No. 21-1601

IN THE

Supreme Court of the United States

ARELI ESCOBAR,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICUS[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA") respectfully submits this brief as amicus curiae in support of petitioner.

The ABA is the largest association of attorneys and legal professionals in the world. Its members come from all fifty States, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, State, and federal governments, as well as judges, legislators, law professors, law students, and associates in related fields.[2]

In 2006, the ABA issued standards on DNA evidence. *See generally* ABA Standards for Criminal Justice: DNA Evidence (3d ed. 2007) ("DNA Standards").[3] These standards were developed through a robust process in which every "side" of the criminal justice system was represented; they represent a consensus view

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties were timely notified of this filing ten days in advance. All parties consented.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. And no inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief.

[3] The standards are published in a document that includes the black-letter standards as well as commentary explaining the standards. When citing the black-letter standards themselves, this brief uses the standard number. When citing the commentary accompanying the standards, this brief cites the page number of the document.

of the best practices regarding the collection, handling, analysis, and use of DNA evidence in criminal cases.

The introduction to those standards explains that "DNA analysis is one of the greatest technical achievements for criminal investigation since the discovery of fingerprints." DNA Standards p.17 (quotation marks omitted). Because DNA evidence is an "undeniably powerful tool for purposes of convicting the guilty and exonerating the innocent," "[e]rrors and misconduct" in its use "can lead to inaccurate results." *Id*. at pp.18, 21. Such errors can cause injustice in particular cases and discredit DNA evidence as a whole. "Consequently, accreditation, proficiency testing, extensive discovery, defense experts, post-conviction testing, and other procedures are vital to ensuring the exoneration of the innocent and the conviction of the guilty." *Id*. at p.21.

The DNA Standards are part of a larger project, the ABA's Standards for Criminal Justice ("ABA Standards"), which are among the ABA's most prominent efforts to improve the quality of the criminal justice system. When the final volume of the first edition of the ABA Standards was published in 1974, Warren Burger, chair of the Standards project until his appointment as Chief Justice of this Court in 1969, described the project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history" and recommended that "[e]veryone connected with criminal justice . . . become totally familiar with [the ABA Standards'] substantive content." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251 (1974).

Judges, prosecutors, defense attorneys, legislatures, and scholars frequently rely upon the ABA Standards, recognizing that they are the product of careful consideration and drafting by experienced and fair-minded experts drawn from all parts of the criminal justice system. Indeed, the standards have been cited *thousands* of times in opinions by this Court, federal and state appellate courts, and trial courts. *See* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just., no. 4, 2009, at 12, 12; *see also Missouri v. Frye*, 566 U.S. 134, 145 (2012) (describing the ABA standards as "important guides"); *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010) (describing the standards as "valuable measures of the prevailing professional norms of effective representation"); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable").

The legal system relies on the ABA Standards so frequently because the standards are rightly "perceived as both balanced and practical," reflecting "a consensus of the views of representatives of all segments of the criminal justice system" including lawyers, legal scholars, judges, prosecutors, defense lawyers, public defenders, law professors, penology experts and police officials. Marcus, *supra*, at 15-16. The standards are promulgated and updated over time pursuant to a four-step process that involves input from a task force of experts, the ABA Standards Committee, the ABA's Criminal Justice Section Council, and finally the ABA's House of Delegates. *See id.* at 16-17. In sum, the ABA Standards reflect "the

considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process," and are adopted only after being "drafted and repeatedly revised on more than a dozen occasions, over three or more years." *Id*. at 17. This "undeniably lengthy and painstaking" process results in "a thoughtful, informed, and balanced reflection of the views of all the relevant parts of the criminal justice system." *Ibid*.

The DNA Standards were formulated pursuant to that robust process—involving years of expert review. In 2000, the ABA's Criminal Justice Council passed a resolution ordering the creation of standards. DNA Standards p.22. A study group was then appointed to identify issues for a task force of experts to address. *See ibid.* The task force met from 2003 to 2005 before submitting the Standards, which were further reviewed and finally approved by the ABA's House of Delegates in August 2006. *See id*. at 22-23.

Here, the state habeas court found that the DNA evidence used to secure petitioner's conviction and death sentence was "false, misleading, and unreliable," and that its use violated petitioner's "constitutional rights to due process." Pet. App. 141a. Indeed, the use of this evidence "violated fundamental concepts of justice." *Id*. at 144a. This case is thus of particular interest to the ABA, because the severe lapses and misconduct by law enforcement plainly contravene ABA Standards. Due to these errors, petitioner's resulting capital conviction and sentence should not be permitted to stand. The ABA's membership, and society at large, have an interest in the proper handling and presentation of accurate DNA evidence in the criminal process, and in the correction of such errors

at any stage, including later and even successive post-conviction challenges.

SUMMARY OF ARGUMENT

The petition presents an unusually strong case for reversal because both petitioner and the State agree that petitioner's capital conviction and sentence rest on fundamentally unreliable DNA evidence. The State used this evidence to convict petitioner in 2011. Pet. App. 3a. In subsequent years, it became clear that the DNA lab that prepared the evidence was woefully deficient—so much so that the State permanently shut it down in 2016. *See id*. at 39a. The Court also has the benefit of detailed and rigorous factual findings by the trial-level habeas court, which determined that petitioner is entitled to relief. The ABA agrees with the parties and the habeas court that petitioner's conviction ought not stand as a matter of fundamental fairness, and that a new trial is appropriate. Finality interests should never trump the misuse of inaccurate DNA evidence, particularly in a capital case.

The DNA evidence and analysis in this case were flawed and directly violate the ABA's 2006 DNA standards—which were developed and promulgated after careful and broad consideration by experts on all "sides" of the criminal justice process.

Specifically, the evidence and testimony in this case ran afoul of at least four relevant parts of the ABA standards: (1) standards requiring DNA testing laboratories to obtain and maintain accreditation through transparency and scrupulous adherence to scientific best practices; (2) standards requiring labs to collect and keep evidence in a manner that prevents contamination—which risks fundamentally compromising

the value of the evidence; (3) standards requiring labs to implement scientifically valid protocols, control for deviations, and maintain quality assurance programs to ensure ongoing compliance; and (4) standards commanding laboratories to take steps to minimize bias in the interpretation of DNA test results. Indeed, the APD lab so consistently and egregiously mishandled DNA evidence that it was shut down by the State. This misconduct taints the evidence in this case.

The DNA errors in this case are not minor quibbles. No, they go directly to the heart of the reliability of the evidence in this case, and cast a pall over petitioner's conviction and sentence. DNA evidence is powerful because it carries the imprimatur of objective science and certitude; indeed, many jurors are likely to regard such evidence as essentially infallible. Consequently, when DNA evidence and related testimony are in fact the product of scientifically unsound methods and practices, there is an unacceptable risk that the resulting conviction will be tainted. It is no surprise, then, that petitioner, the State, and the habeas court all agreed that relief was warranted. In the face of that consensus—and the serious problems with the evidence underlying petitioner's conviction—the Court of Criminal Appeals' perfunctory order denying relief must be reversed.

ARGUMENT

I. The Collection, Handling, Analysis, and Use of the DNA Evidence Used to Convict Petitioner Was Fundamentally Flawed, as Shown by Multiple ABA Standards

Although the DNA Standards are not binding, they reflect a robust consensus about the minimum requirements for the collection, handling, analysis, and use of DNA evidence in criminal cases. The ABA considers adherence to such standards critical because DNA evidence is "an undeniably powerful tool for purposes of convicting the guilty and exonerating the innocent." DNA Standards p.18. The DNA evidence used to obtain petitioner's capital conviction ran afoul of several key DNA Standards relating to four topics, in ways that imperil the administration of justice and call out for reversal—or at least review.

1. Accreditation standards

First, labs testing DNA evidence should "be accredited every two years under rigorous accreditation standards." DNA Standards 16-31(a)(i). Accreditation provides an important mechanism of accountability and expert oversight. But "[a]ccreditation, of course, is not a panacea; accredited laboratories have made mistakes." *Id*. at p.63.

Here, the APD lab was accredited, but leaned too heavily on its accreditation alone—obscuring the deep flaws in its evidence handling and testing procedures. The lab's employees provided "misleading" testimony, giving the jury "the impression that the APD DNA lab operated pursuant to a stringent system of checks and balances which met scientific standards," which could

not "be squared with the evidence of APD's systemic deficiencies," which "were endemic." Pet. App. 36a. Due to this false testimony, the jury was substantially more likely to place weight on the DNA evidence than it otherwise might have.

The DNA Standards also provide that labs should "timely report credible evidence of laboratory misconduct or serious negligence to the accrediting body." DNA Standards 16-3.1(a)(vi). The purpose of this transparency standard is to facilitate an investigation and corrective action. *See id*. at p.68. But here, the evidence shows that the lab not only failed to report its misconduct; it actively concealed that misconduct and resisted inquiries. *See* Pet. App. 41a-42a. For example, when a freezer once failed for a week, potentially compromising the samples within, staff did not report the problem—even though the lab was already under scrutiny by then. *See id*. at 60a-61a. This incident was "evidence of a systematic lack of transparency and poor-quality assurance practices." *Id*. at 61a.

Audits by accrediting organizations failed to "pick[] up on the lab's issues," even though they were severe. Pet. App. 53a. This may be because lab staff were not forthcoming, *id*. at 70a (explaining that "[l]ooking outside of the lab for best practices and suggesting improvements was considered an insult"), and also likely resulted from the lab's inadequate procedures for documenting problems—which meant that documentation was not handed over to auditors. *See id*. at 66a-67a. "[T]he failure of these checks and balances [was] highly problematic because criminal justice stakeholders relied on the APD lab's accreditation as an indication that the lab's work was sound." *Id*. at 54a. These lapses clearly and directly violate the

relevant DNA standards and undermine confidence in the lab's work.

2. Quality assurance and contamination standards

Second, "DNA evidence should be collected, preserved and tested, and the test results interpreted, in a manner designed to ensure the highest degree of accuracy and reliability," DNA Standards 16-1.2(b), and to "ensure [the evidence's] integrity," *id*. 16-2.5(a). In this regard, "[s]teps to prevent contamination are critical" because "any substantial contamination to DNA material will result in a confusing result." *Id*. at pp.54-55 & n.136 (quotation marks omitted).

The APD lab failed to meet these basic standards. An audit revealed "multiple contamination incidents," Pet. App. 23a, which "raised significant concerns about APD's capacity to adequately prevent, investigate and respond to contamination incidents, including its obligation to disclose potential contamination to end-users in the criminal justice system," *id*. at 51a. The number of errors was significant enough that it "should have triggered a quality assurance process to address the issue," but the lab did not report the errors or take corrective action. *Id*. at 61a. Instead, staff provided explanations that were often "nonsensical," and "[t]he response of lab leadership to those incidents was wholly inadequate and demonstrated a failure to implement adequate safeguards against further contamination incidents." *Id*. at 62a. The habeas court thus found, "[b]ased on APD's ineffective responses to contamination incidents and failure to prevent continued contamination," that "from at least 2006 and up until the closure of the lab, APD exhibited an inability to handle evidence in a way that would consistently

protect and preserve its integrity, thereby denying stakeholders reassurance of the validity of any resulting analysis." *Id*. at 73a-74a.

The contamination problems likely affected the evidence in this case. These issues were "endemic," and the habeas court found "that there were multiple opportunities for contamination even before the evidence in this case was transferred to the DNA section." Pet. App. 74a. This included that at least two employees who touched the evidence "had serious disciplinary issues related to proper evidence handling," *ibid*., as well as problems documenting the chain of custody that stemmed "both from poor documentation practices, as well as from APD's demonstrated culture of inattention to detail, carelessness, and failure to appreciate proper procedures," *id*. at 75a-76a. Thus, the habeas court found "that the DNA results in [petitioner's] case are particularly untrustworthy." *Id*. at 114a.

A separate ABA standard is implicated here, providing that "[w]hen DNA evidence is offered at trial, evidence relevant to the reliability of that evidence, including relevant evidence of laboratory error, contamination, or sample mishandling, should also be admissible." ABA Standard 16-5.3(d). The evidence of the APD lab's systemic failures to address contamination issues was not available at the time of trial—and so the jury never heard that side of the story. *See* Pet. App. 103a-05a.

3. Scientific validity and qualification standards

Third, the DNA Standards provide that laboratories should "use quality assurance and quality control procedures, including audits, proficiency testing, and

corrective action protocols, that are consistent with generally accepted practices." DNA Standards 16-3.1(a)(iii). They should also "use protocols for testing and interpreting DNA evidence that are scientifically validated through studies that are described in writing." *Id*. 16-3.1(a)(iv).

In conflict with these standards, the APD lab employed staff that were "not appropriately qualified," who adhered to protocols that were "unreasonable and indefensible from a scientific standpoint." Pet. App. 42a. The inadequate staff included the analysts who worked on petitioner's case. *See ibid*. These analysts used an approach to DNA testing that "was not supported by any peer-reviewed studies and was scientifically indefensible." *Id*. at 44a. Specifically, the lab used a "stochastic threshold" to analyze DNA that "lacked sufficient data and was both poorly designed and poorly executed." *Id*. at 44a-45a.

Staff at the APD lab also "deviated from the [standard operating procedures] and protocols for applying the threshold without justification." Pet. App. 45a. This included situations where staff deviated from protocol even when the "issue had not been flagged by the lab's standard technical review process or by the technical leader," and were unable to provide coherent explanations for their behavior. *Ibid*. That conflicts with an ABA standard providing that lab procedures should "be governed by written policies and procedures, including protocols for testing and interpreting test results, and permit deviation from protocols only when approved by a technical leader or other appropriate supervisor." DNA Standards 16-3.1.

In a similar vein, staff at the lab frequently failed to follow manufacturer instructions and other normal

rules, exhibiting a "cavalier attitude toward best practices, and an overall willingness . . . to disregard or deviate from quality assurance standards." Pet. App. 52a (quotation marks and citation omitted). Analysts "lacked understanding about the importance of quality assurance procedures, and some analysts required training on basic issues." *Ibid*. The problem went to the top, *i.e.*, the technical leaders, who lacked the qualifications and/or diligence to enforce proper quality assurance standards. *See id*. at 52a-53a.

In addition to noting these problems and the likely effects they had on this case, the habeas court also documented extensive advances in the science of DNA mixture interpretation that had occurred since the trial. *See* Pet. App. 81a-103a. The court explained that this evidence, which was not available until after petitioner's trial, *id*. at 105a-06a, rendered the APD lab's analyses unreliable, *id*. at 107a-114a.

4. Bias and objectivity standards

Fourth, the DNA Standards stress the need to "follow procedures designed to minimize bias when interpreting test results." DNA Standards 16-3.1(a)(v). The standard is designed to address at least two forms of bias. The first, cognitive bias, "occurs because people tend to see what they *expect* to see, and this typically affects their decisions in cases of ambiguity." *Id*. at p.67. The second, motivational bias, "arises when the lab personnel's often close association with the police subconsciously influences their conclusions." *Ibid*.

Here, the APD lab used "suspect and victim-driven interpretation methods"—an approach "commonly referred to as 'suspect driven bias,'" which "is a form of confirmation bias and undermines the

reliability of interpretation results." Pet. App. 47a. There was "strong evidence for suspect driven bias" with respect to the evidence in this case, specifically. *Ibid*. This was reflected by the testing done, and by the fact "that lab personnel were also exposed to task-irrelevant information regarding [petitioner's] case, creating a strong risk of contextual bias." *Id*. at 48a. The task-irrelevant information included, for example, information about the crime, and about how petitioner came to be a suspect—which are facts known to contribute to bias against an individual. *See id.* at 48a-49a.

* * *

All of these best practices were in place and available for review and application at the time the investigation and analysis in this case occurred. Yet the lab repeatedly chose not to implement best practices, essentially rejecting the combined wisdom and experience of a panel of experts, and prominent legal thinkers from both the prosecution and defense side, as well as judges. The lab's violations, particularly if allowed to stand as support for a capital conviction, threaten to undermine the credibility of DNA evidence altogether.

Finally, as has been well documented, the problems at the APD lab were sufficiently severe that the lab was audited by the state government and eventually shut down after the government determined that it would be futile to attempt to reconstitute the lab. What is more, "those issues may have only been the tip of the iceberg," as an ongoing review of the lab continues to reveal even more problems. Pet. App. 58a.

II. This Court Should Not Permit a Capital Conviction Based on Flawed DNA Evidence to Stand

It ought to be uncontroversial that when, as here, subsequent revelations show that the evidence against a defendant in a capital murder trial was based on scientifically unreliable methods and processes of dubious validity, the resulting conviction cannot stand. The risk of executing an innocent person requires relief.

Almost all the relevant stakeholders agree. Based on the foregoing critical problems with the DNA evidence, the habeas court found that petitioner was entitled to a new trial, including on federal due process grounds. Pet. App. 141a-44a, 187a. As the court explained, "the DNA evidence was the most critical part of the prosecution's case against [petitioner]," as the prosecutors "repeatedly emphasized the importance of the DNA evidence throughout the trial proceedings." *Id*. at 126a. The habeas court further found that the State's remaining evidence "was circumstantial and weak and would not have supported a conviction for capital murder." *Id*. at 127a. And sure enough, one juror acknowledged in testimony that he was "sitting on the fence," and that "the DNA evidence . . . was the sealing factor" that made him vote in favor of guilt. *Ibid*.

What is perhaps most remarkable about this case is that the State itself—which secured the conviction—has now changed position and acknowledged that petitioner's due process rights were violated and that a new trial is warranted. Pet. App. 195a. Thus, the State supported petitioner in the Court of Criminal Appeals, and even went so far as to seek

reconsideration when the court upheld petitioner's conviction. The State's willingness to change its position in the interests of justice—as opposed to pursing a win-at-all-costs approach—reflects the best ideals of the legal profession and is a credit to the State's integrity. *See, e.g.*, ABA Standards for Criminal Justice: Prosecution Function 3-1.2 (4th ed. 2017) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."); *id*. 3-8.1 ("The prosecutor should not defend a conviction if the prosecutor believes . . . that a miscarriage of justice associated with the conviction has occurred.").

Yet the Court of Criminal Appeals voted to deny relief—notwithstanding the habeas court's findings and the State's position. The court did so by disregarding the importance of the faulty DNA evidence to petitioner's conviction. It concluded that the false DNA evidence was not material to the conviction. Pet. App. 7a. Specifically, the court concluded that other evidence, including "recalculated statistics for some of the DNA samples," was "still incriminating." *Ibid*. The court also placed weight on the non-DNA evidence that the habeas court found to be weak. *See id*. at 7a-8a.

The Court of Criminal Appeals' order—which addresses the federal due process claim in a single paragraph and disregards the habeas court's meticulous factual findings—should be reversed. As this Court has explained, "DNA testing can provide powerful new evidence unlike anything known before," and "[g]iven the persuasiveness of such evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner." *McDaniel v. Brown*, 558 U.S. 120, 136 (2010) (per curiam) (quotation marks omitted). Indeed, the reason the ABA promulgated specific

standards about DNA evidence is that this kind of evidence is particularly important in criminal cases. *See* DNA Standards pp.17-18. Because of its perceived objectivity and clarity, DNA evidence has unique power to move a jury.

When the science behind the DNA analysis in a case is flawed, the result necessarily rests on a shaky foundation. It strains credulity that a State could secure a conviction for capital murder based principally on false and misleading DNA evidence and that the conviction could be upheld after the flaws in the evidence came to light. This Court should not countenance that result.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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