No. 17-1093

IN THE

# Supreme Court of the United States

RODNEY REED,
*Petitioner*,
vs.

THE STATE OF TEXAS
*Respondent*.

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

## RESPONDENT'S BRIEF IN OPPOSITION


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**CAPITAL CASE**

## QUESTIONS PRESENTED

1. Whether jurisdiction exists for pure state-law procedural questions, and where the purportedly constitutional issues were not passed upon below but raised for the first time in a discretionary, post-judgment motion being directly appealed to this Court.

2. Whether fact-bound questions, not properly raised below, regarding Texas's postconviction DNA testing scheme—a scheme in accord with many other states and the Court's relevant precedent—warrant review.

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## BRIEF IN OPPOSITION

Almost twenty years ago, Petitioner Rodney Reed was convicted of capital murder for the abduction, rape, and strangulation of Stacey Stites and sentenced to death. Reed has vigorously challenged his conviction since its imposition. Five years into this fervent attack, Texas enacted a postconviction DNA testing scheme—Chapter 64 of the Texas Code of Criminal Procedure. Reed's present DNA testing request, however, came only after a court of appeals affirmed the denial of federal habeas relief, thirteen years after Chapter 64 became effective.

Nonetheless, the State agreed to DNA test some of the items collected during the investigation. The results confirmed what the jury had found nearly two decades ago—that Reed is guilty. For the other items, Reed engaged Chapter 64. However, depending on the specific item, Reed failed to satisfy at least two of the reasonable requirements under Chapter 64—that the evidence not be tampered with or altered, and that the DNA testing request not be made for purposes of unreasonable delay. Reed now appeals from a decision of the highest criminal court in Texas affirming those two evidentiary failings.

There is no jurisdiction in this case. The issues Reed raises are truly state-law matters. Fact-bound matters tied to procedural requirements in a state statute do not present a constitutional issue.

Even if Reed presented constitutional issues—which he does not—they were not raised in the trial court, they were not properly raised in the court below, they were not passed upon, and they are not the same as

those perfunctorily mentioned in a motion for rehearing. This case therefore presents an exceedingly poor vehicle for their resolution.

Reed also fails to demonstrate a constitutional deprivation. There is nothing unconstitutional in requiring evidence integrity and diligence in a postconviction DNA testing statute. Reed, however, failed to meet either of these requirements. He simply disagrees with the result below and tries to constitutionalize his complaints. The petition should be denied.

## STATEMENT OF THE CASE

### I. THE CAPITAL MURDER TRIAL

Stacey Stites was a happily-engaged nineteen-year-old just eighteen days shy of her wedding. 43.RR.81–82, 85.[1] She lived in an apartment complex with her police-officer fiancé, Jimmy Fennell, and her mother, Carol, who lived in the apartment below, and with whom Stites spent her last days planning her upcoming nuptials. 43.RR.81; 44.RR.51.

Stites worked at a Bastrop, Texas grocery store—about thirty miles from her residence—and was scheduled for a 3:30 a.m. shift. 43.RR.95; 44.RR.48. When she did not show, a fellow employee became worried and called Carol around 6:30 a.m. 43.RR.96, 101–02. Carol then called Fennell, who went to look for Stites while Carol notified authorities. 44.RR.70–71.

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[1] "RR" refers to the transcribed statement of facts of from Reed's capital murder trial, or reporter's record, preceded by volume and followed by page numbers.

Before Carol was alerted to Stites's disappearance, a Bastrop police officer had, at 5:23 a.m., discovered the pickup truck Stites took to work, which was seemingly abandoned in a local high school parking lot. 43.RR.117. Because the truck was not reported stolen, the officer took no further action, but, before he left, he noticed a piece of a belt lying outside the truck. 43.RR.118–122.

Later that day, Stites's body was found off a rural road. 44.RR.18, 21. Texas Department of Public Safety Crime Laboratory (DPS) personnel processed the scene. 44.RR.108. They observed a partially clothed Stites—her shirt removed, bra exposed, and missing a shoe and an earring. 44.RR.113. Her pants were undone, the zipper was broken, and her panties were bunched at her hips. 44.RR.113–14, 122. She was discovered with her work apparel—a nametag and a large knee brace. 44.RR.128, 151. On the side of the road was another piece of belt. 44.RR.115.

Because of obvious signs of rape, a DPS criminalist took vaginal and breast swabs from Stites's body. 44.RR.123; 45.RR.51. On-site chemical testing signaled the presence of semen. 44.RR.124–27. Around 11:00 p.m. that night, microscopic analysis showed the presence of intact sperm, which indicated recent seminal deposit—based on published scientific articles, sperm remains whole within the vaginal cavity for usually no longer than twenty-six hours. 44.RR.131; 45.RR.15–16.

Later forensic testing matched the belt fragments to each other, and it appeared that the belt was torn apart, not cut, 47.RR.83–85, and it was identified as Stites's, 45.RR.102. A search of the truck yielded Stites's

missing shoe and earring, and the remnants of a smashed, plastic drinking glass. 47.RR.44–45; 49.RR.34, 38. Additionally, the driver's-side seatbelt was still engaged and the seat was angled in a way that a 6'2" person could properly utilize the rearview mirror. 46.RR.101; 49.RR.43.

Stites's body was autopsied the next day by Dr. Roberto Bayardo. 48.RR.111. He observed a large mark across Stites's neck that matched the pattern of her belt. 48.RR.119–20, 136–37. There were also bruises on Stites's arms consistent with forcible restraint, bruises on her head consistent with the knuckles of a fist, and bruises on her left shoulder and abdomen consistent with an over-the-shoulder seat belt. 48.RR.115–18. Based on physical changes in the body, Dr. Bayardo estimated time of death at 3:00 a.m., give or take four hours. 48.RR.113–14.

Dr. Bayardo took vaginal, oral, and rectal swabs. 48.RR.121–23. He, too, observed intact sperm from a vaginal swab, which he stated indicated "quite recent[]" seminal deposit. 48.RR.121–22. There were also injuries to Stites's anus, including dilation and lacerations, which were consistent with penile penetration inflicted at or near the time of death. 48.RR.126–27. And, Dr. Bayardo, via microscopic analysis, thought he saw sperm heads from a rectal-swab slide, though he acknowledged that chemical testing was negative for semen. 48.RR.123–24. Nonetheless, he noted that sperm break down quicker in the rectal cavity than in the vagina, so the fragmented sperm also indicated recent seminal deposit. 48.RR.125.

Thereafter, DPS personnel conducted DNA testing on the vaginal, rectal, and breast swabs, and the results indicated that the foreign DNA came from a single source. 49.RR.95–113. They also "mapped" Stites's panties, which showed little movement after seminal deposit. 44.RR.190–91; 55.RR.40. This too connected the timing of the seminal deposit with the murder. 55.RR.41.

For approximately a year, multiple agencies searched for Stites's killer. They interviewed hundreds and obtained biological samples from twenty-eight males; none matched the foreign DNA in and on Stites. 46.RR.111–12; 49.RR.114–19. And none mentioned that Reed associated with Stites. 46.RR.112.

Reed became a suspect in Stites's murder after he was arrested for kidnapping, beating, and attempting to rape and murder another nineteen-year-old woman, Linda Schlueter.[2] 46.RR.122. Schlueter was abducted by Reed approximately six months after Stites's murder, near both the route Stites typically took to work and the time she disappeared—3:00 a.m. 61.RR.10, 37–47. Moreover, Reed was regularly seen in this area by Bastrop police officers in the early morning hours, and his home was close to where both Stites's and Schlueter's vehicles were abandoned. 50.RR.70–73, 80, 95–96. Further, Reed's height—6'2"—aligned with the angle of the driver's seat. 49.RR.43.

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[2] The details of the Schlueter offense were not introduced at the guilt-innocence phase. The jury only knew that law enforcement had "information that led [them] to look at [Reed] as a suspect." 46.RR.122.

Given the similarities between these crimes, law enforcement inquired with DPS if they had Reed's DNA profile on file; they did because Reed had raped his intellectually disabled girlfriend, Caroline Rivas.[3] 46.RR.122–23. Reed's DNA profile was compared to the foreign DNA inside and on Stites's body—the two were consistent. 50.RR.104. Reed was then questioned and he denied knowing Stites. 48.RR.82–83. Additional biological samples were obtained from Reed via search warrant. 48.RR.18, 86–92.

More DNA testing was performed by DPS and by a private laboratory retained by the State. 49.RR.118–19; 50.RR.120–36, 140; 49.RR.127; 51.RR.33–34. The results were conclusive—Reed could not be excluded as the foreign DNA contributor but 99% of the world's population could be, and only one person in 24 to 130 billion people would have the same foreign DNA profile. 49.RR.118, 122; 50.RR.144–45; 51.RR.80. But, to be sure, samples were taken from Reed's father and three of his brothers, and they were ruled out as contributors too. 49.RR.123–25

Reed's two trial counsel, assisted by three investigators and a DNA expert, attempted to counter this damning evidence with a two-pronged attack—they tried to blame someone else for the murder, and they argued that Reed and Stites were engaged in a clandestine but consensual sexual relationship.

To prove the former, Reed's DNA expert, Dr. Elizabeth Johnson, testified that a hair found on Stites's

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[3] The jury, at the guilt-innocence phase, only knew that "there was a known sample [of Reed] on file," but not the details of Rivas's rape. 46.RR.123.

back did not match any of the samples gathered by law enforcement, and a couple of witnesses testified they saw three men in a white truck near the area where Stites's body was recovered. 51.RR.107–08, 124–25; 54.RR.50–52.

Trial counsel also suggested that Fennell was the murderer, and that law enforcement did not thoroughly investigate him—law enforcement interviewed Fennell several times and they collected biological samples from him, but never searched his apartment. 45.RR.110–12; 46.RR.62.

Further, trial counsel cast suspicion on David Lawhon, a Bastrop resident who murdered another woman, Mary Ann Arldt, two weeks after Stites's death. 46.RR.158. They called several witnesses that testified about a connection between Stites and Lawhon, including one who said Lawhon had confessed to killing Stites. 52.RR.29–31, 89.

As to the secret-relationship defense, one witness testified that she saw Stites and Reed talking at the grocery store, and another said Stites came by Reed's house looking for him. 51.RR.136; 53.RR.92. The jury did not believe Reed's defenses and found him guilty of two counts of capital murder.

## II. THE STATE'S PUNISHMENT CASE

The rape and murder of Stites was hardly Reed's first or last foray against women. First was Connie York, a nineteen-year-old who had come home late one evening after swimming with friends. 57.RR.34–35. York was grabbed from behind and told "don't scream or I'll hurt you." 57.RR.35–36. When York did not listen, she was

repeatedly struck, dragged to her bedroom, and raped multiple times. 57.RR.37–42. Reed was interviewed, and, while he admitted that he knew York from high school, he denied raping her. 57.RR.123–24. When confronted with a search warrant for biological samples, Reed had an about-face, "Yeah, I had sex with her, she wanted it." 57.RR.138. The case went to trial four years later, 57.RR.30, 60, and Reed was acquitted, 57.RR.61.

Next was A.W., a twelve-year-old girl, who was home alone, having fallen asleep on a couch after watching TV. 58.RR.36–42. A.W. awoke when someone began pushing her face into the couch and had blindfolded and gagged her. 58.RR.42–43. She was repeatedly hit in the head, called vulgar names, and orally, vaginally, and anally raped. 58.RR.43–49. The foreign DNA from A.W.'s rape kit was compared to Reed; Reed was not excluded and only one in 5.5 billion people would have the same foreign DNA profile from A.W.'s rape kit. 58.RR.51, 92; 61.RR.26.

Then came Lucy Eipper, who Reed had met in high school, and whom Reed began to date after her graduation. 59.RR.10–12. Eipper had two children with Reed. 59.RR.13–14, 19–20 Throughout their relationship, Reed physically abused Eipper, including while she was pregnant, and raped her "all the time," including one time in front of their two children. 59.RR.14–17, 21, 25–32.

Afterwards, Reed began dating Caroline Rivas, an intellectually disabled woman. 60.RR.39–41. Rivas's caseworker noticed bruises on Rivas's body and, when asked about them, Rivas admitted that Reed would hurt her if she would not have sex with him. 60.RR.41, 61.

Later, Rivas's caseworker noticed that Rivas was walking oddly and sat down gingerly. 60.RR.43. Rivas admitted that Reed had, the prior evening, hit her, called her vulgar names, and anally raped her. 60.RR.44, 63–65. The samples from Rivas's rape kit provided the link to Stites's murder. 60.RR.89–90.

Shortly thereafter, and about six months before Stites's murder, Reed raped Vivian Harbottle underneath a train trestle as she was walking home. 59.RR.87–92. When she pleaded for her life for the sake of her children, Reed laughed at her. 59.RR.94. The foreign DNA from Harbottle's rape kit was compared to Reed; he could not be excluded, and only one person in 5.5 billion would be expected to have the same foreign DNA profile. 59.RR.95, 113–14; 61.RR.26.

Finally, and about six months after Stites's murder, Reed convinced nineteen-year-old Linda Schlueter to give him a ride home at about 3:30 a.m. 61.RR.10, 37–47. Reed led her to a remote area and then attacked her. 61.RR.47–58. After a prolonged struggle, Schlueter asked Reed what he wanted and Reed responded, "I want a blow job." 61.RR.60. When Schlueter told Reed that "you will have to kill me before you get anything," Reed stated "I guess I'll have to kill you then." 61.RR.60. Before Schlueter could be raped, a car drove by and Reed fled. 61.RR.62–64.

After Reed's trial counsel, assisted by his three investigators, a forensic psychologist and a neuropsychologist, presented a case in an attempt to mitigate punishment, the jury answered the special

issues in such a way that Reed was sentenced to death. 1.CR.489–493.[4]

## III. REED'S POSTCONVICTION PROCEEDINGS.

Reed's conviction was affirmed on direct appeal by the Texas Court of Criminal Appeals (CCA), *Reed v. State*, No. 73,135 (Tex. Crim. App. Dec. 6, 2000) (*Reed I*), and this Court denied Reed a writ of certiorari, *Reed v. Texas*, 534 U.S. 955 (2001).

With direct appeal pending, Reed filed an application for state habeas relief. 2.SHCR-01/02, at 2–251.[5] A little more than a year later, Reed filed a "supplemental claim." 3.SHCR-01/02, at 391–402. The CCA denied Reed's initial application and found the "supplemental claim" to be a subsequent application and dismissed it as abusive. *Ex parte Reed*, Nos. 50,961-01, 50,961-02 (Tex. Crim. App. Feb. 13, 2002) (*Reed II*).

Reed turned to federal court, filing a habeas petition in the Western District of Texas, Austin Division. Petition for a Writ of Habeas Corpus, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012). The case was stayed and placed in abeyance so that Reed

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[4] "CR" refers to the clerk's record for Reed's capital murder trial. The references are preceded by volume number and followed by page numbers.

[5] "SHCR-01/02" refers to the clerk's record for Reed's first and second state habeas proceedings. Similarly, "SHCR-03," "SHCR-04," "SHCR-05," "SHCR-06," "SHCR-07," and "SHCR-08" refer to the third, fourth, fifth, sixth, seventh, and eighth state-habeas-proceeding clerk's records, respectively. The references are preceded by volume number and followed by page numbers.

could return to state court. Order, Mar. 1, 2004, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012).

Reed then filed his third state habeas application. 1.SHCR-03, at 2–343. The CCA dismissed all of Reed's claims as abusive, save two claims that were remanded to the trial court for factual development. *Ex parte Reed*, No. WR-50961-03, 2005 WL 2659440, at *1 (Oct. 19, 2005) (*Reed III*). After a live hearing and findings from the trial court, the CCA issued an exhaustive opinion denying relief and finding that Reed's actual innocence "claim" was not persuasive enough to overcome the untimeliness of his procedurally defaulted claims. *Ex parte Reed*, 271 S.W.3d 698 (Tex. Crim. App. 2008) (*Reed IV*).

With his third state habeas application pending, Reed filed his fourth and fifth state habeas applications. SHCR-04, at 2–15; SHCR-05, at 2–89. Both applications were dismissed as abusive by the CCA. *Ex parte Reed*, Nos. WR-50,961-04, WR-50,961-05, 2009 WL 97260, at *1–6 (Tex. Crim. App. Jan. 14, 2009) (*Reed V*).

After those proceedings terminated, Reed filed his sixth state habeas application. SHCR-06, at 2–59. This, too, was dismissed as abusive by the CCA. *Ex parte Reed*, No. WR-50961-06, 2009 WL 1900364, at *1–2 (Tex. Crim. App. July 1, 2009) (*Reed VI*).

The stay in federal district court was lifted. Order, Aug. 20, 2009, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012). A federal magistrate judge recommended denial of relief, *Reed v. Thaler*, No. A-02-CV-142-LY, 2012 WL 2254217 (W.D. Tex. June 15, 2012) (*Reed VII*), which the federal district judge largely adopted, and who independently denied relief, Order on

Report and Recommendation, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012). The federal district judge also denied all of Reed's post-judgment filings. Order, Feb. 4, 2013, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012).

Reed then appealed the denial of federal habeas relief, but the Fifth Circuit affirmed by denying a certificate of appealability (COA). *Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014) (*Reed VIII*). This Court denied Reed's petition for writ of certiorari from this proceeding. *Reed v. Stephens*, 135 S. Ct. 435 (2014).

The State then requested the setting of Reed's execution. 1.CR(DNA).34–35.[6] The trial court heard the State's motion and granted a modified execution date. 1.RR(DNA).17.[7] The Court also memorialized an agreement between the State and Reed for DNA testing on certain items. 2.CR(DNA).144–48.

The same day as the execution-setting hearing, Reed filed his Chapter 64 motion. 2.CR(DNA).74–143. A hearing was held on the motion, and the trial court heard from five witnesses and received documentary evidence. After considering this evidence and the trial record, the trial court denied Reed's Chapter 64 motion because he failed to prove, by a preponderance of the evidence, that he would not have been convicted had exculpatory DNA results been available at trial and that

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[6] "CR(DNA)" refers to the clerk's record for the Chapter 64 proceeding. The references are preceded by volume number and followed by page numbers.

[7] "RR(DNA)" refers to the reporter's record for the Chapter 64 hearing. The references are preceded by volume number and followed by page numbers.

he did not request DNA testing to unreasonably delay the execution of sentence or the administration of justice. 4.RR(DNA).227. These findings were later reduced to writing. 3.CR(DNA).362–68. Reed then filed a notice of appeal. 3.CR(DNA).359.

About three weeks before his then-pending execution date, Reed filed his seventh state habeas application. 1.SHCR-07, at 8–84. This application caused the CCA to stay Reed's execution, *Ex parte Reed*, No. WR-50,961, 2015 WL 831673, at *1 (Tex. Crim. App. Feb. 23, 2015), but it was later dismissed as abusive, *Ex parte Reed*, Nos. WR-50,961-07 & WR-50,961-08, 2017 WL 2131826, at *1 (Tex. Crim. App. May 17, 2017) (*Reed IX*).

In the interim, the results from the agreed-upon DNA testing came back. Using short tandem repeat (STR) analysis, Reed could not be excluded from DNA profiles developed from the sperm fractions of a vaginal swab and Stites's panties, and only 1 in 3.176 sextillion (the most conservative statistic) would be expected to have that DNA profile. Suppl.CR(DNA).52. Reed also could not be excluded, using Y-STR analysis, from three vaginal swabs, a rectal swab, Stites's panties, vaginal-swab sticks, a vaginal sperm-search slide, and extracts of stains found on Stites's back brace, pants, and a breast swab. Suppl.CR(DNA).53. This additional testing demonstrated that DNA profiles consistent with Reed's were in even more locations than what the jury knew about—Stites's back brace (found in the truck) and her pants (she was wearing).

Thereafter, while considering Reed's Chapter 64 appeal, the CCA remanded the case to the trial court for

additional findings. *Reed v. State*, No. AP-77,054, 2016 WL 3626329, at *1 (Tex. Crim. App. June 29, 2016). The trial court entered supplemental findings and returned the case. 4.CR(DNA).18–27.

During the pendency of Reed's seventh state habeas application, he filed his eighth. 1.SHCR-08, at 5–23. The CCA remanded that application for further factual development. *Reed IX*, 2017 WL 2131826, at *2. A hearing was held and the trial court recommended denial of relief. 2.SHCR-08, at 152–75. The case remains pending.

Finally, and most pertinent to this petition, the CCA affirmed the trial court's denial of postconviction DNA testing. *Reed v. State*, No. AP-77,054, 2017 WL 1337661, at *6–15 (Tex. Crim. Apr. 12, 2017) (*Reed X*). For many of the items that Reed sought to test, the CCA affirmed that, because the items had been touched with ungloved hands (by trial attorneys, court personnel, and potentially jurors), and because the items had been stored commingled without protective packaging, there was an insufficient chain of custody. *Id.* at *7–8. Indeed, "Reed's own witnesses conceded that the manner of the trial exhibits' handling contaminated or tampered with the evidence." *Id.* at *7. And this contamination was exacerbated "especially for the specific testing Reed seeks"—"touch DNA." *Id.* at *7.

For other items, the CCA affirmed that Reed failed to prove that they were or contained biological material. *Id.* at *9. And for the remaining items, the CCA affirmed that Reed had failed to prove by a preponderance of the evidence that he would not have been convicted if the testing provided exculpatory

results. *Id.* at *9. This is because there was nothing connecting the items to the murder, or because the items would not have undermined the State's theory at trial. *Id.* at *12–13.

As to all items, the CCA affirmed that Reed failed to prove he was not making his DNA testing request to unreasonably delay the execution of his sentence or administration of justice. *Id.* at *13–15. The CCA considered various factors including the fact that Reed had "taken a 'piecemeal approach' to his post-conviction litigation," he started negotiations for DNA testing only after a court of appeals affirmed the denial of federal habeas relief, and the fact that there did "not appear to be any factual or legal impediments that prevented Reed from availing himself of post-conviction DNA testing" during the thirteen years of Chapter 64's existence. *Id.* at *14–15.

Reed sought rehearing. Appellant Rodney Reed's Motion for Rehearing, *Reed v. State*, No. AP-77,054, 2017 WL 1337661 (Tex. Crim. Apr. 12, 2017) [hereinafter Mot. Reh'g]. The motion was denied. Order, *Reed v. State*, No. AP-77,054 (Tex. Crim. App. Oct. 4, 2017). This proceeding follows.

## REASONS TO DENY THE PETITION

### I. THE ISSUES DECIDED BELOW ARE STATE-LAW MATTERS OVER WHICH THIS COURT HAS NO JURISDICTION.

The Court holds "no supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Thus, the Court will not address a federal question if the state-court decision rests on grounds independent of the federal issue and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

The issues passed upon by the court below are state-law matters. The process for obtaining postconviction DNA testing is codified state law. *See* Tex. Code Crim. Proc. arts. 64.01–.05. And the findings Reed attacks—chain of custody and unreasonable delay—are not federal matters, but rather narrow matters of state law. *See* Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(ii), (a)(2)(B). The exclusivity of state law explains why the opinion below cites only Chapter 64 and cases interpreting it. *Reed X*, 2017 WL 1337661, at *6–15. There was no federal issue passed upon by the court below and therefore no federal issue upon which jurisdiction can rest. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). A writ of certiorari must therefore be denied.

## II. THIS COURT'S PRECEDENT SHOWS DENIAL IS APPROPRIATE HERE.

Even if this case implicates matters of constitutional dimension, the prudence expressed in this Court's cases compels denying a writ of certiorari.

*First*, Reed failed to raise his "constitutional" issues in the trial court originally considering his Chapter 64 motion. Even if Reed's failure to raise his "constitutional" issues in the trial court is not jurisdictional—a matter Texas does not concede—his choice to deprive the state court of the full development of the issues presented counsels against review in this Court. *See Eagerton*, 462 U.S. 176, 181 n.3 (considering that petitioner did not raise issue in trial court).

*Second*, Reed did not properly present his "constitutional" issues in the CCA, nor did that court pass upon them. In fact, Reed did not so much as mention federal law in his merits briefing before the CCA. But "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)). Even though Texas believes this is jurisdictional, it need not be decided in this case "'because even treating the rule as purely prudential,

the circumstances here justify no exception.'" *Id*. at 445–46 (quoting *Adams*, 520 U.S. at 90).[8]

*Third*, even if a motion for rehearing could preserve a constitutional issue, it did not do so here. Concerning chain of custody, the bulk of Reed's rehearing argument was that the CCA's decision conflicted with state law. Mot. Reh'g 6–13. Only at the end of this argument did Reed mention federal law and only then cursorily, broadly claiming that the CCA's chain-of-custody interpretation "violates Reed's rights under the Texas and United States Constitutions" and that, if the CCA did not adopt his chain-of-custody interpretation, it would violate his "due process rights, his right to the due course of law, access to the courts and to a remedy as guaranteed by the Texas and United States Constitutions." Mot. Reh'g 14. Concerning unreasonable delay, Reed argued that, as a factual matter, he did not request DNA testing for such purpose and that any unreasonable delay finding would violate his "constitutional right to due process, due course of law, access to courts and to a remedy under the Texas and United States Constitutions." Mot. Reh'g 23. However, a "vague appeal to constitutional principles does not preserve" a petitioner's constitutional claims. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988). Reed did no more than generically reference due

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[8] Reed will likely retort that he raised his "constitutional" issues in a motion for rehearing. Assuming that were true, it would not salvage the procedural deficiency. "It has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 114 S. Ct. 1867, 1867 (1994) (O'Connor, J., concurring). There is no reason to depart from the norm here.

process, and his choice to deprive the CCA of adequate and timely briefing favors the denial of certiorari.

*Fourth*, because Reed's "constitutional" briefing in the CCA was so perfunctory, his significantly greater briefing here was not before the CCA. Thus, if Reed's delayed and cursory argument below preserved some vaguely "constitutional" issue, it was not the same as presented here. However, "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). The Court should not break with this ordinary appellate practice.

*Fifth*, the adequacy of a chain of custody and whether a filing was made for unreasonable delay are factual matters. *See Reed X*, 2017 WL 1337661, at *14. The Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see* Sup. Ct. R. 10. Given these fact-specific inquiries, a writ of certiorari should be denied.

## III. EVEN IF THE COURT POSSESSES JURISDICTION, AND EVEN IF THE ISSUES PRESENTED HAD BEEN PROPERLY RAISED AND PASSED UPON, REED STILL FAILS TO DEMONSTRATE A CONSTITUTIONAL VIOLATION.

Convicted individuals have no constitutional right to postconviction DNA testing, but if a state provides such a right, the procedures must satisfy due process. *Dist. Att'y's Office for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69, 72–74 (2009). However, a "criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *Id*. at 68. Thus, a state "has more flexibility in deciding what procedures are needed in the context of postconviction relief." *Id*. at 69. In order to demonstrate constitutional infirmity, a convicted individual must show that the postconviction procedures "are fundamentally inadequate to vindicate the substantive rights provided," such that the procedures "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id*. at 69–71. *Osborne* "left slim room for the prisoner to show that the governing state law denies him procedural due process." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011).

### A. REED FAILS TO PROVE THAT A CHAIN-OF-CUSTODY REQUIREMENT VIOLATES DUE PROCESS.

Reed's initial complaint concerns Chapter's 64's chain-of-custody requirement. Reed first argues that the decision in this case violates due process because there were contradictory findings—that the evidence existed

and was in a condition permitting DNA testing, but that the evidence's chain of custody was lacking. Pet. Cert. 27–28. Because there is no conflict in these findings, there cannot be a constitutional deprivation arising therefrom.

There are several requirements to obtain postconviction DNA testing in Texas, including that the evidence "still exists and is in a condition making DNA testing possible; and has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect." Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(i)–(ii). As Reed admits, Pet. Cert. 22 n.4, chain-of-custody requirements are routinely found in postconviction DNA testing schemes, *see, e.g.*, 18 U.S.C. § 3600(a)(4).

These requirements—existing-and-testable and chain-of-custody—serve two distinct purposes. The existing-and-testable requirement ensures that the items to be tested still exist because, if they do not, DNA testing is not possible. One could also imagine various other conditions making DNA testing impossible, including storage issues (e.g., extreme heat), performance of other tests (e.g., fingerprint chemicals), or cleaning of an item for visual inspection (e.g., tool mark comparison), all of which could destroy or remove DNA. Necessarily, only after it is proven that an item exists and can be DNA tested does chain of custody come into play. Instead of being "mutually exclusive," the existing-and-testable requirement is a *precondition* to chain of custody.

The chain-of-custody requirement, on the other hand, ensures "the identity and integrity of physical evidence." 23 C.J.S. *Criminal Procedure* § 1150 (2018). The latter rationale is clearly contemplated by Chapter 64's chain-of-custody requirement—"that [the evidence] has not been substituted, tampered with, replaced, or altered in any material respect." Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(ii).

Here, it is undisputed that the evidence admitted at Reed's capital murder trial has been stored commingled and without protective covering. 4.RR.(DNA)178–83, 193–94. Additionally, these items were handled at trial without gloves by attorneys, court personnel, and possibly jurors (though in accord with the standards of the time). 4.RR(DNA).198–201. Indeed, Reed's experts conceded that if you "hand [evidence] to other people and you touch it, yes, you've tampered with [it]," 3.RR(DNA).155, and there is "a good chance it's contaminated[9] evidence," 2.RR(DNA).72. Given this record, there was nothing unreasonable in finding that chain of custody was inadequate.[10]

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[9] Reed and an amicus argue that the CCA grafted a non-statutory element on the chain-of-custody requirement—absence of contamination. Pet. Cert. 24; Br. Amici Curiae 13 Retired Judges Supp. Pet'r 9–12. This argument is difficult to understand because chain of custody is regularly discussed in terms of contamination. *See, e.g.*, 23 C.J.S. Criminal Procedure § 1150 (2018) ("A chain of custody for physical evidence may have to be established as part of the foundation for its admission as in cases where physical evidence is not readily identifiable or may be susceptible to tampering, contamination, or exchange.").

[10] An amicus suggests that the chain-of-custody issue here could be widespread in Texas because the relevant biological-

Reed also argues that Chapter 64's chain-of-custody requirement "must be construed and applied consistent with well-settled standards governing authenticity and chain of custody" lest due process be violated. Pet. Cert. 28–32. The "well-settled standard[]" seems to be that chain of custody normally goes to the weight of evidence, not its admissibility. *See* Pet. Cert. 28–30. Reed fails to show a due process error.

Reed initially ignores the context of this case. Chapter 64's requirements are for postconviction *DNA testing*, not for *admissibility* of evidence. Reed has offered no rationale for why a state must, as a matter of due process, use the admissibility chain-of-custody definition when determining whether to permit postconviction DNA testing. In seeking DNA testing, Reed is trying to remove biological material from certain items to develop a DNA profile. In postconviction DNA

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evidence-preservation statute "does not specify where this evidence is to be stored, at what temperature, how it is preserved, or who has access to it." Br. Amici Curiae 13 Retired Judges Supp. Pet'r 17. That is true, but it grossly overlooks the entirety of the statute. Specifically, DPS has been directed to create "standards and rules, consistent with best practices . . . that specify the manner of collection, storage, preservation, and retrieval of biological evidence" for governmental entities retaining biological material. Tex. Code Crim. Proc. art. 38.43(g). Those standards have been in place since 2012. Texas Department of Public Safety, *Best Practices for Collection, Packaging, Storage, Preservation, and Retrieval of Biological Evidence*. And the biological-evidence-preservation statute, a companion piece of legislation with Chapter 64, has been in place since 2001. Act of April 5, 2001, 77th Leg., R.S., ch. 2, § 1, art. 38.39, 2001 Tex. Sess. Law Serv. Ch. 2. Given the greater knowledge of DNA testing and evidence preservation engendered by these enactments, it is unlikely the situation here will occur in the future.

testing schemes, "[t]he central point of the chain of custody requirement is to assure that the evidence is what it purports to be—that is, related to the crime—and that it has not been contaminated or tampered with such that testing of it will yield unreliable (and therefore irrelevant) results." *Cookson v. State*, 17 A.3d 1208, 1213 (Me. 2011). In other words, chain of custody, in this context, is rightly focused on the integrity of the biological material itself, not the item on which it is found. There is nothing irrational or unconstitutional in ensuring the integrity of biological material through chain-of-custody requirements. *See, e.g.*, *Noling v. State*, No. 2014-1377, 2018 WL 1193740, at *10 (Ohio Mar. 6, 2018) (postconviction DNA testing denied on chain-of-custody grounds).

Assuming traditional chain-of-custody jurisprudence must apply to a postconviction DNA testing scheme, Reed still fails to demonstrate due process error. What he overlooks is that, *normally*, chain of custody goes to the weight of evidence. But "affirmative evidence of *tampering* or *commingling*" goes to admissibility. *Dossett v. State*, 216 S.W.3d 7, 17 (Tex. App.—San Antonio 2006) (emphasis added);[11] *see also* 23 C.J.S. *Criminal Procedure* § 1150 (2018) ("Whether a

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[11] Reed cites *Dossett* in support of his weight-of-the-evidence argument claiming that it was authored by Judge Keasler, the same judge who authored the opinion at issue, to seemingly suggest inconsistency in the treatment of the chain-of-custody issue. Pet. Cert. 28–29. *Dossett*, however, was not authored by Judge Keasler, a judge of the highest criminal court in Texas, but instead a justice from a regional, intermediary Texas court of appeals. *Dossett*, 216 S.W.3d at 13 (opinion by Justice Speedlin of the Fourth Court of Appeals). An amicus makes the same erroneous court attribution. Br. Amici Curiae 13 Retired Judges Supp. Pet'r 13.

proper chain of custody has been established goes to the weight of the evidence rather than its admissibility at least where the trial court determined that in reasonable probability the proffered evidence has not been changed in any important respect."). Here, it was proved that the evidence had been both stored in a commingled manner and tampered with when it was touched by ungloved hands. Thus, it would not be admissible even if the traditional chain-of-custody jurisprudence applied.

Reed finally argues "that the mere risk of contamination" should not break chain of custody when his evidence suggested probative results could still be obtained. Pet. Cert. 32–33. But there was not a "mere risk" of contamination here. There was actual contamination from the ungloved handling of the evidence, which one of Reed's experts conceded was tampering, 3.RR(DNA).155, along with the commingled storage of the items.

Reed should, in fact, be estopped from asserting otherwise. This is because Reed was required to prove, by a reasonable likelihood, that the items for which he sought DNA testing "contain[ed] biological material suitable for DNA testing[.]" Tex. Code Crim. Proc. art. 64.03(a)(B). He did this based on Locard's Exchange Principle, which "maintains skin cells and DNA deposits remain on an item every time it is touched," i.e., "touch DNA[.]" *Reed X*, 2017 WL 1337661, at *8. And the Court below accepted his assertion. *Id.* at *8–9; *see New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (discussing judicial estoppel). By proving that biological material was on the items he sought to DNA test, he also proved that the items had been tampered with or altered

by the ungloved handling at trial and the commingled storage afterwards.

Regardless, the denial of DNA testing in this case does not violate due process. Indeed, Justice Alito predicted this very factual scenario almost a decade ago:

> [M]odern DNA testing is so powerful that it actually increases the risks associated with mishandling evidence. STR tests, for example, are so sensitive that they can detect DNA transferred from person X to a towel (with which he wipes his face), from the towel to Y (who subsequently wipes his face), and from Y's face to a murder weapon later wielded by Z (who can use STR technology to blame X for the murder). Any test that is sensitive enough to pick up such trace amounts of DNA will be able to detect even the lightest, unintentional mishandling of evidence.
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> . . . .
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> Then, after conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident—for example, degradation or contamination of the evidence—would provide the basis for seeking postconviction relief. Denying the opportunity for such an attempt to game the criminal justice system should not shock the conscience of the Court.

*Osborne*, 557 U.S. at 82, 85 (Alito, J., concurring). Here, numerous other DNA profiles could be on the items

admitted at trial (three prosecutors, two defense attorneys, at least one court employee, and twelve jurors, not to mention any trace DNA they picked up from other sources), all unconnected to the offense.[12] Denying DNA testing of tampered with or altered evidence "should not shock the conscience of the Court" and the petition should be denied.

### B. REED FAILS TO PROVE THAT IT IS UNCONSTITUTIONAL TO IMPOSE A DILIGENCE REQUIREMENT.

Reed's second complaint concerns Chapter 64's no-unreasonable-delay requirement.[13] Reed first argues that the CCA improperly equated unreasonable delay with laches. Pet. Cert. 34. Even if true, placing time

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[12] An amicus argues that DNA testing of the evidence "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 he was wrongly convicted." Br. Amici Curiae 13 Retired Judges Supp. Pet'r 1–2. This is an overly simplistic view of the facts here. First, the lack of Reed's DNA on any item does not prove innocence. For example, there may be so many DNA profiles on an item that it cannot be deconvoluted. Second, assuming Reed's DNA profile is not found on any particular item, this does not account for the fact that Reed's DNA was on and inside an obviously raped and dead woman. Third, many other DNA profiles are likely on each item admitted at trial because they were handled ungloved, but it has absolutely nothing to do with commission of the offense.

[13] As with Reed's chain-of-custody complaint, Reed fails to cite a single due process case in arguing that the unreasonable-delay finding is unconstitutional. Again, this is proof that it truly is a state-law matter.

limitations on postconviction DNA testing requests is not unconstitutional.

Chapter 64 requires that the DNA testing movant prove that the request "is not made to unreasonably delay the execution of sentence or administration of justice." Tex. Code Crim. Proc. art. 64.03(a)(2)(B). This could be reasonably interpreted as the codification of a laches test. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973 (2014) ("[Laches's] principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation."). But that has no constitutional import.

Whether the no-unreasonable-delay requirement is read as a codified laches test or an undefined statute of limitations, they "serve a similar function" of "shield[ing] against untimely claims." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). The requirement that DNA testing "must have been diligently pursued" is similar to requirements imposed "by federal law and the law of other States, and they are not inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness.'" *Osborne*, 557 U.S. at 70 (citation omitted) (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). Indeed, the federal counterpart—the "model for how States ought to handle" enactment of postconviction DNA testing schemes, *id.* at 63—presumes untimeliness if the request is made five years after the statute's enactment or three years after conviction. § 3600(a)(10)(B). Here, Reed waited thirteen years from the enactment of Chapter 64. *Reed X*, 2017 WL 1337661, at *15. There is

nothing unconstitutional in precluding DNA testing after such a dilatory request.

Reed next challenges the CCA's unreasonable-delay affirmance because it relied on cases where an execution date had been set, yet Reed informally requested DNA testing before such a date had been set for him. Pet. Cert. 34–35. While the CCA did consult such cases, it did not look to any one as dispositive. Rather, it noted that, while these cases provided guidance, "they offer no definitive criteria for answering this inherently fact-specific and subjective inquiry." *Reed X*, 2017 WL 133761, at *14.

Moreover, the CCA did not simply sustain the trial court's unreasonable-delay finding based just on interference with the execution of sentence, but also with "the administration of justice." *Id*. Thus, even if the CCA did improperly consider cases where an execution date had been set—which it did not—Reed's dilatory litigation behavior was sufficient to prove that he tried to unreasonably delay the administration of justice—an alternative finding he does not discuss.

Reed further challenges the unreasonable-delay finding because, he argues, the Texas Legislature removed the fault provision in Chapter 64. Pet. Cert. 35. That is true, but irrelevant. Reed was not denied DNA testing because he, for example, made a strategic decision at the time of trial to forgo additional DNA testing. *See Skinner v. State*, 293 S.W.3d 196, 203 (Tex. Crim. App. 2009). Although such a basis for denying DNA testing would not be unconstitutional, *see Osborne*, 557 U.S. at 85, it simply was not a basis upon which the lower-court decision rests.

Instead of looking to the statute, Reed tries to divine the intent of the Texas Legislature, claiming that it removed the fault provision "and replaced it with the current" no-unreasonable-delay requirement. Pet. Cert. 35. Even if one were to speculate about legislative intent, Reed is simply wrong about the legislative action here—the no-unreasonable-delay requirement has existed since the inception of Chapter 64; it was not added in exchange for the removed fault provision. Act of April 5, 2001, 77th Leg., R.S., ch. 2, § 2, art. 64.03, 2001 Tex. Sess. Law Serv. Ch. 2. Fault and timeliness are two different inquires; Reed failed to prove the latter, and the decision below says nothing about the former.

Reed next complains that the CCA improperly "read[] an assumption of guilt into Chapter 64" because it considered his conviction challenges in affirming the no-unreasonable-delay finding, equating his persistence with unreasonable delay. Pet. Cert. 36–37. Assuming that was true, Reed does not explain why it is improper. After all, Reed was "proved guilty after a fair trial" and therefore "does not have the same liberty interests as a free man." *Osborne*, 557 U.S. at 68. Following his conviction, "the presumption of innocence disappears." *Id*. at 69 (quoting *Herrera v. Collins*, 506 U.S. 390, 399 (1993)).

Regardless, the CCA did not review Reed's intent in filing a Chapter 64 motion "through a fundamentally unfair lens." Pet. Cert. 36. Rather, the CCA conscientiously considered a host of factors, including that: (1) Reed requested DNA testing on items that the State had already agreed to test and on other items

"whose relevance to the crime are unknown;" (2) he filed five state habeas applications that were dismissed as untimely; (3) his litigation tactics had been previously described as "piecemeal;" (4) he attempted to delay the finality of his federal habeas case by seeking amendment of his petition after final judgment; (5) he began DNA testing negotiations only after the Fifth Circuit denied a COA; (6) he took four months to begin obtaining a reference sample after agreeing to some DNA testing with the State; (7) he filed his Chapter 64 motion on the day the trial court heard the State's motion to set an execution date; and (8) "Chapter 64 had existed with only slight variations for over thirteen years at the time Reed filed his motion, and there does not appear to be any factual or legal impediments that prevented Reed from availing himself of post-conviction DNA testing earlier." *Reed* X, 2017 WL 1337661, at *14–15.

The CCA did not equate persistence with unreasonable delay, but drew reasonable inferences from litigation tactics generously construed as "piecemeal." And while the CCA did not mention Reed's attempt to obtain DNA testing in 1999 (likely because he did not mention it in the trial court), it did consider his attempt to secure DNA testing by agreement, calling it "laudable" but finding that it was undermined by the fact he "initiated negotiations only after the Fifth Circuit . . . denied his request for a [COA] approximately three days before." *Id.* at *14. There was nothing unreasonable in the CCA's affirmance of a well-supported fact finding, and certainly nothing unconstitutional in placing time limitations on DNA testing. *See Osborne*, 557 U.S. at 70; *see also, e.g.*, *United*

*States v. Cowley*, 814 F.3d 691, 697–701 (4th Cir. 2016) (denying a postconviction DNA testing request as untimely).

Finally, Reed complains that the CCA did not consider all his postconviction evidence of purported innocence. Pet. Cert. 37. He offers absolutely no briefing on why the Due Process Clause requires courts, reviewing only whether a movant is statutorily entitled to DNA testing, must consider evidence not presented at trial in determining materiality. As the Court noted, "[a] requirement of demonstrating materiality is common," *Osborne*, 557 U.S. at 63, which is frequently done by presuming exculpatory results on the requested items and comparing the hypothetical results with only the evidence introduced at trial, *see, e.g.*, *Meinhard v. State*, 371 P.3d 37, 44 (Utah 2016) ("And other provisions of the code make clear that only DNA test results can establish factual innocence under Part 3 of the PCRA."). Indeed, in *Osborne*, this Court overturned the Ninth Circuit's critique of the Alaska Supreme Court's materiality inquiry that "focus[ed] only on the state of the evidence as it exited at trial and whether that trial record would lead one to question the integrity of that evidence." *Dist. Att'y's Office for the Third Jud. Dist. v. Osborne*, 521 F.3d 1118, 1135 (9th Cir. 2008).

In other contexts, materiality is judged by comparing the undisclosed or undiscovered evidence with that presented at trial, *see, e.g.*, *United States v. Bagley*, 473 U.S. 667, 681–82 (1985); *Strickland v. Washington*, 466 U.S. 668, 695–96 (1984), and the use of a well-worn rule in the context of postconviction DNA is not fundamentally unfair, *see Osborne*, 557 U.S. at 63

(holding no due process violation where postconviction DNA testing scheme required the items to "be sufficiently material"). [14]

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[14] Chapter 64's materiality-review limitation does not mean that Reed is without recourse concerning his other postconviction evidence. Indeed, Reed's actual innocence "claim" has been reviewed repeatedly—and repeatedly rejected. The CCA has done so on multiple occasions. *Reed VI*, 2009 WL 1900364, at *1–2; *Reed V*, 2009 WL 97260, at *4–6; *Reed IV*, 271 S.W.3d at 746–51. And the same is true for the federal courts. *Reed VIII*, 739 F.3d at 766–73; Order on Report and Recommendation 3–17, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012); *Reed VII*, 2012 WL 2254217, at *12–16. Moreover, Reed's newest theory of innocence, including the supposed retraction from Dr. Bayardo and the opinions of Drs. Baden and Spitz, has also been found insufficient. *Reed IX*, 2017 WL 2131826, at *1–2. Reed has been given the opportunity to be heard on his actual innocence "claim," but he has simply failed to prove it. There is nothing fundamentally unfair in the repeated, in-depth review Reed has been afforded of his actual innocence "claim."

Moreover, the State disagrees with the factual basis for Reed's actual innocence "claim", and it is Reed's unspoken reason for a writ of certiorari. As to Dr. Bayardo's "recantation," two federal courts have disagreed with Reed's word choice, finding little difference between his trial testimony and affidavit. *See Reed VIII*, 739 F.3d at 770 ("Dr. Bayardo's affidavit contributes little to the evidence already in the record."); Order on Report and Recommendation 12, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012) ("Reed also dramatically overstates the relevance and import of [Dr. Bayardo's affidavit] to his claim of factual innocence."). As to Reed's new time of death estimate, opining that Stites died earlier than estimated, it is curious given that Reed has tried to push back Stites's time of death through supposedly reliable eyewitnesses, *Reed IV*, 271 S.W.3d at 717, 741–42, and he has offered other expert testimony that no reliable time of death could be estimated in this case, *id.* at 743. In other words, as soon as a court debunks one theory of innocence, he simply offers another. *See id.* at 746 ("Reed's claim of innocence is seriously

### C. OTHER FINDINGS AFFIRMED BY THE LOWER COURT, THAT REED DOES NOT ADDRESS, WOULD RESULT IN DENIAL OF DNA TESTING.

Although Reed complains about the chain-of-custody and unreasonable-delay findings, the CCA also affirmed other findings that would preclude DNA testing, at least for certain items. Stated differently, even if the Court overturned the findings Reed challenges, he still would not be entitled to DNA testing under Chapter 64.

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disjointed and fragmented—he presents numerous alternative but critically incomplete theories."). As to no supposed forensic evidence of sexual assault, that too has been rejected as a theory of innocence. *Reed VIII*, 739 F.3d at 771–72 ("[T]he evidence that Reed forced himself on Stites and subsequently murdered her is extensive."). As to the timing inference to be drawn by morphologically intact sperm, that has also been rejected, *Reed IV*, 271 S.W.3d at 750, and Reed offered learned treatises that supported the trial testimony, *see, e.g.*, Second Amend. Pet. Ex. 36 at 136, ECF No. 137-7; Second Amend. Pet. Ex. 37 at 514, ECF No. 137-7. As to Fennell, whatever might be said about him, it pales in comparison with Reed's history of violent sexual assault, assaults sharing many similarities with Stites's murder—many victims were Stites's age or very near (York, Eipper, Schlueter); many were abused in Bastrop (A.W., Rivas, Harbottle, and Schlueter; the latter two in extremely close proximity to Stites's work route); a couple were raped or abducted close in time to Stites's murder (Harbottle and Schlueter; the latter around 3:00 a.m.); many were subjected to anal or attempted anal rape (York, Eipper, A.W., and Rivas); and all but one were subjected to physical violence in addition to rape or attempted rape (York, Eipper, A.W., Rivas, and Schlueter). Ultimately, Reed must have a compelling reason for why his semen was inside a murdered woman. But "[b]ecause Reed's claim that he had an affair with Stacey Stites does not have credible evidentiary support, his claim of actual innocence is doomed." *Reed VII*, 2012 WL 2254217, at *15.

The CCA affirmed the trial court's findings "that Reed's witnesses did not address whether a number of items are reasonably likely to contain biological material." *Reed IX*, 2017 WL 1337661, at *9. As such, "Reed failed to satisfy his [biological-material] burden as to those items." *Id*. The CCA further held that Reed failed to establish that he would not have been convicted if the items he sought testing on, minus those that were "tampered with, or altered in any material way," contained exculpatory results. *Id*. at *9–13. Because these findings would compel the denial of DNA testing on remand, and because Reed does not challenge them here, the result below, at least for certain items, would be the same. A writ of certiorari should not be granted where other findings support the judgment below and are unchallenged on appeal.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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