APPENDIX

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 19-70022

United States Court of Appeals
Fifth Circuit
FILED
May 1, 2025
Lyle W. Cayce
Clerk

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 Sherriff*

Defendants—Appellees.

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

ON REMAND FROM
THE SUPREME COURT OF THE UNITED STATES

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

JENNIFER WALKER ELROD, *Chief Judge*:

Rodney Reed challenges the constitutionality of Texas's postconviction DNA-testing procedures under the Due Process Clause of the Fourteenth Amendment. The first time we heard this case, we concluded that Reed's claim was time-barred in light of our precedent, *Reed v. Goertz*, 995 F.3d 425, 430–31 (5th Cir. 2021), but the Supreme Court reversed, *Reed v. Goertz*, 598 U.S. 230, 235–37 (2023). Turning now to the merits, we conclude that Reed has not pleaded a plausible due process violation because he has not shown that Texas's scheme is unfair or unjust in such a way that it is fundamentally inadequate to vindicate the substantive right to postconviction DNA testing that it confers upon him. Accordingly, we AFFIRM the district court's dismissal of Reed's claim

I

A

Stacy Stites was murdered in 1996.[1] The same day that she was reported missing, her body was found on the side of the road in Bastrop County, Texas. She had been strangled with her own belt, part of which was found near her body. A truck that she shared with her fiancé, Jimmy Fennell, was later found in a parking lot, the other half of Stites's belt nearby. DNA testing matched intact sperm found in Stites's body to Rodney Reed. Reed was charged with Stites's murder. He defended himself on the theory that he and Stites had been carrying out an affair, that the two had engaged in consensual sex prior to Stites's murder, and that someone else—possibly Fennell—had killed her. The

[1] We do not attempt to recite all of the facts of Reed's case here. For a much more thorough treatment, *see Ex parte Reed*, 670 S.W.3d 689, 699–743 (Tex. Crim. App. 2023).

jury convicted Reed of capital murder and sentenced him to death.

Since his conviction, Reed has continued to press his innocence through myriad habeas petitions in state and federal court. *See Ex parte Reed*, 670 S.W.3d 689, 710–28 (Tex. Crim. App. 2023) (summarizing Reed's ten state habeas petitions); *Reed*, 995 F.3d at 427–29 (discussing our decision in *Reed v. Stephens*, 739 F.3d 753 (2014) (Reed's first federal habeas petition); *In re Reed*, No. 24-50529 (5th Cir. Nov. 5, 2024) (denying leave to file a second federal habeas petition). All of those petitions have been denied.

In 2014, Reed moved in Texas state court under Chapter 64 of the Texas Code of Criminal Procedure for postconviction DNA testing of a number of items found near Stites's body and Fennell's truck. Notably, Reed filed this motion on the same day that his execution date was to be set. *Reed v. State*, 541 S.W.3d 759, 764 (Tex. Crim. App. 2017). Reed's motion sought DNA testing in the form of the new "touch DNA" technique, which can provide genetic information from those who have merely handled an item. *Id.* at 764–66. The state opposed the motion, arguing that it did not satisfy several elements of Chapter 64. *Id.* at 764, 766–77, 769.

The trial court denied Reed's motion, finding Chapter 64's requirements unsatisfied for several reasons. Some pieces of evidence, it concluded, had been "contaminated, tampered with, or altered." *Id.* at 769–70. It determined that there was "not a reasonable likelihood that any of the items Reed sought tested … contain[ed] biological material suitable for DNA testing." *Id.* at 770. None of Reed's identified evidence, even when considered altogether, showed that "he

would not have been convicted in light of exculpatory results." *Id.* at 773. And that "Reed failed to meet his burden" of establishing that he had not brought his request for DNA testing to unreasonably delay his sentence. *Id.* at 777.

The Court of Criminal Appeals affirmed. *Id.* at 780. It disagreed with the trial court's determination that Reed's identified evidence did not contain biological material suitable for testing, but it agreed with the remainder of the lower court's reasons for denying the requested relief. *See id.* at 770, 780.

Reed filed this lawsuit, a 42 U.S.C. § 1983 action against Bastrop Country District Attorney Bryan Goertz, in August 2019. *Reed*, 995 F.3d at 428. Goertz moved to dismiss Reed's claims under Federal Rule of Civil Procedure 12(b)(6), the Western District of Texas obliged, and we affirmed, reasoning that Reed's claims were time-barred under our binding precedent. *Id.* at 431 (applying *Russell v. Bd. of Trs.*, 968 F.2d 489, 493 (5th Cir. 1992)). The Supreme Court, however, disagreed, holding that "when a prisoner pursues state post-conviction DNA testing through the state-provided litigation process, the statute of limitations for a § 1983 procedural due process claim begins to run when the state litigation ends." *Reed*, 598 U.S. at 237. Thus, "the statute of limitations began to run when the Texas Court of Criminal Appeals denied Reed's motion for rehearing," and "Reed's § 1983 claim was timely." *Id.*[2]

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[2] The Court also addressed three "threshold arguments," confirming that: (1) Reed has standing; (2) "the *Ex parte Young* doctrine allows suits like Reed's"; and (3) Reed's procedural due process claim does not offend the *Rooker–Feldman* doctrine. *Id.* at 234–35 (citing *Ex parte Young*, 209 U.S. 123 (1908); *Rooker v.*

Reed returned to our court and moved for leave to file supplemental briefing on the merits. We granted that motion, heard argument, and now consider the substance of his due process claim.[3]

B

In Texas, individuals who wish to gain access to postconviction DNA testing have two methods of recourse available to them. Chapter 64 of the Texas Code of Criminal Procedure governs the first and gives Texas courts the ability to order such testing. *See State v. Patrick*, 86 S.W.3d 592, 595 (Tex. Crim. App. 2002). "A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material."[4] Tex. Code Crim. Proc.

Fid. Tr. Co., 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Skinner v. Switzer*, 562 U.S. 521 (2011)).

[3] Reed's complaint identified five claims, alleging: (1) denial of due process; (2) impairment of his access to the courts; (3) cruel and unusual punishment; (4) denial of an opportunity to prove actual innocence; and (5) various violations of the Texas Constitution. Reed, however, has not continued to brief any claims other than his due process claim. And when asked at oral argument whether the remaining claims were still live, Reed's attorney conceded that they "rise and fall" with Reed's ability to show a due process violation. Thus, because we conclude that Reed has not stated a plausible due process-violation claim, we need not address the remaining claims.

[4] In 2011, the Texas legislature amended Chapter 64 to include a definition of "biological material." H.B. 1573, 82nd Leg. § 5 (2011); *see also Reed*, 541 S.W.3d at 779. The statute defines the term as "an item that is in possession of the state and that contains blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing." Tex. Code Crim. Proc. art. 64.01(a)(1).

art. 64.01(a-1). The state must have obtained the evidence "in relation to the offense that is the basis of the challenged conviction" and possessed it during trial. *Id.* art. 64.01(b). The evidence must not have been previously tested (or if it was, there exists a reasonable likelihood that a new testing technique will provide more accurate and probative results, or it was tested by a laboratory the Texas Forensic Science Commission found engaged in faulty testing practices that has since ceased conducting DNA testing). *Id.* And "identity" must have been or currently be "an issue in the case." *Id.* art. 64.03(a)(1)(C).

Three of chapter 64's requirements are particularly relevant here. First, the court must find 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). Second, the individual seeking testing must demonstrate that he "would not have been convicted if exculpatory results had been obtained through DNA testing." *Id.* art. 64.03(a)(2)(A). And third, that individual must show that he is not attempting to "unreasonably delay the execution of sentence or administration of justice." *Id.* art. 64.03(a)(2)(B).

If all of these elements are met, "the court shall order that the requested forensic DNA testing be conducted." *Id.* art. 64.03(c). And unless the evidence had previously been tested using "faulty testing practices," *see id.* art. 64.03(b-1), those conditions are necessary as well, *id.* art. 64.03(a).

Once the individual seeking DNA testing brings his Chapter 64 motion, the court must provide a copy of the motion to the state. *Id.* art. 64.02(a)(1). In

response, the state must either "deliver the evidence to the court" or "explain in writing … why [it] cannot" within 60 days. *Id.* art. 64.02(a)(2). And after that period has run, the court may rule on the motion even if the state has failed to respond. *Id.* art. 64.02(b). Appeals of those rulings generally follow Texas's typical appellate course, but appeals by individuals sentenced to death go straight to the Texas Court of Criminal Appeals (CCA). *Id.* art. 64.05.

The second avenue by which an individual might gain access to postconviction DNA testing is through an agreement with the state. That is, a prosecutor may simply agree to perform the requested testing without court intervention. *See, e.g., Skinner v. State*, 484 SW.3d 434, 436 (Tex. Crim. App. 2016). Such an agreement may be reached at any time, and without the burden of Chapter 64's strictures. *See, e.g., Reed*, 541 S.W3d at 765 ("The State and Reed agreed to have [various pieces of evidence] tested outside of Chapter 64's parameters, and the judge entered an agreed order to that effect …."). As Goertz has put it, Chapter 64 "does not cabin a prosecutor's discretion" or otherwise "impose any requirements on a prosecutor" because her ability to issue testing is found in "a plenary common law privilege that the Court of Criminal Appeals has recognized." Prosecutors may, however, rely on Chapter 64 and a movant's inability to satisfy its requirements as a reason for declining or opposing testing.[5]

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[5] Indeed, the Supreme Court reasoned that Reed has standing to bring this case because of his allegation that Goertz "denied access to the [requested] evidence," "thereby caused [his] injury," and would not be justified in denying DNA testing if a

II

A

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. 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 accept all facts as pleaded and construe them in "the light most favorable to the plaintiff." *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017).

B

Reed complains that Chapter 64 is unconstitutional both facially and as applied to him. "Normally, a plaintiff bringing a facial challenge must 'establish that no set of circumstances exists under which the [law] would be valid,' *United States v. Salerno*, 481 U.S. 739, 745 (1987) or show that the law lacks 'a plainly legitimate sweep,' *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) (alteration in original). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745; *see also id.* (noting that facial-challenge plaintiffs "shoulder [a] heavy burden").

In adjudicating Reed's as-applied challenge, we consider "the particularities of [his] circumstances," *United States v. Giglio*, 126 F.4th 1039, 1045 (5th Cir.

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federal court held Chapter 64 unconstitutional. *Reed*, 598 U.S. at 234.

2025) to determine whether Chapter 64 can be constitutionally applied to him, *see Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (noting that the distinction between facial and as-applied challenges "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint."). That is, we look not just at the contours of the rule at issue and the liberty it supposedly offends, but also to the facts relevant to either or both.

C

To plead a violation of his due process rights, Reed must show that Goertz deprived him of a constitutional right while acting under color of state law. *Kovacic v. Villarreal*, 628 F.3d 209, 213 (5th Cir. 2010). "No State shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. But process itself is not a protectable end. *Dist. Atty's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67 (2009). Rather, for the Due Process Clause to attach and its protections to obtain, a plaintiff must identify a protected "liberty interest." *Id.*

The Constitution does not recognize a "freestanding right to DNA evidence." *Id.* at 72; *see also Skinner*, 562 U.S. at 525 ("Osborne rejected the extension of substantive due process to this area ….."). But the states, as policymakers, may nevertheless elect to confer such a right in its citizens. *Osborne*, 557 U.S. at 56, 67–68; *see also Wolff v. McDonnell*, 418 U.S. 539, 556–58 (1974) ("We think a person's liberty is equally protected [by the Due Process Clause], even when the liberty itself is a statutory creation of the State."). These "state-created right[s] can, in some circumstances, beget yet other rights to procedures essential

to the realization of the parent right." *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). Thus, if we determine that the Due Process Clause applies, we must then consider what process is due. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff*, 418 U.S. at 558. In this context, this means that the Due Process Clause guarantees that state-created rights, once created, are "not arbitrarily abrogated." *Id.* at 557. But at the same time, states have "flexibility in deciding what procedures are needed" when they choose to extend "help to those seeking relief from convictions." *Osborne*, 557 U.S. at 69. In other words, "due process does not 'dictate the exact form such assistance must assume.'" *Id.* (alteration adopted) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987)). "The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice." *Id.* at 62. But the Supreme Court has clearly instructed that the task of solving this dilemma "belongs primarily to the legislature." *Id.*

These principles in mind, we must decide "whether consideration of [Reed]'s claim within the framework of the State's procedures for postconviction relief 'offends 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 fairness in operation.'" *Id.* at 69 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)); *see also Jauch v. Choctaw Cnty.*, 874 F.3d 425, 431 (5th Cir. 2017) (explaining that *Medina*, not *Mathews v. Eldridge*, 424 U.S. 319 (1976), supplies the correct

framework for assessing the constitutionality of state criminal procedure rules (citing *Kaley v. United States*, 571 U.S. 320, 334 (2014))). Put differently, we "may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Osborne*, 557 U.S. at 69.

These strictures "le[ave] slim room for the prisoner to show that the governing state law denies him procedural due process." *Skinner*, 562 U.S. at 525.

III

Turning now to the merits of Reed's arguments, we conclude that the district court correctly granted Goertz's motion to dismiss because Reed has not shown that the process Chapter 64 offers is "fundamentally inadequate to vindicate the substantive rights" it provides. *See Osborne*, 557 U.S. at 69.

Reed seeks a declaratory judgment that Chapter 64 of the Texas Code of Criminal Procedure violates the Due Process Clause of the Fourteenth Amendment.[6] He levies three due process attacks against Chapter 64. First, he argues that the Texas Court of Criminal Appeals has "unfair[ly]" grafted a "non-contamination" requirement onto Chapter 64's "chain-of-custody" requirement that "bars prisoners from accessing DNA testing … based on the state's own insufficient procedures." Second, he decries Chapter 64's exoneration requirement "because it excludes

[6] Goertz does not dispute that he acts pursuant to state law, *Kovacic*, 628 F.3d at 213, or that Chapter 64 of the Texas Code of Criminal Procedure extends a right to postconviction DNA testing to which the Due Process Clause attaches, *Emerson v. Thaler*, 544 F. App'x 325, 327–28 (5th Cir. 2013).

consideration of" evidence that might "inculpat[e] a third party." And third, Reed maintains that Chapter 64's no-unreasonable-delay requirement "arbitrarily punishes prisoners for litigating their innocence and requires them to have predicted that a new technology, touch-DNA testing, was available before [Chapter] 64 or the CCA said it was."

Addressing each in turn, we conclude that none of these requirements are fundamentally inadequate to Reed's right to postconviction DNA testing either on their face or as applied to him. And because he would have to show that all three meet that definition to obtain his requested relief,[7] *a fortiori*, we conclude that the district court correctly granted Goertz's motion to dismiss.

A

Reed's first argument concerns what he calls an "extratextual non-contamination requirement."[8] This

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[7] As discussed above, article 64.03 provides that the state court adjudicating a motion for postconviction DNA testing may order that testing "only if" all of its requirements are met. Tex. Code Crim. Proc. 64.03(a). Thus, so long as Reed fails to satisfy at least one requirement that passes constitutional muster, that court would remain statutorily required to deny testing.

[8] Reed does not cite a single case (from the Court of Criminal Appeals or otherwise) for the proposition that the Texas courts have appended some additional, "extratextual" stricture to Chapter 64's chain-of-custody requirement. The high criminal court did use the word "contaminated" in adjudicating this aspect of Reed's postconviction-testing motion. *See Reed*, 541 SW.3d at 769–70. But it does not appear that, by using that term, the court held Reed to some standard other than what is plainly required by Article 64.03(a)(1)(A)(ii). Nor does it appear that, in any event, this matters. *See Skinner*, 562 U.S. at 532 (blessing a challenge to the CCA's "authoritative[] constru[ction]" of Chapter 64);

aspect of Chapter 64, he says, "is fundamentally unfair and violates due process because it (a) breaks promises Texas postconviction law makes to prisoners seeking to prove their innocence; (b) ignores reliability concerns produced by the prosecution; and (c) arbitrarily applies a different standard to inmates and prosecutors." But these arguments, operating at a very high level of generality, do not convincingly fit this requirement into the "slim" space provided for actions challenging state postconviction DNA testing schemes.[9] *See Skinner*, 562 U.S. at 525.

Reed first argues that the "non-contamination" requirement reneges on Texas's promise of providing post-conviction DNA testing because it makes that option hinge on "the state's own handling and storage of evidence." It is "fundamentally unfair," he asserts, to foreclose testing due to deficiencies on the part of the state, especially "because DNA testing can yield highly probative information even where crime-scene evidence was supposedly contaminated …."

Putting aside the fact that Reed cites no caselaw for this proposition, it seems both inevitable and necessary that the state be tasked with storing evidence and that contaminated evidence, regardless of fault, be treated with increased scrutiny. It is not lost on us that this system might sometimes disadvantage individuals like Reed through no fault of their own. But

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Wood v. Patton, 130 F.4th 516, 519 & n.5 (5th Cir. Mar. 7, 2025) (same).

[9] Goertz also argues that Reed forfeited this argument below. But Reed argued before the district court that Chapter 64 "places an impossible burden on applicants with respect to evidence *over which they have no control*." This is the exact argument that he makes on appeal.

the process this system offers is not arbitrary. Someone must maintain custody of potentially exculpatory evidence, and it is hard to imagine this someone being anyone other than the government. Pair all that with the reality that at least some mishandling of evidence is inevitable, and you end up with a government-run system that, at least sometimes, yields evidence that has been "contaminated, tampered with, or altered" in some way. *See Reed*, 541 S.W.3d at 769. And because we afford government actors a presumption of good faith in the exercise of their official duties, *Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009), we do not think that entrusting this responsibility to the government is fundamentally unfair on its face.

All of this does not mean that individuals who draw such a short straw will be without recourse. It might very well be the case that an individual who shows that the state mishandled his evidence, by rebutting the presumption of good faith, would have a viable due process claim. But absent some showing of bad faith or bad conduct, we cannot see how committing the custody of potentially exculpatory evidence to the state is fundamentally inadequate to vindicate the right to the possibility of postconviction testing that it offers—especially given the Supreme Court's emphasis that the power to define these contours is vested in the state legislature. *See Osborne*, 557 U.S. at 62. And because Reed does not make such a showing, he has not shown that the so-called "non-contamination" requirement renders Chapter 64 fundamentally inadequate as applied to him.

The remainder of Reed's "non-contamination" arguments fare no better. First, he complains that Chapter 64 places the chain-of-custody burden on

him, "hold[ing] supposed contamination against the prisoner even though the state is responsible for the condition of the evidence …." But Reed's claim "must be analyzed in light of the fact that he has already been found guilty at a fair trial." *Id.* at 69. "Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears," *Herrera v. Collins*, 506 U.S. 390, 399 (1993), and the state is then justified in placing certain burdens on the convicted individual, *Osborne*, 557 U.S. at 68–69. Under this framework, the Supreme Court approved of Alaska's postconviction-DNA-testing scheme, which places a clear-and-convincing burden on the person seeking testing. *Id.* at 68. Failing to even attempt to distinguish the Alaska statute, Reed does not demonstrate why a different result should obtain here.

Next, Reed argues that "law enforcement procedures" might themselves "cause grave reliability concerns at the defendant's expense." He attempts to draw an analogy to due process prohibitions on the prosecution's use of false evidence or testimony, *see Napue v. People of State of Ill.*, 360 U.S. 264, 269 (1959) and "unnecessarily suggestive identification procedure[s]," *see Perry v. New Hampshire*, 565 U.S. 228, 241 (2012). But these comparisons fail because the analogy is simply too general to be convincing. Not only so, but they also ignore the fact just discussed that postconviction relief procedures are not held to as strict a standard as trial procedures when challenged for supposed violations of due process. *Osborne*, 557 U.S. at 69.

Reed cites to us the Supreme Court's reminder in *Perry* that a "primary aim" of our due process rules "is

to deter law enforcement use of improper [procedures] in the first place." *Perry*, 565 U.S. at 241. But the very next line in *Perry* belies Reed's argument: "This deterrence rationale is inapposite in cases … where there is no improper police conduct." *Id.* Reed might disagree with the state's handling of evidence, and we might know better now than we did then about how to do it. But none of this means that Chapter 64, as written or construed, is "fundamentally inadequate" to vindicate an individual's right to postconviction DNA testing. *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (recognizing that the Due Process Clause is not violated when "there [is] no suggestion of bad faith" and law enforcement conduct "can at worst be described as negligent").

Last, Reed complains that the "non-contamination requirement unfairly imposes a more stringent chain-of-custody burden on inmates … than on prosecutors … at trial." But for the same reasons discussed above, it is unclear how this violates procedural due process when there is no requirement that postconviction relief procedures be held to the same standards as procedures at trial. *Osborne*, 557 U.S. at 69. It is true, as Reed points out, that we have interpreted the chain of custody requirement contained within the federal DNA-testing statute, *see* 18 U.S.C. § 3600(a)(4), to *not* impose a more exacting standard than that imposed at trial. *United States v. Fasano*, 577 F.3d 572, 576 (5th Cir. 2009). But *Fasano* is a case turning on statutory interpretation, not on the strictures of procedural due process. That this court has interpreted the *federal* DNA-testing statute one way does not mean that a state court interpreting a *state* DNA-testing statute a different way results in a state procedure that violates due process.

Thus, Reed does not demonstrate that article 64.03(a)(1)(A)(ii) is fundamentally inadequate to vindicate his right to postconviction DNA testing. It is not enough to disagree with how the state has elected to use its permissible discretion or to complain that it has misapplied its own standards. Instead, Reed would have to show that those standards are fundamentally unfair or unjust in some way, but he has simply failed to do so.

B

Reed next challenges Chapter 64's exculpatory-results requirement. He argues that "the CCA's construction of the exoneration inquiry prevents an inmate from obtaining DNA testing that, together with posttrial developments, can show his innocence by inculpating a third party."

Reed's first issue concerns the CCA's interpretation of article 64.03(a)(2)(A). The statute requires the individual seeking testing to show that he "would not have been convicted if exculpatory results had been obtained through DNA testing." Tex. Code Crim. Proc. art. 64.03(a)(2)(A). And the CCA has interpreted "exculpatory results" to mean "only results excluding the convicted person as the donor of" the biological material at issue. *Reed*, 541 S.W.3d at 774 (quoting *Holberg v. State*, 425 S.W.3d 282, 287 (Tex. Crim. App. 2014)). To Reed, this interpretation is fundamentally unfair because it precludes testing of material that might exculpate the convicted individual by "fail[ing] to exclude another suspect."

We disagree. This exoneration requirement exists to ensure that the "DNA tests will prove a convicted person's innocence" and not "merely muddy the waters." *Kutzner v. State*, 75 S.W3d 427, 438, n27 (Tex.

Crim. App. 2002). Because evidence that "fails to exclude another suspect" does not necessarily fall into the former category, we cannot say that this requirement is fundamentally unfair. To start, *Osborne* approved of materiality requirements, recognizing both that they are "common" features of DNA-testing schemes and that "they are not inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.'" *Osborne*, 557 U.S. at 63, 70 (quoting *Medina*, 505 U.S. at 446, 448). But Reed's proposed rule runs headlong into this blessing. He argues, essentially, that due process requires the state to test evidence on the mere allegation that someone else's DNA might also be identified. But as Goertz puts it, "if the CCA were required to presume another suspect's DNA was on every piece of evidence," it would be "hard to imagine a case in which [it] would not grant DNA testing." *State v. Swearingen*, 424 S.W.3d 32, 39 (Tex. Crim. App. 2014). Reed's argument that it is unconstitutional to require the evidence to exculpate the movant therefore contravenes *Osborne*. Said differently, if Reed is correct, there would be no room for the materiality requirements the Supreme Court has already said are permissible. Accordingly, we cannot agree with him that due process requires the state to test evidence that would not demonstrate a reasonable probability of innocence.

Not only so, the facts of Reed's own case belie both his facial and as-applied challenge. The whole premise of Reed's claim is that favorable results "would fail to exclude" Fennell, his proffered suspect. But even if Fennell's DNA was found on the items for which Reed sought testing, that finding would show nothing more than the fact that Fennell drove his own truck or had

touched his fiancé's belt. *See Reed*, 541 S.W.3d at 773–77. It can hardly be said that these results would be exculpatory. Thus, it does not seem arbitrary or fundamentally unfair to deny Reed testing under Chapter 64's exculpatory-results requirement, so we conclude that this requirement neither violates the Due Process Clause facially or as applied to Reed.

As somewhat of an afterthought, Reed also criticizes the CCA's requirement that the exoneration inquiry exclude consideration of posttrial factual developments. He cites *Holmes v. South Carolina*, 547 U.S. 319, 327 (2006) for the proposition that evidence "that someone else committed the crime" is generally admissible. And he points to *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973) to demonstrate that he has a "fundamental right" to present that sort of evidence. But again, these arguments discount the fact that the Due Process Clause requires much less of postconviction procedures than of preconviction ones. *Osborne*, 557 U.S. at 69. Not only so, but a holding that due process forces states to augment the trial record would be inconsistent with well-established precedent in other contexts. For example, direct appeals are generally limited to the record developed at trial. *See, e.g., Trevino v. Thaler*, 569 U.S. 413, 422 (2013). And the same is true for federal habeas review. *See, e.g., Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). If due process permits of such a limitation in the federal courts, "the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system." *See Smith v. Phillips*, 455 U.S. 209, 218 (1982).

Accordingly, we conclude that the CCA's interpretation of article 64.03(a)(2)(A) is not fundamentally

inadequate to vindicate postconviction-DNA-testing rights whether on its face or as applied to Reed.

C

Finally, Reed urges that the CCA's interpretation of Chapter 64's diligence requirement violates due process because it (1) "arbitrarily punishes prisoners for developing evidence of innocence and (2) "prevent[s] any prisoner seeking touch-DNA testing after the 2011 amendments from obtaining testing."[10] But we cannot tell that either is true. *See Reed*, 541 S.W.3d at 778 (stating "Article 64.03(a)(2)(B) does not contain set criteria a court must consider" in making this determination; such determinations are an "inherently fact-specific and subjective inquiry" for which there is no "definitive criteria."). Similarly, in *Osborne*, the state law at issue required a showing that the requested DNA evidence was newly available, *diligently pursued*, and sufficiently material. *Osborne*, 557 U.S. at 70.

To evidence his first argument, Reed cites nothing other than the CCA's opinion in his own case. But even then, it is less than clear that the court "punish[ed] [him] for exercising his legal rights." To the contrary, it considered (1) Reed's ""piecemeal

[10] Goertz also argues that Reed forfeited this argument. Reed only briefed his due process claim before us, even conceding at oral argument that his remaining claims "rise and fall" with his ability to show a due process claim. Because Reed argues only the due process claim on appeal, he has forfeited all other claims. *See United States v. Joseph*, 102 F.4th 686, 691 (5th Cir. 2024) (quoting *Rollins v. Home Depot USA*, 8 F.4th 393, 398 (5th Cir. 2021)) ("A party forfeits an argument … by failing to adequately brief the argument on appeal."); *see also* FED R. APP. P. 28(a)(8)(A), (B).

approach' in his post-conviction litigation," (2) Reed's failure to seek a testing agreement until we denied him a certificate of appealability, (3) that "he took four months" to facilitate the execution of that agreement, and (4) that Reed filed his motion "on the same day the judge heard the State's motion to set an execution date filed three months earlier." *Reed*, 541 S.W.3d at 777–79; *see also id.* at 777–78 (enumerating the trial court's seven reasons for denying testing). To put it simply, the CCA's application of the law hardly seems arbitrary, and it certainly gives no indication that it has or would "punish" any other postconviction-DNA-testing applicant. Because Reed has not shown a fundamentally unfair application of the law in his case (much less facially), we disagree with his contention that the no-undue-delay provision offends due process. *See Wood*, 130 F.4th at 523 (rejecting similar challenge when challenger could not show that a certain factor was "dispositive (or even key) … in finding unreasonable delay").

Reed's second critique is no more persuasive. He argues that the CCA "construed the unreasonable-delay requirement to hold against prisoners any pre-2011 delay in seeking touch-DNA testing even though it wasn't clear that Article 64 allowed touch-DNA testing until the law was amended in 2011."[11] This construction, he urges, "punishes prisoners for not being fortunetellers." But the problem with Reed's

[11] As Reed helpfully explains, the 2011 amendment added "skin tissue or cells," "fingernail scrapings," and "other identifiable biological evidence that may be suitable for forensic DNA testing" to the definition of "biological material," "thus capturing types of biological material suitable for touch-DNA testing." *See supra* at note 4.

argument is that he brings no evidence of such construction. *See Wood*, 130 F.4th at 523 ("*Reed* did not create a new rule; it restated the existing rule …."). The CCA did note that Reed could have known of the possibility of his claim: "Chapter 64 had existed with only slight variations for over thirteen years at the time Reed filed his motion, 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*, 541 S.W.3d. at 779 (footnote omitted). Citing *Swearingen v. State*, 303 S.W.3d 728, 732–33 (Tex. Crim. App. 2017), the trial court reasoned that Reed could have known that "biological material" included touch DNA "at a much earlier time." *Id.*[12] But as we discussed above, this point was not dispositive as the CCA spent several pages discussing other reasons for its undue-delay finding. And does Reed identify any other example of a motion being denied on this basis. Thus, for much the same reasons, Reed has not shown a due process violation here either.

IV

The question we face today is whether Chapter 64 of Texas's Code of Criminal Procedure "'offends 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 fairness in operation'" such that it is "fundamentally inadequate to vindicate" the right to postconviction DNA testing that it provides. *See Osborne*, 557 U.S. at 69 (quoting *Medina*, 505 U.S. at 446, 448). As we have

[12] The trial court noted on the record that Reed's attorney at the time was also counsel for the movant in the *Swearingen* case.

drawn out, we conclude that it does not. Reed, therefore, has not stated a claim upon which relief could be granted, and the district court correctly granted Goertz's motion to dismiss for that reason. We AFFIRM.

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	§	*** CAPITAL CASE ***
DISTRICT	§	
ATTORNEY,	§	
DEFENDANT	§	

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,

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

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 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

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[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
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> (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

United States Court of Appeals for the Fifth Circuit

No. 19-70022

United States Court of Appeals
Fifth Circuit
FILED
June 3, 2025
Lyle W. Cayce
Clerk

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 Sherriff*

Defendants—Appellees.

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

ON PETITION FOR REHEARING
AND REHEARING EN BANC

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

PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

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*Judge Andrew S. Oldham, did not participate in the consideration of the rehearing en banc.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RODNEY REED, Plaintiff, v. BRYAN GOERTZ, Bastrop County District Attorney, in his official capacity only, Defendant.	§ § § § § § § § § § § §	**CIVIL CASE NO. 1:19-cv-794** **CAPITAL CASE**

AMENDED COMPLAINT PURSUANT TO 42 U.S.C. § 1983

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INTRODUCTION

> *"DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty."*

Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 55, 129 S. Ct. 2308, 2312, 174 L. Ed. 2d 38 (2009) (Roberts, C.J.*)*

1. The State of Texas used DNA evidence to convict Mr. Reed, but since that conviction has been called into question in post-conviction proceedings, the State has consistently opposed DNA, testing which is capable of proving Mr. Reed's innocence and identifying another man as the murderer. Mr. Reed properly filed a motion for DNA testing under the existing Texas law approximately five years ago, but his request was denied after lengthy proceedings—including two appeals to the Texas Court of Criminal Appeals (the "CCA") and one to the United States Supreme Court. This constitutional challenge to the Texas post-conviction DNA testing statute, Article 64 of the Texas Code of Criminal Procedure ("Article 64"), is brought after the Supreme Court's denial of certiorari and subsequent unsuccessful efforts to remedy

the deficiencies in the statute in the 86th Texas Legislature.

2. This action under 42 U.S.C. § 1983 ("Section 1983") challenges the constitutionality of Article 64 both on its face and as interpreted, construed and applied by the CCA. Specifically, this action raises the constitutional violations that flow from the extra-statutory conditions that the CCA imposed on Article 64, conditions which effectively preclude most post-conviction DNA testing absent State consent and eviscerate the relief that Article 64 was designed to provide. Given the unique ability of DNA evidence to identify the perpetrator of a crime, the CCA's adoption of non-statutory criteria to preclude Mr. Reed from testing key trial evidence to prove his innocence violates fundamental notions of fairness and denies him due process of law and access to the courts.

3. Accordingly, Mr. Reed seeks a declaration that Article 64, as interpreted, construed and applied by the Texas courts to deny his motion for DNA testing, violates his rights under the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and under Article 1 of the Texas Constitution. Relief under Section 1983 is warranted when a state's post-conviction DNA testing scheme is applied in a manner that violates constitutional principles of fundamental fairness or due process. *See Osborne*, 557 U.S. at 69. The declaratory relief sought in this action is necessary to preserve Mr. Reed's liberty interest, recognized by the Supreme Court in *Osborne*, and to access the Texas statutory procedure to conduct forensic DNA testing and to use that DNA evidence to prove his innocence. *Id.* at 68.

JURISDICTION

4. This Court has jurisdiction over Mr. Reed's federal constitutional claims under 28 U.S.C. §§ 1331, 1343, 1651, 2201, 2202 and Section 1983, and supplemental jurisdiction over his state law claims under 28 U.S.C. § 1367.

5. Defendant Goertz has opposed, and continues to oppose, Mr. Reed's requests—both formal and informal—to conduct DNA testing on the items of evidence at issue in this case. In addition, Defendant Goertz has directed or otherwise caused each of the non-party custodians of the evidence identified below to refuse to allow Mr. Reed to conduct DNA testing on the evidence in their custody. Accordingly, there is a present, actual and continuing case and controversy between the parties.

VENUE

6. Venue lies in this Court under 28 U.S.C. § 1391 because the events or omissions that gave rise to this action took place in the Western District of Texas, and Defendant maintains and office in this district. *See* 28 U.S.C. § 1391(b) (2016).

PARTIES

7. Plaintiff Rodney Reed is a resident of Bastrop County, Texas and is incarcerated at the Polunsky Unit of the Texas Department of Criminal Justice in Livingston, Texas. Mr. Reed is sentenced to death by the 21st Judicial District Court of Texas (the "District Court").

8. Defendant Goertz is the Bastrop County District Attorney.[1] A district attorney who opposes DNA

[1] Defendant is sued only in his official capacity.

testing is a proper defendant in a Section 1983 action seeking DNA testing. *See, e.g., Osborne*, *supra* (suit against district attorney's office); *Skinner v. Switzer*, 562 U.S. 521 (2011) (suit against District Attorney); *Elam v. Lykos*, 470 F. App'x 275 (5th Cir. 2012) (same). Just like in *Osborne* and *Skinner*, Defendant Goertz has the power to control access to the evidence that Mr. Reed seeks to test. Defendant Goertz is sued in his official capacity for declaratory relief and is a proper Defendant in an action under Section 1983.

NON-PARTY CUSTODIANS OF EVIDENCE

9. Non-party Sarah Loucks is the Bastrop County District Clerk. She maintains an office in Bastrop, Texas. Loucks has custody of certain evidence specified in Exhibit A and is identified for informational purposes only.

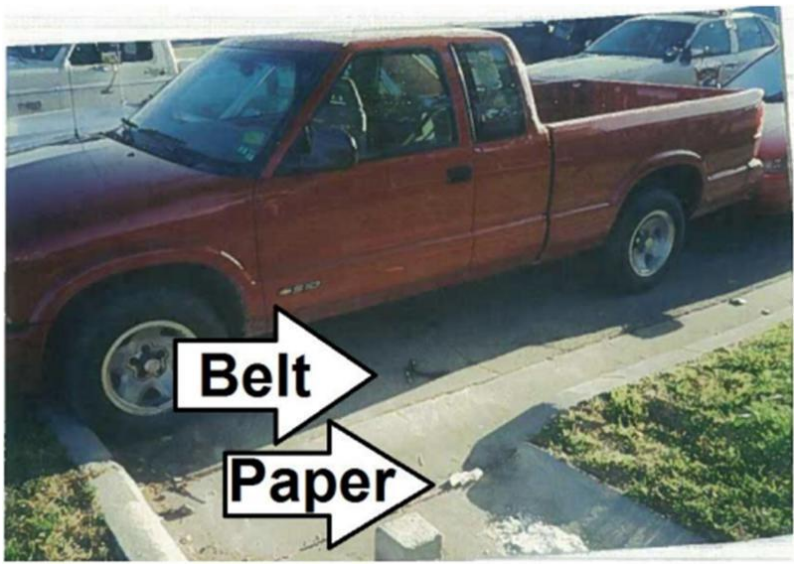
10. Non-party Maurice Cook is the Bastrop County Sheriff. He maintains an office in Bastrop, Texas. Cook is the ultimate supervisor of the Bastrop County Sheriff's Office, which has custody of certain evidence specified in Exhibit A, and is identified for informational purposes only.

11. Non-party Steve McCraw is the Director of the Texas Department of Public Safety. He maintains an office in Austin, Texas. McCraw is the ultimate supervisor of the Department of Public Safety Crime Lab, which has custody of certain evidence specified in Exhibit A, and is identified for informational purposes only.

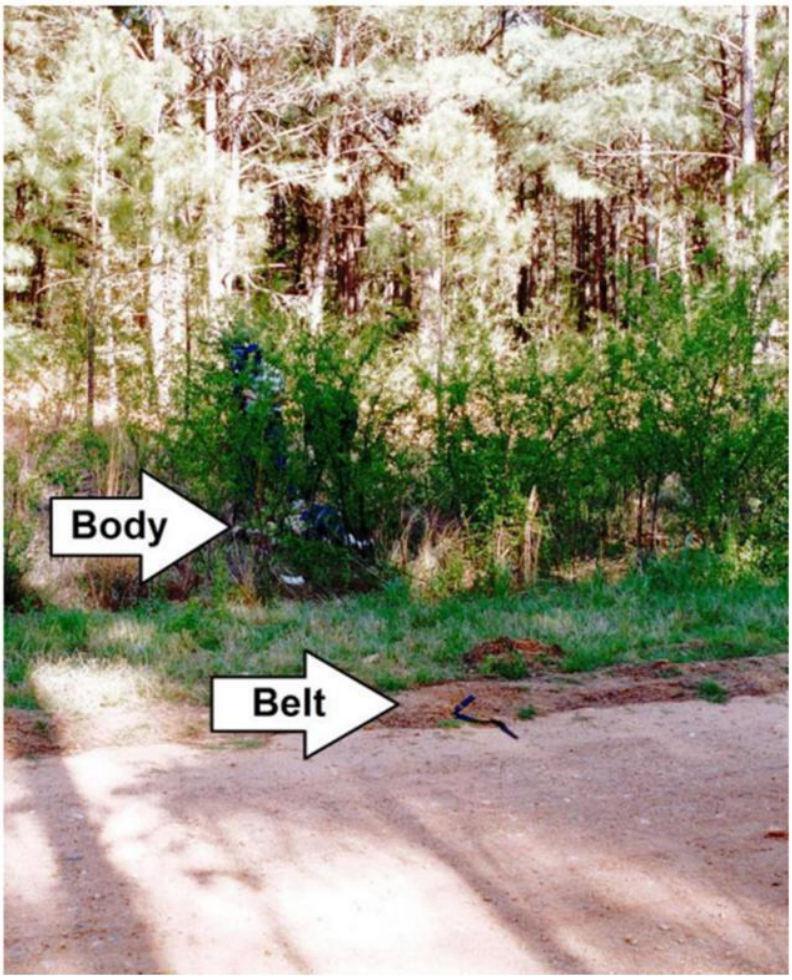
FACTUAL BACKGROUND

A. The Murder of Stacey Stites, Investigation, and Collection of Evidence

12. Stacey Stites was reported missing after she failed to arrive for her early morning shift at the Bastrop H.E.B. on the morning of April 23, 1996. She was alleged to have been traveling in her fiancé Jimmy Fennell's red pickup truck, which was found that morning in the Bastrop High School parking lot. Immediately outside of the locked driver side door were some papers and a broken portion of Ms. Stites's leather woven belt, as pictured below:



13. Later in the day, a passerby discovered Ms. Stites's body in the brush along an unpaved road in rural Bastrop County, Texas. As pictured below, the murderer left the other half of Ms. Stites's belt at the side of the road in a position that pointed directly toward her body:



14. An autopsy confirmed that the murderer used the leather woven belt to strangle Ms. Stites. Accordingly, the killer forcefully gripped the belt with both hands for a substantial period of time.

15. Neither portion of the belt has ever been tested for DNA, even though the evidence remains in

the custody of the Bastrop County District Clerk under lock and key.

16. The Bastrop County District Clerk's office representative testified that the belt sections and other relevant evidence in that office's custody, listed on Exhibit A, have always been securely maintained, and have never been tampered with or replaced. Both portions of the belt, along with other evidence identified in Exhibit A, are in a condition in which today's sophisticated DNA tests can extract valuable identifying biological information.

17. Multiple additional items of evidence collected during the investigation of Ms. Stites's murder have also been kept secure by the various custodians and have never been subjected to DNA testing despite the possibility that they may contain DNA from the murderer. These untested items are detailed in Exhibit A. Like the belt sections, these other items of evidence, including hairs collected from Ms. Stites's body, remain secure under lock and key, have never been tampered with or replaced, likely contain biological material that can yield probative results if subjected to DNA testing, and are in a condition suitable for DNA testing.

18. In 1996, Fennell was a police officer in Giddings, Texas. For months after the body was found, Fennell was a suspect in his fiancé's murder. When initially interviewed by police during the investigation, Fennell claimed that he and Ms. Stites spent the evening of April 22, 1996 at home together. After Fennell was found deceptive on a second polygraph test, he refused to cooperate further with the investigation and asserted his Fifth Amendment Rights against self-incrimination. However, the investigation of

Fennell was superficial. Inexplicably, investigators *never* searched the apartment that Fennell shared with Ms. Stites for signs of foul play or other probative evidence.

19. Fennell's behavior before and after Ms. Stites's murder was unusual. Although it did not contain much money, Fennell closed his bank account the morning of April 23, 1996, while Ms. Stites was still missing. Fennell told police and later testified that he had not had sex with Ms. Stites for several days because she was on the "green pill" on her both control medication that he had been told that there was a higher risk of pregnancy during that time. Merrill Lewen, M.D., a Houston-area Board Certified OB/GYN, has reviewed this statement and concluded that it is false. Fennell gave another false statement on the morning of Ms. Stites's disappearance, when he told police he had filled his truck with gas the night before. He changed his story a few days later when police discovered the truck's gas tank was less than ¼ full. Fennell also testified to agreeing with Ms. Stites that she would drive his truck to work the next morning. However, Carol Stites, Ms. Stites's mother, remembered Fennell insisting on the evening of April 22 that he drive Ms. Stites to work the next morning. Fennell disposed of the truck shortly after Ms. Stites's body was recovered.

20. In 2016, it came to light that Fennell made other inconsistent statements, which suggest his culpability in the murder. In an interview with CNN, Curtis Davis, Fennell's best friend at the time, recounted a private conversation he had with Fennell on the morning Ms. Stites was reported missing, but before her body was found. Contrary to what Fennell

told police and later testified to at Mr. Reed's trial, Fennell told Davis that, on the night of April 22, 1996, he came home late that night because he had been out drinking beer with other officers after his youth baseball team's evening practice. Davis was not interviewed about Fennell during the investigation, and Fennell's statements to Davis (a career Bastrop Sheriff's Officer) were not disclosed until the 2016 interview, after which Davis was officially reprimanded by the Bastrop County Sheriff for speaking publicly about the case.

21. Fennell's inconsistent statements regarding his whereabouts and activities on the night of April 22, 1996 are particularly significant because the condition of Ms. Stites's body indicates that she was murdered several hours before her body was transported in Fennell's truck and left in the remote location where she was found. Prominent forensic pathologists have reached the unrebutted conclusion that Fennell's testimony that Ms. Stites was abducted and murdered while on her way to work at around 3:30 a.m. is medically and scientifically impossible.

22. Mr. Reed later became a suspect when investigating officers identified him as the source of a small amount of semen collected from Ms. Stites's vaginal cavity and underwear. After Mr. Reed was indicted for the murder, Fennell waived his Fifth Amendment privilege, as previously asserted, and testified for the State at Mr. Reed's trial as to his activities that evening. Fennell's trial testimony generally conformed with his prior statements to the police and again contradicted what he told his best friend, Bastrop Sheriff's Officer Curtis Davis, on the morning of April 23, 1996, before Ms. Stites's body was found. Fennell's

trial testimony omitted entirely his conversation with Davis.

23. Fennell was a principal suspect in the killing of Ms. Stites for more than a year after her death—long after it was determined that he was not the source of the semen collected from Ms. Stites. Investigators eventually claimed to have dismissed Fennell as a suspect when they could not account for his presence at the couple's apartment on the morning of April 23, 1996 without his truck; but they did not thoroughly investigate whether Fennell may have had an accomplice.

24. Around the time of the murder, Fennell was the subject of several complaints alleging racial bias and use of excessive force at the Giddings Police Department, where he worked. After Ms. Stites's death, Fennell was described by a subsequent girlfriend as emotionally abusive, controlling, and virulently racist. She described him stalking her home and harassing her friends after she ended their relationship. Fennell later abused his position as a police officer while working for the Georgetown, Texas Police Department. Fennell was recently released from prison, after serving a ten-year prison sentence after being convicted of the abduction and rape of a young woman who he was called out to protect while on duty. When confronted with this allegation, Fennell falsely denied responsibility. A subsequent Texas DPS investigation of Fennell revealed that the assault for which he was convicted was part of a pattern of sexual violence by Fennell against women.

25. Before Ms. Stites was killed, Fennell was overheard on multiple occasions saying that if Ms. Stites were to cheat on him, he would kill her. At least

once, he specifically stated that he would strangle her with a belt.

26. Notwithstanding investigators' initial suspicions of Fennell, his inconsistent statements to investigators, his deceptive answers in two polygraph examinations to questions about harming Stites, and his subsequent invocation of his Fifth Amendment right not to testify, the prosecution embraced Fennell's version of the murder timeline and presented it as their own at trial. Fennell testified at Mr. Reed's trial in 1998 that on the evening of April 22, 1996, he returned home from baseball practice around 7:30 to 8 p.m., and he and Ms. Stites spent a quiet evening at home. He testified that the two showered together, that she went to sleep around 9 p.m., and that he stayed up watching TV. Fennell testified that Ms. Stites had likely taken his truck and left for her early-morning shift at the Bastrop H.E.B. grocery store at her usual time of 2:30 to 3 a.m., although he was asleep when she left. Fennell, who gave an entirely different account of his activities and whereabouts around the time of the murder to his best friend and Bastrop County Sheriff's Officer, Curtis Davis, was the last person to see Ms. Stites alive. At a 2017 habeas hearing regarding Fennell's statements to Officer Davis, Fennell refused to testify and improperly invoked the Fifth Amendment rights that he had previously waived.

B. The Trial of Rodney Reed

27. The State's theory of the crime was entirely speculative. At Mr. Reed's 1998 trial, relying largely on Fennell's testimony to establish a timeline, the State contended that Ms. Stites left their apartment alone in Fennell's truck between 2:30 and 3:30 a.m. on

the morning of April 23, 1996. The State further claimed that Mr. Reed must have stopped Ms. Stites as she drove past his neighborhood in central Bastrop and then abducted, raped and murdered her—leaving her body off an unpaved road out of town and then abandoning the truck in the Bastrop High School parking lot. The State did not present a single eyewitness to ***any*** of these events.

28. Mr. Reed argued in his defense that his semen was found because he and Ms. Stites were having an affair, which they kept secret because Ms. Stites was engaged. At a bond hearing after Mr. Reed's arrest and later at trial, witnesses testified to seeing Ms. Stites and Mr. Reed together at various times prior to her murder.

29. There was no evidence connecting Mr. Reed to the scenes where Ms. Stites's body was found or where the truck was abandoned. The only suggestion that Mr. Reed may have driven Fennell's truck was based on racially charged observation that a smudge on the rear window could have been made by the kind of hair products black people use.

30. In most murder cases, the time of death is typically established through a number of customary forensic markers, such as core body temperature, lividity, and bodily discharge. Not so here. Instead, the evidence the State used to infer Ms. Stites's time of death, and Mr. Reed's alleged role in her murder, rested almost entirely on the shaky timeline provided by Fennell and three intact spermatozoa[2] found in

[2] There are over 150 million spermatozoa in the average ejaculation by a fertile male. *See* https://www.who.int/reproductivehealth/topics/infertility/cooper_et_al_hru.pdf

samples taken from Ms. Stites's body. DNA testing of those samples associated them with Mr. Reed. The State then presented uncontradicted testimony from three purported experts that, as a matter of scientific fact, intact spermatozoa cannot be found in the vaginal cavity more than approximately 24-26 hours after intercourse. Based on this asserted scientific fact, the State argued that the intact condition of three sperm proved that Mr. Reed had intercourse with Ms. Stites at or near the time of her death and, therefore, must have killed her. This central expert testimony relied on by the State to convict Mr. Reed has since been recanted, retracted and proven false. See *infra* at ¶¶ 56-59.

31. Mr. Reed was convicted of capital murder and subsequently sentenced to death based largely on this faulty scientific evidence.

C. Mr. Reed's First DNA Testing Motion

32. As part of his initial state habeas proceedings, Mr. Reed filed a motion for DNA testing of various items of evidence, including Ms. Stites's belt and clothing. That motion was denied in a summary order on May 27, 1999.

D. Mr. Reed's Second DNA Motion

33. On July 14, 2014, Mr. Reed filed a motion in the District Court seeking forensic DNA testing pursuant to Article 64 (the "Article 64 Motion") of certain evidence items, including items recovered from the location where Ms. Stites's body was found and from the location of the truck.

34. Despite the apparent availability of the elected 21st District Court Judge in whose court the

case was filed,[3] the Article 64 Motion was assigned to Retired Judge Doug Shaver. The Article 64 Motion sought DNA testing of all of the evidence identified in Exhibit A.

35. Also on July 14, 2014, the State and Mr. Reed stipulated to the agreed DNA testing of several items of evidence. The stipulation referenced above, which was so-ordered by Judge Shaver, expressly provided that it was not a waiver of any of Mr. Reed's rights "to seek additional forensic DNA testing on evidence related to the case[.]"

36. On November 25, 2014, the District Court held a one-day evidentiary hearing on Mr. Reed's Article 64 Motion. Mr. Reed presented the testimony of John Paolucci, an expert in crime scene investigation, and Deanna D. Lankford, M.T., an expert in DNA testing.

37. Mr. Reed's experts testified that many evidence items recovered by the State from both scenes would contain potentially exculpatory DNA evidence if subjected to DNA testing. They further testified that this evidence was in a suitable condition for testing using modern "touch DNA" technology to identify cells left by other individuals present at the crime scenes.

38. The State did not even attempt to rebut the testimony of Mr. Reed's experts, and relied instead on an employee of the Attorney General's Office,[4] who

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[3] Other matter relating to the case had initially been assigned to 335th District Court Judge Reva Townslee Corbett, who recused herself because her father had presided over Mr. Reed's trial.

[4] Counsel for the State in these proceedings included attorneys from the Office of the Attorney General of Texas who were deputized as special assistant Bastrop District Attorneys.

claimed that the evidence in the possession of the Bastrop County District Clerk was contaminated because of the manner in which the evidence was stored. This testimony was presented by the State as evidence supporting its contention that a proper chain of custody could not be established as required under Article 64.

39. However, Bastrop District Court Clerk employee Etta Wiley, the custodian of the evidence, testified that she was responsible for the evidence at the clerk's office, and that the evidence was secured "under lock and key" and that she was confident that it had "not been substituted, replaced, tampered with, or materially altered."

40. At the conclusion of the hearing, Retired Judge Shaver rendered a brief verbal ruling expressing his intent to deny Mr. Reed's Article 64 Motion and requested that the State draft proposed findings on the matter. On December 16, 2014, he affixed his signature to the State's proposed findings of fact and conclusions of law (the "Initial Findings"), adopting them verbatim as his own. A copy of these findings is attached as Exhibit B.

41. Mr. Reed timely appealed the Initial Findings to the CCA, and on June 29, 2016, the CCA entered an order finding that the District Court failed to make certain requisite findings regarding the elements of Article 64 for the items which Mr. Reed sought to test, including: (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. The CCA's June 29, 2016 Order remanded the proceeding to the District Court and directed it to make findings on the elements that had been omitted from the Initial Findings. *Reed v. State*, No. AP-77,054, 2016 WL 3626329 (Tex. Crim. App. 2016).

42. The proceedings on remand were marred by procedural irregularity. Given the passage of approximately nineteen months between the evidentiary hearing (November 2014) and the CCA's remand order (June 2016), Mr. Reed proposed an in-person court appearance at which the parties could present argument in favor of their proposed findings. The State opposed Mr. Reed's request and moved for entry of a scheduling order requiring the parties to submit proposed findings of facts and conclusions of law. Retired Judge Shaver granted the State's motion, and the parties thereafter filed their proposed findings.

43. The parties' proposed findings were in direct conflict as to two disputed Article 64 elements: (1) chain of custody as to the items maintained by the Bastrop County District Clerk's Office, and (2) whether there was a reasonable likelihood that certain items contain biological material suitable for DNA testing.

44. On September 15, 2016, Retired Judge Shaver signed and submitted ***both*** parties' proposed findings to the CCA without explanation for his two wildly inconsistent rulings in the same matter. True and correct copies of each of the District Court's September 15, 2016 sets of findings and conclusions are

attached to as Exhibits C (drafted by Mr. Reed) and D (drafted by the State).

45. Mr. Reed's proposed findings provided that he met each of the requirements for DNA testing under Article 64. *See* Ex. C. By signing those findings, Retired Judge Shaver was statutorily required to order the DNA testing. Texas Code of Crim. Proc. Art. 64.03(c) ("If the convicting court finds in the affirmative the issues listed in Subsection (a)(1) and the convicted person meets the requirements of Subsection (a)(2), the court ***shall*** order that the requested forensic DNA testing be conducted.") (Emphasis added.)

46. The State promptly sought to remand the competing signed findings back to Retired Judge Shaver for clarification. The State's remand motion stated that "[f]or some findings, this [the two sets of findings and conclusions] does not pose a problem, but for others, it does. For example, the State proposed that chain of custody had not been shown for certain items, but Appellant asserted to the contrary that it had....*Both cannot be right* and resolution of the convicting court's intent is therefore necessary." (emphasis added).

47. On September 23, 2016, Retired Judge Shaver then sent an unsolicited letter to the CCA, stating only that he had meant to rule in favor of the State:

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.

Sincerely,

Doug Shaver, Senior Judge

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48. On October 3, 2016, the CCA denied the State's motion to remand and a motion by Mr. Reed to strike Retired Judge Shaver's unsolicited letter.

49. On April 12, 2017, the CCA affirmed the District Court's denial of Mr. Reed's Article 64 Motion.

50. The CCA opinion discusses some of Retired Judge Shaver's findings, but does not disclose the fact that Retired Judge Shaver actually adopted two diametrically-opposed sets of findings of fact and conclusions of law in ruling on the Article 64 Motion, nor does it identify whether the findings discussed came from those proposed by the State or by Mr. Reed. Mr. Reed's motion for reconsideration was denied by the CCA on October 4, 2017. *Reed v. State*, 541 S.W.3d 759, 762 (Tex. Crim. App. 2017), *reh'g denied* (Oct. 4, 2017).

51. Mr. Reed petitioned the United States Supreme Court for review of the CCA opinion on February 1, 2018, supported by several *amici*. After seeking multiple extensions of time to respond, the State, represented by Defendant Goertz, opposed Mr. Reed's petition. The Supreme Court declined to review the CCA opinion on June 25, 2018. *See* 138 S. Ct. 2675, 201 L. Ed. 2d 1071 (2018).

E. The CCA's Arbitrary Interpretation of Article 64 Prevents Access to Potential Evidence of Innocence

52. In seeking DNA testing in state court, Mr. Reed proved each of the statutory requirements of Article 64 through expert testimony that the crime scene evidence he seeks to test (1) exists in the State's custody; (2) is in a condition suitable for DNA testing; (3) has not been substituted, tampered with or materially altered; and (4) potentially contains probative forensic DNA results that could both exculpate Mr. Reed and identify another person as responsible for the murder.

Novel and Arbitrary Chain of Custody Requirement

53. Despite Mr. Reed's proof of his entitlement to relief under the plain language of Article 64, the CCA construed and applied the statute to include a novel construction of the traditional chain of custody requirement such that the then-customary storage of evidence together in a box by state officials, and the routine handling of such evidence by trial officials, negated the chain of custody.

54. On its face, Article 64's chain of custody requirement merely requires the District Court to make a finding (without assigning a burden of proof) that the evidence is what it purports to be – that it "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." Chain of custody is a well-established concept under Texas law. Mr. Reed had no notice that the CCA would read an entirely different definition into the text of Article 64.[5]

55. It is undisputed that none of the evidence that Mr. Reed seeks to test is a substitute or replacement for the actual crime scene evidence, and that no person has altered or tampered with any of the items. It is also undisputed that each item of evidence Mr. Reed seeks to test is what it purports to be, *i.e.*, the broken sections of the belt comprise the murder weapon, the employee name tag is the one investigators found placed in the crook of Ms. Stites's knee, and the clothing is the clothing removed from Ms. Stites's body. Thus, the CCA has arbitrarily grafted non-statutory barriers onto Article 64 that have deprived Mr. Reed of his liberty interest in proving his innocence with new evidence under state law.

56. The CCA's arbitrarily imposed and novel chain of custody requirement also stems from its arbitrary limitation on the potential "exculpatory results" from DNA testing that the CCA is willing to consider when deciding whether to grant DNA testing under Article 64. DNA expert Lankford testified that issues of contamination could be resolved if DNA testing identified a known offender through the CODIS DNA database or produced a consistent DNA profile on both

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[5] *Stoker v. State*, 788 S.W.2d 1, 10 (Tex. Crim. App. 1989) *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990); *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997).

items that were comingled and those stored separately.

Arbitrary Finding of Unreasonable Delay

57. The CCA also unconstitutionally construed and applied the Article 64 element of unreasonable delay. Contrary to the findings of state courts, Mr. Reed has for years been persistent in his pursuit of post-conviction relief and DNA testing. He utilized the rudimentary DNA technology that was available at the time of trial. He again sought DNA testing as part of his initial post-conviction proceedings in 2001. This request was summarily denied by the trial court, and Mr. Reed continued to litigate his innocence based on other evidence until his motion for DNA testing was brought in 2014 under the recently amended Article 64. This statutory amendment was enacted to allow for DNA testing of touched items for skin cells, which is precisely the type of DNA testing sought in Mr. Reed's motion. By finding that Mr. Reed's request for DNA testing was brought for an improper purpose, the Texas courts have arbitrarily construed and applied the unreasonable delay prong of the statute to deny Mr. Reed DNA testing in violation of Mr. Reed's constitutional rights, especially when the CCA acknowledged that Mr. Reed's "Article 64 motion largely hinges on the newly available analysis of touch DNA" and such testing was unavailable under the statute prior to its amendment. *See* CCA Op. at 9; *see also Swearingen v. State*, No. 99-11-06435-CR (9th Dist., Montgomery County, Tex. June 10, 2013).

Arbitrary Prohibition on Consideration of Additional Exculpatory Evidence

58. The CCA, and the District Court, denied DNA testing based, in part, on factual assertions from trial that have since been disproven.

59. At the 2017 evidentiary hearing in Mr. Reed's state habeas proceedings, world-renowned forensic pathologist, Dr. Michael Baden testified as an expert witness. His testimony was consistent with his report which is attached as Exhibit E. Dr. Baden's testimony proved that the State's theory of Mr. Reed's guilt was false for at least three reasons:

60. *First*, the State claimed that Ms. Stites had been sexually assaulted at the time of her murder. Dr. Baden examined the evidence and explained in his report and in his testimony at the hearing that Ms. Stites had ***not*** been sexually assaulted. He found absolutely "no forensic evidence that Ms. Stites was sexually assaulted in any manner."

61. *Second*, although no physical evidence placed Mr. Reed in Fennell's truck, the State repeatedly claimed that the minimal amount of semen taken from Ms. Stites's body was the "smoking gun" that tied Mr. Reed to her murder. But the medical examiner who testified in support of the State's argument at trial, Dr. Roberto Bayardo, has since recanted his trial testimony in a sworn affidavit. This affidavit is attached as Exhibit F. Dr. Bayardo's affidavit states that sexual contact between Ms. Stites and Mr. Reed occurred more than twenty-four hours prior to her death, corroborating Mr. Reed's assertion that he and Ms. Stites had consensual relations at least a day before her murder. At the 2017 evidentiary hearing, Dr. Baden testified that Mr. Reed's semen was deposited

at least a full day before Ms. Stites was killed, thus confirming Dr. Bayardo's sworn affidavit. These opinions are also confirmed by Dr. Werner Spitz, author of the seminal textbook on forensic pathology, *Spitz and Fisher's Medicolegal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation*. Dr. Spitz's report is attached as Exhibit G.

62. In addition to Dr. Baden, Dr. Bayardo, and Dr. Spitz, additional forensic experts—including Dr. LeRoy Riddick, M.D., Joseph Warren, Ph.D., and Ronald Singer, M.S.— have confirmed that the State's timeline based on the presence of sperm in Ms. Stites's body was not reliable. These experts also demonstrated that the State's assertion that sperm can only last within the human body for no more than 24 to 26 hours is scientifically false.

63. *Third*, Dr. Baden's testimony flatly rebutted the flimsy timeline the State presented at trial through Fennell. The State argued that Ms. Stites was killed after leaving for work on the morning of April 23, 1996. In his report and testimony at the evidentiary hearing, Dr. Baden explained why the State's timeline was "not possible." Dr. Baden examined the evidence and demonstrated that Ms. Stites was murdered before midnight on April 22, 1996, the very time when, according to Fennell's testimony, the two were home in bed together. Specifically, Dr. Baden examined the lividity present in Ms. Stites's body and concluded, among other things, that "[w]hen [Ms. Stites] was killed ... she lay face down in one spot for at least four or five hours before she was moved ... by the car where she had some evidence of decomposition, until she was placed in this ... roadside area, on

her back." Dr. Spitz similarly noted that his review of the case lead him to conclude that, "Stacy Stites was murdered prior to midnight on April 22, 1996" and "[t]he lividity ... on Stites's face, shoulder, and arm, scientifically proves that she was dead in a position different from that which she was found for a period of at least 4-5 hours." He went on to say that, "[t]he presence of lividity in these nondependent areas makes it medically and scientifically impossible that Stites was killed between 3-5am on the date in question ... It is impossible that Stites was murdered and left at the scene in the two-hour time frame asserted by the State at trial."

64. This new evidence establishes that the State's timeline and theory that Mr. Reed raped Ms. Stites and killed her immediately thereafter is false. The assertion that Mr. Reed's semen must have been left close to the time of Ms. Stites's death has been definitively refuted, along with Fennell's unsubstantiated claim that Ms. Stites left for work around 2:30 to 3:30 a.m. on April 23, 1996.

65. The State has not presented any expert to contradict the scientific evidence of innocence discussed above, and the State's trial experts (or their employing agents) have retracted the opinions offered at trial. The State nonetheless insisted on moving to set Mr. Reed's execution date at the first available opportunity after the CCA's denial of Mr. Reed's habeas proceeding became final. Notwithstanding the complete lack of remaining trial evidence that incriminates Mr. Reed, the Defendant and his lawyer decided together decided to move to set the execution date promptly in order to "ensure state court finality of the CCA's decision." Exhibit J, Affidavit of Matthew

Ottoway dated September 13, 2019, at 2; *see also* Exhibit K, Affidavit of Brian Goertz dated September 12, 2019, at ¶ 3 (acknowledging that State decided to move to fix execution date as soon as "the time for Mr. Reed to request a rehearing had expired on July 11, 2019.")

66. Mr. Reed was convicted because his DNA was linked by expert testimony to a purported sexual assault the State claimed was contemporaneous with the murder.

67. The Texas Department of Public Safety (who employed criminalist Karen Blakely), the Bode Cellmark Forensics Laboratory (who employed the State's retained expert Meghan Clement), and former Travis County Medical Examiner Dr. Bayardo have all now acknowledged that the scientific opinions offered by the State to tie Mr. Reed to the murder were in error. *See* Exhibit H (Letter from DPS); Exhibit I (report from Bode); Exhibit F (Bayardo affidavit). This is because it is a scientific fact that sperm can survive intact longer than twenty-six hours; indeed, the actual time period has been proven to be much longer.

68. The CCA's opinion denying DNA testing arbitrarily fails to take into account any of the foregoing newly discovered evidence, which negates the State's evidence against Mr. Reed. Instead, the CCA cites the very same "scientific" evidence used to support the State's timeline that has since been recanted or proven false, and fails to even acknowledge that this evidence has been roundly rejected in the scientific community. The CCA further fails to recognize the exculpatory potential of crime scene evidence by summarily dismissing the mountain of evidence of

third-party guilt Mr. Reed has presented linking Fennell to the murder.

Denial of Article 64 Motion Deprives Access to Other Available Remedies

69. The Texas courts' arbitrary construction and application of Article 64's statutory requirements also unconstitutionally denied Mr. Reed his due process rights and his right to access available statutory remedies. Further, proceeding with Mr. Reed's execution while arbitrarily denying DNA testing capable of proving his innocence would violate the Eighth Amendment's prohibition on cruel and unusual punishment. If DNA testing reveals exculpatory results, Articles 11.071, 11.073, and 64.04 of the Texas Code of Criminal Procedure provide procedures for adjudicating Mr. Reed's innocence and overturning his conviction and death sentence. Exculpatory DNA results can also provide the basis for a request for executive clemency under Texas law. Moreover, exculpatory DNA results can provide the factual basis for a showing of innocence necessary for the federal courts to consider a successive federal habeas petition pursuant to 28 U.S.C. § 2244.

70. Article 64 tracks the traditional legal standard for proof of chain of custody, the purpose of which is to authenticate evidence by establishing that the evidence is what the proponent says it is. The CCA has repeatedly applied this standard to uphold the admission of evidence offered by the State as evidence of guilt, including DNA results from evidence that had been handled before, during and after trial. Evidence is routinely admitted in Texas criminal cases absent evidence of fraudulent tampering, substitution, alteration or other fraud.

71. The CCA interprets the same chain of custody standard in Article 64 cases in a contrary manner, to require additional proof that the evidence is not only what it purports to be, but also that the evidence has been stored by the State in a manner such that no additional DNA was added. This contrary interpretation is arbitrary and deprives Mr. Reed of fundamental constitutional rights.

72. The CCA's unprecedented interpretation and application of Article 64 will automatically deny Article 64 relief to any person convicted before rules governing the State's handling and storage of evidence were put in place, and preclude such persons from proving innocence through newly available DNA analysis. In fact, the CCA's interpretation and application of Article 64 will preclude Article 64 relief any time that the State contends that the DNA profile of evidence, including evidence secured at the crime scene, was changed, irrespective of whether that evidence retains the ability to reliably demonstrate innocence.

73. Despite the powerful and unrebutted evidence of Mr. Reed's innocence, he continues to be denied relief on grounds that cannot withstand constitutional scrutiny.

74. Mr. Reed has a constitutional right to access and utilize the Texas statutory DNA testing procedure in a fair and due-process-compliant manner, to exonerate himself by identifying the person whose DNA is on the belt that was used to murder Ms. Stites, as well as the clothing, name tag and other items that her killer likely touched. The CCA's tortured, results-driven and utterly unfair interpretation and application of Article 64 deny Mr. Reed basic constitutional

protections under both the United States Constitution and the Texas Constitution.

CLAIMS FOR RELIEF

First Claim for Relief: Denial of Due Process (Declaratory Judgment)

75. Mr. Reed re-alleges and incorporates herein by reference the allegations contained in all of the preceding paragraphs of this Amended Complaint.

76. Pursuant to Article 64, when an individual sentenced to death, such as Mr. Reed, presents a motion that requests DNA testing of biological material that both still exists in a condition that makes testing possible and also could yield exculpatory results, he or she is entitled to have the evidence tested. Vernon's Ann. Texas C.C.P. Art. 64.03 (2017). If testing successfully produces an unidentified DNA profile, that profile must be compared to the FBI's CODIS database, and the database established by the Department of Public Safety. Vernon's Ann. Texas C.C.P. Art. 64.035 (2011). Exculpatory DNA results obtained under Article 64 are considered by the trial court, and the movant is entitled to a determination of whether those results prove innocence. Vernon's Ann. Texas C.C.P. Art. 64.04 (2011).

77. Exculpatory DNA results are accepted under Texas law as evidence that can be used to prove a claim for habeas relief based on innocence, false or misleading testimony, and other constitutional violations brought under Article 11.071 of the Texas Code of Criminal Procedure. Exculpatory DNA results can also be used as evidence to prove a claim for a new trial pursuant to Article 11.073 of the Texas Code of Criminal Procedure, and may be considered by the Board of Pardons and Paroles and the Texas Governor

in a request for executive clemency. *See State v. Holloway*, 360 S.W.3d 480, 489 n.58 (Tex. Crim. App. 2012), *abrogated on other grounds by Whitfield v. State*, 430 S.W.3d 405 (Tex. Crim. App. 2014).

78. Because the State of Texas has created a procedure through which convicted persons can obtain DNA testing and then utilize exculpatory results from that testing to secure a declaration of innocence, habeas relief, a new trial, executive clemency and potentially other relief from their convictions, the processes employed by the State for obtaining access to DNA must not violate fundamental fairness. *See Osborne*, 557 U.S. at 69; *Skinner v. Switzer*, 562 U.S. 521 (2011); *Elam v. Lykos*, 470 F. App'x 275, 276 (5th Cir. 2012) ("While there is no freestanding right for a convicted defendant to obtain evidence for post-conviction DNA testing, Texas has created such a right, and, as a result, the state provided procedures must be adequate to protect the substantive rights provided."); *Emerson v. Thaler*, 544 F. App'x 325, 327 (5th Cir. 2013) ("Although states are under no obligation to provide mechanisms for postconviction relief, when they choose to do so, the procedures they create must comport with due process and provide litigants with a fair opportunity to assert their state-created rights.").

79. The CCA's interpretation and application of Article 64 violates fundamental fairness in several ways. *First*, the CCA's flawed construction of the chain of custody requirement of Article 64 resulted in the erroneous exclusion from eligibility for testing the majority of key pieces of evidence introduced at trial, including pieces of the belt used to strangle Ms. Stites, her clothing, and several other crucial pieces of evidence likely touched by the murderer.

80. The CCA incorrectly found that these significant pieces of physical evidence were excluded by this requirement because they were potentially contaminated by poor storage procedures or the ungloved handling of evidence in court. The CCA ignored the unrebutted testimony of Mr. Reed's DNA expert that the potential additional DNA did not preclude probative results, and such evidence could still be successfully tested.

81. This failure to appropriately apply the chain of custody requirement imposed by Article 64 resulted in the exclusion of the majority of the key evidence in this case, testing of which could exonerate Mr. Reed.

82. *Second*, the manner in which the CCA adjudicated Mr. Reed's appeal was arbitrary in its own right. The CCA's arbitrary limitation of "exculpatory results" to be considered pursuant to Article 64.003 of the Texas Code of Criminal Procedure ignores the clear inculpatory inferences from identifying DNA of a known offender on the evidence or finding the same unidentified DNA profile on both properly stored items and those which could have been contaminated.

83. *Third*, the CCA's failure to clarify, acknowledge, or even differentiate between the inconsistent competing findings of fact and conclusions of law signed by the District Court— on which its opinion relies—violates Mr. Reed's Due Process rights. As explained above, on remand, the District Court signed two diametrically opposing and irreconcilable sets of findings of fact and conclusions of law submitted by the State and Mr. Reed, a profound and inexplicable error in any case, let alone a capital case. Instead of implementing DNA testing, as required by Article 64.03(c) in light of the findings contained in Exhibit C,

the CCA accepted Retired Judge Shaver's inappropriate explanation without question, briefing or a hearing. The CCA's subsequent opinion did not vacate either set of findings and conclusions, yet said nothing about Judge Shaver's careless and confusing adoption of conflicting sets of findings and conclusions; instead, the CCA both agreed and disagreed with various findings of the District Court without indicating which of the two sets of findings it was addressing. The CCA simply notes that "[a]fter remand, the judge made supplemental findings of fact and conclusions of law." This fundamental breakdown in the procedures afforded to petitioners under Article 64 violates Mr. Reed's procedural Due Process rights as well as the clear requirement of Article 64 itself.

84. *Fourth*, the CCA's finding of unreasonable delay violated Mr. Reed's rights to procedural due process by faulting him for not bringing a Aticle 64 motion prior to 2014, when in fact the type of "touch DNA" testing that Mr. Reed sought in his motion did not become available under Article 64 until the statute was amended in 2014. *See* ¶ 55, *infra*. The CCA overlooked this critical fact, as well as the fact that Mr. Reed sought DNA testing in 1999, before Article 64 was even enacted.

85. Finally, the CCA's interpretation of Article 64's requirement that the petitioner show that he or she would not have been convicted if exculpatory DNA results were produced ignores the most powerful aspects of DNA testing and excludes from consideration evidence tending to inculpate third parties. The Supreme Court, however, holds that evidence of third-party guilt *is* exculpatory; indeed, a defendant's ability to present such exculpatory evidence lies at the

heart of the Constitutional guarantee of a "meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (internal citations omitted). The CCA's analysis, which expressly excludes all DNA results that inculpate a third party and instead focuses only on results that exclude the movant as a contributor, violates due process. *Cf Chambers v. Mississippi*, 410 U.S. 284 (1973) (trial court's exclusion of evidence that inculpated a third party resulted in denial of a trial in accord with fundamental standards of due process).

86. The District Court and the CCA also violated Mr. Reed's due process rights by relying on trial evidence that has since been recanted, discredited and proven false, to deny his request for DNA testing under Article 64. The CCA specifically relied on the District Court's "conclusion" that "[t]he State's case on guilt-innocence was strong," its finding that the evidence showed Mr. Reed's "presence" and that "sexual assault occurred contemporaneously with the murder." *Reed v. State*, 541 S.W.3d 759, 773 (Tex. Crim. App. 2017). Today, however, not one of the State's three expert witnesses from Mr. Reed's criminal trial stand by their trial testimony. Additional experts, including world renowned forensic pathologists Dr. Michael Baden and Dr. Werner Spitz, have provided unrebutted forensic conclusions, which completely eliminate the scientific foundation for the State's case against Mr. Reed. Moreover, Fennell, whose trial testimony formed the backbone of the State's chronology of Ms. Stites's death and, thus, the case against Mr. Reed, improperly invoked the Fifth Amendment in a 2017 habeas proceeding, negating both Fennell's trial testimony and any suggestion that the State's case against Mr. Reed was "strong."

87. The CCA's unreasonable construction and application of Article 64, and the procedural faults in the handling of Mr. Reed's motion, including in particular the CCA's extra-statutory construction and application of Article 64's chain of custody requirement, have prevented Mr. Reed from gaining access to exculpatory evidence that could demonstrate that he is not guilty of capital murder. Since the State of Texas provides a means for obtaining post-conviction forensic DNA testing, those procedures, including the construction and application of well-settled terms included in the statutory text, such as chain of custody, must be imbued with a fundamental fairness. *See generally Osborne*, 557 U.S. 52; *Skinner v. Switzer*, 562 U.S. 521 (2011). The CCA's failures in construing and applying Article 64 violate "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Osborne*, 557 U.S. at 69. Specifically, the CCA's failures here have deprived Mr. Reed of his liberty interests in utilizing these state procedures to obtain a declaration of innocence, a new trial, executive clemency, or other avenues for relief, all in violation of his right to due process of law under the Fourteenth Amendment to the United States Constitution, and he is entitled to a declaratory judgment so stating pursuant to 28 U.S.C. §§ 2201-2202.

Second Claim for Relief: Access to Courts (Declaratory Judgment)

88. Mr. Reed re-alleges and incorporates herein by reference the allegations contained in all of the preceding paragraphs of this Amended Complaint.

89. Mr. Reed has a fundamental right to access to courts, rooted in the First and Fourteenth

Amendments, which requires that states make available the tools necessary for prisoners to obtain meaningful access to available judicial remedies. State law must ensure that prisoners like Mr. Reed have meaningful access to post-conviction remedies in order to vindicate this right. *Cf. Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that prison authorities are required to provide inmates meaningful legal assistance or resources to ensure that their constitutional right of access to courts be upheld).

90. As alleged above, Mr. Reed has available remedies under Texas law for access to post-conviction DNA testing, and to a declaration of innocence, to relief from his conviction and to executive clemency based on the exculpatory results of such testing. And, as alleged above, Texas's restrictive procedure for obtaining access to DNA testing under Article 64, and the CCA's construction and application thereof, is not adequate, meaningful or effective.

91. Mr. Reed incurred actual injury when the CCA denied his request for DNA testing that could potentially produce exculpatory evidence, and thus provide him with relief from his conviction.

92. As stated above, the CCA's unreasonable interpretation of Article 64 has prevented Mr. Reed from gaining access to exculpatory evidence that could demonstrate that he is not guilty of capital murder. These failures have deprived Mr. Reed of his fundamental right to access to courts under the First and Fourteenth Amendments, and he is entitled to a declaratory judgment so stating pursuant to 28 U.S.C. §§ 2201-02.

Third Claim for Relief: Cruel and Unusual Punishment (Declaratory Judgment)

93. Mr. Reed re-alleges and incorporates herein by reference the allegations contained in all of the preceding paragraphs of this Amended Complaint.

94. The Eighth Amendment's prohibition on cruel and usual punishment prevents the execution of prisoners, like Mr. Reed, who have viable claims that they are innocent of the crime for which they have been convicted without first affording them the opportunity to prove their innocence. The CCA has interpreted Article 64 to bar DNA testing even where realistically possible exculpatory DNA results from such testing have the capacity to prove innocence based solely on the State's handling of evidence. Because Texas law does not allow for DNA testing under circumstances where such testing has the capacity to prove innocence, Article 64 violates the Eighth Amendment prohibition on cruel and unusual punishment, and he is entitled to a declaratory judgment so stating pursuant to 28 U.S.C. §§ 2201-02.

Fourth Claim for Relief: Denial of Opportunity to Prove Actual Innocence (Declaratory Judgment)

95. Mr. Reed re-alleges and incorporates herein by reference the allegations contained in all of the preceding paragraphs of this Amended Complaint.

96. By refusing to release the physical evidence for DNA analysis, and thereby preventing Mr. Reed from gaining access to evidence that can exonerate him, Mr. Reed is denied the opportunity to make a conclusive showing that he is actually innocent of the crime for which he is currently incarcerated, 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 of the United States Constitution, and Mr. Reed is entitled to a declaratory judgment so stating pursuant to 28 U.S.C. §§ 2201-02.

97. The State will suffer no prejudice by allowing Mr. Reed to access the evidence for purposes of DNA testing. The testing that Mr. Reed seeks may be conducted at a fully accredited DNA laboratory with the expenses to be paid by his counsel at the Innocence Project, in which case it would proceed at no cost to the State. DNA testing is also in the State's interest, and indeed, the State's conduct concedes the point – while tirelessly opposing every request for testing from Mr. Reed, the State continues to this day to secretly conduct DNA tests (without any input from Mr. Reed) on evidence previously tested years ago, as shown by a September 26, 2019 supplemental DNA testing report attached hereto as Exhibit L. In other words, while continuing to resist DNA testing on the murder weapon, the State continues to test extraneous evidence that has no implications for guilt or innocence. DNA testing can both determine whether an innocent man is in prison and identify the real murderer.

Fifth Claim for Relief: Violations of Texas Constitution (Declaratory Judgment)

98. Mr. Reed re-alleges and incorporates herein by reference the allegations contained in all of the preceding paragraphs of this Amended Complaint.

99. The foregoing allegations constitute violations of Mr. Reed's rights under the Texas Constitution, including, without limitation, his right to receive substantive and procedural due process of law (Article

1, Section 19), his right to access to courts and to a remedy by due course of law (Article 1, Sections 13 and 27), and his right to not be subjected to cruel and unusual punishment (Article 1, Section 13). Mr. Reed is entitled to a declaratory judgment so stating pursuant to 28 U.S.C. §§ 2201-02.

PRAYER FOR RELIEF

WHEREFORE, Mr. Reed prays that this Court provide relief as follows:

1. A declaration that the CCA's interpretation and application of Article 64 of the Texas Code of Criminal Procedure is unconstitutional under both the United States Constitution and the Texas Constitution because:

a. Such interpretation and application imposes a fundamentally unfair limitation, in violation of due process and the First Amendment right to access to courts, upon Mr. Reed's access to statutory remedies available under Texas law, and deprives Mr. Reed of adequate, effective and meaningful access to such remedies. Those remedies include: (1) the statutory right to access post-conviction DNA testing pursuant to Article 64; (2) the statutory right to a declaration of innocence pursuant to Article 64.04 of the Texas Code of Criminal Procedure based on exculpatory DNA results; (3) the statutory right to habeas relief for innocence and other constitutional violations pursuant to Article 11.071 of the Texas Code of Criminal Procedure based on exculpatory DNA evidence; (4) the statutory right to a new trial pursuant to Article 11.073 of the Code of Criminal Procedure based on exculpatory

DNA results; and (5) executive clemency based on exculpatory DNA results.

b. Such interpretation and application denies Mr. Reed the protection of the Eighth Amendment of the United States Constitution, which prohibits the execution of persons who are actually innocent of the crime for which they are convicted and requires that state laws providing persons facing the death penalty with a right to seek post-conviction DNA testing be construed and applied in a manner that allows a convicted person to access and test evidence where realistically possible exculpatory results can prove innocence.

2. Such other and further relief as this court deems just and proper.

DATED: October 1, 2019 Respectfully submitted,

/s/ Bryce Benjet

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