No. 21-442

IN THE
Supreme Court of the United States

RODNEY REED,
Petitioner,

v.

BRYAN GOERTZ,
Respondent.

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

BRIEF OF AMICI CURIAE EIGHT RETIRED JUDGES IN SUPPORT OF PETITIONER

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BRIEF FOR EIGHT RETIRED JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

Amici are former judges from the Texas Court of Criminal Appeals and from other state and federal courts around the country.[2] Amici have an interest in ensuring the integrity of judicial proceedings. It is critically important to the fair administration of the death penalty and state post-conviction DNA testing statutes that States be required to provide basic procedural due process in implementing these statutes. Post-conviction

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to this brief's filing.

[2] The individual judges submitting this brief are listed in the Addendum to the brief.

DNA testing statutes seek to further the core value of protection against wrongful convictions by allowing convicted persons access to evidence used to convict them so that that evidence can be DNA tested.

SUMMARY OF THE ARGUMENT

State-created post-conviction DNA testing statutes must comport with the Constitution's procedural due process guarantees. *See District Attorney's Office for Third Judicial District* v. *Osborne*, 557 U.S. 52, 68–69 (2009). Fairness and truth are the foundation of our criminal justice system. *E.g.*, *Coffin* v. *United States*, 156 U.S. 432, 456 (1895) (holding that it is "better that ten guilty persons escape than that one innocent suffer" (quoting 2 William Blackstone, Commentaries *358)). DNA testing carries out those principles by increasing the accuracy of criminal convictions. *See Osborne*, 557 U.S. at 62. All fifty states have enacted post-conviction DNA testing statutes. These statutes allow the wrongfully convicted to prove their innocence in an innocence claim or habeas petition. And, as this Court explained in *Osborne*, state-created post-conviction DNA testing statutes must be "fundamentally []adequate to vindicate the substantive rights provided." *Id*. at 69.

The implementation of Texas's post-conviction DNA testing statute that underlies the decision below falls short of that mark. Petitioner Rodney Reed seeks access to evidence used to convict him in order to conduct DNA testing on that evidence, using technology that was unavailable in 1996, when the crime at issue occurred. Texas has enacted a post-conviction DNA testing statute that, in theory, would allow Reed to test the evidence in his case. But the Texas trial court denied Reed's motion for DNA testing of this evidence, and the Texas Court of

Criminal Appeals upheld that denial. They did so by grafting new requirements onto the Texas statute that preclude a defendant from obtaining DNA testing of evidence that, in the same condition, the State could subject to DNA testing and use to prosecute a defendant. And the Texas Court of Criminal Appeals reached that result even though the State unilaterally controls how the evidence is handled.

ARGUMENT

I. POST-CONVICTION DNA TESTING STATUTES ARE BASED ON PRINCIPLES OF FAIRNESS AND ACCURACY THAT ARE FOUNDATIONAL FOR OUR JUSTICE SYSTEM.

Our Nation's justice system is founded on a longstanding commitment to protecting innocent people's liberty and punishing only those who are truly culpable. Post-conviction DNA testing statutes are a modern reflection of those principles. But these statutes can support the principles of fairness and accuracy only if they are interpreted in a way that is consistent with Due Process.

A. Post-Conviction DNA Testing Statutes Reflect our Criminal Justice System's Concern for the Wrongfully Convicted.

1. "[T]he central purpose of any system of criminal justice" is not just "to convict the guilty," but to "free the innocent." *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993). Thus, although finality is important, its value is premised on the accuracy of criminal convictions. *Compare, e.g.*, *Calderon* v. *Thompson*, 523 U.S. 538, 555-56 (1998) ("Finality is essential to both the retributive and the deterrent functions of criminal law."), *with e.g.*, *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969) ("[C]onventional notions of finality in litigation have no place where life or liberty is at stake and infringement of constitutional

rights is alleged."). Public confidence in the application of the death penalty relies "in no small part" on "the Constitution['s] *** unparalleled protections against convicting the innocent." *Herrera*, 506 U.S. at 420 (O'Connor, J., concurring).

2. Because of its accuracy, DNA testing has become an important tool for our criminal justice system. The current standard for forensic DNA testing is the Short Tandem Repeat (STR) method. Petitioner Rodney Reed seeks to use the STR method to test the evidence at issue here. STR testing has "increas[ed] exponentially the reliability of forensic identification over earlier techniques" and is "qualitatively different from all that proceeded it." *Harvey* v. *Horan*, 285 F.3d 298, 305 & n.1 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc); *cf. Herrera*, 506 U.S. at 403 (noting that, ordinarily, "the passage of time only diminishes the reliability of criminal adjudications").

There are two primary advantages of STR testing. First, STR testing can generate results from very small and highly degraded samples of DNA. Second, STR testing can generate a profile that is effectively unique among the world's population; for example, the odds that two unrelated white Americans would share the same STR profile are estimated at one in 575 trillion. *See* Roland AH van Oorschot et al., *Forensic trace DNA: a review*, Investigative Genetics 2–3 (2010);[3] Department of Justice, Future of Forensic DNA Testing 19 (2000); John M. Butler, Forensic DNA Typing 12, 146 (2005).

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[3] Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3012025/pdf/2041-2223-1-14.pdf.

"[T]here is no technology comparable" to this modern method "for matching tissues when such evidence is at issue." *Osborne*, 557 U.S. at 62; *see also* Kristen McIntyre, *A Prisoner's Right to Access DNA Evidence to Prove His Innocence: Post-Osborne Options*, 17 Tex. Wesleyan L. Rev. 565, 567–68 (2011). These "extra-ordinary scientific advance[s]" in DNA testing "have the potential in certain instances to prove beyond all doubt whether the requesting person in fact committed the crime for which he was convicted and sentenced." *Harvey*, 285 F.3d at 310 (opinion of Luttig, J.).

The availability of DNA testing for convicted defendants bolsters the legitimacy of the criminal justice system as a whole. *See* JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. Rev. 47, 53 (2010). "DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others." *Osborne*, 557 U.S. at 62. In addition, "DNA exonerations have disclosed deliberate (and in some cases criminal) police and prosecutorial misconduct in obtaining the tainted convictions." Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 563 (2002). DNA exonerations have also exposed more "systemic flaws in the criminal justice system" like "faulty eyewitness identifications, false confessions, ineffective defense counsel, * * * [and] unethical police or prosecutors." *Id*.

3. Every state and the federal government has enacted post-conviction DNA testing statutes to address this advancing technology. The first DNA testing statutes were enacted in 1994 and 1997 by New York and Illinois, respectively. *See* Act of Aug. 2, 1994, ch. 737, 1994 N.Y.

Laws 3709 (codified at N.Y. Crim. Proc. Law Ann. § 440.30(1-a) (West)); Act of May 9, 1997, Pub. Act. No. 90-141, 1997 Ill. Laws 2461 (codified at 725 Ill. Comp. Stats., ch. 725, § 5/116-3(a) (West)). Other states and the federal government quickly followed suit.[4]

The legislative and political discussion surrounding these statues often focused on the importance of fairness

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[4] *See* Innocence Protection Act, 18 U.S.C.A. § 3600 (2004); Ala. Code § 15-18-200 (LexisNexis Supp. 2009); Ariz. Rev. Stat. Ann. §13-4240 (2001); Ark. Code Ann. § 16-112-202 (2006); Cal. Penal Code § 1405 (West Supp. 2010); Colo. Rev. Stat. § 18-1-413 (2009); Conn. Gen. Stat. § 52-582 (2005); Del. Code Ann. tit. 11, § 4504 (2007); D.C. Code §§ 22-4133 to -4135 (Supp. 2009); Fla. Stat. Ann. §925.11 (West Supp. 2010); Ga. Code Ann. § 5-5-41 (Supp. 2009); Haw. Rev. Stat. Ann. § 844D-123 (LexisNexis 2007); Idaho Code Ann. § 19-4902 (2004); 725 Ill. Comp. Stat. Ann. § 5/116-3 (West 2006); Ind. Code Ann. § 35-38-7-5 (LexisNexis Supp. 2006); Iowa Code Ann. § 81.10 (West Supp. 2008); Kan. Stat. Ann. § 21-2512 (2007); Ky. Rev. Stat. Ann. § 422.285 (LexisNexis Supp. 2009); La. Code Crim. Proc. Ann. art. 926.1 (Supp. 2010); Me. Rev. Stat. Ann. tit. 15, § 2137 (Supp. 2009); Md. Code Ann., Crim. Proc. § 8-201 (LexisNexis Supp. 2009); Mich. Comp. Laws Ann. § 770.16 (West Supp. 2009); Minn. Stat. § 590.01 (2008); Mo. Ann. Stat. § 547.035 (West 2002); Mont. Code Ann. § 46-21-110 (2009); Neb. Rev. Stat. § 29-4120 (2008); Nev. Rev. Stat. Ann. § 176.0918 (LexisNexis 2006); N.H. Rev. Stat. Ann. § 651-D:2 (LexisNexis 2007); N.J. Stat. Ann. § 2A:84A-32a (West Supp. 2009); N.M. Stat. Ann. § 31-1A-2 (LexisNexis 2009); N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005); N.C. Gen. Stat. Ann. § 15A-269 (2009); N.D. Cent. Code § 29-32.1-15 (2006); Ohio Rev. Code Ann. § 2953.72 (LexisNexis Supp. 2009); Or. Rev. Stat. § 138.690 (2007); 42 Pa. Cons. Stat. Ann. § 9543.1 (West 2007); R.I. Gen. Laws § 10-9.1-11 (Supp. 2008); S.C. Code Ann. § 17-28-30 (Supp. 2009); Tenn. Code Ann. § 40-30-304 (2006); Tex. Crim. Proc. Code Ann. §§ 64.01-64.05 (Vernon 2006 & Supp. 2009); Utah Code Ann. §§ 78B-9-300 to 78B-9-304 (2008); Vt. Stat. Ann. tit. 13, § 5561 (2009); Va. Code Ann. § 19.2-327.1 (2008); Wash. Rev. Code Ann. § 10.73.170 (West Supp. 2009); W. Va. Code Ann. § 15-2B-14 (LexisNexis 2009); Wis. Stat. Ann. § 974.07 (West 2007); Wyo. Stat. Ann. § 7-12-303 (2009).

in the adjudication of criminal cases. The legislative history of Texas's post-conviction DNA statute, for example, explains that the Texas legislature enacted Chapter 64 of the Texas Code of Criminal Procedure to increase post-conviction access to DNA testing and remedy inconsistencies in how courts treated requests for DNA testing. *See* House Research Org., Bill Analysis, Tex. S.B. 3 (Mar. 21, 2001) ("[C]ourts tend to order testing only in the rare case in which a prosecutor agrees with an inmate's request.").

Although the various DNA testing statutes that have been enacted differ substantially, *see* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 Cal. W. L. Rev. 355, 358-360 (2002), "all of the statutes have some common provisions," Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 Am. Crim. L. Rev. 1239, 1239–40 (2005). State DNA testing statutes tend to create the same procedural right, "permit[ing] a convicted prisoner to petition the court for DNA testing of biological evidence in the possession of the government, notwithstanding the expiration of the normal time period for post-conviction litigation under applicable court rules and local statutes." *Id*. at 1251. These statutes also tend to have the same types of procedural limitations. For example, "[t]o qualify for DNA testing under most innocence protection statutes, the prisoner's petition for testing must" (1) "aver that the identity of the perpetrator was a disputed issue at trial," (2) "include a declaration that there still exists biological evidence that was collected by the government in the original investigation which has been maintained by the government with a proper chain of custody," and (3) "state that DNA

analysis of the evidence would demonstrate that the prisoner is actually innocent or would not have been convicted." *Id*. at 1251-52.

B. State-Created Post-Conviction DNA Testing Statutes Must Be Fundamentally Adequate to Vindicate the Substantive Rights Provided.

1. This Court first recognized that state-created post-conviction DNA testing statutes must comport with procedural due process requirements in *Osborne*, 557 U.S. at 69. The defendant there had sued Alaska state officials in a civil rights action for violating his due process right to obtain evidence that was used to convict him of certain criminal offenses. He wanted the evidence to perform DNA testing that was unavailable at the time of his trial. The *Osborne* Court held that Alaska's procedures for post-conviction DNA testing, developed through the Alaska courts' interpretation of the state's constitution and post-conviction statute, were "not inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.' " 557 U.S. at 70 (quoting *Medina* v. *California*, 505 U.S. 437, 446, 448 (1992)). Although a petitioner must meet certain eligibility requirements under Alaska law to obtain discovery and perform DNA testing—namely, the petitioner must show that the DNA results were not discoverable at trial and would constitute clear and convincing evidence of the petitioner's innocence—those requirements were not "fundamentally inadequate" to vindicate a prisoner's substantive right to post-conviction relief on the basis of actual innocence. *Id*. at 69. This Court therefore held Alaska's procedures for post-conviction DNA testing to be consistent with due process.

But, in holding that Alaska's procedures were adequate, the *Osborne* Court provided important guidance on what procedures for post-conviction DNA testing would *not* be consistent with due process: those that are unfair to defendants. As the Court explained, post-conviction DNA testing statutes, along with related post-conviction remedies, create a constitutionally protected liberty interest that is infringed where "the State's procedures for post-conviction relief 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Osborne*, 557 U.S. at 69 (quoting *Medina*, 505 U.S. at 446, 448). State-created post-conviction DNA testing statutes must be "fundamentally []adequate to vindicate the substantive rights provided." *Id.*

2. Like any other process provided by Texas, the State's procedures for post-conviction DNA testing must be "essential[ly] fair[]," even if the proceedings themselves are not constitutionally mandated. *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 120 (1996). Of course, a state is under no obligation to provide a prisoner with particular mechanisms for postconviction relief; this Court has suggested that a state could even preclude a prisoner from taking a direct appeal from his conviction. *See McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Where a state does create a mechanism for postconviction relief, however, "the procedures used * * * must comport with the demands of the Due Process [Clause]." *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). Thus, relying in part on procedural due process, this Court has held that a state that provides for a direct appeal as of right must also afford a criminal defendant an adequate and effective opportunity to present his claims. *See, e.g., Douglas* v. *California*, 372 U.S. 353, 358

(1963) (holding that a state must provide for the appointment of counsel on appeal to an indigent defendant); *Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956) (holding that a state must provide free trial transcripts). Where a state creates a process for postconviction relief, therefore, the prisoner has a constitutionally protected liberty interest in fair access to that process, so as to avoid rendering the process arbitrary or futile.

For that reason, even if the "fundamental adequacy" guaranteed by the Due Process Clause and described by the *Osborne* Court does not mean that DNA evidence must be stored indefinitely, *see, e.g.*, *Arizona* v. *Youngblood*, 488 U.S. 51, 57 (1988), or that every prisoner may access the DNA evidence collected in his case, *see Osborne*, 557 U.S. at 68-70, "fundamental adequacy" *does* mean at least this much: when state law confers a liberty interest in proving a prisoner's innocence with DNA evidence, there must be an adequate system in place for the prisoner to access that evidence. An adequate system is one that does not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgress[] any recognized principle of fundamental fairness in operation." *Medina*, 505 U.S. at 445, 448 (quotation marks omitted).

II. THE TEXAS COURT OF CRIMINAL APPEALS GRAFTED NEW REQUIREMENTS ONTO TEXAS' POST-CONVICTION DNA TESTING STATUTE THAT PRECLUDE DEFENDANTS FROM OBTAINING DNA TESTING OF EVIDENCE THAT, IN THE SAME CONDITION, THE STATE COULD TEST AND USE.

Chapter 64's chain of custody provision does not expressly require a finding regarding a lack of possible contamination. The CCA construed Chapter 64,

however, to impose such a requirement—and then held that Reed could not meet it because the State had allowed evidence to be touched at trial and had later stored multiple pieces of evidence together.

A. Texas's Post-Conviction DNA Testing Statute Requires Showing a Chain of Custody, Not Non-Contamination.

1. Texas's post-conviction DNA testing scheme is codified at Chapter 64 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. arts. 64.01-.05. Chapter 64 requires, first, that a defendant show that DNA testing could bear on his or her guilt or innocence. In particular, Chapter 64 provides that convicted person may submit a motion to the convicting court for DNA testing of evidence "that has a reasonable likelihood of containing biological material," Tex. Code Crim. Proc. Ann. art. 64.01(a-1), if the evidence was "secured in relation to the offense" for which the person was convicted and has been "in the possession of the state during the trial of the offense," *id*. at 64.01(b). And because Chapter 64 is not providing a do-over for DNA testing, the testing must be for one of three reasons: (1) the evidence was not previously subjected to DNA testing; (2) the evidence can be tested using newer techniques with a reasonable likelihood of more accurate or probative results; or (3) the evidence was previously tested at a lab that has since been shut down because an audit by the Texas Forensic Science Commission revealed that the lab had engaged in "faulty testing practices" during the time the prior test occurred. *Id*.

Second, after these pre-conditions establishing that DNA testing could potentially bear on the defendant's guilt or innocence are met, the defendant must show that

other, additional requirements related to the condition, authenticity, and probative value of the evidence are *also* met. *See id.* at 64.03(a). Specifically, Chapter 64 provides that the convicting court may order DNA testing "only" if the court finds that the evidence "still exists and is in a condition making DNA testing possible" and "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." *Id.*

Third and finally, the defendant must show that he is seeking DNA testing to aid, rather than to undermine, the criminal justice system. In the statue's terms, the defendant must "establish[] 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" and that "the person would not have been convicted if exculpatory results had been obtained through DNA testing." *Id.* at 64.03(a).

2. Chapter 64's chain-of-custody requirement is part of the second group of pre-conditions bearing on the evidence's authenticity. As noted above, under Chapter 64, "[a] convicting court may order forensic DNA testing * * * only if * * * the court finds 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." *Id*. art. 64.03(a)(1)(A)(ii).

The statute does not explicitly mention the possibility of contamination. Neither the word "contamination" nor any synonym thereof appears anywhere in the statute. The concept of contamination generally refers to the *quality or condition* of the evidence. "Contamination" can "soil, stain, corrupt or infect by contact or association,"

or otherwise "render" an item "unfit for use by the introduction of unwholesome or undesirable elements." Webster's Third New International Dictionary 491 (1993). Chapter 64's chain-of-custody requirement, by contrast, uses words referring to the *identity* of the evidence, not its quality or condition. *See* Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(ii) (asking if the evidence has been "substituted, tampered with, replaced, or altered"). A "substitute," for example, is "[o]ne who stands in another's place," Black's Law Dictionary 1470 (6th ed. 2004), that is, "a replacement." *See* American Heritage Dictionary of the English Language 1354 (3d ed. 2000). And "tampering" is "[t]he act of altering a thing," Black's Law Dictionary 1494 (6th ed. 2004). "Alter," in turn, means "to make [an object] different." *See* Webster's II New College Dictionary 33 (1999). In other words, the text of Chapter 64's chain-of-custody requirement demonstrates a concern for whether the evidence is what it purports to be, not what condition the evidence is in.

Nor can Chapter 64's chain-of-custody requirement be reasonably read to prohibit a chain-of-custody finding because of the possibility of contamination. Reading non-contamination into the chain-of-custody requirement would be inconsistent with the CCA's interpretation of chain-of-custody requirements in other areas of Texas criminal law. Texas's traditional legal standard for authentication of evidence through chain of custody requires only that a "proponent produce evidence sufficient to support a finding that the item is what the proponent claims it is." *See* Tex. R. Evid. 901(a). Indeed, the CCA has repeatedly held that the risk of contamination is insufficient to preclude the admission of DNA evidence against a defendant at trial, and does not break the

chain of custody. *See, e.g.*, *Druery* v. *State*, 225 S.W.3d 491, 503-04 (Tex. Crim. App. 2007) ("Absent evidence of tampering or other fraud[,] * * * problems in the chain of custody do not affect the admissibility of the evidence" and instead "affect the weight that the fact-finder should give the evidence * * *."); *Lagrone* v. *State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997) ("Without evidence of tampering, most questions concerning care and custody of a substance go to the weight attached, not the admissibility.").

Reading non-contamination into a chain-of-custody requirement is also inconsistent with the widespread understanding across state and federal courts that contamination goes to the weight of the DNA evidence as opposed to its admissibility. *See United States* v. *Morrow*, 374 F. Supp. 2d 42, 46 (D.D.C. 2005) (noting that "the great weight of legal precedent indicates that possible contamination issues go towards the weight—rather than the admissibility—of DNA evidence"); *see also, e.g.*, *Bean* v. *State*, 373 P.3d 372, 385 (Wyo. 2016) ("[T]he possible contamination or degradation of DNA samples[] are issues going toward the weight of the evidence rather than admissibility."); *United States* v. *Goodrich*, 739 F.3d 1091, 1098 (8th Cir. 2014) ("The contamination of the DNA evidence in the collection process and the weight to give it are questions for the jury to decide."); *Redden* v. *Calbone*, 223 F. App'x 825, 830 (10th Cir. 2007) (citation omitted) ("[F]laws in the chain of custody that might have resulted from the police's handling of the evidence, such as contamination, 'go to the weight of the evidence, but will not preclude admissibility' if the government lays a proper foundation for the evidence at trial." (quoting *United States* v. *Washington*, 11 F.3d 1510, 1514 (10th Cir. 1993)); *People* v. *Johnson*, 743 N.E.2d 150,

155 (Ill. App. 2000) ("Issues concerning * * * possible contamination of DNA samples, are matters that go to the weight of the evidence, not its admissibility."). Chapter 64's chain-of-custody requirement, as interpreted by the CCA, is therefore outside the mainstream.

B. In Reed's Case and Others, The Texas Court of Criminal Appeals Has Interpreted Texas' Post-Conviction DNA Testing Statute To Require Showing Non-Contamination.

1. At an earlier stage of this litigation, Petitioner Rodney Reed sought access, through a motion in state court under Texas's Chapter 64, to evidence used to convict him in order to conduct DNA testing on that evidence. In denying that motion because of the risk that the State had contaminated the evidence in Reed's case, the CCA effectively wrote a new non-contamination requirement into Chapter 64's chain-of-custody requirement, Tex. Code Crim. Proc. Ann. art. 64.03(a)(i)(A)(ii).

a. On April 23, 1996, the body of Stacey Stites was found in the brush along a rural road in Bastrop County, Texas. *See Reed* v. *State*, 541 S.W.3d 759, 762 (Tex. Crim. App. 2017). Investigators determined that Stites was strangled with her belt, and that her fiancé's truck was used to move her body. *Id*. The State argued that Reed had abducted, raped and murdered Stites because intact sperm cells from Reed were recovered from Stites's body. *Id*. Reed, a black man, explained he and Stites, a white woman, were in a relationship and had consensual intercourse days before the murder, but the State argued that Petitioner's intact sperm cells conclusively proved that he raped and killed Stites. *Id*. at 776. Reed was convicted in 1998 of Stites's murder by an all-white jury and sentenced to death. *Id*. at 762.

In the years since his conviction, Reed has gathered a "considerable body of evidence" undermining the jury's verdict. *Reed* v. *Texas*, 140 S. Ct. 686, 687 (2020) (statement of Sotomayor, J., respecting the denial of certiorari). The medical examiner has recanted his trial testimony regarding the time of Stites's death and the occurrence of sexual assault. *Id*. Forensic pathologists have opined that Stites was not sexually assaulted, and that Reed's semen was likely deposited days before, rather than in conjunction with, Stites's murder, and that her murder occurred during the time that Stites's fiancé, Jimmy Fennell, testified the two were at home together. *Id*. And Fennell, who was later incarcerated on unrelated charges, allegedly told a fellow inmate that his ex-fiancée "had been sleeping around with a black man behind his back," and so he "had to kill [his] n***r-loving fiancé[e]." *Id*. at 688.

b. In 2014, Reed filed a motion, pursuant to Chapter 64, for DNA testing of the physical evidence in the case. *See Reed* v. *State*, 541 S.W.3d at 764. He sought to have several items tested for DNA evidence, including "items recovered from Stites's body or her clothing," "items found in or near Fennell's truck," and "items found near the victim-recovery scene." *Id*. at 764. The hearing on Reed's Chapter 64 motion included testimony from a forensic DNA testing expert, who explained that DNA evidence left by the actual killer would likely be found on the evidence. *Id*. at 766. The trial court nevertheless denied Reed's motion. *Id.* at 726. And the CCA ultimately affirmed that denial. *Id*. at 701.

The CCA's affirmance noted that the State did not dispute several of Chapter 64's elements, including "that the items Reed seeks to have tested exist and are in a condition making DNA testing possible," and "were either not tested for DNA or could be tested with newer

technologies providing more accurate and probative results." *Id*. at 769. But, with respect to key evidence, such as the belt used to strangle the victim and her clothing, the CCA accepted the State's argument that the statutory chain of custody element could not be met because of how the State had handled and stored the evidence. *Id*. at 769-70.

In particular, the CCA concluded that certain items that Reed sought to have tested had been "contaminated, tampered with, or altered," because the evidence had been handled without gloves by "attorneys, court personnel, and possibly the jurors," and DNA from those individuals could have been transferred to the evidence as a result. *Id*. at 769-70. In addition, the various items of evidence had been stored together, such that there is "a good chance that [the items in the clerk's boxes are] contaminated evidence." *Id*. at 770.

The CCA reached this conclusion even though there is no question that the items of evidence are what they are purported to be. The belt is the murder weapon, and the clothing and name tag were taken from Stites's body. Indeed, the State's custodian testified that none of these items had been substituted, replaced, tampered with or altered. *Id*. at 767 ("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.").

2. In holding that Chapter 64's chain-of-custody requirement could not be met because of the risk that the State had contaminated the evidence in Reed's case, the CCA effectively wrote a new non-contamination requirement into Chapter 64's chain-of-custody requirement. And since in ruling in Reed's case, Texas courts

have applied that judicially-created non-contamination requirement to deny relief in other cases as well. *See, e.g.*, *Hernandez* v. *State*, No. 13-20-00216-CR, 2022 WL 324069, at *4 & n.2 (Tex. App. Feb. 3, 2022), *reh'g denied* (Apr. 22, 2022) ("Here, it is very likely that an exculpatory DNA result from the golf club was contributed by an innocent person. * * * The record also indicates the prosecutor, defense counsel, and Moreno handled the golf club without gloves during Hernandez's trial"); *Webb* v. *State*, No. 13-18-00046-CR, 2019 WL 1561825, at *4 (Tex. App. Apr. 11, 2019) ("[A]s in *Reed*, many people handled the gun without gloves at trial," which "support[s] the trial court's finding that the gun has 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.'").

III. THE TEXAS COURT OF CRIMINAL APPEALS' DECISION EXEMPLIFIES A FAILURE TO PROVIDE PROCEDURAL DUE PROCESS TO A DEFENDANT.

The Texas Court of Criminal Appeals' decision provides a stark example of why the Due Process guarantee is crucial: While the State's post-conviction DNA testing statute theoretically provides Reed and other convicted persons the right to postconviction DNA testing, convicted persons cannot meaningfully access that right because of a set of impossible-to-meet prerequisites, such as the chain-of-custody standard as interpreted by the CCA. The principles of fairness and accuracy underpinning our justice system require more.

A. Fair Administration of the Death Penalty Requires Subjecting Defendants and the State to the Same Standards Regarding DNA Evidence.

This Court has long recognized that fairness in the administration of the death penalty should be a guiding principle. *See, e.g.*, *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982) ("[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all."). DNA testing statutes were enacted to allow convicted defendants access to DNA testing of evidence used to convict them. Nothing about the language of Article 64.03(a)(1)(A)(ii) suggests that movants seeking to test evidence should face a higher burden than the State. Indeed, every other court that has looked at chain-of-custody requirements in DNA testing statutes has found that both fundamental fairness and the aims of the statute require a less restrictive interpretation of the chain-of-custody requirement than that employed by the CCA.

Nevertheless, that court's interpretation of Article 64.03(a)(1)(A)(ii) to require no likelihood of contamination imposes a greater burden than that faced by prosecutors seeking to introduce evidence at trial. As noted above, Texas's standard for authentication of evidence through chain of custody requires only that a "proponent * * * produce evidence sufficient to support a finding that the item is what the proponent claims it is." Tex. R. Evid. 901(a). This authenticity standard for admitting DNA evidence to establish guilt is not defeated by possible or even actual contamination. *See id.*

Texas courts have applied this standard liberally for prosecutors. In *Dossett* v. *State*, 216 S.W.3d 7 (Tex. Crim. App. 2006), for example, the court rejected a defendant's

challenge that the State could not establish chain of custody of DNA evidence because the mere possibility of contamination or tampering was "insufficient to exclude the evidence" on chain-of-custody grounds even where a 20-year-old rape kit had grown fungus, mold, and bacteria and contained other unidentifiable DNA. *Id*. at 20–22; *see also Druery*, 225 S.W.3d at 503–04 ("[a]bsent evidence of tampering or other fraud[,] * * * problems in the chain of custody do not affect the admissibility of evidence" but rather go to the weight of the evidence). This is undoubtedly a lower chain-of-custody standard than the bar the CCA has set for convicted persons seeking DNA testing under Chapter 64.

Courts in other states have looked at chain-of-custody requirements containing language nearly identical to Article 64.03(a)(1)(A)(ii) and concluded that there should not be a higher burden regarding chain of custody for defendants who want to DNA test evidence than for prosecutors who introduced the same type of evidence at trial. *See, e.g.*, *People* v. *Travis*, 329 Ill. App. 3d 280, 285 (2002) ("It asks too much to require petitioning defendant in these cases to plead and prove proper chain of custody at the outset, for the evidence at issue will undoubtedly have been within the safekeeping of the State, not the defendant."); *People* v. *Noble*, No. 1-11-3548, 2012 WL 6861355, at *4 (Ill. App. Ct. Dec. 21, 2012) ("An allegation that the evidence to be tested had been in the continuous possession of the police or some other State agency is facially sufficient regarding the chain-of-custody requirement, and a defendant cannot be expected to prove at the outset a proper chain of custody because the evidence at issue will typically have been within the State's possession."); *Commonwealth* v. *Lyons*, 51 N.E.3d 476, 484 (Mass. App. Ct. 2016) (allowing a petitioner to

obtain discovery regarding the condition and chain of custody of evidence she sought tested because she met her burden of showing evidence was potentially material).

Courts that have looked squarely at this question have found that interpretations of a chain-of-custody requirement that place a heavier burden on convicted defendant than on prosecutors unfairly restrict convicted defendants' rights to obtain DNA testing. In *United States* v. *Fasano*, for example, the Fifth Circuit rejected an interpretation of the chain of custody requirements of the federal Innocence Protection Act (IPA) that would have made the chain-of-custody requirement for DNA testing purposes was "narrower than that demanded for the admission of evidence at trial." 577 F.3d 572, 576 (5th Cir. 2009). The Fifth Circuit rejected that interpretation because it did "not read the statute to impose a more exacting standard for a showing of the chain of custody in a proceeding under the Innocence Act than would be demanded in a trial itself." *Id*. "Indeed," in the Fifth Circuit's view, "there is argument with some purchase, that the trial standard is itself too exacting for an inquiry into whether tests should be ordered." *Id*. The Fifth Circuit went on to discuss the circumstances of the evidence in question, noting that the lack of evidence of chain of custody should not inure to the detriment of the convicted. It explained: "we cannot place upon the defendant the burden of proving its history while it is held in government custody." *Id*. at 577.

The language of the Texas statute tracks the IPA's chain-of-custody provision almost exactly,[5] and as with the federal statute, interpreting that provision in a way that places a higher burden on the defendant than the State faced at trial "would create an entrance gate so difficult to enter as to frustrate the core objective of the statute." *Id*. For post-conviction DNA testing statutes to promote—rather than undermine—the principles of fairness and accuracy that undergird our criminal justice system, they must be interpreted to further the aims of the statutes and to allow defendants to effectively have access to evidence used to convict them. A fundamentally adequate system cannot prevent convicted defendants with no control over evidence in a state's possession from testing that evidence because of an unduly restrictive reading of the chain-of-custody requirement.

B. Fair Administration of the Death Penalty Precludes Denying Post-Conviction DNA Testing Based On Factors Within the State's Sole Control.

The process afforded convicted persons under Chapter 64, as interpreted by the CCA, is also fundamentally unfair because the State has physical control over the evidence and effectively controls whether a prisoner can later meet the chain-of-custody requirement. As part of investigating a crime, the State generally collects evidence and maintains custody of that evidence. In Texas, as in many states, the State has an obligation to preserve

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[5] The IPA's chain-of-custody provision requires that the evidence be in the State's possession and have been "subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing." 18 U.S.C. § 3600(a)(4).

evidence long after a crime has occurred or a conviction has been obtained: The law enforcement agency, prosecutor's office, court, public hospital, or crime laboratory charged with the collection storage, preservation, analysis, or retrieval of biological evidence must retain and preserve biological evidence for at least 40 years if the crime is unsolved or, in a capital case, until the defendant is executed, dies, or is released on parole. Tex. Code Crim. Proc. Ann. art. 38.43(b), (c)(1)-(2).

Thus, the State maintains physical custody of the biological evidence and can control who has access to it and where and how it is stored. The statute governing preservation of evidence in Texas—Chapter 38.43 of the Texas Code of Criminal Procedure—does not specify where this evidence is to be stored, at what temperature, how it is preserved, or who has access to it. Indeed, Chapter 38.43 provides no precise guidance about how to fulfill the State's preservation obligation. As happened here, the preserved evidence could be handled by others or could be stored with other evidence while the government has physical custody of the evidence and the exclusive ability to control how it is treated. The State's actions alone will therefore determine whether the evidence a convicted person wants tested through Chapter 64's procedures will meet the chain of custody requirement. With this power, Texas could effectively prevent any—or all—convicted persons from ever obtaining postconviction DNA testing.

Yet the due process clause requires states to honor the promises that they make in their dealings with criminal defendants. *See, e.g.*, *Doyle* v. *Ohio*, 426 U.S. 610 (1976) (state, having assured defendant that his silence will not be used against him, may not use a defendant's post-arrest silence to impeach his trial testimony); *Santobello* v.

New York, 404 U.S. 257 (1971) (state bound by promise made during plea negotiations not to make sentence recommendation after guilty plea entered); *Raley* v. *Ohio*, 360 U.S. 423, 473 (1959) (state may not prosecute for contempt after assuring defendants they could refuse to answer questions on grounds of self-incrimination).

In Chapter 64, Texas has made a promise that prisoners can have access to evidence for DNA testing by showing chain of custody—and the CCA has broken that promise by imposing a novel requirement that is impossible to meet. It is fundamentally unfair to require a perfect record for post-conviction testing when the government retains custody of the evidence at issue. *See, e.g.*, *Newton* v. *City of New York*, 681 F. Supp. 2d 473, 491 (S.D.N.Y. 2010) (movant need not show evidence of bad faith when the City misplaced evidence because "due process rights have been violated if attempts to locate the evidence are frustrated due to a poor or non-existent evidence management system"); *State* v. *Pratt*, 842 N.W.2d 800, 811 (Neb. 2014) ("If we were to interpret the physical integrity prong as demanding that the biological evidence was secured in a way likely to avoid accidental contamination with extraneous DNA from epithelial cells, then the express purposes of the Act would be undermined.").

What is more, there is no remedy for convicted persons when evidence in Texas's custody is mishandled. Chapter 38.43 does not provide any remedy when the State's actions render the evidence contaminated. And this Court's precedent in *Arizona* v. *Youngblood* suggests that little relief would be constitutionally required. 488 U.S. at 56–57 (finding that failure to preserve evidence does not establish a substantive due process violation unless the defendant can show bad faith by the government in

destroying the evidence and the exculpatory value of the evidence was apparent before the evidence was destroyed). Finally, Chapter 38.43 even allows Texas to destroy evidence as long as the State provides notice to the defendant and the convicting court. Tex. Code Crim. Proc. Ann. art. 38.43(d).

In short, the State has exclusive control over the evidence and nearly unchecked power to render it contaminated. A fundamentally adequate system cannot prevent convicted defendants with no control over evidence in a State's possession from testing that evidence based on the State's own errors in storing that evidence.

CONCLUSION

For the foregoing reasons, as well as those in Petitioner's brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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JULY 2022

ADDENDUM

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AMICI CURIAE RETIRED JUDGES

Charles F. Baird

Judge, 299th Criminal District Court, Travis County, Texas (2007-2011); Judge, Texas Court of Criminal Appeals (1991-1999).

Oliver E. Diaz, Jr.

Justice, Mississippi Supreme Court (2000-2008); Judge, Mississippi Court of Appeals (1994-2000).

Timothy Lewis

Judge, United States Court of Appeals for the Third Circuit (1992-1999).

Justice, Mississippi Supreme Court (2000-2008); Judge, Mississippi Court of Appeals (1994-2000).

Nan R. Nolan

Magistrate Judge, United States District Court for the Northern District of Illinois (1998-2012).

Michol O'Connor

Justice, Texas First Court of Appeals (1989-2000).

Stephen M. Orlofsky

Judge, United States District Court for the District of New Jersey (1996-2003); Magistrate Judge, United States District Court for the District of New Jersey (1976-1980).

Sol Wachtler

Judge, New York Court of Appeals (1972-1992); Judge, New York State Supreme Court (1968-1972).

Warren D. Wolfson

Justice, Illinois Court of Appeals (1994-2006); Judge, Cook County Circuit Court, Illinois (1975-1994).