No. _____

IN THE
Supreme Court of the United States

BRIAN EDWARD DAVIS,
Petitioner,
v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

****CAPITAL CASE****

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CAPITAL CASE

I. QUESTIONS PRESENTED

This petition is brought by a capital defendant, Brian Edward Davis, who was convicted for a murder in 1991 based almost entirely on a confession obtained from Davis, after Davis had initially asserted his right to not incriminate himself and to the assistance of counsel during custodial questioning. The prosecutor stated in closing arguments that Davis would not have even been charged if he had not confessed, which Davis initially refused to do. Davis only confessed after his wife, Tina McDonald, was threatened with a death sentence by investigating police after Davis had asserted his rights to silence and to counsel during custodial questioning. Police had no probable cause to charge Davis' wife McDonald for the murder when a detective threatened her with a death sentence, and never charged her for the capital murder. A jailer who testified his job included cooperating with investigating police officers to develop evidence against jailed inmates ensured that wife McDonald, who was jailed in the women's section of the same jail where Davis and McDonald were both detained on an unrelated offense, was able to communicate the death threats received by McDonald to her husband Davis. Seeking to protect his wife from a capital prosecution and death sentence for which police never developed enough evidence to charge her, Davis sought to protect his wife's life by waiving his previously-asserted Fifth and Fourteenth Amendment rights to silence and to assistance of counsel during custodial interrogation, and confessing to the murder in exchange for immunity sought for his wife from the capital prosecution. Police had told his wife McDonald that all the evidence pointed to his wife and none to Davis, even though in

fact police had not developed sufficient evidence to charge wife McDonald with murder at the time they threatened her with a death sentence, and never developed such evidence sufficient to charge McDonald.

The questions presented are:

1. Whether Mr. Davis's confession was involuntary and coerced under the Fifth and Fourteenth Amendments, and his will overborne, where police threats to impose a death sentence on his wife coerced Davis to waive his previously asserted rights to silence and to the assistance of counsel during custodial interrogation, and to confess to the murder in an attempt to gain immunity for his wife—which claim both State and federal courts denied contrary to this Court's clearly established confession voluntariness precedent in *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) and *Lynumn v. State of Illinois*, 372 U.S. 528, 534 (1963).

2. Whether materially inaccurate DNA evidence presented rendered Mr. Davis' 2011 capital sentencing retrial unconstitutional under the Eighth Amendment.

II. RELATED PROCEEDINGS

As the federal district court noted in its § 2254 habeas decision[1], "Davis's case presents a lengthy, and intricate, procedural history. Since Davis's conviction, he has initiated extensive legal proceedings. Davis has brought his case to the Texas Court of Criminal Appeals twice in direct appeal proceedings. Davis has led nine state habeas actions, some of which resulted in a merits review and others which the state courts dismissed as an abuse of Texas Court of Criminal Appeals." These include:

> *Davis v. State*, No. AP-71,513, 961 S.W.2d 156 (Tex. Crim. App. 1998) (Tex. Crim. App. 1998) (affirming Petitioner's sentence on direct review).
>
> *Ex parte Davis* No. WR-40,339-01 (Tex. Crim. App. Mar. 10, 1999) (unpublished) (denying Petitioner's initial state post-conviction writ of habeas corpus).
>
> *Ex parte Davis*, No. AP-76,263, 2009 WL 3839065 (Nov. 18, 2009) (unpublished) (granting Petitioner's sixth successor state post-conviction writ of habeas corpus on the *Penry* claim and ordering a new trial only on punishment).
>
> *Davis v. State*, No. AP-76,521, 2013 WL 5773353 (Tex. Crim. App. Oct. 23, 2013) (unpublished) (affirming Davis's second death sentence).
>
> *Ex parte Davis*, No. WR 40,339-09, 2017 WL 6031852, at *2 (Tex.

[1] *Davis v. Lumpkin*, 4:16-cv-01867, Pet. App. at 8a, D.E. 99, at 8 (S.D.Tex. Sept. 4, 2024) (ROA.2410). "ROA" is the Fifth Circuit Electronic Record on Appeal, consisting of 87 volumes and 27,220 pages of the record on appeal since Davis' prosecution commencing in 1991, over 34 years ago.

Crim. App. Dec. 6, 2017) (dismissing four of Davis's claims but remanding his *Atkins* claim for further proceedings.)

Ex parte Davis, No. WR- 40,339-09, 2020 WL 1557291 (Tex. Crim. App. Apr. 1, 2020) (unpublished) (denying Petitioner's ninth successor state post-conviction writ of habeas corpus).

U.S. District Court for the Southern District of Texas:

Davis v. Lumpkin, No. H-16-1867 (S.D. Tex. Sept. 4, 2024) (unpublished) (denying Petitioner's federal post-conviction writ of habeas corpus and certificate of appealability).

United States Fifth Circuit Court of Appeals:

Davis v. Guerrero, No. 24-70006 (unpublished) (Sept. 10, 2025) (denying certificate of appealability).

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CAPITAL CASE

PETITION FOR A WRIT OF CERTIORARI

Brian Edward Davis respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals and to grant a certificate of appealability.

III. OPINIONS BELOW

The TCCA opinion affirming Mr. Davis's conviction and death sentence on direct review, is available at *Davis v. State*, No. AP-71,513, 961 S.W.2d 156 (Tex. Crim. App. 1998) (Tex. Crim. App. 1998). The TCCA opinion denying Petitioner's initial state post-conviction writ of habeas corpus is unpublished. *Ex parte Davis* No. WR-40,339-01 (Tex. Crim. App. Mar. 10, 1999). The TCCA opinion granting Petitioner's sixth successor state post-conviction writ of habeas corpus on the *Penry* claim and ordering a new trial only on punishment is unpublished and available at *Ex parte Davis*, No. AP-76,263, 2009 WL 3839065 (Nov. 18, 2009). The TCCA opinion affirming Davis's second death sentence is unpublished and available at *Davis v. State*, No. AP-76,521, 2013 WL 5773353 (Tex. Crim. App. Oct. 23, 2013) (unpublished). The TCCA opinion dismissing four of Davis's successor petition claims but remanding his *Atkins* claim for further proceedings is unpublished and available at *Ex parte Davis*, No. WR 40,339-09, 2017 WL 6031852, at *2 (Tex. Crim. App. Dec. 6, 2017). The TCCA opinion denying Petitioner's ninth successor state post-conviction writ of habeas corpus is unpublished but available at *Ex parte Davis*, No. WR- 40,339-09, 2020 WL 1557291 (Tex. Crim. App. Apr. 1, 2020). The Memorandum Opinion and

Order denying the federal habeas corpus writ and certificate of appealability, Pet. App. at 1a–129a, is unpublished. *Davis v. Lumpkin,* No. H-16-1867, D.E. 99 (S.D. Tex. Sept. 4, 2024). The Fifth Circuit order denying certificate of appealability, Pet. App. at 130a, is unpublished. *Davis v. Guerrero*, No. 24-70006 (5th Cir. Aug. 20, 2025).

IV. JURISDICTION

The Fifth Circuit Court of Appeals entered judgment against Mr. Davis on September 10, 2025. Pet. App. at 130a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

V. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be...compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VI. STATEMENT OF THE CASE

I. Introduction

These matters warrant full and thorough debate by reasoned jurists, and a COA should issue after the grant of *certiorari*.

A. Factual Background

Mr. Davis was convicted of capital murder on June 11, 1992, and sentenced to death on June 16, 1992, in Harris County District Court. ROA.2620, 1992 Trial 1 CR 256, 257.[2] After extensive post-trial proceedings in both state and federal court, the Texas Court of Criminal Appeals set aside Davis's death sentence in 2009. In 2011, the State of Texas held a punishment-only retrial. Davis was again sentenced to death on March 9, 2011.

The case-in-chief against Davis was for the murder of Michael Foster, an intellectually disabled man who lived by himself. Foster's body was found on Tuesday, August 13, 1991 around noon, stabbed to death, and importantly, in a state of very little decomposition. The testimony of Medical Examiner Dr. Eduardo Bellas estimated that Foster had died around 1AM on Tuesday August 13, approximately twelve hours before his body was found by police. Lead homicide Detective Smith, who examined Foster's body when found around noon August 13, 1991, also testified that he too estimated Foster's time of death as occurring around 1AM Tuesday morning, approximately twelve hours before Foster's body was found around noon,

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[2] Citations in this application will be to the Fifth Circuit Electronic Record on Appeal ("ROA") where available. The state trial court record in this case, includes the Clerk's Record [cited herein as "CR"], and the Reporters Record [cited herein as "__ RR __" where the volume precedes and the page number follows].

agreeing with the ME Bellas' estimated time of death.

Detective Smith ultimately focused on Tina McDonald, Davis' then-wife of months, as the likely murderer, due to the highly idiosyncratic and unusual Skinhead writings found on Foster's wall (the initials "NSSH" and a swastika); learning that Tina McDonald was a member of the obscure Houston Skinhead group unknown to the general public, the NSSH, or National Socialist Skinheads of Houston; and finally, that Tina McDonald and Brian Davis were observed by one witness, bar owner Ralph Ulrich, leaving with Foster from Ulrich's bar on either Friday night, August 9, 1991, or Saturday night, August 10, 1991, the weekend before Foster's estimated time of death of early Tuesday morning. Ulrich initially could not recall to police what day he had last seen Foster leave his bar. Ulrich also initially stated to police he could not positively identify Davis in a photo lineup, but remembered a tattoo, and identified Davis' tattoo in a suggestive single-photo lineup of the tattoo.

Davis ultimately gave a recorded confession, after several months of significant pressure including Det. Smith threatening his wife with indictment for capital murder and lethal injection, and claimed that he and McDonald had indeed left Ulrich's bar – the Pik-N-Pak -- late Friday night/early Saturday morning, and Davis claimed that he killed Foster after the bar closed at 2AM early Saturday. Lead detective Smith testified he confirmed through two witnesses, Jarred and Chiarra Dennis, information that corroborated Davis' confession in one key respect, namely, that the Dennis' had both been with Davis and McDonald at the Pik-n-Pak bar on Friday night, as Davis had told the police.

No witness, fingerprint or DNA evidence linked Davis to the crime scene in Foster's apartment. Davis was in fact excluded from all fingerprint, hair comparison, and DNA evidence tested from the crime scene. Much of the evidence, in fact, was tied to Ms. McDonald, as well as individuals associated with the NSSH Skinhead group of Houston during this time period. At the time the police threats of imposing a death sentence against his wife McDonald were made, and a jailer arranged communications between husband and wife so Davis was coerced by these threats into confessing in order to protect the life of his wife, in fact police did not yet have sufficient probable cause to charge McDonald, and Det. Smith admitted this in his sworn testimony.

Lead detective Smith testified at the 1992 trial that all the evidence collected, though insufficient to charge McDonald, pointed towards Tina McDonald and not to Davis (before Davis' confession). Davis and McDonald had married months earlier before their arrest in August 1991, and McDonald had an infant daughter. Davis and McDonald were incarcerated for another stabbing incident, of Steven Sherman, when police focused on Tina McDonald as their prime suspect in the Foster murder. Jail officials allowed Davis and McDonald to communicate by phone at least four times while both were incarcerated, and lead detective Smith repeatedly told McDonald that all evidence pointed to her guilt for the Foster murder and none to Davis. Attempting to shield his young wife with an infant daughter from the threat made by police of a death sentence, and after months of communications allowed by jailer Strickland from his wife McDonald allowing Davis to learn details from the crime

scene, Davis attempted to obtain immunity for his wife by confessing to the Foster murder. Davis was 23 years old at the time of his confession, and at age fifteen had tested as having a full-scale IQ of 74.

While the State initially claimed there was no immunity agreement with McDonald, Davis nonetheless confessed to the Foster murder, getting many crime scene details wrong, and giving the time of death in his confession in a manner wholly inconsistent with the official consensus as to Foster's time of death. McDonald ultimately received immunity for the Foster murder in a 1992 plea deal for the Sherman stabbing for which she was jailed along with Davis, after Davis received his death sentence, and was never charged in the Foster murder. Many years later Detective Smith wrote the Texas Parole Board requesting denial of parole for Tina McDonald, stating she was guilty of the Foster murder but had been granted immunity in a quid pro quo for getting Davis to confess to the Foster murder. Detective Smith had also written to the prosecutor many years later in another letter that there had never been sufficient evidence to charge McDonald for the Foster murder.

Materially Inaccurate DNA Evidence Was Presented at Davis' Punishment Retrial Which Resulted in a Second Death Sentence.

During Davis' second punishment retrial after his initial death sentence was overturned by the TCCA due to *Penry* error, the State introduced materially inaccurate DNA evidence linking Davis to a second uncharged murder of a man called Keith Blaylock in Mineral Wells, Texas in 1988. In 2017, six years after Davis' second punishment retrial in 2011 ended in another death sentence, the DNA evidence

introduced in 2011 to support the highly-contested Blaylock murder used to prove the Texas special issues of future dangerousness and lack of sufficient mitigation evidence, was withdrawn or recanted by the Texas Department of Public Safety ("DPS") Crime Lab using revised DNA mixture interpretations protocols or standards based on improved national scientific understanding. The Texas DPS Crime Lab had increased their scientific standards for analyzing DNA evidence in 2015 due to repeated criticisms within the State and across the country about scientifically invalid complex DNA mixture comparison standards, known as "interpretation" standards within the scientific community.

When the Texas DPS Crime Lab amended their DNA mixture comparison standards in August 2015, in what the DPS Laboratory called "sweeping changes to mixture interpretation protocols to incorporate the 2010 Scientific Working Group on DNA Analysis Methods (SWGDAM) guidelines" to address these criticisms of scientific unreliability, Texas DPS Crime Lab offered retesting of their prior complex DNA mixture comparisons to prosecutors and defense counsel. Davis' defense counsel requested the retesting offered under the improved scientific standards. When retesting was performed, the Texas DPS Crime Lab issued an amended DNA report stating that they could no longer stand by their analyst's prior testimony in Davis' 2011 punishment retrial implicating Davis because (1) the samples were potentially contaminated, and the possibility of contamination could not be ruled either in or out, preventing any comparison being made under DPS Crime Lab testing standards, and (2) more importantly because the DNA evidence was now too complex a mixture (of

at least five persons) to be validly interpreted or compared under their improved DNA mixture comparison scientific standards. For both reasons, DPS DNA Lab could no longer support their 2011 punishment retrial DNA testimony implicating Davis in the unsolved 1988 Blaylock murder. The 2017 retraction of the Texas DPS DNA Lab's 2011 DNA comparison testimony matching Davis to the 1988 Blaylock murder evidence caused the then-pending state capital murder prosecution of Davis to be voluntarily dismissed by State prosecutors within a month in Mineral Wells, Texas. By then in 2017 however, Davis' 2011 punishment retrial jury had already heard the now-recanted or withdrawn DNA evidence and the State had relied on the withdrawn evidence in their argument for imposing a death sentence for the 1991 Foster murder in Houston.

B. Procedural History

The District Court in its opinion stated "Davis' case presents a lengthy, and intricate, procedural history", Pet. App. at 8a, ROA.2410, spanning over thirty-four years from Davis' arrest in 1991 until today. The District Court's lengthy memorandum opinion recounts the complex procedural history in Davis' case, including the numerous lower state court decisions spanning over thirty years. Pet. App. at 8a-22a, ROA.2410-ROA.2424.

Mr. Davis ultimately timely filed a federal habeas corpus petition in 2020, ROA.344 et seq, after exhausting the confession voluntariness and Eighth Amendment *Johnson v. Mississippi* claims set forth herein in state direct appeal and successor habeas litigation. Ultimately the District Court denied all relief, and

declined to issue a COA. Pet. App. at 1a, ROA.2403. A timely appeal followed. The Fifth Circuit declined to issue a certificate of appealability, by adopting the District Court's decision as its own.

VII. REASONS FOR GRANTING THE PETITION

A. This Court Should grant Certiorari and Certificate of Appealability. Reasonable jurists would find the lower court's assessment of Davis' confession involuntariness claim debatable or wrong, and Davis' waiver of his previously asserted right to silence and to assistance of counsel during custodial interrogation coerced by threats to impose a death sentence on his Wife that were communicated to Davis, in violation of Mr. Davis's Fifth and Fourteenth Amendment rights not to be coerced into incriminating himself.

The governing law provides that:

> (c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.
> (c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find the lower court's assessment of his constitutional claims is debatable or wrong, and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001).

In a federal habeas proceeding, the ultimate determination of the voluntariness of a *Miranda* waiver under the Fifth and Fourteenth Amendments is "a legal question requiring independent federal determination." *Miller v. Fenton*, 474 U.S. 104, 110 (1985)(citing *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)). However, a state court's determination of the facts underlying the voluntariness of a confession are still entitled to a presumption of correctness, subject to rebuttal by clear and

convincing evidence. 28 U.S.C. § 2254(e)(1).

This court reviews the voluntariness of a confession, a legal question, under § 2254(d)(1). *Bobby v. Dixon*, 565 U.S. 23, 28 n.1 (2011) (citing *Miller v. Fenton*, 474 U.S. 104, 110 (1985) and *Arizona v. Fulminante*, 499 U. S. 279, 287 (1991)).[3] After passage of AEDPA the standard is whether the state court's conclusions were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[4] The standard for granting certificate of appealability is whether reasonable jurists would find the lower court's assessment of his constitutional claims is debatable or wrong. The state court proceedings here resulted in a decision that was contrary to, and involved an unreasonable application of, clearly established federal law, and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented, and reasonable jurists would find the lower court's assessment of his constitutional claims are debatable or wrong.

The Court's Law of Confession Voluntariness

Bobby v. Dixon cited *Arizona v. Fulminante*, 499 U. S. 279, 287 (1991) as clearly established federal law on confession voluntariness. *Arizona v. Fulminante* itself cited *Rogers v. Richmond* as clearly established federal law on confession voluntariness: ""[W]e agree with the conclusion that Fulminante's confession was coerced. The Arizona Supreme Court found a credible threat of physical violence

[3] Both the *Miller v. Fenton* and *Arizona v. Fulminante* passages cited in *Bobby v. Dixon* themselves cite *Rogers v. Richmond* as clearly established Supreme Court law on the voluntariness of confessions.
[4] 28 U.S.C. § 2254(d)(1).

unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. As we have said, "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition....*See also Rogers v. Richmond*, 365 U.S. 534, 540 (1961)." *Fulminante*, 499 U. S. at 287; *Miller v. Fenton*, 474 U.S. at 110 (also citing *Rogers v. Richmond*).

Bobby v. Dixon by citing these passages from *Arizona v. Fulminante* and *Miller v. Fenton* both citing *Rogers v. Richmond*, thus shows that the TCCA's decision of the confession voluntariness claim, not complying with clearly established precedent of this Court in either *Rogers v. Richmond* or *Lynumn v. Illinois*,[5] was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). Here, the clearly established Federal law on confession voluntariness, as determined by this Court, includes *Rogers v. Richmond*, 365 U.S. 534, 540, which held that "Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand."

In *Rogers v. Richmond*, the Supreme Court found that after Roger's arrest for an unrelated robbery, Rogers was interrogated while in custody for the robbery about an unsolved murder, during which he denied involvement in the murder. 365 U.S. at 535. Then "[w]hen petitioner persisted in his denial that he had done the shooting,

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[5] *Lynumn v. State of Illinois*, 372 U.S. 528, 534 (1963).

Chief Eagan pretended, in petitioner's hearing, to place a telephone call to police officers, *directing them to stand in readiness to bring in petitioner's wife for questioning.* After the passage of approximately one hour, during which petitioner remained silent. Chief Eagan indicated that he was about to have petitioner's wife taken into custody. At this point petitioner announced his willingness to confess and did confess in a statement which was taken down in shorthand by an official court reporter." *Rogers, Id.* at 535-36 (emphasis added). At the state court voluntariness evidentiary hearing, Rogers had "testified that shortly after the commencement of the interrogation he asked to see a lawyer but was never permitted to do so. He also testified, with reference to Chief Eagan's pretense of bringing petitioner's wife in for questioning, that this move took the form of a threat to do so unless he confessed and that in making this threat Chief Eagan told him that he would be 'less than a man' if he failed to confess and thereby caused her to be taken into custody. According to petitioner his wife suffered from arthritis, and he confessed to spare her being transported to the scene of the interrogation." *Rogers, Id.* at 536.

In *Rogers*, this Court found the threat to bring in the defendant's wife merely for questioning, not to prosecute her for an offense, much less threaten to give his wife a death sentence as occurred here, could reasonably have rendered the subsequent confession Rogers made coerced. *Rogers, Id.* at 548 n.5. *Rogers*' conviction had to be overturned because the state court held the confession voluntary because the feigned threat to bring his wife merely in for questioning likely did not induce the defendant to make an untrue confession, an improper legal standard for

voluntariness. Id. at 543-44.

In *Lynumn v. Illinois*, the threat to the defendant's family members made by police consisted of threatening to take Lynumn's infant children from her, and to cut off state financial aid for her infant children, if she did not confess. The holding of *Lynumn* that the Supreme Court held to be clearly established federal law on voluntariness of confessions is:

> It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.' These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up.' There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.
>
> We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed.

Lynumn v. State of Illinois, 372 U.S. 528, 534 (1963). The police threat to take custody of Lynumn's children away from her and to cut off their state welfare aid rendered the subsequent confession coerced.

Reasonable jurists would thus find the district court and Court of Appeals' assessment of Davis' confession involuntariness claim area debatable or wrong, because both courts evaluated Davis' confession involuntariness claim by reliance on Circuit Court precedent that purported to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that the Supreme Court has not announced, and is thus not clearly established Supreme Court precedent under §

2254(d). The Circuit court precedents relied on by the courts below are also contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.

The district court, in denying Davis' confession involuntariness claim, held that Fifth Circuit precedent allows police to make threats to immediate family members to prosecute them, and such police conduct is not coercive under the Fifth and Fourteenth Amendments where the family member is plausibly tied to the crime—here, Davis' wife McDonald. *See* District Court Opinion, Pet. App. at 47a, ROA.2449, D.E. 99, at 47:

> While it is true that "[t]hreats . . . to somehow burden [a defendant's loved one] until or unless the defendant confesses can raise coercion issues[,]" the concerns "are attenuated when the family member or loved one is plausibly tied to the crime." *States v. Hall*, 711 Fed. App'x 198, 202 (5th Cir. 2017); *see also Allen v. McCotter*, 804 F.2d 1362, 1364 (5th Cir. 1986). The Court of Criminal Appeals reviewed the evidence that pointed toward McDonald's involvement in the Foster murder and found that as "the evidence mounted against [her], officer[']s contact increased." In essence, the Court of Criminal Appeals found that the police did not threaten McDonald to secure Davis's confession, they "were following the only leads they possessed ..." The record does not contain any other evidence that the police concocted a scheme to pressure McDonald while allowing them to communicate."). ROA.2449.

Neither *States v. Hall* or *Allen v. McCotter*, relied on by the federal district court to authorize police threat of capital punishment made against Davis' spouse so long as the family member "is plausibly tied to the crime", cited any Supreme Court authority authorizing threats made against family members in order to induce a confession under the standard of "plausibly tied to the crime", that would contradict either *Rogers v. Richmond* or *Lynumn v. State of Illinois*, both of which prohibited

threats against family members as unduly coercive.

Under this Court's interpretation of the AEDPA, "Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Lopez v. Smith*, 574 U.S. 1, 7, 135 S. Ct. 1, 190 L.Ed.2d 1 (2014)(citing *Marshall v. Rodgers*, 569 U.S. 58, at 64, 133 S. Ct. 1446, at 1451, 185 L. Ed. 2d 540 (2013). The lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since "a general standard" from this Court's cases can supply such law. *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). *Yarborough v. Alvarado* gave as an example of federal law clearly established by the Supreme Court after passage of AEDPA to be that "the voluntariness of a statement is often said to depend on whether 'the defendant's will was overborne,' *Lynumn v. Illinois*, 372 U. S. 528, 534 (1963), a question that logically can depend on "the characteristics of the accused," *Alvarado*, 541 U.S. at 667-68. Thus, like *Rogers v. Richmond*, *Lynumn v. Illinois* continues to be clearly established federal law as determined by this Court after the passage of AEDPA.

Neither the Texas Court of Criminal Appeals ("TCCA") decision (ROA.7428, TCCA Opinion, *Davis v. State of Texas*, No. 71,513, at 12) nor the state trial court decision (ROA.22044-ROA.22048), however, ever determined that there was in fact probable cause to charge McDonald, and McDonald was never arrested or charged for the Foster murder. It is not surprising because state courts are not bound to follow federal Circuit court decisions interpreting constitutional law, like the Fifth Circuit

decisions in *States v. Hall* or *Allen v. McCotter, supra,* but only clearly established Supreme Court constitutional decisions. § 2254(d). The limited evidence against McDonald police possessed nevertheless was inconclusive and did not establish probable cause, with much evidence tested exculpatory for McDonald. At the time that police detective Smith was making threats of imposing lethal injection against Davis' wife McDonald in a capital prosecution,[6] in the several months of police contacts with his wife before Davis was coerced by these threats into waiving his previously-asserted Fifth Amendment rights to the assistance of counsel during custodial interrogation and to not incriminate himself during his November 21, 1991 confession, even six months after Davis' confession at the time of Davis' suppression hearing on May 18, 1992, ROA.2728,[7] police detective Smith still had not charged McDonald, and testified that the State was still waiting for DNA results to return before believing there was enough evidence to charge McDonald for the Foster murder.

> Q. Why hasn't charges yet been filed on Tina McDonald?
> A. We are still waiting on laboratory results.
> Q. Have you and I discussed the filing of those charges against Tina McDonald when we get those results?
> A. Yes, we have.
> Q. We are talking about the DNA results?
> A. Yes, that's correct.
> Q. What is our current understanding as regarding filing charges on Tina McDonald?
> A. That we are basically waiting for the DNA results to come back to confirm the match of her hair.

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[6] ROA.2887, 1992 Trial 2 RR 158 ("Q. Did you tell Tina McDonald that if this case got filed, that it could be a capital case which could result in the defendant being put to death? A (Det. Smith). Yes. I'm sure I could have said that.")

[7] "ROA.XX" refers to the Fifth Circuit Electronic Record on Appeal, and XX refers to the exact page number of the Record on Appeal.

Q. Then what are we going to do?
A. I assume, trying to file the charges.
MS. SIEGLER (prosecutor): Pass the witness.
ROA.2898-2899, 2 RR 169-170.

The Foster crime scene DNA evidence the prosecutor and police mentioned testing (unknown hair sample Item 8C) was submitted to Forensic Science Associates of Richmond, CA for DNA comparison to Foster's and McDonald's known blood samples in November 11, 1991. ROA.24301-ROA.24303. The Texas DPS Crime Lab report dated 10/30/1991 had visually compared McDonald's hair to a hair recovered from murder victim Michael Foster's shirt (Item 8C). ROA.24301. The Texas DPS Crime Lab report concluded on October 30, 1991, before Davis' November 21, 1991 confession, ROA.24301, that one visually compared hair could have originated from McDonald, but also could not have, and was thus inconclusive. ROA.24302.

Three more hairs recovered from victim Foster's hand (hairs 1A-1C) were visually compared to Brian Davis and Tina McDonald's hair and were determined to be dissimilar to Davis and McDonald comparator hairs. Thus four crime scene hairs definitively were not linked to Tina McDonald, five were definitively not linked to Brian Davis, and one hair (8C) was possibly consistent with but could not "be positively identified as having originated from a particular person to the exclusion of all others," in other words was not a "match" to a particular person, and was therefore inconclusive. ROA.24302.

The DNA results came back from Forensic Science Associates in July 1992, long after the threats by Det. Smith of imposing lethal injection on Davis' wife Tina McDonald were made September through November 1991, and long after Davis'

November 21st, 1991 confession, and after Davis' May 1992 capital trial. Tina McDonald "was eliminated as the source of the DNA associated with the hair [Item 3]" in the July 1992 DNA Report. ROA.31155. Victim Michael Foster "can not be eliminated as the source of the DNA associated with the hair [Item 3]." ROA.31154. The July 1992 DNA Report results, given long after the police threats of lethal injection were made to Tina McDonald, were at best inconclusive, where after "eliminating" McDonald as the source of the DNA associated with the tested hair, the report was inconclusive in its results stating "However, McDonald can not be eliminated as the source of the hair, per se, since the DNA associated with the hair may originate from cellular material, such as blood, which contaminates the hair surface." ROA.31155. Again the DNA results, like the hair comparison results, reached no definitive conclusion, and were therefore inconclusive and not a match.

Handwriting exemplars given by Tina McDonald also could not be affirmatively linked to the crime scene. ROA.24219. While items such as a leather jacket, a knife and cassette tapes identified as belonging to Foster were recovered from McDonald's vehicle after she was jailed for the unrelated offense, the items could have been given to McDonald by Foster, both of whom including Davis were seen leaving the Pik-N-Pak bar late Saturday night over 48 hours before Foster's estimated time of death according to the Medical Examiner. Tina McDonald was never charged for the Foster murder and any possible prosecution of her was dropped. Nine years after his 1992 testimony, lead detective Smith wrote in a letter to the prosecutor in 2001 that there had been "insufficient evidence to charge her

[McDonald] in the case" despite Smith's personal belief that "McDonald was directly involved in the crime." ROA.24198. Detective Smith admitted in his May 1992 suppression hearing testimony that there was insufficient evidence to charge McDonald at the time the threats to impose capital punishment were made by him from September to November 1991, and later probable cause never was developed to charge McDonald or threaten her with a death sentence, although Det. Smith did threaten her with a death sentence.

Davis was not given *Miranda* warnings before his initial custodial interrogation by detective Smith, ROA.2868, but Det. Smith testified Davis asserted his right to silence and to the assistance of counsel during questioning, ROA.2833, after which his questioning ceased. Id. Smith testified that Davis was a suspect and Smith hoped for his confession during the initial September 1991 custodial interrogation. ROA.2867. Smith understood that his failure to give *Miranda* warnings to Davis that day would have led the confession Smith sought to be inadmissible. ROA.2868. Davis' counsel Terry Gaiser again asserted Davis' Fifth Amendment right to silence and to the assistance and presence of his counsel Gaiser during any custodial interrogation directly to Detective Smith in a telephone call, ROA.2964-2965, and again after Smith came to a court hearing on either September 30 or October 30, 1991 for the unrelated offense and requested a court order for handwriting exemplars from McDonald. ROA.2970. Davis's counsel Gaiser recalled this meeting also and testified that Gaiser had again asserted Davis' Fifth Amendment right to silence and to the assistance of his counsel Gaiser during any

custodial interrogation directly to Detective Smith while in court. ROA.2967-ROA.2968 (Gaiser telephone call invocation of Davis' Fifth Amendment rights); ROA.2970 (in court invocation of rights), and that Smith understood this. Smith denied that he received this second invocation of Fifth Amendment rights from Davis' counsel Gaiser, contradicting Gaiser's testimony, although Smith confirmed he spoke to Gaiser in court and understood Gaiser was Davis' counsel. ROA.2876.

Police then over a period of several months after Davis had initially invoked his Fifth Amendment rights to silence and to the assistance of counsel repeatedly questioned and threatened his wife Tina McDonald with a death sentence for the capital murder of Michael Foster, when McDonald was also in custody in the women's section for the same unrelated offense for which Davis was charged and in custody in the men's section. Jailer and Coordinator of the Criminal Intelligence Unit of the Harris County Jail Robert Strickland, ROA.2747, testified that he met with Davis and allowed Davis to speak on a jail phone to his wife Tina McDonald four separate times after Davis had invoked his *Miranda* right to silence and right to counsel, ROA.2812-ROA.2813, during which Tina McDonald communicated the increasing threats made to her by the lead homicide detective, Detective Smith, to give her a death sentence for the murder of Michael Foster. ROA.2887 ("Q. Did you tell Tina McDonald that if this case got filed, that it could be a capital case which could result in the defendant being put to death? A. Yes. I'm sure I could have said that.")

Jailer Strickland testified he was aware that Davis was motivated to confess to Detective Smith, after Davis initially invoked his right to silence and to the

presence of counsel during custodial questioning, in an attempt to protect his wife Tina McDonald from an indictment for capital murder and a death sentence, by Davis "doing the chivalry thing and trying to protect Tina." ROA.2817. By allowing Davis and McDonald to communicate four times through telephone calls arranged by jailer Strickland before Davis confessed, when Davis and McDonald were each detained separately in the men's and women's sections of the jail where Strickland was Criminal Intelligence Unit chief, Strickland ensured that the threats of imposing lethal injection upon conviction of the Foster capital murder communicated by Detective Smith to McDonald, after Davis had invoked his rights to silence and to counsel, were then communicated from McDonald to Davis. That police understood that Davis knew of the death threats made by police to his wife Tina McDonald is undisputed because Detective Smith was aware that Davis sought immunity from prosecution for his wife McDonald from Smith in exchange for his confession, ROA.2848, and the prosecutor O'Brien present for Davis' confession also knew Davis sought immunity from prosecution for his wife McDonald in exchange for his confession, ROA.2763-ROA.2764.

Strickland testified his job in the jail as Criminal Intelligence Unit chief was "developing and obtaining criminal intelligence and assimilating it and correlating it...and giving it to other various law enforcement agencies." ROA.2747. After Davis had invoked his Fifth Amendment *Miranda* rights to not incriminate himself and to the assistance of his counsel Gaiser during any questioning directly to Detective Smith, detectives Smith and Hendrix kept jailer Strickland, who was in regular

contact with Davis, informed of the progress and direction of their murder investigation where Davis and McDonald were the suspects. ROA.2792. Strickland was kept informed of the fact that during the months of September, October and November 1991 Humble Police Department Detectives Smith and Hendrix were working on the Michael Foster murder case and that Detectives Smith and Hendrix thought Brian Davis and Tina McDonald were suspects in the case. ROA.2792. Jailer Strickland thus testified he was working jointly with Humble Police Department detectives Smith and Hendrix in developing evidence against Davis and McDonald, kept in touch with them about their investigation, and assisted Smith and Hendrix in making sure that the threats of a capital sentence made against Davis' wife McDonald were communicated by McDonald to Davis, through the four telephone calls that Strickland allowed and coordinated between Davis and McDonald, while both were separately in custody in the men's and women's parts of the jail Strickland administered. When Davis had not yet been coerced by threats of lethal injection made against his wife and was interrogated by Smith in September 1991, Davis forcefully asserted his Fifth Amendment rights to silence and to the assistance and presence of his counsel. It was only when his wife was threatened with a capital prosecution and a death sentence, repeatedly over the course of months, that Davis succumbed to the coercive pressure and waived his previously-asserted Fifth and Fourteenth Amendment rights. Davis was concerned with protecting his wife's life, and her ongoing relationship with her infant daughter and his stepdaughter. It is undisputed that Davis attempted to obtain immunity from prosecution for his wife in

exchange for his confession, and thus was clearly aware of the threats of lethal injection Det. Smith made against his wife McDonald.

This Court's precedents in *Rogers v. Richmond* and *Lynumn v. Illinois* clearly established that threats made against family members, in *Rogers* to merely bring his wife in for questioning, and in *Lynumn* to remove her small children from Lynumn's custody and to have their welfare benefits revoked, rendered the subsequent confessions coerced, involuntary and therefore inadmissible. The District Court and the Fifth Circuit in rendering their decision instead relied on Fifth Circuit precedent[8] to deny Davis' confession involuntariness claim despite *Rogers v. Richmond* and *Lynumn v. Illinois*, where no clearly established Supreme Court precedent allowed the Fifth Circuit's different rule of decision, and instead clearly established Supreme Court precedent prohibited it. This Court has made clear that "Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Lopez v. Smith*, 574 U.S. at 7 (citing *Marshall v. Rodgers*, 569 U.S. at 64). Reasonable jurists thus could find the district court's resolution of the confession voluntariness claim debatable or wrong, because the federal district court and Fifth Circuit applied Fifth Circuit precedent to "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced," *Lopez v. Smith*, supra, *Marshall v.*

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[8] *See* Pet. App. at 47a, ROA.2449, D.E. 99, at 47 ("While it is true that "[t]hreats . . to somehow burden [a defendant's loved one] until or unless the defendant confesses can raise coercion issues[,]" the concerns "are attenuated when the family member or loved one is plausibly tied to the crime." *States v. Hall*, 711 Fed. Appx. 198, 202 (5th Cir. 2017); *see also Allen v. McCotter*, 804 F.2d 1362, 1364 (5th Cir. 1986)).

Rodgers, supra. That is the Fifth Circuit rule allowing threats to family so long as there is probable cause for the threats, and which "refine[d] or sharpen[ed]" clearly established Supreme Court law in *Rogers v. Richmond* and *Lynumn v. Illinois*, supra, into a different rule this Court has never announced, that "plausible ties to the crime" allows threats to family members.

The facts adduced at the state court suppression hearing nevertheless established that at the time of the state district court's denial of Davis' confession involuntariness motion to suppress, after the evidentiary hearing that took place immediately before the start of his May 1992 trial, that probable cause for the prosecution of Tina McDonald for the murder of Michael Foster did not exist, because police and prosecutors were still waiting for DNA results to come back on Tina McDonald before deciding whether to charge her. The DNA results that came back after Davis' trial were inconclusive, like the hair comparisons and the handwriting comparisons previously done by police. Supra. Tina McDonald was never charged for the Foster murder. Because no probable cause ever existed for charging Davis' wife McDonald, the federal district court's resolution of the confession voluntariness claim was debatable or wrong, because the district court and Fifth Circuit both applied Fifth Circuit precedent that "refine[d] or sharpen[s] a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced," *Lopez v. Smith*, supra, *Marshall v. Rodgers*, supra, and the decision contradicts clearly established Supreme Court law in *Rogers v. Richmond* and *Lynumn v. Illinois*, supra. Davis was coerced into waiving his previously asserted Fifth and Fourteenth

Amendment rights to not incriminate himself and to the assistance of counsel during custodial interrogation and his confession was coerced by threats of imposing a death sentence made without probable cause against his wife McDonald, for whom probable cause to charge McDonald never developed and did not exist at the time Davis' confession and waiver of his *Miranda* rights occurred.

1. Davis was Also Subjected to Continued "Interrogation" under *Rhode Island v. Innis* after Davis' Invocation of his Fifth Amendment Rights to Silence and Counsel

In *Rhode Island v. Innis*[9] this Court held that the term "interrogation" under *Miranda* "refers not only to express questioning, but also to *any words or actions on the part of the police* (other than those normally attendant to arrest and custody) that the *police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.* A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." 446 U.S. at 301, 100 S.Ct. at 1689-90 (emphasis added). *See also United States v. Webb*, 755 F.2d 382, 391 (5th Cir. 1985).

Sgt. Strickland and Detective Smith knew that Davis and McDonald were married, and that McDonald was the mother of a little girl of less than a year old, who was Davis' infant stepdaughter. By jailer Strickland being kept aware of the ongoing status of Detective Smith's investigation against Davis and McDonald, over a period of months after Davis' invocation of his right to silence and to the presence

[9] 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

of counsel during his first custodial interrogation in September 1991, and Strickland thereafter allowing McDonald to communicate by phone from inside the jail four (4) times with Davis, after being apprised by Det. Smith that Smith had interviewed and threatened Davis' wife McDonald with the death penalty in a capital murder prosecution, both Det. Smith and jailer Strickland engaged in "*any ... actions on the part of the police...*(other than those normally attendant to arrest and custody) that the *police should know are reasonably likely to elicit an incriminating response from the suspect.*" Allowing male and female jail inmates housed separately by sex to communicate by phone repeatedly is not normally attendant to ordinary inmate custody.

Jailer Strickland allowing Davis' wife McDonald to repeatedly communicate the threats of a death sentence being made to her by Detective Smith, after Davis had invoked his Fifth Amendment rights to silence and assistance of counsel, constituted "actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." *Innis*, 446 U.S. at 301. Detective Smith knew that husband Davis and wife McDonald were jailed in the same facility because he visited them both there multiple times, for taking their photos, hair samples, handwriting exemplars and blood samples. Part of a husband's

ordinary duties society expects husbands to perform are to protect his wife from physical harm. Given that police knew both husband and wife were incarcerated, and both were suspects, police should know it is reasonably likely that a wife threatened with the imposition of a death sentence would communicate this death threat to her husband, and that knowledge "is reasonably likely to evoke an incriminating response from a suspect" incarcerated husband, who has no other practical method of protecting his wife from physical harm in this situation but accepting sole culpability, truthfully or not, and such a practice "thus amounts to interrogation." *Innis*, 446 U.S. at 301. Such practice is also coercive, as found by this Court in *Rogers* and *Lynumn*.

The Texas Court of Criminal Appeals' ("TCCA") decision denying Davis' confession involuntariness claim, however, did not apply this Court's clearly established law in *Innis*, because the TCCA's decision did not conduct its analysis by "focus[ing] primarily upon the perceptions of the suspect, rather than the intent of the police." *Innis*, Id. Instead, the TCCA reversed this Court's test and focused on the intent of the police, and determined the facts without concern for the perceptions of the suspect Davis. The TCCA decision wrote:

> Appellant asserts that the officers contacted appellant's wife knowing that she would tell her husband of the officers' suspicions. However, the record does not support this assertion. The officers appeared to contact his wife more often because hair samples taken from the crime scene matched her hair and writing on the wall at the crime scene matched her handwriting sample. As the evidence mounted against appellant's wife, the officers contact with her increased. A trial court could view this evidence and determine that the officers were following the only leads they possessed—that appellant's wife was present at the crime scene. We hold that the trial judge did not abuse its discretion in determining that by re-initiating contact with the detectives, appellant waived his right to the prophylactic protections of *Miranda*

v. Arizona, supra.

ROA.7428, TCCA Opinion, *Davis v. State of Texas*, No. 71,513, at 12. The TCCA decision was thus "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" in *Rogers v. Richmond*, *Lynumn v. Illinois*, and *Innis*, supra.

As shown supra, *see* ROA.24302, the single red hair at the crime scene possibly could have come from McDonald, but the hair could have come from another person according to the hair comparison analyst, and was inconclusive and not a "match", according to Detective Smith, contrary to the incorrect factual determination made by the TCCA. ROA.2888 ("Q. Did you tell her that red hair had been found in the victim's hand, which had been positively identified as hers? A (Detective Smith). Not positively. No. Q. Didn't you tell her it was a positive identification? A. No."). The hair comparison report confirmed Detective Smith's testimony that there was no positive hair identification or match for McDonald, and all other hairs tested conclusively did not match McDonald. ROA.24302, *supra.*

Detective Smith testified the handwriting comparison results were also inconclusive, contrary to the TCCA's factual determination. ROA.2889 ("Q. And you talked about the fact that her handwriting sample could be matched. Correct? A (Detective Smith). I told her that I was having it compared. Q. Okay. And eventually you told her that you had it compared. Correct? A. I don't believe I ever talked to her after I got it back."). The handwriting comparison was in fact inconclusive. ROA.24219, supra.

Detective Smith testified at the May 1992 suppression hearing that there also was no DNA match as of May 1992 to wife McDonald or to Davis. ("Q. Didn't you tell her that you had DNA and DNA was a positive identification? A (Detective Smith). No."). ROA.2888. The DNA results did not come back until July 1992, and Smith testified that police and prosecutors were waiting on the DNA results to decide whether to charge McDonald, supra. When the DNA results came back McDonald "was eliminated as the source of the DNA associated with the hair [Item 3]." ROA.31155, supra. These TCCA factual findings therefore resulted in a decision that was also based on an unreasonable determination of the facts in light of the evidence presented in the state court suppression hearing that found Davis' confession admissible and not coerced. 28 U.S.C. § 2254(d)(2).

Detective Smith threatened Davis' wife McDonald with a death sentence during the months of September through November 1991 during his jail visits with her, supra, despite not having sufficient probable cause to charge McDonald. Jailer Strickland's conduct of allowing Davis' wife McDonald to share those threats with her husband Davis through at least four phone calls arranged by jailer Strickland, while jailer Strickland was cooperating with and made aware of the ongoing developments in Detective Smith's investigation, made it reasonably likely husband Davis would be made aware by McDonald of the threats by Det. Smith of imposing a death sentence on her.

Even *six months after* Smith's threats to impose a death sentence were communicated to Davis' wife McDonald from September to November 1991, Smith

testified in the May 1992 suppression hearing that he was still waiting for DNA test results to come back before Smith and the prosecutor believed they had enough evidence to charge wife McDonald for the Foster murder. *Supra*, ROA.2898-2899. Thus at the time the threats of a death sentence for McDonald were made by Detective Smith, Smith did not yet have probable cause to charge McDonald for the death sentence-eligible capital murder offense, according to Detective Smith, and never would have probable cause, because the DNA results came back inconclusive. The death threats were not based on probable cause and were capable of coercing, and did coerce, Davis to give up his previously asserted *Miranda* rights to silence and to the assistance of counsel during custodial interrogation Davis had made when first interrogated. Facilitating the repeated communication by McDonald of Detective Smith's threats of a death sentence against McDonald, ROA.2887, supra, to her husband Davis, it was reasonably foreseeable to police, and constituted "'interrogation' under *Miranda*", that is "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect," *Innis*, 446 U.S. at 301, for Davis to seek to protect his wife from physical harm by assuming all culpability and thereby exculpating his wife. Any later waiver of Davis' previously asserted *Miranda* rights therefore occurred after police-initiated "interrogation" of Davis occurred under *Innis*, violated the rule in *Edwards v. Arizona*,[10] and was not a knowing, intelligent and voluntary waiver under *Edwards*

[10] 451 U.S. 477 (1981).

because coerced by the death threats made against his wife by police.

The state court proceedings here resulted in a decision that was contrary to, and involved in unreasonable application of, clearly established federal law, and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented, 28 U.S.C. § 2254(d), and reasonable jurists would find the lower court's assessment of his constitutional claims are debatable or wrong. 28 U.S.C. § 2253(c).

This Court should respectfully therefore grant certiorari and grant certificate of appealability on this claim.

B. Reasonable Jurists Could Debate Whether Materially Inaccurate DNA Evidence Rendered Mr. Davis' 2011 Capital Sentencing Retrial Unconstitutional

A. Relevant Facts

(1) Trial evidence

At Mr. Davis' 2011 capital re-sentencing trial, the State sought to implicate Mr. Davis in an uncharged 1988 homicide of Keith Blaylock at a Beverage Barn in Mineral Wells, Texas. Mr. Davis had never been charged in this killing, nor had he ever been identified as a suspect in that case.[11] The State's primary evidence supposedly connecting Mr. Davis to the Blaylock homicide was two-fold: the highly discredited testimony of State's witness David Cason, who admitted participation in the Blaylock homicide only after he was formally granted immunity by the State, and DNA evidence from DPS analyst Uyen Henson, who testified that to a high degree of

[11] The primary suspect in the case was Tyler Strader, who died in a separate incident not long after the Blaylock homicide.

probability, Mr. Davis could not be excluded from a mixed DNA sample obtained from a stocking cap found at the scene of Mr. Blaylock's death, and that Mr. Cason was excluded as a contributor of DNA to the stocking cap.

As to David Cason, he was an admittedly poor witness for the State, and was heavily impeached with inconsistencies in his various statements over the years, ROA.13300- ROA.13301, ROA.13308. In the first place, Cason waited fifteen years to come forward with information about the Blaylock homicide, and then only in exchange for complete immunity. ROA.13030 (Cason demanding full immunity), ROA.14225 (Cason waited fifteen years to come forward).

Moreover, at the time of the Blaylock homicide in 1988, Cason was both selling and using methamphetamine and marijuana on a daily basis. ROA.13213-ROA.13215; ROA.13300- ROA.13301, ROA.13308. By the time of his 2011 testimony, Cason was a twice-convicted felon and seasoned penitentiary inmate. ROA.13212-ROA.13217.

Cason was also impeached as to his motives, as well as the motive of his cousin (who himself informed police Cason told him about the Blaylock homicide), both of whom actively sought and received immunity deals for their testimony against Davis and Cason, respectively. ROA.13325 (Cason was seeking and received immunity for capital murder in exchange for his testimony against Davis); ROA.13327 (cousin was seeking leniency for his testimony against Cason).

Perhaps the clearest indication of the critical importance of the now-recanted Blaylock murder DNA evidence to establishing a case against Davis is the fact that

the 2014 capital murder indictment of Davis for the 1988 Blaylock murder was voluntarily dismissed by the State within weeks of the April 2017 DPS DNA Lab recantation of its DNA evidence in the Blaylock murder. ROA.468 (citing Exhibit 7, Order Dismissing Blaylock Murder Indictment dated May 9, 2017). Previously the prosecutor Mitchell had written in 2011: "We were able to successfully prove to our jury that Brian Davis murdered Keith Blaylock and we obtained a swift death sentence for the defendant." ROA.632 (citing Exhibit 35). Without the DPS DNA Lab conclusions about the Blaylock stocking mask connecting Davis to the Blaylock murder, the State felt it could not prevail in a case based upon the other evidence linking Davis to the Blaylock murder, particularly given the strong evidence pointing towards the deceased Tyler Strader being the murderer of Blaylock, including multiple witnesses testifying to hearing Strader's confession on different occasions to committing the Blaylock murder, all of which were heavily disputed at Davis' 2011 punishment retrial. ROA.14227.

B. Post-conviction recantation of DNA evidence

On April 12, 2017 the Texas Department of Public Safety ["DPS"] issued a letter recanting the trial testimony and evidence provided by DNA analyst Henson at Mr. Davis' 2011 re-sentencing trial. Prior to the issuance of that letter, in 2015 the Texas Forensic Science Commission ["TFSC"] had sent out an advisory to Texas attorneys and courts regarding significant changes in interpretation protocols for DNA evidence from mixed samples containing DNA profiles from more than one person. ROA.24055-ROA.24058. The advisory noted that "changes in mixture

interpretation have occurred primarily over the last 5-10 years and were prompted by several factors, including but not limited to mixture interpretation guidance issue in 2010 by the Scientific Working Group on DNA Analysis." *Id.* The TFSC advisory recommended that attorneys – prosecutors and defense attorneys -- seek a re-calculation of the probabilities of inclusion/exclusion in any case in which the lab conducting the testing had not relied upon the currently accepted protocols for DNA mixture evidence. *Id.* "The potential range of interpretive issues has yet to be assessed," the TFSC advisory notes, "but the potential impact on criminal cases raises concerns for both scientists and lawyers." *Id.*

In light of this 2015 TFSC advisory and the Harris County prosecutor's invitation for DNA mixture re-analysis, ROA.24055, then-state habeas counsel for Mr. Davis sought re-analysis, or "re-interpretation" as that term is known in DNA testing, of the Blaylock homicide DNA evidence relied upon by the State at Mr. Davis' 2011 resentencing trial. ROA.24117-ROA.24120. After substantial delays, the DPS DNA section eventually issued an amended DNA report and memo, dated April 12 (ROA.24462) and April 28, 2017 (ROA.24465), respectively.

In this updated report and memo, DPS retracted its prior findings in the case, because "DPS made changes in [DNA] mixture interpretation protocols, [and] policy was implemented to no longer interpret with four individuals manually utilizing a stochastic threshold", the prior method used by DNA analyst Henson to derive his 2011 resentencing trial DNA testimony. ROA.24466. These prior DNA mixture interpretation protocols, allowing manual mixture interpretation "with four

individuals manually utilizing a stochastic threshold," had been reviewed and "sweeping changes" made because their scientific validity had been undermined by the 2010 Scientific Working Group on DNA Analysis Methods (SWGDAM) guidelines. ROA.24465.

When the DNA reanalysis was performed under the August 10, 2015 DPS Lab "sweeping changes to [DPS] mixture interpretation protocols", the results changed dramatically: Davis could no longer be validly included as a DNA contributor to the complex DNA mixture found on the Blaylock stocking cap found at the murder scene for two separate reasons. First, when the revised DNA mixture interpretation protocols were implemented, "as recommended by the top experts in the field" and after consultation with the Texas Forensic Science Commission, "it was observed when the analytical threshold was lowered to 50 rfu for the stocking [the newly implemented standard], that the mixture was representing at least five DNA contributors which is too complex for interpretation [i.e. comparison] under DPS policy." ROA.24466.

The second reason was that the sample originally tested was now determined to be possibly contaminated, and the reagent blank, used to detect contamination or the other possibility of low-level DNA drop in, was depleted, and contamination of the DNA sample tested could not be ruled out. ROA.24466.

The April 2017 DPS Laboratory memo summarized the findings under their amended DNA mixture interpretation protocols or guidelines: "A final report was issued April 12, 2017 stating that no further interpretations or comparisons will be

made to the profile from the stocking due to the quality event and potential number of contributors in the profile. In summary no interpretation can be made to the swabbing from the [Blaylock murder] stocking using current protocols due to the quality event [the unresolved potential contamination]. If we did not have the quality event we still can no longer interpret the profile because under current protocols [the August 10, 2015 DPS Lab "sweeping changes to mixture interpretation protocols"] the mixture is now too complex." ROA.24466.

The reanalysis under the improved standards undermined the entirety of the DNA conclusions the DPS Laboratory provided at Mr. Davis' 2011 resentencing trial. First, DPS retracted its 2011 testimony that the evidence in the case was *not* contaminated, instead admitting that there was *clear evidence of possible contamination* found in the reagent blank used as a control to detect such issues, and contamination could not be definitively ruled in or out, barring DNA analysis of the sample. This conclusion directly contradicts the 2011 testimony of DPS analyst Henson, who testified no evidence of contamination existed, and therefore a DNA comparison could be validly rendered. ROA.13206.

Second, DPS retracted its claim that State's witness Cason could be excluded from the DNA evidence found on the stocking cap. In fact Mr. Cason could *not* be excluded from the mixed sample tested, because no DNA comparison could be provided: "[W]e still can no longer interpret the profile because under current protocols the mixture is now too complex." Supra. This too contradicted analyst Henson's 2011 trial testimony that conclusively excluded Cason as a DNA contributor

to the Blaylock murder scene stocking cap. ROA.13162.

Finally and most critically, DPS retracted its testimony linking Mr. Davis to the DNA found on the stocking cap. Instead, after further review of the evidence utilizing the August 2015 DPS DNA Lab "sweeping changes to mixture interpretation protocols", DPS found that, because of the number of potential contributors to the DNA found on the stocking cap, now known to be at least five, the "mixture is now too complex" for *any* reliable interpretation or comparison to Davis' DNA. In short, no reliable DNA link could now be established from the stocking cap connecting Mr. Davis to the Blaylock crime scene evidence. Thus the 2011 punishment retrial testimony given by DPS DNA analyst Henson conclusively including Davis as a DNA contributor to the Blaylock stocking cap is now known to be materially inaccurate. ROA.13162.

These new DNA conclusions were of "great concern" to DNA expert Prof. Hampikian, who explained in plain language in his affidavit that they "cast serious doubt on Mr. Davis' conviction ..." ROA.24423-ROA.24428. In the first place and to be clear about the status of the trial record, Dr. Hampikian noted that analyst Henson's testimony was DNA "match" testimony, namely, that the stocking cap DNA "matched Mr. Davis with a match statistic of 1 in 758,200 Caucasians." *Id.* Second, Dr. Hampikian confirmed that the new DPS conclusions contradicted the trial testimony from DPS analyst Henson regarding the possibility of any contamination in the case. *Id.* Third and most importantly, Dr. Hampikian underscored that the new DPS findings in the Davis case made plain that "the lab was no longer standing by

its conclusions ... The Texas DPS State Crime Laboratory has therefore retracted its conclusions regarding this crucial DNA evidence that had been shared with the Court during Mr. Davis' sentencing." ROA.24425.

In short, whereas at the 2011 punishment retrial the State presented and relied heavily upon DNA evidence supposedly linking Mr. Davis to an unsolved, uncharged, decades-old homicide, the post-trial record contains undisputed scientific evidence -- emanating from the same agency that conducted the original testing for the 2011 trial -- that this evidence was "materially inaccurate", false and scientifically unreliable.

C. Applicable Legal Principles and Standard of Review

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the U.S. Supreme Court held that a death sentence based on "materially inaccurate" evidence violates the Eighth Amendment. In *Johnson* the Court found that the prosecution's reliance on a prior New York conviction at the defendant's capital sentencing trial, valid at the time of the capital sentencing trial but that was later overturned, post-sentencing, on constitutional grounds, *Id.* at 580, rendered the capital sentencing trial itself unconstitutional, because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." *Id.* at 590.

Because Appellant here seeks a Certificate of Appealability on this issue, he need only show that the question of whether there exists harmful *Johnson* error in this case is "debatable among jurists of reason." As can be readily demonstrated, it is far beyond reasonable debate that, given the State's heavy reliance upon the DNA

evidence in the case to establish that Mr. Davis was supposedly a double-murderer, this "materially inaccurate" evidence and testimony had a substantial impact on the trial outcome. "DNA testing can provide powerful new evidence unlike anything known before. Given the persuasiveness of such evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner." *McDaniel v. Brown*, 558 U.S. 120, 136, 130 S.Ct. 665, 175 L. Ed. 2d 582 (2010). "A DNA profile may provide powerful incriminating evidence against a person who is identified." *Williams v. Illinois*, 567 U.S. 50, 85 (2012).

The State relied heavily upon the allegation that Mr. Davis participated in the Blaylock homicide in its case for a sentence of death. The closing arguments of the prosecution are replete with full-throated discussions of the details of the Blaylock homicide, expressly relying upon Mr. Davis' involvement—based on the then-undisputed but now retraced and unreliable DNA evidence—to urge the jury to conclude that someone who had committed two murders (including the case-in-chief) was both dangerous and not deserving of mercy. ROA.14275-ROA.14276; ROA.14270-ROA.14271 (arguing DNA match statistic of one in 782,000 Caucasians proved Davis' guilt where the population of Mineral Wells, Texas was 17,000).

VIII. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and a certificate of appealability should be issued.

Respectfully Submitted,

/s/ Kenneth McGuire

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May 7, 2026