No. 23-____

In the Supreme Court of the United States

RODNEY REED, PETITIONER

v.

STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In the twenty-five years since Rodney Reed was convicted of murder and sentenced to death, a "considerable body of evidence" has accumulated that he is innocent. *Reed v. Texas*, 140 S. Ct. 686, 687 (2020) (statement of Sotomayor, J., respecting the denial of certiorari). In 2021, Reed presented overwhelming evidence of innocence at a state habeas hearing that comprehensively dismantled the state's case against him, confirming that his conviction remains "mired in doubt." *Id.* at 690. But the trial court adopted the state's proposed findings verbatim. The Texas Court of Criminal Appeals—unable to cure the trial court's abdication of its role with no independent way to assess witness credibility—then denied relief, reasoning that Reed had not produced "affirmative evidence" that showed it was more likely than not his theory of the case "is the correct one." App. 99a, 126a.

The questions presented are:

1. Whether it violates due process and contravenes *Schlup v. Delo*, 513 U.S. 298 (1995), to require a petitioner pursuing a gateway-innocence claim not just to provide new reliable evidence making it more likely than not that a reasonable juror would have reasonable doubt, but to prove with "affirmative evidence" that it is more likely than not that a particular theory of innocence is true.

2. Whether a trial court violates due process when it adjudicates a habeas petition by adopting verbatim the state's error-riddled findings of fact rather than conducting its own independent analysis of the evidence.

PARTIES TO THE PROCEEDING

Petitioner Rodney Reed was the habeas applicant below in the Court of Criminal Appeals of Texas and the 21st Judicial District Court of Texas. Respondent is the State of Texas.

RELATED PROCEEDINGS

This case is directly related to the following proceedings:

Court of Criminal Appeals of Texas:

Ex parte Rodney Reed, No. WR-50,961-10 (June 28, 2023) (opinion denying in part and dismissing in part habeas application; decision below here)

Ex parte Rodney Reed, No. WR-50,961-11 (June 28, 2023) (order dismissing habeas application; decision below here)

Ex parte Rodney Reed, No. WR-50,961-09 (June 26, 2019) (order dismissing habeas application)

Ex parte Rodney Reed, No. WR-50,961-08 (May 17, 2017) (order dismissing habeas application)

Ex parte Rodney Reed, No. WR-50,961-07 (May 17, 2017) (order dismissing habeas application)

Ex parte Rodney Reed, No. WR-50,961-06 (July 1, 2009) (order dismissing habeas application)

Ex parte Rodney Reed, No. WR-50,961-05 (Jan. 14, 2009) (order dismissing habeas application)

Ex parte Rodney Reed, No. WR-50,961-04 (Jan. 14, 2009) (order dismissing habeas application)

Ex parte Rodney Reed, No. WR-50,961-03 (Dec. 17, 2008) (opinion denying habeas application)

Ex parte Rodney Reed, No. WR-50,961-02 (Feb. 13, 2002) (order dismissing habeas application)

Ex parte Rodney Reed, No. WR-50,961-01 (Feb. 13, 2002) (order denying habeas application)

Rodney Reed v. Texas, No. 73,135 (Dec. 6, 2000) (opinion affirming conviction)

21st Judicial District Court of Texas:

Ex parte Rodney Reed, No. 8701 (Oct. 31, 2021) (findings of fact, conclusions of law and recommendation on habeas application)

Ex parte Rodney Reed, No. 8701 (Jan. 8, 2018) (findings of fact, conclusions of law and recommendation on habeas application)

Ex parte Rodney Reed, No. 8701 (June 7, 2006) (findings of fact and conclusions of law on habeas application)

Ex parte Rodney Reed, No. 8701 (Oct. 1, 2001) (findings of fact and conclusions of law on habeas application)

State v. Rodney Reed, No. 8701 (May 29, 1998) (order on conviction and sentence of death)

Supreme Court of the United States:

Rodney Reed v. Texas, No. 19-411 (Feb. 24, 2020) (denying petition for a writ of certiorari)

Rodney Reed v. Stephens, No. 13-1509 (Nov. 3, 2014) (denying petition for a writ of certiorari)

Rodney Reed v. Texas, No. 01-5170 (Oct. 9, 2001) (denying petition for a writ of certiorari)

United States Court of Appeals (5th Cir.):

In re Rodney Reed, No. 19-51044 (Nov. 14, 2019) (order dismissing motion to file successive habeas petition)

Rodney Reed v. Stephens, No. 13-70009 (Jan. 10, 2014) (opinion affirming denial of habeas petition)

United States District Court (W.D. Tex.):

Rodney Reed v. Thaler, No. 02-cv-142 (Sept. 26, 2012) (judgment denying habeas petition)

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INTRODUCTION

This case presents two exceptionally important constitutional questions arising out of the Texas Court of Criminal Appeals' (CCA) denial of Petitioner Rodney Reed's state habeas applications. Reed has steadfastly maintained his innocence since he was convicted of murder and sentenced to death a quarter century ago. Since then, he has amassed a "considerable body of evidence" showing his innocence. *Reed v. Texas*, 140 S. Ct. 686, 687 (2020) (statement of Sotomayor, J., respecting the denial of certiorari). In 2021, he expected a fair opportunity to present that evidence and his claims to an open-minded judge.

He never got the chance. After hearing nine days of testimony from forty-seven witnesses, the trial court told the parties that he would not make his own findings but would instead rubberstamp one of the parties' proposals. The court subsequently adopted the state's proposed findings verbatim—errors, too—crediting *all* of the state's witnesses and *none* of Reed's, even *the victim's friends*. That violated Reed's right to due process. The Constitution guarantees litigants—especially capital habeas petitioners—neutral decisionmakers who will not delegate their judicial responsibility to one of the parties.

On appeal, the CCA compounded the constitutional error. It recognized that the trial court abdicated its judicial responsibility, but deferred to several of its key findings anyway—and it didn't help that the trial court had barred transmission of the audio recordings to the CCA. (The trial court had also barred broadcast of the hearing on the public court-access channel.) Then, addressing Reed's gateway-innocence claim, the CCA adopted a standard

incompatible with *Schlup v. Delo*, 513 U.S. 298 (1995), the constitutional minimum this Court requires, putting it at odds with the majority of lower courts. But for those errors, Reed might have had a chance to prove his innocence.

1. Reed was convicted in 1998 of the murder of Stacey Stites. Stites had been engaged to Jimmy Fennell, a local police officer and the last person who said he saw Stites alive. Although Fennell proved deceptive on polygraph tests and at first invoked the Fifth Amendment, investigators did not search the apartment he shared with Stites and instead charged Reed.

The state rested its case primarily on sperm with DNA matching Reed's found in Stites' vaginal tract. Reed, who is black, protested his innocence, admitting that he was having an affair with Stites, who was white, as is Fennell. Refusing to believe Reed, the prosecution relied on Fennell's timeline—that he spent the night with Stites before she was found dead the next morning—plus expert statements about the longevity of sperm, to argue that Reed kidnaped and raped Stites in the early-morning hours before her death. An all-white jury convicted Reed and sentenced him to death.

2. Reed has been fighting to prove his innocence for a quarter century.

In 2021, at a habeas hearing before a Texas trial court, Reed presented evidence comprehensively dismantling the state's narrative. His witnesses—none of whom had any affiliation to Reed—testified that Fennell was abusive toward Stites, that Reed and Stites were in a consensual sexual relationship, and that sperm can remain intact for days. Two witnesses even

testified that *Fennell had confessed* to murdering Stites.

The trial court wasn't interested. It adopted verbatim the state's error-riddled proposed findings of fact and conclusions of law, which (because they were written by the state) credited all of the state's witnesses and discredited all of Reed's. And when Reed asked the trial court to include the audio recording of the hearing in the appellate record so the CCA could hear the testimony for itself, the court refused.

In denying relief, the CCA acknowledged that the trial court had abdicated its judicial responsibility. But it deferred to that court on key credibility determinations anyway—it had no way to assess the evidence for itself. And in analyzing Reed's innocence claims, the CCA contorted the *Schlup* standard. The CCA asked whether it was more likely than not that Reed's affirmative theory of innocence was correct—rather than whether the new evidence likely showed that a reasonable juror would have reasonable doubt.

3. The CCA's decision deepens disagreement among appellate courts about the proper interpretation of *Schlup*. The majority approach allows petitioners bringing gateway-innocence claims to rely on any new reliable evidence—whether it affirmatively proves their innocence or disproves the state's case—so long as it would likely give a reasonable juror reasonable doubt. But the CCA and the Missouri Supreme Court require a higher standard of proof and will consider only evidence that affirmatively proves a petitioner's innocence.

The CCA's interpretation of *Schlup* violates the due-process guarantee. *Schlup* sets the constitutional floor for gateway-innocence claims. But although the

CCA acknowledged that Reed's evidence created doubt—all *Schlup* requires—it nonetheless denied relief because it said Reed couldn't meet its more onerous interpretation.

4. The trial court's rubberstamping of the state's findings violated Reed's due-process rights. Rubberstamping threatens the due-process guarantee that judges will not delegate their adjudicative roles to a party. Although appellate courts routinely criticize rubberstamping, no uniform approach to rubberstamping has emerged. But, at the very least, rubberstamping violates due process when the record shows that the trial court did not make its own findings based on its own review of the evidence.

Reed's case underscores why the Court should intervene. Without any of its own analysis, the trial court simply adopted the state's view that *all* of Reed's *nineteen witnesses*—none of whom had any affiliation to Reed and some of whom were formerly in law enforcement or friends with Stites—were not credible. And although the CCA purported to cure the trial court's due-process violation by reviewing the record itself, the CCA still deferred to the trial court's credibility determinations on certain key witnesses. It had no choice: only the trial court heard the testimony and had access to the audio recording.

5. The questions presented are critically important, and this case is an ideal vehicle to resolve them. The CCA relied on an interpretation of *Schlup* that conflicts with this Court's guidance and the majority approach in the lower courts, and all but conceded that Reed would have met the correct standard. And on the rubberstamping issue, the CCA recognized that the trial court abdicated its

responsibility to carefully review the state's proposed findings before adopting them wholesale, but still could not cure the violation. This presents an ideal opportunity to address both issues, and the stakes could not be higher. The Court should grant review.

OPINIONS BELOW

The CCA's opinion in No. WR-50,961-10 (App. 1a-152a) is reported at 670 S.W.3d 689. The CCA's order in No. WR-50,961-11 (App. 153a-170a) is unreported, but available at 2023 WL 4234348. The district court's findings of fact and conclusions of law in No. 8701 (App. 171a-248a) are unreported.

JURISDICTION

The CCA issued its opinion and order on June 28, 2023. App. 152a, 170a. This Court's orders of September 14, 2023, and October 16, 2023, extended the time to file a petition for a writ of certiorari to November 27, 2023. *See* 28 U.S.C. § 2101(c). This petition is timely filed on November 22, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Section 5(a)(2) of Article 11.071, Texas Code of Criminal Procedure, provides:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the

> merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that … by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt[.]

STATEMENT

A. Legal background

1. a. This Court's precedent distinguishes between freestanding and gateway-innocence claims. When a habeas petitioner's only constitutional claim is that the state convicted an innocent man—a freestanding claim under *Herrera v. Collins*, 506 U.S. 390 (1993)—"it is appropriate to apply an 'extraordinarily high' standard of review," because he "has been 'tried before a jury of his peers, with the full panoply of protections that our Constitution affords.'" *Schlup*, 513 U.S. at 315-16 (quoting *Herrera*, 506 U.S. at 419, 426 (O'Connor, J., concurring)).

But when the petitioner seeks to show innocence to overcome a procedural barrier to bringing a constitutional claim, the conviction is "not … entitled to the same degree of respect." Id. at 316. The innocence claim is "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim[s] considered on the merits." Id. at 315. Under Schlup, the standard for gateway claims is thus much lower than the standard for freestanding claims.

Schlup established that a habeas petitioner asserting a gateway-innocence claim must show that "it is more likely than not that no reasonable juror would have convicted him in the light of" "new reliable

evidence." *Id.* at 324, 327. That evidence can include "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" not presented at trial. *Id.* at 324. Those categories are not exhaustive. *See House v. Bell*, 547 U.S. 518, 537 (2006); *Hyman v. Brown*, 927 F.3d 639, 660 (2d Cir. 2019). And the "analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup*, 513 U.S. at 328. Thus, a petitioner must demonstrate only that, "in light of the new evidence," it is "more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538.

b. The *Schlup* standard flows from the due-process requirement, particularly significant in capital cases, that all convictions be supported by proof beyond a reasonable doubt. *See Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). *Schlup* stressed the "overriding importance" in avoiding the "quintessential miscarriage of justice [of] the execution of a person who is entirely innocent" and in "correcting a fundamentally unjust incarceration." 513 U.S. at 320-21, 324-25. The constitutional need "of avoiding [those] injustice[s] … *requires* application of [the *Schlup*] standard." *Id.* at 325-26 (emphasis added).

Here, Texas law incorporates *Schlup*'s constitutional floor. The Texas legislature has enacted a statutory "codification of the Supreme Court's *Schlup v. Delo* standard" for gateway-innocence claims. App. 100a (citing Art. 11.071 § 5(a)(2)).

2. This Court has repeatedly "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties." *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985); *see United States v. El Paso*

Natural Gas Co., 376 U.S. 651, 656-57 (1964). Indeed, such "rubberstamping" raises serious due-process concerns. That's because "due process requires a 'neutral and detached judge in the first instance,'" so it violates due process to "delegate[] adjudicative functions" to an interested party. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 617 (1993).

Although the Court has not barred rubberstamping, *see Anderson*, 470 U.S. at 572, it has suggested some constitutional limits. In *Jefferson v. Upton*, 560 U.S. 284, 291 (2010), the Court considered whether rubberstamping can violate a habeas petitioner's right to an "adequate" "factfinding procedure;" to "a full, fair, and adequate hearing in the State court proceeding;" or to "otherwise" not be "denied due process of law." Ultimately, the Court remanded to the court of appeals, without announcing a rule. *Id.* at 294. But the Court suggested that rubberstamping might be unconstitutional if, for example, a judge "adopts findings that contain internal evidence suggesting that the judge may not have read them." *Id.*

B. Factual and procedural background

Reed has been fighting for a quarter century to prove his innocence. During that time, a "considerable body of evidence" has accumulated calling Reed's conviction into question. *Reed*, 140 S. Ct. at 687 (statement of Sotomayor, J., respecting the denial of certiorari). This case centers on Texas courts' unconstitutional basis for denying two of Reed's state habeas petitions, which brought gateway-innocence claims.

1. In 1998, a Texas jury convicted Reed of murdering Stacey Stites and sentenced him to death.

In 1996, Stites, a nineteen-year-old white woman, was found dead on the side of a country road. App. 2a, 9a. Her fiancé, a white man and local police officer named Jimmy Fennell, was the last person known to have seen her alive. App. 7a. After Stites disappeared, Fennell's pickup truck was discovered abandoned in a parking lot. App. 8a.

Police concluded that Reed, a black man, was responsible for Stites' murder. Vaginal swabs recovered intact sperm matching Reed's DNA. App. 19a. But Reed admitted that he and Stites were having an affair. *Reed*, 140 S. Ct. at 686 (statement of Sotomayor, J., respecting the denial of certiorari). And no other physical evidence implicated Reed. *Id.* at 686-87. Fennell, who was supposed to drive Stites to work the day she went missing, proved to be deceptive on polygraph tests and at first invoked the Fifth Amendment. Pet. App. 87a, 166a, 176a, 263a, *Reed v. Texas*, No. 19-411, 140 S. Ct. 686 (2019 Pet. App.). Police never searched the apartment he shared with Stites. App. 17a.

Given when Fennell said he last saw Stites, the timeline was a key issue at trial. Waiving his prior invocation of the Fifth Amendment, Fennell testified that he had been with Stites the night before she was found dead. App. 6a-7a. The prosecution used that testimony to establish that Stites was abducted and killed while driving to work at around 3 a.m. the next morning. 2019 Pet. App. 312a, 316a. And based on expert testimony that sperm remains intact inside a vaginal tract for no longer than twenty-six hours, the state posited that the sperm recovered from Stites' body must have been deposited the night before at the earliest. App. 24a. "This evidence thus tended to inculpate Reed (by suggesting that he must have had sex with Stites very soon before her death) and

exculpate Fennell (by indicating that Stites died after Fennell claimed to have seen her last)." *Reed*, 140 S. Ct. at 687 (statement of Sotomayor, J., respecting the denial of certiorari).

On direct appeal, the Court of Criminal Appeals affirmed Reed's conviction and death sentence. App. 26a. The court relied on Fennell's timeline and the "strength" of the prosecution's expert witnesses and their view of the forensic evidence. 2019 Pet. App. 57a, 66a. This Court denied review. *Reed v. Texas*, No. 01-5170, 534 U.S. 955 (2001).

2. Since his conviction, Reed has maintained his innocence and sought relief from state and federal courts. Those efforts have produced a "considerable body of evidence" that Reed is innocent, including "a substantial body of evidence that, if true, casts doubt on the veracity and scientific validity of the evidence on which Reed's conviction rests." *Reed*, 140 S. Ct. at 687, 689 (statement of Sotomayor, J., respecting the denial of certiorari). This petition arises out of Texas courts' refusal to give that evidence the consideration the Constitution requires.

a. Reed filed his ninth subsequent state habeas application in November 2019, raising a *Brady* claim, a false-testimony claim, an ineffective-assistance-of-counsel claim, a freestanding innocence claim, and *Schlup* gateway-innocence claims. App. 3a. The CCA remanded to the trial court "for further development." App. 3a.

b. The trial court held an evidentiary hearing at which forty-seven witnesses testified over nine days. App. 3a-4a. Reed presented evidence that comprehensively dismantled the state's theory of his guilt.

First, at trial, the state had portrayed Stites and Fennell as a happy, devoted couple. 56 TRR 60:7-23. But over a dozen credible witnesses unconnected to Reed testified at the hearing that Fennell controlled and abused Stites, 4 HRR 215:5-10; 5 HRR 10:20-11:5, 12:1-12; that Fennell was aware of her relationship with Reed, 2 HRR 276:10-25; and that he publicly threatened to kill her, 2 HRR 309:5-12. Reed also presented evidence that Fennell twice confessed to fellow inmates to killing Stites because she was sleeping with a black man. 3 HRR 47:16-49:10, 67:9-24, 114:17-115:6, 115:18-116:10, 116:16-117:6.

Second, the prosecution told the jury that Fennell, its star witness, was credible, emphasizing that there was nothing inconsistent in his testimony. 56 TRR 76:11-16. But Fennell repeatedly contradicted himself at the hearing. *See, e.g.*, 5 HRR 284:21-285:6. And, unlike every non-adverse witness Reed called, Fennell had every motivation to lie.

Third, the state told the jury that investigators had searched in vain for evidence of a relationship between Reed and Stites. 56 TRR 56:24-57:18. At the hearing, Reed called numerous new witnesses with no connection to him or motive to be untruthful who all testified that Reed and Stites were in a relationship. 4 HRR 17:2-23, 24:5-7, 35:3-19, 278:19-22, 279:19-280:11. Moreover, Reed showed that the state had not—as it had told the jury—talked to every friend and co-worker. 6 HRR 97:1-9.

Fourth, the state supported its narrative that Stites and Reed were strangers with false expert evidence. The prosecution had told the jury that sperm found in Stites' body must have been deposited no more than twenty-four hours earlier and that Reed

sexually assaulted Stites as he murdered her. 56 TRR at 34:6-12. At the hearing, Reed's and even the state's own experts, testified that sperm can survive intact for *days*, and that the jury heard false testimony to the contrary. 8 HRR 116:24-117:9; 8 HRR 209:20-23.

Finally, the forensic testimony presented at the hearing established that Stites likely died well before the narrow 3-to-5-a.m. window the state gave at trial. The state had relied on Fennell's account of when Stites left home, but the forensic evidence shows that Stites died earlier—when Fennell claims he was alone with her. 2 HRR 89:5-11; 4 HRR 64-15:25.

c. Despite the overwhelming evidence of Reed's innocence, and after Justice Sotomayor exhorted the Texas courts to "ensure full and fair consideration of Reed's innocence," 140 S. Ct. at 690 (statement of Sotomayor, J., respecting the denial of certiorari), the trial court adopted the state's proposed findings of fact and conclusions of law verbatim. App. 197a-248a. The findings found Fennell and all of the state's witnesses (including several of Fennell's family members) credible, but none of Reed's witnesses credible, even though none of them was affiliated with Reed. App. 200a-236a.

The court made no pretense of conducting a careful, independent review of the evidence. At closing arguments, the court told the parties that it had "received the proposed findings of fact and conclusions of law from both sides," and wanted "to find out … why you think I ought to sign your version." 13 HRR 5:7-11. The state's findings that the court rubberstamped were riddled with errors, as the CCA later observed. *Infra* p. 13. To make matters worse, the trial court barred use of the public court-access channel during

the hearing; prevented the media from recording the hearing; and denied Reed's motion to include the court reporter's audio recording in the record so the CCA could hear the witness testimony for itself. App. 249a.

3. The CCA denied relief. App. 1a-152a.

a. The CCA acknowledged "[t]he problem" with the trial court's rubberstamping the state's findings without "carefully scrutiniz[ing]" them. App. 97a. The CCA noted that the rubberstamped findings "contain multiple oversights which come directly from the State's proposed [findings]." *Id.* For example, the findings confused the identity of two of the hearing witnesses and misstated the testimony of one of Reed's witnesses in discrediting her. App. 98a n.8. And "[t]his list is by no means exhaustive." *Id.* But the CCA did not "totally disregard" the findings, instead stating that it was viewing them "skeptical[ly]" as it reviewed the evidence. App. 98a.

Because the CCA did not receive the evidence firsthand or even receive audio recordings, it could not meaningfully review and assess the evidence without relying on the trial court's findings. For example, in finding not credible a witness who testified that Fennell had confessed to murdering Stites, the CCA relied on rubberstamped findings to conclude that the witness became "cagey" on cross-examination, crediting the trial court for "observing [that witness's] testimony and demeanor firsthand." App. 117a.

b. The CCA denied relief. App. 1a-152a. The court noted that Reed had brought both freestanding and gateway-innocence claims, and it quoted the *Schlup* standard. App. 100a. But the court then analyzed Reed's freestanding and gateway-innocence claims under the same standard: whether, "more

likely than not, the theory [Reed] is advancing in *this* proceeding is the correct one." App. 126a. For example, the CCA concluded that the "evidence stops well short of demonstrating that, more likely than not, Fennell strangled Stacey." App. 121a. The CCA never meaningfully analyzed what effect Reed's evidence would have had on a reasonable juror. The CCA also required Reed to "affirmatively demonstrate" his innocence by "affirmatively show[ing] that Reed did not kill Stacey" or "affirmatively show[ing] that someone else did." App. 134a-135a. Even though the CCA acknowledged that some of Reed's evidence might "weaken[] the State's case in chief," App. 135a, the court determined that merely "raising doubts about [a petitioner's] guilt" cannot satisfy the *Schlup* standard for gateway-innocence claims. *Id.*

4. In December 2021, Reed filed his tenth subsequent habeas application. App. 160a. The CCA dismissed it without remanding for factual development. App. 153a-170a. In particular, the CCA decided that Reed could not proceed on his claim that the state presented false expert testimony because the court had found, in denying his previous habeas application, that he could not satisfy the *Schlup* gateway standard. App. 170a.

REASONS FOR GRANTING THE PETITION

1. The lower courts do not uniformly apply *Schlup*'s gateway-innocence standard. Most courts require the petitioner to show only that reliable new evidence would create reasonable doubt for a reasonable juror, and those courts will consider *any* new reliable evidence that could create an inference of reasonable doubt. But the CCA and the Missouri Supreme Court impose a higher burden of proof and

consider only reliable evidence that *affirmatively* proves a petitioner's innocence, rather than evidence that rebuts the state's case.

The CCA's approach is unconstitutional, and this case presents the Court a critical opportunity to reinforce the *Schlup* standard. The due-process guarantee *requires* application of *Schlup*, not a distorted, prosecutor-friendly version. What's more, the CCA's error is likely outcome-determinative. Had the CCA applied the correct standard, Reed could have passed through *Schlup*'s gateway and pursued additional claims.

2. Although lower courts have consistently disapproved of trial courts' adopting verbatim parties' proposed findings, their approaches are inconsistent and unpredictable—and the discrepancy can be outcome-determinative. Some appellate courts broadly defer to rubberstamped findings; others scrutinize those findings to ensure they reflect independent judicial analysis and vacate and remand if the findings were not independently reached. And other appellate courts painstakingly review the record for themselves.

Rubberstamping threatens the due-process guarantee of a neutral judge who will adjudicate the case. At best, rubberstamping raises concerns about whether courts are abdicating their roles. At worst, it is patently unconstitutional. At the very least, rubberstamping violates due process when a trial court did not conduct its own review of the evidence—and this Court should say so. Reed's high-stakes case shows why. Even though the CCA attempted to cure the trial court's abdication of its responsibility by reviewing the record itself, the CCA still expressly relied on the trial court's credibility determination as to

certain key witnesses—because only that court actually saw and heard their testimony.

3. This case is an ideal opportunity for resolving two important constitutional questions. The CCA relied on an interpretation of *Schlup* that deviates from the accepted standard. And that error could have life-or-death consequences. What's more, the CCA *acknowledged* that the trial court failed to carefully review the findings it rubberstamped. The Court should grant review.

I. The CCA decision deepens lower-court disagreement about the *Schlup* standard and violates Reed's due-process rights.

Contrary to the vast majority of appellate courts, the CCA and several other courts apply a distorted version of the *Schlup* standard. They require affirmative proof that the petitioner is innocent, rather than any reliable evidence making it more likely than not that a reasonable jury would have reasonable doubt. That approach contravenes *Schlup* and violates the due-process guarantee. And the issue is critically important. As Reed's case shows, applying the correct standard can be a matter of life and death.

A. The courts of appeals and state high courts do not apply the *Schlup* standard uniformly.

The lower courts take different approaches to *Schlup*. Most apply *Schlup* according to the guidance this Court articulated. Those courts require a petitioner to show only that, in light of new evidence, any reasonable juror likely would have had reasonable doubt. And those courts will consider *any* new reliable evidence that, considered alongside the other evidence, could support an inference of reasonable doubt.

But some courts, including the CCA, impose a higher standard than *Schlup* contemplated, and disregard reliable evidence that dismantles the state's case against the petitioner unless it also affirmatively shows the petitioner is innocent.

1. Most courts faithfully apply *Schlup*.

The Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits, plus the Supreme Courts of Montana and Washington, hold that a petitioner satisfies *Schlup* if he presents "new reliable evidence," *Schlup*, 513 U.S. at 324, that, considered alongside the other evidence, shows that any reasonable juror would likely have had reasonable doubt about the petitioner's guilt. These courts acknowledge that a petitioner can satisfy *Schlup* by presenting evidence that undermines the state's case against him, such as by refuting scientific evidence or showing that testimony was recanted, and do not place the burden on the petitioner to *prove* that he is factually innocent by a preponderance of the evidence.

Courts correctly applying *Schlup* do not require the petitioner to show more than that a reasonable juror, in light of new evidence, would likely have reasonable doubt. For example, the Ninth Circuit holds that a petitioner satisfies *Schlup* if his "new evidence [is] sufficient to undermine a court's confidence in his conviction." *Larsen v. Soto*, 742 F.3d 1083, 1096 (9th Cir. 2013). Similarly, the Second Circuit has explained that it is an "erroneous application of the *Schlup* gateway standard" to reject expert testimony as "insufficiently persuasive" solely because that testimony is "unable to state with *absolute certainty*" when a murder victim died. *Rivas v. Fischer*, 687 F.3d 514, 544 (2d Cir. 2012). In short, the court must

"meaningfully explain[] how a jury faced with" a petitioner's new evidence "could nonetheless have concluded that [the petitioner] was guilty beyond a reasonable doubt." *Larsen*, 742 F.3d at 1098-99.

According to courts faithfully applying *Schlup*, a "petitioner 'need not prove that he did not commit the crime'" by a preponderance of the evidence, "but 'only has to be successful in convincing the reviewing court that a reasonable jury would not likely convict him in light of the new evidence.'" *State v. Beach*, 302 P.3d 47, 53 (Mont. 2013). Thus, a petitioner need not offer "a unifying theory for why th[e] [c]ourt or anyone should believe" he is innocent. *Fontenot v. Crow*, 4 F.4th 982, 1035 (10th Cir. 2021). "[R]easonable doubt 'does not require [the defense] to prove to [the jury] who'" is guilty. *Id.* (alterations in original).

Courts correctly applying *Schlup* also do not categorically bar consideration of any type of new reliable evidence. Evidence can satisfy *Schlup* so long as it could support reasonable doubt. That's because the examples of evidence mentioned in *Schlup* "are not an exhaustive list of the types of evidence that can be 'reliable.'" *Munchinski v. Wilson*, 694 F.3d 308, 338 (3d Cir. 2012). Thus, a *Schlup* petitioner "need not always affirmatively show physical evidence that he or she did not commit the crime." *Gandarela v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2002). Instead, "new evidence that undermines the credibility of the prosecution's case may alone suffice." *Id.* (emphasis removed). Put simply, "there are no categorical limits on the types of evidence that can be offered" to show innocence. *Hyman*, 927 F.3d at 660.

Under this approach, courts have held that impeachment evidence and evidence that key witnesses

for the state have recanted could be considered reliable under *Schlup*. For example, the Sixth and Eighth Circuits have held that evidence of recanted testimony can satisfy *Schlup* if it "'chip[s] away' at the rather slim circumstantial evidence upon which [the petitioner] was convicted." *Souter v. Jones*, 395 F.3d 577, 592 (6th Cir. 2005); *accord Amrine v. Bowersox*, 128 F.3d 1222, 1228 (8th Cir. 1997). The Third Circuit agrees that, "[l]ike any form of evidence, recantations should be analyzed on an individual and fact-specific basis." *Howell v. Superintendent Albion SCI*, 978 F.3d 54, 60 (3d Cir. 2020). And the Washington Supreme Court has considered reliable an expert witness report suggesting that the state's key witnesses had misidentified the petitioner. *In re Weber*, 284 P.3d 734, 260-62 (Wash. 2012) (en banc).

2. The CCA and other courts apply a heightened standard.

The CCA and the Missouri Supreme Court apply a heightened standard that makes it more difficult for petitioners to pursue gateway-innocence claims. Those courts categorically exclude certain types of evidence, like impeachment evidence, from "reliable evidence," and require petitioners to affirmatively convince the court that they are factually innocent—rather than that any reasonable juror likely would have had reasonable doubt.

a. In rejecting a gateway-innocence claim in *State ex rel. Barton v. Stange*, 597 S.W.3d 661, 664 (Mo. 2020) (en banc), the Missouri Supreme Court excluded expert rebuttal evidence and required the petitioner to prove his innocence to a heightened standard. The petitioner sought to introduce new "testimony from a blood spatter expert" that would have

shown that "blood found on [the petitioner's] shirt and pants after the murder was not blood spatter evidence as claimed by the State's expert." *Id.* The court acknowledged that "this testimony might have been useful to counter the testimony of the State's expert," but suggested it did not meet the threshold for reliable evidence because "it does not exculpate [the petitioner] or inculpate another." *Id.* Rather, the court explained, "[i]t simply provides competing expert testimony as to the source and nature of the blood." *Id.* The court further reasoned that the evidence would not meet the *Schlup* standard because "it would not *require* the jury to find [the petitioner] was actually innocent." *Id.* (emphasis added).

b. Earlier this year, a panel of the Eleventh Circuit held that a new expert report that impeached the state's DNA experts did "not meet the rigorous *Schlup* innocence standard." *Wainwright v. Secretary, Florida Department of Corrections*, No. 20-13639, 2023 WL 4582786, at *6 (11th Cir. July 18, 2023) (per curiam). The panel opined that the new evidence "merely point[ed] to some ways the [state's] experts may have deviated from proper protocol" and "highlight[ed] some conclusions that … could not have been reliably drawn from the results." *Id.* In the panel's view, that was insufficient because the expert report did "not include results from new DNA testing showing that [the petitioner] is innocent." *Id.* In other words, the panel interpreted *Schlup* to require a petitioner's reliable evidence to affirmatively prove innocence rather than simply rebut the state's case—even if rebutting the state's case would likely lead any reasonable juror to have reasonable doubt about the petitioner's guilt.

c. The CCA below similarly deviated from the majority approach to *Schlup*, adopting an onerous test much more difficult to meet.

First, the CCA imposed the wrong burden of proof and a restrictive view of categories of evidence. While the CCA recited the *Schlup* standard, App. 100a, its analysis makes clear that it would only assess whether "more likely than not, the theory [Reed] is advancing in *this* proceeding is the correct one." App. 126a. For example, in rejecting Reed's evidence implicating Fennell, the CCA held that the "evidence stops well short of demonstrating that, more likely than not, Fennell strangled Stacey." App. 121a; *see also* App. 117a-118a. And the CCA rejected "Reed's experts' pronouncements" because they were "subjective and inexact," App. 127a, without assessing whether that evidence likely would have created reasonable doubt for a reasonable juror.

Second, the CCA imposed a novel requirement that Reed "affirmatively demonstrate" his innocence by "affirmatively show[ing] that Reed did not kill Stacey" or "affirmatively show[ing] that someone else did." App. 134a-135a. The CCA acknowledged that some of Reed's evidence might "weaken[] the State's case in chief," but it dismissed that evidence because, in its view, weakening the state's case "is not the point of an actual innocence claim." App. 135a. In short, under the CCA's "affirmative evidence" requirement, evidence that merely "raise[s] doubts about [a petitioner's] guilt" cannot satisfy *Schlup*. *Id.*

B. The CCA's decision is wrong and contravenes *Schlup*.

The CCA's approach is incompatible with *Schlup*. The CCA and the Missouri Supreme Court have

raised the *Schlup* bar, requiring petitioners to go beyond this Court's requirement that a gateway-innocence claimant need only provide reliable evidence making it likely that a reasonable juror would have reasonable doubt. That error violates due process—and is especially concerning in Reed's case—because "[t]he paramount importance of avoiding the injustice of executing one who is actually innocent … *requires* application" of the *Schlup* standard. *Schlup*, 513 U.S. at 325-26 (emphasis added).

1. Start with the CCA's erroneous adoption of a preponderance-of-the-evidence standard. To be sure, *Schlup* requires a gateway-innocence claimant to show it is "more likely than not" that a reasonable juror would have reasonable doubt. *Id.* at 327. But it doesn't require more-likely-than-not proof *of affirmative innocence*. The CCA simply cut out the "reasonable doubt" part. As noted (at 21), the CCA rejected Reed's gateway-innocence claim because it thought he failed to show that, "more likely than not," his theory of the case "is the correct one" or that "more likely than not, Fennell strangled Stacey." App. 121a, 126a. Missing from the CCA's opinion is any meaningful analysis of whether a reasonable juror would have had reasonable doubt if faced with Reed's new evidence. Without *that* analysis, the CCA didn't apply *Schlup*, but something else altogether.

2. The CCA's affirmative-and-reliable-evidence requirement similarly violates *Schlup*'s constitutional floor. The *Schlup* standard is calibrated to avoid "the injustice of executing one who is actually innocent," 513 U.S. at 325-26, and there's no reason (and the CCA did not provide one) why that injustice should depend on what type of reliable evidence of innocence a petitioner has offered. Under the CCA's logic, even

if a petitioner has rebutted the state's case against him with reliable evidence, he is still not entitled to pursue his constitutional claims. That makes no sense. Indeed, the CCA went so far as to suggest (without explanation) that, because twenty-five years have passed since Reed's conviction, he must muster "*especially* reliable evidence." App. 144a (emphasis added).

Even prior Texas decisions show why the CCA's adoption of an "affirmative evidence" requirement for *Schlup* claims is unconstitutional. Both this Court and Texas courts differentiate between freestanding *Herrera* innocence claims and gateway *Schlup* claims. *Supra* pp. 6-7; App. 101a. Texas courts have previously applied the "affirmative evidence" requirement to *Herrera* claims. App. 112a, 115a (quoting *Ex parte Franklin*, 72 S.W.3d 671, 677 (Tex. Crim. App. 2002)). *Schlup* held that the gateway-innocence standard must "impose[] a lower burden" on the petitioner than the *Herrera* standard. *Schlup*, 513 U.S. at 327. Replacing *Schlup* with *Herrera* violates that command.

C. The correct standard is critically important, especially in capital cases like Reed's.

Gateway-innocence claims are crucial last resorts for prisoners to correct otherwise defaulted claims arising out of constitutional violations that led to their wrongful convictions. *Schlup* addresses those "extraordinary case[s]," where "principles of comity and finality" "*must yield* to the imperative of correcting a fundamentally unjust incarceration." *House*, 547 U.S. at 536 (emphasis added). Given that imperative, any deviation that makes the *Schlup* standard more demanding may risk the erroneous execution of an innocent person—a "quintessential miscarriage of

justice" and a "'constitutionally intolerable event.'" *Schlup*, 513 U.S. at 324, 314 (quoting *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring)).

Reed's case and the CCA's distorted standard show why the question presented is important and, if left unaddressed, will lead to different outcomes for petitioners in jurisdictions that apply different rules. Indeed, in applying the *wrong standard*, the CCA repeatedly suggested that Reed's evidence of innocence would have satisfied the *correct standard*, because that evidence would have given a reasonable juror reasonable doubt. For example, the CCA said that Reed's evidence that Fennell was the culprit was "clearly not nothing." App. 121a. And the CCA thought that Reed's evidence that Fennell was jealous that Stites was having an affair was "an important brick" in Reed's wall of evidence of innocence but that it did not "by itself complete the wall." App. 118a. Indeed, when presented with just some of the posttrial developments in Reed's case, a Member of this Court opined that "there is no escaping the pall of uncertainty over Reed's conviction" and that his "conviction remains so mired in doubt." *Reed*, 140 S. Ct. at 690 (statement of Sotomayor, J., respecting the denial of certiorari). If Reed were in a jurisdiction that correctly applies *Schlup*, it is overwhelmingly likely a court would have found that he had met that standard.

D. This Court has jurisdiction to review the *Schlup* question.

Texas may argue that this Court lacks jurisdiction to review the *Schlup* issue because *Schlup* is a gateway procedural standard that applies only in federal habeas. That argument would be incorrect.

First, *Schlup* sets a constitutional floor, *supra* p. 7, so any downward deviation from that floor—such as the standard imposed in the CCA's opinion—violates the Constitution's due-process guarantee. Indeed, Texas courts have "[f]ollowed the Supreme Court's lead" in explaining that the "incarceration of an innocent person is as much a violation of the [federal] Due Process Clause as is the execution of such a person." *In re Allen*, 366 S.W.3d 696, 705 (Tex. 2012). And "[s]tates may not disregard a controlling, constitutional command in their own courts." *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016).

Second, even if the *Schlup* standard weren't constitutionally required, it is incorporated into Texas law. App. 100a; *supra* p. 7. A Texas court's interpretation of that federal standard thus falls within this Court's jurisdiction. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 816 (1986); Br. for United States as Amicus Curiae 25-34, *Montgomery*, 577 U.S. 190 (July 29, 2015) (No. 14-280), https://www.justice.gov/media/737026/dl?inline.

II. The lower courts do not consistently police rubberstamping, and this Court should impose constitutional limits on the practice.

Reed's case also presents another troubling constitutional problem: rubberstamping showing abdication of the judicial role. Federal and state appellate courts have consistently criticized rubberstamping. But without clear guidance from the Court, they have taken varying approaches that do not place uniform limits on the practice. The problems with rubberstamping are especially concerning in capital habeas cases, and Reed's case shows the constitutional dangers of failing to rein in the practice. This

Court should intervene. At a minimum, where the circumstances show that the trial court failed to exercise independent judgment, rubberstamped findings violate the Constitution's due-process guarantees and require renewed independent judicial judgment.

A. Without this Court's guidance, lower courts have taken differing approaches to reviewing rubberstamped findings.

Although many appellate courts have criticized rubberstamping, their responses vary, and there is no uniform constitutional rule. Some courts afford near-categorical deference to rubberstamped findings; others take a close look at whether the trial court rendered an independent judgment and vacate findings if the trial court did not; and some courts attempt to clean up the trial court's abdication of its responsibility by looking at the record themselves, like the CCA claimed it was doing (but, for the reasons explained below (at 28-31), could not constitutionally accomplish).

1. Some courts broadly defer to rubberstamped findings, suggesting that rubberstamping can never violate the Constitution. For example, the Eleventh Circuit has held that it was not "fundamentally unfair" for a bankruptcy court to solicit counsel for a prevailing party *ex parte* to draft orders for his signature, and the judge didn't "abdicate his adjudicative role" by doing so. *In re Colony Square Co.*, 819 F.2d 272, 276-77 (11th Cir. 1987). And in *Bluewater Logistics, LLC v. Williford*, 55 So.3d 148, 155-56 (Miss. 2011), the Mississippi Supreme Court held that rubberstamped findings are reviewable only for abuse of discretion, overruling prior opinions that had applied a "less deference" or "heightened scrutiny" standard.

2. Other courts express deeper suspicion of rubberstamping and vacate findings lacking indicia that the trial court exercised independent judgment. For example, the Third Circuit has held that "there must be evidence in the record demonstrating that the district court exercised 'independent judgment' in adopting a party's proposed findings." *In re Community Bank of Northern Virginia*, 418 F.3d 277, 300 (3d Cir. 2005); *Pennsylvania Environmental Defense Foundation v. Canon-McMillan School District*, 152 F.3d 228, 233 (3d Cir. 1998). The Tenth Circuit, similarly, holds that it "must view the challenged findings and the record as a whole with a more critical eye to insure that the trial court has adequately performed its judicial function." *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero Reservation*, 616 F.2d 464, 467 (10th Cir. 1980). Indeed, the Tenth Circuit in *Ramey* "remanded for significantly new, more detailed findings." *Id.* at 468. Several state courts have endorsed *Ramey*. *See Chavarria v. Fleetwood Retail Corp.*, 143 P.3d 717, 723 (N.M. 2006); *Clifford v. Klein*, 463 A.2d 709, 713 (Me. 1983).

3. Still other courts, like the CCA below, attempt to salvage rubberstamped findings by reviewing the record themselves. That approach presents "a Herculean task" for the appellate court, which must assess whether each individual finding is "clearly erroneous," as the D.C. Circuit explained in *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1408 (D.C. Cir. 1988). There, the court held that it was obligated "to check the adopted findings against the record 'with particular, even painstaking, care,'" with its review differing "not in the test that we apply to a particular finding of fact … but in the volume of

evidence we sift in judging the correctness of such findings." *Id.*

B. This Court should make clear that rubberstamping violates the due-process guarantee when the court abdicates its judicial role.

The rubberstamping question merits this Court's attention. The Constitution's due-process guarantee requires courts to act as neutral decisionmakers and precludes courts from abdicating their judicial role. When a trial court adopts a party's proposed findings wholesale, it is exceedingly difficult to be sure that the court has rendered an independent judgment. That concern is heightened in the habeas context—especially in capital cases—where a prisoner's liberty or life is on the line. And although this Court's precedents suggest situations in which rubberstamping might run afoul of the Constitution, the Court has never announced a clear rule. It should do so here. When findings suggest that the trial court did not make an independent judgment, rubberstamped findings must be vacated to permit a constitutionally sound process on remand.

1. "[D]ue process requires a 'neutral and detached judge in the first instance.'" *Concrete Pipe*, 508 U.S. at 617. A court thus cannot "delegate[] adjudicative functions" to a party, but must conduct its own independent review of the record to reach its own conclusions. *Id.* When a court allows a party to serve as factfinder, it abdicates its fundamental judicial role. Indeed, it is a basic requirement of due process that "no man can be a judge in his own case." *Williams v. Pennsylvania*, 579 U.S. 1, 8-9 (2016).

Rubberstamping threatens those due-process principles. When a trial court adopts a party's findings verbatim, it is difficult if not impossible for an appellate court to assess whether the trial court "conducted its own independent review" and whether the opinion "is the product of [the trial court's] own judgment." *Bright v. Westmoreland County*, 380 F.3d 729, 731 (3d Cir. 2004). Rubberstamping thus obscures potential—if not likely—constitutional violations.

Rubberstamping is especially problematic in habeas cases, when a prisoner's liberty or life is at stake. Indeed, even if rubberstamping did not implicate due-process concerns more broadly, it would pose constitutional problems in the habeas context, where "the Due Process Clause … informs the procedural contours" of "the writ of habeas corpus." *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004). And "the need for an adversarial process and a neutral arbiter is at its zenith" in the *capital* habeas context. *Burr v. Jackson*, 19 F.4th 395, 404 (4th Cir. 2021); *see Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

2. Without this Court's guidance, some lower courts have misconstrued the statement in *Anderson* that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Burr*, 19 F.4th at 404 (quoting *Anderson*, 470 US at 572); *see Jones v. GDCP Warden*, 753 F.3d 1171, 1182 (11th Cir. 2014); *Green v. Thaler*, 699 F.3d 404, 415-16 (5th Cir. 2012). That view misunderstands *Anderson*, where the Court concluded that rubberstamped findings *might* be entitled to deference.

First, even assuming rubberstamped findings could sometimes be entitled deference,

rubberstamping undermines the rationale for deferring to trial-court findings. Findings "drawn with the insight of a disinterested mind" assist the appellate court in its review more than findings drafted by parties. *El Paso*, 376 U.S. at 656. Requiring trial courts to reduce the facts to writing wards off careless errors: "Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942). When a court delegates this task, "[t]he adversarial zeal of counsel for the prevailing party too often infects" the findings. *Cuthbertson v. Biggers Bros., Inc.*, 702 F.2d 454, 459 (4th Cir. 1983). That dynamic is particularly troubling when, as here, the trial court commits to signing whichever proposed findings come *closer* to its view, thereby leaving no room for nuance or divergence from the closer party's position. *See Pennsylvania Environmental Defense Foundation*, 152 F.3d at 233. Rubberstamping is thus far more than a procedural foot-fault. It *strongly suggests* the absence of process altogether, even if it does not prove the absence of process.

Second, the Court later clarified in *Jefferson* that there is reason to doubt the "lawfulness" of rubberstamped findings when there are indications that the trial judge did not render an independent judgment. 560 U.S. at 294. *Jefferson* further suggested three circumstances in which rubberstamping might result in an unfair proceeding or "otherwise den[y] due process": "(1) a judge solicits the proposed findings *ex parte*, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read

them." *Id.* at 291, 294. But *Jefferson* did not present an opportunity to announce a better-defined rule.

3. The Court should intervene and hold that rubberstamping violates due process when it shows that the trial court abdicated its judicial role. The Third and Tenth Circuits' approach, which focuses on whether the record indicates that the trial judge rendered an independent judgment, *supra* p. 27, is a good starting point. When a court adopts findings drafted by a party, the Constitution requires an appellate court to vacate those findings if there are indications the trial court abdicated its judicial responsibility and failed to conduct its own independent review of the evidence.

C. The trial court's rubberstamping of the state's findings and the CCA's failed attempt to launder those tainted findings violated Reed's due-process rights.

Reed's case highlights the need for clearer constitutional limits on rubberstamping. Indeed, even the CCA found that the trial court did not "carefully scrutinize" the state's proposed findings, App. 97a—just like one of the examples this Court gave in *Jefferson* of when rubberstamping might be unlawful. 560 U.S. at 294. The CCA's attempt to conduct its own review of the record cannot cure the due-process violation.

1. The record contains compelling indications that the trial court neither scrutinized the state's findings before signing them nor made any effort to render an independent judgment. Not only did the court adopt obvious factual errors—including some identified by the CCA—but he also told the parties beforehand that he was not interested in examining their proposals, but rather intended just to sign one or

the other. *Supra* p. 12. As the Third Circuit held in *Pennsylvania Environmental Defense Foundation*, a trial court's commitment to sign one party's or the other's proposed findings "offends our belief that a judge's findings and conclusions should represent that judge's view, no more and no less." 152 F.3d at 233; *see Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 315 (Tenn. 2014) (rubberstamping "gives rise to the impression that the trial judge … has done little more than choose between two provided options rather than fashioning a considered, independent ruling"). By committing to one party's version of the facts, the court in Reed's case opted for whatever findings were closer to his view of the case, regardless of whether they were accurate. And, as the CCA correctly found, they were not. App. 98a n.8. The trial court abdicated its judicial role.

2. The CCA's purported attempt to conduct a "skeptical," "independent review of the record" did not (and could not) cure the trial court's error. App. 98a. If anything, the CCA's approach compounds the problem. As this case shows, rubberstamping can deeply contaminate even purportedly non-deferential appellate review.

The CCA admitted that the findings the trial court signed were riddled with basic inaccuracies. App. 98a n.8 (presenting a "by no means exhaustive" list of these defects). The CCA acknowledged that it could not endorse the findings "with all due confidence." App. 97a. It also noted that the trial court had, when ruling on *three of Reed's previous habeas petitions*, similarly adopted the State's factual findings verbatim, including material inaccuracies. App. 31a, 38a, 61a. Despite that pattern of judicial abdication, the CCA nonetheless deferred to many of the trial court's

supposed credibility determinations because the trial court had "observ[ed]" the witness's "testimony and demeanor"—observations that, like the rest of the trial court's factual findings, were drafted by the prosecution. App. 117a, 143a.

Moreover, even where the CCA did not expressly rely on the trial court's credibility determinations, it consistently reached the same conclusions as that court: that *none* of Reed's nineteen witnesses was credible—even though none had any affiliation with Reed, some had been friends with Stites, and some were former law-enforcement officials. That outcome illustrates the pitfalls of attempting to "fix" rubberstamped findings on appeal. The CCA had no opportunity to judge for itself the credibility of the witnesses beyond reading the bare transcript, as colored by the one-sided picture painted by rubberstamped findings below. Thus, *no* judge performed that role. And the error is especially egregious here because the trial court went out of its way to prevent the CCA from conducting independent review by denying Reed's motion to include an audio recording of the hearing in the record on appeal (it also barred media and public recordings). App. 249a. Without the full record, the CCA's "independent review" did not *correct* the prosecutor-drafted findings. It laundered them.

III. This case is an ideal vehicle.

This case presents an ideal opportunity for resolving the questions presented. Both questions are cleanly presented. The CCA clearly stated the factual findings underlying its faulty *Schlup* analysis, and it relied on an improper burden of proof and a novel "affirmative evidence" requirement to deny Reed relief. *Supra* pp. 21-24. As for rubberstamping, the trial

court signaled in advance that it didn't intend to make its own findings; it adopted the state's findings verbatim; and the CCA expressly found that the trial court had not carefully reviewed those findings. *Supra* pp. 31-33. And this rubberstamping was egregious. With the stroke of his pen, and no analysis of his own, the trial judge declared not credible the *nineteen witnesses* who testified for Reed. This case thus presents an unusually clearcut opportunity for this Court to translate its longstanding criticism of rubberstamping into a concrete standard. What's more, this petition arises on direct review of a *state* capital habeas decision—meaning both that the case is immensely important and that it presents none of the complicating features of applying the deferential federal habeas standard.

This Court should intervene to prevent a grave miscarriage of justice. The Texas courts' two constitutional errors—applying an unconstitutionally onerous gateway-innocence standard and rubberstamping the State's proposed findings—violated Reed's due-process rights twice over, and their combination makes clear that Texas courts never gave him a fair chance to fight for his life. Three years ago, Justice Sotomayor observed that the "pall of uncertainty over Reed's conviction" is inescapable, but expressed hope "that available state processes will take care to ensure full and fair consideration of Reed's innocence." *Reed*, 140 S. Ct. at 690 (statement of Sotomayor, J., respecting the denial of certiorari). But despite more evidence than ever of Reed's innocence—forty-seven witnesses—Texas' courts have fallen short. The trial court abdicated its duty to render an independent judgment. And the CCA, recognizing that abdication and aware that the state-drafted findings were laced

with inaccuracies, App. 97a-98a & n.8, laundered those rubberstamped findings under a standard contrary to *Schlup*—all to avoid reaching the conclusion that should be apparent to any reasonable jurist: There is more than reasonable doubt about Reed's guilt. Correcting those errors would give Reed a fair chance to make that showing.

* * *

Rodney Reed has steadfastly maintained his innocence for a quarter century, and a "considerable body of evidence" has accumulated supporting that claim. *Reed*, 140 S. Ct. at 687 (statement of Sotomayor, J., respecting the denial of certiorari). But the Texas courts relied on two constitutional errors to deny him relief: adopting a novel gateway-innocence standard that violates *Schlup*, and abdicating the judicial duty to exercise neutral, independent judgment and instead rubberstamping the state's factual findings (an error the CCA did not and could not cure). Important to many litigants, those issues are critical to Reed, whose life hangs in the balance. The Court should not fail to intervene while "the pall of uncertainty over Reed's conviction" remains. *Id.* at 690.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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