No. 24-1268

IN THE

Supreme Court of the United States

RODNEY REED,
Petitioner,

vs.

BRYAN GOERTZ,
Respondent.

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

QUESTION PRESENTED

Whether this Court should grant certiorari for Reed where he wholly fails to allege a complaint sufficiently plausible on its face because he cannot show Texas's statutory DNA testing structure rises to the elevated level of fundamental inadequacy.

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This Court has long held that state legislatures are best suited to establish, if they so choose, a particularized process by which inmates can access postconviction DNA testing. Texas's legislature enacted a statutory scheme that is substantially like the one upheld by this Court in *Osborne*,[1] including a timeliness component. Applying the statute to Petitioner Rodney Reed's request, Texas's Court of Criminal Appeals (CCA) found that he failed multiple necessary components and, thus, affirmed the denial of his request. Reed now uses 42 U.S.C. § 1983 as a fig leaf for his petition to simply override the CCA's decision through pure error correction. But, as the Fifth Circuit and district court found, he wholly fails to plead a plausible due process violation. As such, a writ of certiorari 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.[2] She lived in an apartment complex with her police-officer fiancé, Jimmy Fennell, and her mother, Carol. 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

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[1] *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009).

[2] "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.

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 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. 44.RR.131; 45.RR.15–16.

Later forensic testing matched the belt fragments to each other, and it appeared that the belt, which was identified as Stites's, was torn apart, not cut, 45.RR; 47.RR.83–85. 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 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.[3] 46.RR.122. Reed abducted Schlueter approximately six months after Stites's murder, near the route Stites typically took to work and around the 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.

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[3] 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.[4] 46.RR.122–23.[5] 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 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

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[4] 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.

[5] 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.

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.[6] 52.RR.29–31, 89.

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[6] 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.

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, the State introduced substantial evidence of Reed's crimes against other women; Connie York, 57.RR.34–61, 123–24; A.W. (a twelve-year-old girl), 58.RR.36–51, 92; 61.RR.26; Lucy Eipper, 59.RR.10–32; Caroline Rivas, 60.RR.39–44, 61–65, 89–90; Vivian Harbottle, 59.RR.87–95, 113–14; 61.RR.26; and Linda Schlueter, 61.RR.10, 37–64. Reed presented his case to mitigate punishment. Based on the jury's answers to the special issues presented, the court sentenced Reed to death. 1.CR.489–493.[7]

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).

Reed filed a state habeas application. 2.SHCR-01/02, at 2–251.[8] A little more than a year later, Reed

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[7] "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.

[8] "SHCR-01/02" refers to the clerk's record for Reed's first and second state habeas proceedings. Similarly, "SHCR-03," through "SHCR-11" refer to the respective state-habeas-proceeding clerk's

filed a "supplemental claim." 3.SHCR-01/02, at 391–402. The CCA denied Reed's initial application and dismissed the "supplemental claim" as an abusive subsequent application. *Ex parte Reed*, Nos. 50,961-01, 50,961-02 (Tex. Crim. App. Feb. 13, 2002) (*Reed II*).

Reed filed 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, *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 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.

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records. The references are preceded by volume number and followed by page numbers.

App. Jan. 14, 2009) (*Reed V*). The CCA was also troubled by Reed's apparent "piecemeal approach" to postconviction litigation. *Id.* at *1.

Reed then 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 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.

The Fifth Circuit denied 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).

On the State's motion, the trial court set Reed's execution date. 1.RR(DNA).17.[9] The Court also memorialized an agreement between the State and Reed for DNA testing on certain items. 2.CR(DNA).144–48.

This same day, Reed filed his state motion for postconviction DNA testing pursuant to Texas Code of Criminal Procedure Chapter 64. 2.CR(DNA).74–143. An evidentiary hearing was held, and the trial court denied Reed's 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 appealed. 3.CR(DNA).359.

About three weeks before his execution date, Reed filed his seventh state habeas application. 1.SHCR-07, at 8–84. The CCA stayed Reed's execution. *Ex parte Reed*, No. WR-50,961, 2015 WL 831673, at *1 (Tex. Crim. App. Feb. 23, 2015). While this was pending, Reed filed his eighth application. 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

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

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, 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*). This Court again denied Reed certiorari. *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.

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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.

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*). This Court, however, held otherwise, reversed the decision, and remanded the case. *Reed v. Goertz*, 598 U.S. 230, 235 (2023) (*Reed XIV*).

Back in Reed's tenth state habeas proceeding, after presiding over a two-week hearing, the state trial court recommended relief be denied. 15.SHCR-10, at 1767, 1799. In an eighty-page published opinion, the CCA engaged in a thorough review of Reed's claims. *Ex parte Reed*, 670 S.W.3d 689, 743–69 (Tex. Crim. App. 2023) (*Reed XV*). Based on its extensive and detailed analysis, the court denied the three remanded claims and dismissed another claim as abusive. *Id.* The CCA dismissed Reed's motion for reconsideration. Postcard Dismissal, Oct. 4, 2023, *Ex parte Reed*, No. WR-50,961-10 (Tex. Crim. App).

While his tenth application was under consideration in the CCA, Reed filed his eleventh state habeas application. *See Ex parte Reed*, No. WR-50,961-11, 2023 WL 4234348, at *3–4 (Tex. Crim. App. June 28, 2023) (*Reed XVI*). The CCA dismissed this application as abusive. *Id.* at 8. However, it also made a prima facie determination that Reed failed to prove the merits of his

first and second claims. *Id.* at 6–7. This Court again denied certiorari. *Reed v. Texas*, 144 S. Ct. 2716 (2024).

Returning to federal district court, Reed filed a motion under Rule 60 in which he urged reopening a decade-old judgment and an attending motion for discovery, which the district court dismissed without prejudice. Order, *Reed VII*, 2012 WL 2254217, ECF No. 231.

While that was pending, Reed also filed a motion for authorization for a successive petition in the Fifth Circuit. Mot. for Order Authorizing D. Second Pet. Writ Habeas Corpus Pursuant to 28 U.S.C. § 2244, *In re Reed*, No. 24-50529, ECF No. 2. The court heard oral argument on this motion (at the same time it heard argument on Reed's remanded petition in this case) and denied the motion. Order, *In re Reed*, No. 24-50529, (5th Cir. Nov. 5, 2024), ECF No. 42 (*Reed XVII*).

When Reed filed his motion for authorization, he also filed the successor petition in the federal district court. Second or Succ. Pet. for Writ Habeas Corpus Pursuant to 28 U.S.C. § 2244, *Reed v. Lumpkin*, No. 1:24-cv-726, ECF No. 1. Based on the Fifth Circuit's ruling, the district court dismissed without prejudice the petition as impermissibly successive. Dismissal Order, *Reed v. Lumpkin*, No. 1:24-cv-726 (June 12, 2025), ECF No. 3.

While his federal habeas litigation was ongoing, Reed returned to the Fifth Circuit in the case at bar. The court permitted supplemental briefing and heard argument on his substantive claims. *Reed v. Goertz*, 136 F.4th 535, 540 (5th Cir. 2025) (*Reed XVIII*). Taking all that into consideration, the court again affirmed the

district court's dismissal of Reed's claims because he failed to plead a plausible due process violation. *Id.* at 539. Reed has now filed a petition for certiorari to review that opinion. Pet. Writ Cert. (Pet.).

REASONS TO DENY THE PETITION

Convicted individuals have no substantive constitutional right to postconviction DNA testing, but if a State provides access, the procedures must satisfy procedural due process. *See 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 v. Switzer*, 562 U.S. 521, 525 (2011); *see Garcia v. Castillo*, 431 F. App'x 350, 353 (5th Cir. 2011) (unpublished).

Reed cannot fit through this narrow gap because he does not show that Chapter 64's process rises to the elevated level of fundamental inadequacy. Indeed, his petition merely seeks further appellate review of his case. But he does not even allege a complaint sufficiently plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); Fed. R. Civ. P. 12(b)(6). The lower courts were correct to pour him out. And this Court should not expend its limited resources on such a case.

I. REQUIRING AN ADEQUATE CHAIN OF CUSTODY BEFORE PERMITTING POSTCONVICTION DNA TESTING IS NOT FUNDAMENTALLY UNFAIR.

Reed first argues that Chapter 64's chain-of-custody requirement, which he calls "extratextual," Pet. 13, violates due process for several reasons: it is based on an incorrection assumption that contaminated evidence cannot yield reliable, probative results; it applies different standards to convicted persons postconviction than to the State at trial; it holds the requestor responsible for the State's actions; and it is ultimately circular.[11] Pet. 21–27. And yet, it is his own logic that proves circular and fallacious.

In the district court, Reed simply argued "as to why the []CCA was incorrect in its application of Chapter 64[.]" *Pruett v. Choate*, 711 F. App'x 203, 206 (5th Cir. 2017) (unpublished). But this is not the same as proving that Chapter 64, or the CCA's interpretation of it, "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (quoting *Osborne*, 557 U.S. at 69). Here, "the []CCA carefully considered each of [Reed's] contentions as to Chapter 64; it reviewed the evidence

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[11] Goertz urged in the Fifth Circuit that Reed forfeited many of these arguments by not raising them in the first instance. Suppl. Appellee's Br. 6–7, *Reed XVIII*, ECF No. 111. That court did not address this issue, but Goertz includes the argument here for preservation purposes.

with due diligence, then found that [Reed] was not entitled to . . . relief under Chapter 64." *Id.* at 206–07. Reed's complaint "boil[s] down to the bare claim that the []CCA misapplied Texas law[.]" *Id.* at 207. But a "'mere error of state law,' [as this Court] ha[s] noted, 'is not a denial of due process.'" *Rivera v. Illinois*, 556 U.S. 148, 158 (2009) (quoiting *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982)). Hence, what Reed pled in the district court does not demonstrate a violation of due process. The same is true even considering his new arguments raised for the first time in the Fifth Circuit.

Due process undoubtedly permits the States to impose restrictions on access to postconviction DNA testing, *see Osborne*, 557 U.S. at 69–70, and a chain-of-custody requirement falls within those broad bounds. The federal scheme, which is the "model for how States ought to handle the issue" of postconviction DNA testing, *id.* at 63, has one, 18 U.S.C. § 3600(a)(4), and so do many other state schemes, *see, e.g.*, Cal. Penal Code § 1405(g)(2); Fla. Stat. § 925.11(f)(2); 42 Pa. Cons. Stat. § 9543.1(d)(1)(ii). There is good reason to have such a requirement—it ensures "the identity and *integrity* of physical evidence." 23 C.J.S. Criminal Procedure § 1150 (2023) (emphasis added). Chapter 64's chain-of-custody requirement promotes both goals, including the latter, 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 evidentiary integrity.

Reed disagrees, saying that Texas makes a promise to prisoners that they can prove their innocence

through DNA testing and then reneges on that promise through the non-contamination requirement. Pet. 21–22, 35–36. Indeed, he explicitly argues that the requirement is not needed "to protect against unreliable results; the testing itself does that." Pet. 24. In this, Reed effectively argues that Texas must provide postconviction DNA testing to all its inmates.

Reed is attempting to transform a procedural due process claim into a substantive one. This is because, regardless of the state postconviction scheme, state prisoners may seek federal habeas relief and argue that actual innocence overcomes any bar to merits review. *See, e.g.*, *Schlup v. Delo*, 513 U.S. 298, 314–15 (1995). Thus, under his view, any State that provides any form of postconviction DNA testing must provide it without limit. But this Court has rejected Reed's disguised substantive due process argument. *See, e.g.*, *Skinner*, 562 U.S. at 525. And it has permitted limits on access to postconviction DNA testing, even when the inmate pursues a claim of actual innocence. *See Osborne*, 557 U.S. at 70 ("Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence . . . . [but t]hese procedures are not without limits."). Chain of custody is one of those permissible limits, as Justice Alito explained more than 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 slightest, unintentional mishandling of evidence.
>
> . . . .
>
> 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). Justice Alito's prescient opinion demonstrates why the lower court was right to dismiss Reed's procedural due process claim concerning chain of custody.

Turning to the specific facts of his case,[12] Reed complains that items introduced at his trial were

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[12] Goertz recognizes that this Court overruled his *Rooker-Feldman* objection the last time up. *Reed v. Goertz*, 598 U.S. 230, 235 (2023). However, with each changing iteration of his complaints, Reed continues to brief himself more squarely into a pure challenge of the CCA's adverse decision. As Justice Thomas noted in his dissent, it cannot simply be that a petitioner simply has to utter an incantation that he is not challenging an adverse decision and then gets to do precisely that. *Id.* at 246–47 (Thomas,

handled ungloved by trial participants (as per usual at that time, *Reed IX*, 541 S.W.3d at 769–70)), and that he is now forced to bear the burden for those decisions. But, "[t]he [trial] judge concluded that the remaining items that were not similarly handled and stored have been subject to a chain of custody sufficient to establish that they have not been substituted, tampered with, replaced, or altered in any material respect." *Id.* at 770. Thus, Reed's case demonstrates that a chain-of-custody requirement is not a complete bar to obtaining postconviction DNA testing (even if other requirements barred Reed). And, as explained above, chain-of-custody requirements heighten reliability, so it clearly has a legitimate sweep. Thus, a facial challenge to Chapter 64's chain-of-custody requirement fails. *See, e.g.*, *Ams. for Prosperity Found.*, 141 S. Ct. at 2387.

Reed further argues that placing the chain of custody burden on him, and presumably other Texas inmates seeking postconviction DNA testing, is fundamentally unfair because he is not the custodian of the evidence. But again, Reed proved up chain of custody for all evidence not introduced at trial, *Reed IX*, 541 S.W.3d at 770, so a facial challenge fails, *see, e.g.*, *Ams. for Prosperity Found.*, 141 S. Ct. at 2387. And, to the extent that he complains about the handling of the trial evidence in *his* case, he goes beyond the limited facial challenge permitted. *See Hooper v. Brnovich*, 56 F.4th 619, 626 (9th Cir. 2022) ("[The plaintiff] merely disagrees with the way in which the state courts applied

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J. dissenting). Setting *Rooker-Feldman* to the side, though, these particularized complaints with Chapter 64 and how it was applied in his case push Reed further away from the slim opening afforded by *Osborne* and *Skinner*.

the statute to the facts of his case."); *Wade v. Monroe Cty. Dist. Att'y*, 800 F. App'x 114, 119 (3d Cir. 2020) (unpublished) ("Unlike the claim in Skinner, Wade contends that the [state postconviction] court misinterpreted the DNA statute in his case specifically[.]"). And even if the facts of Reed's case can be considered, denying DNA testing when chain of custody fails isn't fundamentally unfair, as Justice Alito explained. *See Osborne*, 557 U.S. at 82, 85.

Further, placing the chain-of-custody burden on postconviction movants is not otherwise constitutionally objectionable. At a criminal trial, both parties have the obligation to demonstrate authentication before evidence can be introduced. *See, e.g.*, Tex. R. Evid. 901. Chain of custody is but one of the many ways to prove authentication. *See, e.g.*, *Davis v. State*, 992 S.W.2d 8, 10 (Tex. App.—Houston [1st Dist.] 1996, no pet.) ("An objection to the chain of custody is similar to an objection to inadequate authentication or identification in that both objections complain of the lack of the proper predicate to admitting the item in question."). That the burden flips in postconviction, i.e., the defendant now must prove something to obtain relief, is the norm. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 98 (2011) (holding that a habeas petitioner has the burden to demonstrate entitlement to relief). And here, where Reed met his burden with respect to some evidence, *Reed IX*, 541 S.W.3d at 770, he does not prove such scheme fundamentally unfair.

Reed pivots to policy and argues that making inmates shoulder the chain-of-custody burden will not sufficiently rebuke state officials when the chain fails,

and it will allow corrupt ones to bar testing by purposefully improperly handling the evidence. Pet. 24–25, 32–33. But, as the Fifth Circuit recognized, state officials are entitled to a presumption of good faith. *Reed XVIII*, 136 F.4th at 545; *see also, e.g.*, *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009) ("[G]overnment actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties."). And to whatever extent remedial action was warranted, Texas has undergone it. *See* Tex. Code Crim. Proc. art. 38.43(g) (requiring the Texas Department of Public Safety to create "standards and rules, consistent with best practices, relating to . . . the manner of collection, storage, preservation, retrieval, and destruction of biological evidence").

That Reed's capital murder trial occurred before the "advancement in touch DNA, a relatively new DNA technique that can develop a DNA profile from epithelial cells left by those handling the item," *Reed IX*, 541 S.W.3d at 769, requiring greater care by participants (including defense counsel) to not deposit epithelial cells on evidence introduced at trial, does not make the statute fundamentally unfair as to all individuals (or to him, if such a review is permissible), *see Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding that there was no due process violation when state officials failed to refrigerate biological samples); *see also id.* ("Part of it stems from our unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be

of conceivable evidentiary significance in a particular prosecution." (internal citation omitted)). And while Reed claims that, despite this chain of custody failing, DNA testing *may* produce probative and reliable results, it won't be probative of who committed the crime, just who touched the evidence at trial, *see Osborne*, 557 U.S. at 82, 85 (Alito, J., concurring). Consequently, Reed fails to demonstrate fundamental unfairness.

Reed further argues that Chapter 64 is fundamentally unfair because it creates a higher chain-of-custody burden on those seeking postconviction DNA testing than on prosecutors seeking to introduce evidence at trial. Reed's argument ignores the difference between biological material, e.g., epithelial cells, and where such material may be found, e.g., a belt. And this ignorance is why he continues to suggest that there's something other than Chapter 64's chain-of-custody requirement at play. Whatever he wants to call it—contamination, tampering,[13] or comingling—it all bears on the chain of custody for DNA evidence even if it might not be particularly relevant for traditional physical evidence.

Maine's highest court appreciates the difference between the two contexts—"[t]he central point of the chain of custody requirement is to assure that the

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[13] It is hard to understand how chain of custody could be different from tampering when the statute uses the phrase "tampered with[.]" Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(ii). The same is true for contamination when a movant must show that the evidence, in this case touch DNA, has not been "altered in any material respect[.]" *Id.*

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). The CCA understood it, too, with Reed's help—"Reed's own witnesses conceded that the manner of the trial exhibits' handling contaminated or tampered with the evidence." *Reed IX*, 541 S.W.3d at 770. In other words, there is a difference between introducing DNA evidence and introducing the evidence where the DNA was found. Reed's attempt to compare the two doesn't prove the use of different standards, just different contexts.

Reed's biggest complaint with the Fifth Circuit is that it refused to consider this argument: that contamination does not necessarily mean a nonprobative result. Pet. 31–35. And yet, the court clearly addressed this assertion, albeit in the context of an imbalanced burden between the State at trial and a prisoner postconviction. *Reed XVIII*, 136 F.4th at 545. Even still, by Reed's logic that testing any one thing *could* yield a probative result means a denial of testing is fundamentally unfair, States would have to test everything. Such a result would "[]necessarily overthrow[] the established system of criminal justice." *Osborne*, 557 U.S. at 62. There is nothing fundamentally unfair in requiring an adequate chain of custody, as Chapter 64 reasonably does.

II. IT IS ALSO NOT FUNDAMENTALLY UNFAIR TO REQUIRE A DEMONSTRATION OF MATERIALITY.

Reed mostly hinges his petition on the chain-of-custody issue. But he briefly touches on two other

aspects of Chapter 64. Pet. 27–28. He first argues that Chapter 64's materiality requirement, which Reed calls an "exoneration requirement," violates due process because it improperly defines exculpatory result, and it doesn't consider posttrial developments. Pet. 28–29. Again, he's wrong.

To obtain testing under Chapter 64, movants must prove by a preponderance of the evidence that they "would not have been convicted if exculpatory results had been obtained through DNA testing." Tex. Code Crim. Proc. art. 64.03(a)(2)(A). As explained by the CCA, "'[e]xculpatory results' means only results excluding the convicted person as the donor of this material." *Reed IX*, 541 S.W.3d at 774. Then, in conducting the probabilistic review, a Texas court considers "whether exculpatory results 'would alter the landscape if added to the mix of evidence that was available at the time of trial.'" *Id.* (quoting *Holberg v. State*, 425 S.W.3d 282, 285 (Tex. Crim. App. 2014)).

"A requirement of demonstrating materiality is [a] common" feature in postconviction DNA testing schemes, *Osborne*, 557 U.S. at 63, such as requiring inmates to prove that their requests are "sufficiently material," and it is "not inconsistent with the 'traditions and conscience of our people' or with 'any recognized principle of fundamental fairness,'" *id.* at 70 (quoting *Medina*, 505 U.S. at 446, 448). That is what Chapter 64 requires, and it is not fundamentally unfair. *See Cromartie v. Shealy*, 941 F.3d 1244, 1257 (11th Cir. 2019) (holding that Georgia's materiality requirement—"that the favorable DNA testing results create a reasonable probability that he would have been

acquitted had those results been available at trial"—was constitutional because "[this Court] has already approved of this type of materiality standard in *Osborne*"). In fact, it would not be fundamentally unfair even if it had no presumption of exculpatory results at all. *See McKithen v. Brown*, 626 F.3d 143, 153 (2d Cir. 2010) (holding that New York's postconviction DNA testing scheme, "even when understood not to require state courts to assume that the DNA testing sought will produce exculpatory results, cannot be said to conflict with the 'traditions and conscience of our people' or 'any recognized principle of fundamental fairness.'").

Nonetheless, Reed argues that the CCA should be required, as a constitutional matter, to interpret "exculpatory" as presuming a match to another suspect because such results would substantiate a third-party defense. Pet. 28. But if the CCA were required to presume another suspect's DNA was on every piece of evidence, "it makes it hard to imagine a case in which [it] would not grant DNA testing." *State v. Swearingen*, 424 S.W.3d 32, 39 (Tex. Crim. App. 2014). Reed's argument again calls for on-demand postconviction DNA testing, but "there is no such substantive due process right." *Osborne*, 557 U.S. at 72.

Even if Reed's argument is narrower, he still fails to show fundamental unfairness because the CCA largely utilized Reed's proposed definition of "exculpatory," assuming a redundant DNA profile belonging to Stites's fiancé, Jimmy Fennell, on all the items he sought to test (with sufficient chains of custody), yet it found that such was not enough to show likely acquittal. *Reed IX*, 541 S.W.3d at 773–77. This

was partly based on Reed's evidence at the Chapter 64 hearing—"Reed's experts contradict his argument that touch DNA would prove the perpetrator's identity." *Id.* at 777. The court carefully considered whether exculpatory results on each such item would be sufficiently material, finding that Reed failed to establish that much of the evidence was even connected with the crime. *Id.* at 774–75. Reed plainly cannot establish a procedural due process violation based on the CCA's refusal to apply a particular materiality standard when it assumed arguendo Reed's preferred standard—that Fennell was a redundant contributor. *Id.* at 777.

Nor has Reed shown that, as a matter of constitutional law, state courts must consider posttrial developments in determining whether DNA testing should be permitted. See Pet. 29. Indeed, the Supreme Court in *Osborne* reversed the respective circuit court when it framed the materiality analysis as an expansive "forward-looking" inquiry requiring a court to consider "all the evidence, old and new, incriminating and exculpatory.'" *Osborne v. Dist. Attorney's Office for the Third Judicial Dist.*, 521 F.3d 1118, 1135 (9th Cir. 2008) (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)); *id.* at 1140 ("[A]ll new evidence may be considered in assessing the potential materiality of further DNA testing."). Nothing in the Supreme Court's *Osborne* opinion mandates that a state court employ, as the Ninth Circuit did, a materiality analysis equivalent to that which would apply to a claim of actual innocence. *Id.* at 1140.

Moreover, due process does not mandate that States provide *any* postconviction review. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). When a State does,

it need not provide an attorney, even in capital cases. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion). And due process does not even mandate inmate competence during the postconviction process. *Ryan v. Gonzales*, 568 U.S. 57, 67 (2013). The point of this being that there is simply no precedent to suggest that states must, as a constitutional matter, offer an open-ended factfinding avenue when they enact postconviction DNA testing schemes.

Direct appeal is generally limited to the record developed at trial even if new evidence arises during the pendency of review. *See, e.g.*, *Trevino v. Thaler*, 569 U.S. 413, 422 (2013). The same is true for federal habeas review. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011). Reed does not explain why a State cannot do what the federal courts or government can do. *See Smith v. Phillips*, 455 U.S. 209, 218 (1982) ("It seems to us to follow 'as the night the day' that if in the federal system a post-trial hearing such as that conducted here is sufficient to decide allegations of juror partiality, the Due Process Clause of the Fourteenth Amendment cannot possibly require more of a state court system."). This is especially true as Texas provides a venue for Reed to air his "new" evidence via its habeas corpus process—and he has done so eleven times. The State does not have to disrupt its entire postconviction DNA testing scheme to give him another venue.

Texas is not alone in limiting the evidence to be considered when performing a materiality review. *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."); *Anderson v. State*, 831 A.2d 858, 867 (Del. 2003) ("When deciding whether evidence is materially relevant, the trial court must consider not only the exculpatory potential of a favorable DNA test result, but also the other evidence presented at trial."). Notably, a materiality review that focuses on the effect of trial is a well-worn rule in many constitutional contexts. *See Cromartie*, 941 F.3d at 1257 (rejecting challenge to Georgia's materiality standard, in part, because it is consistent with this Court's precedent in the suppression-of-evidence and ineffective-assistance-of-trial-counsel contexts); *Tarver v. Kunzweiler*, No. 20-CV-392, 2020 WL 6050572, at *5–6 (N.D. Okla. Oct. 13, 2020) (unpublished) (dismissing materiality challenge to Oklahoma's postconviction DNA testing statute). And these well-worn standards do not require an untethered reassessment of posttrial developments. Rather, they have causal nexuses, tying the error to the harm caused by it.

For example, a reviewing court considers the effect of suppressed evidence on the trial, not the suppressed evidence plus all other postconviction developments. *See, e.g.*, *United States v. Sipe*, 388 F.3d 471, 479 (5th Cir. 2004) ("[Materiality review] is intimately intertwined with the trial proceedings: because the court must judge the effect of the evidence on the jury's verdict, the *Brady* decision can never be divorced from the narrative of the trial."). Similarly, in the ineffective-assistance-of-trial-counsel context, for example, evidence undiscovered because of deficient performance is compared with the trial evidence, not with all posttrial developments. *See, e.g.*, *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010) ("An applicant

'who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial.'" (quoting *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989))). Employing a common component of a postconviction materiality standard in a postconviction DNA testing scheme makes sense and is not fundamentally unfair. *See Osborne*, 557 U.S. at 70; *Cromartie*, 941 F.3d at 1257.

Reed's primary retort is to appeal to the "facts" of his innocence case. Pet. 29. In other words, Reed is saying that because he's mustered a quantum of evidence that he believes proves innocence, he's more entitled to DNA testing.[14] But if the Court is going to consider posttrial developments, the CCA's exhaustive consideration of Reed's innocence case settles the matter. There, the court roundly rejected Reed's actual innocence arguments, including those focusing on the time-of-death inferences to be drawn from intact spermatozoa and physiological changes to Stites's body, along with allegations that Fennell confessed to killing Stites or that they were in an abusive, violent relationship. *Ex parte Reed*, 670 S.W.3d at 749–57; *see also Reed XVIII*, 136 F.4th at 547 (noting that even if "favorable results 'would fail to exclude' Fennell," all it would show is "the fact that Fennell drove his own truck

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[14] Again, this goes beyond a facial challenge and runs into *Rooker–Feldman*'s jurisdictional limitation. *See Alvarez v. Att'y Gen. for Fla.*, 679 F.3d 1257, 1262–63 (11th Cir. 2012) ("His as-applied procedural due process claim plainly and broadly attacks the state court's application of Florida's DNA access procedures to the facts of his case[.]").

or had touched his fiancé's belt," results that "can hardly be said [to] be exculpatory.").

Reed does not explain why these rejected theories and evidence somehow mean an inmate is more entitled to postconviction DNA testing (or how that could be consistent with a facial challenge to a postconviction DNA testing scheme). Thus, if Reed's claim is a facial challenge, it fails because materiality requirements are permissible under the Due Process Clause, and if it's an as-applied challenge, the Court lacks jurisdiction to entertain it and it is not otherwise successful in light of the rejection of Reed's innocence claims.

III. THE USE OF TIME LIMITATIONS IN A POSTCONVICTION DNA TESTING SCHEME DOES NOT OFFEND FUNDAMENTAL FAIRNESS.

Finally, Reed complains that Chapter 64's prohibition on unreasonable delay violates due process because it arbitrarily punishes prisoners for previously litigating claims of innocence and even counts that time against the prisoner.[15] Pet. 30–31. Chapter 64 requires that a movant prove that the request for postconviction DNA testing "is not made to unreasonably delay the execution of sentence or administration of justice." Tex. Code Crim. Proc. art. 64.03(a)(2)(B). The requirement that DNA testing "must have been diligently pursued" is similar to requirements imposed "by federal law and the

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[15] Again, Goertz urged in the Fifth Circuit that Reed forfeited many of these arguments by not raising them in the first instance. Suppl. Appellee's Br. 26–27, *Reed XVIII*, ECF No. 111. That court held that all arguments outside of the due process claim were actually abandoned on return to the appellate court and, thus, waived. *Reed XVIII*, 136 F.4th at 548 n.10.

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**Error! Bookmark not defined.** (quoting *Medina*, 505 U.S. at 446, 448). Indeed, the federal counterpart, the model for such schemes, *id*. at 63, *presumes* untimeliness if the request is made five years after its enactment or three years after conviction, § 3600(a)(10)(B). Chapter 64's generous limitations period is therefore facially constitutional.

If the facts of Reed's case are relevant, he surely does not prove unconstitutionality—he waited thirteen years after the enactment of Chapter 64 to seek DNA testing, "and there does not appear to be any factual or legal impediments that prevented Reed from availing himself of post-conviction DNA testing earlier." *Reed*, 541 S.W.3d at 779. Reed's dilatoriness was an appropriate basis on which the CCA denied DNA testing, and Reed fails to prove that the timeliness requirement of Chapter 64 is fundamentally unfair. *Cf. Cromartie*, 941 F.3d at 1256 (finding that the due diligence requirement in Georgia's postconviction DNA testing scheme did not violate due process).

Reed's attacks don't change that conclusion. For one, while *he* was supposedly developing actual innocence evidence between Chapter 64's enactment in 2001 and his request for DNA testing in 2014, that doesn't mean *everyone* seeking DNA testing has been diligent with their time. In other words, Reed fails to show that Chapter 64's timeliness requirement is unconstitutional in all situations. *See, e.g.*, *Ams. for Prosperity Found.*, 141 S. Ct. at 2387. But even giving

Reed the benefit of the doubt, it's not fundamentally unfair to require him to diligently develop DNA evidence, *along with* whatever else he might want considered—and not wait until the day he was set for execution. *See Reed IX*, 541 S.W.3d at 779 ("The timing of Reed's motion is even more suspect when we consider that it was filed on the same day the judge heard the State's motion to set an execution date filed three months earlier.").

The CCA specifically addressed—and rejected—Reed's assertion that he could not have sought touch DNA testing earlier than he did under Chapter 64. *Id*. Reed's disagreement with the CCA's conclusion belies any assertion that he is making a facial attack on the constitutionality of Chapter 64's procedures. Instead, he merely disagrees with the CCA's fact findings and conclusion founded upon those facts. *See* Pl. Suppl. Br. 30 ("But, in the CCA's view, touch-DNA testing was available before the 2011 amendments, even though [Chapter] 64 included no provision purporting to allow it and no decision had granted touch-DNA testing under [Chapter] 64."). This is patently insufficient to state a plausible, facial due process claim, but is rather an impermissible as-applied challenge. *See supra*, Argument II.

In any event, Chapter 64 clearly permits movants to seek DNA testing based on new technological developments, Tex. Code Crim. Proc. art. 64.01(b)(2)(A), it's just that Reed wasn't diligent in seeking to avail himself of those developments, and was clearly trying to stave off an execution date with litigation, *see Reed IX*, 541 S.W.3d at 779 (noting that the CCA had addressed

touch DNA testing under Chapter 64 four years before Reed made his request). There is nothing fundamentally unfair with Chapter 64's "punishment" of abusive, dilatory movants.

CONCLUSION

The petition for writ of certiorari should be denied.

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