No. 23-934

In the Supreme Court of the United States

ARELI ESCOBAR, PETITIONER

v.

STATE OF TEXAS

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

AMICUS CURIAE BRIEF OF THE CORRECTIONAL INSTITUTIONS DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE IN OPPOSITION TO PETITION

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

AARON L. NIELSON
Solicitor General
Counsel of Record

PHILIP A. LIONBERGER
Assistant Solicitor General

MATTHEW OTTOWAY
Assistant Attorney General

J. ANDREW MACKENZIE
Assistant Attorney General

CAPITAL CASE

QUESTIONS PRESENTED

Represented by a county district attorney (DA), Texas presented considerable evidence that Petitioner Areli Escobar raped and murdered Bianca Maldonado. After a jury convicted Escobar, the Texas Court of Criminal Appeals (CCA)—Texas' highest court for criminal cases—affirmed his conviction, and this Court denied certiorari.

Escobar later asked the CCA to reopen his conviction due to his concerns about DNA evidence. After the election of a new DA who had campaigned on an anti-death-penalty platform, the State changed positions and confessed error. Although it considered the DA's changed position, the CCA undertook an independent review and concluded that the judgment of conviction should stand. The CCA later reaffirmed that conclusion on remand from this Court.

The questions presented are:

1. Whether the Fourteenth Amendment's Due Process Clause forbids a state court to rely on its own independent review of a state judgment of conviction.

2. Whether the Court should review the CCA's denial of Escobar's fact-bound, procedurally flawed, and Texas-law-focused second state-habeas application.

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INTEREST OF AMICUS CURIAE

Amicus, the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ), is the custodian of felony inmates in Texas. The Attorney General of Texas represents the TDCJ in Escobar's pending federal habeas case, *Escobar v. Lumpkin*, No. 1:22-cv-00102 (W.D. Tex. Feb. 7, 2022). *See Buck v. Davis*, 580 U.S. 100, 110 (2017) ("[T]he Texas Attorney General represents state respondents in federal habeas cases, but not state habeas cases."). In Escobar's related second state-habeas case (the subject of this certiorari petition), Texas is represented by the Travis County DA. *See* Tex. Code Crim. Proc. art. 2.01. TDCJ disagrees with the Travis County DA's refusal to defend Escobar's conviction, which is contrary to the position taken by previous Travis County DAs. TDCJ therefore has an interest in defending the judgment of conviction.[1]

SUMMARY OF ARGUMENT

Courts do not lightly set aside judgments. The CCA thus will not grant habeas relief just because parties ask it to. It instead undertakes an independent review.

Here, a jury convicted Escobar of raping and murdering Bianca Maldonado, a 17-year-old girl, in Austin, Texas—the heart of Travis County. Represented by the Travis County DA, Texas presented significant evidence of Escobar's guilt, including DNA evidence, fingerprint evidence, a text message sent by Escobar's girlfriend the night of the murder saying "OMG [I] think

[1] The parties were notified of amicus's intent to file this brief on March 18, 2024. No counsel for either party authored this brief in whole or in part, nor did they, or any other person other than the amicus, its members, or its counsel, provide a monetary contribution intended to fund the preparation or submission of this brief.

[Escobar] raped someone," evidence that Escobar was heard with a screaming woman around the time of Bianca's murder, eye-witness testimony that he was soon thereafter splattered in blood, cell-tower evidence suggesting that he was nearby when Bianca was murdered, and testimony that his accounts of what happened shifted markedly. Escobar was sentenced to death, the CCA affirmed, and this Court denied certiorari.

Escobar eventually instituted a second state-habeas proceeding that challenged the DNA evidence used at his trial. The Travis County DA retained new experts—including a professor with decades of experience working on DNA analysis for the Federal Bureau of Investigation (FBI)—to assess blood samples using the latest methodologies. These experts again determined blood on Escobar's shoes and in the car that he was driving the night of the murder almost certainly was Bianca's.

Nonetheless, an elected trial judge in Travis County recommended habeas relief, and the Travis County DA's Office—now headed by a new DA who had run on an anti-death-penalty platform—confessed error. The CCA, however, conducted an independent review of the facts and refused to disturb Escobar's conviction. After this Court remanded in light of the DA's confession of error, the CCA once more performed an independent review of the evidence and again upheld the judgment.

TDCJ recounts this history for a reason: It illustrates why the Court should not require courts to give dispositive weight to a prosecutor's confession of error. Not only do this Court's cases reject Escobar's theory, *e.g.*, *Young v. United States*, 315 U.S. 257, 258-59 (1942), but embracing that theory would undermine the judicial process and override federalism. It would also allow

people who commit heinous crimes to escape punishment because of a shift in the political winds.

The CCA was right to exercise its own independent judgment in considering Escobar's habeas petition. It also correctly applied Texas law to deny the petition. Substantial evidence, including updated DNA evidence, supports the CCA's judgment. Escobar's briefing to the CCA also barely touched on federal law, creating significant vehicle issues, if not a jurisdictional bar to certiorari. TDCJ thus urges the Court to deny the petition.

STATEMENT

I. Factual Background

A. Seventeen-year-old Bianca Maldonado lived with her mother, sister, and infant son in an apartment complex in Austin. *Ex parte Escobar*, No. WR-81,574-02, 2022 WL 221497, at *1 (Tex. Crim. App. Jan. 26, 2022) (per curiam) ("*Escobar I*"); 22.RR.68-70.[2] Escobar lived in an apartment separated from the Maldonados' by a parking lot. 25.RR.175.

"At around 3:00 a.m. on the morning of May 31, 2009, Bianca's mother and sister left their apartment to deliver newspapers." *Escobar I*, 2022 WL 221497, at *1; 22.RR.70, 77-78. Around the same time, Escobar and some friends returned to his apartment from a nightclub. 23.RR.136-40. Escobar texted his girlfriend, Zoe Moreno, to join them. 23.RR.65. She arrived at Escobar's apartment around 3:00 a.m. along with Escobar's sister Lydia and her friend. 23.RR.67, 197. At least as of 2:00

[2] "RR" refers to the trial court reporter's record of Escobar's capital-murder trial, "SX" to the State's exhibits from that trial, and "SHCR-1" and "SHCR-2" to the habeas clerk's records from Escobar's first and second state-habeas proceedings.

a.m., "[w]itnesses testified that [Escobar] did not appear to be injured." *Escobar I*, 2022 WL 221497, at *1; *see* 23.RR.89, 140, 153-54, 198. At some point, Escobar escorted Lydia and her friend outside. 23.RR.200. Lydia chatted with her friend in the parking lot before taking her home. During this time, Escobar disappeared. 23.RR.201.

Zoe called Escobar several times starting around 4:00 a.m., but he did not pick up. SX.373. On her fourth try, around 4:15 a.m., Escobar's phone picked up, but Escobar did not speak. 23.RR.76, 117. Instead, for approximately ten minutes, Zoe heard a woman screaming, 23.RR.76, and then the screams turned into "moans, grunts, [and] screaming in between," 23.RR.77. At first, Zoe thought Escobar must have been having consensual sex. 23.RR.78. But she soon believed Escobar was raping someone. 23.RR.80. "Phone records" demonstrate "this call 'hit' a cellular tower close to the apartment complex where the offense occurred." *Escobar I*, 2022 WL 221497, at *1; SX.382.

Suspecting that Escobar may have left with Lydia's friend, Zoe began calling and texting Escobar's family. 23.RR.205; SX.370, 374. Around 5:30 a.m., Escobar's sister Nancy texted Zoe that Escobar had shown up at his mother's apartment wearing a bloody shirt, telling his mother he had gotten into a fight and could not go home because someone might be looking for him. *Escobar I*, 2022 WL 221497, at *1; 23.RR.159, 168, 178; SX.374. After hearing this, at 5:46 a.m., Zoe texted her son: "OMG [I] think [Escobar] raped someone[.]" SX.372.

Also around this time, Escobar called his sister's boyfriend, Tano, to say he had gotten into a fight with an "old lady" and to ask if he could stay over. 24.RR.169-70.

Escobar sounded agitated. 24.RR.171. Escobar arrived where Tano was staying, got into a fight with some people there, 24.RR.168, 172-75, then went inside and fell asleep. 24.RR.175, 180. Escobar told Tano he had "f*cked up some woman." 24.RR.179. Notably, "Tano texted Nancy and said [Escobar] told him that he had 'f-ed up' and that some girl's blood was on his clothes." *Escobar I*, 2022 WL 221497, at *1; SX.370.

Around 6:40 a.m., Bianca's mother and sister returned home to discover Bianca lying naked except for her bra in a disheveled and bloody living room. *Escobar I*, 2022 WL 221497, at *1; 22.RR.80-81. Bianca's body was face down with her baby lying unconscious and bloody by her side. 22.RR.82-84. Emergency responders were called but were too late to save Bianca. The baby survived.

B. An autopsy revealed that Bianca suffered 76 stabs and cuts. 27.RR.147, 167, 170. She sustained four rib fractures and numerous blunt-force injuries to her face and head. 27.RR.136-37, 146, 170. There was also evidence of an extremely violent sexual assault. *Escobar I*, 2022 WL 221497, at *1; 27.RR.137-38, 140-41, 143-45. The medical examiner determined Bianca could have been conscious for up to five minutes during the attack. 27.RR.152-53.

Escobar "was arrested at his mother's apartment on June 2, 2009, after Zoe made an anonymous call to Crime Stoppers and her son called the police." *Escobar I*, 2022 WL 221497, at *1; *see* 24.RR.13, 22. Escobar denied killing Bianca and claimed he had been in a fight with several men two days before Bianca's murder. 23.RR.220-21. Yet his own sisters and girlfriend had seen him without any injuries just hours before Bianca's

murder. *Escobar I*, 2022 WL 221497, at *1; 23.RR.89, 140, 153-54, 198.

Escobar also provided varying explanations for the screams Zoe heard. 22.RR.89, 153, 198. He told his sister Rosalva that Zoe heard him having consensual sex. 23.RR.189, 192. When Rosalva told Escobar that he was being accused of hurting a girl, he said: "why would I hurt a girl. I just tapped that." 24.RR.189. But Escobar told Zoe the sounds she heard came from a movie. 23.RR.82; SX.372. At trial, Escobar did not present alibi evidence for the relevant time, let alone from the mystery woman with whom he allegedly was having violent but supposedly consensual intercourse.

Austin Police Department (APD) detectives and crime-scene specialists collected evidence from Escobar's, his mother's, and Bianca's apartments, and also from a Mazda Escobar drove the day of the murder. *Escobar I*, 2022 WL 221497, at *1; 23.RR.152-53; 24.RR.43, 97-122, 125-27, 138, 140-50. They sent a bloody shoeprint from carpet near Bianca's body to a lab, which determined Escobar's left shoe could not be eliminated as the source. 25.RR.27-34, 46. Police also found a bloody fingerprint on a bottle of baby lotion near Bianca's body. *Escobar I*, 2022 WL 221497, at *3; 22.RR.157-58, 212. A latent-print examiner determined the fingerprint had come from Escobar's ring finger. *Escobar v. State*, No. AP-76,571, 2013 WL 6098015, at *19 (Tex. Crim. App. Nov. 20, 2013) (not designated for publication); 27.RR.54, 74. A second APD examiner confirmed that finding. *Escobar*, 2013 WL 6098015, at *19; 27.RR.96-99.

Investigators also recovered DNA in blood stains from Escobar's shoes, clothing, and the Mazda. At trial, representatives of two DNA labs—the APD DNA lab and Fairfax Identity Laboratories (Fairfax)—testified to

a remarkably high likelihood that the DNA in several stains was Bianca's. *Escobar I*, 2022 WL 221497, at *1; 26.RR.135, 138-39, 168-76, 191, 193; SX.399.

II. Procedural Background

A. The Travis County DA's Office, under DA Rosemary Lehmberg, tried Escobar for capital murder. A jury convicted him; the conviction was upheld on appeal, *Escobar*, 2013 WL 6098015; and this Court denied certiorari, *Escobar v. Texas*, 574 U.S. 959 (2014). The Travis County DA's Office—still under Lehmberg—defended the conviction in the CCA and this Court.

Alongside his direct appeal, Escobar filed a state-habeas application asserting 24 grounds for relief. 1.SHCR-1.82-93. The judge who had presided over Escobar's trial recommended denying his claims, 7.SHCR-1.1795-820, and the CCA accepted that recommendation, *Ex parte Escobar*, No. WR-81,574-1, 2016 WL 748448 (Tex. Crim. App. Feb. 24, 2016) (per curiam). DA Lehmberg's office continued to defend the conviction. 4.SHCR-1.866.

B. Escobar filed a second state-habeas application almost one year after his first application was denied. 1.SHCR-2.9-246. To overcome Texas's subsequent-application bar, Escobar sought a "new science" writ under Article 11.073(a) of the Texas Code of Criminal Procedure, which applies to scientific evidence that was not available to the defendant at trial or that contradicts scientific evidence that the State relied on at trial.

Article 11.073(a) requires the applicant to show that "the factual or legal basis for his claims was unavailable on the date he filed the previous application." *Ex parte Escobar*, No. WR-81,574-2, 2017 WL 4675538, at *1 (Tex. Crim. App. Oct. 18, 2017) (per curiam); *see Escobar I*,

2022 WL 221497, at *3. The CCA remanded for consideration of five claims under that provision.

Escobar's main contention on remand was that new information undermined the reliability of the DNA evidence presented at his trial. The APD DNA lab had shut down after an unfavorable audit, and Escobar alleged that the Fairfax scientists had presented inaccurate testimony. *Escobar I*, 2022 WL 221497, at *3. Escobar also argued he "was entitled to relief under the statutory 'new science' writ on the basis that fingerprint evidence relied upon by the State for conviction was scientifically unreliable" and "his right to due process was violated by misleading and false testimony concerning cell phone and cell tower records." *Ex parte Escobar*, 676 S.W.3d 664, 666-67 (Tex. Crim. App. 2023) ("*Escobar II*"); *see* 1.SHCR-2.172, 192.

By that time, Margaret Moore had been elected Travis County DA. Her office opposed Escobar's application, 2.Suppl.SHCR-2.46-318, but called for reevaluation of the DNA evidence, 2.Suppl.SHCR-2.93-94. Professor Bruce Budowle, a world-renowned DNA expert who had spent 26 years at the FBI's Laboratory Division, was brought in to reexamine the lab work. 2.Suppl.SHCR-2.93; 28.SHRR-2.158.

Dr. Budowle confirmed the overwhelming likelihood of Escobar's guilt. For several of the stains he evaluated, his statistical calculations were "not significantly different" from the original results. 28.SHRR-2.277-78. And for two others, his calculations were even more devastating for Escobar. 28.SHRR-2.278-79.

At the DA's request, a company called Mitotyping Technologies (the successor to Fairfax) also re-evaluated other DNA-test results used at trial. 2.Suppl.SCHR-2.93-94; 28.SHRR-2.369-95. For most stains,

Mitotyping's analysis was not significantly different from the original results. 28.SHRR-2.386-94. Especially relevant here, Mitotyping amended its random-match probabilities concerning a pair of blood stains in the Mazda to one in 620,000 and to one in ten trillion with respect to Bianca. 2.Suppl.SHCR-02.97.

C. Under Texas law, the CCA is responsible for determining whether habeas relief is warranted. Tex. Code Crim. Proc. art. 11.071, §11; *Ex parte Simpson*, 136 S.W.3d 660, 667 (Tex. Crim. App. 2002). The CCA exercises that authority by having trial judges act essentially as special masters to make recommendations the CCA can decide whether to adopt. *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008).

Despite the State's updated DNA evidence, the state trial judge—who had not presided over Escobar's trial or initial habeas proceeding and who admitted a lack of expertise with respect to DNA evidence, 21.SHRR.5—recommended granting Escobar habeas relief based in large part on a conclusion that the APD lab's handling of evidence rendered "all of the DNA samples that were 'collected, processed, and stored' by the APD DNA Lab unreliable," *Escobar I*, 2022 WL 221497, at *3; *see* Pet.App.90. The trial court further found that "the use of unreliable and misleading DNA evidence violated Mr. Escobar's due process rights by undermining the fundamental fairness of his trial." Pet.App.91. "The trial court found no merit to the rest of [Escobar's] remanded claims." *Escobar I*, 2022 WL 221497, at *4; *see* Pet.App.90.

In the meantime, yet another Travis County DA, José Garza—who had vowed never to seek the death penalty, *e.g.*, Editorial, *Experiment in Austin: DA Candidate Vows to End Low-Level Drug Prosecutions, Not Pursue*

the Death Penalty, Texarkana Gazette (July 18, 2020, 1:20 a.m.), https://tinyurl.com/mpunmuvp—was elected. He took office one day after the trial court recommended relief and agreed with the trial court's recommendation. 2.Suppl.SHCR-2.3-16.

D. The case returned to the CCA, "the ultimate fact-finder in habeas corpus proceedings," *Reed*, 271 S.W.3d at 727, which rejected the trial court's recommendation, *Escobar I*, 2022 WL 221497, at *2.

Among other things, the CCA found that Escobar had failed "to meet the[] requirements" of Article 11.073 because "the recalculated results continue to show Bianca's DNA was at least on [Escobar]'s shoes and in the Mazda." *Id.* at *3. The CCA also found that Escobar failed to show that his critiques of the APD lab "specifically affected the DNA results in his particular case." *Id.* Regardless, "[t]he State presented other evidence to support [Escobar]'s conviction ..., including the latent print on the lotion bottle, the cell phone evidence, the shoe print, Zoe's testimony, and [Escobar]'s statements and appearance after the offense." *Id.*

Escobar petitioned this Court for a writ of certiorari. DA Garza, on behalf of Texas, confessed error. The Court granted the writ, vacated the CCA's judgment, and "remanded to the [CCA] for further consideration in light of the confession of error by Texas[.]" *Escobar v. Texas*, 143 S.Ct. 557 (2023).[3]

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[3] As noted, *see supra* p. 1, Escobar filed a federal habeas application in 2022. The federal district court stayed proceedings based on this Court's vacatur of the CCA's decision. The stay was lifted when the CCA rendered its latest judgment. Order Reopening Case, *Escobar v. Lumpkin*, No. 1:22-cv-00102 (W.D. Tex. Oct. 30, 2023).

E. On remand, the CCA "reconsider[ed] [Escobar]'s [claims] in light of the State's confession of error." *Escobar II*, 676 S.W.3d at 665-66. The CCA gave Escobar 30 days to supplement the record. *Id.* at 669-70. He did so but failed "to explain the evidentiary value of the new materials and state why they could not have been filed in the trial court before [the court] set th[e] case for submission." *Id.* at 671. In any event, the CCA held that the new material did not change its original assessment of Escobar's false-testimony claim. *Id.* at 666, 670-72.

The CCA next considered the arguments Escobar had raised in this Court. *Id.* at 672-75. It observed that, although "the State's confession of error in a criminal case is important and carries great weight, we are not bound by it." *Id.* at 672 (quoting *Estrada v. State*, 313 S.W.3d 274, 286 (Tex. Crim. App. 2010)). The CCA confirmed it had been "aware of the State's position when the order [denying habeas relief] was handed down." *Id.* at 673. And because the DA had provided no "explanation for its change of position," the CCA concluded the DA "had nothing to add to the convicting court's findings." *Id.* The CCA also explained that "correctly revised [DNA] estimates would still inculpate [Escobar]." *Id.* at 674. It thus concluded that, "[e]specially in light of other evidence," Escobar's "DNA evidence did not create a reasonable likelihood of a different outcome." *Id.*

ARGUMENT

I. Courts Should Independently Review Judgments, Not Defer to Prosecutors.

A. This Court's decision in *Young* supports the CCA's exercise of independent judgment.

The judiciary's power to enter judgment is foundational to "the Constitution's separation of powers." *Plaut*

v. Spendthrift Farm, Inc., 514 U.S. 211, 213 (1995). That is true under the U.S. Constitution, *id.*, and the Texas Constitution, *e.g.*, *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 754 (Tex. 2017). Nonetheless, Escobar argues that federal due process requires a court to overturn a prior conviction upon a prosecutor's confession of error. Precedent is to the contrary.

The Court need look no further than *Young*. There, the government also confessed error. 315 U.S. at 258. Yet that did "not relieve this Court of the performance of the judicial function." *Id.* Of course, "[t]he considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight." *Id.* But "judicial obligations" compel independent review. *Id.* at 258-59. Indeed, the judiciary "promotes a well-ordered society" by not lightly overturning judgments, especially because "judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Id.* at 259.

The rule from *Young* traces back to at least the 1708 trial of Lord Griffin at the Court of Kings Bench. *Id.* (citing *Rex v. Wilkes*, 98 Eng. Rep. 327 (1770)). "Sir Philip Yorke, then Attorney-General, came into Court, and said he had a sign manual 'to confess the errors and consent to the reversal.'" *Wilkes*, 98 Eng. Rep. at 340. Yet "[t]he court told him 'his confessing an error in law would not do: they must judge it to be an error; and their judgment would be precedent.'" *Id.* Simply put, courts must "examine the whole record before setting aside a conviction for a crime." *Parlton v. United States*, 75 F.2d 772, 773 (D.C. Cir. 1935).

This Court continues to apply *Young*. For example, in *Sibron v. New York*, 392 U.S. 40 (1968), the Court addressed a DA who repudiated a pair of related

convictions. 392 U.S. at 43-44. Citing *Young*, the Court said "[i]t is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained." *Id.* at 58. The Court then explained that deferring to the confession of error of a single DA—"the elected legal officer of one political subdivision within the State"—would be a "disservice" to the other branches of New York government. *Id.* at 58-59. The Court upheld one of the convictions. *Id.* at 67.

This Court has reaffirmed *Young* by name in other cases. *Garcia v. United States*, 469 U.S. 479, 484-85 (1984); *Gibson v. United States*, 329 U.S. 338, 344 & n.9 (1946). And it has reaffirmed *Young* in practice by appointing amici to defend judgments. *See, e.g.*, *Erlinger v. United States*, No. 23-370; *Lange v. California*, 141 S.Ct. 2011 (2021). The Court sometimes affirms in such cases. *See, e.g.*, *Terry v. United States*, 593 U.S. 486, 495 (2021); *Beckles v. United States*, 490 U.S. 256, 270 (2017). Such a power is critical to "the independent ability of the Judiciary to vindicate its authority." *United States v. Providence J. Co.*, 485 U.S. 693, 703 (1988).

Circuit courts also follow *Young*, including in the habeas context. *E.g.*, *United States v. Surrat*, 797 F.3d 240, 269 (4th Cir. 2015); *Knight v. United States*, 576 F. App'x 4, 7 (2d Cir. 2014); *Johnson v. McCaughtry*, 265 F.3d 559, 564 (7th Cir. 2001); *United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996); *Every v. Blackburn*, 781 F.2d 1138, 1140 (5th Cir. 1986).

Texas courts do the same. Quoting *Young*, for example, the CCA has held that "[a] confession of error by the prosecutor in a criminal case is important, but not conclusive." *Saldano v. State*, 70 S.W.3d 873, 884 (Tex. Crim. App. 2002) (quoting *Young*, 315 U.S. at 258-59). It is thus

black-letter law that Texas courts "must make an independent examination of the merits of any claim of error raised on appeal." *Wright v. State*, No. 03-14-00468-CR, 2015 WL 4609743, at *1 n.2 (Tex. App. July 28, 2015).

B. Escobar has not identified a "special justification" for overruling *Young*.

There is no reason to revisit *Young*—not only because it is correct, but also because of *stare decisis*. *Stare decisis* promotes "the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). It also "permits society to presume that bedrock principles are founded in law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Stare decisis thus requires a "special justification" to overrule precedent. *Allen v. Cooper*, 589 U.S. 248, 249 (2020). Escobar does not provide a single substantive argument that *Young* was wrongly decided. But even assuming he had identified a due-process problem that somehow escaped notice for centuries, *stare decisis* requires "reasons that go beyond mere demonstration that the overruled opinion was wrong," for "otherwise the doctrine would be no doctrine at all." *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring).

To that end, this Court has identified additional factors "that should be considered in deciding when precedent should be overruled." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 267-68 (2022). They include: (1) the precedent's "consistency and coherence with previous or subsequent decisions"; (2) any "changed law,"

"changed facts," or evidence that the precedent is not "workab[le]"; (3) any "reliance interests"; and (4) "the age of the precedent." *Ramos v. Louisiana*, 140 S.Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring). Each favors upholding *Young*.

First, *Young* is consistent with this Court's overarching commitment to judicial independence. "One of the key elements of the Federalists' arguments" in the ratification debates was "that Article III judges would exercise independent judgment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 120 (2015) (Thomas, J., concurring). "Independent judgment requires judges to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources." *Id.* 120-21. The ratifiers particularly worried about—and therefore sought to insulate the judiciary from—political pressure. "The Legislature and Executive may be swayed by popular sentiment to abandon the strictures of the Constitution or other rules of law. But the Judiciary, insulated from both internal and external sources of bias, is duty bound to exercise independent judgment in applying the law." *Id.* at 122.

This Court has thus declined to permit parties to control the judicial power. It is axiomatic, for example, that "no action of the parties can confer subject-matter jurisdiction upon a federal court." *Ins. Corp. of Ireland Ltd. v. Comagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Nor do party stipulations control the appropriate standard of review. *E.g.*, *United States v. Sanchez-Hernandez*, 931 F.3d 408, 411 (5th Cir. 2019). Just last week, the Court conducted a lengthy analysis of the merits despite the respondent's confession of error and "radical agreement" with the petitioner on the question presented. *Sheetz v. County of El Dorado*, No. 22-1074, slip

op. at 10 (U.S. Apr. 12, 2024). Even "[c]ommunity consensus" about the meaning of a constitutional provision, while "'entitled to great weight,' is not itself determinative." *Graham v. Florida*, 560 U.S. 48, 67 (2010). Ultimately, when it comes to the judicial function, the "unvarying rule" is that courts must "always exercise[] an independent judgment." *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 370-71 (1893).

Second, Escobar has not identified any change in law or facts rendering *Young* unworkable. *Young* helps avoid capriciousness in our criminal-justice system, preventing local prosecutors from wielding the equivalent of a pardon power. Furthermore, "[o]nly with real finality can the victims of crime move forward knowing [society's] moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). "To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty', an interest shared by the State and the victims of crime alike." *Id.* (citation omitted).

Third, the reliance interests here are substantial. Consider just the federalism stakes. The State of Texas sometimes delegates power to DAs, who are elected by only small portions of the State, rather than to statewide officers. Texas can do that because the CCA's duty to exercise independent judgment prevents DAs from confessing away the entire State's interests. If Escobar were right, States would have to reexamine whether local DAs should have such authority. The Court should pause (and pause again) before effectively requiring States to fundamentally revisit their allocations of prosecutorial authority.

Finally, the rule stated in *Young* is older than the United States. *Stare decisis* has special force when

applied to a principle that has been on the books for centuries. *See United States v. IBM Corp.*, 517 U.S. 843, 856 (1996) (explaining that "[t]he principles that animate our policy of stare decisis caution against overruling a longstanding precedent").

C. *Glossip* Does Not Support Certiorari.

Against the foregoing, Escobar offers only a single response: The Court's grant of certiorari in *Glossip v. Oklahoma*, No. 22-7466 (U.S. Jan. 22, 2024). One of the questions presented in *Glossip* is whether due process requires habeas relief if a prosecutor confesses error. Escobar contends his petition presents a better vehicle to decide that question because, unlike *Glossip*, it does not pose a recusal problem and—he claims—does not involve threshold questions that could keep the Court from reaching the issue. (As discussed *infra*, Escobar is wrong that there are no vehicle problems.)

Escobar, however, is likely mistaken about why the Court granted certiorari in *Glossip*. The Court presumably granted certiorari in *Glossip* not to revisit *Young*, but rather to address case-specific arguments. Indeed, the Court directed the parties to brief and argue an additional case-specific question. Order, *Glossip*, *supra* (Jan. 22, 2024). It also appointed an amicus. Order, *Glossip*, *supra* (Jan. 26, 2024). The Court's grant of certiorari therefore may be best explained by the fact that the Court already once granted certiorari in *Glossip*, *see Glossip v. Gross*, 576 U.S. 863 (2015), the rarity of a statewide officer confessing error, and various case-specific evidentiary arguments.

None of those factors is present here. Escobar's case has not previously generated a merits decision from this Court (let alone one that divided the Court), it is hardly surprising that an avowedly anti-death-penalty DA

would refuse to defend a capital judgment, and the evidence largely speaks for itself.

II. There Are Further Reasons To Deny Certiorari.

A. The petition suffers from significant vehicle problems.

The petition's first question is answered by precedent. It is also misplaced, as Escobar did not present the question to the CCA, much less argue that *Young* should be overruled. Instead, he raised arguments related to new science. Because questions regarding *Young* were "'not pressed nor passed upon' in state court," *Illinois v. Gates*, 462 U.S. 213, 219 (1983), such questions are not part of the "[f]inal judgment[] or decree[] rendered by the highest court of" Texas necessary for this Court's jurisdiction, 28 U.S.C. §1257(a). Regardless, "the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below," *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); *see also City & County of San Francisco v. Sheehan*, 575 U.S. 600, 609 (2015) (dismissing a question "not passed on below" as improvidently granted).

Similar flaws afflict Escobar's second question presented. He purports (at 4) to raise a claim under *Napue v. Illinois*, in which this Court held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. 264, 269 (1959). But although Escobar at least cited *Napue* below, he did not—as required, *id.*—allege that Texas *knowingly* used false evidence, *Escobar II*, 676 S.W.3d at 666 n.4. Instead, he relied on Texas's more defendant-friendly rule that due process may also limit a State's *unknowing* use of false evidence. *Id.* (citing *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009)). The CCA thus did not

directly address *Napue*, but rather a more generous body of "Texas caselaw." *Id.*

This Court, by contrast, is "unlikely" to extend *Napue* so broadly. *Cash v. Maxwell*, 132 S.Ct. 611, 615 (2012) (Scalia, J., dissenting from denial of certiorari). And even if the Court someday were to expand *Napue*, this would not be the case in which to do so because Escobar does not allege a circuit split as to what *Napue* requires. And make no mistake: Expanding *Napue* in the way that Escobar needs would be a monumental decision. The Court should not take such an extraordinary step where the issue has received almost no analysis in the lower court decision or the certiorari petition.

Many of Escobar's arguments, moreover, appear to support his Article 11.073 "new-science" claim. But as the CCA explained, "[t]he 'new science' claim, based solely on a Texas statute, is not even a cognizable federal question." *Escobar II*, 676 S.W.3d at 674.

Even putting all of that aside, Escobar's second question presented is factbound, and this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *cf. Foster v. Chatman*, 578 U.S. 488, 500 (2016) ("[I]n the absence of exceptional circumstances, we defer to state court factual findings unless we conclude that they are clearly erroneous."). That task fell to the CCA. Escobar suggests (at 34) that Texas law required that court to adopt the state trial court's recommendations. But "[i]t is a fundamental principle" of Texas "habeas corpus law" that "the Court of Criminal Appeals is not bound by the trial court's findings and conclusions of law." *Ex parte Adams*, 768 S.W.2d 281, 288 (Tex. Crim. App. 1989). Because the CCA is the "ultimate fact-finder," it "may exercise [its] authority to make contrary

or alternative findings and conclusions." *Reed*, 271 S.W.3d at 727.

Here, the CCA considered Escobar's and Texas's expert testimony with respect to DNA and adopted the view of Texas's experts. *Escobar II*, 676 S.W.3d at 668. The CCA also considered Escobar's arguments with respect to fingerprint evidence and concluded that a critical part of the argument could (and so should) have been raised before Escobar's second state-habeas application—an independent and adequate state ground. *Escobar I*, 2022 WL 221497, at *4; *see also Hughes v. Quarterman*, 530 F.3d 336, 341 (5th Cir. 2008) (following, *inter alia*, *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). And the CCA *agreed* with the trial court's finding that Escobar "did not demonstrate that new scientific evidence ... significantly undermines the reliability of the latent print evidence presented at trial." Pet.App.90; *see also Escobar I*, 2022 WL 221497, at *4. Again, the Court does not typically wade into such issues.

B. There is no basis to second guess the CCA.

On the merits, Escobar must demonstrate, *inter alia*, that deficiencies in the evidence against him were material to the jury's verdict. *See Napue*, 360 U.S. at 271. Yet Texas's new DNA experts reviewed the blood samples and concluded that the evidence against Escobar remains overwhelming. *See Escobar II*, 676 S.W.3d at 674 ("[R]evised estimates would still inculpate [Escobar]."); *Escobar I*, 2022 WL 221497, at *3 ("[Escobar] cannot show that this evidence is material because the recalculated statistics for some of the DNA samples are still incriminating.").

Furthermore, Escobar wrongly attempts (at 33) to liken the original DNA evidence to "false evidence." But as just noted, the CCA recognized that the State's

additional DNA analysis *reconfirmed* Escobar's guilt. And even if the jury had heard only Escobar's impeachment evidence—without hearing any of the State's updated DNA evidence, *but see United States v. Alahmedalabdaloklah*, 94 F.4th 782, 830 (9th Cir. 2024) (noting that a court must consider what prosecutors would have said in response)—it would still would have weighed that impeachment evidence against all of the State's evidence combined.

In that counterfactual, the jury would have been told there may be some speculative risk of contamination. But it would also have heard about Escobar's bloody fingerprint in Bianca's apartment; about the screaming woman on his phone; about the blood on Escobar's clothes; that "Tano texted Nancy and said [Escobar] told him that he had 'f-ed up' and that some girl's blood was on his clothes"; that Zoe so strongly believed Escobar had just raped someone that she and her son reported him to law enforcement; the shoeprint evidence; the cell-tower evidence; and Escobar's inconsistent stories about what happened, including his lack of an alibi (if he had consensual sex around the time of Bianca's murder, an alibi witness should exist) and his false statement that he had been injured before Bianca's murder. Escobar attempts (at 33-37) to downplay the combined weight of that evidence by attacking each piece individually. The CCA, however, considered his arguments but concluded "that, *under the evidence as a whole*, the inaccurate statistical estimates were not material." *Escobar II*, 676 S.W.3d at 674-75; *see also Al–Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010) (explaining why evidence must be combined).

Against all of this, Escobar offers various complaints about the CCA. But this Court's remand required only

"further consideration in light of the confession of error by Texas." *Escobar*, 143 S.Ct. at 557. The CCA did that and independently concluded that the Travis County DA's new position did not undermine the judgment. The CCA, in other words, gave weight to the DA's confession—just not dispositive weight. That is not ignoring the DA's confession; it's providing reasoned disagreement with it.

CONCLUSION

The petition for a writ of certiorari should be denied.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

AARON L. NIELSON
Solicitor General
Counsel of Record

PHILIP A. LIONBERGER
Assistant Solicitor General

MATTHEW OTTOWAY
Assistant Attorney General

J. ANDREW MACKENZIE
Assistant Attorney General

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