No. 19-411

In the Supreme Court of the United States

RODNEY REED,

Petitioner,

v.

TEXAS,

Respondent.

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

BRIEF OF DEKE PIERCE AND OTHER CURRENT AND FORMER TEXAS LAW ENFORCEMENT OFFICERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amici are thirteen current and former Texas law enforcement officers with over 250 years of combined experience.[2] They include police officers with local sheriffs' and constables' offices, a police department chief, corrections officers, an evidence specialist, and a major crimes detective.

Each of the amici cares deeply about the criminal justice system and the rule of law. While that often means holding wrongdoers accountable, an equally important goal of the justice system is to avoid punishing the innocent. "[I]nvestigations *must* inculpate and *exculpate*." (E-mail from Amicus William Evans.) Wrongful convictions, and *a fortiori* wrongful executions, are not only unjust; they also undermine the legitimacy of our laws and the public trust therein. In the words of one Amicus: "if all evidence is not re-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* ("Amici") affirm that no counsel for a party authored this brief in whole or in part, and no person other than Amici and their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice at least 10 days prior to the due date of the intention of Amici to file this brief. All parties consented to the filing of the brief.

[2] Amici submit this brief only in their capacities as private citizens. To the extent an Amicus's employer is named, it is solely for descriptive purposes and does not constitute the employer's endorsement of the brief or any portion of its content.

viewed and/or tested, and the wrong person is executed[,] it … tarnishes the image of [the] System whose laws [we] swore to uphold." (E-mail from Amicus Jessie Tippie (typo corrected).)

Many of the Amici do not oppose the imposition of the death penalty in appropriate cases. But all agree with this Court's longstanding view that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Amici also believe that for the reasons explained in Petitioner's brief, such reliability is lacking in this case. There are serious "questions as to whether all pertinent and critical evidence was introduced during Mr. Reed's trial." (E-mail from Amicus Manuel Mancias (typo corrected).) Justice requires that "the evidence of this case in particular needs to be reheard before a man is executed." (E-mail from Amicus Jordan Murray.) Failing to do so would be a "travesty" of justice. (E-mail from Amicus Mike McGann.)

SUMMARY OF ARGUMENT

Death—the harshest sentence meted out by any judicial system—is both uniquely severe and uniquely irrevocable. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); *accord, e.g.*, *Woodson*

v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). For those reasons, this Court has insisted time and time again that capital trials meet a heightened level of reliability. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604, (1978); *Gardner v. Florida*, 430 U.S. 349, 359 (1977).

Mr. Reed's conviction lacks that necessary reliability. The record in this case, including significant new evidence potentially exonerating Mr. Reed and implicating a different suspect, raises serious doubts about Mr. Reed's guilt. For that reason, Amici respectfully urge the Court to ensure that Mr. Reed's case gets a thorough second look before he is executed.

This brief is intended to explain why, from a law enforcement perspective, such review is critical on the facts of this case. First, the criminal justice system has a strong interest not only in punishing the guilty but also in *not* punishing the innocent. Executing an innocent person is "[t]he quintessential miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995). Not only would doing so be cruel and immoral, it would also undermine the rule of law and the legitimacy of the very system Amici have sworn to uphold.

Second, Amici know that under the wrong conditions even good investigators and prosecutors can make mistakes. A case that is objectively weak can appear much stronger to those in the middle of it. As law

enforcement officers, Amici are familiar with the phenomena of forensic error, weak facts, tunnel vision, and community pressure that can distort an investigation. There is a significant, atypical risk that these factors tainted the outcome of Mr. Reed's trial.

Third, this brief explains from Amici's perspective why the evidence of Mr. Reed's innocence—and Mr. Fennell's guilt—is so uniquely compelling that granting Mr. Reed's Petition, and reversing the judgment below, would not open the floodgates to meritless appeals and *habeas* petitions. Amici understand as well as anyone the need for finality in criminal cases. But where, as here, there is a significant risk of executing an innocent man, that need for finality must yield to the needs of justice.

ARGUMENT

I. AMICI BELIEVE THAT WRONGFUL EXECUTIONS UNDERMINE THE RULE OF LAW

A. About The Amici

Lead Amicus Deke Pierce is a sixth-generation Texan and has been a Texas Peace Officer since 1992—including since 1994 in Central Texas, near where the Reed investigation took place. Mr. Pierce currently serves as Deputy Constable for Williamson County Precinct 1 Constable's Office, a position he has held since 2017. For 22 years prior, Mr. Pierce served as a Deputy Sheriff and Traffic Investigator for the

Travis County Sheriff's Office. Mr. Pierce is also a veteran of the U.S. Air Force, serving as an Avionics System Specialist at Moody Air Force Base in Valdosta, Georgia.

Mr. Pierce holds a Texas Master Peace Officer's certification, based on over 3000 hours of training, and has received the Academic Recognition Award from the Texas Commission on Law Enforcement. Mr. Pierce is or has been a member of the Sheriff's Association of Texas, Texas Municipal Police Association, Texas Search and Rescue Board and Advisory Board, Association of Certified Fraud Examiners, and Williamson County Deputies Association. He has also been a law enforcement shift commander and volunteer for Rodeo Austin, director of the Sheriff's Memorial & Benevolent Society of Travis County, and a member of American Legion Kerlin/Lyerly Post 154.

Mr. Pierce's interest in Mr. Reed's case stems from his 2015 introduction to Anthony Graves, who was wrongfully convicted of murdering six people in Somerville, Texas, in 1992, only to be released in 2010 after 18 years of incarceration. Through his association with Mr. Graves, Mr. Pierce ultimately met Mr. Reed's mother Sandra and brother Rodrick, who introduced Mr. Pierce to the facts of Mr. Reed's arrest and conviction. Mr. Pierce's subsequent investigations into Mr. Reed's case—including Mr. Pierce's ongoing conversations with other current and former Texas peace officers (see below)—have led Mr. Pierce to the inescapable conclusion that justice would not be done were Mr. Reed to be executed based on the current record.

The other current and former Texas law enforcement officers who stand with Mr. Pierce in seeking to ensure that Mr. Reed's case receives the thorough review it deserves are:

- **Tip Birdwell:** Mr. Birdwell served in Texas law enforcement from 1978 to 2018, including positions with Travis County Sheriff's Office, Travis County Constable's Office Precinct 4, Austin Park Rangers, and Austin Independent School District. Mr. Birdwell is also a veteran of the U.S. Marine Corps.[3]

- **Rodney Blackmon:** Mr. Blackmon began his service with the Travis County Sheriff's Office in 1989, working in both corrections and law enforcement. Mr. Blackmon has received Master-level certifications with respect to both disciplines.

- **William Evans:** Mr. Evans served for 17 years with the Travis County Sheriff's Office after previously serving for three years as a civilian volunteer with the office.

- **Manuel Mancias:** Mr. Mancias served for 19 years in the Travis County Sheriff's Office, retiring at the rank of Sergeant. He spent five years as a Detective and Supervisor of the Major Crimes unit.

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[3] Mr. Birdwell joins this brief in his capacity as a former law enforcement officer, not in his current capacity as a Municipal Court Associate Justice.

- **Pete Mateo:** Mr. Mateo served for 27 years with the Travis County Sheriff's Office, mostly as a patrol officer, and has also worked in corrections. Mr. Mateo is a certified Master Peace Officer and has also received a Master-level certification in corrections.

- **Mike McCann:** Mr. McCann served 27 years in public safety roles, including 18 years of service with the Cedar Park Police Department. He was a patrol supervisor at that department when he retired in 2016.

- **Jordan Murray:** Mr. Murray has been a Reserve Officer with the Smithville, Texas police department since 2012.

- **Robert Phillips:** Mr. Phillips has been a Texas law enforcement and corrections officer for over 23 years, and currently serves in commercial vehicle enforcement with the Travis County Sheriff's Office. He is a certified Master Peace Officer and holds an advanced certification in corrections.

- **Shane Sexton:** Mr. Sexton currently serves as Chief of Police for the Concordia University Texas Police Department, and is a Board Member for the Texas Association of College and University Police Administrators. He has served in law enforcement since 2000. Mr. Sexton is a certified Master Peace Officer, an Adjunct Instructor for the Austin Police Academy

and the UT System Police Academy, and previously served as a Texas Commission on Law Enforcement Instructor.

- **Samuel Strauss:** Mr. Strauss has served as a Reserve Deputy and Reserve Deputy Constable with the Travis County Sheriff's Office, Williamson County Sheriff's Office, and Williamson County Precinct 1 Constable's Office.

- **Jessie "Jess" Tippie:** Mr. Tippie retired in 2018 with over thirty years of experience as a Texas law enforcement officer. He spent ten years with the Bastrop County Sheriff's Office, including six as a criminal investigator. He also served thirteen years with the Travis County Sheriff's Office.

- **Jay Whitney:** Mr. Whitney served for 34 years in the Grayson County Sheriff's Office, including 15 years' experience in narcotics and criminal investigations that involved six homicide investigations. Mr. Whitney has investigated several cold cases, where he has seen first-hand the consequences of investigative biases.

B. Wrongful Convictions and the Rule of Law

Amici have a broad range of experience in law enforcement but share a common belief that only the guilty should suffer punishment, especially when capital punishment is involved. To be sure, law enforcement should ensure community safety. But the need

to treat the people of the community with dignity and respect, and to meet with and listen to community members about their needs and concerns, is just as important. Allowing Mr. Reed to be executed while significant questions exist about the accuracy of his conviction would serve neither of these goals.

Indeed, it benefits both the law enforcement community and the public when convictions and executions are both actually reliable, and generally perceived to be reliable. The existence and perception of wrongful convictions undermine the public's trust in law enforcement. This in turn may discourage members of the community from cooperating with law enforcement, thus making it even harder for law enforcement personnel to perform what is already a difficult job. And of course, wrongful convictions are directly antithetical to law enforcement officers' foremost sworn duty: to uphold the law.

II. AMICI BELIEVE THERE IS A MANIFEST NEED FOR HEIGHTENED RELIABILITY IN CAPITAL CASES

Capital cases require heightened reliability because, as this Court has consistently recognized, "death is different." *E.g.*, *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion).

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); *accord, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.").

For decades, it has been a cornerstone of this Court's death penalty jurisprudence that "this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett*, 438 U.S. at 604; *accord, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 443-44 (prohibiting death penalty for non-fatal child rape in part because of risks of "unreliable … child testimony"), *as modified on denial of reh'g*, 554 U.S. 945 (2008) ; *Lankford v. Idaho*, 500 U.S. 110, 125-26 (1991) (reversing conviction because judge's failure to give notice that he was considering death penalty undermined relia-

bility of the adversarial process); *Whitmore v. Arkansas*, 495 U.S. 149, 167 (1990) (Marshall, J., dissenting) ("It is by now axiomatic … that the unique, irrevocable nature of the death penalty necessitates safeguards not required for other punishments."); *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985) (holding that death sentence is not constitutionally reliable if the jury is misled as to its "awesome responsibility" in sentencing); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (recognizing that ineffective assistance of counsel can threaten reliability by undermining the adversarial process); *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983) ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (internal quotation marks and citation omitted)); *Gardner v. Florida*, 430 U.S. 349, 359 (1977) (holding that heightened need for reliability outweighs state's interest in keeping presentencing report secret).

This principle applies whether the question is one of "reliability of the sentencing" or, as here, "reliability of the guilt determination." *Beck v. Alabama*, 447 U.S. 625, 638 (1980). The bottom line is that "the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Stephens*, 462 U.S. at 884-85.

III. AMICI BELIEVE THAT SYSTEMIC FACTORS CREATED A HIGH RISK OF WRONGFUL CONVICTION IN THIS CASE

Despite this need for heightened reliability in capital cases, the record now shows that Mr. Reed's conviction was anything but reliable. Emerging criminology and social science research demonstrates that wrongful convictions predictably result from numerous factors present in this case, including forensic error, weak facts, tunnel vision, and community pressure.

In 2009, the National Research Council identified "a critical need in most fields of forensic science to raise the standards for reporting and testifying about the results of investigations." Nat'l Res. Council, *Strengthening Forensic Science in the United States: A Path Forward*, at 185 (2009). Forensic error often arises from the skewed interpretation of test results by expert witnesses at trial. For example, forensic error can include "overstating the inculpatory nature of the evidence by providing inaccurate or non-existent statistics" and "misstating the certainty of the results." Jon B. Gould, et al., *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice*, at xix-xx (2012). For this reason, criminal justice professionals increasingly recognize that "[f]orensic science reports, and any courtroom testimony stemming from them, must include clear characterizations of the limitations

of the analyses, including associated probabilities where possible." Nat'l Res. Council, *supra*, at 186.

But that salutary acknowledgment of the limits of forensic science did not occur at Mr. Reed's trial. Instead, the State's forensic experts testified categorically—and incorrectly—that sperm can remain intact for no more than 24 or 26 hours after intercourse. (App. 91a-93a, 103a-104a, 306a-309a.) Studies show that forensic experts are particularly prone to overstating the probative value of their test results where, as here, there is scant evidence linking a defendant to a crime. "Forensic scientists, aware of the desired result of their analyses, might be influenced—even unwittingly—to interpret ambiguous data … to support the police theory." Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 293 (2006); *see also* Gould et al., *supra*, at xix (noting that "weak facts may encourage prosecutors to engage in certain behaviors designed to bolster the case, which our statistics show help predict an erroneous conviction"). Here, the State's forensic experts would have understood that the State's case depended almost entirely on their testimony. Amici believe that the "weak facts" linking Mr. Reed to Ms. Stites's murder invited the forensic experts to make the fundamental forensic errors that now taint Mr. Reed's conviction.

As current and former law enforcement officers, Amici also recognize the problem of tunnel vision, to which all law enforcement officers are susceptible, and which "can occur at any point in the criminal justice process." Gould, et al., *supra*, at xxi. Tunnel vision refers to the "'compendium of common heuristics and logical fallacies,' … that lead actors in the criminal justice system to 'focus on a suspect, select and filter the evidence that will "build a case" for conviction, while ignoring or suppressing evidence that points away from guilt.'" Findley & Scott, *supra*, at 292 (citations omitted). This phenomenon does not depend on any bad faith or incompetence of the officers involved. Rather, it is a result of ordinary cognitive bias, that can make even experienced, well-intentioned officers fixate on a theory of the case that, from an objective perspective, does not hold up.

Amici believe that tunnel vision also tainted the investigation of Ms. Stites's murder. In particular, the pre-trial investigation shows that police did not believe the forensic evidence exonerated Mr. Fennell *until after* Mr. Reed became a suspect. Only after Mr. Reed was identified as the source of an intimate sample did police consider the forensic evidence dispositive of guilt.

Shortly after Ms. Stites was murdered in April 1996, vaginal swabs obtained at the crime scene and during a subsequent autopsy revealed a small number of intact spermatozoa. (App. 92a-93a.) These sperm

cells were not linked to Mr. Reed until a year later, in early 1997. (App. 102a.) In the interim, investigators spent months considering Mr. Fennell as a suspect, subjecting him to aggressive interrogations and polygraph tests which led him to invoke his Fifth Amendment privilege against self-incrimination. Mr. Fennell was actively pursued as a suspect "even though DNA testing excluded him as the donor of the semen." (App. 99a.) So long as Mr. Fennell was their primary suspect, investigators did not regard unidentified sperm in the victim's body as evidence that Mr. Fennell had not committed the murder. Only after the sperm had been linked to a specific person—Mr. Reed—did the State adopt the theory that the person who deposited the sperm must also have committed the murder. At that point, Amici believe that tunnel vision set in and investigators allowed themselves to forget what they had previously known: that another person's sperm did not necessarily exculpate Mr. Fennell. Investigators abruptly shifted focus to Mr. Reed and never looked back. This fixation on Mr. Reed despite such weak evidence raises Amici's concerns that he was, as one Amicus has phrased it, "railroad[ed]." (E-mail from Amicus Rodney Blackmon.)

Finally, Amici believe that Mr. Reed's conviction was tainted by "community pressure," which "may encourage overly swift resolutions to cases involving serious crimes like rape and murder." Gould, et al., *supra*, at xviii-xix. Community pressure helps explain

how well-meaning investigators, prosecutors, and scientific experts may unwittingly succumb to tunnel vision, fixate on a suspect despite limited evidence against him, and exaggerate the import of ambiguous forensic evidence to compensate for fundamental weaknesses in the State's proof. In a high-profile murder case, these factors can become mutually self-reinforcing, "dismantl[ing] the rigorous testing of evidence that makes the investigative and adversarial processes function effectively." *Id.* at xxi. "*[O]verall, the erroneously convicted are truly cases of systemic failure.*" *Id.* (emphasis in original).

IV. GRANTING MR. REED'S PETITION WOULD NOT "OPEN THE FLOODGATES" TO MERITLESS *HABEAS* CLAIMS

Amici submit that Mr. Reed's case presents two exceptional factors that warrant additional review: the complete undermining of the forensic case against him and the strong evidence pointing to Mr. Fennell as the real killer. These factors are not present in most cases, so granting relief in this case would not mean opening the door to thousands of other appeals and collateral attacks.

Moreover, granting relief in this case would be consistent with the Court's traditional use of innocence—or a significant possibility of innocence—as a "safety valve" in capital cases. Indeed, Amici note that this case is factually quite similar to *House v. Bell*, 547

U.S. 518 (2006), where this Court allowed the petitioner (Mr. House) to bring defaulted *habeas* claims because there was significant evidence of actual innocence. (Mr. House was subsequently exonerated and freed.)

As current and former law enforcement officials, Amici believe as much as anyone in the need for finality in criminal prosecutions. Meritless appeals and collateral attacks can waste resources and deny closure to victims and their families. Evidence and witness testimony are often more reliable when they are fresh. Thus, the trial is supposed to be the "main event." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). But these considerations do not outweigh the enormity of potentially executing an innocent person, which, this Court has recognized, is "[t]he quintessential miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995). Expedience cannot become a substitute for justice. For that reason, the Court has long allowed *habeas* claims that would otherwise be barred to avoid a miscarriage of justice. *E.g.*, *House*, 547 U.S. at 555; *Sanders v. United States*, 373 U.S. 1, 16 (1963).[4]

[4] This principle is so important, in fact, that the Court has continued to apply the "ends of justice" exception even though it is not expressly stated in the applicable statutes. *See House*, 547 U.S. at 539 (reading limitations of the Antiterrorism and Effective Death Penalty Act as inapplicable to litigation of "defaulted claims based on a showing of actual innocence"); *Kuhlmann v. Wilson*, 477 U.S. 436, 451 (1986) (similar).

Mr. Reed's case is strikingly similar to *House v. Bell*. In *House*, this Court found that the defendant had made a sufficient "gateway" showing of potential innocence to allow him to seek *habeas* review of procedurally defaulted constitutional claims. 547 U.S. at 555. The Court based this holding on two factors, which are also present here: the complete undermining of the forensic case against the petitioner and a compelling alternative suspect.

First, the forensic evidence against Mr. House was completely undermined. DNA testing showed that semen found on the victim, "the only forensic evidence at the scene that would link Mr. House to the murder," did not match Mr. House. *Id.* at 540-41. Expert testimony also showed that blood on Mr. House's pants most likely came from cross-contamination by the police. *Id.* at 541-44. This case is similar. The scientific basis for Mr. Reed's conviction has completely eroded as the State's three forensic experts (or their colleagues and successors) have acknowledged significant flaws in the scientific opinions presented against Mr. Reed at trial. (App. 228a-229a, 233a, 277a.) These developments raise profound concerns because forensic evidence was the cornerstone of the State's case. With the validity of that evidence now in serious doubt, the overall weakness of the case against Mr. Reed appears striking and unmistakable. Most notably, no physical evidence links Mr. Reed to either of the two crime scenes. And new evidence and witnesses

support Mr. Reed's claim that he had a consensual sexual relationship with Ms. Stites (App. 422a-434a).

Second, Mr. House presented new "troubling evidence" showing that someone else—the victim's husband—"could have been the murderer." 547 U.S. at 548. This evidence included testimony that the victim's husband had been physically abusive, *id.* at 548-49, tried to fabricate an alibi, *id.* at 549, and lied to police about his whereabouts on the night of the murder. *Id.* at 551. In this case, Mr. Reed has presented similar new evidence that implicates Ms. Stites's fiancé, Mr. Fennell, as a strong suspect in her murder. (App. 344a). Evidence, including a rape conviction, demonstrates Mr. Fennell's history of violence towards women. (Pet. 10; App. 182a-83a.) A witness heard Mr. Fennell say that he would strangle his girlfriend with a belt if he ever caught her cheating. (App. 117a.) Mr. Fennell told inconsistent stories about his whereabouts on the night of the murder. (*See* Pet. 11-13.) And his own testimony puts him with Ms. Stites at the time she was killed. (*See* Pet. 10). In Amici's view, Mr. Reed's conviction cannot be considered reliable without ruling out the substantial chance that Mr. Fennell was Ms. Stites's real killer.

These two factors, so persuasive in *House*, are both extreme and uncommon. As this Court has noted, "[c]laims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity" than do other kinds of collateral attack, in

large part because "experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Schlup*, 513 U.S. at 324.

These factors are also relatively objective. This is not a case where the weight of the evidence has merely shifted; rather, the forensic case against Mr. Reed has been completely obliterated. Similarly, the new evidence showing Mr. Fennell's predilection for violence against women and his means, motive, and opportunity to murder Ms. Stites go far beyond a whiff of possibility. Thus, opening the courthouse doors to Mr. Reed's claims would not open a floodgate of meritless *habeas* suits.

CONCLUSION

For all of the foregoing reasons, Amici urge the Court to grant the Petition for Certiorari and reverse the decision below.

Respectfully submitted,

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