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 OF RESPONDENT STATE OF TEXAS IN SUPPORT OF PETITIONER

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*** CAPITAL CASE ***
QUESTION PRESENTED

Question presented by Petitioner:

Did the Texas Court of Criminal Appeals err in holding that the prosecution's reliance on admittedly false DNA evidence to secure petitioner's conviction and death sentence is consistent with the federal Due Process clause because there is no reasonable likelihood that the false DNA evidence could have affected the judgment of the jury?

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BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Texas,[1] respectfully files this brief responding to Areli Escobar's petition for writ of certiorari. The State agrees that this Court should grant a writ of certiorari summarily reversing the judgment below and remanding, or, alternatively, for plenary review.

STATEMENT OF JURISDICTION

On January 26, 2022, the Texas Court of Criminal Appeals ("CCA") entered its order denying or dismissing all of Petitioner's grounds in his application for writ of habeas corpus in cause number WR-81,574-02. *See* Pet. App. A. Petitioner filed a motion for rehearing in the CCA, but it was denied on March 15, 2022. The State filed a suggestion that the CCA reconsider its decision (Pet. App. E), but it was denied on April 4, 2022. Pet. App. C. Petitioner filed two applications to extend the time to file a petition for a writ of certiorari, which Justice Alito granted. No. 21A602. Petitioner then timely filed his petition for writ of certiorari on June 24, 2022. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). Petition at 1. The State does not dispute jurisdiction.

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[1] Respondent will hereafter be referred to as "the State" or "the District Attorney."

INTRODUCTION AND SUMMARY OF ARGUMENT

In this death penalty case, the State initially opposed Petitioner's state habeas application. Yet after a lengthy factfinding process, the District Court found in Petitioner's favor, entering over 400 findings of fact and conclusions of law and determining that Petitioner's conviction was secured in violation of his right to due process.

Faced with the District Court's exhaustive and persuasive findings, in the interest of justice, the District Attorney undertook a comprehensive reexamination of the forensic evidence and claims raised in Petitioner's case. As a result of that review, the State filed a document contesting some aspects of the findings, but ultimately agreeing that Petitioner was entitled to a new trial. The State's attorneys found that new evidence before the habeas court showed that the State had offered flawed and misleading forensic evidence at Petitioner's trial and this evidence was material to the outcome of his case in violation of clearly established federal due process law.

Despite the State's concession of error, the Texas Court of Criminal Appeals entered an unpublished per curiam order denying or dismissing all of Petitioner's claims without acknowledging the State's position. Even after the State filed a motion clarifying its position and requesting that the CCA reconsider its ruling, the CCA declined without explanation. In refusing to acknowledge the State's admission of error, the CCA undermined the District Attorney's

historical role in the criminal justice system and failed to remedy the federal due process violation that both parties and the District Court have agreed occurred.

STATEMENT OF THE CASE

A. The Investigation and Criminal Charges

Applicant was charged by indictment in Cause Number D-1-DC-09-301250 with the capital murder of a young woman on or about May 31, 2009. 1 CR 12-13.[2] The District Court's findings of fact contain the following summary of the facts of the offense:

> Seventeen-year-old [victim] was stabbed 43 times and cut 30 times. She was brutally sexually assaulted with some unknown object which was never identified or recovered. [The victim's] mother and sister found her dead on the living room carpet, covered in blood when they returned from delivering newspapers. Next to her body was her infant son, who survived. Police recovered multiple items of potential evidence from the scene, including bloodstains, a bloodstained lotion bottle with a fingerprint, a shoe-print impression, and bloodstains from the front door. There was no sign of forced entry. There

[2] "CR" refers to the clerk's record in the original trial proceeding which was prepared by the District Clerk of Travis County for Petitioner's direct appeal to the Texas Court of Criminal Appeals. "RR" refers to the reporter's record. Each such reference will be preceded by the volume number and followed by the applicable page number(s) of the record volume.

> were no eyewitnesses. This was a stranger-on-stranger offense. [Petitioner], who lived in the same apartment complex as [the victim], became a suspect when his girlfriend reported that she had attempted to call him on his cell phone multiple times without success but that there had been one phone connection during which she heard sounds she associated with sexual activity and then a woman screaming. The morning of the murder, [Petitioner] appeared at his mother's home, injured and wearing bloody clothing. He said he had been in a fight. His mother washed his clothing. He later made statements concerning having had sex with a woman earlier that morning.

Pet. App. B at 17a.

The indictment alleged that Petitioner intentionally or knowingly caused the death of the victim by cutting and stabbing her with a knife or sharp object while in the course of committing or attempting to commit aggravated sexual assault. *Id.* As there were no eyewitnesses and there was no apparent relationship between Petitioner and the victim, DNA and other scientific evidence were critical to the State's case. The Austin Police Department's DNA Laboratory ("APD DNA Lab") collected and tested much of the forensic evidence; some additional DNA testing was conducted by a private laboratory, Fairfax Identity Laboratories ("Fairfax Lab"), which confirmed some of the APD DNA Lab's results. *Id.* at 19a.

B. The Forensic Evidence and Trial

During the six-day trial in 2011, the State presented three days of forensic science testimony. *See id.* at 18a. The following DNA evidence was presented at trial:

- A stain from the doorknob lock inside the front door to the victim's apartment (the only DNA sample from the crime scene)—trial testimony indicated that Petitioner could not be excluded;
- Five stains taken from the Polo shoes seized from Petitioner's bedroom—trial testimony indicated the victim could not be excluded;
- One stain taken from the Lee Jeans seized from Petitioner's apartment—trial testimony indicated the victim could not be excluded;
- One sample collected from a Nautica shirt collected from the washer at Petitioner's mother's residence—trial testimony indicated the victim could not be excluded; and
- Two mixed-profile DNA samples that APD collected from the Mazda Protégé that Petitioner was seen driving on the day of the offense—trial testimony indicated the victim could not be excluded.

Id. at 18a-20a.

The State's witnesses assured the jury that the APD DNA Lab was accredited and had protocols based on sound scientific principles that had been validated. *Id.* In closing argument, the State argued that the forensic evidence items were pieces of a

puzzle that together showed that Petitioner murdered the victim. *Id.* at 20a. The prosecutor told the jury they were fortunate because they had DNA evidence, and that each DNA sample was a "key piece" of the puzzle proving Petitioner's guilt. *Id.*

In addition, a latent print examiner, who had previously excluded Petitioner from all latent print evidence, was asked to reexamine one partial, low-quality latent print from the crime scene (from the lotion bottle found next to the victim). *Id.* at 20a, 167a-168a. In the middle of trial, the examiner conducted the last-minute reexamination of this unidentified print following a message from the prosecutor about the print. *Id.* The examiner then agreed with the prosecutor that the print was "identical" to the middle joint of the known prints of Petitioner's left ring finger. *Id.* at 20a, 161a-162a. The prosecutor informed the jury that this latent print was the "piece[] of the puzzle" that placed Petitioner inside the victim's apartment. *Id.* at 19a-20a.

The jury returned a general verdict of guilty of capital murder. 2 CR 313. Following a punishment hearing and based upon the jury's answers to statutorily mandated special issues, the District Court sentenced Petitioner to death. 2 CR 313-314; *see also* Tex. Code Crim. Proc. art. 37.071.

C. Petitioner's Direct Appeal and Initial State Writ

The CCA affirmed Petitioner's conviction and sentence on direct appeal. *Escobar v. State*, No. AP-76,571 (Tex. Crim. App. 2013) (not designated for publication). Petitioner filed an initial postconviction application for habeas relief in May 2013 containing

twenty-four grounds; the CCA denied relief on all those grounds. *Ex parte Escobar*, No. WR-81,574-01 (Tex. Crim. App. 2016) (not designated for publication).

D. The Collapse of the APD DNA Lab

In 2016, APD shuttered its DNA Lab following an audit conducted by the Texas Forensic Science Commission ("TFSC"). The inquiry started in May 2015, when the Federal Bureau of Investigation ("FBI") notified DNA labs nationally that it had identified discrepancies in the population databases they used to calculate their statistics. *See* Pet. App. B at 22a. An investigation of the effects of those discrepancies led the TFSC to discover more problems with the DNA mixture interpretation protocols used by Texas labs. *Id.* at 41a. In late 2015, the TFSC, with the assistance of DNA experts including Dr. Bruce Budowle, reviewed the mixture interpretation protocols used at publicly funded labs in Texas. *Id.* at 42a. At around the same time, the District Attorney's Office requested that Dr. Budowle review the APD Lab's DNA testing and interpretations in selected sexual assault cases. *Id.*

As Dr. Budowle examined the APD DNA Lab's practices, he found significant flaws in the lab's methods for interpreting DNA mixtures. *Id.* When confronted with these problems, lab personnel were unwilling to reinterpret DNA mixtures in a manner consistent with scientifically sound methods. *Id.* One of the analysts—who had conducted the DNA testing in Petitioner's case—wrote reports in which she continued to defend APD's mixture interpretation protocols, even after she was informed that those protocols were not scientifically supportable. *Id.* This scrutiny led to the TFSC's 2016 audit of the APD DNA Lab and ultimately to its closure. *See Id.* at 54a.

The District Court's findings quote from a letter that the Travis County criminal district judges sent to the Austin City Council and the Travis County Commissioners Court. *Id.* at 13a-14a. The letter detailed the judges' concerns about work done by the APD DNA Lab:

> As you have become aware, serious issues with the Austin Police Department's DNA Lab practices led to the closing of the lab after a two-day audit by the [TFSC]. The problems discovered raise questions about every determination made by the lab. Issues focused on within that audit include: the contamination of evidence; the use of protocols not accepted by the scientific community; the use of measure[s] in the lab that encouraged confirmation bias; and, other serious errors that might impact the validity of the results obtained.
>
> * * *
>
> This recommendation is based on three considerations: 1) national forensic best practices recommend that forensic investigations be independent of law enforcement; 2) the integrity of the APD DNA lab has been so compromised that future use is deemed unreliable; and 3) the APD Lab has proven incapable of producing timely and reliable results.

Id. (emphasis in original).

E. Petitioner's Second State Writ and the Remand Order

In February 2017, Petitioner filed a second application for habeas relief, raising six additional grounds. Petitioner argued that the grounds in his subsequent application should be considered on the merits because the factual or legal basis for the claims was unavailable when he filed the previous application. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a); *see also* Pet. App. F at 198a. Petitioner also argued that he was entitled to relief under Texas Code of Criminal Procedure Article 11.073.[3] Pet. App. B at 130a.

The CCA remanded the case to the District Court for further factfinding, ruling that Petitioner had alleged sufficient prima facie facts regarding Grounds

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[3] Article 11.073—sometimes referred to as Texas's "junk science" writ law—provides that a trial court may grant a convicted person relief on an application for a writ of habeas corpus if:

> (1) the convicted person files an application . . . containing specific facts indicating that:
>
> (A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and
>
> (B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
>
> (2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

Tex. Code Crim. Proc. art. 11.073(b).

One through Four and the due process claim in Ground Six.[4] *Ex parte Escobar* No. WR-81,574-02 (Tex. Crim. App. October 18, 2017) (not designated for publication); Respondent's Appendix ("Res.App.") A at 1a-3a. The remanded grounds included Petitioner's claim that his Fourteenth Amendment right to due process was violated by the State's presentation of unreliable, misleading, and false DNA testimony during the guilt phase of trial in violation of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). *See* Res.App. A at 1a-3a; Pet. App. B at 25a.

F. The District Court's Factfinding

In compliance with the CCA's remand order, the District Court began an in-depth investigation of the merits of the remanded claims. The Court admitted hundreds of exhibits and presided over a series of evidentiary hearings starting in May 2018 and ending with closing arguments on December 3, 2020. *See* Pet. App. E at 194a. The State initially opposed Petitioner's claims for relief in these proceedings. *See, e.g.*, Pet. App. B at 123a, 133a n.27.

G. The District Court's Findings of Fact and Conclusions of Law

On December 31, 2020, the District Court entered over 400 findings of fact and conclusions of law determining in part that Petitioner's conviction was secured in violation of his right to due process and re-

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[4] In habeas proceedings in Texas, the District Court—as the "original factfinder"—makes recommendations to the CCA which serves as the "ultimate factfinder" and decisionmaker regarding whether relief will be granted. *See Ex parte Storey*, 584 S.W.3d 437, 439 (Tex. Crim. App. 2019).

commending that he be granted a new trial. *Id.* at 10a, *et seq*. The District Court's findings and conclusions included the following:

> 256. Having found that the relevant scientific community, law enforcement, the judiciary and the governmental entities responsible for funding and oversight of the APD DNA lab reached the conclusion that the testing done by the lab was unreliable, the Court concludes it would be shocking to the conscience to uphold the conviction of [Petitioner]. [Petitioner's] trial was fundamentally unfair.
>
> 257. Based on the foregoing findings of fact, the Court finds that there is a "reasonable likelihood" that the false DNA testimony affected the judgment of the jury. . . . The State's use of unreliable, false, or misleading DNA evidence to secure [Petitioner's] conviction violated fundamental concepts of justice. DNA was the crux of the prosecution's case, and the remaining evidence was either weak and circumstantial, or has now been shown to be scientifically questionable. Accordingly, the use of flawed DNA evidence violated [Petitioner's] rights to due process as guaranteed by the United States and Texas Constitutions, and this Court recommends that [Petitioner's] conviction be reversed.
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> * * *
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> Specifically, the Court recommends that [Petitioner] be granted a new trial because relevant scientific evidence, admissible under the Texas Rules of Evidence, is currently

> available that contradicts scientific evidence relied on by the State at trial to convict [Petitioner] and currently available science was not available to be offered by [Petitioner] at trial. Furthermore, the Court recommends that [Petitioner] be granted a new trial because [his] conviction was secured in violation of [his] right to due process under the Fourteenth Amendment to the U.S. Constitution. *Brady v. Maryland*, 373. U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959); *Ex parte Chabot*, 300 S.W. 3d 768 (Tex. Crim. App. 2009).

Pet. App. B at 144a, 187a-188a.

H. The State's Reconsideration of the Evidence in the Habeas Record

In view of the District Court's exhaustive and carefully reasoned findings and conclusions, the District Attorney[5] initiated a wholesale review of the habeas record and reexamined the State's position regarding each of Petitioner's claims.[6]

The State's attorneys became concerned about the problems with the State's forensic evidence revealed through the postconviction investigation. Many of these problems are adequately described in the Petition and

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[5] In January 2021, a new District Attorney took office in Travis County. *See* Pet. App. E at 194a; *see also* Tex. Const. art. V, § 21; Tex. Code Crim. Proc. art. 2.01.

[6] Undersigned counsel of record—an assistant district attorney with over fifteen years of prosecutorial experience and over seven years of experience as a staff attorney for the CCA—worked with other experienced prosecutors in conducting this review.

will not be enumerated here. However, the State's attorneys were especially troubled by evidence adduced postconviction that exposed contamination issues within the APD Lab, some bearing upon the processing of the evidence in this case. The jury never learned this important information which potentially compromised the integrity of the State's biological evidence in Petitioner's case prior to any DNA analysis, interpretation, or reinterpretation. In fact, as discussed in more detail below, the jury was told quite the opposite: the APD DNA Lab was accredited and met stringent scientific standards.

First, the independent audit of the APD DNA Lab performed by the TFSC—which led to the APD DNA Lab suspending operations in 2016—revealed not only the use of unscientific standards to analyze and interpret DNA testing results, but also multiple contamination incidents and inadequate training and oversight of staff. *Id.* at 23a. The audit led to subsequent reviews, including a Texas Department of Public Safety ("DPS") evaluation of the casework of an APD DNA Lab analyst who had five contamination incidents between October 2008 and April 2010. *Id.* at 61a. This analyst had swabbed the inside doorknob lock from the crime scene and performed serology on biological evidence in Petitioner's case. *Id.* at 18a, 45a, 61a.

Another APD DNA Lab analyst, who had performed some of the serology and DNA testing on important evidence including Petitioner's Polo shoes and Nautica shirt, had been involved in at least nine documented contamination incidents between 2006 and 2015, impacting more than thirty cases. *Id.* at 62a. In one documented contamination incident, this second analyst developed a major DNA profile on an evidenti-

ary item that was consistent with another lab employee. *Id.* at 63a-64a. This analyst had to be repeatedly reminded to wear gloves and her performance was placed under review. *Id.* at 63a.

In Petitioner's case, one of these analysts violated best practices mandating that crime scene samples should not be placed next to person-of-interest samples when she processed high-quantity DNA swabs from the crime scene and the victim's fingernail clippings at the same time as low-quantity DNA samples taken from Petitioner's shirt and jeans. *Id.* at 115a-116a. Further, the analyst noted that a seal was coming apart on the package of a bloody carpet cutting from the crime scene. *Id.* at 74a, 115a. She resealed the package and later indicated that she did not consider the compromised seal to be an issue. *Id.* at 115a. Expert testimony in the habeas record showed that a compromised seal increases the risk of contamination prior to DNA testing. *Id.* at 115a.

After the APD DNA Lab was closed following the TFSC audit, DPS attempted to retrain the two analysts described above; however, the analysts were unable to complete the serology portion of the training and never advanced to the DNA testing portion. *Id.* at 57a. Both were reassigned to administrative roles. *Id.*

Additionally, the habeas record reveals that at least two APD crime scene specialists who handled important biological evidence in this case had significant disciplinary issues related to proper evidence handling. *Id.* at 74a-75a. For example, an evidence control specialist who handled the same bloody piece of carpet from the crime scene in this case had prior disciplinary incidents "including mislabeling or im-

properly sealing evidence, losing, and even intentionally damaging evidence, . . . drinking while on call [and throwing] a rape kit in anger." *Id.*

Another specialist, who collected Petitioner's garments from his apartment and his mother's residence, had been disciplined for improperly packaging and handling crime scene evidence in a manner that could have "caused the evidence to spill out of the bags during transport, causing damage, cross contamination, or even complete loss." *Id.* at 75a. This employee later resigned from APD "after it was discovered that she falsified her qualifications on her employment application and perjured herself in court." *Id.*

The above factors were compounded by other issues documented in the habeas record indicating a significant risk of cross-contamination. For example, evidence in the record suggests that two APD employees may have improperly shared a drying room and intermingled items collected from the crime scene ("some of it wet with blood and uncovered") with Petitioner's belongings seized from his apartment and his mother's residence. *Id.* at 74a-81a. One of these employees was the one who was disciplined for improperly handling evidence, falsified her qualifications, and resigned after committing perjury. *Id.*

Moreover, in reviewing the trial and habeas records together, the State's attorneys determined that the DNA evidence formed the backbone of the State's case. As the District Court noted, Petitioner appeared to be a "stranger" to the victim and no eyewitness was ever found. *Id.* at 17a. The primary non-forensic evidence—the testimony of Petitioner's estranged ex-girlfriend about what she heard on a phone call to Petitioner on the night of the offense—was weakened

by the fact that her account had evolved over time from overhearing sounds of consensual sex to overhearing "screaming and screaming and screaming and screaming." *Id.* at 128a-129a.

Furthermore, the non-DNA forensic evidence linking Petitioner to the crime—that the CCA relied upon in its ruling—had significant shortcomings:

1. Latent Print from the Lotion Bottle

Prosecutors at trial elicited testimony that the latent print from the lotion bottle next to the victim's body was "a match" to the middle joint of Petitioner's left ring finger; they told the jury that the latent print placed him "inside that crime scene." *Id.* at 20a, 127a-128a, 161a, 164a; 28 RR 39. However, the APD latent print examiner had initially found that Petitioner was excluded and then changed her position after reexamining the print during the trial, following a message from a prosecutor about the print. Pet. App. B at 161a-162a. The examiner then agreed with the prosecutor that the print was "identical" to the known prints of Petitioner's left ring finger joint. *Id.* at 20a, 161a-162a; 27 RR 75. Petitioner's postconviction expert found that the quality of this complex latent print was low and blind verification and better documentation were needed. Pet. App. B at 128a, 166a-171a. Further, the expert opined that the APD examiner's 2011 comparison was subject to cognitive bias and was expressed using terminology, *e.g.*, "match," that does not comply with contemporary scientific standards governing fingerprint testimony. *Id.*

2. Cell Towers Evidence

Expert testimony offered in postconviction proceedings indicated that it was not possible to specifically pinpoint the location of Petitioner's cell phone in relation to the cell towers based on the evidence at trial, which omitted data concerning the "azimuth" of the cell towers' sectors as well as which individual sectors were used. *Id.* at 174a-181a. And because Petitioner lived in the same apartment complex as the victim, the cell tower evidence merely showed that he was in the general vicinity of his own apartment, or even his mother's house, on the night of the offense. *Id.*

3. Bloody Shoe Print on the Carpet at the Crime Scene

The trial testimony established that Petitioner's shoe could not be excluded as a "possible source" of the shoe print found at the crime scene. 25 RR 34. However, the State's witness was only able to assess some "class characteristics" for this shoe print impression. 25 RR 40, 47, 50-55. Additionally, the State's expert did not measure the print, could not determine the size of the shoe, did not know which types of shoes had this tread pattern, and could not determine what brand of shoe made the impressions. 25 RR 47, 50-55, 57. Thus, there could potentially have been thousands of similar shoes in the Austin area. *Id.* 50-51, 57; Pet. App. B at 128a.

Further, in recent years, scientists have criticized "forensic feature-comparison methods," such as shoe print comparisons, as unreliable because they "are not supported by sufficiently rigorous scientific studies," and because these disciplines have not developed

objective criteria for reaching conclusions. *See* Kayleigh E. McGlynn, *Remedying Wrongful Convictions Through DNA Testing: Expanding Post-Conviction Litigants' Access to DNA Database Searches to Prove Innocence*, 60 B.C.L. REV. 709, 720 (2019) (citations omitted); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 20, 95 (2009) (citations omitted).

I. Testimony About the APD DNA Lab's Accreditation Revealed to Be Misleading

The State's attorneys weighed the fact that the State had presented powerful expert testimony that the APD DNA Lab: was accredited based on standards developed by the FBI and the forensic science community; was required to meet protocols based on sound scientific principles that had been validated; and had "the right[] types of checks and balances." Pet. App. B at 33a-34a. Yet in reviewing the lab's practices, Professor Keith Inman (a criminalist and DNA analyst with forty years of experience) found that APD's "entire process of evidence collection, preservation, documentation and analysis from crime scene to report exhibited an inability to handle evidence in a way that would consistently protect and preserve its integrity[.]" *Id.* at 68a. Considering Professor Inman's review, along with the TFSC audit and other postconviction evidence, it became evident to the State's attorneys that the accreditation process did not actually provide meaningful "checks and balances" regarding the lab's work in this case. *See* Pet. App. F at 201a, 212a; Pet. App. E at 195a. In hindsight, by offering the accreditation testimony, prosecutors unwittingly misled the jury about the soundness of the lab's practices.

The State's attorneys ultimately concluded that the false and misleading testimony in this case was "material" in that there was "a reasonable likelihood that the false testimony could have affected the judgment of the jury." *See* Pet. App. F at 201a; Pet. App. E at 195a; *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see also Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011).

J. The State's Objections to the Court's Findings of Fact and Conclusions of Law and Abandonment of Certain Proposed Findings of Fact and Conclusions of Law

Consequently, in January 2021, the State filed its "Objections to the Court's Findings of Fact and Conclusion of Law and Abandonment of Certain Proposed Findings of Fact and Conclusions of Law" (henceforth "Objections").[7] *See* Pet. App. F at 197a, *et seq*. In this pleading, the State raised particularized objections to some of the District Court's findings, yet ultimately expressed no opposition to the remainder of the findings and to the Court's conclusions that Petitioner was entitled to relief on Grounds One and Two. *See Id.* at 201a, 208a-209a, 212a, Pet. App. B at 187a-188a.

K. The Court of Criminal Appeals' January 2022 Order

Petitioner's state habeas case was then returned to the CCA pursuant to Texas's habeas procedures. *See* Tex. Code Crim. Proc. art. 11.071, § 9; Tex. R. App.

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[7] The Texas Rules of Appellate Procedure provide that, after the trial court enters findings of fact and conclusions of law, a party has ten days from the date he receives them to "file objections." Tex. R. App. P. 73.4(b)(2).

P. 73. Approximately one year later, the CCA issued an unpublished per curiam order denying relief on all the remanded grounds. *See* Pet. App. A at 8a; *see also* Tex. Code Crim. Proc. art. 11.071, § 11. The CCA based its ruling upon the Court's "own review," thereby eschewing the trial court's findings and conclusions. Pet. App. A at 8a. The CCA's order referred to the State's trial and habeas evidence contesting Petitioner's claims without acknowledging the State's changed position that Petitioner was entitled to relief on two grounds. *See* Pet. App. A at 6a.

L. The State's Suggestion for Reconsideration

Deducing that the CCA may have misunderstood the State's position, the State filed a suggestion that the CCA reconsider its ruling. *See* Pet. App. E at 192a, *et seq*. In this pleading, the State clarified its changed position regarding Petitioner's Grounds One and Two. *Id*. at 195a. The State asked that the CCA "file and set the case, order briefing, and issue a full opinion acknowledging the entirety of the record, in the interests of justice." *Id*. at 196a. On April 4, 2022, the CCA denied the State's suggestion for reconsideration without a written order. *See* Pet. App. C at 189a.

M. Petition for Writ of Certiorari

After receiving two extensions of time, Petitioner timely filed his petition for writ of certiorari on June 24, 2022. Petitioner argued that the CCA's decision "was plainly wrong under this Court's precedents," noting that the CCA "failed even to acknowledge the State's position." Petition at 2-3. Petitioner noted that the State "relied heavily on DNA evidence from a lab so deeply troubled that the State itself forced its closure" and neither the State nor the CCA provided

a "genuine basis to doubt . . . that the resulting DNA evidence . . . would have been excluded as unreliable if the truth had been known at the time of the trial." *Id.* at 2. Petitioner maintained that the CCA's decision should be summarily reversed in part because the CCA "stepped outside of the judicial role by sustaining the conviction on the basis of arguments no party made, reaching a result no party advocated, and in the process took upon itself the role of the prosecutor[.]" *Id.* at 2.

On July 15, 2022, the State submitted to the Clerk a motion to extend the time in which to file the State's response to the petition. The motion was granted, extending the time to file a response. The State submitted a second motion to extend time which was also granted, extending the time to file the State's brief to and including September 28, 2022.

REASONS FOR GRANTING REVIEW

I. PROSECUTORS' PRIMARY DUTY: TO SEE THAT JUSTICE IS DONE

This Court has long held that a "prosecutor's role transcends that of an adversary": a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, a prosecutor is "the servant of the law" and should "prosecute with earnestness and vigor" but must "refrain from improper methods calculated to produce a wrongful conviction":

> The United States Attorney is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Viereck v. United States, 318 U.S. 236, 248 (1943) (citing *Berger*, 295 U.S. at 88). Texas has enshrined this principle in its Code of Criminal Procedure, which provides that, "It shall be the primary duty of all prosecuting attorneys, including any special pros-

ecutors, not to convict, but to see that justice is done." Tex. Code Crim. Proc. art. 2.01.

Though the State—in its Objections—disputed some aspects of the District Court's findings, the State ultimately agreed that Petitioner's due process rights were violated when the State relied on forensic DNA testimony now known to be false or misleading. In deciding to take this stance, the State's attorneys carefully considered voluminous forensic evidence and expert analysis adduced in habeas proceedings, the trial record, the constitutional principles at stake, and the interests of justice.

II. THE POWER AND FALLIBILITY OF DNA EVIDENCE

As this Court has observed, "[t]he advent of DNA technology is one of the most significant scientific advancements of our era." *Maryland v. King*, 569 U.S. 435, 442 (2013). The Court noted that DNA testing possesses an "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *Id.* (citing *DA's Office v. Osborne*, 557 U.S. 52, 55 (2009)).

The impact of this powerful forensic technology can lead jurors "to place undue weight" on the DNA evidence and may "cloud their judgment":

> Scientific evidence, particularly DNA evidence, may impress juries to an unreasonable and undesirable extent. Although its existence is not empirically substantiated, the so-called "CSI effect," where television shows cause jurors to expect and almost demand forensic evidence at trial before they will vote to convict, may also cause jurors to place undue weight on DNA evidence and cloud their judgment. The "CSI effect" holds that

> television portrays forensic science as insurmountable and "quashes concerns of human error" while increasing the juror's idea that crime scene technicians are experts.

Brooke G. Malcolm, *Convictions Predicated on DNA Evidence Alone: How Reliable Evidence Became Infallible*, 38 CUMB. L. REV. 313, 324 (2008) (citations omitted).

Yet this Court has noted that prosecution experts —even DNA analysts—can make mistakes and such mistakes can lead to unfair trials:

> Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials."

Hinton v. Alabama, 571 U.S. 263, 276 (2014) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009)). Despite its vaunted status, DNA is susceptible to many of the same problems as the other types of forensic evidence:

> Although viewed by many courts as almost infallible, DNA has proven to be susceptible to many of the same problems that are associated with other types of evidence. Adhering to strict gathering and laboratory procedures does not insure the reliability of DNA. DNA can easily become contaminated or corrupted from factors not limited to: time, temperature, contact with other contaminants, and exposure to the elements. Further,

> criminal laboratories have reported a backlog of DNA testing, which can increase the likelihood of errors.

Malcolm, *Convictions Predicated on DNA Evidence Alone*, 38 CUMB. L. REV. at 319-20.

As this Court noted in *Melendez-Diaz*, 557 U.S. at 319, and *Hinton*, 571 U.S. at 276, one study of cases in which exonerating evidence resulted in overturning convictions found that, in 60% of the exoneration cases, "forensic analysts called by the prosecution provided invalid testimony at trial":

> This was not the testimony of a mere handful of analysts: this set of trials included invalid testimony by 72 forensic analysts called by the prosecution and employed by 52 laboratories, practices, or hospitals from 25 states. Unfortunately, the adversarial process largely failed to police this invalid testimony.

Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. at 3.

III. PROSECUTORS' DUTY TO CORRECT WHAT THEY KNOW TO BE FALSE OR MISLEADING AND TO ELICIT THE TRUTH

When a prosecutor sponsors a witness who has offered false or misleading testimony, the prosecutor has a duty to correct the misleading facts and elicit the truth:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to

> apply merely because the false testimony goes only to the credibility of the witness.
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> * * *
>
> ["]A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Napue, 360 U.S. at 269-70 (citing *People v. Savvides*, 136 N.E.2d 853, 854-855 (1956)). "The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred." American Bar Association, *Criminal Justice Standards for the Prosecution Function* 3-8.1 (4th ed. 2017).

Moreover, whenever a wrongful conviction may have occurred, a chance remains that the true perpetrator has remained at large to commit other crimes:

> According to the Innocence Project, 362 people have been exonerated by DNA evidence since 1989. The group has identified actual perpetrators in those cases who went on to commit "additional violent crimes, including 80 sexual assaults, 35 murders, and 35 other violent crimes while the innocent sat behind bars for their earlier offenses."

Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 423 (2018) (citations omitted). In such cases, duty requires that a prosecutor evaluate the record with a clear eye and speak the truth about the State's evidence. To do otherwise renders a disservice to justice and public safety.

IV. THE STATE'S CONCESSION OF ERROR AND THE IMPACT OF THE CCA'S ORDER

In reevaluating the State's position in this case, the State's attorneys devoted particular attention to the postconviction evidence showing that the State's expert testimony and forensic evidence misled the jury. The State's trial testimony assured the jury that the APD DNA Lab's practices were scientifically sound and validated when they were not. *See* Pet. App. B at 33a-34a. The State, through its witnesses and argument, informed the jury that its DNA evidence was validly and reliably tested and interpreted, which was inaccurate and misleading in light of the habeas record. *See id.* at 20a-21a, 48a, 93a-94a, 121a; 22 RR 51. And the jury never heard about the "suspect-driven" and "victim-driven" bias found in the casework of the DNA analysts on Petitioner's case, or the many opportunities for contamination of the biological evidence in this case. *See* Pet. App. B at 47a-48a, 74a.

Further, as the crime appeared to have been committed by a stranger and there were no known eyewitnesses, the State relied heavily on the DNA and other forensic evidence. *Id.* at 17a, 20a-21a. In opening statements, the State announced that "the science of DNA does tell us who is connected to this crime." *Id.* at 126a; 22 RR 50. Three days of the State's case-in-chief were devoted to the presentation of forensic evidence and testimony. Pet. App. B at 18a. And approximately

one-third of the State's closing arguments addressed the DNA evidence. *See* 28 RR 21-39, 61-78. The State argued that the jurors were "fortunate" to have DNA and fingerprint evidence—that they had asked to see DNA evidence and fingerprint evidence and the State had supplied it:

> [W]e asked you what kind of evidence would you like to see in a case, and the top two answers that we get, DNA, bring me DNA and you got my attention. What other evidence? Fingerprints. Show me that fingerprint that puts this defendant in that crime scene. That DNA that connects this defendant to that crime scene.

28 RR 26. Highlighting the DNA, the State told the jury that each item of forensic evidence was a "piece of a puzzle" that "taken together" showed that Petitioner committed the murder. Pet. App. B at 20a; 28 RR 25-26. The State urged the jury to put the puzzle pieces together to find Petitioner guilty: "when we look at all those pieces, now is the time for you folks to put them together, and we know who did this crime." Pet. App. B at 20a-21a; 28 RR 78.

The State reinforced the DNA evidence with the non-DNA forensic evidence—especially one latent print from the crime scene—arguing to the jury that this latent print put "this defendant inside that crime scene." 28 RR 39. However, the APD latent print examiner who testified at trial had initially found that Petitioner was excluded and then changed her mind after reexamining the print during the trial, after the prosecutor sent a message about that print. Pet. App. B at 161a-162a. Yet Petitioner's postconviction expert found that this print was of low quality and

blind verification and better documentation were needed. *Id.* at 128a, 166a-171a. Further, the expert found that the APD examiner's 2011 comparison was subject to cognitive bias and was expressed using terminology that does not comply with contemporary scientific standards. *Id.* Also, the probative value of the shoe print and cell towers testimony was low, especially in light of information developed postconviction, as discussed *supra*. Additionally, the State's primary non-forensic evidence—the testimony of Petitioner's estranged ex-girlfriend about her phone call to Petitioner on the night of the offense—was weakened as her description of the call had changed drastically over time. *Id.* at 128a-129a.

For the above reasons, the State agrees that Petitioner has established a reasonable likelihood that the State's flawed and misleading DNA testimony affected the judgment of the jury, and the CCA's decision represented an unreasonable determination of the facts based on the evidence in the record of the habeas proceedings.

The District Attorney had the responsibility and duty to take remedial action when he learned that the State had offered materially false and misleading forensic evidence in Petitioner's trial. *See Young v. United States*, 315 U.S. 257, 258 (1942) ("The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent.").

The District Attorney attempted to do just that when the State filed its "Objections" in 2021. *See* Pet. App. F. Yet the CCA issued its 2022 order finding that the DNA evidence was not material to Petitioner's

conviction without acknowledging the State's concession of error or requesting briefing or argument. *See* Pet. App. A at 6a-8a. The Court then refused the State's request to reconsider—which clarified the State's position that Petitioner's due process rights were violated—without comment. *See* Pet. App. C.

In fact, the CCA's order related the State's trial and habeas evidence contesting Petitioner's claims without recognizing the State's changed position that Petitioner was entitled to relief. *See* Pet. App. A at 6a (*e.g.*, "The State has presented updated DNA statistics" and "The State presented other evidence to support Applicant's conviction"). In so ruling without even acknowledging the State's confession of error, the CCA prevented the District Attorney from fulfilling his constitutionally mandated duty to correct the State's presentation of evidence he learned was false or misleading and to elicit the truth. *See Napue*, 360 U.S. at 269-70; *see also Young*, 315 U.S. at 258.

Although the CCA—like this Court—must perform its "judicial function" and "examine independently the errors confessed," a prosecutor's "considered judgment . . . that reversible error has been committed is entitled to great weight." *Young*, 315 U.S. at 258-59; *see also United States v. Flitcraft*, 863 F.2d 342, 344 (5th Cir. 1988) ("Although the government's recommendation does not bind us, it is entitled to great weight") (citing *Young*, 315 U.S. at 258-59). Given a prosecutor's duty to ensure that justice is done—not merely to seek convictions—due process mandates that a postconviction court give full and fair consideration to a prosecutor's position on the rare occasion when the government agrees that relief is warranted.

This Court held in *Wearry* that it was appropriate for the Court to exercise its jurisdiction over the final judgment of a state postconviction court in a capital case when "circumstances so warrant":

> [S]ummarily deciding a capital case, when circumstances so warrant, is hardly unprecedented.
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> * * *
>
> This Court, of course, has jurisdiction over the final judgments of state postconviction courts, s*ee* 28 U.S.C. § 1257(a), and exercises that jurisdiction in appropriate circumstances.

Wearry v. Cain, 577 U.S. 385, 395-96 (2016).

Respectfully, the State agrees with Petitioner that the circumstances warrant such an exercise of jurisdiction here.

CONCLUSION

On the basis of the foregoing arguments and authorities, the State agrees with Petitioner that this Court should summarily reverse the CCA's ruling or, alternatively, grant the petition and set this case for argument.

Respectfully submitted,

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