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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

If ever there were a case calling for summary reversal, it is this capital case. Denying the petition would be a grave miscarriage of justice.

Everyone agrees on the legal issue: whether petitioner, who was convicted of capital murder and sentenced to death, is entitled to a new trial because there is "*any* reasonable likelihood" that the false and misleading DNA evidence the prosecution presented during its case in chief "*could* have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). It is on that issue that petitioner, the tribunal closest to the record, and the State agree. Petitioner has shown that his conviction was secured based on false and misleading DNA testimony and evidence. The habeas court issued over 400 findings of fact and conclusions of law, after years of taking evidence and hearing testimony presented by both sides, ultimately agreeing that the DNA evidence presented to the jury was false, misleading, and material, such that petitioner's conviction was secured in violation of Due Process. The District Attorney, "[f]aced with the District Court's exhaustive and persuasive findings, [and] in the interest of justice," then "undertook a comprehensive reexamination of the forensic evidence and claims," "ultimately agreeing that Petitioner was entitled to a new trial." Resp. 2.

When the parties and the court closest to the facts are all in accord that the legal standard for upholding the conviction cannot be met, it would have to be the incredible case for an appellate tribunal to fairly conclude otherwise. Especially in a capital case like this one. The "severity" of a capital conviction "mandates careful scrutiny in the review of any colorable claim of

error." *Zant v. Stephens*, 462 U.S. 862, 885 (1983). And before rejecting a confession of error, one would expect the reviewing court to carefully consider the prosecutor's views. *See Young v. United States*, 315 U.S. 257, 258 (1942) (the "considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight").

Yet in a terse, three-page opinion, the Texas Court of Criminal Appeals (CCA) rejected the conclusions of everyone else involved in the case. The CCA did not dispute (a) the habeas court's findings that the DNA evidence and testimony presented by the prosecution was false and misleading, (b) that the State heavily relied on that evidence in making its case, or (c) the record evidence of a juror's testimony that he was on the fence as to petitioner's guilt until he saw that DNA evidence. Instead, the CCA concluded that the scant remaining circumstantial evidence rendered the faulty DNA evidence utterly immaterial. Because the CCA is so clearly wrong and has so evidently rebuffed the materiality standard set forth by this Court, it is appropriate to grant the petition and summarily reverse now. *E.g.*, *Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam) (*Moore II*); *id.* at 672-73 (Roberts, C.J., concurring). Three sets of amici curiae with subject matter expertise, representing divergent viewpoints from across the political and law-enforcement spectrum, have reviewed the record and agree. Denying the petition, thus requiring Mr. Escobar to seek federal habeas relief pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), *see* 28 U.S.C. § 2254, would be manifestly unjust.

I. The False And Misleading DNA Evidence And Testimony Was Critical To Securing Mr. Escobar's Conviction.

The constitutional standard is exceptionally rigorous in favor of overturning a conviction where the prosecution presents false and misleading evidence during a criminal trial. If there is "*any* reasonable likelihood" that the false and misleading evidence "*could* have affected the judgment of the jury," the conviction must be vacated. *Agurs*, 427 U.S. at 103 (emphasis added). Both the habeas court—the neutral arbiter closest to the record—and the prosecution itself—which almost always seeks to protect its convictions—are emphatic that petitioner's capital conviction cannot be upheld under this standard. Nevertheless, the CCA came to the opposite conclusion all on its own. It is abundantly clear that the CCA got it wrong. Petitioner is entitled to a new trial.

No matter how one looks at the record, it is impossible to conclude that the CCA faithfully applied the standard described by this Court in *Agurs*. That is why, in addition to the parties, three sets of prominent amici curiae with subject matter expertise support summary reversal as well. The American Bar Association has taken the rare step of calling for summary reversal at the petition stage due to the mishandling of the DNA evidence in this case, which violated multiple ABA standards. ABA Amicus Br. 7-16. The Innocence Network and the Center for Integrity in Forensic Sciences, Inc., call for summary reversal because the "jury relied" on "wholly unreliable" DNA evidence to convict Mr. Escobar, as well as shoe-print and latent fingerprint evidence that "was also unreliable." Innocence Network & CIFS Amicus Br. 4-23. Former State

Attorneys General, United States Attorneys, and state prosecutors from across the political spectrum argue for summary reversal because the CCA "fail[ed] to give due regard to the prosecution's confession of error." Former State Attorneys General, United States Attorneys, and Prosecutors Amicus Br. 5-9. Failing to summarily reverse, according to these amici, would be a "miscarriage of justice in this capital case." *Id.* at 9-12.

The record shows, and no one disputes, that "one of the sitting jurors," when asked by the State during an evidentiary hearing "when he decided that Mr. Escobar was guilty," replied: "I was sitting on the fence, if you will, as to whether he was guilty or not guilty all the way up to when the DNA evidence was submitted to the jury, and for me, that was the sealing factor." Pet. App. 127a. The CCA did not even acknowledge this extremely probative fact. Nor did the CCA address the mountain of *other* evidence in the record that led the District Attorney itself to admit that the DNA evidence was "critical to the State's case." Resp. 4. Because "the crime appeared to have been committed by a stranger," with "no known eyewitnesses," the State "relied heavily on the DNA and other forensic evidence." Resp. 27. Indeed, "approximately *one-third* of the State's closing arguments addressed the DNA evidence." Resp. 27-28 (emphasis added).

At the outset of trial, the prosecution "asked" the jury "what kind of evidence [it] would [] like to see," and "the top two answers" were "DNA" and "Fingerprints." Resp. 28 (internal quotation marks omitted). The parties, amici curiae, and habeas court all agree, and the CCA does not dispute, that the DNA evidence presented to the jury was false and misleading. And the parties and habeas court all agree that the expert's

mid-trial, 180° switch at the behest of the prosecutor—from initially *excluding* Mr. Escobar as the source of a latent crime-scene print to testifying that it "match[ed]" the joint of his left ring finger—was questionable at best, and in any event fails to comply with "scientific standards governing fingerprint testimony." Resp. 16; *see* Pet. App. 128a, 166a-171a; *see also* Innocence Network & CIFS Amicus Br. 19-21 (explaining why the latent-fingerprint evidence was unreliable).

The reasons the CCA gave to nevertheless hold that it would be *unreasonable* to conclude that the false DNA evidence *could have* affected the jury's judgment, and thus why petitioner should still be put to death despite the views of everyone else in the case, are ridiculous. Without the faulty DNA evidence, all that was left, as the State itself describes, was: the questionable latent print "match" noted above; cellphone tower evidence that "merely showed that [petitioner] was in the general vicinity of his own apartment, or even his mother's house, on the night of the offense"; a shoeprint on the carpet of the crime scene that the "State's expert did not measure," and for which the expert "could not determine the size," the "type[]," or the "brand"; and the ever-changing testimony of a jilted ex-girlfriend, which "evolved over time from overhearing sounds of consensual sex to overhearing 'screaming and screaming and screaming and screaming.'" Resp. 15-17 (quoting Pet. App. 128a-129a). For these 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" to the contrary. Resp. 29. When the State itself does not think

that this other circumstantial evidence is sufficient to sustain the conviction it secured, that is a very good indication that it is not. *See, e.g.*, *Young*, 315 U.S. at 258-59 (although courts must "examine independently the errors confessed," the "considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight").

The CCA also suggested that post-trial recalculated DNA statistics presented by the State to the habeas court were still consistent with petitioner's guilt. Pet. App. 6a. But the CCA did not (and cannot) explain why those recalculated statistics are meaningful, given the habeas court's conclusion (with which the State agrees) that the samples were already compromised. *See* Pet. 18-19; Resp. 12-15; Pet. App. 185a. Any recalculation is irrelevant when the samples on which the new data are drawn are already tainted by, for example, cross-contamination.

Relatedly, as the State points out in its response supporting the petition, the CCA relied on the State's post-trial recalculations without also "recognizing the State's changed position that Petitioner was entitled to relief," thus "prevent[ing] 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." Resp. 30. The State did not come to this conclusion lightly. It was only after a "wholesale review" of the entire record and trial proceedings that the State concluded petitioner is entitled to a new trial. Resp. 12.

While the CCA's abdication of its duty to faithfully apply the materiality standard would be unacceptable in any case in which an individual's liberty is at stake,

it is a travesty here, where petitioner's life is on the line. Courts' "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (internal quotation marks omitted). The "severity" of a capital conviction thus "mandates careful scrutiny in the review of any colorable claim of error." *Stephens*, 462 U.S. at 885; *see also Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."). This command is at its zenith when the prosecution is unwilling to stand behind a capital conviction that it secured.

II. Federal Habeas Review Under The AEDPA Is Not An Adequate Avenue For Relief.

This Court should not close its eyes to the CCA's obvious error in the belief that it can be rectified through federal habeas proceedings. Requiring petitioner to pursue relief under the AEDPA, *see* 28 U.S.C. § 2254, rather than considering the case now pursuant to this Court's jurisdiction to directly review state postconviction proceedings, *see* 28 U.S.C. § 1257(a), could literally be fatal to Mr. Escobar.

This Court is well aware that the "AEDPA significantly limits federal courts' power to upset state criminal convictions." *Shoop v. Cassano*, 142 S. Ct. 2051, 2053 (2022) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari); *see id.* at 2051 ("[T]he Sixth Circuit failed to treat the state-court adjudication of [petitioner]'s self-representation claim with the deference demanded by the [AEDPA]. To correct this manifest error, I would grant Ohio's petition and summarily

reverse the Sixth Circuit."). The hurdle to relief Congress enacted in the AEDPA has been described as "a rule that federal habeas relief is never available to those facing execution" from a state capital conviction. *Dunn v. Reeves*, 141 S. Ct. 2405, 2421 (2021) (Sotomayor, J., joined by Kagan, J., dissenting) (collecting cases denying federal habeas relief to state prisoners on death row). Everyone on this Court understands that declining to exercise jurisdiction now would subject petitioner to the much different, "exceedingly deferential posture of federal habeas review" of a state conviction. *Id.* at 2409 n.3 (per curiam). Although petitioner believes his case meets the AEDPA's exacting requirements, he should not have to prove his claim under the highest standard known in the law when his life is on the line and relief is so clearly warranted. *Cf. Harrington v. Richter*, 562 U.S. 86, 98, 102 (2011) (a decision "'involve[s] an unreasonable application of ... clearly established Federal law'" only if "there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with this Court's precedents") (quoting 28 U.S.C. § 2254(d)(1)).[*]

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[*] One study "examined all Texas death penalty cases from January 1, 2000, through February 25, 2020." David R. Dow & Jeffrey R. Newberry, *Reversal Rates in Capital Cases in Texas, 2000–2020*, 68 UCLA L. Rev. Discourse 2, 6 (2020). "[O]f the 151 completed federal habeas proceedings" filed pursuant to the AEDPA during those two decades, "inmates were ultimately successful in *a single case*." *Id.* at 12 (emphasis added). "In one additional case, the inmate was successful in the Fifth Circuit, but the court of appeals subsequently granted the government's petition for en banc review." *Ibid.* The full Fifth Circuit reversed course, holding that the petitioner "cannot surmount the [AEDPA]"; this Court declined to review that decision. *Lucio v. Lumpkin*, 987 F.3d 451, 456 (5th Cir.) (en banc), *cert. denied*, 142 S. Ct. 404 (2021).

But Congress did not impose the AEDPA's restrictions on *this* Court for cases that come up directly from state postconviction review. Instead, Congress granted this Court "jurisdiction over the final judgments of state postconviction courts" under 28 U.S.C. § 1257(a), clearly contemplating that the Court would "exercise[] that jurisdiction in appropriate circumstances." *Wearry v. Cain*, 577 U.S. 385, 395-96 (2016) (per curiam). In fact, that is why the AEDPA directs all other federal courts to look *only* to this Court's decisions, making federal habeas cases that consider a state court's adjudication of a federal claim less likely to contain significant errors that require this Court's intervention. *See* 28 U.S.C. § 2254(d)(1) (when a state court adjudicates a state prisoner's federal claim on the merits, a federal court may not grant habeas relief unless the adjudication of the claim resulted in a decision "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

Put another way, the reason the harsh AEDPA standard is justified is because it contemplates that defendants will have a chance to seek this Court's review unencumbered by the AEDPA's significant barriers on direct review from state habeas. Congress clearly contemplated that this Court could directly review decisions like that of the CCA with appropriate deference. *See Wearry*, 577 U.S. at 395-96. Thus, there is nothing unusual about this Court exercising jurisdiction to review state collateral proceedings. *See, e.g.*, *ibid.* (reversing state habeas court's decision upholding capital conviction); *Andrus v. Texas*, 140 S. Ct. 1875, 1878 (2020) (per curiam) (same); *Montgomery v. Louisiana*, 577 U.S. 190, 213 (2016) (same). In fact,

this Court has recognized that capital cases present particularly appropriate circumstances for the Court's prompt review: "The alternative to granting review … is forcing [petitioner] to endure yet more time on … death row" due to constitutional error. *Wearry*, 577 U.S. at 396; *see, e.g.*, *Sears v. Upton*, 561 U.S. 945, 956 (2010) (per curiam) (vacating capital sentence upheld in state habeas review and remanding for determination under correct legal standard); *Deck v. Missouri*, 544 U.S. 622, 624 (2005) (reversing state postconviction decision that had upheld capital sentence).

Not long ago, this Court addressed the CCA's errors on direct review from state habeas in *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), another capital habeas case that the CCA got patently wrong. And when the CCA still failed to apply the correct standard on remand from *Moore I*, this Court did not hesitate to grant a petition for the second time in the same case—in this instance, summarily reversing rather than granting plenary review. *Moore II*, 139 S. Ct. at 672. The Chief Justice concurred in the opinion summarily reversing in *Moore II*, noting that although he had dissented from the majority opinion in *Moore I*, "it [wa]s easy to see that the Texas Court of Criminal Appeals misapplied [*Moore I*]" on remand, "repeat[ing] the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance." *Ibid.* (Roberts, C.J., concurring).

This Court has jurisdiction to consider, on direct review of the CCA's adjudication of petitioner's claim, whether Mr. Escobar's capital conviction was secured in violation of Due Process. Given how vastly different the standard of review is under the AEDPA, it would be incredibly unfair to deny the petition and force Mr.

Escobar to pursue federal habeas under 28 U.S.C. § 2254, when all sides and numerous amici curiae agree that relief is so clearly warranted and appropriate in this posture.

* * *

At the end of the day, no one is asking this Court to exonerate Mr. Escobar. Granting the relief he seeks—which the State also asks for, and which three sets of prominent amici curiae urge as well—would not allow him to walk free. It merely gives the State a chance to exercise its prosecutorial discretion, based on its view of the legitimate evidence, to decide whether to retry him. And it ensures that a potentially innocent man is not put to death based on a conviction that was secured using false evidence, in violation of Due Process.

CONCLUSION

For the foregoing reasons, this Court should summarily reverse the judgment below and remand for a new trial or, alternatively, grant the petition and set the case for argument.

Respectfully submitted,

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