CAPITAL CASE
No. 17-_____

In the Supreme Court of the United States

RODNEY REED,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Rodney Reed ("Petitioner") was convicted and sentenced to death for the 1996 strangulation murder of Stacey Stites in rural Bastrop, Texas. Because of the technology available at the time of Petitioner's trial, DNA testing has never been performed on the belt used to strangle Ms. Stites and other key evidence in the case. Modern DNA testing is capable of identifying the murderer and providing evidence that will support a number of state and federal postconviction remedies.

Although Petitioner sought DNA testing under Texas's postconviction DNA testing statute, Chapter 64 of the Texas Code of Criminal Procedure ("Chapter 64"), his motion was denied by the Bastrop County District Court. On appeal, the Texas Court of Criminal Appeals (the "CCA") affirmed the denial based on a novel and unfounded interpretation of the statutory "chain of custody" element found in Article 64.03(a)(1)(A)(ii). The CCA also affirmed a finding that Petitioner could not prove that his request for DNA testing was not brought for the purpose of unreasonable delay, as required by Article 64.03(a)(1)(A)(i).

Did the State of Texas violate Petitioner's due process rights and his right to access to the courts when he was denied postconviction DNA testing of evidence which could prove his innocence based upon:

1. a fundamentally unfair and novel interpretation of Chapter 64's chain of custody requirement that includes a lack of contamination

element that does not appear in either Chapter 64 or the parallel chain of custody test for introducing such evidence at trial, and proof that the evidence exists in a condition sufficient to permit probative DNA testing and was not substituted, replaced, tampered with, or materially altered; and

2. a subjective, arbitrary and fundamentally unfair interpretation of Chapter 64's "unreasonable delay" element that cited against Petitioner his sustained efforts to challenge his wrongful conviction and postconviction habeas actions (which have generated compelling evidence of his actual innocence), and disregarded proof that Petitioner sought DNA testing in 1999 and 2014 without delay or improper purpose?

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

CASES

Page

STATUTES AND OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the CCA affirming denial of his Chapter 64 Motion.

OPINIONS BELOW

The opinion below, *Reed v. State*, No. AP-77,054 (Tex. Crim. App. Apr. 12, 2017), is included in the Appendix. (App.-1a.)

JURISDICTION

The CCA denied Petitioner's motion for rehearing on October 4, 2017. (App.-231a.) The Court has jurisdiction pursuant to 28 U.S.C. §1257(a) and Rule 13.1. On December 14, 2017, Justice Alito granted Petitioner's application to extend the time to file a petition for a writ of certiorari from January 2, 2018 until February 1, 2018. (No. 17A639)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in the Appendix. (App.-238a-239a.)

INTRODUCTION

This capital case provides the right vehicle for the Court to decide the due process and other constitutional requirements for access to postconviction DNA testing, where such testing is capable of proving a person's innocence. This issue is of paramount importance not only to Petitioner, a Texas death row inmate, but also to wrongfully convicted persons nationwide.

Forensic DNA testing is changing our nation's criminal justice system. All 50 states and Congress have enacted postconviction DNA testing statutes. Nevertheless, postconviction DNA testing in Texas remains largely unavailable absent prosecutor consent due to unduly restrictive judicial interpretations of Chapter 64.

Many postconviction DNA testing statutes contain similar language to Texas's Chapter 64, but are interpreted more broadly. This Court has noted in *Dist. Attorney's Office v. Osborne*, 557 U.S. 52 (2009), that the Constitution may require postconviction DNA testing to afford access to other postconviction remedies, but it has yet to articulate the scope of such a right.

On April 23, 1996, the body of Stacey Stites was found in the brush along a rural road in Bastrop County, Texas. Investigators determined that Stites was strangled with her belt, and that her fiance's truck (found miles away at the local high school) was used to move her body. There were no eyewitnesses to the murder, nor any fingerprints, footprints, hair, DNA or other physical evidence that placed Petitioner at either crime scene. The State

nonetheless claimed that Petitioner abducted, raped and murdered Stites based on a tiny amount of Petitioner's intact sperm cells recovered from Stites's body. Petitioner, who is black, claimed he and Stites, a white woman, were in an intimate relationship and had consensual intercourse days before the murder, but the State argued that Petitioner's intact sperm cells conclusively proved that he raped and killed Stites. Petitioner was convicted in 1998 of Stites's murder by an all-white jury and sentenced to death.

Through postconviction habeas proceedings, Petitioner has developed and presented the Texas courts with substantial evidence of his innocence. Dr. Bayardo, the medical examiner, has recanted his trial testimony regarding the time of Stites's death and the occurrence of sexual assault. Renowned forensic pathologists Drs. Michael Baden and Werner Spitz have likewise opined that Stites was not sexually assaulted. Drs. Baden and Spitz further state that Petitioner's semen was likely deposited days before, rather than in conjunction with, Stites's murder, and that her murder occurred before midnight on April 22, 1996—the precise time Stites's fiancé, Jimmy Fennell, testified the two were asleep together at home. Three weeks ago, LabCorp formally retracted the trial testimony of its representative, cited heavily by the State to bolster its theory that the murder immediately followed intercourse. All of the foregoing evidence refutes the State's theory at trial and corroborates Petitioner's assertion that he and Stites had a consensual relationship.

Despite ever-growing proof of Petitioner's innocence, the State of Texas and its courts have

steadfastly refused Petitioner's attempts to obtain forensic DNA testing, both by consent and through legal process. The CCA affirmed the District Court's denial of Petitioner's Chapter 64 Motion. Chapter 64, which contains a boilerplate chain of custody article similar to those in 33 other jurisdictions, does not expressly require a finding regarding a lack of possible contamination. However, the CCA construed Chapter 64 to impose such a requirement, and then held that this new putative requirement was not met because the State allowed evidence to be touched at trial and later stored multiple items of evidence together. Chapter 64's chain of custody provision does not include either actual or potential contamination as an element, and the CCA has rejected contamination as an element of the State's chain of custody proof to admit evidence during prosecution. Moreover, Petitioner presented unrebutted expert testimony that probative DNA results were achievable notwithstanding any risk of "contamination." Finally, the State conceded, and the CCA found, that the evidence existed in a condition sufficient to permit DNA testing. The CCA's conditional finding is flatly inconsistent with its conclusion that Petitioner's Chapter 64 Motion had to be denied due to possible contamination risk.

The CCA also held incorrectly that Petitioner's Chapter 64 Motion was made to unreasonably delay his execution. In doing so, the CCA erroneously interpreted the statute to preclude testing based on an arbitrary and unspecified time frame, even though Petitioner first asked for postconviction DNA testing in 1999—more than a decade before an execution date was ever contemplated. As demonstrated below, the CCA's denial of Petitioner's Chapter 64 Motion

violated his constitutional rights and liberty interest without due process of law.

STATEMENT OF THE CASE

A. The State's Theory Of The Murder Of Stacey Stites.

On April 23, 1996, Stacey Stites's body was found along a rural road in Bastrop County, Texas. (App.-2a.) Stites had been strangled with her belt and her body transported in Fennell's pickup. (App.-3a.) Fennell, a local police officer, testified he and Stites spent the prior evening alone in his apartment. (App.-102a.) Although Fennell was supposed to drive Stites to work the next morning, he claimed they later abandoned that plan. (App.-102a.)

Fennell was the last person to see Stites alive, but officers never searched his apartment and promptly returned his truck to him. (App.-112a-113a.) Investigators also did not conduct DNA testing on the belt, Stites's clothing or the employee name tag placed in the crook of her knee. Investigators dropped Fennell as a suspect because they could not solve how he could have returned from the abandoned truck in Bastrop to his apartment in Giddings, roughly 30 miles away. (App.-114a.) Investigators did not consider that Fennell could have had an accomplice, and did not interview his best friend Curtis Davis, a Bastrop deputy who checked out early from his night shift that same night. (App.-185a.) Investigators and prosecutors adopted Fennell's timeline of Stites's last hours even

though Fennell failed two polygraph tests concerning his involvement in her murder. (App.-181a.)

Petitioner was arrested after a small amount of intact sperm found in Stites's body matched his genetic profile. (App.-5a.) At trial, using Fennell's timeline, the State theorized that Petitioner stopped Stites in Fennell's truck around 3:00 a.m. on her route to work; raped and murdered her in the truck, then drove the truck to a different country road and dumped her body; and then drove the truck miles away to the high school lot, where he locked it and walked away. No eyewitnesses and no fingerprint, footprint, hair, DNA or other evidence suggested, let alone proved, that Petitioner had actually been in the truck or at the rural location where the body was found. (App.-4a.)

The defense argued at trial that Petitioner and Stites were in a consensual intimate relationship, and had had sex recently. The State countered with testimony from a LabCorp technician and a DPS crime scene investigator that sperm deteriorate more than 24 hours after intercourse; accordingly, because three recovered sperm were intact, they established that sex occurred in the 3:00 a.m. time frame consistent with the time that Fennell claimed Stites left for work. (App.-5a-6a, 118a-119a.) The State also presented testimony from medical examiner Dr. Bayardo – since recanted – to argue that Stites was both sexually assaulted and killed during that same time frame. (App.-4a, 220a-221a.) The jury convicted Petitioner of murder and sentenced him to death. (App.-5a.)

The CCA affirmed Petitioner's conviction on direct appeal based upon the State's testimony that sex

occurred at the time of death. (App.-6a, 124a.) In 2008, the CCA acknowledged that the evidence supported "a healthy suspicion that Fennell had some involvement in Stacey's death," but denied habeas relief, concluding that Petitioner had not undermined "the evidence of vaginal assault" or the testimony that intercourse and the murder occurred together. (App.-202a.)

B. Unrefuted Scientific Proof Negates The State's Theory Of The Case.

Petitioner developed evidence in his habeas proceedings that disproves the State's timeline, establishes that Stites was not sexually assaulted, and proves the scientific falsity of the trial testimony that relied upon the intactness of Petitioner's few sperm to connect the times of intercourse and Stites's murder:

1. Stites Died Before Midnight, When Fennell Claimed She Was Home With Him.

Based on Fennell's testimony and the recanted testimony of Dr. Bayardo, the State argued that Stites was murdered on her way to work between 3:00 a.m. and 5:30 a.m. (App.-108a.) In 2012, Dr. Bayardo retracted his trial testimony regarding time of death:

> My estimate of time of death, again, was only an estimate, and should not have been used at trial as an accurate statement of when Ms. Stites died. . . . If the prosecuting attorneys had advised me that they

> intended to use my time of death estimate as a scientifically reliable opinion of when Ms. Stites died, I would have advised them not to do so. (App.-276a-277a.)

Renowned forensic pathologists Drs. Baden and Spitz – without contradiction – have demonstrated that Stites was murdered before midnight on April 22, hours before she was scheduled to leave for work, and when Fennell claimed the two were home in bed. As Dr. Baden explained:

> The intensity and extent of the lividity present on Ms. Stites' body demonstrates . . . that Ms. Stites was dead before midnight on April 22nd . . . (App.-288a.)
>
> This is typical post-mortem purge fluid that flowed from [Stites's] nose and mouth as her body began to decompose and showed other decomposition changes, such as skin slippage and green discoloration of skin, which were also described at the scene and autopsy. . . . she had been dead for a number of hours, before midnight, when she was placed in the passenger seat. (App.-288a.)

Dr. Spitz's analysis is consistent:

> My review of the autopsy report, autopsy photos, crime scene photos, crime scene video, and report of crime scene investigation leads me to conclude that Stacey Stites was murdered prior

> to midnight on April 22, 1996 (the night before her body was found). (App.-280a.)
>
> The presence of lividity in these non-dependent areas makes it medically and scientifically impossible that Stites was killed between 3-5 a.m. 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. (App.-281a.)
>
> My review shows evidence of decomposition that is not consistent with a time of death at 3 a.m. on April 23, 1996. (App.-282a.)
>
> When all of these factors are considered together, it becomes indisputable that the time of death was considerably earlier than 3:00 am on April 23rd as estimated by Dr. Bayardo. All findings point to a post-mortem interval of about 20-24 hours before the body was filmed. (App.-284a.)

2. Stites Was Not Sexually Assaulted.

The CCA affirmed Petitioner's conviction, accepting that Petitioner raped Stites based on "expert testimony that the sexual assault occurred at or near the time of death." (App.-6a.) Dr. Bayardo has since recanted his testimony that Stites was sexually assaulted:

> I found on autopsy that Ms. Stites was sexually assaulted, and testified consistently at trial. However, the

> presence of spermatozoa in Ms. Stites's vaginal cavity was not evidence of sexual assault. There was no indication that the spermatozoa in Ms. Stites's vaginal cavity was placed there in any fashion other than consensually. Also, because there was no spermatozoa found in Ms. Stites's rectal cavity, there is no evidence that any spermatozoa was deposited in the rectal cavity as a result of the sexual assault.

(App.-278a.)

Drs. Baden and Spitz agreed. Dr. Baden explained that there "is no forensic evidence that Ms. Stites was sexually assaulted in any manner" and "that there is no evidence of anal intercourse or of sexual assault." (App.-289a.) Dr. Spitz confirmed that "there is no evidence of anal penetration." (App.289a.)

3. Petitioner's Sperm Was Not Deposited At The Time Of Death.

The State argued that the donor of the sperm and the murderer had to be the same person because sperm can only survive for 24 hours. Judge Alcala observed that the State repeatedly emphasized this supposed scientific fact to the jury at trial: "that semen got in that girl's body within 24 hours of that eleven o'clock moment which is when? On her way to work. . . . And semen, specifically spermatozoa, only stay about 24 hours." (App.-219a.)

However, Dr. Bayardo explained that "[i]f the prosecuting attorneys had advised me that they intended to present testimony that spermatozoa cannot remain intact in the vaginal cavity for more

than 26 hours, and argue that Ms. Stites died within 24 hours of the spermatozoa being deposited, I would have advised them that neither the testimony nor the argument was medically or scientifically supported." (App.-217a.)

Dr. Bayardo further stated:

> At trial, I testified that the very few spermatozoa I found in Ms. Stites's vaginal cavity had been deposited here "quite recently.". . . . I am personally aware of medical literature finding that spermatozoa can remain intact in the vaginal cavity for days after death. Accordingly, in my professional opinion, the spermatozoa I found in Ms. Stites's vaginal cavity could have been deposited days before her death. Further, the fact that I found "very few" (as stated in the autopsy report) spermatozoa in Ms. Stites's vaginal cavity suggests that the spermatozoa was not deposited within 24 hours before Ms. Stites's death. (App.-277a.)

Dr. Spitz further explained:

> Very few sperm were found on autopsy smears, and the crime scene investigator found only 3 intact spermatozoa. If the victim was sexually assaulted between 3-5 a.m., there would be more sperm found on the slides. . . . The amount of sperm found on the slides is more consistent with a longer interval between intercourse and the

> time the sample was collected. As I explain in my book, intact spermatozoa can be found in the vagina up to 72 hours after coitus. (App.-282a.)

Dr. Baden confirmed:

> The testimony at trial that no intact sperm remains in the vagina after 24 hours is not correct. It is my experience, and the experience of other forensic pathologists as reported in the forensic science literature, that sperm may remain intact for more than 72 hours after intercourse. The few sperm seen are entirely consistent with consensual intercourse that Petitioner said occurred between midnight and 3:00 a.m. on April 22, 1996. (App.-289a.)

Finally, three weeks ago, LabCorp issued a formal report designating the trial testimony of its technician that sperm can survive for no more than 24 hours as "unsatisfactory." (App.-409a.) The CCA heavily relied upon this testimony in affirming Petitioner's conviction, denying habeas relief and rejecting his Chapter 64 appeal. (App.6-a, 118a.)

4. Evidence Implicating Fennell.

Petitioner has developed substantial evidence implicating Fennell in Stites's murder.

Fennell testified for the State at Petitioner's 1998 trial, but invoked his Fifth Amendment rights in 2017 when called to testify by Petitioner at a habeas hearing. (App.-428-429a.) The subject of the hearing concerned newly-discovered statements that Fennell

made on April 23, 1996 while waiting in his apartment with his best friend, Bastrop Sheriff's deputy Curtis Davis, for investigators to locate Stites. Davis stated that Fennell told him he had been drinking the night before the murder with fellow officers. These statements by Davis contradicted Fennell's trial testimony and were not disclosed to Petitioner. (App.-427a.)

Petitioner has also uncovered the following:

- Fennell stated that he would strangle Stites with a belt if he caught her cheating on him. (App.-138a.)

- Fennell is completing a ten-year prison sentence for violently and sexually abusing women in his custody. (App.-420a-421a.)

- Fennell and other Giddings police officers routinely abused suspects, especially non-whites. (App.-198a.)

- Just months after Stites died, Fennell started dating another woman who described him as "abusive, possessive, controlling and extremely prejudiced toward African-Americans." (App.-197a, 415a.) Fennell later stalked her, harassed her next boyfriend, and caused him to lose his job. (App.-198a.)

- Fennell's ex-wife filed a report of domestic violence. (App.-226a.)

C. The Items Petitioner Sought To Test.

Petitioner sought DNA testing of three categories of evidence that could contain the DNA of the perpetrator of the crime: items recovered from Stites's body and clothing; items recovered near her body; and items found in or near Fennell's truck. (App.-8a.) The State conceded, and the CCA concluded, that the evidence exists in a condition that makes DNA testing possible and was either not tested or could be tested with new technology that would provide additional probative results. (App.-17a.)

D. Petitioner's Efforts To Obtain DNA Testing.

Petitioner first filed a motion for postconviction DNA testing in 1999. This motion, filed before the enactment of Chapter 64, was opposed by the State and denied by the Bastrop County District Court. (App.-98a.)

On January 13, 2014, before the State requested an execution date, Petitioner's counsel requested that the Bastrop County District Attorney consent to DNA testing and offered to pay for it. (App.-326a.)

On April 8, 2014, while Petitioner's counsel was negotiating with the State in an attempt to conduct consensual DNA testing, the State moved to set an execution date. (App.-326a.) On July 14, after further repeated delays by the State, the State approved an agreed *de minimis* testing order and rejected the bulk of Petitioner's testing requests. (App.-327a.) The same day, Petitioner filed his Chapter 64 Motion seeking to test the items for

which the State had not consented. (App.-327a) Petitioner's Motion included an affidavit of forensic DNA testing expert Deanna Lankford, stating that DNA evidence left by the actual killer would likely be found on the evidence. (App.-328a.) At the evidentiary hearing on the Motion, Petitioner called Ms. Lankford and crime scene investigative expert John Paolucci to discuss each item to be tested. (App.-331a.) The State called no rebuttal witnesses.

The District Court denied the Motion in a one-sentence bench ruling, stating it "was filed untimely and calls for unreasonable delay, that there's no reasonable probability the defendant would not have been convicted had the results been available at the trial of the case." (App.-95a.) The District Court later signed *verbatim* the State's proposed findings and conclusions. (App.-83a.)

Petitioner appealed to the CCA. On June 29, 2016, the CCA remanded the Chapter 64 Motion for further findings on certain statutory elements. (App.-68a.) Judge Keller dissented, ignoring all of the unrefuted evidence presented, claiming that "there is no hope of exoneration" no matter what DNA evidence might show because, in her view, the "rapist was [the] murderer . . . and the appellant was the rapist." (App.-79a.)

The State and Petitioner thereafter submitted proposed findings of fact and conclusions of law to the district judge, who then signed and docketed *both* submissions, which included contrary findings and conclusions. (App.-42a, 53a.)

E. The CCA's Ruling.

More than two years after Petitioner's appeal, the CCA affirmed the District Court's denial of Petitioner's Chapter 64 Motion. (App.-1a.) The CCA affirmed following remand without additional briefing and, therefore, Petitioner raised the constitutional issues presented here in his motion for rehearing, which the CCA denied. (App.-263a-265a, 269a-271a.)

The CCA's affirmance observed that "Reed's Chapter 64 motion largely hinges on the newly available analysis of touch DNA" and noted that the State did not dispute several Chapter 64 elements, including "that the items Reed seeks to have tested exist and are in a condition making DNA testing possible," and "were either not tested for DNA or could be tested with newer technologies providing more accurate and probative results." (App.-10a, 17a.)

With respect to key evidence, such as the belt used to strangle Stites and her clothing, the CCA accepted the State's argument that the statutory chain of custody element could not be met because of how the State handled and stored the evidence. (App.-19a.) Chapter 64, however, requires only a finding that the evidence sought to be tested has been subjected to a chain of custody "sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect." (App.-239a.) Moreover, there is no question that the items of evidence are what they are purported to be—that the belt is the murder weapon and that the clothing and name tag were taken from Stites's body.

Indeed, the State's custodian testified that none of these items had been substituted, replaced, tampered with or altered. (App.-14a.)

Nevertheless, the CCA accepted the District Court's findings (the ones proposed by the State) that the State's ungloved handling at trial of the items and subsequent storage conditions "casts doubt on the evidence's integrity" sufficient to preclude a chain of custody finding and access to probative DNA testing. (App.-20a.) The CCA read a possible contamination element into Chapter 64's chain of custody element where none exists in the statute. The CCA also disregarded its prior findings and the unrebutted testimony by Petitioner's experts that the evidence could be effectively subjected to DNA testing notwithstanding its handling and storage. (App.-10a-12a, 17a.)

The CCA's flawed chain of custody finding permeates its entire opinion. By excluding the evidence with the greatest potential to exonerate Petitioner and inculpate a third party, the CCA never considered whether exculpatory DNA test results from such evidence could have altered the outcome at trial. (App.-26a.) With respect to the other items for which the State could not refute chain of custody, the CCA relied on the retracted testimony of Dr. Bayardo and the false testimony of the crime scene investigator to conclude that exculpatory test results from such ancillary evidence items "do nothing to undermine the State's case or alter the evidentiary landscape at Reed's trial . . . [nor] affect the State's timeline supporting its theory tying the murder to the rape." (App.-32a.) Even though Petitioner presented the CCA with unrebutted proof that the

State's case was medically and scientifically impossible and was founded on retracted and false testimony, the CCA improperly incorporated such false testimony into its analysis.

The CCA also accepted the District Court's findings (the ones proposed by the State) that Petitioner's ongoing efforts to prove his innocence for a crime for which he is sentenced to die precluded him from establishing that he did not file his Motion to unreasonably delay his execution. (App.-37a.) *First*, the CCA found that Petitioner's request was "untimely" because there were no impediments preventing him from seeking testing earlier, despite recognizing that his motion was premised on "newly available" DNA analysis. (App.-10a, 37a, 40a.) *Second*, the CCA faulted Petitioner for his persistent efforts to prove his innocence, while ignoring his 1999 DNA testing motion altogether. (App.-38a.) The CCA likewise ignored the substantial postconviction evidence of Petitioner's innocence, and that Chapter 64 only requires Petitioner to show that he did not seek DNA testing to unreasonably delay his execution.

REASONS FOR GRANTING THE WRIT

When a state law creates a liberty interest, the state's procedures must comport with due process. *Evitts v. Lucey*, 469 U.S. 387, 399-401 (1985) (states "must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause"); *Wooten v. Virginia*, 154 F. Supp. 3d 322, 333 (W.D. Va. 2016) ("'[D]ue process is flexible' [and] protects the right *to actually receive* process if Plaintiff follows administrative remedies,

not the illusory 'opportunity' to request process that will never be given.") (quoting *Gilbert v. Homar*, 520 U.S. 924, 930 (1997)). Likewise, when a state creates a judicial remedy, access to that remedy must be fairly afforded. *See Bounds v. Smith*, 430 U.S. 817 (1977) (affirming that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law).

Like every other state in the union, Texas enacted a law, Chapter 64, to provide convicted persons a definitive right to obtain forensic DNA testing of evidence to prove their innocence either under a remedy provided for in the DNA law or under a separate postconviction remedy. (App.-431a.)[1]

The CCA, however, has a well-known history of unreasonably narrow interpretations that render Chapter 64 illusory. *See* C.S.S.B. 487, Committee Report (Apr. 7, 2015) ("recent [CCA] decisions have strictly interpreted the language of Chapter 64" to "prevent[] the discovery of exonerations"); C.S.S.B. 122 Committee Report (Sept. 1, 2011) (Chapter 64 amendments intended to address interpretations "in the Ricardo Rachell exoneration in Houston and the *Routier v. State* decision by the [CCA]"); *see also*

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[1] Texas enacted Chapter 64 to remedy significant inconsistencies in the judicial treatment of postconviction DNA testing requests. Tex. B. Anal., S.B. 3 (Mar. 21, 2001) ("[C]ourts tend to order testing only in the rare case in which a prosecutor agrees with an inmate's request.").

Postconviction DNA Testing: When Is Justice Served? S. Hrg. 106-1061, at 49-50 (June 13, 2000) (former CCA judge testifying that CCA's denials of Chapter 64 relief are "twisted, contorted and confused").

Postconviction DNA testing statutes have been enacted in all 50 states and by Congress.[2] The statutory provisions at issue here are identical or very similar to chain of custody provisions in 33 other jurisdictions and suitability statutes in 18 other jurisdictions.[3]

These statutes – as well as related postconviction remedies – create a constitutionally-protected liberty interest and right to regular access that cannot be frustrated by fundamentally unfair, judicially-created procedural hurdles erected to render them illusory. A prisoner's liberty interest, while limited, is infringed where "the State's procedures for postconviction relief 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 69 (2009) (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). Moreover, it is not sufficient that a state pay mere lip service to its own procedures because "[t]his 'state-

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[2] *See Access To Postconviction DNA Testing,* Innocence Project, (Jan. 17, 2018, 3:51 P.M.), https://www.innocence project.org/access-post-conviction-dna-testing/(compiling state statutes); 18 U.S.C. § 3600.

[3] *See* Appendix at 439a (compiling statutes).

created right . . . beget[s] yet other rights to procedures essential to the realization of the parent right.'" *Id.* at 68 (citation omitted).

This Court has not yet provided a standard for evaluating whether the application of a state's postconviction DNA testing procedure violates a prisoner's liberty interest under *Medina*. *See Cunningham v. Dist. Attorney's Office*, 592 F.3d 1237, 1261 (11th Cir. 2010) (recognizing that *Osborne* "attempted neither to define exactly the level of process required to satisfy the fundamental fairness standard nor to specify the process due").

The CCA construed the Chapter 64 language here (present in many other postconviction DNA testing statutes as well) to impose two separate unconstitutional bars to obtaining DNA testing. Accordingly, this case presents an ideal vehicle for clarifying the constitutional due process requirements of such statutes, and for prohibiting improper interpretations that render the right to testing illusory, particularly to those most vulnerable.

I. THE CCA'S INTERPRETATION OF CHAPTER 64'S CHAIN OF CUSTODY REQUIREMENT IS FUNDAMENTALLY UNFAIR AND DENIES PROCEDURAL DUE PROCESS AND ACCESS TO COURTS.

Certiorari should be granted to ensure that procedural due process is satisfied in the interpretation and application of Chapter 64 and similar postconviction DNA testing statutes. Due process is lacking when relief under a DNA testing statute is denied based upon non-statutory

requirements, contradictory findings of fact, and a misapplication of forensic science, particularly where such testing would be mandatory if the convicted person were tried today, and where the state could establish chain of custody if it sought to introduce the same evidence at trial for inculpatory purposes.

* * *

Chapter 64 requires findings on the authenticity of the evidence and its suitability for forensic DNA testing, without assigning a burden of proof on those issues. *See* Article 64.03(a)(1)(A)(ii) (evidence must be "subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect"); Article 64.03(a)(1)(A)(i) (requiring that evidence "still exists and is in a condition making DNA testing possible"). Similar requirements exist in many other DNA testing statutes.[4] The Texas legislature intended Chapter 64 to provide an accessible right[5] to DNA testing, such that authenticity could be established

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[4] *See* Appendix at 439a.

[5] In 2003, Texas explained that Chapter 64 should be similar in practice to pretrial motions. Tex. B. Anal., H.B. 1011 (Sept. 1, 2003) ("The Legislature did not intend to introduce procedures and burdens which mirror the traditional post-trial procedure of writs of habeas corpus."). Other states with similar chain of custody provisions treat the requirement in the same straightforward manner that Texas lawmakers intended. *See*, *e.g.*, *Olson v. State*, 750 N.W.2d 459, 461 (N.D. 2008) (under North Dakota statute, clerk testimony regarding existence of evidence satisfied chain of custody requirements); *Morrison v. Peterson*, 809 F.3d 1059, 1069 (9th Cir. 2015) (under California statute, prosecutor's obligation to retain biological evidence may demonstrate lack of tampering).

with "copies of reports from law enforcement officials." Tex. B. Anal., S.B. 3 (Mar. 21, 2001). Texas law permits custodians to issue self-authenticating chain of custody affidavits, eliminating the need for live testimony. Tex. R. Crim. Proc. § 38.42.

Chapter 64 has been met with stern judicial resistance in Texas. The CCA, which by statute oversees appeals of DNA testing motions in capital cases, routinely denies testing.[6] To deny testing

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[6] Petitioner's research reveals that the CCA has decided more than 80 appeals seeking DNA testing in capital cases but remanded for testing just four times since 2001. *Compare Esparza v. State*, 282 S.W.3d 913 (Tex. Crim. App. 2009); *Routier v. State*, 273 S.W.3d 241 (Tex. Crim. App. 2008); *Blacklock v. State*, 235 S.W.3d 231 (Tex. Crim. App. 2007); *Smith v. State*, 165 S.W.3d 361 (Tex. Crim. App. 2005), *with LaRue v. State*, 518 S.W.3d 439 (Tex. Crim. App. 2017); *Pruett v. State*, No. AP-77,065, 2017 WL 1245431 (Tex. Crim. App. Apr. 5, 2017), *cert. denied*, 138 S. Ct. 213 (2017); *State v. Swearingen*, 478 S.W.3d 716 (Tex. Crim. App. 2015) (reversing trial court's grant of Chapter 64 motion); *Davis v. State*, No. PD-1490-14, 2015 WL 9594718 (Tex. Crim. App. Mar. 18, 2015); *Pruett v. State*, No. AP-77,037, 2014 WL 5422573 (Tex. Crim. App. Oct. 22, 2014); *Holberg v. State*, 425 S.W.3d 282 (Tex. Crim. App. 2014); *State v. Swearingen*, 424 S.W.3d 32 (Tex. Crim. App. 2014) (reversing trial court's grant of Chapter 64 motion); *Hughes v. State*, No. AP-76,921, 2012 WL 5878821 (Tex. Crim. App. Nov. 15, 2012); *Wilson v. State*, No. AP-76,835, 2012 WL 3206219 (Tex. Crim. App. Aug. 7, 2012); *State v. Holloway*, 360 S.W.3d 480 (Tex. Crim. App. 2012), *abrogated on other grounds*, *Whitfield v. State*, 430 S.W.3d 405 (Tex. Crim. App. 2014); *Cantu v. State*, No. AP-76,281, 2010 WL 4010833 (Tex. Crim. App. Oct. 13, 2010); *Gutierrez v. State*, 307 S.W.3d 318 (Tex. Crim. App. 2010); *Swearingen v. State*, 303 S.W.3d 728 (Tex. Crim. App. 2010); *Leal v. State*, 303 S.W.3d 292 (Tex. Crim. App. 2009); *Garcia v. State*, No. PD-1039-08, 2009 WL 3042392 *(cont'd)*

here, the CCA grafted a non-existent statutory element—absence of "contamination"—upon Chapter 64's authentication requirement, such that DNA testing is now categorically unavailable for evidence that is indisputably suitable for DNA testing if it was

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(Tex. Crim. App. Sept. 23, 2009); *Prible v. State*, 245 S.W.3d 466 (Tex. Crim. App. 2008); *Wilson v. State*, 185 S.W.3d 481 (Tex. Crim. App. 2006); *Thacker v. State*, 177 S.W.3d 926 (Tex. Crim. App. 2005); *Smith v. State*, 165 S.W.3d 361 (Tex. Crim. App. 2005); *Hood v. State*, 158 S.W.3d 480 (Tex. Crim. App. 2005); *Flores v. State*, No. 74,708, 2004 WL 3092757 (Tex. Crim. App. Apr. 28, 2004); *Whitaker v. State*, 160 S.W.3d 5 (Tex. Crim. App. 2004); *Skinner v. State*, 122 S.W.3d 808 (Tex. Crim. App. 2003); *Wolfe v. State*, 120 S.W.3d 368 (Tex. Crim. App. 2003); *Smith v. State*, No. 74,575, 2003 WL 22303995 (Tex. Crim. App. Oct. 8, 2003); *Shannon v. State*, 116 S.W.3d 52 (Tex. Crim. App. 2003); *Wilson v. State*, No. 74,390, 2003 WL 1821465 (Tex. Crim. App. Mar. 26, 2003); *Bell v. State*, 90 S.W.3d 301 (Tex. Crim. App. 2002); *Rivera v. State*, 89 S.W.3d 55 (Tex. Crim. App. 2002); *Dinkins v. State*, 84 S.W.3d 639 (Tex. Crim. App. 2002); *State v. Patrick*, 86 S.W.3d 592 (Tex. Crim. App. 2002); *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App. 2002).

This may reflect the empirically-proven tendency of elected judges to deny relief in capital cases. *See*, *e.g.*, K. Berry, *How Judicial Elections Impact Criminal Cases* (Dec. 2, 2015), available at *https://www.brennancenter.org/publication/how-judicial-elections-impact-criminal-cases* ("Empirical studies … find that proximity to re-election makes judges more punitive – more likely to impose longer sentences, affirm death sentences, and even override life sentences to impose death."); *see also* D. Levine and K. Cooke, *In states with elected high court judges, a harder line on capital punishment* (Sept. 22, 2015), available at *https://www.reuters.com/investigates/special-report/usa-deathpenalty-judges* ("In the 15 states where high court judges are directly elected, justices rejected the death sentence in 11 percent of appeals, less than half the 26 percent reversal rate in the seven states where justices are appointed.").

handled at trial or if the evidence's DNA profile was potentially altered while in State storage thereafter. The CCA has shut the DNA testing door—and, thus, the pathway to scientifically challenge a wrongful conviction—to, at the very least, an entire class of persons who were convicted before the legislature enacted evidence-handling laws. *See* Tex. R. Crim. Proc. § 38.43. This is particularly troubling given that Texas leads the nation in both executions (545 since 1976) and in exonerations through DNA testing (59).[7]

As construed by the CCA, Chapter 64's authentication element unfairly and unconstitutionally denies applicants their statutory right to DNA testing of potentially exculpatory

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[7] *See Executions by Region,* Death Penalty Information Center (Nov. 9, 2017), https://www.deathpenaltyinfo.org/number-executions-state-and-region-1976; *see also Exonerations by State,* Nat'l Registry of Exonerations (Jan. 16, 2018), http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx. Many Texas DNA exonerations result from formal conviction integrity units in Dallas, Houston, San Antonio and Fort Worth. I. Chandler, Conviction Integrity Review Units: Owning the Past, Changing the Future, Crim. Justice (Summer 2016), at 3, available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/v31/chandler.authcheckdam.pdf. Bastrop County has never had a DNA-based exoneration and lacks a conviction integrity unit. *See Exonerations by State*, Nat'l Registry of Exonerations (Jan. 16, 2018), http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx. Bastrop County is sparsely populated and mostly white. *See* https://www.census.gov/quickfacts/fact/table/bastropcountytexas/PST120217 (whites account for more than 87% of Bastrop County's 2016 population of 82,700).

evidence. This Court therefore should grant review to clarify that postconviction DNA testing under Chapter 64 cannot be denied based on non-statutory, judicially-created authentication criteria when the statute's express chain of custody requirements are satisfied.

* * *

Both halves of the belt used to strangle Stites were recovered by investigators, matched to the ligature pattern on her neck, and admitted into evidence at Petitioner's trial. Petitioner's fingerprints were not on the belt, and no DNA testing of it was ever conducted, despite the obvious evidentiary value of such test results. Petitioner's Chapter 64 Motion sought to conduct DNA tests on both belt sections, which have been secured since trial by the Bastrop County Clerk.

When Stites's body was recovered, investigators observed her plastic work name tag resting on one knee outside her pants, and extensive scratches on her exposed skin resulting from the dragging of her body. Petitioner sought to test Stites's shoes, clothing and name tag because the person that dragged her body and placed the name tag on her knee likely left DNA on those items. Like the belt, Stites's shoes, clothing and name tag have been maintained securely in the State's custody.

Two years after Petitioner's first motion for DNA testing was denied, Texas enacted laws that would have presumptively subjected this evidence to mandatory DNA testing in a capital case. Texas Code Crim. Proc. § 38.43(i)-(j).

* * *

The CCA's construction and application of Chapter 64's authenticity requirement to Petitioner's Chapter 64 Motion are fundamentally unfair and deny Petitioner procedural due process for at least three reasons.

First, the CCA accepted the District Court's contradictory findings on whether the evidence is suitable for DNA testing and is authentic. The State conceded, and CCA accepted, that the evidence exists in a condition suitable for DNA testing. (App.-17a.) However, the District Court accepted, and the CCA affirmed, the State's position that the "manner in which the evidence was handled and stored [by the State] casts doubt on the evidence's integrity" and that the chain of custody provisions of Article 64.03(a)(1)(ii) were therefore not met. (App.-20a.) The two conclusions are mutually exclusive: the evidence cannot be in a condition sufficient to permit DNA testing if the risk of contamination precludes DNA testing.

There are additional contradictory judicial findings and conclusions on these issues. The trial judge signed and filed with the CCA the divergent findings and conclusions proposed by both Petitioner and the State.[8] (App.-42a, 53a.) The contradictory

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[8] Retired Judge Shaver notoriously presided over a capital case in which defense counsel slept through key prosecution witness testimony. He commented to the press that the "Constitution says everyone's entitled to the lawyer of their choice . . . . The Constitution doesn't say the lawyer has to be awake." H. Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, Los Angeles Times, July 15, 2000 (Main News, Part A, at 1).

findings, which directly conflict on chain of custody and other critical issues, were never vacated or withdrawn. (App.-47a, 57a.) Remarkably, the CCA never even acknowledged that the District Court submitted competing findings. Moreover, the CCA's conclusion that chain of custody was not satisfied overlooked the uncontested testimony from the Bastrop County Clerk that the evidence had always been secured under lock and key in the custody of the Bastrop County Clerk's Office, and had never been tampered with or altered in any way. (App.-14a.) This testimony from the State's official custodian should have been dispositive and supported a finding that Chapter 64's chain of custody requirement was satisfied.

Second, to comport with due process, Chapter 64's authenticity requirement must be construed and applied consistent with well-settled standards governing authenticity and chain of custody. Texas's traditional legal standard for authentication of evidence through chain of custody requires only that a "proponent produce evidence sufficient to support a finding that the item is what the proponent claims it is[,]" *see* Tex. R. Evid. 901(a) (2017), and that this authenticity standard for admitting DNA evidence for purposes of establishing guilt is not overcome by possible or actual contamination.

In *Dossett v. State*, 216 S.W.3d 7 (Tex. App. 2006), writing for the majority, Judge Keasler (the author of the opinion that is the subject of this petition), rejected a defendant's argument that the State could not establish chain of custody of DNA evidence due to contamination. *Dossett*, a cold-case prosecution, turned on DNA results obtained from a 20-year-old

rape kit that had grown fungus, mold and bacteria, and also contained other unidentifiable DNA. 216 S.W.3d at 16, 20-21. The CCA held that the mere possibility of contamination or tampering was "insufficient to exclude evidence" on chain of custody grounds. *Id.* at 21-22 (internal citations omitted).

The CCA has repeatedly held that the risk of contamination is insufficient to preclude the admission of DNA evidence, and does not destroy chain of custody. *See Druery v. State*, 225 S.W.3d 491, 503-04 (Tex. Crim. App. 2007) ("Absent evidence of tampering or other fraud[,] . . . problems in the chain of custody do not affect the admissibility of evidence. Instead, such problems affect the weight that the fact-finder should give the evidence . . . ."); *Lagrone v. State*, 942 S.W.2d 602, 617 (Tex. Crim. App. 1997) ("Without evidence of tampering, most questions concerning care and custody of a substance go to the weight attached, not the admissibility."). *Accord Wortham v. State*, 903 S.W.2d 897, 900 (Tex. App. 1995).

Courts in other jurisdictions consistently reach the same conclusion. *See, e.g., People v. Hickey*, 687 N.E.2d 910 (Ill. 1997) (possible contamination or degradation of DNA evidence, quality of control and quality assurance measure employed by laboratories, and protocol and manner in which it was followed are issues that go to weight of DNA evidence and not DNA evidence's admissibility under the *Frye* test); *People v. Whalen*, No. 4-09-0563, 2011 WL 10468207 (Ill. App. Ct. Sept. 30, 2011) (storage of evidence for 15 years in an open box with other evidence and possible contamination with the DNA of a person unrelated to the commission of the crime are not

sufficient reasons to prohibit testing because "it is also possible a third person could be identified who committed the crime. A 'mixed DNA sample' is accepted in the scientific community to reliably reveal the number of contributors to a DNA sample and major versus minor contributors."); *People v. Mehlberg*, 618 N.E.2d 1168 (Ill. App. Ct. 1993) (expert witnesses should be used to raise doubts in the jury's mind regarding reliability of DNA evidence and laboratory procedures); *People v. Ko*, 757 N.Y.S.2d 561 (N.Y. App. Div. 2003), *cert. granted, judgment vacated sub nom. Ko v. New York*, 542 U.S. 901 (2004) ("[M]itochondrial DNA analysis has been found reliable by the relevant scientific community, and that issues regarding contamination go to the weight to be given such evidence."); *Wagner v. State*, 864 A.2d 1037 (Md. Ct. Spec. App. 2005) (potential for contamination of DNA testing of evidence affected weight of DNA evidence, not DNA evidence admissibility); *Bean v. State*, 373 P.3d 372 (Wyo. 2016) (speculation of contamination and allegations or questions regarding the care and custody of DNA evidence is an issue for jury in determining if DNA evidence is reliable; it is not a question of admissibility); *People v. Perez*, 59 N.E.3d 891, 898 (Ill. App. Ct. 2016) ("Once the State has introduced evidence at trial and used that evidence to procure a conviction, we will not entertain an argument from the State that that evidence should now be considered too tainted to be considered.").

This is not the first time the CCA has violated a petitioner's constitutional rights in a capital case by applying a different standard to postconviction requests – notably, standards that it does not apply outside of the postconviction context. In *Moore v.*

Texas, this Court reversed the CCA's denial of habeas relief to a death row inmate because the CCA applied outmoded scientific standards in evaluating whether the inmate was intellectually disabled. 137 S. Ct. 1039, 1042 (2017). The CCA applied a standard for evaluating mental disability that was contrary to the standard applied in other contexts, including state-mandated testing for intellectual disabilities or determining if juvenile offenders were intellectually disabled. In reversing the CCA, this Court remarked that "Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, *yet clings to superseded standards when an individual's life is at stake*." *Id.* at 1052 (emphasis added). The CCA did the same thing here by reading into Chapter 64's chain of custody a "contamination" element that is neither found in the statute nor applied by the State in other chain of custody contexts, such as when seeking to introduce evidence for inculpatory purposes.

The CCA's addition of a new element into Chapter 64's chain of custody requirement is fundamentally unfair because, among other reasons, it places an impossible burden on a convicted person with respect to evidence over which he or she has no control. This is acutely problematic for those, like Petitioner, who were convicted years ago because new DNA testing techniques have the ability to exonerate despite the now-prohibited manner in which the State handled evidence.

Other courts have recognized the fundamental unfairness of placing a heightened burden on the movant to show that the State adequately

maintained the items in order to establish similar chain of custody requirements. These courts have found that such statutory constructions would eviscerate legislative intent and deny due process to persons seeking postconviction DNA testing. *See State v. Pratt*, 842 N.W.2d 800, 811 (Neb. 2014) (reversing district court decision that evidence that was handled by multiple individuals at trial and co-mingled in cardboard box after 1975 trial did not meet chain of custody requirement: "[i]f we were to interpret the physical integrity prong as demanding that the biological evidence was secured in a way likely to avoid accidental contamination with extraneous DNA from epithelial cells, then the express purposes of the Act would be undermined"); *Newton v. City of New York*, 681 F. Supp. 2d 473, 491 (S.D.N.Y. 2010) (rejecting argument that movant must show evidence of bad faith when City misplaced evidence: "due process rights have been violated if attempts to locate the evidence are frustrated due to poor or non-existent evidence management system"). *Accord Cookson v. State*, 86 A.3d 1186, 1192 (Me. 2014) (dissenting opinion states that requiring defendant to "prove a negative" that evidence was not tampered with "places an impossible burden on any person seeking DNA analysis, and the Court's interpretation is an illogical reading of the postconviction DNA analysis statute").

Third, even if Chapter 64 contained a "no contamination" element, and it does not, the CCA erred in concluding that the mere *risk* of contamination as a result of the State's handling of it precluded a favorable chain of custody finding because that conclusion is flatly at odds with the evidence presented. Petitioner presented unrebutted

testimony from two experts that probative results could be achieved from DNA testing of the evidence covered by the Motion, irrespective of how the State handled or stored it. (App.-11a.) Indeed, the CCA stated that the evidence is "in a condition making DNA testing possible" and that it could be "tested with newer technologies providing more accurate and probative results." (App.-17a.)

Certiorari is necessary because the CCA's interpretation of the chain of custody element wrongly excluded from consideration the key evidence introduced at Petitioner's trial, *including the murder weapon*, the victim's clothing and essentially every other item touched by the murderer. The CCA's improper construct and application of Chapter 64's chain of custody/authentication element to deny Petitioner's Chapter 64 Motion infects the entire CCA opinion. In particular, the issue wrongly limited the CCA's consideration of whether Petitioner would have been convicted in light of exculpatory results to evidence items that were not directly and obviously associated with the murder. The CCA thus failed to consider the exculpatory effects of *any* of the key evidence used to convict Petitioner, and ignored the same body of relevant evidence in assessing Petitioner's intent in requesting DNA testing, all because the CCA adopted a fundamentally unfair and unconstitutional interpretation of Chapter 64's chain of custody requirement. *See infra* Section II.

II. THE CCA'S INTERPRETATION OF CHAPTER 64'S UNREASONABLE DELAY ELEMENT VIOLATES DUE PROCESS BECAUSE IT IS OVERBROAD AND ASSUMES GUILT.

This Court should grant review of the CCA opinion to correct the CCA's interpretation of Chapter 64's unreasonable delay element: Art. 64.03(a)(2)(B). (App. 251a.) The CCA improperly equated unreasonable delay to laches, instead of confining its analysis, as the statute requires, to whether Petitioner sought DNA testing to unreasonably delay his execution or the administration of justice.

In denying Petitioner's Chapter 64 Motion, the CCA relied on cases in which the CCA found movants sought testing to delay an imminent execution. (App.-37a, citing *Swearingen v. State*, 303 S.W.3d 728, 736 (Tex. Crim. App. 2010) (motion filed 21 days before scheduled execution); *Thacker v. State*, 177 S.W.3d 926, 927 (Tex. Crim. App. 2005) (motion filed less than 30 days before scheduled execution).)[9] Petitioner's efforts to seek DNA testing and his

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[9] The CCA also cited a concurring opinion in *State v. Patrick*, 86 S.W.3d 592, 598 (Tex. Crim. App. 2002), which, likewise, stated that the legislature wanted to prohibit "last minute" requests from delaying the execution of a sentence. *Reed*, 2017 WL 1337661, at *11 n.36]. *Cf. Skinner v. State*, 122 S.W.3d 808, 811 (Tex. Crim. App. 2003) (overruling trial court's finding of "unreasonable delay" and finding where movant does not have set execution date execution, and has federal habeas appeal pending, DNA testing could be conducted before appellant is assigned an execution date or appears on his federal habeas claim).

Chapter 64 Motion were not made in the face of a pending execution date. When Petitioner sought the State's consent to conduct DNA testing, no execution was scheduled, and the State had not moved to set one. The CCA nonetheless improperly and unfairly faulted Petitioner for not filing his Chapter 64 Motion sooner, even though it had specifically noted that Petitioner's Motion was premised on "newly available" DNA testing techniques. (App.-10a.)

The CCA's affirmance of the District Court's finding that Petitioner sought DNA testing to unreasonably delay his unscheduled execution violated Petitioner's due process rights, including because in 2011, the Texas legislature specifically *removed* from Chapter 64 a prior fault-based requirement following the CCA's decision in *Skinner v. State,* 293 S.W.3d 196, 201-02 (Tex. Crim. App. 2009). Before the 2011 amendment, Chapter 64 required a movant to prove that the evidence to be DNA tested had not previously been tested "through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing." *See* Certain Pretrial and Post-Trial Procedures and Testing in a Criminal Case, 82nd Leg., 2011 Reg. Sess., ch. 14 § 5, 2011 Tex. Sess. Law Serv. Ch. 278 (H.B. 1573) (Vernon) (amending Tex. Code Crim. Proc. Ann. art. 64.01). The 2011 amendment to Chapter 64 removed this element and replaced it with the current requirement: that the movant merely show his motion was not meant to *unreasonably* delay his execution. Here, as with the chain of custody element, the CCA simply ignored both the letter and spirit of the statute to deny DNA testing.

Moreover, the CCA's opinion improperly reads an assumption of guilt into Chapter 64. The CCA stated that Petitioner's "unreasonable delay" in seeking DNA testing was shown by his "protracted litigation" since his conviction. (App.-37a.) The CCA lists Petitioner's habeas record, insinuating that his persistent efforts to prove his innocence of a crime for which he was sentenced to die justifies a finding of "unreasonable delay." (App.-37a-38a.) Reading a presumption of guilt into the statute deprives Petitioner of due process for at least two reasons.

First, the CCA's presumption of guilt in considering a movant's intent is not consistent with the legislature's stated intent that Chapter 64 impose a *lower* burden than other postconviction procedures. *See* Texas Bill Analysis, H.B. 1011 (Apr. 17, 2003), 78th Legislature, 2003 Regular Session (Chapter 64 intended to create motions practice akin to pretrial motions that is less onerous than post-trial procedures).

Second, the CCA judged Petitioner's intent through a fundamentally unfair lens. The CCA assumed that Petitioner's persistence equates to unreasonable delay, but did not temper that assessment with any consideration of the substantial evidence of Petitioner's innocence developed through Petitioner's postconviction litigation efforts. The CCA also disregarded Petitioner's diligent efforts to obtain DNA testing by motion in 1999 and by agreement from January to July 2014; and the prompt filing of Petitioner's Chapter 64 Motion when negotiations with the State failed. Given the CCA's well-documented extreme reluctance to order postconviction DNA testing over the State's objection,

see n. __ *infra*, Petitioner's counsel can hardly be faulted for sustained efforts to obtain the State's consent.

Moreover, Petitioner's intent in seeking DNA testing should be gauged in light of all of the facts. Petitioner filed his Chapter 64 Motion *after* Dr. Bayardo, the medical examiner at trial, recanted his trial testimony regarding, among other things, the occurrence of sexual assault, the time of Stites's death and the supposed sperm-based nexus between coitus and death. The CCA improperly ignored Dr. Bayardo's retraction, the testimony of Drs. Baden and Spitz and the other postconviction evidence of Petitioner's innocence. That, too, was error. Fundamental principles of due process require that a wrongly convicted person, such as Petitioner here – a man determined to prove his innocence despite the State's continued reliance upon retracted testimony and false evidence to preserve Petitioner's conviction – should be able to invoke Chapter 64 with the assurance that the evidence of his innocence, and his sheer perseverance in *finding* that same evidence, will not be used to close the door on his wrongful conviction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 1, 2018

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