No. 17-1093

IN THE
Supreme Court of the United States

RODNEY REED,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

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

BRIEF OF *AMICI CURIAE* 13 RETIRED JUDGES IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Petitioner Rodney Reed seeks access to evidence used to convict him in order to conduct DNA testing on that evidence—testing that was unavailable in 1996 when the crime at issue occurred. This testing will either show that Petitioner's DNA is on the crime scene evidence, consistent with the State's theory of the crime, or that someone else's DNA is on that evidence, consistent with Petitioner's claim that

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amicus curiae,* its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief under Rule 37.2(a), and all parties have given their consent to the filing of this brief.

he was wrongly convicted. The only way to know whether the State or Petitioner is correct is to allow Petitioner to conduct the testing that he seeks to conduct at his own expense.

Texas has created a post-conviction DNA testing statute that, in theory, would allow such testing to occur. But the Texas trial court denied Petitioner's motion for DNA testing of this evidence, and the Texas Court of Criminal Appeals upheld that denial. They did so by grafting new requirements onto the Texas statute that preclude a defendant from obtaining DNA testing of evidence that, in the same condition, the State could subject to DNA testing and use to prosecute a defendant and even though the State unilaterally controls how the evidence is handled.

Amici are former judges from around the country with a vested interest in ensuring the integrity of judicial proceedings.[2] It is critically important to the fair administration of the death penalty and state post-conviction DNA testing statutes that States be required to provide basic procedural due process in implementing these statutes. These statutes seek to further the core value of protection against wrongful convictions by allowing convicted persons access to evidence used to convict them so that that evidence can be DNA tested. The Texas Court of Criminal Appeals' decision guts that core value. This petition presents a question left open in *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 69 (2009)—when do the procedures employed by

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

a State to limit a defendant's access to DNA testing fail to comport with procedural due process.

The hundreds of exonerations based on DNA evidence provide convincing proof that innocent individuals are sometimes convicted. Every State now has a post-conviction DNA testing statute, and it is imperative that those statutes be implemented in a fair way that ensures procedural due process. Amici feel compelled to file this brief because they believe strongly that the Court needs to provide guidance on what procedural due process means in the context of post-conviction DNA testing statutes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Notions of fairness and truth have long served as the foundations of our justice system. *E.g.*, *Coffin v. United States*, 156 U.S. 432, 456 (1895) (holding that it is "better that ten guilty persons escape than that one innocent suffer" (quoting 2 William Blackstone, Commentaries *358)). DNA testing increases the accuracy of convictions and ensures those principles continue to play a central role in our justice system. *See Osborne*, 557 U.S. at 62. To that end, all fifty states have enacted post-conviction DNA testing statutes intended to further truth and fairness in criminal convictions. These statutes allow the wrongfully convicted to prove their innocence in an innocence claim or habeas petition.

State-created post-conviction DNA testing statutes must comport with procedural due process, as this Court held in *Osborne*. *Id.* at 68–69. The case below exemplifies post-conviction DNA testing procedures that are fundamentally *un*fair. The Texas Court of Criminal Appeals imposed on Petitioner a chain of

custody requirement far more burdensome than the requirement that governs whether prosecutors can introduce evidence at trial. And making matters worse, Texas unilaterally controls the evidence—*i.e.* how it is stored and who has access to it—such that it is the *State's* actions that determine whether a convicted person can meet the chain of custody requirement. In both of these respects, Texas has rendered illusory procedural due process in the application of its DNA testing statute.

This Court declined to provide specific guidance about the procedural due process right surrounding post-conviction DNA testing in *Osborne*, but such guidance is sorely needed. This Court has provided just this type of guidance in other cases, and it should do so here as well. That would help ensure that application of these statutes furthers the principles of truth and fairness underlying our justice system.

ARGUMENT

I. POST-CONVICTION DNA TESTING STATUTES ARE BASED ON TRADITIONAL NOTIONS OF FAIRNESS AND ACCURACY INHERENT IN OUR JUSTICE SYSTEM.

Our Nation's justice system is founded on a longstanding commitment to protecting innocent people's liberty and only punishing those truly culpable. As this Court has noted time and again, the law reflects our society's long-held belief that it is paramount to ensure the innocent are not wrongfully convicted. *See Schlup v. Delo*, 513 U.S. 298, 320 (1995) ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system" and

is reflected in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). This deeply embedded principle is more than a testament to the nation's values in justice; it is also a means to foster faith in the judicial system.

Post-conviction DNA testing statutes, like Chapter 64 of the Texas Code of Criminal Procedure, are a modern embodiment of this principle. Modern DNA testing provides more accurate evidence than any prior technique. *Osborne*, 557 U.S. at 62. As technology has advanced, the ability of DNA testing to exonerate the innocent has increased exponentially. Today, for example, it is possible to obtain DNA even from fingerprints left at a crime scene and to test that DNA for comparisons. *See* Roland AH van Oorschot et al., *Forensic trace DNA: a review*, Investigative Genetics 2–3 (2010).[3] As this Court has stated, "there is no technology comparable to DNA testing for matching tissues when such evidence is at issue." *Osborne*, 557 U.S. at 62; *see also* Kristen McIntyre, *A Prisoner's Right to Access DNA Evidence to Prove His Innocence: Post-*Osborne *Options*, 17 Tex. Wesleyan L. Rev. 565, 567–68 (2011).

To date, 354 innocent people have been freed as wrongfully convicted as a result of DNA testing, and 152 true perpetrators have been identified.

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

Exonerate the Innocent, Innocence Project.[4] The availability of DNA testing for convicted defendants thus enhances the finality of convictions and the legitimacy and accuracy of the criminal justice system as a whole. JH Dingfelder Stone, *Facing the Uncomfortable Truth: The Illogic of Post-Conviction DNA Testing for Individuals Who Pleaded Guilty*, 45 U.S.F. L. Rev. 47, 53 (2010).

The first DNA testing statutes were enacted in 1994 and 1997 by New York and Illinois, respectively. *See* Act of Aug. 2, 1994, ch. 737, 1994 N.Y. Laws 3709 (codified at N.Y. Crim. Proc. Law Ann. § 440.30(1-a) (West)); Act of May 9, 1997, Pub. Act. No. 90-141, 1997 Ill. Laws 2461 (codified at 725 Ill. Comp. Stats., ch. 725, § 5/116-3(a) (West)). Since then, every other state and the federal government has enacted post-conviction DNA testing statutes to address this advancing technology. The environment in which these statutes were enacted is telling. Texas politicians, for example, envisioned that DNA testing would be an integral tool in the efficient and fair adjudication of criminal cases even before the implementation of Texas's post-conviction DNA testing statute. Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 Am. Crim. L. Rev. 1239, 1239–40 (2005). The State must now DNA test evidence in capital cases. Tex. Code Crim. Proc. Ann. art. 38.43(i). Chapter 64 was enacted to provide a definitive right to access forensic DNA testing and to remedy

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[4] *Available at* https://www.innocenceproject.org/exonerate/ (last visited Mar. 5, 2018).

existing inconsistencies in access to that tool. *See* House Research Org., Bill Analysis, Tex. S.B. 3 (Mar. 21, 2001) ("[C]ourts tend to order testing only in the rare case in which a prosecutor agrees with an inmate's request.").

Post-conviction DNA testing statutes are not ends in themselves, but a means by which convicted persons may develop claims for actual innocence. Every state has developed procedures that are at least ostensibly intended to allow incarcerated individuals to pursue claims of actual innocence by presenting newly discovered evidence. *See* John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(G-1)?*, 76 Alb. L. Rev. 1453, 1472–74 (2013). And courts have increasingly adopted theories of habeas relief that acknowledge that the incarceration of the innocent offends basic principles of justice fundamental to our society.

This Court has recognized that actual innocence claims are also potentially cognizable in habeas through constitutional claims. *See In re Davis*, 557 U.S. 952 (2009); *Herrera v. Collins*, 506 U.S. 390 (1993). And for good reason: Punishing the innocent "makes no measurable contribution to the acceptable goals of punishment." Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence As A Constitutional Claim*, 50 Cal. W. L. Rev. 171, 212 (2014). Moreover, wrongful incarceration of the innocent constitutes "purposeless and needless imposition of pain and suffering" that is grossly out of proportion to the severity of the crime—or lack thereof. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

Courts in Texas and other states have followed this Court's lead in acknowledging the availability of habeas relief to protect the factually innocent. *See, e.g.*, *Holmes v. Honorable Ct. of Appeals for the Third Dist.*, 885 S.W.2d 389 (Tex. Crim. App. 1994); *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). Today, courts have recognized habeas claims premised on actual innocence theories based on newly discovered evidence, jurisdictional defects, and fundamental trial defects such as constitutionally ineffective assistance of counsel. *See* Daryl E. Harris, *By Any Means Necessary: Evaluating the Effectiveness of Texas' DNA Testing Law in the Adjudication of Free-Standing Claims of Actual Innocence*, 6 Scholar 121, 127-28 (2003).

Of course, an innocence claim and the post-conviction DNA testing that would support it go hand-in-hand. A convicted person cannot meaningfully pursue an innocence claim without being able to access crime-scene evidence for purposes of conducting the DNA testing contemplated by post-conviction DNA testing statutes. In *Osborne*, this Court held that state-created post-conviction DNA testing statutes must be "fundamentally []adequate to vindicate the substantive rights provided" but declined to specify what minimum due process requires in this context. 557 U.S. at 69. Absent this Court's guidance on that issue, meaningful access to post-conviction DNA testing often remains restricted. As explained below, the Texas Court of Criminal Appeals has interpreted Chapter 64 to impose an enhanced chain-of-custody requirement, even though defendants have no control over the chain of custody, and to preclude defendants from obtaining DNA testing, even though

prosecutors can use testing conducted under the same facts to seek a conviction. It is time for this Court to provide further guidance, as it has in other contexts, about what procedural due process requires.

II. THE DECISION BELOW EXEMPLIFIES A FAILURE TO PROVIDE PROCEDURAL DUE PROCESS TO A DEFENDANT.

The Texas Court of Criminal Appeals' decision provides a stark example of why guidance from this Court is crucial: While the State's post-conviction DNA testing statute *theoretically* provides Petitioner and other convicted persons the right to post-conviction DNA testing, in practical and technical terms, convicted persons cannot meaningfully access that right because of a set of impossible-to-meet prerequisites, such as the chain-of-custody standard. Fair administration of the death penalty and the principles of fairness and truth underpinning our justice system require more.

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

Chapter 64 provides for post-conviction DNA testing. A convicted person may submit a motion to the convicting court for DNA testing of evidence "that has a reasonable likelihood of containing biological material," Tex. Code Crim. Proc. Ann. art. 64.01(a-1), if the evidence was "secured in relation to the offense" for which the person was convicted and has been "in the possession of the state during the trial of the offense," *id.* at 64.01(b). Because Chapter 64 is not providing a do-over for DNA testing, the testing must be for one of three reasons: (1) the

evidence was not previously subjected to DNA testing; (2) the evidence can be tested using newer techniques with a reasonable likelihood of more accurate or probative results; or (3) the evidence was previously tested at a lab that has since been shut down because an audit by the Texas Forensic Science Commission revealed that the lab had engaged in "faulty testing practices" during the time the prior test occurred. *Id.*

Once these conditions are met, a convicted person may obtain DNA testing if the court finds that other requirements related to the condition, authenticity, and probativeness of the evidence are met. *See id.* at 64.03(a). Specifically, Chapter 64 provides that the convicting court may order DNA testing "only" if:

> (1) the court finds that:
>
> (A) the evidence:
>
> (i) still exists and is in a condition making DNA testing possible; and
>
> (ii) 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;
>
> (B) there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and
>
> (C) identity was or is an issue in the case; and

> (2) the convicted person establishes by a preponderance of the evidence that:
>
> > (A) the person would not have been convicted if exculpatory results had been obtained through DNA testing; and
> >
> > (B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

Id.

The Texas legislature enacted Chapter 64 in 2001 to increase post-conviction access to DNA testing and remedy inconsistencies in how courts treated requests for DNA testing. *See* House Research Org., Bill Analysis, Tex. S.B. 3 (Mar. 21, 2001). While Chapter 64 imposes a series of substantial hurdles that convicted persons must overcome before a Texas court will order testing, this case shows that the Court of Criminal Appeals has improperly interpreted Chapter 64 to make those requirements even more demanding.

In the decision below, the court effectively wrote a new non-contamination requirement into Chapter 64's chain-of-custody requirement, Tex. Code Crim. Proc. Ann. Art. 64.03(a)(i)(A)(ii). The Court of Criminal Appeals affirmed the trial judge's conclusion that certain items Petitioner sought to have tested had been "contaminated, tampered with, or altered." App.-17a. According to the trial judge, this contamination occurred because the evidence had been handled without gloves by "attorneys, court

personnel, and possibly the jurors," and DNA from those individuals could have been transferred to the evidence as a result. App.-19a-20a. In addition, the various items of evidence had been comingled, such that there is "a good chance that [the items in the clerk's boxes are] contaminated evidence." App.-19a. The notion of "contamination" appears nowhere in the statute. By grafting a new non-contamination requirement onto the statute, the Court of Criminal Appeals hampered the fair administration of the death penalty.

B. Fair Administration Of The Death Penalty Requires Subjecting Defendants And The State To The Same Standards Regarding DNA Evidence.

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

Nevertheless, that court's interpretation of Article 64.03(a)(1)(A)(ii) to require no likelihood of contamination imposes a greater burden than that faced by prosecutors seeking to introduce evidence at trial. Texas's standard for authentication of evidence through chain of custody only requires that a "proponent . . . produce evidence sufficient to support a finding that the item is what the proponent claims it is." Tex. R. Evid. 901(a). This authenticity standard for admitting DNA evidence to establish guilt is not defeated by possible or even actual contamination. *See id.* Texas courts have applied this standard liberally for prosecutors. In *Dossett v. State*, 216 S.W.3d 7 (Tex. Crim. App. 2006), for example, the court rejected a defendant's challenge that the State could not establish chain of custody of DNA evidence because the mere possibility of contamination or tampering was "insufficient to exclude the evidence" on chain-of-custody grounds even where a 20-year-old rape kit had grown fungus, mold, and bacteria and contained other unidentifiable DNA. *Id.* at 20–22; *see also Druery v. State*, 225 S.W.3d 491, 503–04 (Tex. Crim. App. 2007) ("[a]bsent evidence of tampering or other fraud[,] . . . problems in the chain of custody do not affect the admissibility of evidence" but rather go to the weight of the evidence). This is undoubtedly a lower chain-of-custody standard than what the Court of Criminal Appeals imposed on convicted persons seeking DNA testing under Chapter 64.

Courts in other states have looked at chain-of-custody requirements containing language nearly identical to Article 64.03(a)(1)(A)(ii) and concluded that there should not be a higher burden regarding chain of custody for defendants who want to DNA

test evidence than for prosecutors who introduced the same type of evidence at trial. *See*, *e.g.*, *People v. Travis*, 329 Ill. App. 3d 280, 285 (2002) ("It asks too much to require petitioning defendant in these cases to plead and prove proper chain of custody at the outset, for the evidence at issue will undoubtedly have been within the safekeeping of the State, not the defendant."); *People v. Noble*, No. 1-11-3548, 2012 WL 6861355, at *4 (Ill. App. Ct. Dec. 21, 2012) ("An allegation that the evidence to be tested had been in the continuous possession of the police or some other State agency is facially sufficient regarding the chain-of-custody requirement, and a defendant cannot be expected to prove at the outset a proper chain of custody because the evidence at issue will typically have been within the State's possession."); *Commonwealth v. Lyons*, 51 N.E.3d 476, 484 (Mass. App. Ct. 2016) (allowing a petitioner to obtain discovery regarding the condition and chain of custody of evidence she sought tested because she met her burden of showing evidence was potentially material).

Courts that have looked squarely at this question have found that interpretations of the chain-of-custody requirement that place unfair burdens on convicted defendants, as compared to prosecutors, unfairly restrict convicted defendants' rights to obtain DNA testing. In *People v. Perez*, the evidence that the defendant wished to have tested "was admitted as evidence at trial and had thus presumably remained in the possession and control of the State." 59 N.E.3d 891, 897 (Ill. App. Ct. 2016). The court thus concluded that "[t]o require defendant to provide any more specific information than this, information he would not be privy to, would render it

nearly impossible for a defendant to ever obtain forensic testing." *Id.*

In *United States v. Fasano*, the defendant argued on appeal that "the district court erred in finding that he failed to meet the chain of custody requirements" of the federal Innocence Protection Act (IPA). 577 F.3d 572, 575 (5th Cir. 2009). The IPA's chain-of-custody provision required that the evidence be in the State's possession and have been "subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing." 18 U.S.C. § 3600(a)(4). The district court in *Fasano* held that the chain-of-custody requirement for DNA testing purposes was "narrower than that demanded for the admission of evidence at trial." *Fasano*, 577 F.3d at 576. The Fifth Circuit rejected that interpretation:

> We do not read the statute to impose a more exacting standard for a showing of the chain of custody in a proceeding under the Innocence Act than would be demanded in a trial itself. Indeed there is argument with some purchase, that the trial standard is itself too exacting for an inquiry into whether tests should be ordered.

Id. The Fifth Circuit went on to discuss the circumstances of the evidence in question, noting that the lack of evidence of chain of custody should not inure to the detriment of the convicted. The Fifth Circuit explained: "we cannot place upon the

defendant the burden of proving its history while it is held in government custody." *Id.* at 577. The language of the Texas statute tracks the IPA's chain-of-custody provision almost exactly, and as with the federal statute, interpreting that provision in a way that places a higher burden on the defendant than the State faced at trial "would create an entrance gate so difficult to enter as to frustrate the core objective of the statute." *Id.*

If DNA testing statutes are going to have sustained, meaningful effects on our justice system, they have to be interpreted to further the aims of the statutes and to allow defendants to effectively have access to evidence used to convict them. When discussing these statutes, courts have also repeatedly recognized the need for "a fundamentally adequate system for permitting defendants to access evidence." *Newton v. City of New York*, 779 F.3d 140, 152 (2d Cir. 2015). A fundamentally adequate system cannot prevent convicted defendants with no control over evidence in a state's possession from testing that evidence because of an unduly restrictive reading of the chain-of-custody requirement.

C. Fair Administration Of The Death Penalty Precludes Denying Post-Conviction DNA Testing Based On Factors Within The State's Unilateral Control.

The process afforded convicted persons under Chapter 64, as unilaterally modified by the Court of Criminal Appeals, is also fundamentally unfair because the government has physical control over the evidence and can effectively control whether the chain-of-custody requirement can be met. As part of

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

Thus, the government maintains physical custody of the biological evidence and can control who has access to it and where and how it is stored. The statute governing preservation of evidence in Texas—Chapter 38.43 of the Texas Code of Criminal Procedure—does not specify where this evidence is to be stored, at what temperature, how it is preserved, or who has access to it. Indeed, Chapter 38.43 provides no precise guidance about how to fulfill the State's preservation obligation. As happened here, the preserved evidence could be handled by others or comingled together while the government has physical custody of the evidence and the exclusive ability to dictate how it is treated.

The government's actions alone will therefore determine whether the evidence a convicted person wants tested through Chapter 64's procedures will meet the chain of custody requirement. With this power, Texas could effectively prevent any—or all—convicted persons from ever obtaining post-conviction DNA testing. The Fifth Circuit concluded,

with respect to the chain-of-custody requirements imposed on convicted persons and prosecutors, that "we cannot place upon the defendant the burden of proving its history while it is held in government custody." *Fasano*, 577. F.3d at 577.

The same is true with respect to a judicially created contamination requirement that is entirely outside the convicted person's control: It is fundamentally unfair to require a perfect record for post-conviction testing when the government retains custody of the evidence at issue. *See also Newton v. City of New York*, 681 F. Supp. 2d 473, 491 (S.D.N.Y. 2010) (movant need not show evidence of bad faith when the City misplaced evidence because "due process rights have been violated if attempts to locate the evidence are frustrated due to a poor or non-existent evidence management system"); *State v. Pratt*, 842 N.W.2d 800, 811 (Neb. 2014) ("If we were to interpret the physical integrity prong as demanding that the biological evidence was secured in a way likely to avoid accidental contamination with extraneous DNA from epithelial cells, then the express purposes of the Act would be undermined.").

What is more, there is no remedy for convicted persons when evidence in Texas's custody is mishandled. Chapter 38.43 does not provide any remedy when the State's actions render the evidence contaminated. And this Court's precedent in *Arizona v. Youngblood*, 488 U.S. 51 (1988), suggests that little relief would be constitutionally required. *Id.* at 56–57 (finding that failure to preserve evidence does not establish a substantive due process violation unless the defendant can show bad faith by the government in destroying the evidence and the exculpatory value of the evidence was apparent

before the evidence was destroyed). Finally, Chapter 38.43 even allows Texas to destroy evidence as long as the State provides notice to the defendant and the convicting court. Tex. Code Crim. Proc. Ann. art. 38.43(d). The State has exclusive control over the evidence and nearly unchecked power to render it contaminated.

Texas is not the only state with preservation requirements that place the evidence exclusively within the government's control. For example, Virginia has created limited preservation duties and has also explicitly eliminated any causes of action that could arise from improper evidence destruction. Va. Code Ann. § 19.2-270.4:1(E) (2008) ("Nothing in this section shall create any cause of action for damages against the Commonwealth, or any of its political subdivisions or officers, employees or agents of the Commonwealth or its political subdivisions."); *Lovitt v. Warden*, 585 S.E.2d 801, 815–816 (Va. 2003) (holding that state did not act in bad faith and did not violate due process when destroying DNA evidence and any failure of state to comply with statutory evidence preservation requirement did not entitle petitioner to habeas corpus relief); *see generally* Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 Drake. L. Rev. 799, 852 n.362 (2011).

Alabama has adopted a different approach, but its statutory regime likewise provides an illusory right to post-conviction DNA analysis. The convicted individual, and his trial record, must show that the "evidence to be tested is in the possession of the state or the court and has been subject to a chain of custody sufficient to establish that it has not been

altered in any material respect." Ala. Code § 15-18-200(f)(1)(b). Despite these requirements, the government has no preservation duty until after it receives a post-conviction request for DNA testing. *Id.* at § 15-18-200(d). Thus, convicted individuals seeking relief under this statute are put in an impossible position: They must prove the condition of evidence the government has no duty to preserve.

This Court cautioned in *Osborne* that "constitutionaliz[ing] this area would short-circuit what looks to be a prompt and considered legislative response" to the challenges DNA technology pose to our criminal justice systems. 557 U.S. at 73. Nearly nine years later, the Court of Criminal Appeals has interpreted Texas' post-conviction DNA testing statute in a way that is fundamentally unfair and contrary to our long-held belief in the importance of our judicial system's truth-seeking function. And there is opportunity for similarly unfair interpretations of these statutes in other states. The judges interpreting post-conviction DNA testing statutes consequently need guidance from this Court about how to apply these statutes in ways that comport with these long-held principles and procedural due process.

III. STATE COURTS NEED GUIDANCE AS TO WHAT PROCEDURAL DUE PROCESS REQUIRES WITH RESPECT TO POST-CONVICTION DNA TESTING STATUTES.

Proper interpretation of DNA testing statutes necessitates some understanding of what minimum process is due under the Fourteenth Amendment. State courts administering state-created rights such as Chapter 64 look to this Court for guidance on

preserving procedural due process rights. *See Osborne*, 557 U.S. at 67–68. But this Court has not yet set clear guideposts for procedural due process rights surrounding post-conviction DNA testing.

In *Osborne*, the convicted defendant had a post-conviction right to present "newly discovered evidence" to prove that he deserved a "vacation of [his] conviction or sentence in the interest of justice." *Id.* at 68 (quoting Alaska Stat. §§ 12.72.020(b)(2), 12.72.010(4)). The Court confirmed that post-conviction rights are subject to due-process review, and cautioned that "[f]ederal courts may upset a State's postconviction relief procedures [when] they are fundamentally inadequate to vindicate the substantive rights provided." *Id.* at 69. *Osborne* set forth only two indicia of fundamentally inadequate procedures—a lack of access to discovery and time bars. It left for another day what procedures imposed on post-conviction rights would cross the line.

The Texas Court of Criminal Appeals has filled the void left by *Osborne* with a host of restrictions on the right to DNA testing that render the right virtually illusory for many convicted defendants. In so doing, the Court of Criminal Appeals has removed much of the force from a law passed to protect against imprisonment of the innocent. The judicial gloss has left Texas's post-conviction procedures "fundamentally inadequate to vindicate the substantive rights provided" by Chapter 64.

Courts in Texas and elsewhere need guidance from this Court, similar to what the Court has provided in other procedural due process contexts. Although *Osborne* specified that post-conviction relief is

subject to the procedural-due-process framework applied to state criminal law and procedure, which means that Texas courts may not administer Chapter 64 in any unfair manner they can conjure up, this Court has long provided guidance to state courts as to whether criminal laws and procedures abide by federal constitutional due-process requirements.

Just last year, this Court held that a state providing a refund of costs, fees, and restitution paid by defendants whose convictions have been reversed or vacated may not first require a showing of innocence by clear and convincing evidence. *Nelson v. Colorado*, 137 S. Ct. 1249 (2017). *Nelson* provides a more comprehensive set of guideposts by which states can judge procedural due process compliance: whether foundational rights such as the presumption of innocence are involved, the severity of the burden on the party seeking to exercise its rights, and the adequacy of existing truth-seeking procedures. *Id.* at 1255–58. This Court further noted fallacies in Colorado's position that would—against the law's stated purpose—allow the State to keep an innocent person's money. *Id.* at 1257. *Nelson* offered the sort of clear-cut conclusion absent from *Osborne*: "To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated." *Id.* at 1258. A similarly detailed and unambiguous holding regarding the procedural due process inherent in a particular state right is essential here.

Some criminal-procedure rights are so fundamental that a trial cannot occur without them, such as a defendant's right to demonstrate incompetence.

Medina v. California, 505 U.S. 437 (1992). Others exist only if states choose to create them. *See Osborne*, 557 U.S. at 65. But in both scenarios, states have some leeway to define rights and access to them, fettered by this Court's procedural due process guidelines. When a state purports to create rights for criminal defendants, the administration of those rights may not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," but beside references to centuries-old common law, *Medina* did not thoroughly explain what such an offense might look like. 505 U.S. at 446 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

This Court has since fleshed out the *Medina* rule in the context of a defendants' right to show incompetence to stand trial. States may not impose a burden on the defendant to demonstrate incompetence by clear and convincing evidence that "has [no] roots in prior practice" when "a rule significantly more favorable to the defendant has had a long and consistent application," resulting in "a significant risk of an erroneous determination that the defendant is competent." *Cooper v. Oklahoma*, 517 U.S. 348, 356, 363 (1996).

States now need a similar demarcation of procedural due process guideposts in the context of post-conviction DNA testing, which since *Osborne* has been made a right by statute in every state. The newness of this right creates a challenge: Unlike in *Medina* and *Cooper*, there are no centuries of practice to look to. That makes guidance from this Court all the more urgent.

While *Osborne*, *Cooper*, and *Medina* all addressed the constitutionality of state statutes on their face, this Court should still provide guidance even though the Texas Court of Criminal Appeals—rather than the state legislature—has imposed restrictions on Petitioner's access to his right. A decade ago, this Court held that a court's mere routine of visibly shackling a defendant during the penalty phase of a capital case violates the defendant's procedural due process rights. *Deck v. Missouri*, 544 U.S. 622 (2005). *Deck* offers precisely what Petitioner here requests: a general rule for what state courts may, or may not, do along with guidance for when deviation from that rule is permissible. *See id.* at 633 (While routine shackling is not permissible, "case specific" determinations "reflect[ing] . . . special security needs or escape risks" allow for some judicial discretion.). In the same vein, the issue here is not the Court of Criminal Appeals' misinterpretation of Chapter 64. Rather, it is whether the Texas Court's gloss on Chapter 64—which is the law of the land—comports with federal procedural due process.

All fifty states have now enacted post-conviction DNA testing laws, and based on a review of the litigation of those laws since, *Osborne*'s review of Alaska's procedures has proven insufficient guidance for the States. The Texas Court of Criminal Appeals has thrown up roadblocks that eviscerate convicted persons' liberty interest in post-conviction relief and in so doing, deprive Petitioner and similarly situated defendants of their due process rights. The substantive right provided by Chapter 64—and by laws in every state—is plain: the "forensic DNA testing of evidence" for convicted persons. This

Court should now pick up where *Osborne* left off and evaluate whether the harsh procedural restrictions placed on that right are fundamentally inadequate to allow meaningful access to it.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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ADDENDUM

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AMICI CURIAE RETIRED JUDGES

Harry Lee Anstead

Justice, Florida Supreme Court (1994-2009, Chief Justice 2002-2009); Judge, Florida 4th Circuit Court of Appeals (1977-1994).

Charles F. Baird

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

U. W. Clemon

Judge, United States District Court for the Northern District of Alabama (1980-2006, Chief Judge 1999-2006).

Oliver E. Diaz, Jr.

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

W. Thomas Dillard

Magistrate Judge, United States District Court for the Eastern District of Tennessee (1976-1978).

Norman S. Fletcher

Justice, Supreme Court of Georgia (1989-2005, Chief Justice 2001-2005).

Gerald Kogan

Justice, Florida Supreme Court (1987-1998, Chief Justice 1996-1998); Judge, Eleventh Judicial Circuit of Florida (1980-1987).

Nan R. Nolan

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

Michol O'Connor

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

Stephen M. Orlofsky

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

Sol Wachtler

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

Warren D. Wolfson

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

Michael D. Zimmerman

Justice, Utah Supreme Court (1984-2000, Chief Justice 1994-1998).