No. 23-569

IN THE

Supreme Court of the United States

RODNEY REED,
Petitioner,
vs.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should the Court create a new federal constitutional rule by establishing a floor for state gateway-innocence claims—claims of actual innocence to overcome a state procedural bar—in a case where Petitioner claims were reviewed and rejected on the merits?

2. Should the Court create a new federal constitutional rule regarding "rubberstamped" findings by a state trial court in a case where the Petitioner received an independent and thorough analysis in the state high court?

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BRIEF IN OPPOSITION

Petitioner Rodney Reed has received more postconviction review than the vast majority of capital defendants. His claims have generated hundreds of pages of opinions, many of them published, all denying him relief. Indeed, twenty-five years after he brutally raped and murdered Stacey Stites, he was provided a full and fair, two-week evidentiary hearing where the central question was: in light of all of the evidence, old and new, incriminating and exculpatory, was Reed actually innocent of Stacey's capital murder.

The answer from the state courts was resounding: no. His evidence amounted to rehashed forensic testimony that offered nothing new and lay witnesses who gave accounts which, at best, were questionable; at worst, they were clearly perjurious.[1] And though Reed attempts to shift the spotlight to Jimmy Fennell, Stites's fiancé, Reed's own history of multiple sexual assaults continues to seriously discredit any assertions of a consensual sexual relationship with Stites prior to the time he murdered her.

After the Texas Court of Criminal Appeals (CCA) rejected his claims in an eighty-one-page published opinion, he now raises two questions before this Court, both, at bottom, attacking the state-created procedures of state habeas corpus review, particularly of subsequent applications. But this Court should decline his invitation to exercise broad supervisory power over state proceeding which are not grounded in the

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[1] One of Reed's witnesses even asserted his right against self-incrimination when presented with unassailable evidence of his lies.

Constitution as Reed suggests, especially because the new rules which Reed advances are barred by anti-retroactivity principles and would not provide Reed any relief. As such, the petition should be denied.

STATEMENT OF THE CASE

I. THE CAPITAL MURDER TRIAL

Stacey Stites was a happily engaged nineteen-year-old just eighteen days shy of her wedding. 43.RR.81–82, 85.[2] She lived in an apartment complex with her fiancé Jimmy Fennell, who was a police officer. 43.RR.81. Her mother Carol, with whom Stites spent her last days planning her upcoming nuptials, lived in an apartment downstairs from theirs. *Id.*; 44.RR.51.

Stites worked at a Bastrop, Texas grocery store (H-E-B) about thirty miles from her residence and was scheduled for a 3:30 a.m. shift. 43.RR.95; 44.RR.48. When she did not show up for work, a fellow employee became worried and called Carol around 6:30 a.m. 43.RR.96, 101–02. Carol then called Fennell, who went to look for Stites while Carol notified authorities. 44.RR.70–71.

That same morning, at 5:23 a.m., a Bastrop police officer discovered the pickup truck Stites took to work, which was seemingly abandoned in a local high school parking lot. 43.RR.117. Because the truck was not reported stolen, the officer took no further action.

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[2] "RR" refers to the reporter's record from Reed's capital murder trial which was included as an exhibit during the proceedings below. It is preceded by volume and followed by page numbers.

43.RR.118–122. But he did notice a piece of a belt lying outside the truck. *Id.*

Later that day, Stites's body was found off a rural road. 44.RR.18, 21. Texas Department of Public Safety Crime Laboratory (DPS) personnel processed the scene. 44.RR.108. They observed a partially clothed Stites—her shirt removed, bra exposed, and missing a shoe and an earring. 44.RR.113. Her pants were undone, the zipper was broken, and her panties were bunched at her hips. 44.RR.113–14, 122. She was discovered with her work apparel—a nametag and a large knee brace. 44.RR.128, 151. On the side of the road was another piece of belt. 44.RR.115.

Because of obvious signs of rape, a DPS criminalist took vaginal and breast swabs from Stites's body. 44.RR.123; 45.RR.51. On-site chemical testing signaled the presence of semen. 44.RR.124–27. Around 11:00 p.m. that night, microscopic analysis showed the presence of intact sperm, which indicated a recent seminal deposit—based on published scientific articles, sperm remains whole within the vaginal cavity for usually no longer than twenty-six hours. 44.RR.131; 45.RR.15–16.

Later forensic testing matched the belt fragments to each other, and it appeared that the belt was torn apart, not cut, 47.RR.83–85, and it was identified as Stites's, 45.RR.102. A search of the truck yielded Stites's missing shoe and earring, and the remnants of a smashed, plastic drinking glass. 47.RR.44–45; 49.RR.34, 38. Additionally, the driver's-side seatbelt was still engaged and the seat was angled in a way that a

6'2" person could properly utilize the rearview mirror. 46.RR.101; 49.RR.43.

Stites's body was autopsied the next day by Dr. Roberto Bayardo. 48.RR.111. He observed a large mark across Stites's neck that matched the pattern of her belt. 48.RR.119–20, 136–37. There were also bruises on Stites's arms consistent with forcible restraint, bruises on her head consistent with the knuckles of a fist, and bruises on her left shoulder and abdomen consistent with an over-the-shoulder seat belt. 48.RR.115–18. Based on physical changes in the body, Dr. Bayardo estimated time of death at 3:00 a.m., give or take four hours. 48.RR.113–14.

Dr. Bayardo took vaginal, oral, and rectal swabs. 48.RR.121–23. He, too, observed intact sperm from a vaginal swab, which he stated indicated "quite recent[]" seminal deposit. 48.RR.121–22. There were also injuries to Stites's anus, including dilation and lacerations, which were consistent with penile penetration inflicted at or near the time of death. 48.RR.126–27. Dr. Bayardo also thought he saw sperm heads from a rectal-swab slide via microscopic analysis, although he acknowledged that chemical testing was negative for semen. 48.RR.123–24. Nonetheless, he noted that sperm break down quicker in the rectal cavity than in the vagina, so the fragmented sperm he believed he saw also indicated recent deposit. 48.RR.125.

Thereafter, DPS personnel conducted DNA testing on the vaginal, rectal, and breast swabs, and the results indicated that the foreign DNA came from a single source. 49.RR.95–113. They also "mapped" Stites's panties, which showed little movement after

seminal deposit. 44.RR.190–91; 55.RR.40. This too connected the timing of the seminal deposit with the murder. 55.RR.41.

For approximately a year, multiple agencies searched for Stites's killer. They interviewed hundreds and obtained biological samples from twenty-eight males; none matched the foreign DNA in and on Stites. 46.RR.111–12; 49.RR.114–19. And none mentioned that Reed associated with Stites. 46.RR.112.

Reed became a suspect in Stites's murder after he was arrested for kidnapping, beating, and attempting to rape and murder another nineteen-year-old woman, Linda Schlueter.[3] 46.RR.122. Reed abducted Schlueter approximately six months after Stites's murder, near the route Stites typically took to work and around the same time that Stites had disappeared—3:00 a.m. 61.RR.10, 37–47. Moreover, Reed was regularly seen in the area by Bastrop police officers in the early morning hours, and his home was close to where both Stites's and Schlueter's vehicles were abandoned. 50.RR.70–73, 80, 95–96. Further, Reed's height—6'2"—aligned with the angle of the driver's seat. 49.RR.43.

Given the similarities between these crimes, law enforcement inquired with DPS if they had Reed's DNA profile on file; they did because Reed had raped his intellectually disabled girlfriend, Caroline Rivas.[4]

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[3] The details of the Schlueter offense were not introduced at the guilt-innocence phase. The jury only knew that law enforcement had "information that led [them] to look at [Reed] as a suspect." 46.RR.122.

[4] Rivas was scared after the rape, and didn't want to testify, so she did not initially pursue charges against Reed. 60.RR.66. She

46.RR.122–23.[5] Reed's DNA profile was compared to the foreign DNA inside and on Stites's body—the two were consistent. 50.RR.104. Reed was then questioned and he denied knowing Stites. 48.RR.82–83. Additional biological samples were obtained from Reed via search warrant. 48.RR.18, 86–92.

More DNA testing was performed by DPS and by a private laboratory retained by the State. 49.RR.118–19; 50.RR.120–36, 140; 49.RR.127; 51.RR.33–34. The results were conclusive—Reed could not be excluded as the foreign DNA contributor but 99% of the world's population could be, and only one person in 24 to 130 billion people would have the same foreign DNA profile. 49.RR.118, 122; 50.RR.144–45; 51.RR.80. In an abundance of caution, samples were taken from Reed's father and three of his brothers, and they were ruled out as contributors too. 49.RR.123–25

Reed's trial counsel, assisted by three investigators and a DNA expert, attempted to counter this damning evidence by blaming someone else for the murder and asserting that Reed and Stites were engaged in a clandestine but consensual sexual relationship.

To prove the former, Reed's DNA expert, Dr. Elizabeth Johnson, testified that a hair found on Stites's back did not match any of the samples gathered by law

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later changed her mind because "it's better to tell the truth in front of . . . people." 60.RR.66–67.

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

enforcement. And a couple of witnesses testified they saw three men in a white truck near the area where Stites's body was recovered. 51.RR.107–08, 124–25; 54.RR.50–52.

Trial counsel also suggested that Fennell was the murderer, and that law enforcement did not thoroughly investigate him. The evidence showed, however, that although law enforcement never searched Fennell's apartment, they did interview him several times and collected biological samples from him. 45.RR.110–12; 46.RR.62.

Reed's counsel also cast suspicion on David Lawhon, a Bastrop resident who murdered another woman, Mary Ann Arldt, two weeks after Stites's death. 46.RR.158. They called several witnesses who testified about a connection between Stites and Lawhon, including one who said Lawhon had confessed to killing Stites.[6] 52.RR.29–31, 89.

As to the secret-relationship defense, one witness testified that she saw Stites and Reed talking at the grocery store, and another said Stites came by Reed's house looking for him. 51.RR.136; 53.RR.92. The jury did not believe Reed's defenses and found him guilty of two counts of capital murder.

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

II. THE STATE'S PUNISHMENT CASE

During the punishment phase of the trial, the State introduced substantial evidence of Reed's crimes against other women. First was Connie York, a nineteen-year-old who had come home late one evening in 1987 after swimming with friends. 57.RR.34–35. York was grabbed from behind and told "don't scream or I'll hurt you." 57.RR.35–36. When York did not listen, she was repeatedly struck, dragged to her bedroom, and raped multiple times. 57.RR.37–42. Reed was interviewed, and, while he admitted that he knew York from high school, he denied raping her. 57.RR.123–24. When confronted with a search warrant for biological samples, Reed had an about-face, "Yeah, I had sex with her, she wanted it." 57.RR.138. The case went to trial four years later, 57.RR.30, 60, and Reed was acquitted, 57.RR.61.

Next was A.W., a twelve-year-old girl, who was home alone, having fallen asleep on a couch after watching TV one night in 1989. 58.RR.36–42. A.W. awoke when someone began pushing her face into the couch and had blindfolded and gagged her. 58.RR.42–43. She was repeatedly hit in the head, called vulgar names, and orally, vaginally, and anally raped. 58.RR.43–49. The foreign DNA from A.W.'s rape kit was compared to Reed; Reed was not excluded and only one in 5.5 billion people would have the same foreign DNA profile from A.W.'s rape kit. 58.RR.51, 92; 61.RR.26.

Then came Lucy Eipper, whom Reed had met in high school, and whom Reed began to date after her graduation. 59.RR.10–12. Eipper had two children with Reed. 59.RR.13–14, 19–20 Throughout their

relationship, which started in 1988 and ended in 1991, Reed physically abused Eipper, including while she was pregnant, and raped her "all the time," including one time in front of their two children. 59.RR.14–17, 21, 25–32.

Afterwards, Reed began dating Caroline Rivas, an intellectually disabled woman. 60.RR.39–41. Rivas's caseworker noticed bruises on Rivas's body and, when asked about them, Rivas admitted that Reed would hurt her if she would not have sex with him. 60.RR.41, 61. Later, Rivas's caseworker noticed that Rivas was walking oddly and sat down gingerly. 60.RR.43. Rivas admitted that Reed had, the prior evening and about nine months before Stites's murder, hit her, called her vulgar names, and anally raped her. 60.RR.44, 63–65. The samples from Rivas's rape kit provided the link to Stites's murder. 60.RR.89–90.

Shortly thereafter, and about six months before Stites's murder, Reed raped Vivian Harbottle underneath a train trestle as she was walking home. 59.RR.87–92. When, for the sake of her children, she pleaded for her life, Reed laughed at her. 59.RR.94. The foreign DNA from Harbottle's rape kit was compared to Reed; he could not be excluded, and only one person in 5.5 billion would be expected to have the same foreign DNA profile. 59.RR.95, 113–14; 61.RR.26.

Finally, and about six months after Stites's murder, Reed convinced nineteen-year-old Linda Schlueter to give him a ride home at about 3:30 a.m. 61.RR.10, 37–47. Reed led her to a remote area and then attacked her. 61.RR.47–58. After a prolonged struggle, Schlueter asked Reed what he wanted and Reed

responded, "I want a blow job." 61.RR.60. When Schlueter told Reed that "you will have to kill me before you get anything," Reed stated, "I guess I'll have to kill you then." 61.RR.60. Before Reed could follow through on this threat, a car drove by, and Reed fled. 61.RR.62–64.

Reed's trial counsel, assisted by his three investigators, a forensic psychologist, and a neuropsychologist presented a case to mitigate punishment. The jury rejected Reed's mitigation defense and answered the special issues presented. Reed was sentenced to death. 1.CR.489–493.[7]

III. REED'S POSTCONVICTION PROCEEDINGS

Reed's conviction was affirmed on direct appeal by the CCA. *Reed v. State*, No. 73,135 (Tex. Crim. App. Dec. 6, 2000). This Court denied a writ of certiorari, *Reed v. Texas*, 534 U.S. 955 (2001).

With direct appeal pending, Reed filed an application for state habeas relief. 2.SHCR-01/02, at 2–251.[8] A little more than a year later, Reed filed a "supplemental claim." 3.SHCR-01/02, at 391–402. The CCA denied Reed's initial application and found the

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[7] "CR" refers to the clerk's record for Reed's capital murder trial. The references are preceded by volume number and followed by page numbers.

[8] "SHCR-01/02" refers to the clerk's record for Reed's first and second state habeas proceedings. Similarly, "SHCR-03," "SHCR-04," "SHCR-05," "SHCR-06," "SHCR-07," "SHCR-08," "SHCR-09," "SHCR-10," and "SHCR-11" refer to the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh state-habeas-proceeding clerk's records, respectively. The references are preceded by volume number and followed by page numbers.

"supplemental claim" to be a subsequent application and dismissed it as abusive. *Ex parte Reed*, Nos. 50,961-01, 50,961-02 (Tex. Crim. App. Feb. 13, 2002).

Reed turned to federal court, filing a habeas petition in the Western District of Texas, Austin Division. Petition for a Writ of Habeas Corpus, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Feb. 13, 2003), ECF No. 33. The case was stayed and placed in abeyance so that Reed could further exhaust state court remedies. Order, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Mar. 1, 2004), ECF No. 114.

Reed then filed his third state habeas application. 1.SHCR-03, at 2–343. The CCA dismissed all of Reed's claims as abusive, save two claims that were remanded to the trial court for factual development. *Ex parte Reed*, No. WR-50961-03, 2005 WL 2659440, at *1 (Oct. 19, 2005). After a live hearing and findings from the trial court, the CCA issued an exhaustive opinion denying relief on the merits and finding that Reed's actual innocence "claim" was not persuasive enough to overcome the untimeliness of his procedurally defaulted claims. *Ex parte Reed*, 271 S.W.3d 698 (Tex. Crim. App. 2008).

With his third state habeas application pending, Reed filed his fourth and fifth state habeas applications. SHCR-04, at 2–15; SHCR-05, at 2–89. The CCA dismissed both applications as abusive. *Ex parte Reed*, Nos. WR-50,961-04, WR-50,961-05, 2009 WL 97260, at *1–6 (Tex. Crim. App. Jan. 14, 2009). The CCA was also troubled by Reed's apparent "piecemeal approach" to postconviction litigation. *Id*. at *1.

After those proceedings terminated, Reed filed his sixth state habeas application. SHCR-06, at 2–59. This, too, was dismissed as abusive by the CCA. *Ex parte Reed*, No. WR-50961-06, 2009 WL 1900364, at *1–2 (Tex. Crim. App. July 1, 2009).

Reed then returned to federal court and the stay was lifted. Order, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Aug. 20, 2009), ECF No. 135. A federal magistrate judge recommended denial of relief, *Reed v. Thaler*, No. A-02-CV-142-LY, 2012 WL 2254217 (W.D. Tex. June 15, 2012), which the federal district judge largely adopted, and who independently denied relief, Order on Report and Recommendation, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Sept. 26, 2012), ECF No. 177. In doing so, the federal district judge found that Reed's post-recommendation motion to test certain evidence was "untimely" and so was Reed's submission of additional evidence, calling its late presentation "extremely suspect." *Id*. at 11–13. The court denied all of Reed's post-judgment motions. Order, *Reed v. Thaler*, No. A-02-CV-142-LY (W.D. Tex. Feb. 4, 2013), ECF No. 191.

Reed appealed the denial of federal habeas relief, but the Fifth Circuit affirmed by denying a certificate of appealability (COA). *Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014). In its opinion, the Fifth Circuit noted that Reed had untimely presented several pieces of evidence and failed to provide a "persuasive reason for waiting" so long to do so. *Id*. at 768 n.5; *see id*. at 771 n.6, 776 n.12. This Court denied Reed's petition for a writ of certiorari. *Reed v. Stephens*, 135 S. Ct. 435 (2014).

In 2014 the trial court entered its first order setting Reed for execution. *Reed v. State*, 541 S.W.3d 759, 764 (Tex. Crim. App. 2017). On the same day, the State and Reed agreed to an order for DNA testing for several items recovered from the victim's body and her clothing. *Id.* at 764–65. Also on this day, Reed filed a motion to have many other items tested under Chapter 64. *Id.* at 764.

The trial court held an evidentiary hearing where it took live testimony. *Id.* at 765–67. Based on the hearing and the pleadings before it, the trial court denied Reed's request for additional testing. *Id.* at 767. And the CCA affirmed that decision. *Id.* at 780. Reed sought rehearing in the CCA, Appellant Rodney Reed's Motion for Rehearing, *Reed v. State*, No. AP-77,054, 2017 WL 1337661 (Tex. Crim. Apr. 12, 2017), which the CCA denied, Order, *Reed v. State*, No. AP-77,054 (Tex. Crim. App. Oct. 4, 2017). This Court once again denied a writ of certiorari. *Reed v. Texas*, 138 S. Ct. 2675 (2018).[9]

The trial court modified the 2015 date for Reed's execution. *In re State ex rel. Goertz*, No. WR-90,124-02, 2019 WL 5955986, at *1 (Tex. Crim. App. Nov. 12, 2019). But the CCA stayed the execution to further review claims raised in his seventh application. *Ex parte Reed*, No. WR-50,961, 2015 WL 831673, at *1 (Tex. Crim. App. Feb. 23, 2015). While the seventh application was pending, Reed filed his eighth. 1.SHCR-08, at 5–23.

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[9] Reed's federal challenge to this litigation under 42 U.S.C. § 1983 remains pending. *See Reed v. Goertz*, 598 U.S. 230, 237 (2023).

The CCA dismissed Reed's seventh application and remanded two claims from the eighth for factual development. *Ex parte Reed*, Nos. WR-50,961-07, WR-50,961-08, 2017 WL 2131826, at *1–2 (Tex. Crim. App. May 17, 2017). A multi-day hearing was held, and the trial court recommended the denial of relief. 2.SHCR-08, at 152–75. About a half year later, Reed filed his ninth application. SHCR-09, at 4–56.

The CCA addressed both applications in a single order, denying the eighth on the merits and dismissing the ninth as abusive. *Ex parte Reed*, Nos. WR-50,961-08, WR-50,961-09, 2019 WL 2607452, at *1–3 (Tex. Crim. App. June 26, 2019). In dismissing the ninth application, the CCA noted that Reed had attached some of the same evidence and presented "a substantially similar" ground in his seventh application. *Id*. at *2. Reed again sought a writ of certiorari, and this Court again denied him one. *Reed v. Texas*, 140 S. Ct. 686 (2020).

IV. REED'S TENTH AND ELEVENTH APPLICATIONS

Reed was again set for execution. *In re State ex rel. Goertz*, No. WR-90,124-02, 2019 WL 5955986, at *1 (Tex. Crim. App. Nov. 12, 2019). He then filed his tenth state habeas application alleging four claims: (1) the State suppressed material evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (2) the State presented false testimony at trial; (3) he received ineffective assistance of counsel at trial (IATC); and (4) a freestanding claim of actual innocence. *Ex parte Reed*, 670 S.W.3d 689, 728–31 (Tex. Crim. App. 2023) (*Reed-10*). The CCA remanded all but the IATC claim to the trial court. *Id.* at 731.

The trial court held a two-week evidentiary hearing on the remanded claims. *Id.* at 735–43. Based on the evidence presented, the trial court entered findings and conclusions recommending relief be denied for the remanded claims. *See id.* at 743. In an eighty-page published opinion, the CCA engaged in an independent review of the remanded claims and the record, giving careful scrutiny to the trial court's recommendations (which the CCA noted were largely supported by the record). *Id.* 743–44. Based on its extensive and detailed analysis, the court denied the three remanded claims and dismissed the IATC claim as abusive. *Id.* at 744–69.

Prior to the evidentiary hearing, the State provided Reed's attorneys with two disclosure letters: one regarding *pretrial* interviews conducted with Ron Haas, Andrew Cardenas, and Jose Coronado; another regarding a *2021* interview with Suzan Hugen conducted in preparation for the evidentiary hearing. *Id.* at 731–32. Reed attempted to raise new *Brady* claims regarding these disclosures and include them in the upcoming hearing, but the trial court denied that request finding that such claims were new and outside the scope of the CCA's remand. *Id.* at 732.

While his tenth application was pending in the CCA post-remand, Reed filed an eleventh state habeas application alleging three claims: (1) that the State failed to disclose material evidence, including the pretrial interviews of Haas, Cardenas, and Coronado, and Hugen's 2021 interview; (2) that the State elicited false testimony from several lay witnesses, which Reed claimed was contradicted by some of the assertions that

he raised in the first claim; and (3) that the State elicited false expert testimony, regarding, in part, how long spermatozoa remain intact. *Ex parte Reed*, No. WR-50,961-11, 2023 WL 4234348, at *3–4 (Tex. Crim. App. June 28, 2023) (*Reed-11*). The CCA dismissed the eleventh application as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071 § 5. *Id.* at 8. However, it also made a prima facie determination that Reed failed to prove the merits of his first and second claims. *Id.* at 6–7.

The day before Thanksgiving (and almost a full week early), Reed filed the instant petition for certiorari in this Court. *See generally* Pet. Writ Cert. (Pet.). The State's opposition now follows.

REASONS TO DENY THE PETITION

I. THE COURT SHOULD NOT GRANT CERTIORARI TO EXERCISE BROAD SUPERVISORY POWER OVER THE STATE COURTS.

In an appeal to this Court's supervisory authority Reed urges the Court to invade the province of state legislatures and judiciaries by creating two new constitutional rules: (1) a homogenous standard of review for "gateway" claims of actual innocence asserted to overcome a procedural issue on state habeas review, Pet.16–25; and (2) "a uniform constitutional rule" that would define the contours of a due process claim for "rubberstamped" findings by the state habeas court, Pet.25–33. He argues that this is the ideal vehicle to take up both issues. Pet.33–35. However, the Court has routinely declined to recognize the federal constitutional rules which Reed now proposes.

Turning to the first issue, Reed asserts that in *Schlup v. Delo*, 513 U.S. 298 (1995), the Court affirmatively established the burden of proof for gateway claims of actual innocence *for all claims and all suits*. Indeed, the gravamen of his argument is that the Due Process Clause imposes what is essentially the lowest conceivable burden of proof for an "ultimate" fact issue. However, he provides no historical, textual or precedential support for his argument that the Due Process Clause somehow demands application of the non-constitutional, equitable exception created in *Schlup* to a state court's review of habeas claims that have not yet been recognized by the Court.

Reed even recognizes the problem: that *Schlup* established the standard for gateway claims on *federal* habeas review. Pet.24. But neither the federal habeas process nor the ability to assert a gateway claim of innocence to overcome a federal procedural bar finds its bedrock in the constitution. And the Court should decline to "fashion a new due process right out of thin air" on Reed's behalf. *See Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("[P]etitioner asserts that the failure to allow the District Court to enter a judgment of acquittal would violate the Due Process Clause of the Fifth Amendment. Petitioner has failed to proffer any historical, textual, or controlling precedential support for his argument that the inability of a district court to grant an untimely postverdict motion for judgment of acquittal violates the Fifth Amendment, and we decline to fashion a new due process right out of thin air.").

In exercising its authority under 28 U.S.C. § 1257(a), the Court has made clear that it holds "no

supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Here, Reed suggests that the Due Process Clause dictates an evidentiary standard for state court postconviction review of not yet recognized claims but provides not a single material constitutional argument in support of such a claim. In essence, he is asking the Court to provide supervisory guidance over the state courts to assist them in analyzing gateway claims of actual innocence under state procedural law. The Court cannot accept this invitation.

In addition, because Reed appeals from a state habeas proceeding, his failure to demonstrate a constitutional violation creates another reason to deny certiorari. As Justice O'Connor described the role of state habeas corpus proceedings:

> A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). Hence, providing such supervisory guidance in the context of state habeas proceedings, and outside of the criminal process, is doubly gratuitous.

Reed likewise fails to demonstrate a constitutional dimension to rubberstamping. At bottom

this is a separate but like attempt by Reed to federalize state habeas proceedings. He relies on broad sweeping appeals to due process concerns, but he consistently recognizes that the mechanisms of state habeas—particularly as it relates to the role of findings of fact and conclusions of law—are not clearly defined or even consistent among the states. Indeed, "the State remains free to impose proper procedural bars to restrict repeated returns to state court for postconviction proceedings." *Slack v. McDaniel*, 529 U.S. 473, 489 (2000).

In sum, this Court's authority under § 1257(a) "is limited to enforcing the commands of the United States Constitution." And Reed fails to establish that the Constitution requires a state to adopt a procedural gateway based on actual innocence, much less the standard governing that gateway. He likewise fails to establish the Constitution requires a particular state habeas process regarding findings, the Court must decline his request to exercise supervisory authority to formalize the contours of state habeas practice.

II. THE COURT SHOULD NOT GRANT CERTIORARI REVIEW BECAUSE THE PETITIONER'S PROPOSED NEW CONSTITUTIONAL RULES ARE BARRED BY ANTI-RETROACTIVITY PRINCIPLES.

Reed's conviction became final on October 9, 2001, when this Court denied certiorari from direct appeal. *Reed*, 534 U.S. at 955. Hence, the State's interest in the finality of its convictions outweighs Reed's interest in the retroactive application of any new rule of constitutional law. *See Teague v. Lane*, 489 U.S. 288,

309–10 (1989) (plurality opinion); *see also Chaidez v. United States*, 568 U.S. 342, 347 (2013).

Despite asking the Court to create not one, but two new constitutional rules, Reed does not address the anti-retroactivity principles at issue in *Teague* and *Chaidez*. Yet these principles are plainly applicable to review of a state postconviction proceeding on certiorari. Unless a new rule falls within a *Teague* exception, the "new constitutional rules . . . will not be applicable *to cases which have become final before the new rules are announced*." *Teague*, 489 U.S. at 310 (emphasis added). And *Teague* defines a non-final case as one "'pending on direct review or not yet final.'" *Id.* at 305–6 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). Reed's conviction is final for purposes of *Teague*.

The rules he suggests are also clearly new under *Teague* as they would "'break[] new ground or impose[] a new obligation' on the government." *Chaidez*, 568 U.S. at 347 (quoting *Teague*, 489 U.S. at 301). Said another way, the result Reed seeks is not "dictated by precedent existing at the time the [his] conviction became final," *Teague*, 489 U.S. at 301.

Finally, the sole exception in *Teague* does not apply here. *See O'Dell v. Netherland*, 521 U.S. 151, 157 (1997); *Edwards v. Vannoy*, 593 U.S. 255, 272 (2021) (eliminating the "watershed exception"). That exception applies to rules placing primary conduct beyond the government's power to proscribe or a class of persons beyond the government's power to punish in certain ways. *Graham v. Collins*, 506 U.S. 461, 477 (1993). Hence, any new constitutional rule recognized by this Court should not be applicable to this case.

To the extent Reed might argue that *Teague* is explicitly limited to constitutional rules that are first recognized in federal habeas corpus, he would be incorrect. This Court has not yet analyzed the procedural gap between the finality of a state conviction and the onset of federal habeas corpus, at least with respect to the Court's non-retroactivity analysis. *See Truesdale v. Aiken*, 480 U.S. 527, 529–30 (1987) (Powell, J., dissenting) ("[T]he Court [has not] decided whether the same retroactivity rules should apply to state post-conviction proceedings . . . [as] apply to federal habeas corpus proceedings."); *see also Mallett v. Missouri*, 494 U.S. 1009, 1012 (1990) (Marshall, J., dissenting from denial of certiorari) (questioning whether *Teague* applies to Court's review of state postconviction proceedings).

But the rationale for *Teague* applies with equal vigor to this Court's review of a state postconviction proceeding. The plurality in that case criticized earlier retroactivity implementations, noting that the "'selective application of new [constitutional] rules violates the principle of treating similarly situated defendants the same.'" *Teague*, 489 U.S. at 304 (quoting *Griffith*, 479 U.S. at 323–24). To avoid the intolerable inequity that disparate treatment engendered, the plurality determined that it would "simply refuse to announce a new rule in a given case unless the rule would be applied retroactively *to the defendant in the case and to all others similarly situated*." *Id*. at 316 (emphasis added).

That limiting principle finds application here. The constitutional rules which Reed seeks would not

benefit all similarly situated petitioners, petitioners with final convictions who are pursuing state collateral review. Specifically, whether or not he could benefit from the new rules, other similarly situated petitioners pursuing state postconviction review are unlikely to benefit because the state courts are free to deny retroactive application of new rules in their own postconviction proceedings. *See Danforth v. Minnesota*, 552 U.S. 264, 266 (2008) (holding that state courts are not bound by *Teague* and may adopt their own non-retroactivity rules for postconviction proceedings).

Because a grant of certiorari in this Court would have the same impact upon the finality of Reed's conviction as a federal habeas appeal, the Court is bound to consider the issues raised only in light of clearly established constitutional principles dictated by precedent. With this in mind, Reed's petition presents no important questions of federal constitutional law to justify this Court's exercise of its certiorari jurisdiction.

III. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE FIRST QUESTION PRESENTED BECAUSE REED ALREADY RECEIVED THE RELIEF HE SEEKS AND HIS GATEWAY CLAIM OF INNOCENCE ALREADY FAILED UNDER THE PREPONDERANCE STANDARD OF PROOF.

In his first Question Presented Reed asserts that the CCA erred by not utilizing the lowest conceivable burden of proof when ruling on his gateway claim of actual innocence. Ostensibly then, the harm he suffered was a lack of merits review for his claims. However, the trial court and CCA expressly reviewed and rejected on the merits all but one of his claims in his tenth

application and the CCA implicitly rejected the underlying merits of the remaining claim (his IATC claim). Further, for federal review purposes, the CCA provided a merits determination on the claims raised in his eleventh writ. Thus, assuming arguendo the CCA applied the incorrect burden of proof to his gateway innocence claim, Reed suffered no harm.

As mentioned above, in his tenth application Reed raised four grounds for relief: (1) a *Brady* claim; (2) a false testimony claim; (3) an IATC claim; and (4) a freestanding claim of actual innocence. *Reed-10*, 670 S.W.3d at 728–31. The basis for his IATC claim was that trial counsel failed to discover and develop the evidence used to support the other grounds for relief. *Id.* at 731. The CCA remanded all but the IATC claim to the trial court for further factual development. *Id.* Implicit in this decision was a recognition that the IATC claim was so entwined with the other grounds that, if he failed there, he would necessarily fail to show trial counsel was ineffective.

After the trial court returned the case to the CCA, that court, in an exhaustive approach, thoroughly discussed and denied relief on the three remanded claims. Regarding his *Brady* claim, the CCA found that Reed failed, primarily because he could not show any evidence was suppressed. *Id.* at 762–67. As to his assertions that Fennell testified falsely when he said he did not know about the alleged affair between Reed and Stites and when he averred he did not kill Stites, the CCA determined that Reed failed to show the testimony was false. *Id.* at 767–68. Further, applying "the most favorable materiality standard," the court found that

any "new" testimony to counter the "happy relationship" between Fennell and Stites was simply cumulative of what Reed put on at trial. *Id.* at 768. As such, the CCA denied the false testimony claim on the merits as well.

The court spent that lion's share of its opinion addressing Reed's freestanding claim of actual innocence. *Id.* at 744–62. After methodically examining every facet of "Reed's present-day innocence narrative,"—for his story of innocence has shifted and changed over time, including differing accounts by Reed himself—and detailing all the evidence and testimony produced, not just in his tenth application proceedings, but over the decades of litigation, the CCA said:

> Taking all of the foregoing phases of evidence into account, Reed has not shown *by a preponderance of the evidence* that no rational jury would have convicted him in light of his post-trial evidence of innocence. His lay witnesses have given accounts that are questionable at best when viewed in isolation and disharmonious when viewed holistically. His scientific and forensic experts have relied (and continue to rely) on science that has been available since the time of Reed's trial, and even looking past the prior-availability issue, Reed's scientific and forensic evidence does not affirmatively show that Reed is innocent. It reflects "differing opinions," *Reed*, 271 S.W.3d at 748, not a scientific consensus pointing toward Reed's innocence. Finally, to whatever extent Fennell's extraneous

> conduct shifts suspicion away from Reed and toward Fennell, Reed's extraneous conduct, added to the evidentiary mix, shifts the suspicion back to Reed (and them some). Reed's history of sexual assault seriously discredits his assertion—of which he is trying to persuade this Court—that he and Stacey had consensual sex. These observations suffice to dispose of Reed's procedural, Section 5(a)(2)-based innocence claim *as well as his substantive, Elizondo-based innocence claim*. Because it does not warrant relief under either rubric, claim four is denied.

Id. at 762 (emphasis added).

The CCA denied Reed's *Brady*, false testimony, and freestanding actual innocence claim on the merits. *Id.* at 769. The CCA dismissed *only* the IATC claim based on the state procedural bar and finding that Reed could not avail himself of any exception, including the gateway claim of innocence, to the bar. But the IATC rested atop the other three claims. Thus, as those claims failed on the merits, in some part because the testimony presented at the hearing in 2021 mirrored that presented by trial counsel in 1998, so too would the IATC claim. What is more, Reed does not now argue why merits review of that claim would result in a different outcome than his other claims.

In his eleventh application, Reed raised three grounds for relief: (1) another *Brady* claim; (2) another false testimony claim; and (3) a claim that the State presented false forensic testimony. *Reed-11*, 2023 WL

4234348, at *3–4. Although the CCA dismissed the eleventh application as an abuse of the writ, it made a prime facie determination of the merits of the first two claims. *Id.* at *6 ("Reed has not made a prima facie showing that he suffered a *Brady* violation . . . ."), *7 ("Reed has not made a prima facie showing that he suffered a due process violation [regarding false lay-witness testimony] . . . ."). For federal review purposes, this is a merits adjudication. *See, e.g.*, *In re Davila*, 888 F.3d 179, 188–89 (5th Cir. 2018) (finding that a *Brady* claim the CCA determined was prima facie insufficient was a merits adjudication).

Regarding the false forensic testimony, the CCA found that Reed did not satisfy any of the exceptions to the abuse-of-the-writ bar, including a gateway showing of actual innocence. *Reed-11*, 2023 WL 4234348, at *7–8. Importantly, though, this relied on the same evidence presented during the 2021 evidentiary hearing. So, just like his tenth-application IATC claim, this claim would necessarily fail any further merits review.

The State would clarify its position here. The CCA's opinions, especially the portions quoted here, demonstrate that it did not stray outside the boundaries of *its own state law* regarding its determination of Reed's gateway-innocence claim. But more to the point, even if it did (and assuming arguendo that breach of state law precedent amounted to a federal constitutional violation), Reed simply cannot show that he suffered any harm because his claims explicitly failed, or implicitly would have failed, on their own standing. As such, nothing is left for the Court to do here except deny the petition.

IV. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE SECOND QUESTION PRESENTED BECAUSE REED ALREADY RECEIVED AN INDEPENDENT REVIEW FROM THE CCA.

The same infirmity plagues Reed's second Question Presented as, despite his protestations to the contrary, he received a full, fair, and independent review by the CCA. Here, Reed lobs specious challenges regarding Texas's state habeas process. At bottom, he complains that the trial court signed the State's proposed findings which included errors. Pet.31–33. But from 190 discrete findings, the only errors the CCA noted were minor, amounting to typos or semantical issues, and were by no means outcome determinative. He then attempts to castigate the CCA's independent review which resulted in an eighty-one-page published opinion wholly eviscerating his fallacious evidence. *Id.*

Turning first to the trial court's findings and conclusions, both Reed and the CCA note there were "oversights," *Reed-10*, 670 S.W.3d at 744, that came directly from the State's proposed order. It is worth noting here that Reed does not point to a single finding that was truly outcome determinative for any claim. Rather, he relies on the CCA's opinion. Pet.12–13. In turn, the CCA pointed to only three errors from 190 discrete findings, and none from the additional thirty-three conclusions of law.[10] But again, none of the

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[10] The first example was a simple typo where the year said "2021" instead of "2020." *Reed-10*, 670 S.W.3d at 744 n.8; *see* Pet.App.198a. The second was a simple transposition error (truly, a copy-and-paste error) where the name of one law enforcement officer was substituted for another in a single finding. *Id.*; *see*

cited errors were of consequence in the determination of any claim. *Reed-10*, 670 S.W.3d at 744. Indeed, the CCA noted that the trial court's findings were largely supported by the testimony and evidence from the hearing. *Id.*

Here then, Reed complains that by relying on these findings, the CCA's thorough opinion is effectively tainted by an already poisoned tree. Not only is this assertion conclusory, but it is also belied by the eighty-one page opinion issued by the high state court methodically analyzing each claim and witness. Reed also complains that the state courts denied his request to have the court reporter send her audio recordings to the CCA for its review. But this request was clearly prohibited under state law, and Reed has no purchase here under federal constitutional law.

Ultimately, Reed's true complaint is a longstanding mantra: the courts—state and federal, trial-level and appellate—do not simply believe his witnesses out of hand. Rather, the courts, particularly here, the CCA, test his witnesses and evidence using

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Pet.App.202a–03a. Interestingly, the CCA cited to "Finding 26" when in fact the error occurred at Finding 34. The third example was a statement that Suzan Hugen claimed that Stites called off her bridal shower. *Id.*; *see* Pet.App.215a. The State maintains that this is clearly implied by Hugen's testimony. Nevertheless, there were several other reasons to discredit Hugen's testimony, such as her account that Reed and Stites were flirting in the grocery store, while customers were present, in a part of the produce section called "Action Alley," so named for the heavy foot traffic in that part of the store. *See* Pet.App.215a. While the CCA said the list was not exhaustive, presumably these were the worst examples to which it, or Reed, could point.

venerable principles of reliability and credibility. The CCA also compared the witnesses and evidence from the 2021 hearing to his ongoing history of postconviction challenges and, importantly, his varying stories. *Id.* at 746 ("But the passage of time and the filing of successive applications have narrowed some of Reed's chosen themes and broadened others. The 'alternate suspect' theme, once containing a gallery of alternate suspects,[FN 9] has gradually narrowed to a single suspect: Fennell. The 'romantic relationship' theme, once limited to a smattering of (frankly unimpressive) lay witnesses, has expanded to include a large amount of forensic and scientific evidence. And Reed's broader innocence narrative now contains evidence that undermines the State's case in ways that neither directly exculpate Reed nor directly implicate anyone else."), 748 ("The problem for Reed is that his sources are so disparate in what they describe, and so internally inconsistent, that even after contemplating this 'wall' in its entirety we are left with the indelible impression that Reed has not carried his burden.").

Nothing that Reed presents now comes close to showing how the CCA's opinion was rubberstamped. So, just like with his first Question, he cannot show that he has not already received the relief which he ultimately seeks. So again, nothing remains for the Court to do except deny his petition.

CONCLUSION

For the forgoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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