No. 21-442

IN THE

Supreme Court of the United States

RODNEY REED,
Petitioner,

vs.

BRYAN GOERTZ, ET AL.,
Respondents.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the *Rooker–Feldman* doctrine bar review of a civil rights action when a plaintiff's complaints are directed towards a district attorney's discrete actions, or a court's application of law to fact, rather than the constitutionality of a state's postconviction DNA testing scheme?

2. Does a district attorney enjoy Eleventh Amendment immunity when the relief sought is a declaratory judgment concerning the construction of a postconviction DNA testing statute that the district attorney does not administer?

3. Does a plaintiff challenging a postconviction DNA testing statute have a traceable or redressable claim against a district attorney when the trial court is the sole arbiter of the plaintiff's eligibility for DNA testing?

4. Does the limitations period for a claim challenging a state's postconviction DNA testing regime begin accruing once the trial court has denied testing?

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BRIEF IN OPPOSITION

This case presents a poor vehicle for addressing the purported circuit split that Petitioner Rodney Reed identifies: the proper accrual date in a civil rights suit ostensibly challenging a state's postconviction DNA testing scheme. The petition suffers from three federal jurisdictional defects that alone warrant denial of the petition. *First*, Reed is challenging the discrete actions of the district attorney and the application of law to fact by Texas's courts, not Texas's postconviction DNA testing scheme itself. His claim is therefore barred by the *Rooker–Feldman* doctrine. *Second*, Reed's claim is barred by sovereign immunity because the remaining defendant has no authority to compel DNA testing. *Third*, Reed seeks declaratory relief regarding a statute with no enforcement mechanism beyond a trial court's order. His injury is thus not traceable to the district attorney or redressable by a favorable judgment against him.

On the merits, Reed's claims fare no better. The circuit split Reed identifies is nascent: there are only three published opinions addressing accrual dates vis-à-vis DNA testing scheme challenges. And this Court has overruled the authority that the Eleventh Circuit relied upon to reach its conclusion that a claim does not accrue until all appeals have been exhausted. It is thus unclear whether the Eleventh Circuit would even reach the same result it did over a decade ago if confronted with the same issue today. Moreover, the fact that only three federal appellate courts have considered this issue in published opinions suggests that it is not particularly important (or that other litigants are diligent in raising

their challenges, unlike Reed). But even if the Eleventh Circuit's rule applied, his suit might still be untimely. Finally, the Fifth and Seventh Circuits' have the better approach because a harm accrues for statute of limitations purposes when a plaintiff becomes aware of the harm to him. And here, that harm was the trial court's denial of DNA testing, not an appellate court's affirmation of that denial. Finally, even if Reed's suit had been timely, it was entirely without merit and he would still lose because Texas's postconviction DNA testing scheme is substantially like the one upheld by this Court in *Osborne*, including a timeliness component that Reed predictably failed to meet. Thus, a decision in Reed's favor would not only have a miniscule impact generally, but it would have no impact in his case. A writ of certiorari should be denied.

Over the last 25 years, multiple courts have admonished Reed for his abuse of the judicial process. This suit is another in a long line of dilatory litigation tactics. The Court should not, and need not, countenance those efforts. 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

[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.

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.

That same morning, at 5:23 a.m., a Bastrop police officer 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. Dr. Bayardo

also thought he saw sperm heads from a rectal-swab slide via microscopic analysis, although 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 he believed he saw also indicated recent 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. Reed abducted Schlueter approximately six months after Stites's murder, near the route Stites typically took to work and around the

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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.

same time that Stites had disappeared—3:00 a.m. 61.RR.10, 37–47. Moreover, Reed was regularly seen in the 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.

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.[4] 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. In an

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[3] Rivas was scared after the rape, and didn't want to testify, so she did not initially pursue charges against Reed. 60.RR.66. She later changed her mind because "it's better to tell the truth in front of . . . people." 60.RR.66–67.

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

abundance of caution, 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 trial counsel, assisted by three investigators and a DNA expert, attempted to counter this damning evidence by blaming someone else for the murder and asserting 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 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. The evidence showed, however, that although law enforcement never searched Fennell's apartment, they did interview him several times and collect biological samples from him. 45.RR.110–12; 46.RR.62.

Reed's counsel also 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 who testified about a connection between Stites and Lawhon,

including one who said Lawhon had confessed to killing Stites.[5] 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

During the punishment phase of the trial, the State introduced substantial evidence of Reed's crimes against other women. First was Connie York, a nineteen-year-old who had come home late one evening in 1987 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

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[5] Lawhon was excluded as a contributor to the semen found in Stites's vaginal cavity. 49.RR.116–18. And his supposed confession lacked credibility—the witness who testified about the "confession" initially told police, in a signed statement, that an entirely different person confessed. 52.RR.92–94. Moreover, Lawhons's then-wife testified that there was nothing unusual in Lawhon's activity the day Stites was murdered, which happened to be her son's first birthday. 54.RR.142–43.

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 one night in 1989. 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, whom 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, which started in 1988 and ended in 1991, 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 and about nine months before Stites's murder, 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, for the sake of her children, she pleaded for her life, 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 Reed could follow through on this threat, a car drove by and Reed fled. 61.RR.62–64.

Reed's trial counsel, assisted by his three investigators, a forensic psychologist, and a neuropsychologist presented a case to mitigate punishment. The jury rejected Reed's mitigation defense

and answered the special issues presented. Reed was sentenced to death. 1.CR.489–493.[6]

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 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.[7] 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. Feb. 13, 2003), ECF No. 33. The case was stayed and placed in abeyance so that Reed could exhaust state court remedies. Order,

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[6] "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.

[7] "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," "SHCR-08," "SHCR-09," and "SHCR-10" refer to the third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth state-habeas-proceeding clerk's records, respectively. The references are preceded by volume number and followed by page numbers.

Reed v. Thaler, No. A-02-CV-142-LY (W.D. Tex. Mar. 1, 2004), ECF No. 114.

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 on the merits 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. The CCA dismissed both applications as abusive. *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*). The CCA was also troubled by Reed's apparent "piecemeal approach" to postconviction litigation. *Id*. at *1.

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*).

Reed then returned to federal court and the stay was lifted. Order, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Aug. 20, 2009), ECF No. 135. 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), ECF No. 177. In doing so, the federal district judge found that Reed's post-recommendation motion to test certain evidence was "untimely" and so was Reed's submission of additional evidence, calling its late presentation "extremely suspect." *Id*. at 11–13. The court denied all of Reed's post-judgment motions. Order, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Feb. 4, 2013), ECF No. 191.

Reed 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*). In its opinion, the Fifth Circuit noted that Reed had untimely presented several pieces of evidence and failed to provide a "persuasive reason for waiting" so long to do so. *Id.* at 768 n.5; *see id*. at 771 n.6, 776 n.12. This Court denied Reed's petition for a writ of certiorari. *Reed v. Stephens*, 135 S. Ct. 435 (2014).

The State then requested an execution date for Reed. 1.CR(DNA).34–35.[8] The trial court heard the State's motion and granted a modified execution date. 1.RR(DNA).17.[9] The Court also memorialized an

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[8] "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.

[9] "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.

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 state motion for postconviction DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure. 2.CR(DNA).74–143. An evidentiary hearing was held and, after considering the admitted 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 the time of trial and that he did not request DNA testing to unreasonably delay the execution of the sentence or the administration of justice. 4.RR(DNA).227; 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). While the seventh application was pending, Reed filed his eighth. 1.SHCR-08, at 5–23.

During the stay, 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 (which she was wearing).

The CCA affirmed the trial court's denial of postconviction DNA testing. *Reed v. State*, 541 S.W.3d 759, 768–80 (Tex. Crim. App. 2017) (*Reed IX*). 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 769–71. Indeed, "Reed's own witnesses conceded that the manner of the trial exhibits' handling contaminated or tampered with the evidence." *Id*. at 770. And this contamination was exacerbated "especially for the specific testing Reed seeks"—"touch DNA." *Id*.

For other items, the CCA affirmed that Reed failed to prove that they were or contained biological material suitable for testing. *Id*. at 772–73. 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 773. 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 775–77.

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 777–80. 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 the Fifth Circuit 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 778–79. Reed sought rehearing of that decision, Appellant Rodney Reed's Motion for Rehearing, *Reed v. State*, No. AP-77,054, 2017 WL 1337661 (Tex. Crim. Apr. 12, 2017), which the CCA denied, Order, *Reed v. State*, No. AP-77,054 (Tex. Crim. App. Oct. 4, 2017). This Court once again denied a writ of certiorari. *Reed v. Texas*, 138 S. Ct. 2675 (2018).

A few months after affirming the denial of DNA testing, the CCA dismissed Reed's seventh application and remanded two claims from the eighth for factual development. *Ex parte Reed*, Nos. WR-50,961-07, WR-50,961-08, 2017 WL 2131826, at *1–2 (Tex. Crim. App. May 17, 2017) (*Reed X*). A multi-day hearing was held, and the trial court recommended denial of relief. 2.SHCR-08, at 152–75. About a half year later, Reed filed his ninth application. SHCR-09, at 4–56. The CCA addressed both applications in a single order, denying the eighth on the merits and dismissing the ninth as abusive. *Ex parte Reed*, Nos. WR-50,961-08, WR-50,961-09, 2019 WL 2607452, at *1–3 (Tex. Crim. App. June 26, 2019) (*Reed XI*). In dismissing the ninth application, the

CCA noted that Reed had attached some of the same evidence and presented "a substantially similar" ground in his seventh application. *Id.* at *2. Reed again sought a writ of certiorari and this Court again denied him one. *Reed v. Texas*, 140 S. Ct. 686 (2020).

Shortly afterwards, Reed's execution was set a second time. *In re State ex rel. Goertz*, No. WR-90,124-02, 2019 WL 5955986, at *1 (Tex. Crim. App. Nov. 12, 2019). About a month later, Reed filed the civil rights lawsuit underlying this proceeding in federal district court, pursuant to 42 U.S.C. § 1983, ostensibly challenging Texas's postconviction DNA testing scheme. ROA.7–37.[10] Reed sued the district attorney for declaratory relief, and the director of DPS, the local district clerk, and the local sheriff for injunctive relief to produce evidence for testing. ROA.10, 36–37. He amended his complaint about two months later, dropping the latter three individuals as parties and dropping any request for injunctive relief. ROA.164, 192–93. The same day he amended his complaint, he also moved the federal district court to stay his execution. ROA.259–69.

A few days later, Reed's civil rights suit was dismissed as failing to state a claim and his request for a stay of execution denied. ROA.857–76. As to the former, the district court found no due process infirmities in Chapter 64, and that Reed failed to otherwise prove his access-to-courts and Eighth Amendment claims. ROA.867–73. As to the latter, the court found that equity did not favor staying the

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[10] "ROA" refers to the Fifth Circuit's record on appeal generated for Reed's appeal of his civil rights case's dismissal.

execution because Reed delayed seeking testing in state court for more than a decade, did not move for DNA testing until the State first sought an execution date, and waited to file his civil rights action "over two years *after* the conclusion of Reed's state DNA proceedings." ROA.874–75.

The same day the district court dismissed Reed's civil rights suit, the CCA stayed his execution on his tenth application, filed about a week earlier, and remanded three claims for factual development. *Ex parte Reed*, No. WR-50,961-10, 2019 WL 6114891, at *2 (Tex. Crim. App. Nov. 15, 2019) (*Reed XII*).

About a year and a half later, the Fifth Circuit affirmed the dismissal of Reed's civil rights suit on the grounds it was untimely. *Reed v. Goertz*, 995 F.3d 425, 427–31 (5th Cir. 2021) (*Reed XIII*). The Fifth Circuit determined that Reed "first became aware that his right to access that evidence [he wanted DNA tested] was allegedly being violated when the trial court denied his Chapter 64 motion in November 2014." *Id.* at 431. "Because Reed knew or should have known of his alleged injury in November 2014, five years before he brought his § 1983 claim, his claim is time-barred." *Id.*

Just a few months ago, the state trial court presided over a two-week hearing and thereafter recommended that relief be denied. 15.SHCR-10, at 1767, 1799. Amongst other findings, the court held that two of Reed's claims were barred by laches for late presentation. 15.SHCR-10, at 1792, 1796. And just a few weeks ago, Reed filed his eleventh application. The matters are currently pending in the CCA. Request for

Grant of Application for Writ of Habeas Corpus, No. WR-50,961-11 (Tex. Crim. App. Dec. 22, 2021).

REASONS TO DENY THE PETITION

I. REED'S DILATORY LITIGATION TACTICS SHOULD NOT BE REWARDED.

Federal and state judges have reproved Reed's dilatory litigation tactics. The CCA has dismissed six of his state habeas applications as abusive, *see Reed XI*, 2019 WL 2607452, at *1–2, and has described his litigation style as "piecemeal," *Reed V*, 2009 WL 97260, at *1. And it has affirmed a finding that Reed sought DNA testing to unreasonably delay his execution or the administration of justice. *Reed IX*, 541 S.W.3d at 770–80.

The federal district court has rebuked Reed for filing an untimely motion and submitting untimely evidence. Order on Report and Recommendation at 11–13. And the Fifth Circuit agreed with those findings, noting that Reed failed to provide any sufficient explanation for his dilatoriness. *Reed VIII*, 739 F.3d at 768 n.5, 771 n.6, 776 n.12. Finally, in the context of a stay of execution, the district court found that the equities did not favor Reed's request because, among other reasons, he waited more than two years after the CCA affirmed the denial of postconviction DNA testing to bring the underlying suit. ROA.874–75.

This time-barred civil rights action continues that pattern. It was filed almost five years after the state trial court denied DNA testing and more than two years after the CCA affirmed that denial. And it is not coincidental that Reed waited for more than a year from the denial of

certiorari, and only about three months before this then-pending execution date, before filing this civil rights action. This timeline suggests that his intention was to delay his execution. And that objective, and his manipulation of the judiciary to achieve it, is reason enough that this case is not compelling. *See Rhines v. Weber*, 544 U.S. 269, 277–78 (2005) ("In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death."); *see also Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 85 (2009) (Alito, J., concurring) ("[A]fter conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident—for example, degradation or contamination of 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.").

II. THE LOWER COURTS LACKED JURISDICTION OVER REED'S SUIT.

Reed claims that this case presents an excellent vehicle to take up the accrual date issue in postconviction DNA testing cases raised under § 1983. Pet. Writ Cert. 29. This is, in part, because there are "no jurisdictional problems." *Id*. That is incorrect for three reasons.

A. THE *ROOKER-FELDMAN* DOCTRINE BARS REVIEW OF REED'S CIVIL RIGHTS ACTION.

The "*Rooker–Feldman* doctrine" prohibits "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the

district court proceedings commenced and inviting district court review and rejections of those arguments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). When *Rooker–Feldman* applies, "lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Lance v. Dennis*, 546 U.S. 459, 463 (2006).

The district court, ROA.865, and the Fifth Circuit, *Reed XIII*, 995 F.3d at 429–30, found the doctrine inapplicable on the basis that Reed was challenging a state statute. But both courts ignored the thrust of Reed's allegations—that the CCA's application of Chapter 64 was unconstitutional as to *him*. *See, e.g.*, ROA.186–89 (challenging the CCA's heavily fact dependent application of Chapter 64's chain-of-custody, materiality, and no-unreasonable-delay provisions to Reed's case, along with a complaint about the trial judge signing contradictory findings). That makes this case unlike *Skinner v. Switzer*, in which the plaintiff clarified that he was not challenging "the prosecutor's conduct or the decisions reached by the CCA in applying Chapter 64 to his motions." 562 U.S. 521, 530 (2011).

Indeed, in rejecting an immunity argument, the Fifth Circuit summarized the very thing that violates *Rooker–Feldman*—complaints about the prosecutor's conduct. *See Reed XIII*, 995 F.3d at 429 n.2 ("According to Reed's amended complaint, [the district attorney] has 'directed or otherwise caused each of the non-party custodians of the evidence [that Reed seeks] to refuse to allow Mr. Reed to conduct DNA testing' on such evidence and 'has the power to control access' to that evidence." (second alteration in original)). Because Reed clearly

challenged "the prosecutor's conduct," *Skinner*, 562 U.S. at 530, and the "the adverse CCA decision[]," *id.* at 532, his claims are barred by the *Rooker–Feldman* doctrine. *See, e.g.*, *Alvarez v. Att'y Gen. for Fla.*, 679 F.3d 1257, 1262–64 (11th Cir. 2012); *Cooper v. Ramos*, 704 F.3d 772, 780–81 (9th Cir. 2012).

B. THE ELEVENTH AMENDMENT BARS SUIT AGAINST THE DISTRICT ATTORNEY.

Reed's claims against the district attorney are barred by the Eleventh Amendment, which prohibits suits against public officials when "the state is the real, substantial party in interest." *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945), *overruled on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 623 (2002). Here, Respondent, a Texas elected district attorney, is an agent of the state when acting in a prosecutorial role and thereby entitled to assert sovereign immunity. *See, e.g.*, *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997).

The Eleventh Amendment "jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–02 (1984). To get around the bar, Eleventh Amendment immunity must be waived or abrogated, and removal of the protection must be unequivocal. *Id.* at 99. Simply bringing a § 1983 suit doesn't work. *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

There are, however, narrow exceptions to Eleventh Amendment immunity. *See Ex parte Young*, 209 U.S. 123, 155–56 (1908). The typical exception, prospective injunctive relief, *see, e.g.*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004), doesn't apply here

because Reed disclaimed any request for such remedy, ROA.419. Reed thus seeks declaratory relief only. That is where Reed hits a jurisdictional snag.

This Court has said that a postconviction DNA testing suit under § 1983 must focus on the statutory scheme alone or run afoul of *Rooker–Feldman*. *See Skinner*, 562 U.S. at 530. But the defendant here was a district attorney who doesn't control whether a movant qualifies for DNA testing under Chapter 64—that is a matter of law to be determined by a trial court. *See* Tex. Code Crim. Proc. art. 64.03(a)(1) ("A convicting court may order forensic DNA testing under this chapter only if . . . the court finds" various requirements met.). Rather, Chapter 64 "is simply a procedural vehicle for obtaining certain evidence." *Ex parte Gutierrez*, 337 S.W.3d 883, 890 (Tex. Crim. App. 2011). Reed has therefore failed to show a necessary connection between the state actor and the complained of constitutional deprivation. "In a word, [Reed] ha[s] not shown that any kind of Government action or conduct has caused or will cause the injury" he attributes to Chapter 64.[11] *California v. Texas*, 141 S. Ct. 2104, 2114 (2021).

In the language of *Ex parte Young*, the district attorney is not the state actor who may behave unconstitutionally in the future. 209 U.S. at 159. Chapter 64 isn't a regulation or penal statute to be *enforced* by the respondent. *Id.* at 160 ("The question

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[11] Normally, district attorneys will not be the custodians of evidence. That is usually left to law enforcement and district clerks. Indeed, that was the case here. 2.CR(DNA).217–29 (affidavits or documents providing evidence invoices from law enforcement agencies and the district clerk).

remains whether the attorney general had, by the law of the state, so far as concerns these rate acts, any duty with regard to the enforcement of the same."). Rather, it is an act of legislative grace, allowing convicted individuals the possibility of accessing evidence for DNA testing if they meet certain requirements, none of which a district attorney controls. Because of that, the respondent was entitled to Eleventh Amendment immunity.

C. REED LACKS STANDING TO SUE THE DISTRICT ATTORNEY.

For related reasons, Reed lacks standing to pursue his claims against the district attorney. Standing requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, 141 S. Ct. at 2113 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)).

As explained above, Chapter 64 is a postconviction statutory scheme with which convicted individuals must comply to gain a gratuitous benefit. It is not a statute where Reed can complain of "an injury that is the result of the statute's actual or threatened *enforcement*, whether today or in the future." *Id*. at 2114. No one enforces Chapter 64. It is a statute that Texas courts construe. Thus, "[h]ere, there is no action—actual or threatened—whatsoever. There is only the statute[]." *Id*. at 2115.

Reed must also connect "'the judicial relief requested' and the 'injury' suffered." *Id*. (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984)). Given what he

sought in the courts below, this means he must connect his request that Chapter 64 be declared unconstitutional with the denial of DNA testing. "Remedies, however, ordinarily 'operate with respect to specific parties.'" *Id.* (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring)). The district attorney did not deprive Reed of DNA testing. Instead, it was his failure to meet the requirements of Chapter 64. Thus, Reed's purported injury is not traceable to the district attorney. And even if Reed received the relief requested in district court, it would "amount to no more than a declaration that the statutory provision [he] attack[s] is unconstitutional, i.e., a declaratory judgment. But once again, that is the very kind of relief that cannot alone supply jurisdiction otherwise absent." *Id.* at 2116. In other words, the relief that Reed seeks would not provide him with any meaningful relief vis-à-vis the district attorney, Thus, Reed's choice to seek only declaratory relief, and to sue only the district attorney, has precluded him from raising a justiciable issue.

III. THE CIRCUIT SPLIT THAT REED IDENTIFIES IS NASCENT, NON-RECURRING, AND DOES NOT AFFECT REED'S SUIT.

Reed's primary argument in support of his petition is the purported circuit split between the Fifth and Seventh on one hand and the Eleventh Circuit on the other. Pet. Writ Cert. 18–21. In the former circuits, postconviction DNA testing claims under § 1983 accrue when a state trial court first denies testing. *Id.* at 19–20. In the latter, such claims accrue at the end of state litigation. *Id.* at 18–19.

As an initial matter, it is unclear whether the Eleventh Circuit would reach the same outcome if it decided the issue today. In *Van Poyck v. McCollum*, the court based its decision almost exclusively on a § 1983 case that decided takings claims are not ripe for federal adjudication until all state process for obtaining compensation had terminated. 646 F.3d 865, 867–68 (11th Cir. 2011) (citing *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990)). But this Court held in *Knick v. Township of Scott*, that takings claims are ripe as soon as the taking occurs. 139 S. Ct. 2162, 2179 (2019). At a minimum, then, the Eleventh Circuit would need to rely on alternative authority to reach the holding it did. This Court need not grant review based on a circuit split that rests on such shaky underpinnings.

Moreover, as Reed acknowledges, Pet. Writ Cert. 18–20, there are just three published decisions addressing the accrual date for § 1983 claims challenging the denial of DNA testing in a state's postconviction. *Reed XIII*, 995 F.3d at 430–31; *Van Poyck*, 646 F.3d at 867–68; *Savory v. Lyons*, 469 F.3d 667, 672–73 (7th Cir. 2006). That hardly signals a robust circuit split warranting immediate review. *See, e.g.*, *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) ("Although one of the Court's roles is to ensure the uniformity of federal law, we do not think that the Court must act to eradicate disuniformity as soon as it appears. . . . Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts.")

The pace at which this conflict has arisen does not suggest a recurring issue. *See Clay v. United States*, 537

U.S. 522, 524 (2003) (granting certiorari review based on a "recurring question"). Although Reed claims otherwise, Pet. Writ Cert. 27–29, he doesn't provide any support for his assertion. This is likely because he can't: it has taken nearly two decades for three circuits to publish cases on the matter, and there are only a handful of unpublished circuit cases beyond those. *See Walker v. Williams*, 653 F. App'x 84, 85 (3d Cir. 2016); *Brookins v. Bristol Twp. Police Dep't*, 642 F. App'x 80, 81 (3d Cir. 2016); *Pettway v. McCabe*, 510 F. App'x 879, 879–80 (11th Cir. 2013).[12] Perhaps other convicted individuals are bringing their cases to federal court more promptly. Or maybe other states have longer statutes of limitations. But whatever the reason, six circuit cases over the last two decades does not demonstrate a recurring issue.

Finally, even if the Fifth Circuit adopted the Eleventh Circuit's framework, Reed's claims might still be untimely. Reed claims otherwise, Pet. Writ Cert. 29, but he ignores the distinction between published and unpublished cases. In the only precedential case in the Eleventh Circuit, the court held that state officers' refusal "to make specific evidence available" to the convicted individual "was apparent no earlier than 2005: the end of the state litigation in which Plaintiff unsuccessfully sought access to the evidence." *Van Poyck*, 646 F.3d at 867. The state court decision discussed was the Florida Supreme Court's opinion

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[12] Another two circuit cases mention that a district court found untimeliness, but do not themselves address the issue. *McKithen v. Brown*, 626 F.3d 143, 149 (2d Cir. 2010); *Young v. Phila. Cnty. Dist. Att'y's Office*, 341 F. App'x 843, 845 (3d Cir. 2009).

affirming the denial of postconviction DNA testing. *Id.* (citing *Van Poyck v. State*, 908 So. 2d 326, 330 (Fla. 2005)). If that *decision* is the terminus of state litigation, which the Eleventh Circuit did not make clear,[13] then Reed's claims are untimely too. That is because the CCA affirmed the denial of Reed's Chapter 64 motion on April 12, 2017, *Reed IX*, 541 S.W.3d at 759, and Reed didn't file his § 1983 suit until August 8, 2019, ROA.7–37, more than the two-year limitations period that Texas law supplies, Tex. Civ. Prac. & Rem. Code § 16.003(a).[14] Hence, it is not clear that Reed's § 1983 claims would have been timely if the Eleventh Circuit were applying its precedent to his claims.

IV. THE FIFTH CIRCUIT'S DECISION WAS CORRECT.

Reed's second argument for a writ of certiorari is that the Fifth Circuit erred. Pet. Writ Cert. 21–27. He claims the court's decision conflicts with *Skinner* because it didn't acknowledge that a § 1983 claim isn't ripe until the state courts authoritatively construe a state's postconviction DNA statute. *Id.* at 22–23. He also claims that the decision conflicts with this Court's "guidance" in *McDonough v. Smith*, 139 S. Ct. 2149

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[13] Van Poyck filed for rehearing in the Florida Supreme Court, *Van Poyck*, 908 So. 2d at 326, but the Eleventh Circuit didn't say whether it was the date of the decision or when rehearing was denied that controlled the accrual date.

[14] The case that Reed uses as support for his assertion that he'd be timely in the Eleventh Circuit did, in fact, construe *Van Poyck* to include denial of certiorari by this Court before starting the limitations clock, *Pettway*, 510 F. App'x at 880, but it has no precedential value, so the question isn't as settled as Reed suggests, Pet. Writ Cert. at 29.

(2019). *Id*. at 23–25. In the end, he thinks that these two cases "make clear that the statute of limitations should from the end of the state-court litigation, including any appeals." *Id*. at 27.

Reed's assertion that the Fifth Circuit got it wrong is no basis to expend the Court's resources. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). And that is because "[e]rror correction is 'outside the mainstream of the Court's functions.'" *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007)).

As to *Skinner*, Reed asserts that his claim is the same as Skinner's—challenging "Texas's postconviction DNA statute 'as construed' by the Texas courts." Pet. Writ Cert. 22 (quoting *Skinner*, 562 U.S. at 530). Setting aside whether that's true, he reasons that the accrual date must be delayed until "the state appellate court interprets the statute" because "a movant cannot know definitively what the statute means and whether it is adequate to protect his constitutional rights." *Id*. But *Skinner* does not help Reed. Foremost, *Skinner* was primarily deciding whether a challenge to a state's postconviction DNA testing scheme was cognizable under § 1983, not the timeliness of such claims. *See, e.g.*, *Skinner*, 562 U.S. at 531. Looking past that distinction, *Skinner* makes clear that a § 1983 plaintiff in a postconviction DNA testing suit cannot "challenge the prosecutor's conduct or the decisions reached by the CCA in applying [Chapter] 64 to his motions," *id.* at 530, so it

makes no sense to tie an accrual date to something this Court has walled off from § 1983 challenge—the application of law to fact by the CCA. Reed fails to reconcile this contradiction in his argument.

It also makes no sense generally because the CCA did not harm Reed. The CCA *affirmed* the true harm—the denial of postconviction DNA testing. And that harm was known to Reed when the trial court found his motion wanting. That is when the "wrongful act or omission result[ed] in damages" starting the limitations period. *Wallace v. Kato*, 549 U.S. 384, 391 (2007) (quoting 1 C. Corman, *Limitation of Actions* § 7.4.1, pp. 526–27 (1991)). The CCA did not harm Reed a second time—unless he's challenging the CCA's application of law to his facts, running him headlong into *Rooker–Feldman*—and this Court did not harm him a third time when it denied his petition for writ of certiorari, but Reed's rule would peg the accrual date to these imaginary harms. What Reed suggests would place "the supposed statute of repose in [his] hands" because it "would begin to run only after [Reed] became satisfied that he had been harmed enough"—that the appellate courts, including this one, affirmed the denial of DNA testing. *Id*. But the Court rejected this absurd result in *Wallace* and it should reject it again here.

McDonough provides Reed no succor either. That case dealt with an allegation most analogous to malicious prosecution, "a type of claim that accrues only once the underlying criminal proceedings have resolved in the plaintiff's favor." *McDonough*, 139 S. Ct. at 2156. Indeed, such a claim cannot be sustained under § 1983 unless the conviction has been set aside or the criminal

proceeding terminated in the defendant's favor. *Id.* (citing *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)). This requirement "is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments." *Id.* at 2157. That rule and reasoning have no application here—Reed is complaining about a *postconviction* DNA testing statute; he is not challenging the legal process that has confined him. Put another way, Reed's § 1983 suit is not a "collateral attack[] on [a] criminal judgment through civil litigation." *Id.* Indeed, that's the very holding of *Skinner*, 562 U.S. at 534 ("Success in his suit for DNA testing would not 'necessarily imply' the invalidity of his conviction."). And it's the very reason why *McDonough* has no application here—there is no risk that Reed's federal suit will clash with a state criminal proceeding, so there is no reason to delay the accrual date until all appeals are exhausted.

Rather, the Fifth and the Seventh Circuits have identified the true harm—the denial of postconviction DNA testing—and begin running the limitations clock when that first happens. *Reed XIII*, 995 F.3d at 431; *Savory*, 469 F.3d at 672–73. But even if Reed's argument about accrual date had any merit, it is worth pointing out once again that his suit is only timely if one counts the CCA's denial of rehearing, or this Court's denial of certiorari, as the accrual date, because he's untimely if one counts the CCA's published opinion in his case. And attaching accrual to either of those dates makes little sense.

Taking Reed's argument as correct, that the limitations period should start when "the Texas courts authoritatively interpreted [Chapter] 64 and applied it to Reed's case," Pet. Writ Cert. 24, that happened, at the latest, when the CCA issued its published opinion. Rehearing of that decision is not a re-interpretation of Chapter 64. Rather, it is an attempt to escape the prior interpretation. In fact, so legally inconsequential are motions for rehearing that they do not generally preserve issues for this Court's review. *See, e.g.*, *Wills v. Texas*, 114 S. Ct. 1867, 1867 (1994) (O'Connor, J., concurring). And this Court's declination of review is not a review of the merits. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 296 (1989) (plurality op.). Given that neither process results in any interpretation of a statute, it makes little sense to pin an accrual date to them for statute of limitations purposes.

V. REED'S CLAIMS ON THE MERITS FAIL UNDER THIS COURT'S PRECEDENT.

Convicted individuals have no constitutional right to postconviction DNA testing, but if a state provides such a right, the procedures must satisfy due process. *Osborne*, 557 U.S. at 69, 72–74. 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. 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*. (quoting *Medina v. California*, 505 U.S. 437, 446 (1992)). *Osborne* "left slim room for the prisoner to show that the governing state law denies him procedural due process." *Skinner*, 562 U.S. at 525.

In district court, Reed claimed that Chapter 64 violated due process because: (1) Chapter 64's chain-of-custody requirement was improperly construed; (2) the definition of "exculpatory" in Chapter 64 was too limited; (3) the finding of "unreasonable delay" erroneous; and (4) evidence outside the trial record wasn't considered. ROA.184–87. None of these present a procedural due process concern.

Due process permits states to impose a chain-of-custody requirement. The federal scheme has one. 18 U.S.C. § 3600(a)(4). Many states do too. *See, e.g.*, Cal. Penal Code § 1405(g)(2); Fla. Stat. § 925.11(f)(2); 42 Pa. Cons. Stat. § 9543.1(d)(1)(ii). And there's good reason to have one—it ensures "the identity and integrity of physical evidence." 23 *C.J.S. Criminal Procedure* § 1150 (2019). The latter goal is clearly the purpose of Chapter 64's chain-of-custody requirement, permitting testing only if 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). There is nothing fundamentally unfair in ensuring evidence integrity.

It also allows for a materiality component that focuses on the evidence presented at trial. Indeed, in *Osborne*, this Court overturned the Ninth Circuit when it critiqued the Alaska Supreme Court's materiality review "focusing only on the state of the evidence as it

existed at trial." *Osborne v. Dist. Att'y's Off. for Third Jud. Dist.*, 521 F.3d 1118, 1135 (9th Cir. 2008). And then the Court confirmed that requiring that evidence to be DNA tested must be "sufficiently material" does not offend principles of fundamental fairness. *Osborne*, 557 U.S. at 70. Chapter 64's materiality requirement does no more than what this Court has endorsed.

Finally, Chapter 64's requirement that DNA testing cannot be "made to unreasonably delay the execution of sentence or administration of justice," Tex. Code Crim. Proc. art. 64.03(a)(2)(B), does not offend fundamental fairness. Indeed, Alaska's testing scheme required DNA testing to "have been diligently pursued," which the Court found consistent with fundamental fairness. *Osborne*, 557 U.S. at 70. And the federal postconviction DNA statute, the "model for how States ought to handle" enactment of their own schemes, *id*. at 63, *presumes* untimeliness if a request is made five years after its enactment or three years after conviction, § 3600(a)(10)(B). In that way, Chapter 64 was more favorable to Reed because there was no presumption of untimeliness. But Reed waited more than a decade to request testing and there was nothing fundamentally unfair with denying it given that lack of diligence.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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