No. 24-1268

In the Supreme Court of the United States

RODNEY REED, PETITIONER

v.

BRYAN GOERTZ,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
ARGUMENT 3
I. Article 64 violates due process because it arbitrarily denies prisoners access to DNA testing by rejecting the same science the state embraces when prosecuting defendants—and the state cannot rationally have it both ways. 3
A. The non-contamination requirement is unconstitutional, and Reed is likely to obtain DNA testing for that reason alone. 4
1. The non-contamination requirement arbitrarily withholds DNA testing. 4
2. Reed is entitled to relief because the non-contamination requirement is unconstitutional, so the Court should summarily vacate to allow the Fifth Circuit to consider the key non-contamination argument it ignored. 8
B. Although Reed should obtain DNA testing based on the non-contamination requirement alone, Article 64's exoneration and unreasonable-delay requirements are also unconstitutional. 9

TABLE OF CONTENTS
(continued)

Page

II. The question presented is exceptionally important, and this case is an excellent vehicle.....11
CONCLUSION.....13

TABLE OF AUTHORITIES

Page(s)

CASES

District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009).....11

Ex parte Reed, 271 S.W.3d 698 (Tex. Crim. App. 2008).....5

Herrera v. Collins, 506 U.S. 390 (1993).....11

Napue v. Illinois, 360 U.S. 264 (1959).....10

Reed v. Goertz, 598 U.S. 230 (2023).....8, 11, 12

Reed v. Texas, 140 S. Ct. 686 (2020).....12

Sears v. Upton, 561 U.S. 945 (2010).....8

Thompson v. United States, 145 S. Ct. 821 (2025).....1

United States v. Fasano, 577 F.3d 572 (5th Cir. 2009).....5, 6

Wolff v. McDonnell, 418 U.S. 539 (1974).....7

STATUTES

Tex. Code Crim. Proc. art. 64.....1, 3, 4, 6, 9, 10, 12

Tex. Code Crim. Proc. art. 64.03(a)(1)(B) 7

INTRODUCTION

Goertz's brief in opposition confirms that this Court must intervene to prevent a grave miscarriage of justice. Like the Fifth Circuit, Goertz continues to dodge the key reason Article 64 violates due process. And he continues to rely on the law's non-contamination requirement to bar Reed from testing *the murder weapon*—even at Reed's attorneys' expense. Goertz does so even though Reed is on death row and DNA testing could show that he is innocent.

As Reed explained, Article 64's non-contamination requirement violates due process because it irrationally and arbitrarily denies prisoners access to DNA testing. The requirement rests on the scientifically incorrect notion that potentially contaminated evidence cannot yield probative results. But the state itself rejects that very premise, and embraces DNA testing of potentially contaminated evidence, when it prosecutes defendants. Indeed, the Texas Department of Public Safety has protocols for testing evidence despite contamination. Baumgartner Br. 14-19.

"To suppose that the same proposition is both true and false is manifestly absurd." *Thompson v. United States*, 145 S. Ct. 821, 826 (2025) (alterations adopted). The state cannot simultaneously rely on contradictory reasoning to perform the testing it wants while denying the testing it fears. That heads-I-win, tails-you-lose approach is the essence of irrational, arbitrary, and fundamentally unfair government action, and it violates the due-process guarantee. And the state cannot dodge the violation by claiming that postconviction prisoners get fewer rights. The problem is claiming that *X* and *not X* are both true—fundamentally unfair nonsense.

The stakes here could not be higher. Over the past two decades, significant evidence has emerged that implicates Fennell in Stites' murder—indeed, he told fellow police officers before the crime that he thought Stites was cheating on him and that he would kill her if so, and later he twice confessed to killing her. If DNA testing on the parts of the belt handled by the killer excludes Reed, it will exculpate him. So, too, if testing shows DNA belonging to Fennell. But Goertz refuses to test the weapon because court personnel *might* have deposited skin cells on it when handling it ungloved at trial. That doesn't make sense, and the state itself wouldn't accept that reasoning if *it* wanted the testing. *See* Pet. 22-23. That's because the presence of court personnel's DNA wouldn't prevent analysts from answering the relevant question: Are Fennell or Reed likely donors of DNA on the belt? *See* Baumgartner Br. 16.

Goertz has no good response. Like the Fifth Circuit, Goertz doesn't engage with Reed's core argument that the non-contamination requirement is irrational, arbitrary, and fundamentally unfair. Instead, he swings at strawmen, erroneously claiming that Reed challenges a generic chain-of-custody requirement and that Reed's argument would always require DNA testing. But all Reed argues is that Article 64 cannot operate irrationally, arbitrarily, and fundamentally unfairly. That is exactly how the non-contamination requirement operates. And it's exactly why, for example, the Nebraska Supreme Court has rejected such a requirement, *see* Pet. 25-27, in a decision Goertz simply ignores.

The Court should intervene. The non-contamination requirement's unconstitutionality, without more, entitles Reed to relief. The Court should summarily

vacate the Fifth Circuit's judgment so the court can consider the key non-contamination argument it avoided, or grant plenary review.

ARGUMENT

I. Article 64 violates due process because it arbitrarily denies prisoners access to DNA testing by rejecting the same science the state embraces when prosecuting defendants—and the state cannot rationally have it both ways.

Article 64's non-contamination, exoneration, and unreasonable-delay requirements violate due process. But this Court can grant Reed relief based solely on the non-contamination requirement's unconstitutionality—a key point Goertz doesn't dispute. Texas accepts DNA science in its prosecutions, relying on the ability to extract probative results from potentially contaminated evidence. Yet Article 64 rejects that very science and instead uses potential contamination as a reason to deny testing. Texas cannot rationally have it both ways: *X* and *not X* cannot both be true, and running a high-stakes postconviction regime on that fallacy is fundamentally unfair.

Although Reed pressed that argument repeatedly, the Fifth Circuit failed to address it. Given the stakes and the serious due-process concerns when a state plays by two different sets of rules, the Court should summarily vacate so the Fifth Circuit can consider the argument, or else grant plenary review.

A. The non-contamination requirement is unconstitutional, and Reed is likely to obtain DNA testing for that reason alone.

1. The non-contamination requirement arbitrarily withholds DNA testing.

a. The CCA construes Article 64's chain-of-custody provision to withhold DNA testing if evidence might be contaminated. App. 66a-67a. That non-contamination requirement arbitrarily denies prisoners the opportunity to obtain probative DNA evidence. The requirement rests on the incorrect assumption that contaminated evidence cannot yield reliable DNA-testing results—an assumption that Texas correctly *rejects* when *prosecuting* defendants. Pet. 22-23. Indeed, the Texas Department of Public Safety has rigorous protocols for reporting DNA results that can identify true donors from complex DNA mixtures involving contamination. Baumgartner Br. 14-19. It is irrational, arbitrary, and fundamentally unfair to rely on DNA testing's ability to produce reliable results from contaminated evidence, on the one hand, and categorically deny that same science to withhold testing of supposedly contaminated evidence, on the other. Simultaneously asserting that something is and isn't possible is absurd and doesn't comport with due process, especially when a man's life is at stake.

b. Goertz doesn't grapple with this argument.

First, Goertz attacks strawmen. He suggests (Opp. 18-19) that Reed challenges a run-of-the-mill chain-of-custody requirement, and not the *non-contamination* requirement the CCA read into Article 64. That distinction matters, as the decisions rejecting a non-contamination requirement make clear. *See* Pet. 25-27. Goertz simply ignores those cases. And the

point isn't that "any State that provides any form of postconviction DNA testing must provide it without limit." Opp. 19. The point is that a state cannot deny testing for a fundamentally unfair reason, and it is fundamentally unfair to rely on the power of DNA science to produce probative results from contaminated evidence when the state wishes while simultaneously rejecting that science to categorically deny testing when the state prefers. The Texas Department of Public Safety "has protocols for determining true donors even in cases of contamination," and "potential contamination" thus "minimally impact[s] DNA test results." Baumgartner Br. 14-17. The state cannot rationally turn around and say just the opposite when confronted with a capital defendant.

The best response Goertz can muster is that testing the belt "won't be probative of who committed the crime, just who touched the evidence at trial." Opp. 24. But that depends on what the results show. All agree that the killer gripped the belt tightly for several minutes to strangle Stites. *Ex parte Reed*, 271 S.W.3d 698, 705-06 (Tex. Crim. App. 2008). And all agree that the belt was "handled by ungloved attorneys" and "court personnel," App. 66a-67a—known individuals who could be excluded with reference samples. If Fennell's DNA is on the belt, the results would be probative. After all, Fennell didn't touch the belt at trial. And if both Fennell's and court employees' DNA are on the belt, the results would still be probative.

The only *rational* approach—which, again, the state relies on when *prosecuting* defendants, Pet. 22-23—is acknowledging that the uncertainty about what testing will show "can be dispelled only by the tests a petitioner is seeking." *United States v. Fasano*, 577 F.3d 572, 576 (5th Cir. 2009); *see* Baumgartner

Br. 8. The only difference in the postconviction context is that Texas simply doesn't want to do the testing.

Second, Goertz claims that it isn't "constitutionally objectionable" to put "the chain-of-custody burden on postconviction movants" because ordinarily the "burden flips in postconviction" proceedings. Opp. 22. That response likewise dodges Reed's argument. The point isn't that states must provide the same due-process protections to postconviction prisoners and criminal defendants who haven't been convicted. The point is that state law's reasons for denying postconviction DNA testing must not be irrational and fundamentally unfair. And it is irrational, and entirely arbitrary, to reject DNA science to deny testing in postconviction proceedings because of purported contamination but embrace that same science to permit testing when prosecuting defendants. Pet. 23. After all, science doesn't change just because a defendant is convicted. The difference in the state's approaches has nothing to do with burdens, but only with the state's preference for testing when prosecuting defendants, but not when defending convictions.

Third, Goertz claims that an Article 64 requirement could violate due process only if it created "a complete bar to obtaining postconviction DNA testing." Opp. 21. And because the CCA held that some of the items for which Reed sought testing (but not the murder weapon) satisfied the non-contamination requirement, Goertz reasons, the non-contamination requirement isn't unconstitutional.

That argument fails. It's true that a DNA-testing law that never permitted testing would be an unconstitutional illusory promise. *See* Pet. 21. But the converse isn't true. The question remains whether the

law's procedures are fundamentally unfair. If Article 64 granted or withheld testing based on a coin toss, it likewise wouldn't be a complete bar to testing, but it also plainly would constitute "arbitrary action of government" violating the due-process guarantee. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

Finally, Goertz falls back on the hard-to-follow argument that there isn't really a non-contamination requirement after all, because Article 64's requirements operate on the epithelial cells that might be on the belt, and not on the belt itself. Opp. 24-25. In his view, an applicant like Reed simply has to prove chain of custody for every epithelial cell on the belt, not just for the belt.

Goertz's argument rewrites the CCA's construction of Article 64. The CCA concluded that the "[s]ection[s] of belt" did "not satisfy th[e non-contamination] standard," not that the epithelial cells didn't satisfy the standard. App. 65a. And to permit testing, Article 64 requires that "there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing." Tex. Code Crim. Proc. art. 64.03(a)(1)(B). That requirement makes clear that the word "evidence" refers to the item containing the biological material, not the biological material itself.

In the end, Goertz's own argument only underscores the irrationality and arbitrariness of the non-contamination requirement. *All* evidence is potentially contaminated from handling—that's why Texas has rigorous protocols for accounting for it. Baumgartner Br. 8-9. Indeed, Goertz doesn't deny that the Texas Department of Public Safety relies on DNA science to produce reliable DNA results from potentially contaminated evidence. Rather, he claims that a

petitioner should somehow have to prove up a chain of custody for invisible biological material without doing the very testing necessary to assess that biological material in the first place. Pet. 23-24.

2. Reed is entitled to relief because the non-contamination requirement is unconstitutional, so the Court should summarily vacate to allow the Fifth Circuit to consider the key non-contamination argument it ignored.

Even though Reed repeatedly pressed the argument, *see* CA5 Oral Arg. 9:24-9:34; CA5 Doc. 103, at 30-31; CA5 Doc. 119, at 6-7; App. 111a-112a, the Fifth Circuit failed to consider Reed's key argument that the non-contamination requirement violates due process because it arbitrarily denies testing of probative results by categorically rejecting the same science the state embraces when prosecuting defendants. The most straightforward path is thus for the Court to summarily vacate the Fifth Circuit's judgment so that court can undertake "the correct … inquiry" on remand, *Sears v. Upton*, 561 U.S. 945, 946 (2010) (per curiam). That approach makes sense because a finding that the non-contamination requirement violates due process, without more, would redress Reed's injury, by "eliminat[ing] the state prosecutor's justification for denying DNA testing" of the belt. *Reed v. Goertz*, 598 U.S. 230, 234 (2023). As explained (Pet. 33-35), Goertz could not rely on Article 64's exoneration or unreasonable-delay requirements to deny a renewed motion to DNA-test the belt.

Goertz doesn't dispute that Reed is entitled to relief even if only the non-contamination requirement is unconstitutional. Instead, Goertz contends (Opp. 25)

that the Fifth Circuit *did* address Reed's key non-contamination argument. But Goertz's explanation shows that just the opposite is true. Goertz says that the Fifth Circuit "clearly addressed" Reed's argument that the non-contamination requirement is irrational and arbitrary by addressing the "imbalanced burden between the State at trial and a prisoner postconviction." Opp. 25 (citing App. 13a-15a). Simply put, Goertz says that the Fifth Circuit addressed Reed's argument by addressing an admittedly *different* argument. As explained (at 6), the problem is that the state is simultaneously (and fundamentally unfairly) asserting *X* and *not X*, not that the state is imposing a burden on postconviction petitioners that doesn't apply to criminal defendants.

That makes no sense. The Court should summarily vacate for the Fifth Circuit to address this argument, or else grant plenary review.

B. Although Reed should obtain DNA testing based on the non-contamination requirement alone, Article 64's exoneration and unreasonable-delay requirements are also unconstitutional.

Because holding the non-contamination requirement unconstitutional would remove Goertz's justification for denying Reed DNA testing on the belt, the Court need go no further. But Article 64's exoneration and unreasonable-delay requirements also violate due process.

1. The exoneration requirement violates due process. The CCA's construction requires decisionmakers to ignore evidence inculpating third parties and posttrial developments—including the fact that trial testimony has been recanted or

scientifically disproven—that, taken together with exculpatory DNA-testing results, could prove a prisoner's innocence. Yet a rule that allows false evidence to support a conviction violates due process. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959); Pet. 21.

Goertz has no good response. He asserts that a generic "materiality requirement" is constitutional and that state courts need not "consider posttrial developments in determining whether DNA testing should be permitted." Opp. 26-28. But those arguments ignore the specific constitutional deficiencies Reed alleges with the CCA's construction of the exoneration requirement. Reed doesn't challenge that provision simply because it requires prisoners to make some threshold materiality showing. Rather, the CCA's construction of Article 64 withholds testing given the trial record, even if key pieces of that record have been recanted or disproven. *See* Pet. 29. That construction doesn't comport with due process.

2. Article 64's unreasonable-delay requirement likewise violates due process. The provision punishes prisoners for exercising their right to prove their innocence through means other than DNA testing and for not predicting future amendments to Article 64.

Here, too, Goertz defends a perceived generic requirement, rather than what Article 64, as construed by the CCA, actually requires. *See* Opp. 32-33. And Reed's case shows how unfair the CCA's construction is. The CCA found Reed's 2014 motion untimely even though Reed had requested testing on some of the items, including the murder weapon, in 1999, App. 104a, 122a, and even though Article 64 didn't authorize until 2011 the touch-DNA testing Reed requested in that 2014 motion. Goertz all but concedes

Reed's diligence. He just says "that doesn't mean *everyone* seeking DNA testing has been diligent with their time." Opp. 33. But that's exactly the point: The CCA construes the unreasonable-delay requirement to allow an unreasonable-delay finding even for *diligent* applicants, making the requirement arbitrary and fundamentally unfair.

II. The question presented is exceptionally important, and this case is an excellent vehicle.

Goertz doesn't dispute that the question presented is critical. Nor could he, given the stakes. "[T]he execution of [a]n … innocent person" is " a constitutionally intolerable event," *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring), and postconviction DNA testing is a critical failsafe to avoid that grave injustice because it is "can provide powerful new evidence unlike anything known before," *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 62 (2009). A state's failure to comport with due process in its postconviction DNA-testing regime can thus have life-or-death consequences, as Reed's case shows.

This case is also an excellent vehicle because, as noted (at 8-9), the non-contamination requirement's unconstitutionality, without more, entitles Reed to relief. Goertz wrongly claims that Reed forfeited the argument that the non-contamination requirement is unconstitutional, but, as explained (at 8), Reed repeatedly pressed that very argument. Goertz also cries "*Rooker–Feldman*," Opp. 20-21 n.12, even though this Court expressly rejected that argument the last time he made it, *Reed*, 598 U.S. at 234-35. Reed "targets as unconstitutional the Texas statute

[the CCA] authoritatively construed." *Id.* at 235. Reed's references to the facts of his own case to show standing and importance, and to underscore the real-life unfairness and stakes posed by Article 64, don't suddenly create a *Rooker–Feldman* problem.

* * *

Since 1999, Reed has been asking to DNA-test *the murder weapon*—the belt used to commit the crime for which he was convicted and sentenced to death. Testing the belt could help reveal the truth about a case that has "remain[ed] so mired in doubt" for almost three decades. *Reed v. Texas*, 140 S. Ct. 686, 690 (2020) (statement of Sotomayor, J., respecting the denial of certiorari).

Yet Goertz continues to refuse that straightforward and commonsense request, without any constitutionally sufficient reason, even though Reed's attorneys have offered to pay for the testing. Goertz relies on Article 64's non-contamination requirement, which withholds testing based on the premise that potentially contaminated evidence cannot produce reliable results. But that premise is unscientific and incorrect, and Texas correctly rejects it when prosecuting defendants. The state thus asserts that *X* and *not X* are both true, simply so it can deny prisoners like Reed the opportunity to obtain exculpatory DNA-testing results. That approach is irrational, arbitrary, and fundamentally unfair. The Court should intervene to avert a miscarriage of justice.

CONCLUSION

The Court should summarily vacate the Fifth Circuit's decision and remand for that court to consider Reed's argument that Article 64's non-contamination requirement violates due process because it rests on an arbitrary and irrational rejection of the very same DNA-testing science the state embraces when prosecuting defendants. Alternatively, the Court should grant plenary review.

Respectfully submitted.

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