No. 23-___

*** CAPITAL CASE ***

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

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTIONS PRESENTED

1. Whether due process of law requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it.

2. Whether the Texas Court of Criminal Appeals erred in holding there was no due process violation because there is "no reasonable likelihood" that the prosecution's use of admittedly false, misleading, and unreliable DNA evidence to secure Petitioner's capital conviction could have affected any juror's judgment.

RELATED PROCEEDINGS

Direct:

Texas v. Escobar, No. D-1-DC-09-301250, District Court of Texas, 167th District, Travis County. Judgment of conviction entered May 25, 2011.

Escobar v. Texas, No. AP-76,751, Court of Criminal Appeals of Texas. Judgment entered November 20, 2013; order denying rehearing entered March 10, 2014.

Escobar v. Texas, No. 13-10544, U.S. Supreme Court. Petition for certiorari denied October 20, 2014.

First state habeas:

Ex parte Escobar, No. D-1-DC-09-301250, District Court of Texas, 167th District, Travis County. Recommendation of denial of relief made December 31, 2014.

Ex parte Escobar, No. WR-81,574-01, Court of Criminal Appeals of Texas. Judgment entered February 24, 2016.

Federal habeas:

Escobar v. Lumpkin, No. 1:22-cv-00102-LY, U.S. District Court for the Western District of Texas, Austin Division. Pending.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Areli Escobar respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals. The first Question Presented here is the same as the second Question Presented in *Glossip v. Oklahoma*, No. 22-7466 (U.S.) (petition granted Jan. 22, 2024), which will be argued next Term. Alternatively, Petitioner respectfully requests that the Petition be held for this Court's resolution of *Glossip*.

RELEVANT OPINIONS

The opinion of the Texas Court of Criminal Appeals (Pet.App.1a-22a) is published at 676 S.W.3d 664. This Court's order granting Petitioner's previous petition for a writ of certiorari, vacating the CCA's prior opinion denying habeas relief, and remanding for further consideration (Pet.App.23a-25a) is published at 143 S. Ct. 557 (mem.). The CCA's vacated opinion (Pet.App.26a-34a) is unpublished but available at 2022 WL 221497. The habeas court's Findings of Fact and Conclusions of Law (Pet.App.35a-217a) is unpublished.

JURISDICTION

The Texas Court of Criminal Appeals' opinion issued on September 27, 2023. Pet.App.22a. On December 20, 2023, Justice Alito extended the time to file this Petition until January 25, 2024. No. 23A566. On January 24, 2024, Justice Alito further extended the time to file this Petition until February 23, 2024. *Ibid.* This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, § 1 provides, in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This Court recently granted certiorari to review: "Whether due process of law requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it. *See Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.)." *See* Order, *Glossip v. Oklahoma*, No. 22-7466 (U.S. Jan. 22, 2024).

Petitioner is the "Escobar" referred to in that Question. After this Court granted his previous petition, vacated the judgment denying habeas relief, and remanded the case "for further consideration in light of the confession of error by Texas in its brief filed on September 28, 2022," Pet.App.23a (GVR), the Texas Court of Criminal Appeals (CCA) again denied the habeas relief that Petitioner, the prosecution, and state habeas court all agree is necessary to prevent a grave miscarriage of justice. And while the first CCA opinion failed to mention the prosecutor's confession of error, the remand opinion is worse—rejecting any deference to the considered judgment of the law enforcement officers who secured the guilty verdict. *See* Pet.App.17a-22a.

While confessions of error do not "relieve this Court of the performance of the judicial function," such confession has particular force when it comes from the office that obtained the conviction. *See Sibron v. New York*, 392 U.S. 40, 58 (1968) (citation omitted); *e.g.*, *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985)

("By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model," because "the prosecutor's role transcends that of an adversary: he 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." (cleaned up)). After all, the injustice of allowing a capital sentence to be carried out where the conviction followed the prosecution's own admitted use of false, misleading, and unreliable DNA evidence and testimony would be nearly unfathomable.

In all events, and deference aside, the CCA's decision is based on mistakes of law that cannot be reconciled with this Court's precedents and mistakes of fact that cannot be reconciled with the record. There is no dispute that the prosecution relied heavily on DNA evidence from a lab so deeply troubled the State forced its closure. And given specific evidence of contamination as to each piece of DNA evidence, and degradation of the samples since Petitioner's trial, the prosecution concedes that all the DNA evidence was, and remains, materially false, misleading, and unreliable. Without that evidence, the prosecution agrees, the State could not have obtained Petitioner's conviction and death sentence.

The CCA's remand opinion cannot be the final word in this case. Petitioner should not be put to death based on a conviction secured by law enforcement officers who no longer defend it.

STATEMENT OF THE CASE

This case involves a conceded due process violation under *Napue v. Illinois*, 360 U.S. 264 (1959), and progeny, relating to the most critical forensic evidence in the case. The case also involves the CCA's extraordinary refusal—*twice*—to give any deference to a confession of error by the very office that secured Petitioner's conviction.

I. Factual Summary

On the morning of May 31, 2009, Bianca Maldonado Hernandez was found dead in the living room of the apartment she shared with her mother and sister. *See* Pet.App.41a-42a. She had been stabbed multiple times and sexually assaulted with an unknown object that was never recovered. Pet.App.42a. The Austin Police Department (APD) collected multiple items of potential evidence from the scene, including bloodstains throughout the room, a bloodstained lotion bottle with a partial print, a shoe-print impression, and bloodstains from the inside of the front door. *Ibid.* There was no sign of forced entry, and there were no eyewitnesses. *See ibid.*

Since there was no sign of forced entry, police initially believed the victim knew her attacker. Petitioner—who did not know the victim but lived in the same massive apartment complex—only became a suspect when police received a tip that Petitioner's then-girlfriend contacted multiple acquaintances, complaining that she called Petitioner the morning of the murder and heard what sounded like consensual sex with another woman. *See* Pet.App.42a-43a, 157a.

Police also learned that Petitioner went to his mother's home the morning of the murder with injuries and a few blood spots on his clothing. Pet.App.43a, 157a. He said his injuries came from being "'jumped'" after leaving his apartment, which is why he went to his mother's place to change, and that he was then attacked again after he changed his clothes and left. *See* Pet.App.157a.[1] An eyewitness "testified that he personally witnessed and broke up" the second fight. *See ibid.* Petitioner's mother testified that she did not notice any blood on his clothing that evening or when she washed them the next day (he had not asked her to), but noticed yellow spots thereafter. *See* Pet.App.157a.

II. Procedural History

A. Petitioner was convicted of capital murder and sentenced to death.

In 2011, Petitioner was tried and convicted by a jury of capital murder and sentenced to death. Pet.App.46a.

1. Because this was seemingly "a stranger-on-stranger offense with no eyewitnesses or other information immediately implicating a suspect," prosecutors "relied heavily on forensic evidence to establish guilt." Pet.App.35a, 37a. Fully half of the State's case in chief was devoted to presenting the testimony of forensic witnesses. *See* Pet.App.43a-45a. Prosecutors told the jury "that the forensic evidence served as pieces of a puzzle that taken together, showed [Petitioner] committed capital murder."

[1] Unless otherwise noted, all citations to the quoted portions of the record are omitted.

Pet.App.45a. The State also "told the jury they were lucky because they got to hear DNA evidence, and that each individual DNA sample was a 'key piece' of the puzzle proving [Petitioner's] culpability." Pet.App.45a-46a. That evidence was largely presented by analysts and experts from within APD's DNA lab, a part of APD's Forensic Science Division. Pet.App.43a-45a, 214a.

DNA evidence. The State presented the following DNA testimony—all of which, the habeas court found, was false, unreliable, and misleading.

The jury was told "the APD DNA lab was an accredited lab" because it had "protocols based on sound scientific principles that had been validated." Pet.App.44a. Dr. Mitchell Holland and Elizabeth Morris, a senior DNA analyst at the lab, testified that the lab was accredited. Pet.App.58a-60a. Being accredited, Dr. Holland testified, meant the lab met "'standards that are developed by the FBI and the forensic science community.'" Pet.App.59a. Ms. Morris testified that accreditation meant "'an outside agency'" had "'look[ed] at all of our procedures and techniques and qualifications of the staff and the laboratory to perform their work,'" and confirmed "'we also follow … the FBI's quality insurance [*sic*] documents for DNA testing laboratories.'" Pet.App.60a.

The jury was then presented with purportedly inculpatory DNA evidence. Ms. Morris told the jury that the victim "could not be excluded as a contributor" to samples collected from the clothing Petitioner's mother washed and the shoes and jeans seized from his home. Pet.App.43a. Marisa Roe, who worked for "a private laboratory, Fairfax Identity Laboratories," was

given the same evidence after it had been collected and examined by APD and "confirmed the APD DNA lab's results for the Polo shoes." Pet.App.44a.

Ms. Roe also testified that the victim "could not be excluded as a contributor to two DNA samples that the APD lab collected from [Petitioner's] shirt and one additional sample that she collected from the shirt" herself. Pet.App.43a-44a. And Ms. Roe testified that the victim "could not be excluded from two mixed-profile DNA samples APD collected from the Mazda Protégé" Petitioner "was seen driving on the day" of the murder. Pet.App.44a-45a.[2]

"APD DNA analyst and serologist Diana Morales" testified that the "APD DNA lab could not identify [Petitioner's] DNA on the samples" she had "collected … from the inside door lock" of the victim's apartment. Pet.App.44a. But Ms. Roe performed further testing at Fairfax, and testified that Petitioner "could not be excluded as a contributor" to one of the samples from the inside doorknob—the only DNA evidence purportedly placing Petitioner inside the crime scene. *See ibid.* No one disputes that this DNA evidence was false, misleading, and unreliable.

Other forensic evidence. The State presented testimony that the "left Polo shoe seized from [Petitioner's] bedroom had a similar tread design to an impression left in blood" on the victim's carpet. Pet.App.43a. The habeas court found that the same

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[2] Mixed-profile DNA or DNA mixture refers to a sample that "contains DNA from several people." *See* Rich Press, *DNA Mixtures: A Forensic Science Explainer*, Nat'l Inst. of Standards & Tech., U.S. Dep't of Commerce (Apr. 3, 2019), https://tinyurl.com/3rpfw8zs.

tread design was shared by "thousands of other shoes in the Austin area." Pet.App.156a. And the State presented testimony that around the time of the murder, Petitioner's "cell phone signal was bouncing off two cell towers on either side" of the large apartment complex where both he and the victim lived. Pet.App.43a.

Lead Detective Scanlon "testified there were no positive results for the latent prints found in [the victim's] apartment." Pet.App.45a. His testimony was based on the work of "APD latent print analyst Sandra Siegel," who "had originally *excluded* [Petitioner] as the source of *all* latent prints found at" the victim's apartment. *Ibid.* (emphasis added). Ms. Siegel's supervisor verified her conclusions. Pet.App.190a.

But at the prosecution's prompting *mid-trial*, Ms. Siegel "decided to re-examine" one "'low quality' latent print found on the lotion bottle next to [the victim's] body." Pet.App.43a, 190a-191a. Ms. Siegel reversed her earlier conclusion, and told the jury the low-quality print and the "middle joint of [Petitioner's] left ring finger" were "a 'match.'" Pet.App.43a. Her about-face, too, was verified by her supervisor. Pet.App.190a-191a.

Circumstantial evidence. The State presented evidence of Petitioner's injuries, the yellow stains on his clothing, and the testimony of Petitioner's ex-girlfriend. Pet.App.157a.

As to the ex-girlfriend's testimony, the habeas court found that "on the day of the crime" she "told at least four different people that she had tried to call [Petitioner] on his cell phone and heard what she thought was him cheating on her with another

woman." Pet.App.157a. "In a series of text messages," she "described to others what sounded like consensual sex, expressing that she was extremely upset and that it was 'over' between her and [Petitioner]." *Ibid.* "That is," the court found, "she was 'a woman scorned' and had motive to fabricate or exaggerate." *Ibid.* "By the time [she] testified at trial two years later, her account of what she heard on that phone call changed dramatically" to Petitioner accidentally answering his ex-girlfriend's call and her hearing "'a woman screaming and screaming and screaming and screaming and just screaming'" on the other end. *Ibid.*

2. In closing arguments, Petitioner "pointed out the inconsistencies between [his ex-girlfriend's] changing versions of what she heard on the phone," "the inconsistent findings in relation to the latent print, and issues with the DNA databases used in this case." Pet.App.46a.

"In rebuttal, the State argued there was no single piece of evidence that could tell the jury what happened, **but each piece of DNA evidence was material to determining [Petitioner's] culpability**." *Ibid.* (emphasis original). Prosecutors "further argued that [Petitioner's] cell phone 'bouncing off two cell towers' on either side" of the "apartment complex was consistent with him being in [the victim's] apartment at the time of her murder, yet another 'piece of the puzzle' proving his culpability." *Ibid.*

The jury found Petitioner guilty of capital murder, then returned answers to capital-sentencing questions that led to his sentence of death. Pet.App.46a. His verdict and sentence were affirmed. Pet.App.47a.

3. Petitioner filed his first state habeas application in May 2013, which the CCA denied. Pet.App.47a.

B. The state habeas court conducted a three-year evidentiary proceeding, concluding that Petitioner is entitled to relief.

After Petitioner's first state habeas application was denied, the APD DNA lab was permanently closed after a state investigation uncovered systematic errors and bias at the lab. Largely based on the revelations from the State's investigation, Petitioner filed the second state habeas application below. *See* Pet.App.49a-50a. At the time, the prosecutor opposed relief, and the court conducted a three-year adversarial proceeding at the CCA's direction.

i. The court found that all the inculpatory DNA evidence presented to the jury was false, misleading, and unreliable.

1. The habeas court began with detailed factual findings related to the APD DNA lab's permanent closure after an audit led "the scientific community, law enforcement, the local courts and the related governmental agencies" to conclude "that the work of that lab was unreliable and the deficiencies were so systemic that it could not be re-constituted." Pet.App.36a, 80a-84a.

The many failures of the APD DNA lab are detailed at pages 10 to 15 of Petitioner's Petition for Certiorari in *Escobar v. Texas*, No. 21-1601 ("*Escobar I*") (U.S. June 24, 2022). In brief, the lab:

- "fail[ed] to adhere to scientifically accepted practices," Pet.App.72a;
- engaged in "suspect and victim-driven bias" that could be seen "in the casework of all APD analysts," Pet.App.73a-74a;
- "likely" caused "carryover contamination" in numerous cases, as well as "serious contamination events" that were likely widespread but evaded detection due to quality control failures and "the lab's 'cavalier attitude about the practice of performing forensic analyses,'" Pet.App.76a-78a;
- employed "DNA analysts" who "lacked understanding about the importance of quality assurance procedures" and leadership who "did not have the scientific and technical knowledge necessary" to lead the lab, Pet.App.79a;
- had an endemic "failure of … checks and balances" that was "highly problematic because criminal justice stakeholders relied on the APD lab's accreditation as an indication that [the] lab's work was sound," Pet.App.80a; and
- employed senior DNA analysts who "displayed" an "inability or unwillingness to adhere to best practices in DNA analysis," Pet.App.83a-84a.

The court further found that the issues identified in the State's audit "may have only been the tip of the iceberg." Pet.App.84a. *See* Petition, *Escobar I*, *supra*, at 14-15. The State stripped the APD DNA lab of its accreditation and ultimately decided that lab personnel could not be retrained. *See* Pet.App.80a-84a. The APD DNA analysts who worked on Petitioner's

case have not been approved for casework or forensic analysis since. Pet.App.84a.

2. The habeas court found that the systemic problems at the lab, which rendered "all DNA evidence connected to APD unreliable," Pet.App.135a-145a, also specifically corrupted each piece of DNA evidence in Petitioner's case, Pet.App.145a-146a.

Contamination errors. The habeas court found an unacceptable risk of "contamination even before the evidence in this case was transferred to the DNA section." Pet.App.101a.

Critical here, the court made detailed cross-contamination findings related to the DNA samples collected from Petitioner's shoes, Pet.App.101a-105a, and Mazda, Pet.App.120a-128a—the only DNA evidence on which the CCA continues to rely to deny relief, *see* Pet.App.21a.

As to Petitioner's shoes, the court found that two events exposed the shoes to cross-contamination. First, lab technicians "improperly shared a drying room," Pet.App.105a, which was a small, linen-closet sized room with open shelves. While evidence from the victim's apartment was being stored in this room, "wet with blood and uncovered"—including "two large sofa cushion covers"—"several items of evidence from [Petitioner's] mother's residence" were stowed "in the same drying room." Pet.App.103a-104a & n.9. There is no evidence that any "measures [were] taken to prevent contamination." Pet.App.105a. Second, an APD employee packaged Petitioner's shoes "at the same time she was in possession" of evidence that had been intermingled with the "bloody evidence from the crime scene." Pet.App.105a & n.10. The court thus

found an unacceptable "risk of cross-contamination between two—and later three—different crime scenes." *Ibid.*

The court also found that "Ms. Morris tested several crime scene samples, including high-quantity DNA swabs," at "the same time as low-quantity DNA samples" from items associated with Petitioner, violating standardized practices "established since at least the mid-1990s" designed to minimize "the risk of carryover contamination." Pet.App.144a. The crime scene samples that she "placed next to" and tested "at the same time" as Petitioner's samples had "over one thousand times more DNA," creating a substantial risk that the high-quantity DNA from the victim's samples would be inadvertently transferred to those associated with Petitioner. Pet.App.144a-145a.

At the Fairfax lab, the court found that "Ms. Roe made a significant error during the processing" of samples "from the Polo shoes, the Nautica shirt, and the front doorknob lock." Pet.App.127a. She "misplaced" these samples while inserting them in the well plate for testing. *Ibid.* "After running the samples, she saw data in the negative control, which should not show any data." Pet.App.128a. "She then confirmed she had misplaced the samples in the tray by pulling the foil"—which had covered the well plate "to prevent contamination"—"out of the trash can" to figure out where she had punctured it. Pet.App.127a-128a. Rather than rerun the test on the entire batch, she "decided to rerun only selected samples," underscoring "the seriousness of her error." *Ibid.* The court found "this incident raise[d] serious concerns that Fairfax's quality assurance and quality control system was

inadequate to effectively address this type of error in [Petitioner's] case." Pet.App.128a.

The court also determined that "Fairfax's DNA testing results, like those generated by the APD DNA lab, have diminished reliability" because "APD's Forensic Science Division initially collected, packaged[,] and stored all of the evidence at issue in this case." Pet.App.145a. "Even the samples that were not initially tested by the APD DNA lab—namely the Mazda car samples—were initially collected, processed, and stored by APD prior to being sent to Fairfax for analysis." Pet.App.146a. The court thus found that "the Mazda samples ... have no guarantee of reliability." *Ibid.*

In addition to the specific cross-contamination exposure in the shared drying room, for example, the court noted that "at least two employees who touched the evidence in this case had serious disciplinary issues related to proper evidence handling." Pet.App.101a. One "former evidence control specialist who handled several key pieces of evidence" had previously been disciplined for "mislabeling or improperly sealing evidence, losing, and even *intentionally damaging* evidence." Pet.App.101a-102a (emphasis added). Another who "collected key pieces of evidence from [Petitioner's] residence," where his shoes were seized, as well as "his mother's residence," also "had a documented pattern of improperly packaging and handling crime scene evidence." Pet.App.102a. She "ultimately resigned from APD after it was discovered that she falsified her qualifications on her employment application and perjured herself in court." Pet.App.102a-103a.

Unscientific testing and analysis. Besides the unacceptable risk of cross-contamination, the habeas court found that the APD DNA lab was using scientifically unsound interpretation protocols in analyzing the DNA samples. Indeed, the State's audit was prompted because recalculations based on updated protocols resulted in "dramatic changes to the statistics for DNA mixtures" in other cases. Pet.App.66a-69a. No one (not even the CCA) disputes that *all* the samples presented as inculpatory to the jury collected from Petitioner's jeans, shirt, and the victim's inside doorknob lock were invalidly interpreted and thus false, unreliable, and misleading. *See* Pet.App.115a-116a, 121a, 129a, 213a.

The outside Fairfax lab, for example, conducted mixed-source DNA analysis of the Mazda samples without "any validation studies." Pet.App.120a. Because Fairfax conducted no validation to determine the appropriate protocols to interpret complex mixed-source samples like those collected from the Mazda, Mitotyping Technologies—which acquired Fairfax after Petitioner's trial—issued an amended report in Petitioner's case "incorporating 'newer guidelines for mixture interpretation and the FBI population database revisions.'" *Ibid.*

Yet the court found that the "Mazda car samples—the only samples that were not previously tested by the APD DNA lab—are now considered inconclusive" and could not be recalculated even with updated protocols. Pet.App.146a; *see* Pet.App.120a-127a

(explaining why).[3] The court thus *rejected* the efforts by Mitotyping and the State's expert Dr. Bruce Budowle to reexamine the Mazda samples.

Instead, the court credited the testimony of Petitioner's competing expert, Dr. Dan Krane, that the Mazda samples ("Item 7" and "Item 8") could not be recalculated and were "uninterpretable" at this point, "especially given the concerns regarding degradation, allelic dropout, allele stacking, saturation, and the error rates associated with underestimating the number of contributors." Pet.App.147a-148a. These problems, the court found, precluded any effort to recalculate the Mazda samples using current methodology.

As for Item 7, Mitotyping itself acknowledged that the sample was "a complex mixture with an unknown number of contributors" and was "degraded." Pet.App.123a. Yet the analyst assessed it using a technique reserved for single-source samples—checking to see if the victim's alleles matched those present on Item 7. *See* Pet.App.123a-124a. But because the alleles in a mixed sample may have come from some combination of other people who, among them, have all the allele types in the suspect or victim's profile, "there is no confidence that the loci identified ... as belonging to a major contributor can actually be associated with a major contributor." *Ibid.* The court thus deemed Item 7 "inconclusive." *Ibid.*

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[3] The forthcoming Brief of The Innocence Network & The Center For Integrity In Forensic Sciences, Inc. as *Amici Curiae* will further explain the science behind why the Mazda samples could not be recalculated.

As to Item 8, even Ms. Roe now attests that the sample had at least three contributors. *See* Pet.App.124a. And Mitotyping's policy was "not to interpret mixtures of three or more people," because the lab could not validate the use of its mixed-source technique on samples known to have more than two. *Ibid.* The court therefore found Item 8 "inconclusive" as well. *Ibid.*

The court rejected the competing testimony of the State's expert Dr. Budowle, who "admitted he did not have a 'good validation study' to support his [recalculation] methods," noting that "Mitotyping's protocols indicate that mixtures of this type should not be interpreted." Pet.App.148a. "In short," the court found "Dr. Budowle's [recalculations] of [the Mazda samples] were not based on any scientifically validated methods but appear to be based solely on his own subjective perceptions about what he believed was most 'plausible.'" *Ibid.*; *see* Pet.App.148a-149a n.21 (finding that Dr. Budowle's testimony would be inadmissible under federal and state evidentiary standards for scientific evidence if the "case were being retried today").

Suspect- and victim-driven bias. The habeas court credited "'strong evidence'" that "Ms. Morris engaged in suspect and victim-driven bias in interpreting the DNA samples in [Petitioner's] case," particularly the samples from Petitioner's shoes, shirt, and jeans. Pet.App.73a-74a. This meant that she calculated the probability of inclusion/exclusion on key samples by working backward from the result she hoped to obtain, using the data from Petitioner's and the victim's profiles in deciding "which loci" to look for in interpreting the samples. Pet.App.73a.

And emails from Cassie Carradine, "who was then the supervisor and Technical Leader of the APD DNA lab," revealed "that APD's testing strategy was influenced by irrelevant case information, including the prosecution's unproven theory of guilt." Pet.App.74a. For example, Ms. Carradine asked the Texas Department of Public Safety (DPS) "to conduct additional testing" after "APD was unable to locate [Petitioner's] DNA on any crime scene evidence," because she believed Petitioner "'gained entry and seriously injured'" a "'teenage girl'"; APD "'really want[ed] to be able to put [Petitioner] at the scene'"; and it "'was really a very brutal murder of a completely innocent victim.'" Pet.App.74a-75a. "Elizabeth Morris," Ms. Carradine advised, "can tell you more if you need more info." Pet.App.75a (brackets omitted). The court found that the "information Ms. Carradine shared with [DPS] is exactly the type of information that can bias examiners." Pet.App.75a-76a.

Bias was not limited to the APD lab. The court found that Ms. Roe, the Fairfax analyst, had also been "exposed to task-irrelevant information prior to conducting her analysis." Pet.App.126a. "Specifically, the DA's Office informed Ms. Roe of the prosecution's unproven theory about the Mazda samples, including that '[Petitioner] drove the vehicle from the crime scene to his friend's house,'" which "had absolutely no relevance to Ms. Roe's analysis and served no purpose but to create a risk of examiner bias." *Ibid.*

ii. The court concluded that the tainted DNA evidence was material to the jury's verdict.

"Based on the foregoing findings of fact," the habeas court concluded that Petitioner had established "a 'reasonable likelihood' that the false DNA testimony affected the judgment of the jury." Pet.App.172a (citation omitted). Thus, the "State's use of unreliable, false, or misleading DNA evidence to secure [Petitioner's] conviction violated" his "rights to due process as guaranteed by the United States and Texas Constitutions," requiring a new trial. *See* Pet.App.172a-173a.

The court found that the tainted DNA evidence was "the linchpin of the prosecution's case at trial." Pet.App.154a. Prosecutors "repeatedly emphasized the importance of the DNA evidence throughout the trial proceedings." *Ibid.* From jury selection, to opening arguments, through the State's closing, prosecutors stressed that the DNA evidence and testimony were "'critical,'" "'key pieces of the evidence' connecting [Petitioner] to the crime," which the jury was "'fortunate'" to see. Pet.App.154a-155a. Prosecutors "specifically emphasized that the samples from the Polo shoes, the doorknob lock and the Mazda were 'critical because they [we]re a strong connection'" between Petitioner and the victim. *Ibid.*

Since "DNA evidence, and scientific evidence in general, has a powerful effect on jurors," the court concluded that "the DNA evidence was likely what tipped the scales in the State's favor." Pet.App.155a. Indeed, "[d]uring an evidentiary hearing on an unrelated issue, the State asked one of the sitting

jurors when he decided that [Petitioner] was guilty." Pet.App.155a-156a. "He answered: '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,'" demonstrating "that the State would not have been able to obtain a conviction without the DNA evidence." Pet.App.156a-158a.

The court did not rely on the juror's testimony, though. Rather, the court found "the remaining evidence relied on by the State was circumstantial and weak and would not have supported a conviction for capital murder." Pet.App.156a. The "partial, low quality latent print found at the crime scene that purportedly 'matched' the joint of [Petitioner's] left ring finger" was "admitted under circumstances suggestive of suspect-driven bias and was expressed in terms that do not comply with current standards." *Ibid.* The "cell-tower evidence was also substantially incomplete and could not be used to reliably place [Petitioner] at the crime scene." *Ibid.* "The only other forensic evidence" was "that one of [Petitioner's] shoes had a similar tread design as an apparent shoe print left on" the victim's carpet, but the court found the same tread was "shared by thousands of other shoes in the Austin area," and "shoe-print evidence, like bitemark testimony, is now considered of questionable validity." *Ibid.*

As to the non-forensic evidence, the court found the "dramatically" "changed" ex-girlfriend's account highly questionable. Pet.App.157a. The court also highlighted exculpatory evidence accounting for Petitioner's injuries and the yellow stains on his clothing. *Ibid.*; *see supra* p.5.

iii. The State agreed that Petitioner is entitled to habeas relief after a comprehensive reexamination.

After the habeas court recommended granting relief, "the District Attorney undertook a comprehensive reexamination of the forensic evidence and claims"—ultimately concluding that it had secured Petitioner's conviction in violation of due process. *See* Brief of Respondent Texas in Support ("Cert. Response"), *Escobar I*, *supra*, at 2 (Sept. 28, 2022).

Thus, when the State submitted its objections to the habeas court's findings and conclusions—which it had only 11 days to prepare—the State reversed its earlier position and did "not object" to the "Court's 'Conclusion and Recommendation'". Pet.App.268-269a (quoting Pet.App.216a-217a). That is, the State agreed that Petitioner should "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." Pet.App.216a-217a (citing *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue*, 360 U.S. at 264; *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009)).

C. The CCA denied relief in an opinion this Court GVR'ed.

1. Although the CCA accepted that all the DNA evidence and testimony, as prosecutors presented it to the jury, was false, misleading, and unreliable, the CCA nonetheless held that the evidence was *immaterial* to the jury's verdict.

The court relied heavily on its view that the "recalculated results" from "Dr. Bruce Budowle and Mitotyping Technologies .... continue to show that [the victim's] DNA was at least on [Petitioner's] shoes and in the Mazda." Pet.App.31a-32a. The CCA failed to address the habeas court's reasons for *rejecting* the State's attempts to recalculate the Mazda samples—crediting Petitioner's competing expert testimony—or the court's finding that Petitioner's shoes had been exposed to items intermingled with others wet with the victim's blood. *Supra* pp.12-18. *Cf.* Pet.App.32a (CCA noting that it reviews such findings "under a deferential standard").

Instead, the CCA mistakenly believed the habeas court found only "*general* deficiencies discovered in the [state] audit," not anything that "specifically affected the DNA results in [this] particular case." Pet.App.31a (emphasis added). The CCA also relied on the ex-girlfriend's "testimony; eyewitness accounts of [Petitioner's] statements and appearance after the offense; and cell phone, fingerprint, and shoe print evidence" that the CCA viewed as "linking [him] to the murder." Pet.App.32a-33a. The CCA neglected to address the habeas court's findings about the failings of that evidence too. *See supra* p.20.

2. After the CCA denied relief, the State became "concerned that it did not clearly illuminate its changed position from initially opposing relief to ultimately that of supporting relief." Pet.App.262a. "The possibility that the State failed to have clearly indicated its change in position" came "to its attention because [the CCA] did not acknowledge in its Order, as is usual practice, that the State had conceded that [Petitioner] was entitled to relief." *Ibid.* & n.3

(collecting cases). Again, prosecutors had only 11 days to prepare their objections, in which they first conceded error. Pet.App.268a.

Thus, the State moved for the CCA "to file and set the case" and "order briefing," so the State could fully explain its confession of error. Pet.App.263a. The State had "much to offer [the CCA] in terms of an analysis of the facts, the law, and the failures in the forensic science that supported the conviction," which it was unable to do in its objections given the short timeframe and nature of the filing, "but procedurally could only provide a brief if [the CCA] request[ed] it." *See ibid.*

The CCA denied the motion without explanation. Pet.App.258a.

3. Petitioner then filed the petition in *Escobar I*, *supra*.

The State of Texas, acting through the office that secured Petitioner's conviction, took the extraordinary step of acquiescing and confessing error. *See* Cert. Response, *Escobar I*, *supra*. Because the CCA had denied the State's motion to set the case and order briefing, this was the State's first opportunity to explain why it could no longer defend the guilty verdict.

The State attributed its reversal to a "comprehensive reexamination of the forensic evidence and claims raised." Cert. Response, *Escobar I*, *supra*, at 2. The State explained that multiple caseworkers with known records of contamination and disciplinary actions performed serology and forensic analysis in Petitioner's case. *Id.* at 13-15. The State also expressed specific concern that Petitioner's shoes

were exposed to evidence that had been "intermingled" with "items collected from the crime scene ('some of it wet with blood and uncovered')." *Id.* at 15 (citing Pet.App.101a-108a). And without the DNA evidence, all of which the State agreed was false, misleading, and unreliable, the State confessed that the other evidence was insufficient to link Petitioner to the murder. *See id.* at 16-18, 28-29.

3. On January 9, 2023, this Court granted the petition, vacated the judgment, and remanded the case "for further consideration in light of the confession of error by Texas in its brief filed on September 28, 2022." Pet.App.23a.

D. The CCA reaffirmed its denial of relief.

Shortly after this Court's mandate issued, the CCA notified the parties on March 1, 2023, that the case would be submitted for consideration on March 15, just two weeks later. *See* Pet.App.256a-257a. The CCA did not order or request briefing and preemptively denied oral argument. Pet.App.257a.

1. On March 14—the day before the case was set for submission—the parties moved for the CCA to stay proceedings, postpone submission, and remand the case to the habeas court for 90 days under Texas Rule of Appellate Procedure 73.7 so the parties could develop the record of a compelling alternative suspect. Pet.App.247a, 252a-253a, 255a.

Separately, the State moved to file additional briefing to explain its confession of error, because its cert.-stage brief was necessarily "quite succinct due to the nature of the filing." Pet.App.226a. The State explained that its Cert. Response in *Escobar I* did "not

detail the State's analysis of each item of forensic evidence relied upon by the State at [Petitioner's] trial or explore in depth the materiality of the State's undermined DNA evidence relative to all the other evidence at trial." *Ibid.* Given this Court's GVR, the State sought "an opportunity to further explain its position." *Ibid.*

Remarkably, the CCA denied the State's motion to submit additional briefing on April 5, 2023. Pet.App.218a. The same day, the CCA "dismissed" the parties' motion to stay and remand the case under Rule 73.7, instead "hold[ing]" the case "on our own motion for thirty days." Pet.App.244a. Then, rather than allow *both* parties to supplement the record, the CCA only ordered that *Petitioner* could "supplement the record in the trial court with evidentiary materials." *Ibid.*

The parties moved for rehearing of the stay and remand motion. They explained that Petitioner, "*joined by the State*," had "sought remand to present evidence relevant to a related, pertinent question before this Court: why the State of Texas, consistent with its duty to see that justice be done, can no longer stand behind the conviction." Pet.App.234a-235a (emphasis added). They further explained that "various items of evidence not yet in the record, when considered together, suggest the guilt of a third party." Pet.App.239a. "But without jurisdiction and authority," they cautioned, "the trial court cannot order the transmission of evidence, facilitate testing, conduct evidentiary development of third-party guilt, or make findings of fact and conclusions of law that organize and interpret this evidence." Pet.App.239a-240a. The "30-day 'hold,'" the parties advised, would

"not allow sufficient time for necessary evidentiary development." Pet.App.240a.

The CCA denied rehearing. Pet.App.229a.

2. The CCA issued its opinion reaffirming its denial of relief on September 27, 2023.

The CCA did not acknowledge that it had denied the State's motion to submit additional briefing on remand. *See* Pet.App.218a. Nor did the court acknowledge that it had rejected the State's efforts to supplement the record and present argument related to new evidence. *See* Pet.App.229a, 244a. Yet the CCA faulted the State for offering "nothing in the way of additional analysis, authorities, or evidence to support granting relief." Pet.App.18a.

The CCA thus accorded *zero* deference to the prosecutor's confession of error. Instead, the CCA advised that it was "aware of the State's position when the [initial] order was handed down," and that it "would perhaps have been better had [the court] noted the specifics of the State's position in [that] unpublished order." Pet.App.17a. But the CCA suggested that it declined to note the State's abandonment—and denied the State's request to order briefing thereafter—because "the logical conclusion to draw [wa]s that the State had nothing to add to the convicting court's findings." Pet.App.17a-18a. And because the habeas court's findings were previously before the CCA, the court reasoned that the State's confession of error before this Court in *Escobar I* "offered nothing that was not already before [the CCA] when [it] denied relief" the first time. Pet.App.19a.

The CCA then reaffirmed its original analysis in a 5-1-3 decision—this time over the dissents of Judges Newell, Walker, and Hervey. Pet.App.1a, 17a-22a.

The court did not dispute that the DNA evidence and testimony presented to the jury was false, misleading, and unreliable. Instead, it continued to focus on just the DNA samples collected from Petitioner's shoes and Mazda. The CCA held that "correctly revised estimates" by Dr. Budowle and Mitotyping "would still inculpate" Petitioner, "as we explained in our prior order." *See* Pet.App.21a. For the second time, the court did not address the habeas court's findings that (a) Petitioner's shoes were exposed to cross-contamination from items still wet with the victim's blood, and (b) the Mazda samples were too degraded or complex to reexamine.

Perhaps worse, the CCA once again failed to address the State's concession that the other evidence prosecutors presented at trial could not support Petitioner's conviction. Instead, the CCA doubled down: "*Especially in light* of [the] other evidence," the CCA concluded, "the somewhat weakened inculpatory inference from the DNA evidence did not create a reasonable likelihood of a different outcome." Pet.App.21a (emphasis added).

This Petition follows.

REASONS TO GRANT THE PETITION

I. This Case Presents The Same Question As *Glossip v. Oklahoma*.

The first Question Presented here is the same as the second Question in *Glossip v. Oklahoma*, on which this Court recently granted certiorari: "Whether due

process of law requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it." No. 22-7466 (U.S.). The Question expressly cites *Escobar I*, which the parties repeatedly referenced in their cert.-stage briefing. *See* Petition for Certiorari, *Glossip v. Oklahoma*, *supra*, at i, 2-3, 20-21 (May 4, 2023); Brief of Respondent, *Glossip v. Oklahoma*, *supra*, at 17-18, 23 (July 5, 2023). And the Oklahoma Court of Criminal Appeals distinguished *Escobar I* (erroneously) in the decision this Court granted certiorari to review. Pet.App.15a n.8, *Glossip v. Oklahoma*, *supra* (May 4, 2023).

There are three reasons this might be a companion case.

First, while Justice Gorsuch has recused himself in *Glossip*, nothing suggests that any justice will be recused here. No justice noted his or her recusal when the Court issued the GVR in *Escobar I*. *See* Pet.App.23a-25a. Taking this case as a companion will give the full Court the opportunity to weigh in on the important Question Presented in both cases. *See, e.g.*, Order, *Relentless, Inc. v. Dep't of Com.*, No. 22-1219 (U.S. Oct. 13, 2023); Order, *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. May 1, 2023).

Second, the Court may not reach the second Question in *Glossip* for two reasons. The Court could resolve *Glossip* on the first Question Presented and decline to reach the second. Or the Court might resolve *Glossip* on procedural grounds that preclude review of the merits. "In addition to the questions presented," the Court directed the parties "to brief and argue" whether there is "an adequate and independent state-law ground for the judgment." Order, *Glossip v.*

Oklahoma, *supra* (Jan. 22, 2024). That issue is not present here.

Third, in this case, there are extensive fact findings that support vacating the conviction, which the CCA reviews "under a deferential standard." Pet.App.32a.

The habeas court conducted an extensive, three-year adversarial proceeding that ran from October 19, 2017, until closing arguments on December 3, 2020. Pet.App.50a-54a. Those proceedings included many hearings and extensive testimony from witnesses on both sides. *See* Pet.App.52a-53a (evidentiary hearings held September 6, 2018, March 18-19, 2019, June 18-19, 2019, July 20-21, 2020, and September 28-29, 2020, and discovery-related dispute heard August 28, 2020). After considering "all exhibits the parties submitted between May 30, 2018 and December 3, 2020," and "all testimonial evidence received during the live evidentiary hearings" and making credibility determinations, Pet.App.54a, the Court issued its extensive findings and conclusions that span 182 pages of the Appendix (35a-217a).

The habeas court's exhaustive findings and conclusions are what prompted the prosecution to conduct the comprehensive reexamination that ultimately led to the State's change in position. Thus, the office closest to both the trial and the adversarial habeas proceedings is the same office that confessed error here. Such confession should have particular force under the Court's precedents.

This Court has explained that the "*prosecutor's* role" is the basis of "the *Brady* rule," which "represents a limited departure from a pure adversary model" and

"require[es] the prosecutor to assist the defense in making its case." *Bagley*, 473 U.S. at 675 n.6 (emphasis added). The role of the prosecutor "transcends that of an adversary." *Ibid.* The 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." *Ibid.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (cleaned up); *e.g.*, *Sibron*, 392 U.S. at 58 ("confession of error by the District Attorney" is "entitled to and given great weight"). "Prosecutors have a special duty to seek justice, not merely to convict." *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) (quotation marks omitted).

II. The CCA Failed To Follow The GVR Order.

Review is warranted because the CCA rebuffed the State's confession of error, despite this Court's clear command that the court consider the confession on remand.

The CCA began by acknowledging that before *Escobar I*, *supra*, it had *denied* the State's motion to order briefing on why it had abandoned its objections to habeas relief. Pet.App.18a. It then suggested that the State could have submitted additional briefing after this Court's GVR during the period the CCA was "holding the case for thirty days," *ibid.*, without acknowledging that it had expressly *denied* the State's motion to submit supplemental briefing *the same day* it ordered that it was holding the case on its "own motion," Pet.App.218a, 244a. Despite having expressly denied the State any opportunity to ever brief its confession before the CCA at any stage, the CCA

faulted the State for "offer[ing] nothing in the way of additional analysis" or "authorities." Pet.App.18a.

The CCA also faulted the State for offering "nothing in the way of additional ... evidence to support granting relief." Pet.App.18a. Again, though, the CCA did not acknowledge that it had dismissed the parties' motion to do so. Pet.App.242a-244a. Instead, the CCA permitted *only Petitioner* to "supplement the record in the trial court with evidentiary materials." Pet.App.244a.

The parties moved for rehearing, explaining that Petitioner, "*joined by the State*," had "sought remand to present evidence relevant to ... why the State of Texas, consistent with its duty to see that justice be done, can no longer stand behind the conviction." Pet.App.234a-235a (emphasis added). Crucially, other "various items of evidence not yet in the record, when considered together, suggest the guilt of a third party." Pet.App.239a. Moreover, the 30-day hold was not "sufficient time for necessary evidentiary development." Pet.App.240a.

It is no surprise that the CCA did not appreciate the relevance of the few pieces of evidence Petitioner was able to submit, since the court rejected the State's attempts to explain itself at every turn. *See* Pet.App.14a-17a (failing to understand "evidentiary value" of evidence related to victim's cell phone, paternity of victim's child, or law-enforcement records relating to prosecution of third party).[4] The CCA

[4] The court also faulted petitioner for failing to sufficiently explain the relevance of the new evidence, despite having rejected the procedural mechanism and any realistic opportunity to do so. *See* Pet.App.12a-17a.

instead speculated about the materials, which were not introduced at trial or reviewed by the habeas judge, while refusing to let the parties develop this newly discovered and newly disclosed evidence.

The CCA then explained why it would not give any weight even to the State's confession before this Court. Because the cert.-stage confession was based on "the convicting court's findings," with which the State agreed, the CCA held that the "State offered nothing that was not already before us when we denied relief." Pet.App.19a. In other words, the CCA claimed it did not need to give any consideration to the fact that the prosecutor confessed error because its reasons for doing so "appear[] to derive directly from the convicting court's findings." *Ibid.*

Even then, the CCA failed to fully consider the State's cert.-stage confession. The State explained why none of the non-DNA evidence could support a conviction. Cert. Response, *Escobar I*, *supra*, at 16-18, 28-29. But the CCA refused to address what the State "sees as potential shortcomings in the other evidence," because "those matters were before [the CCA] in the habeas court's findings." Pet.App.21a. "Especially in light of" the "other evidence," the court concluded there was no "reasonable likelihood of a different outcome." Pet.App.21a.

III. The Tainted DNA Evidence Was Material To The Jury's Verdict, So Its Use At Trial Violated Petitioner's Right To Due Process.

Perhaps because it never let the State fully brief or argue its confession of error, the CCA committed the same legal and factual mistakes it committed in its vacated order.

The CCA agreed that the only question in the case is whether "there is any reasonable likelihood" that the false evidence "could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *see* Pet.App.21a. So too, the CCA understood that a "State's confession of error in a criminal case is important and carries great weight." Pet.App.17a (quotation marks omitted). The CCA did not doubt that those with the most direct and intensive exposure to the facts—the prosecution, habeas court, Petitioner, and even a juror—all agreed that the DNA evidence was potentially outcome determinative. Yet the CCA found no due process violation because, in its view, there was "no reasonable likelihood that the outcome would have changed" without the faulty DNA evidence. Pet.App.2a, 21a.

The linchpin of the CCA's decision was that the samples from Petitioner's shoes and Mazda still connected him to the murder. If "the false evidence had been replaced with accurate evidence" as calculated by Dr. Budowle and Mitotyping, the CCA reasoned, then "there is no reasonable likelihood that the outcome would have changed." *See* Pet.App.2a, 21a, 31a.

First, though, the question is not whether a hypothetical conviction could have been obtained using untainted evidence the jury never saw. Rather, the materiality standard asks "if there is any reasonable likelihood that the *false [evidence]*" that was in fact presented at trial "could have affected the judgment of the jury." *See Agurs*, 427 U.S. at 103 (emphasis added). If the prosecution relies on perjured testimony to obtain a conviction, for example, "the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond

a reasonable doubt." *Bagley*, 473 U.S. at 680. The question is not whether the outcome would have been the same if the perjured testimony were replaced with an honest accounting. *See ibid.*

The CCA did not doubt the habeas court's findings that all the DNA evidence and testimony, *as it was presented to the jury*, was false, misleading, and unreliable. The CCA's materiality analysis was thus legally flawed because it looked to other evidence that did not yet even exist, which the court imagined *could* have been presented in place of the corrupted trial evidence.

Second, the CCA was wrong on the record. As it failed to do in its vacated order, the remand opinion failed to explain why the habeas court was clearly erroneous in finding that (a) the shoes were exposed to items that had been intermingled with evidence wet with the victim's blood, and (b) the Mazda samples are now uninterpretable and inconclusive. *Supra* pp.12-18. The CCA made no effort to address these threshold obstacles.

The State conceded "a significant risk of cross-contamination" for Petitioner's shoes. Cert. Response, *Escobar I*, *supra*, at 15. As the State put it, Petitioner's shoes were exposed to evidence "intermingled" with "items collected from the crime scene ('some of it wet with blood and uncovered')." *Ibid.* But the CCA misunderstood the record as "establish[ing], at most, a risk of contamination based on prior incidents and prevalent practices in the lab." Pet.App.20a.

The court believed the only findings of "risk of contamination in [Petitioner's] case" were at paragraphs "116, 129, [and] 199-207" of the habeas

court's findings. Pet.App.19a. But as earlier described, the court's findings that the shoes were subject to an unacceptable, specific risk of cross-contamination were at paragraphs 120 to 124 (the intermingling), Pet.App.103a-105a, and 172 to 175 (Fairfax's mishandling of "foil to prevent contamination" while testing samples from victim's inside doorknob, Petitioner's shoes, and Petitioner's shirt all at once), Pet.App.127a-128a. Those findings are addressed nowhere in the CCA's remand opinion.

As for the Mazda samples, the habeas court explained—and the State agrees—that they were either too degraded at this point to determine the number of contributors to the mixtures, or had too many contributors to recalculate using Dr. Budowle's or Mitotyping's methods. Pet.App.120a-124a, 146a-148a. Knowing the number of contributors is essential to assessing whether new methods are appropriate to recalculate the probability that any individual's DNA is present in a mixed sample. *See* Pet.App.109a-115a. But "'it is often impossible to tell with certainty which alleles are present in the mixture or how many separate individuals contributed to the mixture, let alone accurately to infer the DNA profile of each individual.'" Pet.App.115a (brackets removed).

This is why the habeas court found that the Mazda samples were inconclusive *despite* the efforts by Mitotyping and Dr. Budowle to reexamine them. Pet.App.113a-115a; *see* Pet.App.123a (crediting Dr. Krane's expert testimony "that because Item 7 is degraded, has indications of missing data, and has an unknown number of contributors, it is impossible to determine with confidence what the data actually means"); Pet.App.124a (same as to Item 8).

Third, even if the CCA were correct that the legal question is whether the jury would have convicted based on nonexistent, untainted evidence the jury never saw, and even if the CCA were factually correct that the samples from the shoes and the Mazda are still inculpatory, its conclusion would still be wrong.

The State "told the jury … that each individual DNA sample was a 'key piece' of the puzzle proving [Petitioner's] culpability." Pet.App.45a-46a. The CCA does not dispute that *most* of the inculpatory DNA evidence remains false and misleading, including:

- Ms. Morris's testimony that the victim could not be excluded as a contributor to DNA samples collected from Petitioner's jeans and shirt;
- Ms. Roe's testimony confirming that the victim could not be excluded as a contributor to DNA samples collected from Petitioner's shirt;
- Ms. Roe's testimony that Petitioner could not be excluded as a contributor to one DNA sample APD collected from the interior doorknob of the victim's apartment—false DNA evidence placing Petitioner inside the crime scene; and
- Expert testimony that the APD DNA lab was an accredited lab with protocols based on sound scientific principles that had been validated.

See Pet.App.43a-45a. So too, the CCA does not dispute that the evidence and testimony of the shoe and Mazda samples, *as it was presented at trial*, was false, misleading, and unreliable. Had the defense been able to impeach this evidence in front of the jury, at least one juror might have changed her mind, even if the State had somehow attempted to rehabilitate the

Mazda and shoes samples using recalculations based on science that did not exist. *See Bagley*, 473 U.S. at 680, 685 (materiality standard requires *prosecutor's error* to be "harmless beyond a reasonable doubt").

And despite two opportunities to do so, the CCA did not address the State's concession that Petitioner's ex-girlfriend's recollection of what she heard when she called him around the time of the murder had "changed dramatically" from her contemporaneous accounts. Cert. Response, *Escobar I*, *supra*, at 29. Nor the State's concession that "it was not possible to specifically pinpoint the location of Petitioner's cell phone in relation to the cell towers." *Id.* at 17, 29. Nor the State's concession that the latent-print examiner's about-face, "following a message from a prosecutor about the print" mid-trial, indicates "cognitive bias." *Id.* at 17, 28-29. Nor the State's concession that her testimony purporting to "'match'" Petitioner's middle-left-ring-finger joint to a "low quality" print from inside the crime scene violates "contemporary scientific standards governing fingerprint testimony." *Id.* at 16, 28-29. Nor the State's concession that "the State's expert did not measure" the "shoe print found at the crime scene," "could not determine the size of the shoe, did not know which types of shoes had this tread pattern"—a tread pattern shared by "thousands of similar shoes in the Austin area"—and "could not determine what brand of shoe" made the imprint. *Id.* at 17-18, 29.

The Petition should be granted and the CCA reversed.

CONCLUSION

The Petition should be granted. In the alternative, the Petition should be held for *Glossip v. Oklahoma*.

Respectfully submitted,

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