

No. 21A__

In the Supreme Court of the United States

ARELI ESCOBAR,

Petitioner,

v.

STATE OF TEXAS

Respondent.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF
CERTIORARI FROM APRIL 26, 2022 TO MAY 26, 2022

To the Honorable Samuel A. Alito, Jr.:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioner Areli Escobar respectfully requests that the time to file a petition for a writ of certiorari be extended 30 days from April 26, 2022, to and including May 26, 2022. On January 26, 2022, the Court of Criminal Appeals of Texas issued a per curiam order denying petitioner's application for a writ of habeas corpus. App. A, *infra*. Absent an extension, the petition would be due on April 26, 2022. This application is being filed at least 10 days before that date. *See* Sup. Ct. R. 13.5. Aside from agreeing that Mr. Escobar is entitled to habeas relief, the State does not oppose the extension request. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257 to review this case.

Background

1. Petitioner Areli Escobar was convicted of capital murder in May 2011, and the trial court set punishment at death pursuant to the jury's answers to special issues submitted under Texas law. His conviction and sentence were affirmed on direct appeal. *Escobar v. State*, No. AP-76,571 (Tex. Crim. App. Nov. 20, 2013) (not designated for publication). His initial application for habeas corpus in state court was subsequently denied.

Mr. Escobar's trial convictions were obtained largely on the basis of DNA evidence that was presented to the jury. But in June 2016, the Austin Police DNA lab—the lab that conducted the DNA testing in Mr. Escobar's case, and the lab whose employees testified to the jury about the soundness of the DNA evidence presented to the jury—suspended operations after an independent audit conducted by the Texas Forensic Science Commission uncovered grave issues that called into serious question the reliability of the lab's work. Based in part on these newly discovered issues, Mr. Escobar filed a second state habeas application—the one at issue in the forthcoming petition—raising six claims related to the closure of the DNA lab, scientific developments pertaining both to DNA testing and latent fingerprint analysis, and issues related to the cell tower and cell phone records evidence presented at trial. The Court of Criminal Appeals of Texas agreed that these claims raised serious questions, so it remanded the case to the state habeas trial court for further proceedings on five of the six claims presented in the application.

The state habeas trial court held an evidentiary hearing and considered voluminous record evidence, and on December 31, 2020, recommended granting relief. In relevant part, the state habeas trial court found that the DNA evidence the State relied on and the testimony from the lab's experts that was presented to support that evidence was scientifically unreliable, false, and misleading. App. B, *infra*, at 1-2 (Findings of Fact and Conclusions of Law (Tex. Dist. Ct. Dec. 31, 2020)). The trial court found that the evidence was critical to the case, and that it was more likely than not that without it, the State would not have secured a conviction against Mr. Escobar. *Id.* at 61-62. Thus, the trial court concluded, the State's use of the false, misleading, and unreliable DNA evidence violated Mr. Escobar's constitutional rights to due process under both the state and federal Constitutions, and the court found that Mr. Escobar was entitled to habeas relief. *Id.* at 62-64.

Relevant here, the State *agreed* with the district court's factual conclusion that the DNA evidence was unreliable, false, and misleading, and also with the finding that Mr. Escobar was entitled to relief on his due process claim because a jury would more likely than not have found that the State failed to meet its prosecutorial burden without that evidence. All agreed—the state habeas trial court, Mr. Escobar, and the State—that the “State's use of unreliable, false, or misleading DNA evidence to secure Mr. Escobar's conviction violated fundamental concepts of justice” and “Mr. Escobar's right to due process as guaranteed by the United States and Texas Constitutions.” *Id.* at 64.

Despite the agreement of the prosecution, Mr. Escobar, and the state habeas trial court, the Texas Court of Criminal Appeals denied Mr. Escobar's application for habeas relief in a short, unpublished opinion that did not even mention the State's concession that Mr. Escobar is entitled to habeas relief. *See* App. A.

2. After the state appellate court denied the relief, Mr. Escobar filed a pro se suggestion for reconsideration that the court denied. For its part, the State *also* filed a suggestion for reconsideration thereafter, which the State noted was "an unusual move," but which was warranted in the unusual posture of this application, because the "State has conceded that the Applicant," Mr. Escobar, "is entitled to relief." App. C, *infra*, at 1-2 (internal quotation marks omitted). Thus, the State suggested that the Court of Criminal Appeals "file and set the case and order briefing from the parties." *Id.* at 2.

The State noted that the state habeas trial court "undertook the laborious task of considering the merits of the remanded claims," which included reviewing "hundreds of exhibits and presid[ing] over a series of evidentiary hearings starting in May 2018," "culminating in closing arguments" over a year and a half later "on December 3, 2020." App. C at 3. The state habeas trial court's "lengthy findings of fact and conclusions of law" consisted of "405 paragraphs." *Ibid.*

Making its position abundantly clear, the State explained that it "ultimately concurs with the District Court that Applicant's due process rights under the laws and Constitution of Texas and under the Constitution of the United States ha[d] been violated and that [Mr. Escobar] is entitled to relief." App. C at 4. "The possibility that

the State failed to have clearly indicated its change in position [came] to its attention because” the Court of Criminal Appeals “did not acknowledge in its Order, as is usual practice, that the State had conceded that Applicant was entitled to relief.” *Id.* at 5 & n.3 (citing cases). The State suggested that it had “much to offer” the court “in terms of analysis of the facts, the law, and the failures in the forensic science that supported the conviction, but procedurally could only provide a brief” if the Court of Criminal Appeals “requests it.” *Id.* at 5. Thus, “[i]n the interests of justice, the State respectfully suggest[ed]” that the Court of Criminal Appeals “reconsider.” *Id.* at 4.

In a one-line mailing from the clerk, the Court of Criminal Appeals of Texas denied the State’s suggestion for reconsideration without a written order on April 4, 2022. App. D, *infra*.

Reasons for Granting an Extension of Time

The time to file a petition for a writ of certiorari should be extended for 30 days for at least three reasons:

1. The press of other matters makes the existing deadline on April 26, 2022, difficult to meet. Petitioner has recently retained Supreme Court counsel to assist in preparing this petition. In addition to this petition, counsel for petitioner has had to prepare and file supplemental briefing in a case remanded to the Michigan Circuit Court from the Michigan Supreme Court on a tight timeline in *Kooman v. Boulder Bluff Condominiums*, No. 18-5518-NO, which was just filed on April 5; will be filing a response and reply brief in the Second Circuit in *Sonterra Capital Master Fund, Ltd. v. UBS AG*, No. 19-2979, on April 8; will be filing an opening brief in the Ninth

Circuit in *Rafay v. Jackson*, No. 20-35963, on April 20; will be presenting argument in Michigan Circuit Court in *Kooman v. Boulder Bluff Condominiums*, No. 18-5518-NO, on April 22; and will be presenting argument in the Third Circuit in *Kajmowicz v. Whitaker*, No. 21-2434, on April 28. The additional time requested will assist counsel in preparing a concise and well-researched petition that will be of maximum benefit to this Court.

2. Whether or not the extension is granted, the petition will be considered during next Term—and, if the petition were granted, it would be argued in the next Term. The extension is thus unlikely to substantially delay the resolution of this case or prejudice any party. Indeed, the State has consented to the relief sought herein, further showing that no party will be prejudiced.

3. Finally, the Court is likely to grant the petition. The petition will raise significant concerns about the Court of Criminal Appeals' failure to adhere to the U.S. Constitution with regards to Mr. Escobar's due process rights. *See Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). As the State agrees, Mr. Escobar's conviction was obtained through the introduction of false and unreliable scientific evidence, in violation of Mr. Escobar's rights to due process and to a reliable sentencing verdict under the U.S. Constitution. Specifically, as the State agrees, the DNA evidence and testimony supporting the DNA evidence presented at trial were false and scientifically unreliable due to significant quality assurance issues at the Austin Police Department and scientific developments in DNA mixture interpretation, which ultimately resulted in the lab's closure. The

upshot is that the State supports the state habeas trial court's conclusion that it is more likely than not that the State would not have been able to obtain Mr. Escobar's conviction in this case without this evidence, such that his convictions should be vacated.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended for 30 days to and including May 26, 2022.

Respectfully submitted,



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