; and Etta Wiley, a deputy district clerk for Bastrop County.
4. At the conclusion of the hearing, the Court denied the Motion and set Reed's execution date for March 5, 2015. R.R. Vol. IV 47:4-11.

5. The State proposed Findings of Facts and Conclusions of Law addressing only that: (1) the Motion was filed untimely and calls for unreasonable delay, and (2) that there is no reasonable probability Reed would not have been convicted had the results been available at the trial of the case. The Court adopted the State's proposed findings and conclusions and entered them in an order dated December 16, 2014.
6. On January 12, 2015, Reed filed a notice of appeal of the Court's denial of the Chapter 64 Motion.
7. On June 29, 2016, the Court of Criminal Appeals entered an order remanding Reed's Chapter 64 case to the Court for additional findings of fact and conclusions of law. *Reed v. Texas*, No. Ap-77,054 (Tex. Crim. App. June 29, 2016) (Order).
8. The Court of Criminal Appeals directed the Court to make the following findings regarding each item Reed seeks to test:

   (a) whether the item still exists and is in a condition making DNA testing possible;

   (b) whether the item has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

   (c) whether there is a reasonable likelihood that the item contains biological material suitable for DNA testing; and

   (d) whether identity was or is an issue in this case.

Id., slip op. at 2.

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Whether Evidence Still Exists And Is In A Condition Making DNA Testing Possible. Tex. Code Crim. Proc. Art. 64.03(a)(1).

9. Reed seeks to test three categories of evidence: (1) the victim's clothing, (2) evidence recovered in or near the truck the State claims the victim was driving when she was purportedly abducted, and (3) evidence recovered from the area where the victim's body was discovered. Each of the items Reed seeks to test is listed in the attached Addendum A.

10. The Court finds that based on the State's evidence, including the evidence inventories and hearing testimony of Gerald Clough and Etta Wiley, each item Reed seeks to test still exists and is within the possession, custody and control of the Attorney General's Office, the Texas Department of Public Safety Crime Lab, or the Bastrop District Court Clerk.

11. Crime-scene and forensics expert, John Paolucci, and DNA expert, Deanna Lankford, testified that each item Reed seeks to test is in a condition making DNA testing possible. The State offered no rebuttal evidence on this element. Although the State attempted to elicit the opinion of its investigator, Gerald Clough, about whether the evidence is suitable for DNA testing, the Court sustained objections to this testimony based on Mr. Clough's lack of qualifications as a DNA expert.

12. The Court finds that each item listed in Addendum A exists and is in a condition making DNA testing possible pursuant to Tex. Code Crim. Proc. art. 64.03(a)(1).

B. Whether The Evidence Has Been Subject To A Chain Of Custody Sufficient To Establish That It Has Not Been Substituted, Tampered With, Replaced, Or Altered In Any Material Respect. Tex. Code Crim. Proc. Art. 64.03(a)(1)(A)(ii).

13. Each of the items Reed seeks to test has been within the custody and control of the State since the item was collected. The State did not contest the chain of custody as to those items of evidence within the custody of the Department of Public Safety Crime Lab or the Office of the Attorney General. The Court finds that all items of evidence in the possession of the office of the Attorney General and the Department of Public Safety Crime Lab have been subjected to a chain of custody sufficient to establish that they have not been substituted, tampered with, replaced, or altered in any material respect pursuant to Article 64.03(a)(1)(A)(ii) of the Texas Code of Criminal Procedure.

14. The State argued that chain of custody was not established with respect to evidence that was introduced at Reed's trial in 1998 and has remained in the custody of the Bastrop District Court ever since.

15. At the hearing, the Bastrop District Court Criminal Deputy Clerk, Etta Wiley, testified that each of the items Reed seeks to test remained within

the custody of the Bastrop District Court "under lock and key." R.R. Vol. IV 195-196. Wiley also testified that to her knowledge, no item has been "been substituted, replaced, tampered with, or materially altered." R.R. Vol. IV 195-197.

16. Trial prosecutor Lisa Tanner testified regarding the handling of evidence before and during the 1998 trial. Tanner testified that the evidence was handled with gloves prior to trial, but that the evidence was handled during the trial by her, the defense attorneys, and court personnel without gloves. R.R. Vol. IV 199. Tanner also testified that she presumed the evidence had been handled by the district clerk and had also been sent back to the jury room. *Id.*

17. The State's investigator, Mr. Clough, testified in response regarding the following hypothetical proposed by the State: "if you had collected evidence and sealed it and put it in custody and somebody came in and opened that seal and touched it and then passed it around to other individuals". Clough gave a conclusory opinion over objection that, under these circumstances, he would consider the evidence to be "contaminated", "materially altered," and "tampered with." R.R. Vol. IV 185-186.

18. Crime-scene and forensics expert John Paolucci and DNA expert Deanna Lankford offered unrebutted expert testimony explaining how items that may have been handled without gloves or comingled can provide probative DNA evidence through either identifying and comparing the DNA of those persons known to have handled the evidence as well as by comparing DNA profiles

from the potentially contaminated items to those detected on items from the Attorney General's evidence locker or the Department of Public Safety Crime Lab which were not handled at trial. *See*, e.g., R.R. Vol. II 26-29, 76-78; R.R. Vol. III 94-101, 104-105, 111; R.R. Vol. IV 76. Reviewing a photograph of the trial exhibits as they were stored together in a box by the Bastrop District Clerk's Office, Lankford also testified that it was common for evidence in old cases to be submitted to her lab for DNA testing under similar conditions. She further testified that the manner of storage under these circumstances did not prevent the lab from obtaining probative results from the items in the box. R.R. Vol. III 96.

19. The Court finds that a proper chain of custody has been established as to the evidence kept as trial exhibits by the Bastrop District Court Criminal Deputy Clerk. By admitting the items into evidence at Reed's 1998 trial, the Court has already determined that the items were subjected to a proper chain of custody prior to trial. There is also no dispute that the evidence was subsequently maintained by the Bastrop District Clerk under secure conditions. As discussed by Lankford, the fact that the items were handled by participants in the trial is certainly relevant to the Court's consideration of any DNA results from the testing of these items. However, such routine handling necessary for the evidence to be considered at trial does not destroy the chain of custody as to that evidence.

20. The Court finds that each item Reed seeks to test 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 within the meaning of Article 64.03(a)(1)(A)(ii) and therefore meets the requirements of that article.

C. Whether There Is A Reasonable Likelihood That The Items Contain Biological Material Suitable For DNA Testing.

21. Crime-scene and forensics expert John Paolucci and forensic DNA expert Deanna Lankford testified why each item Reed seeks to test contains biological evidence.

22. Lankford opined that, to a reasonable degree of scientific certainty, each item Reed seeks to test contains biological material suitable for DNA testing. *See* R.R. Vol. II 17-18; R.R. Vol. III 114, 117-118, 135, 142; Defendant's Hearing Ex. 11, ¶ 15.

23. Paolucci explained how the items would have been handled during the commission of the crime and that DNA evidence obtained from those items could reveal the killer's identity. R.R. Vol. II 17-18.

24. The State offered no rebuttal witnesses, and sponsored no documentary evidence contradicting Paolucci's or Lankford's testimony. In fact, the State's contamination arguments made in the context of chain of custody presume that biological material is present on each of the items of evidence kept in the custody of the Bastrop District Clerk's Office.

25. The Court finds that there is a reasonable likelihood that each item Reed seeks to test contains

biological material and therefore meets the requirements of Tex. Code Crim. Proc. art. 64.01(a).

26. The Court further finds that each item Reed seeks to test was gathered in relation to the offense that is the basis of Reed's conviction and was in the possession of the State during Reed's trial.

27. The Court accepts the unrebutted testimony of Deanna Lankford that the evidence was either not previously subjected to DNA testing, or can be tested using newer techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of any previous testing.

28. Based on the documentary and testimonial evidence introduced at the hearing, the Court finds that the requirements of Tex. Code Crim. Proc. art. 64.01(b) are satisfied for each item Reed seeks to test.

D. Whether Identity Was Or Is An Issue In This Case.

29. The identity of Ms. Stites's killer was the primary contested issue at trial, and has been a contested issue through appeal and petitions for a writ of habeas corpus. The Court of Criminal Appeals has noted that the facts give rise to "a healthy suspicion that Fennell [the victim's fiancé] had some involvement in Stacey's death." *Ex parte Reed*, 271 S.W.3d 698, 747 (Tex. Crim. App. 2008). This Court finds that identity is at issue as required by Article 64.03(a)(1)(C).

ENTERED this 9 day of Sept, 2016.

Hon. Doug Shaver
Presiding Judge
21st District Court
Bastrop County, Texas

Sitting by Assignment

FILED
DATE 9-12-2016
Sarah Loudes
Bastrop County

ADDENDUM A

ITEMS REED SEEKS TO TEST

Victim's Clothing	In or Near Truck	Victim Recovery Scene
Pants	HEB pen	Plastic bags placed over victim's hands during investi-gation
Underwear	Knife and metal cover	Used condom
Bra	Green lighter	Two Busch beer cans
Employee name tag	Metal box cutter	Swabs/samples taken from mouths of two Busch beer cans
White t-shirt	Pack of Big Red gum	Extract sam-ples from blue condom stored in coin envelope
Section of belt (no buckle)	Pieces of plastic cup	piece of shirt
Section of belt with buckle	Brown planner/ organizer	piece of knife
Earring	Single hair from organizer/ planner	
Right shoe	White paper napkin	

Left Shoe	Carbon copies of checks	
HEB Employee shirt	Gas emergency book	
Strands of hair from left sock, back of left leg, back	Latent finger-print	
Tape lifts from pubic area	Automatic teller receipt	
vaginal and rectal swabs	bridal shop re-ceipt	
	Wal-Mart receipt	
	business card	
	plastic bag	
	blue nylon rope	
	brown rope	

Cause No. 8701

STATE OF TEXAS	§	IN THE 21ST DISTRICT
	§	COURT
v.	§	OF
	§	BASTROP COUNTY,
RODNEY REED	§	TEXAS

SUPPLEMENTAL FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After considering the record in this case, and after making credibility determinations following a live hearing in this Chapter 64 proceeding, the Court enters the following supplemental findings of fact and conclusions of law:

Relevant Procedural History

1. On July 14, 2014, Movant filed a Chapter 64 motion.
2. The State responded on September 12, 2014, and attached several exhibits regarding the existence, custody, and present condition of evidence collected in connection with the investigation of Movant's offense.
3. On October 22, 2014, the State filed an amended inventory regarding fingerprint evidence.
4. Movant filed an affidavit from a DNA expert on October 23, 2014.
5. On October 27, 2014, the Court set a hearing on Movant's Chapter 64 motion.
6. Movant filed a reply on November 24, 2014, and attached a personal affidavit.

7. The Court held a live hearing on the Chapter 64 motion on November 25, 2014. Movant called crime-scene and forensics expert, John Paolucci, and DNA expert, Deanna Lankford. The State called Gerald Clough, an investigator with the Office of the Attorney General of Texas, Lisa Tanner, the special prosecutor on Movant's case, and Etta Wiley, a deputy district clerk for Bastrop County. Movant and the State also introduced various exhibits. After considering the record in this case, and after making credibility determinations from the hearing, the Court denied Movant's Chapter 64 motion.
8. On December 12, 2014, the Court issued findings of fact and conclusions of law explaining the denial of Movant's Chapter 64 motion.
9. Movant filed a notice of appeal on January 12, 2015.
10. On June 29, 2016, the Court of Criminal Appeals remanded this case for the limited purpose of making additional findings "regarding each item [Movant] seeks to have tested:

    (1) whether the item still exists and is in a condition making DNA testing possible;

    (2) whether the item 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;

    (3) whether there is a reasonable likelihood that the item contains biological material suitable for DNA testing; and

(4) whether identity was or is an issue in this case."

11. On July 5, 2016, the Court entered a scheduling order requiring the parties to file proposed findings.

Supplemental Findings of Fact and Conclusions of Law

Items Requested for DNA Testing

12. The Court finds that Movant initially requested DNA testing on the following items:

- White paper napkin
- Belt (in two parts)
- HEB pen
- Carbon copies of checks
- Gas emergency book
- Latent fingerprint
- Automated teller receipt
- Bridal shop receipt
- Green cigarette lighter
- Metal box cutter
- Package of Big Red gum
- Walmart receipt
- Business card
- Plastic bag
- Earring
- Knife with metal cover
- Blue rope

- Brown rope
- White t-shirt
- Hair from Stites's left sock
- Hair from Stites's left leg
- Hair from Stites's back
- Hair from pubic tape lift
- Pubic tape lift
- Blue pants
- Black bra
- Green panties
- HEB nametag
- Vaginal swabs taken by medical examiner
- Rectal swabs taken by medical examiner
- Piece of a shirt
- Condom
- Piece of a knife

13. At the hearing, Movant expanded his initial DNA testing request to include these items and parts of items as well:

    - Blue pants—the crotch, zipper, cuffs, waistband, button opening, and button
    - Green panties—the crotch and waistband
    - Black bra—the clasp
    - White t-shirt—the collar
    - Socks—the heels and cuffs
    - Left shoe—the heel and laces

- Right shoe—the heel and laces
- HEB shirt—the collar, cuffs, and armpits
- Pieces of a green cup
- Portrait receipt
- Brown planner
- Beer cans—the lip and crush ridges
- Hair from brown planner
- Bags around Stites's hands
- Extracts from condom
- Extracts from beer cans
- White flakes
- Two tape lifts from Stites's body
- Green blanket
- Driver's seat tape lift
- White paper sheet
- Back brace
- Knee brace

14. At the hearing, Movant withdrew his request to test items that were part of a previous DNA testing agreement with the State:
    - Hair from Stites's left sock
    - Hair from Stites's left leg
    - Hair from Stites's back
    - Hair from pubic tape lift
    - Vaginal swabs taken by medical examiner

- Rectal swabs taken by medical examiner

15. The Court notes that the State timely objected to Movant's expanded DNA testing request.

Existence of Items and Their Condition

16. The Court finds that all of the items listed in findings 12 and 13 still exist and are in a condition making DNA testing possible.

Chain of Custody

17. The Court finds that the following items have NOT 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:

    - Blue pants
    - Green panties
    - Socks
    - Left shoe
    - Right shoe
    - Black bra
    - HEB nametag
    - White t-shirt
    - Belt (in two parts)
    - Earring
    - HEB shirt
    - Knife with metal cover
    - Pieces of a green cup
    - Brown planner

- Back brace
- Bridal shop receipt
- Portrait receipt
- Knee brace
- Carbon copies of checks
- Walmart receipt

18. In making finding 17, the Court considers the following evidence:

    18a. Tanner credibly testified that, following forensic analysis of the items in finding 17, the items were handled ungloved by the trial participants, court personnel, and possibly jurors as they were exhibits in Movant's trial. Tanner's testimony on this point was not contradicted by Movant.

    18b. Clough credibly testified that some of the items in finding 17 have been stored without packaging, comingled in unsealed boxes. Clough's testimony on this point was not contradicted by Movant.

    18c. Wiley credibly testified that some of the items in finding 17 have been stored without packaging, comingled in a manila envelope. Wiley's testimony on this point was not contradicted by Movant.

    18d. Paolucci testified that evidence should remain sealed, or handled with loves if unsealed, "[t]o prevent contamination." Paolucci admitted that there is "a good chance that [the items in finding 17 are] contaminated evidence."

18e. Lankford testified that, if evidence in her laboratory was unsealed and touched with an ungloved hand, "you've tampered with our evidence."

19. The Court finds that all items listed in findings 12 and 13, except those in finding 17, have 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.

Reasonable Likelihood of Biological Material Suitable for DNA Testing

20. The Court finds that there is NOT a reasonable likelihood that the following items contain biological material suitable for DNA testing:

- White paper napkin
- Belt (in two parts)
- HEB pen
- Carbon copies of checks
- Gas emergency book
- Latent fingerprint
- Automated teller receipt
- Bridal shop receipt
- Green cigarette lighter
- Metal box cutter
- Package of Big Red gum
- Walmart receipt
- Business card
- Plastic bag
- Earring

- Knife with metal cover
- Blue rope
- Brown rope
- White t-shirt—the collar
- Pubic tape lift
- Blue pants—the crotch, zipper, cuffs, waistband, button opening, and button
- Black bra—the clasp
- Green panties—the crotch and waistband
- HEB nametag
- Piece of a shirt
- Condom
- Piece of a knife
- Socks—the heels and cuffs
- Left shoe—the heel and laces
- Right shoe—the heel and laces
- HEB shirt—the collar, cuffs, and armpits
- Pieces of a green cup
- Portrait receipt
- Brown planner
- Beer cans—the lip and crush ridges
- Hair from brown planner
- Bags around Stites's hands
- Extracts from condom
- Extracts from beer cans
- White flakes

- Two tape lifts from Stites's body
- Green blanket
- Driver's seat tape lift
- White paper sheet
- Back brace
- Knee brace

21. In making finding 20, the Court considers the following evidence:

    21a. For purposes of establishing biological material on most items, Movant relied on skin cell transfer—Locard's exchange principle.

    21b. Paolucci testified that, for paper items, he would prefer latent print examination over DNA testing because "we didn't have much success testing paper as a substrate."

    21c. The following items are paper goods:

- White paper napkin
- Carbon copies of checks
- Automated teller receipt
- Bridal shop receipt
- Walmart receipt
- Business card
- Portrait receipt
- White paper sheet

    21d. Paolucci testified that he would want additional examination to determine if biological material existed on the following items:

- White paper napkin
- White flakes
- Two tape lifts from Stites's body
- Green blanket
- Driver's seat tape lift
- White paper sheet

21e. Paolucci's request for additional examination to determine if biological material exists on the items in finding 21d necessarily means that he does not know if biological material exists on such items.

21f. Paolucci admitted that the only way to determine if there is biological material on a certain item is if it is tested for DNA and he could not "promise anybody that there's going to be DNA" on any particular item.

21g. Paolucci admitted that he could not "say for sure where—where these items were touched."

21h. Paolucci specifically admitted that he could not say that the perpetrator touched any of the following items:

- White paper napkin
- HEB pen
- Knife with metal cover
- Brown planner

21i. Paolucci did not discuss whether biological material might be found on the following items:

- White paper napkin

- Carbon copies of checks
- Gas emergency book
- Latent fingerprint
- Automated teller receipt
- Bridal shop receipt
- Walmart receipt
- Business card
- Plastic bag
- Blue rope
- Brown rope
- Pubic tape lift
- Piece of a shirt
- Piece of a knife
- Portrait receipt
- Extracts from condom
- Extracts from beer cans
- White flakes
- Two tape lifts from Stites's body
- Green blanket
- Driver's seat tape lift
- White paper sheet

21j. Lankford testified that "the only way to know for sure" if biological material is present "is to test the[items] and obtain a DNA profile" and that she "couldn't testify to there being a biological stain, for instance, on an item of clothing without testing it."

21k. Lankford admitted that she has no personal knowledge that any particular item of evidence was manipulated with bare hands.

21l. Lankford admitted that she did not know whether any particular item was handled or that there is biological material in the supposedly handled spot on the item.

21m. Lankford admitted that she had no personal knowledge that Stites was dragged by her clothing and that it was equally likely that she was moved via her unclothed body parts.

21n. Lankford admitted that she could not say whether any particular stain on the white t-shirt contained biological material.

21o. Lankford admitted that she could not say that the following items were handled during the commission of Stites's murder:

- White paper napkin
- HEB pen
- Carbon copies of checks

21p. Lankford testified that for the items in finding 17, there is the possibility that so much biological material has been contributed it will be impossible to deconstruct the mixture.

21q. Lankford stated she "couldn't say for sure" that DNA will be detected on the items for which Movant requests testing.

21r. Lankford testified that, as far as fingerprints go, "sometimes we obtain a DNA profile and sometimes we don't."

21s. Lankford testified that she would want additional examination to determine if biological material existed on the following items:

- Green blanket
- White paper sheet
- Driver's seat tape lift

21t. Lankford's request for additional examination to determine if biological material exists on the items in finding 21s necessarily means that she does not know if biological material exists on such items.

21u. Lankford did not discuss whether biological material might be found on the following items:

- Gas emergency book
- Automated teller receipt
- Bridal shop receipt
- Walmart receipt
- Business card
- Plastic bag
- Earring
- Blue rope
- Brown rope

- Piece of a shirt
- Piece of a knife
- Portrait receipt
- Hair from brown planner
- Extracts from condom
- Extracts from beer cans
- Green blanket
- Driver's seat tape lift
- White paper sheet
- Back brace
- Knee brace

21v. The items listed in finding 17 have been contaminated, tampered, and/or altered, as explained in finding 18.

21w. There was testimony at trial that Stites was not dragged to her resting place.

21x. There was testimony at trial that Stites's fingernails were too short to obtain scrapings from underneath.

21y. There was no testimony at trial that Stites hit or scraped her attacker with her hands.

21z. There was testimony at trial that the following items contained no stains of evidentiary value on them:

- White t-shirt
- White flakes
- Black bra
- Paper napkin

- White paper sheet
- Knee brace
- HEB shirt

22. The Court finds that there is a reasonable likelihood that all items listed in findings 12 and 13, except those in finding 20, contain biological material suitable for DNA testing. Namely, the hair from the brown planner.
23. The Court notes that the reasonable likelihood standard utilized in finding 20 comes from an amendment of Chapter 64 that occurred after Movant filed his Chapter 64 motion.
24. The Court would enter finding 20 whether applying the 2013 version of Chapter 64 or the 2015 amendments to Chapter 64.

Identity Was or Is an Issue

25. The Court finds that identity was an issue in this case.

Supplementation

26. The above findings are supplemental to those issued by the Court on December 12, 2014.

DONE AND ENTERED this 7 day of Sept, 2016.

Doug Shaver
Presiding Judge
21st District Court
Bastrop County, Texas

Sitting by Assignment

FILED
DATE 9-12-2016
Sierra Louda
Bastrop County

APPENDIX F

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,054

RODNEY REED, Applicant,

v.

THE STATE OF TEXAS

ON DIRECT APPEAL IN CAUSE NO. 8701 FROM THE 21ST DISTRICT COURT, BASTROP COUNTY

Per curiam. **KELLER, P.J., filed a dissenting opinion. NEWELL, J., not participating.**

ORDER

On July 14, 2014, Rodney Reed filed a Chapter 64 Motion for Post-Conviction DNA testing. On November 25, 2014, the convicting court held a hearing on Reed's Chapter 64 motion. The trial judge issued findings of fact and conclusions of law on Reed's motion on December 16, 2014 and denied his request. On February 15, 2015, we received Rodney Reed's direct appeal from the trial court's denial. We now remand the cause to the trial court for additional findings and conclusions pursuant to Chapter 64.

The trial judge made findings and conclusions under article 64.03(a)(2),[1] but did not make findings on whether the pieces of evidence Reed seeks to have tested satisfy article 64.03(a)(1).[2] Specifically, the trial court shall make the following findings regarding each item Reed seeks to have tested: (1) whether the item still exists and is in a condition making DNA testing possible; (2) whether the item 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; (3) whether there is a reasonable likelihood that the item contains biological material suitable for DNA testing; and (4) whether identity was or is an issue in this case.[3]

The trial court shall forward these additional findings to this Court within 60 days of this order. Any extensions of time shall be obtained from this Court.

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[1] TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A)-(B).

[2] *See id.* art. 64.03(a)(1)(A)-(C).

[3] *Id.*

Filed: July 29, 2016
Do not publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,054

RODNEY REED, Appellant,

v.

THE STATE OF TEXAS

ON DIRECT APPEAL IN CAUSE NO. 8701 FROM THE 21ST DISTRICT COURT, BASTROP COUNTY

KELLER, P.J., filed a dissenting opinion.

In recommending that appellant's motion for DNA testing under Chapter 64 be denied, the trial court found that appellant failed to satisfy two of the statutory requirements. The Court, however, remands for the trial court to make findings on four other statutory requirements. Because the trial court's findings are

sufficiently supported and those findings are, with respect to either of the two statutory requirements that were addressed, sufficient to deny relief, I see no point in remanding this case for further findings.

I. BACKGROUND

A. General Chronological Background

Stacey Stites was sexually assaulted and murdered over twenty years ago, on April 23, 1996. The facts of the case are recited in detail in our opinion on direct appeal and in an opinion on appellant's second subsequent habeas application.[1] DNA evidence revealed that appellant's intact sperm was found inside the victim, which indicated that he had sexual intercourse with her shortly before her death.[2] In rejecting a factual sufficiency claim on direct appeal, we observed that the DNA evidence connected appellant to the sexual assault, and the forensic evidence indicated that the person who sexually assaulted the victim was also the person who killed her.[3]

Appellant was tried and convicted of the capital murder of Stites in May of 1998. After we affirmed the conviction on direct appeal in 2000, appellant filed six state habeas applications, the last three of which were disposed of in 2009.[4] Appellant also pursued remedies

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[1] *See Reed v. State*, No. AP–73,135 (Tex. Crim. App. Dec. 6, 2000) (not designated for publication); *Ex parte Reed*, 271 S.W.3d 698, 701–12 (Tex. Crim. App. 2008).

[2] *See Reed*, 271 S.W.3d at 705.

[3] *Id.* at 712 (quoting from our direct appeal opinion).

[4] *See Ex parte Reed*, No. WR-50,961-04 and WR–50,961–05 (Tex. Crim. App. January 14, 2009) (not designated for publication); *Ex parte Reed*, No. WR-50,961-06 (Tex. Crim. App. July 1, 2009) (not designated for publication).

on federal habeas, and the denial of relief in the federal system was ultimately upheld by the Fifth Circuit on January 10, 2014.[5] On April 8, 2014, the State filed a motion to set an execution date. On July 14, 2014, a hearing was held to set an execution date. On that date, shortly before the hearing, appellant had filed a motion for DNA testing. Relying upon his motion and the State's agreement to test some items for DNA, appellant requested that no execution date be set. The State requested an execution date of January 14, 2015, which would give appellant six months to litigate any issues. In accordance with the State's recommendation, the trial court set the execution date for January 14, 2015.

In November 2014, a hearing was held on appellant's DNA motion. At the end of the hearing, the trial court stated that "this motion was filed untimely and calls for unreasonable delay, that there's no reasonable probability the defendant would not have been convicted had the results been available at the trial of the case." At the State's request, however, the trial court reset the execution date to March 5, 2015. On December 2, 2014, appellant requested a subpoena to obtain a personal reference sample for the purpose of the DNA testing that had been agreed to on July 14, 2014.

B. Trial Court's Findings

On December 16, 2014, the trial court filed findings of fact and conclusions of law. These findings are extensive and amplify the trial court's two overarching bases for denying relief. The findings are also supported by the record.

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[5] *See Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014).

1. *Delay*

With respect to the first basis—that the DNA motion was made for the purpose of unreasonably delaying the execution of sentence—the trial court pointed to thirteen factors in support of its conclusion. First, the trial court stated that appellant had not provided the court "with any information regarding time estimates for the extensive DNA testing he seeks." Second, the trial court observed that appellant "filed his Chapter 64 motion on the day [the trial court] initially set the [appellant's] execution date." The trial court believed that the timing of the Chapter 64 filing "was not coincidental but a designed tactic to delay the setting of [appellant's] execution date" and, when combined with appellant's failure to propose "concrete timelines" was indicative of a "repeated desire to infinitely delay his execution date."

Third, the trial court pointed out that appellant's DNA motion "was filed thirteen years after Chapter 64's enactment and approximately three years after Chapter 64's most recent amendment." The trial court remarked that "there was no legal impediment to filing a Chapter 64 motion during this entire period" and pointed out that appellant "has been continuously represented by counsel during his postconviction proceedings." Fourth, the trial court explained that appellant's "first informal request for DNA testing occurred three days after" the Fifth Circuit upheld the denial of relief in the federal system—indicating that appellant "only sought DNA testing after his other efforts at relief proved unsuccessful."

Fifth, the trial court pointed out that appellant's counsel had represented Larry Swearingen and that appellant's motion for DNA testing was similar to

Swearingen's. Consequently, the trial court concluded that appellant's counsel "had the legal and factual knowledge to file [appellant's] present Chapter 64 motion more than a year before it was filed."

Sixth, the trial court pointed to appellant's proceedings in other courts as showing his intent to delay. The trial court observed that appellant "has been cited for abuse of the writ on five separate occasions by the Court of Criminal Appeals." Moreover, the United States District Court for the Western District of Texas had ruled that appellant had untimely sought forensic testing and was dilatory in submitting an affidavit. And the trial court cited the Fifth Circuit as also finding that appellant submitted evidence in an untimely fashion. The trial court concluded these proceedings show that appellant "has engaged in a dilatory and piecemeal litigation strategy throughout his postconviction proceedings" and that his DNA motion "is a continuation of such behavior."

Seventh, the trial court observed that appellant "has thrice asked the Court to indefinitely postpone his execution date." The court concluded that appellant's requests for, "essentially, indefinite stays works against him in proving that he is not attempting to unreasonably delay his execution."

Eighth, the trial court remarked that, at the live evidentiary hearing on the DNA motion, appellant "asked for DNA testing on a substantial amount of evidence that he had not mentioned in his Chapter 64 motion." The trial court considered these "last-minute amendments to his Chapter 64 pleadings" to be yet another example of dilatory tactics.

Ninth, the trial court found appellant's explanation for these amendments—that he learned of the

existence of certain items for the first time from the State's inventory in response to the DNA motion—to be inadequate because one of the items had been heavily litigated during prior postconviction proceedings and other items that were supposedly revealed for the first time in the State's inventory had been referred to in appellant's DNA motion.

Tenth, the trial court observed that appellant possesses extracts from some of the evidence for which he seeks testing. The court concluded that appellant's request "to test these items via Chapter 64 when he could conduct the testing himself, especially given his offer to pay for DNA testing," also supports the trial court's conclusion that the request is for the purpose of unreasonable delay.

Eleventh, appellant has also requested testing of items the State has already agreed to test. This request for "redundant testing" was also seen by the trial court as an attempt to unreasonably delay execution.

Twelfth, the trial court pointed to the fact that appellant's counsel "had repeatedly stated, in pleadings and in court, that he plans to soon file postconviction motions for relief pursuant to Articles 11.071 and 11.073," but despite this "promise of diligence," applicant "has not filed either pleadings."

Finally, the trial court remarked that applicant "waited more than four months to obtain a subpoena for a reference sample from himself for purposes of the agreed-to DNA testing."

2. *Probability of Conviction*

With respect to the second overarching basis for denying relief—that appellant has not shown by a

preponderance of the evidence that he would not have been convicted but for exculpatory results from DNA testing—the trial court pointed to three factors in support of its conclusion. First, the trial court observed that the State's "case on guilt-innocence was strong." Appellant's DNA was found both on and inside the victim, his sperm was intact in the vaginal cavity, and his saliva was on the victim's breasts. The peri-mortem injury to the victim's anus, the victim's bunched up panties, a broken pants zipper, the victim being partially unclothed, and bruises on the victim's arms, torso, and head were obvious signs of sexual assault and showed that the victim did not consent to sexual activity. Other evidence showed that appellant "frequented the area of the victim's disappearance at the time the victim disappeared" and "matched the height of someone who would have fit the adjusted seat in the victim's truck."

Second, the trial court remarked that many of the items appellant seeks to test "were already before the jury and the jury knew they did not match" him. For example, the trial court explained, a DNA and forensics expert testified that one of the hairs that appellant seeks to test did not match his genetic profile. A Department of Public Safety forensics expert testified that none of the hairs collected from the victim's body microscopically matched appellant's hair. And appellant's fingerprints did not match any of the fingerprints collected during the course of the investigation.

Third, the trial court found that "none of the evidence Reed seeks to test was so integral to the State's case that the jury would have acquitted despite knowing that [Reed's] DNA was not on the item." The court

pointed to the fact that many of the items were in a truck shared with the victim's fiancé and evidence demonstrated that other people had ridden in the truck. Moreover, many of the items "have been handled by ungloved individuals." At best, the trial court concluded, exculpatory results would merely "muddy the waters, not prove by a preponderance that he would have been acquitted."

II. ANALYSIS

In several contexts, we have held that a court need only address issues that are sufficient to dispose of the case.[6] Courts on appeal, this Court on habeas, and trial courts on habeas may all decline to address an issue that is not necessary to the disposition of the case because of the court's disposition of some other issue.[7] If, for example, a court grants relief to a habeas applicant on one ground, it may decline to reach other grounds for relief, as long as the unreached grounds would not afford greater relief.[8]

The same principle applies here. There are a number of requirements that must be satisfied in order for a convicted person to be entitled to DNA testing under Chapter 64.[9] The failure to meet any one of these requirements is fatal to a defendant's claim under the statute.[10] The trial court concluded that appellant

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[6] *Ex parte Reyes*, 474 S.W.3d 677, 680–81 (Tex. Crim. App. 2015).

[7] *Id.*

[8] *Id.*

[9] *See* TEX. CODE CRIM. PROC. art. 64.03(a).

[10] *Bell v. State*, 90 S.W.3d 301, 306 (Tex. Crim. App. 2002) ("a court must order testing only if the statutory preconditions are met").

failed to satisfy two of the statutory requirements for obtaining DNA testing. If the trial court is correct as to either of the two requirements, then it need not address whether appellant has satisfied other requirements.[11]

An appellate court should remand a case when "the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case" to the appellate court.[12] We are now in a position to determine whether the trial court's reasons for denying testing are correct. If either of the trial court's two bases for denying relief are correct, there is no "erroneous action or failure or refusal to act" that would serve as a basis for a remand. A remand might well provide further ammunition for a denial of relief, but if either of the trial court's conclusions is correct, further conclusions would not change the outcome of this appeal.

In any event, this is not a difficult case. The trial court has given numerous record-supported reasons for its conclusion that appellant has failed to show that the DNA motion "is not made to unreasonably delay the execution of sentence or administration of justice."[13] Appellant waited over thirteen years after the passage of Chapter 64 to file a DNA motion and

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[11] The trial court could have chosen to address more than two requirements, but it was not obligated to do so; indeed, the trial court did more than it had to by addressing two.

[12] *See* Tex. R. App. P. 44.4(a) ("A court of appeals must not affirm or reverse a judgment or dismiss an appeal if (1) the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeal; and (2) the trial court can correct its action or failure to act.")

[13] *See* TEX. CODE CRIM. PROC. art. 64.03(a)(2)(B).

nearly seven years after it was last amended.[14] He had time to file six habeas applications with this Court but not to file a single motion for DNA testing. He filed his DNA motion only after his other legal avenues were exhausted and after the State sought to set his execution date. He has given no timeframe for when testing might be complete and he has sought to test a large number of items. He has been cited for untimely submitting matters in federal court,[15] and he has been dilatory in connection with his DNA motion even after it was filed—broadening the scope of his testing requests in the evidentiary hearing beyond what was originally sought in his motion, taking four months to even start the process of submitting his own reference sample, and continually seeking to indefinitely postpone his execution date.

This is not the conduct of a convicted person who knows he is innocent and thinks that DNA testing will prove it. Nor is it the conduct of a defense team who has any reason to believe the convicted person is innocent and thinks that DNA testing would prove it. This is the conduct of a defense team that realizes there is no hope of exoneration and is simply trying to delay the inevitable execution.

And then there is the trial court's second basis for denying relief: that appellant has not shown by a preponderance of the evidence that, had exculpatory DNA results been obtained, he would not have been

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[14] The statute has been amended since applicant filed his motion. See Acts 2015, 84th Leg., ch. 70 (S.B. 487), § 2, eff. Sept. 1, 2015; Acts 2015, 84th Leg., ch. 1276 (S.B. 1287), § 11, eff. Sept. 1, 2015.

[15] *See Reed v. Stephens*, 739 F.3d 753, 768 n.5, 776 n.12.

convicted.[16] The trial court's supporting reasons for this basis are not nearly as numerous as for the first basis but they do not have to be. Appellant was tied to this murder by DNA testing: his sperm was found inside the victim. That sperm was intact, indicating that appellant had sex with the victim at a relatively short time before the murder. The forensic evidence shows that the rapist was the murderer and the DNA evidence shows that appellant was the rapist.

Appellant's only answer to the presence of his own sperm in the victim is to advance the theory from his own interested witnesses that he had some prior relationship with the victim and so the sex might have been consensual. In proceedings in federal court, Judge Lee Yeakel effectively answered this contention by explaining that none of applicant's evidence was reliable:

> Without reliable evidence demonstrating how this happened consensually, the DNA evidence effectively condemns Reed. And what evidence is there of a prior relationship? Statements of people who claim to have seen the two together. Yet, many of these are the very sort of eyewitness accounts that have been shown in numerous cases to be unreliable. Most of these witnesses did not know Stacey Stites, and identified her from memory by viewing her photograph. Those who claimed to have known her were proven to be badly mistaken. All of these witnesses were family, friends, or associates of Reed's. Reed was never able to identify anyone who was a

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[16] *See* TEX. CODE CRIM. PROC. art. 64.03(a)(2)(A).

> friend, family member, or associate of Stacey Stites who claimed to have been aware of a relationship between Reed and Stites. In short, there is no reliable evidence that ties Reed to Stites before her murder.[17]

Without reliable evidence that appellant had a prior relationship with the victim, DNA evidence pointing to the involvement of another individual "would not exonerate appellant because it would show nothing more than there was another party to the crime, at best."[18]

Appellant is not entitled to DNA testing. We do not need a remand to arrive at that conclusion. Because the Court remands this case when doing so is unnecessary, I respectfully dissent.

Filed: June 29, 2016

Do Not Publish

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[17] *Reed v. Thaler*, 2012 U.S. Dist. LEXIS 83422, *133 (W.D. Tex. June 15, 2012)

[18] *Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006).

APPENDIX G

CAUSE NO. 8701

STATE OF TEXAS	
v.	IN THE 21ST DISTRICT COURT OF
RODNEY REED	BASTROP COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the record in this case, and after making credibility determinations following a live hearing in this Chapter 64 proceeding, the Court enters the following findings of fact and conclusions of law:

Relevant Procedural History

1. The State, on April 8, 2014, filed a motion to set an execution date for Movant, Rodney Reed. The State requested a date of November 19, 2014.
2. Movant, on April 8, 2014, filed a motion to recuse the elected judge overseeing his case, Judge Towslee-Corbett.
3. Movant, on April 14, 2014, opposed setting of an execution date. Movant requested indefinite delay of his execution to conduct DNA testing, to file a subsequent state habeas application, and to file a scientific-evidence application.
4. On May 23, 2014, Judge Towslee-Corbett issued an order of voluntary recusal.

5. On May 28, 2014, Judge Underwood, the presiding judge of the Second Administrative Judicial Region, assigned the undersigned judge to preside over the case.
6. On June 18, 2014, the Court set a hearing on the State's motion to set an execution date.
7. On June 17, 2014, the Court re-set the hearing on the State's motion to set an execution date at the request of the parties.
8. On July 14, 2014, the Court held a hearing on the State's motion to set an execution date. The Court entered an order setting Movant's execution for January 14, 2015.
9. On July 14, 2014, immediately before the hearing on the State's motion to set an execution date, Movant filed the instant Chapter 64 motion. The motion contained no affidavit from Movant and no affidavit from a DNA expert. Movant, however, attached several affidavits purporting to undermine the State's forensic case at trial.
10. At the July 14, 2014, hearing, the Court signed an order permitting agreed-to DNA testing. The items to be tested included four specified hairs and various swabs taken from the victim's body.
11. At July 14, 2014, hearing, Movant requested indefinite delay of his execution to conduct DNA testing.
12. The State timely responded on September 12, 2014. The State attached several exhibits regarding the existence, custody, and present condition of evidence collected in connection with the investigation of Movant's offense.

13. Movant filed a letter requesting a hearing on the Chapter 64 motion on October 14, 2014.
14. The State filed a letter opposing a hearing on the Chapter 64 motion on October 22, 2014. The State attached an exhibit reflecting an amended inventory regarding fingerprint evidence.
15. Movant filed a letter again requesting a hearing on the Chapter 64 motion on October 23, 2014. Movant attached, for the first time ever, an affidavit from a DNA expert.
16. On October 27, 2014, the Court set a hearing on Movant's Chapter 64 motion.
17. On November 18, 2014, the State moved to modify Movant's execution date. The State requested an amended date of March 5, 2015.
18. Movant filed a reply to the State's Chapter 64 response on November 24, 2014. Movant attached, for the first time ever, a personal affidavit.
19. Movant filed a motion to withdraw his execution date on November 25, 2014, immediately before the hearing on his Chapter 64 motion. Movant requested indefinite delay of his execution to conduct DNA testing or to appeal the denial of DNA testing.
20. The Court held a live hearing on the Chapter 64 motion on November 25, 2014. Movant called crime-scene and forensics expert, John Paolucci, and DNA expert, Deanna Lankford. The State called Gerald Clough, an investigator with the Office of the Attorney General of Texas, Lisa Tanner, the special prosecutor on Movant's case, and Etta Wiley, a deputy district clerk for Bastrop County. Movant and the State also introduced various

exhibits. After considering the record in this case, and after making credibility determinations from the hearing, the Court denied Movant's Chapter 64 motion.

21. At the November 25, 2014, hearing, the Court granted the State's motion to modify Movant's execution date. The Court entered an amended execution order setting Movant's execution for March 5, 2015.

22. On December 2, 2014, Movant requested a subpoena to obtain a personal reference sample for purposes of the agreed-to DNA testing ordered on July 14, 2014. A subpoena issued on December 3, 2014.

Findings of Fact and Conclusions of Law

23. Reed has failed to prove by a preponderance of the evidence that his Chapter 64 motion is not made to unreasonably delay the execution of sentence of administration of justice. This is explained below:

    23a. Movant, to date, has not provided the Court with any information regarding time estimates for the extensive DNA testing he seeks. This alone, the Court believes, is sufficient to show that Movant has failed in his burden to show that his request is not made to unreasonably delay his execution.

    23b. Movant filed his Chapter 64 motion on the day this Court initially set Movant's execution date. This timing, the Court believes, was not coincidental, but a designed tactic to delay the setting of Movant's execution date. Movant's

repeated desire to indefinitely delay his execution, instead of proposing concrete timelines, further supports the Court's belief that his Chapter 64 motion was filed for purposes of unreasonable delay.

23c. The Court notes that Movant's Chapter 64 motion was filed thirteen years after Chapter 64's enactment and approximately three years after Chapter 64's most recent amendment. The Court finds that there was no legal impediment to filing a Chapter 64 motion during this entire period. The Court also notes that Movant has been continuously represented by counsel during his postconviction proceedings, as indicated by the multiple state and federal opinions generated during these proceedings. The lack of filing during this period, which was without factual or legal impediment, leads the Court to believe that the present Chapter 64 motion is filed for purposes of delay.

23d. As pled in Movant's Chapter 64 motion, Movant's first informal request for DNA testing occurred three days after the United States Court of Appeals affirmed the denial of his federal petition for writ of habeas corpus. This timing is important because, as demonstrated in the State's response, there is little chance for relief following affirmation of the denial of a federal habeas petition. Thus, the Court finds that Movant only sought

DNA testing after his other efforts at relief proved unsuccessful. This diminishes Movant's case that his present Chapter 64 motion was not filed for purposes of unreasonable delay.

23e. As demonstrated by the State's exhibits, Movant's attorney—Bryce Benjet—is counsel of record for Larry Swearingen, another Texas death row inmate. Mr. Benjet filed a Chapter 64 motion for Swearingen approximately a year and a half before Movant's Chapter 64 motion. Mr. Benjet filed another Chapter 64 motion for Swearingen approximately two months before Movant's Chapter 64 motion. Movant's motion is substantially similar to Swearingen's initial Chapter 64 motion and attached to Swearingen's initial Chapter 64 motion is a personal affidavit from Swearingen and an affidavit from a DNA expert. Swearingen's second Chapter 64 motion has attached to it another affidavit from a DNA expert. Thus, the Court concludes that Movant, through his counsel, Mr. Benjet, had the legal and factual knowledge to file Movant's present Chapter 64 motion more than a year before it was filed. Movant's delayed presentation of a personal affidavit and an expert affidavit, the Court finds, is a purposeful attempt at delay.

23f. Movant has been cited for abuse of the writ on five separate occasions by the

Court of Criminal Appeals. As demonstrated by the State's evidence, the United States District Court for the Western District of Texas ruled that Movant had untimely sought forensic testing and was dilatory in submitting an affidavit. The United States Court of Appeals for the Fifth Circuit also found that Movant submitted evidence in an untimely fashion. Accordingly, the Court finds that Movant has engaged in a dilatory and piecemeal litigation strategy throughout his postconviction proceedings and the Court believes this Chapter 64 motion is a continuation of such behavior.

23g. Movant has thrice asked the Court to indefinitely postpone his execution date—once in opposing the State's motion to set an execution date, once at the hearing to set an execution date, and once at the hearing on this Chapter 64 motion via a motion to withdraw the date. The Court finds that Movant's request for, essentially, indefinite stays works against him in proving that he is not attempting to unreasonably delay his execution.

23h. Movant, at the live evidentiary hearing on the Chapter 64 motion, asked for DNA testing on a substantial amount of evidence that he had not mentioned in his Chapter 64 motion. Consequently, Movant has not individually briefed or explained the type of testing that he

would like performed on these items. The Court finds this dilatory request to be another example of Movant's last-minute amendments to his Chapter 64 pleadings, which this Court considers to be an attempt to unreasonably delay his execution.

23i. The Court rejects Movant's rationale for failing to request and brief those items of evidence raised for the first time at the hearing on the Chapter 64 motion; specifically, that Movant did not know of the evidence's existence until the State attached inventories to its Chapter 64 response. Movant has failed to demonstrate that he requested such inventories from the State prior to the State's Chapter 64 response or that the State refused him such inventories upon request. Further, one of the items of evidence that Movant requested to be tested for the first time at the Chapter 64 hearing—beer cans—has been heavily litigated during the course of Movant's postconviction proceedings. It is inconceivable to the Court that Movant did not know that such item existed. Moreover, Movant requested DNA testing of items of evidence in his Chapter 64 motion—a condom, a knife, and a shirt piece—that were not introduced at trial and were, therefore, "unknown" to Movant until the State attached an inventory to its response. Stated another way, Movant requested testing of some items he did not "know"

were in the possession of the State or District Clerk. The Court finds Movant's unsupported excuse to be further evidence of his attempts to unreasonably delay his execution.

23j. As demonstrated by the State's evidence, Movant is in possession of extracts from multiple pieces of evidence he seeks testing on and which he could test independently of a Chapter 64 motion. This includes the beer cans, various swabs from the victim's body, stains from the victim's pants and back brace, and a condom. Movant's request to test these items via Chapter 64 when he could conduct the testing himself, especially given his offer to pay for DNA testing, leads the Court to believe that his request for DNA testing is for the purpose of unreasonable delay.

23k. The Court finds that Movant has requested DNA testing of items of evidence that the State has already agreed to test. This includes various hairs and swabs from the victim's body. The Court finds that this request for redundant testing is, again, an attempt to unreasonably delay the execution of sentence.

23l. Movant has repeatedly stated, in pleadings and in court, that he plans to soon file postconviction motions for relief pursuant to Articles 11.071 and 11.073 of the Texas Code of Criminal Procedure. To date, despite Movant's promise of

diligence, he has not filed either pleading. The Court views this procrastination as another example of an attempt to unreasonably delay his execution.

23m. Movant waited more than four months to obtain a subpoena for a reference sample from himself for purposes of the agreed-to DNA testing that this Court ordered in July. This delay in requesting a reference sample demonstrates, the Court believes, unreasonable delay and Movant's tardy actions in his agreed-to DNA testing makes this Court believe he could not complete his requested DNA testing before the present execution date.

24. The Court finds that Movant has failed to prove by a preponderance of the evidence that he would not have been convicted but for exculpatory results from DNA testing. This is explained below:

24a. The State's case on guilt-innocence was strong—Movant's DNA was found both on and inside the victim, which demonstrated presence; the intactness of Movant's sperm inside the victim's vaginal cavity, the peri-mortem injuries to the victim's anus, Movant's saliva on the victim's breasts after she took a shower the evening before her murder, and the small amount of semen in the victim's panties demonstrated sexual assault contemporaneous with murder; the peri-mortem injury to the victim's anus and the obvious signs of sexual assault—the

victim's bunched up panties, a broken pants zipper, partially unclothed, bruises to the arms, torso, and head of the victim—demonstrated lack of consent; and additional evidence indicated that Movant frequented the area of the victim's disappearance at the time the victim disappeared and the Movant matched the height of someone who would have fit the adjusted seat in the victim's truck.

24b. Many of the items of evidence Movant seeks to test were already before the jury and the jury knew they did not match Movant—their exculpatory nature was already before the jury. For example, Movant's DNA and forensics expert testified that one of the hairs Movant seeks to test did not match Movant's genetic profile. As another example, a DPS forensic scientist testified that none of the hairs collected from the victim's body microscopically matched Movant's hair. And, as another example, Movant did not match any of the fingerprints collected during the course of the investigation. Thus, the jury knew that many of the items Movant seeks to test were not from him.

24c. Further, the Court finds that none of the evidence Movant seeks to test was so integral to the State's case that the jury would have acquitted despite knowing that Movant's DNA was not on the item.

> Many of items were in a truck shared with the victim's fiance and evidence at trial demonstrated that other people had ridden in the truck. Thus, the jury would not be surprised to know that foreign DNA was found on items originating from the truck. Further, many of the items of evidence have been handled by ungloved individuals, which further undermines the value of such "exculpatory" results before a jury. Ultimately, at best, exculpatory results from the items Movant seeks to test would muddy the waters, not prove by a preponderance that he would have been acquitted.

Accordingly, Movant's Chapter 64 motion is DENIED.

It is so ORDERED.

DONE AND ENTERED this 12 day of December, 2014.

Doug Shaver
Presiding Judge
21st District Court
Bastrop County, Texas

Sitting by Assignment

FILED 8:40 AM
DATE 2/11/2014
Sarah Loucks
District Clerk, Bastrop County

APPENDIX H

[Appendix H reproduces only that portion of a transcript necessary to reflect the November 25, 2014, oral ruling of the District Court of Bastrop County, Texas]

REPORTER'S RECORD
VOLUME 4 OF 10 VOLUMES
TRIAL COURT CAUSE NO. 8701

STATE OF TEXAS	§	IN THE 21ST DISTRICT
	§	COURT
v.	§	OF
	§	BASTROP COUNTY,
RODNEY REED	§	TEXAS

MOTION FOR POST-CONVICTION DNA TESTING HEARING

On the 25th day of November, 2014, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Doug Shaver, Judge Presiding, held in Bastrop, Bastrop County, Texas.

Proceedings reported by computerized stenotype machine.

APPEARANCES

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[Transcript excerpted to reflect only the trial court's ruling, as set out below.]

THE COURT: All right. After reviewing all the documents that were presented, those in court today, and all the evidence and arguments of counsel, the Court finds that this motion was filed untimely and calls for unreasonable delay, that there's no reasonable probability the defendant would not have been convicted had the results been available at the trial of the case. Your motion is denied.

The motion to modify the execution date is granted. That new execution date is set for March 5th, 2015, and your motion to withdraw the execution date has been denied. All right. That completes our hearing. We're now adjourned.

(Proceedings adjourned.)

THE STATE OF TEXAS)
COUNTY OF BASTROP)

I, Margaret Raiford, Substitute Reporter in and for the 21st District Court of Bastrop County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested by counsel to be included in this volume of the Reporter's Record, in the above-entitled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost of the preparation of this Reporter's Record is $100.00 and will be paid by Mr. Matthew Ottoway.

WITNESS MY OFFICIAL HAND on this the 29th day of December, 2014.

/s/ Margaret Raiford
Margaret Raiford, CSR 9192
Expiration Date; 12/31/16
Certified Shorthand Reporter
327 N. Knox
Giddings, TX 78942
(979) 716-7122

APPENDIX I

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS

P.O. BOX 12308, CAPITOL STATION,

AUSTIN, TEXAS 78711

10/4/2017

REED, RODNEY Tr. Ct. No. 8701 AP-77,054

On this day, the Appellant's motion for rehearing has been denied.

Deana Williamson, Clerk

DISTRICT CLERK BASTROP COUNTY
SARAH LOUCKS
P.O. BOX 770
BASTROP, TX 78602
* DELIVERED VIA E-MAIL *