No. 13-1509

IN THE
Supreme Court of the United States

RODNEY REED,

Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

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

BRIEF FOR EIGHT RETIRED JUDGES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The retired judges submitting this brief as *amici curiae* served on trial and appellate courts around the country as federal and state judges.[2] Those *amici* who served as trial

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief under S. Ct. R. 37.2, and all parties have given their consent to the filing of this brief.

[2] The individual judges submitting this brief are listed in the Addendum to the brief.

judges have firsthand knowledge of just how important it is to see and hear witnesses on the stand when making credibility determinations and resolving disputed factual assertions. Those *amici* who served as appellate judges have decades of experience in understanding the difficulty of discerning issues of expertise, accuracy, judgment, and scientific acumen from cold appellate records. *Amici curiae* thus bring unique insights from their time on the bench to the issues in this case. The Fifth Circuit panel in this case played the role of factfinder in the first instance, which left it to resolve key questions about the correctness and precision of scientific testimony on a cold appellate record—without factual development or witness testimony. It is a fundamental precept of our judicial system that such questions are first addressed by trial courts.

To be clear, *amici* take no position on the merits of Petitioner's ineffective assistance of counsel claims. They submit this brief out of a serious concern that the Fifth Circuit deprived Reed of the opportunity to develop the facts needed to prove his ineffective assistance of counsel claims. In doing so, the Fifth Circuit asked and answered the question whether Reed's ineffective assistance of counsel claims were substantial ones—and it did so in the absence of whatever factual development Reed could have presented to a trial court.

Amici share an abiding belief in the "common-law tradition" that the Founding Fathers wove into our judicial fabric; that tradition is "one of live testimony in court subject to adversarial testing." *Crawford* v. *Washington*, 541 U.S. 36, 43 (2004) (citing 3 W. Blackstone, *Commentaries on the Laws of England* 373-374 (1768)). Had the Fifth Circuit hewed to this common-law tradition, it would have remanded Reed's claims for a trial court to evaluate their merits at an evidentiary hearing. Because it did not do so, *amici* feel compelled to request this Court restore the balance that—for

good and longstanding reasons—has always existed between trial and appellate courts: trial courts are the appropriate venue for developing a factual record and resolving questions of fact, and appellate courts review any factual determinations with the deference appropriate to, and necessitated by, having access to only a cold record.

SUMMARY OF ARGUMENT

The district court denied Reed's ineffective assistance of counsel claims based on since-overturned Fifth Circuit precedent concerning procedural default. *See Trevino* v. *Thaler*, 133 S. Ct. 1911, 1921 (2013) (holding that because Texas criminal procedure "makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," "procedural default" does not bar a Texas habeas petitioner from bringing a federal habeas claim based on "ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective") (citation and internal quotation marks omitted). Because of this reliance on procedural default, the district court proceedings did not include any hearing on the serious issues of recanted testimony from the State's key witness, or anything else.

Yet, rather than remand for an exposition of these issues and any other new evidence concerning Reed's claims, the court of appeals itself determined, in the absence of any hearing or other opportunity for factual development, whether Reed's ineffective assistance of counsel claims were "debatable." Pet. App. 35a n.11. The court of appeals found the claims were not debatable by making its own detailed merits determinations on the basis of a cold record, a record involving numerous affidavits concerning scientifically invalid arguments made by the State, as well as other complex factual questions. This sort of refusal to remand to the district court cannot be squared with the "common-law

tradition * * * of live testimony in court subject to adversarial testing." *Crawford*, 541 U.S. at 43.

a. "Trial courts are the traditional finders of fact, and their determinations of historical fact are entitled to deference." *Manzi* v. *State*, 88 S.W.3d 240, 244 (Tex. Crim. App. 2002). The division of labor between trial and appellate courts is supported by two separate rationales. The first concerns the unique opportunity that trial judges have to observe a witness's demeanor and responses to questioning. The second concerns the expertise that trial judges acquire in making factual findings. Together, these rationales create a "strong presumption" that factual findings are best made in the first instance by the trial court. *United States* v. *Thoms*, 684 F.3d 893, 904 (9th Cir. 2012).

b. The Confrontation Clause and hearsay doctrine are both predicated on the value of cross-examination—the "greatest legal engine ever invented for the discovery of truth." *California* v. *Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore, *Evidence* § 1367). The Confrontation Clause specifically assures that the reliability of a witness's testimony "be assessed in a particular manner," as one means of ensuring its accuracy. *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 317 (2009) (citation omitted). When courts have only affidavits without witness testimony, they lack the means of testing the accuracy, reliability, competence, scientific acumen, proper training, and judgment of the affiant. *Id.* at 317-320.

c. The need for a hearing and live witness testimony is especially vital in evaluating ineffective assistance of counsel claims. As Petitioner's case demonstrates, ineffective assistance claims "often involve complex factual considerations" for which there is a great "benefit from an evidentiary hearing, in which the court can assess the credibility of witnesses during live testimony and cross-examination." American Bar Association Death Penalty Due

Process Review Project, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* 219 (2013). Providing evidentiary hearings to habeas petitioners takes on particular significance given that "fundamental fairness is the central concern of the writ of habeas corpus." *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984). Petitioner's ineffective assistance claims should have been remanded for proceedings that could ensure his writ was resolved in a manner consistent with this fundamental-fairness concern.

ARGUMENT

PETITIONER'S INEFFECTIVE ASSISTANCE CLAIMS SHOULD HAVE BEEN REMANDED FOR RESOLUTION IN THE FIRST INSTANCE BY A TRIAL COURT EQUIPPED TO DEVELOP AND EVALUATE THE EVIDENTIARY RECORD.

The district court did not evaluate the merits of Petitioner's ineffective assistance of counsel claims because it held they were procedurally defaulted under Fifth Circuit precedent. Pet. App. 92a. By the time his claims reached the court of appeals, this Court had overruled that precedent. *Id.* 34a-35a. Rather than remand the claims, however, for a consideration of their merits based on a developed record, the court of appeals affirmed their dismissal. According to the panel, "Reed ha[d] failed to state any debatable ineffective-assistance-of-counsel claims." *Id.* 35a. But that determination was not, by any stretch, a simple one for the court to make.

To the contrary, the appeals court had to dedicate six pages of its decision—which equates to twelve pages in the petition's appendix—to explain its views of the merits of the claims. *Id.* 36a-48a. The court had to conduct a detailed parsing of affidavit testimony from the medical examiner (Dr. Bayardo), a pathologist (Dr. Riddick), and the criminal

laboratory director (Ronald Singer). *Id.* 37a. These affidavits, among other things, raised complicated scientific issues about the DNA evidence in the case and the testing performed on it, *id.* 40a, and explained how the State's characterization of Dr. Bayardo's testimony was "incorrect" and not "medically or scientifically supported," *id.* 235a. The panel had to review and reach a conclusion about what a video of the crime scene showed. *Id.* 40a.

The result of this extensive analysis is clear: the court of appeals made detailed merits determinations on the basis of a cold record, without the benefit of the further factual development that a remand would afford Petitioner. That is not how our system of justice is designed to operate. Patently frivolous habeas claims could perhaps be properly dismissed without holding an evidentiary hearing, but the detailed weighing of evidence done by the court of appeals demonstrates that Petitioner's claims are by no means frivolous. This detailed weighing of evidence should have occurred—in the first instance—in the district court. After an evidentiary hearing had taken place, and the district court had reached its findings of fact and conclusions of law based on that evidentiary hearing, then the court of appeals would have been in the proper position to decide whether "Reed has failed to state any debatable ineffective-assistance-of-counsel claims." Pet. App. 35a. The court of appeals' decision to forgo this process contravenes the accumulated wisdom of the "common-law tradition." *Crawford*, 541 U.S. at 43.

A. Remand For An Evidentiary Hearing Was Necessary To Respect The Traditional Division Of Labor Between Trial And Appellate Courts.

"Trial judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record." *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (citations and internal quotation marks omitted). Because it is the trial

judge who "smells the smoke of the battle" in the courtroom, the trial judge is traditionally understood to be "far better equipped to make findings of fact." *Gavin* v. *State*, 473 So.2d 952, 955 (Miss. 1985). "Trial courts are the traditional finders of fact, and their determinations of historical fact are entitled to deference." *Manzi*, 88 S.W.3d at 244.

The notion that a trial judge "smells the smoke of the battle" is not just rhetoric. *Gavin*, 473 So.2d at 955. That evocative phrase encapsulates two separate rationales for the traditional division of labor among trial and appellate courts. Together, these rationales demonstrate that "the longstanding and repeated invocations in caselaw of the need of district courts to hear live testimony so as to further the accuracy and integrity of the factfinding process are not mere platitudes." *Thoms*, 684 F.3d at 903.

The first rationale is that "a factfinder cannot determine credibility and hence cannot decide between two conflicting versions of an event without seeing and hearing witnesses." *Manzi*, 88 S.W.3d at 251-252 (Cochran, J., concurring). To make factual determinations in the first instance from affidavits, as the court of appeals did in this case regarding Petitioner's ineffective assistance claims, "permits no confrontation, no opportunity to observe, no testing by cross-examination, no inadvertent slips of the tongue, no retraction or recantation of testimony, no clarification of terms, etc." *Id.* at 251 (citation omitted). These many reasons why live testimony facilitates factfinding explain why "live testimony is the bedrock of the search for truth in our judicial system." *Thoms*, 684 F.3d at 903.

The second rationale stems from the expertise trial judges develop in resolving disputed factual issues. *See Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility."). Once it is settled that the

"trial judge's major role is the determination of fact," trial judges obviously gain deep experience in that role. *Anderson*, 470 U.S. at 574. And "with experience in fulfilling that role comes expertise." *Id.*

Embracing the traditional division of labor between trial and appellate courts thus enhances the effectiveness of the judicial system. Indeed, the insight that dividing labor and respecting roles pays dividends can be traced all the way back to Adam Smith, a "great and universally received authority on political economy." *Pac. Ins. Co.* v. *Soule*, 74 U.S. 433, 437 (1868). *See* Adam Smith, *The Wealth of Nations* I.1.1 (1776) ("The greatest improvement in the productive powers of labour, and the greater part of the skill, dexterity, and judgment with which it is any where directed, or applied, seem to have been the effects of the division of labour.").

"In the business of judging, there is nothing more important than getting the facts right." *Thoms*, 684 F.3d at 906. The "strong presumption in our system" is that getting the facts right can be best accomplished by trial courts. *Id.* at 904. The court of appeals should have honored that "strong presumption" by remanding Reed's ineffective assistance of counsel claims for an evidentiary hearing.

B. Remand For An Evidentiary Hearing Was Necessary To Serve The Values Embodied In The Confrontation Clause And Hearsay Doctrine.

"[T]he value of live, in-court testimony is enshrined in the Sixth Amendment's Confrontation Clause." *Id.* at 905. The Confrontation Clause enshrines this value because it "commands" that the reliability of testimonial evidence "be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. In other words, the Confrontation Clause "reflects a judgment * * * about how reliability can be best determined." *Id.*

This Court's Confrontation Clause jurisprudence amply affirms the value of cross-examination. This Court—with citation to Wigmore—has called cross-examination the "greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158 (1970). And this Court knows that when judges assess the reliability of testimonial evidence based purely on a paper record, they are more susceptible to making "assumptions that cross-examination might well have undermined." *Crawford*, 541 U.S. at 66.

Cross-examination can uncover errors in expert and lay testimony alike. The court of appeals' confidence that it could assess the credibility and testimony of all of the affiants solely from reading their affidavits is inconsistent with this Court's explanation in *Melendez-Diaz* for why even supposedly "neutral scientific testing" is not sufficiently reliable to be exempted from the confrontation requirement. *Melendez-Diaz*, 557 U.S. at 318. Not only does this misplaced confidence clash with the values embodied in the Sixth Amendment, but also it ignores the importance of cross-examination in revealing "fraudulent" or "incompetent" testing. *Id.* at 319. The very complexity and seeming reliability of expert evidence make it all the more important that the strengths and weaknesses of such testimony are subject to probing in cross-examination. *Id.* at 318-321 (discussing a National Academy of Sciences Report documenting "serious problems" in the "forensic science system"). The complexity of the expert evidence offered in this case was certainly worthy of "testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

What the Confrontation Clause does for the accused in a criminal case, the hearsay doctrine does for parties more generally. *See* McCormick, *Evidence* § 252 ("The hearsay rule operates to preserve the ability of a party to confront adverse witnesses in open court, and the Confrontation Clause does the same for an accused in a criminal case.").

This Court, drawing on venerable authority, has been clear about the foundation of the hearsay doctrine. "The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination." *Bruton* v. *United States*, 391 U.S. 123, 136 n.12 (1968) (quoting 5 Wigmore, *Evidence* § 1362).

The Sixth Amendment's Confrontation Clause stands alongside the Federal Rules of Evidence concerning hearsay in embodying a national commitment to the value of cross-examination. Commitment to that value is "deeply rooted" in the common-law tradition. *Melendez-Diaz*, 557 U.S. at 315. And that value required the Fifth Circuit to remand Petitioner's ineffective assistance claims for an evidentiary assessment by the district court.

C. Remand For An Evidentiary Hearing Was Necessary To Heed The Teachings Of Judicial Experience.

The collective judicial experience of *amici* confirms that complex claims cannot be adequately resolved on a paper record. Ineffective assistance of counsel claims "often involve complex factual considerations." American Bar Association Death Penalty Due Process Review Project, *supra*, at 219.[3] Because of their complexity, these claims can most "benefit from an evidentiary hearing, in which the court can assess the credibility of witnesses during live testimony and cross-examination." *Id.*

"When affidavits and other documents replace live testimony, relevant facts may be overlooked or undeveloped,

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[3] *Available at* http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project/death_penalty_assessments/texas.html.

including facts supporting a claim of innocence." *Id.* One case highlighted by the American Bar Association's Report illustrates this problem. A state district court recommended denial of Ricardo Guerra's habeas claims, declining to hold an evidentiary hearing before making that recommendation. A state appellate court then accepted this recommendation. *Id.* But an "extensive evidentiary hearing" held by a federal district court uncovered "numerous instances of police and prosecutorial misconduct" in Guerra's case. *Id.* (quoting *Guerra* v. *Johnson*, 90 F.3d 1075, 1075-1076 (5th Cir. 1996)). After Guerra was granted a new trial, prosecutors chose not to retry Guerra, and he was released. But not before he spent fifteen years in prison. *Id.* at 219-220.

It would obviously be quixotic to crusade for evidentiary hearings as the cure for all the ills of the legal system—but this is not just any case or any ill. "Since fundamental fairness is the central concern of the writ of habeas corpus," *Strickland*, 466 U.S. at 697, the need for evidentiary hearings in habeas cases is especially acute. Habeas petitioners "who lose on the merits before the district court have been afforded one full look at the merits of their petition; thus, their arguments are subject to a higher standard of scrutiny before being granted a [certificate of appealability]." David Goodwin, *An Appealing Choice: An Analysis of and a Proposal For Certificates of Appealability in "Procedural" Habeas Appeals*, 68 N.Y.U. Ann. Surv. Am. L. 791, 834 (2013). Habeas petitioners "who lose on a procedural ground, by contrast, have not been afforded an equal courtesy." *Id.*

The court of appeals did acknowledge its circuit precedent requiring that any doubts about granting a certificate of appealability must be resolved in a habeas petitioner's favor in capital cases. Pet. App. 11a. But refusing to remand claims that the district court never considered on the merits does not bespeak the care and consideration that is called for

in such grave matters. This Court can and should grant certiorari review to ensure that courts of appeals respect the critical role of trial courts to find facts in the first instance.

CONCLUSION

For the foregoing reasons, and for those in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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ADDENDUM

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