No. 22-581

IN THE

Supreme Court of the United States

HEIDI R. STEWARD, Acting Director, Oregon Department of Corrections,

Petitioner,

v.

FRANK E. GABLE,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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The parties agree that *Chambers v. Mississippi*, 410 U.S. 284 (1973), announced a rule of "narrow applicability" that almost never justifies a court overturning a ruling that excludes evidence under a federal or state evidence code. BIO 26 (noting that in the past 50 years only about a dozen federal appellate decisions have granted relief under *Chambers*). That only underscores how extraordinarily out of step with settled precedent the Ninth Circuit's decision here is. This Court should summarily reverse or grant plenary review.

A. Summary reversal is warranted.

Respondent does not dispute that the Ninth Circuit erred to the extent it granted habeas relief on the ground that "[t]he state court's application of the Oregon evidence rules was incomplete and almost certainly wrong." App. 27a; *see also* BIO 15–16. Respondent defends only the Ninth Circuit's backup ruling that even if the state court properly applied state law, its exclusion of Crouse's hearsay statements violated due process under *Chambers*. BIO 16 (quoting App. 28a). And respondent agrees that that ruling can be sustained only if Crouse's statements bore persuasive "assurances of trustworthiness." BIO 17.

They did not. Respondent acknowledges that many of Crouse's statements about the murder were "patently false." BIO 17. But even the one story that respondent views as credible—the "interrupted-car-burglary" story, BIO 17—was inconsistent with the facts of the crime in important respects. Although

respondent points to a handful of consistent details, BIO 18–19, those details alone do not make Crouse's story a credible account of the murder.

Most importantly, respondent ignores that at the original criminal trial he *stipulated* to facts showing that the important details of the story could not be corroborated or were inconsistent with the circumstances of the crime. The state court was entitled to consider those stipulations in deciding whether to admit the hearsay evidence despite the state evidentiary rule barring it. Among other things, respondent stipulated that:

- The state's crime lab determined after testing that the "class characteristics of the knife that Mr. Crouse insisted he used against Michael Francke were, in fact, not consistent with the class characteristics of the knife they identified as the weapon that killed Michael Francke" and "not consistent with the clothing or the stab cuts in the business cards." 9th Cir. E.R. 838.
- The lab "processed the knife that he insisted that he used when he allegedly killed Michael Francke and, in fact, processed it twice for blood, took it apart entirely and found no blood on it." *Id.* at 837.
- The lab "processed Johnny Crouse's boots and pants and jacket and sweatshirt and found no evidence of blood on any of the items." *Id.*
- "[T]he pictures from the autopsy do not substantiate Mr. Crouse's version of five stab

wounds including the right forearm, the stomach, and wounds on both arms and both hands." *Id.* at 839.

- "[D]etectives of the Oregon State Police attempted to break into Michael Francke's car using the wire in the method that Johnny Crouse told them that he used and were unable to do that." *Id.* at 837.
- "[A] detective did, in fact, go out to the field that John Lee Crouse took them to where supposedly there was some evidence buried and they rented a backhoe, dug throughout the field and located no evidence, no clothing, nothing buried in the area that John Lee Crouse indicated that the items were buried." *Id.* at 838–39.

See also id. at 839 (defense counsel's assertion that "Your Honor, it's so stipulated").

Respondent may now dispute some of those facts. *See, e.g.*, BIO 19 (arguing that "Crouse's knife *did* match the victim's wound," although citing a part of the record—App. 70a—that does not support that assertion). But the question is whether Crouse's hearsay statements, as they were presented to the state court, had such persuasive assurances of trustworthiness that due process compelled the court to admit them regardless of the rules of evidence. Respondent's stipulations that the statements could not be corroborated and were inconsistent with the forensic evidence in key respects show that they did not have sufficient assurances of trustworthiness.

The same problem of ignoring the proffer of evidence actually made to the state court undermines other arguments respondent makes about the facts. He now argues that Crouse's clothing was consistent with what the eyewitness, Hunsaker, described. BIO 19. But the proffer included testimony from the detective who interviewed Crouse agreeing that he was "aware that the description of the clothing that Mr. Hunsaker gave on the assailant who r[a]n away was totally different than the description of the clothing that Johnny Lee Crouse said that he was wearing the night of the crime." 9th Cir. E.R. 825. Similarly, although respondent now disputes (without citing anything in the record) that Francke's wounds were inconsistent with the left-handed stabs that Crouse described, BIO 19, the detective testified in the state-court proffer that he was aware that "the pathologist that conducted this autopsy[] indicates that basically in terms of the wounds that he found on Michael Francke's body that they are not consistent necessarily with a left-handed stabbing scenario." 9th Cir. E.R. 831.

Crouse got some of the most basic facts of the crime—what knife was used, how the stabbing occurred, what the assailant was wearing—wrong. By contrast, the handful of details that Crouse got *right* about the facts of the murder were unremarkable. The murder was front-page news in Salem, *see, e.g.*, 9th Cir. ER 194–97, and respondent acknowledges that facts like the path of the assailant's flight had been publicly reported, BIO 18. (Even then, Crouse gave two different accounts of the flight, only one of which matched Hunsaker's description. *See* 9th Cir.

E.R. 828–29.) It also had been publicly reported that Francke was attacked "near his car" and that the district attorney had refused "to rule out robbery as a motive." 9th Cir. E.R. 195, 199 (newpaper articles). It is hardly surprising that Crouse might tell, among several other stories, an interrupted-car-burglary story in which the car had "stuff" in it and the victim made a sound after being stabbed. BIO 18. Crouse's correct description of Francke's physical build is also hardly surprising, because Crouse had previously met and spoken to him in person when Crouse was in prison. 9th Cir. E.R. 1228–29.

Nor did Crouse's statements have any other persuasive assurances of trustworthiness. Unlike the confession in *Chambers*, 410 U.S. at 287, Crouse's statements were not sworn under oath; his only sworn testimony on the subject was his denial that he committed the crime. App. 114a. The statements also were not corroborated, as was the confession in *Chambers*, 410 U.S. at 290, by eyewitness testimony identifying him as the murderer.

Respondent acknowledges that the rule from *Chambers* has "narrow applicability" and rarely warrants relief. BIO 26. The Ninth Circuit badly misapplied that rule here. This Court should summarily reverse the grant of habeas corpus.

B. Alternatively, this Court should grant plenary review.

1. This Court should review the constitutionality of the unavailability requirement in hearsay rules.

Hearsay rules, both state and federal, typically allow statements against interest only when the declarant is unavailable to testify. *See, e.g.*, Fed. R. Evid. 804(b)(3); Or. Rev. Stat. § 40.465(3)(c). Respondent does not dispute that this case would warrant plenary review if it implicated the constitutionality of that common requirement. He argues instead that this case does not implicate that requirement because the state court's ruling relied on other grounds. BIO 23–26. But like the Ninth Circuit, he confuses the state court's two evidentiary rulings.

The state court was confronted with two different pieces of evidence and made separate evidentiary rulings as to each of them. The first, and the one at issue for purposes of *Chambers*, was whether to admit Crouse's *out-of-court* statements. The second was whether to allow respondent to call Crouse to the stand for *in-person* testimony. The court excluded the former on hearsay grounds and the latter on relevance grounds.

As to the out-of-court hearsay statements about the circumstances of Francke's murder, which were statements against Crouse's penal interests, the state court ruled that they were inadmissible because Crouse was *not* unavailable to testify. Crouse in fact voluntarily testified on the subject at a hearing outside the jury's presence, denying under oath that

he committed the murder. App. 114a; 9th Cir. E.R. 760. The state court ruled that in doing so he waived any Fifth Amendment privilege he had with respect to that subject. App. 115a; 9th Cir. E.R. 771. And it told the parties that if Crouse tried to avoid answering a question on that subject before the jury, it would order him to do so. App. 115a; 9th Cir. E.R. 778. Respondent did not take the court up on that offer, and Crouse therefore neither was "exempted *by ruling of the court* on the ground of privilege from testifying concerning the subject matter of a statement" nor "[p]ersist[ed] in refusing to testify concerning the subject matter of a statement despite *an order of the court* to do so." Or. Rev. Stat. § 40.465(1)(a)–(b) (emphasis added); *see also* Fed. R. Evid. 804(a)(1)–(2) (a declarant is unavailable if the declarant "is exempted from testifying about the subject matter of the declarant's statement because *the court rules* that a privilege applies" or "refuses to testify about the subject matter despite *a court order* to do so") (emphasis added).

Respondent argues that Crouse was nonetheless unavailable because Crouse only "mistakenly" answered the question on the stand and "intended" to invoke his Fifth Amendment privilege "on all questions." BIO 24. But that is flatly inconsistent with the state court's ruling here, which was challenged and affirmed on appeal. The state court—which had the opportunity to observe Crouse on the stand—ruled that Crouse did not make a mistake at all:

> I have heard Mr. Crouse's counsel say that Mr. Crouse didn't understand the question, but we

> all sat here -- we can get back to un-ringing the bell, we all sat here. I heard [defense counsel's] question. He was very direct, and Mr. Crouse did not hesitate to respond -- to respond to the question. Now, belatedly, counsel says he didn't understand the question and he wants to invoke his Fifth Amendment right based on the fact that he failed to understand the question. A reasonable person has to find that he understood the question. He answered it. So, at least as to that question, he didn't invoke his Fifth Amendment rights. He answered it.

9th Cir. E.R. 770–71. Respondent challenged that ruling on direct appeal, *see* Ex. 106, at 115–20, but the Oregon Court of Appeals affirmed and the Oregon Supreme Court denied review. *See* Pet. 5–6.

As to Crouse's proposed in-court testimony that—consistent with the proffer outside the jury's presence—would deny that he committed the murder, the state court ruled that the testimony was not relevant: "[T]he answer to the question that he was asked would be irrelevant to the jury." 9th Cir. E.R. 784. Crouse's statement that he did *not* commit the murder did not make it more or less likely that respondent did. And although respondent might have sought to impeach that testimony with Crouse's prior inconsistent statements, that would not have allowed the jury to consider those *unsworn* statements for the truth of the matter asserted. Or. Rev. Stat. § 40.450(4)(a)(A) (prior inconsistent statement is not hearsay if it was given under oath); *accord* Fed. R. Evid. 801(d)(1)(A). Thus, even if respondent had been allowed to call Crouse to testify, the jury could not

have considered the statements respondent wanted to use for their truth.

Neither of those evidentiary rulings was "idiosyncratic," "convoluted," "arbitrary," or "hyper-technical." BIO 23–24, 27. They were straightforward applications of well-established rules of evidence. Respondent offers no support for his assertion that "courts across the country" would have admitted Crouse's hearsay statements in these circumstances. BIO 24. Any court faithfully applying similar rules of evidence to the facts found by the state court here would reach the same conclusion.

The *Chambers* question here thus reduces to this: Does the Due Process Clause invalidate the unavailability requirement for hearsay statements against interest like the one at issue here? *Chambers* held that the Due Process Clause invalidated two archaic rules of evidence—a rule against impeaching one's own witness and a rule allowing statements against pecuniary but not penal interest, 410 U.S. at 295–302—but this Court has never considered whether it invalidates the well-accepted unavailability requirement. This case presents an appropriate vehicle to resolve that question.

2. This Court also should review the Ninth Circuit's *Schlup* ruling.

Respondent's brief in opposition makes it clear that this case turns on which of two starkly different interpretations of *Schlup v. v. Delo*, 513 U.S. 298 (1995), is correct. *Schlup* emphasized that "[i]t is not the district court's independent judgment as to whether reasonable doubt exists" that matters but

rather the court must "make a probabilistic determination about what reasonable, properly instructed jurors would do" and may excuse a procedural default only if it finds that "*no* juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 329 (emphasis added). But respondent's brief effectively suggests that federal courts *should* make their own independent judgment about the persuasiveness of the evidence.

Respondent's assertion, for example, that Janyne Gable's sworn statement that respondent told her that he "stuck the guy * * * at the hospital" is "patently not worthy of belief," BIO 35, invites the federal courts to substitute their own credibility determinations for that of reasonable jurors. Some reasonable jurors might be persuaded by respondent's argument that the passage of time undermines the credibility of that statement, but others might well find it plausible that such a dramatic event still stands out in her memory decades later. More generally, respondent is wrong to suggest that the federal courts may disregard the "inculpatory evidence" that was subject to "thorough impeachment." BIO 31. Reasonable jurors can and do credit evidence even though it has been impeached.

Reasonable jurors also can and do discredit arguably exculpatory evidence that has been impeached. Respondent may view it as innocuous, for example, that Harden received a "gift" of $1,000 cash shortly before he recanted, BIO 32–33; *see also* 9th Cir. E.R. 115, but reasonable jurors could reach a different conclusion. The same could be said of the

recanted recantations from individuals such as Walker and Childers, BIO 34–35: Reasonable jurors could reach different conclusions about which version to credit.

Much of the evidence on both sides is subject to some sort of impeachment. That weighs against, not in favor of, a finding of actual innocence, because reasonable jurors can reach differing conclusions about what evidence to credit. But at a minimum, this case presents an opportunity for the Court to clarify how that sort of evidence should be evaluated in the *Schlup* analysis. If the Court does not summarily reverse on the merits, it should review the *Schlup* issue along with the merits.

CONCLUSION

This Court should grant the petition for certiorari and summarily reverse the Ninth Circuit. Alternatively, the Court should grant the petition and set the case for oral argument.

Respectfully submitted,

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