No. 23-934

*** 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

BRIEF FOR RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petition raises two questions of consequence that the Court should take up. Properly framed, the questions presented are:

1. Whether the Texas Court of Criminal Appeals erred in refusing to allow the State to explain its changed position and giving no weight to the State's confession of error.

2. Whether the Texas Court of Criminal Appeals erred in holding there was no due process violation because there was "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 the jury's judgment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Respondent, the State of Texas, respectfully files this brief responding to Areli Escobar's petition for writ of certiorari.

After Petitioner was convicted of capital murder and sentenced to death, the Texas Forensic Science Commission (TFSC) examined the Austin Police Department's DNA Lab (APD Lab) which had collected and tested much of the critical forensic evidence in Petitioner's case. Pet.App.49a.[1] The TFSC audit led to a scathing report, the APD Lab's shutdown, a subsequent state writ application, an extensive postconviction investigation, and over 400 factual findings by the convicting court concluding that the State's reliance on flawed forensic evidence violated Petitioner's due process rights and warranted reversal of his conviction. *Id.*35a-217a.

The State initially opposed all of Petitioner's grounds. However, after receiving the convicting court's extensive findings, the newly elected District Attorney appointed veteran prosecutors to review the record. *Id.*223a. After studying the deeply ingrained problems with the APD Lab and the troubling facts particular to the forensic evidence in Petitioner's case, the prosecutors determined that the convicting court's conclusion that Petitioner's due process rights were violated was supported by the record. *Id.* The State no longer had confidence in the conviction and death sentence it procured due to its reliance on scientific

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[1] References to documents in Petitioner's appendix will be abbreviated "Pet.App." followed by the applicable appendix pages numbers.

evidence now understood to be false, misleading, and unreliable. *Id.*

Yet the Texas Court of Criminal Appeals (TCCA) denied Petitioner relief on his due process claim without even acknowledging the State's changed position. *Ex parte Escobar* (*Escobar I*), No. WR-81,574-02, 2022 Tex. Crim. App. Unpub. LEXIS 32, at *1 (Tex. Crim. App. Jan. 26, 2022) (unpublished order). Petitioner then sought certiorari review and, in 2023, this Court remanded the case to the TCCA with a directive to further consider the case in light of the State's confession of error. Pet.App.23a.

While acknowledging the need for an independent review, this Court has held that the Government's confession of error must be accorded "great weight." *See Young v. United States*, 315 U.S. 257, 258 (1942). However, on remand, the TCCA denied the State's request to file a brief and dismissed an agreed motion to stay the case and send it back to the convicting court for additional investigation into alternate suspects. Pet.App.218a,242a.

Despite these surprising rulings, in its 2023 decision on remand, the TCCA criticized the State for not briefing its arguments and Petitioner for not submitting substantive new evidence. *Ex parte Escobar* (*Escobar II*), 676 S.W.3d 664, 673 (Tex. Crim. App. 2023). The TCCA acknowledged that false forensic evidence was presented at trial but employed an incorrect due-process materiality test to measure its impact: the TCCA required Petitioner to prove that the jury's verdict would have changed if the false DNA evidence "had been replaced with" certain selected new "accurate evidence," while ignoring other evidence corroding its value. *Id.* at 666.

In the end, the TCCA did not meaningfully comply with *Young* or this Court's remand order, and disregarded evidence pointing to an elevated danger of cross-contamination in this case. Essentially, the TCCA gazed beyond the date of conviction, selectively focusing on future forensic evidence that would support the conviction while closing its eyes to other facts eroding confidence in the State's evidence. Yet the jury's guilty verdict rested on the faulty DNA testimony. Pet.App.154a-55a; 28RR26-37,75.[2] In fact, one juror testified that he was "on the fence" until he heard the DNA evidence. Pet.App.156a.

Consequently, the State agrees that Petitioner has demonstrated a "reasonable likelihood" that its use of false, misleading, and unreliable DNA evidence to secure Petitioner's conviction could have affected the jury's judgment. The State joins Petitioner in respectfully requesting that this Court grant the petition.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner was charged by indictment in Cause Number D-1-DC-09-301250 with the capital murder of Bianca Maldonado by cutting and stabbing her with

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[2] "CR" refers to the clerk's record in the original trial proceeding. The habeas clerk's record and supplemental habeas clerk's record are designated as "HCR" and "Supp.HCR." "RR" refers to the reporter's record from the trial. "HR" refers to the reporter's record from the habeas hearings on the second state habeas petition. Each such reference is preceded by the volume number and followed by the applicable page number(s) of the record volume. Where the pages of the record were not numbered, the .pdf page number is used.

a knife or sharp object while in the course of committing or attempting aggravated sexual assault on or about May 31, 2009. 1CR12-13. The State presented three days of forensic science testimony during six days of case-in-chief evidence. Pet.App.43a,154a-55a. As Petitioner was a stranger to the victim and there was no eyewitness, the State relied extensively on this evidence throughout the trial and in closing arguments. 28RR26-37,75. The jurors found Petitioner guilty and, based on their answers to statutorily mandated special issues, Petitioner was sentenced to death. 2CR313-314.

The TCCA affirmed Petitioner's conviction and sentence on direct appeal. *Escobar v. State*, No. AP-76,571 (Tex. Crim. App. 2013) (not designated for publication). Petitioner filed an initial postconviction application for habeas relief in May 2013; the TCCA denied relief. *Ex parte Escobar*, No. WR-81,574-01 (Tex. Crim. App. 2016) (not designated for publication).

Subsequently, in 2017, after APD ceased all casework at its DNA Lab following the TFSC's audit, Petitioner filed a second application for habeas relief, raising six additional grounds and calling attention to the issues with the APD Lab; the TCCA remanded the case to the convicting court for further factfinding. Pet.App.35a-36a. The remanded grounds included Petitioner's claim that his Fourteenth Amendment right to due process was violated by the State's presentation of unreliable, misleading, and false DNA testimony during the guilt phase of trial in violation of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009). *Id.*

The convicting court conducted an in-depth investigation of the merits of the remanded claims, admitting hundreds of exhibits and presiding over a series of evidentiary hearings from May 2018 through December 2020. 1-35HR. On December 31, 2020, the convicting court entered over 400 findings of fact and conclusions of law determining in part that Petitioner's conviction was secured in violation of his right to due process and recommending that he be granted a new trial. Pet.App.35a-217a. The convicting court found that there was a "reasonable likelihood" that the false DNA testimony affected the judgment of the jury, as "DNA was the crux of the prosecution's case, and the remaining evidence was either weak and circumstantial, or has now been shown to be scientifically questionable." *Id.*172a-73a. The convicting court concluded that, "the use of flawed DNA evidence violated [Petitioner's] rights to due process as guaranteed by the United States and Texas Constitutions, and this Court recommends that [Petitioner's] conviction be reversed." *Id.*173a.

On January 1, 2021, newly elected Travis County District Attorney José P. Garza took office. *Id.*5a,261a. Although the State had initially opposed Petitioner's claims for relief, considering the convicting court's lengthy and exhaustive findings, District Attorney Garza asked a small team of veteran prosecutors to thoroughly reexamine the habeas record. *Id.*223a.

In January 2021 following an intensive record review, the State determined that a due process violation had occurred. *Id.* The State then filed its "Objections to the Court's Findings of Fact and Conclusion of Law and Abandonment of Certain

Proposed Findings of Fact and Conclusions of Law" (Objections). *Id.*264a. In this pleading, the State raised particularized objections to some of the convicting court's findings—especially when they reached beyond the claims raised by Petitioner. *Id.*264a-79a. Nonetheless, the State expressly stated that it was *not* opposed to the convicting court's remaining findings and ultimate conclusion that Petitioner was entitled to relief on two grounds, including his due process claim. *Id.*264a-79a.

In January 2022, the TCCA issued an unpublished per curiam order denying relief on all of Petitioner's remaining grounds. *Escobar I*. The TCCA based its ruling on its "own review," rejecting the trial court's findings and conclusions. *Id.* The TCCA's order did not acknowledge the State's position that Petitioner was entitled to relief. *Id.* The State filed a suggestion that the TCCA reconsider its ruling and asked to provide briefing, but the TCCA denied the request without an order. Pet.App.258a-66a.

B. First Petition For Writ Of Certiorari And This Court's Decision

Petitioner filed a petition for writ of certiorari on June 24, 2022, arguing that the TCCA's 2022 decision "was plainly wrong under [the TCCA's] precedents" and the TCCA "failed even to acknowledge the State's position." On September 28, 2022, the State filed a brief in this Court supporting Petitioner's claim for relief and detailed the State's reasons for supporting the petition. On January 9, 2023, this Court remanded the case to the TCCA to reconsider the case "in light of the confession of error by Texas in its brief filed on September 28, 2022." *Id.*23a.

C. Procedural History After This Court's 2023 Remand

After this Court issued mandate on February 10, 2023, the following occurred:

- 3-1-2023 The TCCA sent a letter to the parties setting Petitioner's case for submission on March 15, 2023, without soliciting any input or briefing from the parties. *Id.*256a-57a.

- 3-14-2023 Joined by the State, Petitioner submitted: "Agreed Motion to Stay Article 11.071 Proceedings and Postpone Submission Pursuant to Texas Rule of Appellate Procedure 73.7" and a motion to file the above motion under seal because the filing involved matters that were highly sensitive. Pet.App.233a-34a,245a. Petitioner requested a stay of proceedings and a remand to the convicting court because, due to the State's recent disclosure of evidence, additional forensic testing and evidentiary development was necessary. *Id.*252a.

- On the same day, the State submitted a motion for leave to file merits briefing following the requested remand. *Id.*219a.

- 4-5-2023 The TCCA granted Petitioner's motion for leave to file under seal but dismissed the agreed motion for a stay and remand. *Id.*234a. The TCCA issued a sua sponte order holding the application on the

TCCA's own motion for thirty days. *Id.*243a.

- On the same day, the TCCA ruled: "[T]he State's motion for leave to file the State's brief has been denied." *Id.*218a.

- 4-20-2023 Petitioner filed his "Motion for Rehearing of Order Dismissing Agreed 73.7 Motion," seeking a stay of proceedings and a remand to the trial court to follow up on information recently disclosed by the State that called into question the testimony of trial witnesses, suggested the possible "guilt of a third party," and was "directly relevant to the questions before [the TCCA]." *Id.*230a. Petitioner explained that, without the jurisdiction and authority provided by a remand order, the convicting court would not be able to order the transmission of evidence for forensic testing, evaluate evidence of third-party involvement, or enter any supplemental findings of fact. *Id.*239a-40a. Petitioner asserted that the 30-day hold did not allow sufficient time for "necessary evidentiary development." *Id.*240a.

- 4-26-2023 The TCCA denied Petitioner's motion for rehearing via a postcard. Pet.App.229a.

- 5-11-2023 Petitioner submitted for filing a supplemental clerk's record containing five items. *Id.*11a-17a; Supp.HCR1-125.

- 9-27-2023 The TCCA issued a published opinion reaffirming their denial of relief on Petitioner's writ and dismissing his other claims without reviewing their merits. Three TCCA judges dissented without opinion and one concurred in the result. *Escobar II*.

- 2-23-2024 Petitioner filed his second Petition for Writ of Certiorari which is currently before the Court, arguing that this Court should grant review because the TCCA "rebuffed the State's confession of error, despite this Court's clear command that the court consider the confession on remand."

- Amici curiae briefs supporting Petitioner have subsequently been submitted by The Innocence Network and The Center for Integrity in Forensic Sciences, Inc., the American Bar Association, and a group of Former State Attorneys General, United States Attorneys, and Prosecutors. The Texas Attorney General submitted an amicus curiae brief on behalf of the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ) in opposition to the petition.

- 3-18-2024, 4-22-2024 The Court granted the State's first and second motions for extension and extended the time to file a response to May 29, 2024.

REASONS FOR GRANTING CERTIORARI

A. The State Complied With Its Constitutional And Statutory Duties To Remedy False Evidence And Rectify An Injustice, But The TCCA Gave The State's Viewpoint No Weight.

1. *Despite This Court's Directive To Consider The State's Confession, The TCCA Prevented The State From Submitting Briefing, Set Roadblocks Impeding New Evidence, Then Faulted The State For Failing To Explain Its Position.*

After this Court remanded this postconviction case to the TCCA to consider the State's confession of error, the TCCA denied the parties' agreed motion for a stay and remand to the convicting court. Pet.App.242a. The parties had informed the TCCA through an agreed motion filed by Petitioner that they sought forensic testing probing the involvement of alternate suspects, citing issues surrounding the paternity of the victim's child. Pet.App.252a-253a.

The State also filed in the TCCA a motion for leave to file merits briefing, pointing out that the newly disclosed evidence suggested the need for additional investigation and briefing to assist the TCCA "in making a fully informed decision in this case." *Id.*220a. And the State informed the TCCA through its motion of the need for a stay and remand to the convicting court for additional investigation and/or forensic analysis or testing regarding "one or more alternative suspects." *Id.*227a,252a-253a.

The TCCA denied the State's motion with a postcard that left no room for speculation: "On this

day, the State's motion for leave to file the State's brief has been denied." *Id.*218a. Notwithstanding this denial and the TCCA's refusal to remand for new testing and analysis, the TCCA in its 2023 decision rebuked the State for submitting nothing:

> And to this day, despite our holding the case for thirty days, during which time the State could have proffered its "analysis of the facts, the law, and the failures in the forensic science that supported the conviction" that it claims it already had and that it claims was the basis for its change in position, the State has submitted nothing of the kind to this Court.

Escobar II, 676 S.W.3d at 673.

The TCCA criticized the State's reasoning in its 2022 cert response because it "appears to derive directly from the convicting court's findings." *Id.* But this Court had directed the TCCA to further consider the State's "confession of error … in its brief filed on September 28, 2022." *Id.*23a. The State's 2022 brief discussed contamination issues present in this case. State'sCert.Br. at 8, 13-15, 24-25, 27. Further, this Court's remand order did not exempt matters already reviewed by the convicting court from consideration. *Id.*23a.

Petitioner communicated to the TCCA via a motion for rehearing that the additional investigation and testing the parties sought on remand to the convicting court was "directly relevant" to the questions before the TCCA, that 30 days was insufficient, and that the lack of a remand to the convicting court deprived the lower court of the jurisdiction to issue the orders required to facilitate the analysis and testing needed. *Id.*235a-37a; *see also*

Tex. Code Crim. Proc. art. 11.071, Sec. 9; Tex. R. App. P. 73.7; *State v. Patrick*, 86 S.W.3d 592, 594 (2002). The TCCA denied that motion, too. *Id.*229a.

The agreed motion to remand had informed the TCCA that the parties sought to develop evidence tending to show that the true perpetrator of this capital murder and sexual assault may have been in a prior relationship with the victim and highlighted issues surrounding the paternity of her child. Pet.App.251a. The victim was stabbed over 40 times including numerous stab wounds to her breasts, genitals, and head, and she was raped with a long object. *Id.*26a-27a,42a. This murder thus involved "overkill," meaning that the victim "received far more wounds than necessary to cause [her] death." *Cf. Peyravi v. State*, No. 14-03-00452-CR, 2004 Tex. App. LEXIS 7365, at *7 (Tex. App.—Houston [14th Dist.] Aug. 17, 2004, pet. ref'd) (mem. op., not designated for publication). Such circumstances have been found to support a jury's finding of premeditation and deliberation. *Cf. Kulcsar v. Soto*, No. CV 15-1080 DSF (AS), 2017 U.S. Dist. LEXIS 81452, at *68 (C.D. Cal. 2017) (authorities omitted) (stating that a murder in which the victim is "ambushed and repeatedly stabbed, sustaining multiple fatal wounds" has been held to "strongly support[] the jury's finding of premeditation and deliberation").

Accordingly, investigating officers initially developed potential suspects who had prior relationships with the teenage victim, including her estranged adult boyfriend, Fernando Garcia-Sanchez, who was thought to be the biological father of her child. *See* Supp.HCR.14a-16a. New postconviction evidence reveals that Garcia-Sanchez is probably not

actually the boy's biological father. Supp.HCR.14. Further, a man reported by Bianca's mother to be Bianca's "stalker" could not be ruled out as the child's father, but additional DNA testing is needed. Supp.HCR.14,23.

The day preceding the night of Bianca's death was Garcia-Sanchez's birthday, but Bianca attended a wedding that evening with her family. [3] Supp.HCR.48; 22RR34. Moreover, recently disclosed postconviction evidence reveals that Garcia-Sanchez was prosecuted for an Aggravated Robbery in 2010 in which, armed with a black airsoft handgun, rubber gloves, large zip ties, and a full-face ski mask, he entered the home of his neighbors and violently attacked them. *Id.*16a; Supp.HCR.54-61. Nevertheless, police diverted their focus from Garcia-Sanchez and other suspects when they received a call from the son of Petitioner's estranged girlfriend alerting them to Petitioner.

The TCCA stated that it did not understand the relevance of Petitioner's evidentiary submissions and faulted Petitioner for not more thoroughly explaining their significance. *Id.*14a-16a. However, Petitioner informed the court that the investigation he sought

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[3] The State has more to offer on this subject but is limited by the constraints of this filing. For example, undersigned counsel is aware that police interviewed Garcia-Sanchez shortly after the murder and determined that he was involved in paternity litigation with Bianca around the time of her death, admitted having intimate relations with her less than a week before, expressed hostility towards a rival, and had no alibi for the night of her death. Should this Court grant certiorari, the State can offer additional information and argument for the Court's review, as it would have for the TCCA had that court granted its motion below.

was connected to "recently disclosed *Brady* materials"; it would shed light on an alternative suspect's relationship to the victim and explain how Petitioner "became a suspect to the exclusion of alternative suspects." *Id.*235a,252a. The relevance of new information connecting an alternative suspect to the victim—in a supposed stranger-on-stranger murder with no eyewitnesses and a crumbling foundation of forensic evidence—seems obvious.

Indeed, the TCCA's denial of all of the above requests is consistent with its pattern of reluctance to consider any substantive additional evidence or argument from the parties. For example, following the TCCA's 2022 order denying or dismissing all of Petitioner's grounds despite the trial court's recommendations and over 400 factual findings, the State filed a suggestion that the TCCA reconsider its ruling requesting that the court "file and set the case, order briefing, and issue a full opinion acknowledging the entirety of the record, in the interests of justice." *Id.*263a. The TCCA denied the State's suggestion for reconsideration without a written order. *Id.*258a.

And on March 1, 2023, following this Court's remand directing the TCCA to consider the State's confession of error, the TCCA allotted only two weeks from notification to submission. *Id.*256a-257a. Further, the TCCA included the following admonition emblazoned in capital letters making its intent crystal clear: "ORAL ARGUMENT WILL NOT BE PERMITTED." *Id.* 257a. The TCCA effectively conveyed that the court intended to decide the case on remand without any further input from the parties.

In sum, since 2022, the TCCA has repeatedly blocked attempts by the parties to substantively

supplement the record or file merits briefing, and yet has castigated them for submitting nothing of significance.

2. The TCCA Expressed Misgivings About The State's Confession Of Error—Amplified In TDCJ's Amicus Submission—But The District Attorney Acted Consistent With His Constitutional And Statutory Duties To Correct What He Knows To Be False And Ensure That Justice Is Done.

The TCCA in its 2023 decision found "hollow" the State's averment that it had "much to offer this Court in terms of analysis of the facts, the law, and the failures in the forensic science that supported the conviction." *Escobar II*, 676 S.W.3d at 673. The TCCA also observed, "[i]f the State had believed that the convicting court's analysis in support of relief was incomplete, it could easily have expounded on its position, especially in a document where it was heavily criticizing the convicting court."[4] *Id.* TDCJ, in

[4] In January 2021, the State was working within the confines of a Texas procedural rule that allowed a party "ten days from the date he receives the trial court's findings of fact and conclusions of law to file objections." Tex. R. App. P. 73.4(b)(2). The rule did not provide for the State to file merits briefing in support of Petitioner at this juncture. *Id.* Therefore, the State articulated its objections to some of the convicting court's findings, while clarifying that the State did not object to the convicting court's remaining findings and conclusions. Pet.App.264a-79a.

its amicus brief,[5] for its part makes much of a 2020 article in the *Texarkana Gazette*[6] stating that the newly elected District Attorney of Travis County, José Garza, vowed never to seek the death penalty. TDCJ.9. TCDJ implies—without evidentiary support—that the State only agreed Petitioner was entitled to a new trial because the District Attorney opposes the death penalty. *Id.*9-10.

This Court has recognized that a prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (citations

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[5] TDCJ is represented in this amicus filing by the Office of the Attorney General of Texas (OAGT). The instant amicus filing does not represent the OAGT's only effort to intervene in the work of local prosecutors. The OAGT recently proposed a new rule that would give the OAGT "unprecedented oversight of district and county attorneys" in Texas counties with a population greater than 250,000. Serena Lin, *AG Paxton's proposal may bolster State Republican efforts to rein in Democratic DAs*, AUSTIN AMERICAN-STATESMAN (March 14, 2024), https://www.statesman.com/story/news/politics/state/2024/03/14/tx-attorney-general-ken-paxton-seeks-unprecedented-oversight-of-urban-district-attorneys/72972055007.

[6] It is curious that amicus chose this particular publication as the City of Texarkana, the home of the *Texarkana Gazette*, is over 300 miles from Austin, Texas, the district where the Travis County District Attorney has authority to represent the State of Texas. *See* Tex. Code Crim. Proc. art. 2.01; *see also* See Driving Directions from Austin, Texas to Texarkana, Texas, GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; then search starting point field for "Austin, TX" and search destination field for "Texarkana, TX").

omitted). And the Court has long emphasized a prosecutor's duty to correct false evidence and "elicit the truth":

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness…. **A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth**.

Napue at 269-70 (internal citations and formatting omitted, emphasis added).

"The public trust reposed in the law enforcement officers of the Government *requires* that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Young*, 315 U.S. at 258 (emphasis added). In fact, the TCCA has emphasized these very words from *Young*. *Saldano v. State*, 70 S.W.3d 873, 884 (Tex. Crim. App. 2002).

Per TDCJ's own website, five Travis County defendants resided on death row at the time of the TCCA's decision. TDCJ, *Death Row Information*, https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html (last visited May 5, 2024). To date, District Attorney Garza has agreed to a new trial for only one of them: Petitioner. Moreover, the undersigned counsel of record in this case is a veteran appellate prosecutor. She has defended numerous convictions

over the last two decades, including the conviction of another death row defendant.

In fact, the District Attorney and his assistants have agreed that a due process violation occurred in Petitioner's case, not because of any campaign promise or political objective, but because it is their legal and ethical duty to do so. *See Napue*, 360 U.S. at 269-70; *Young*, 315 U.S. at 258; *see also* Tex. Code Crim. Proc. art. 2.01 ("It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice is done."). As the Constitution requires, the State's attorneys have confessed error and sought to correct the impact of the State's false and misleading trial evidence. *Id.*

To the extent that the amicus, finding the State's approach lacking, may seek to replace the District Attorney as the representative of Texas in these cert proceedings, Texas law holds that the authority to represent the State rests with the local prosecutor:

> The authority to represent the State in criminal cases in certiorari proceedings in the Supreme Court of the United States is in the district attorney or county attorney ... who had the authority to prosecute the case in the courts of Texas, and the [OAGT] is authorized to provide assistance to such an attorney at the request of that attorney[.]

Saldano, 70 S.W.3d at 883; *see also* Tex. Code Crim. Proc. Art. 2.01 ("Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely.") Thus, "the authority of the Attorney General is limited to assisting the district or county

attorney *upon request*." *State v. Stephens*, 663 S.W.3d 45, 55 (Tex. Crim. App. 2021) (emphasis in original). No such request has been extended here.[7]

In sum, having determined that false or misleading forensic evidence materially impacted the result of Petitioner's trial, the State confessed error consistent with its constitutional and statutory duty to speak the truth and to see that justice is done.

3. Though The TCCA Was Entitled To Perform Its Own Independent Review, Under Young, It Should Have Accorded The State's Confession Of Error Great Weight. It Erred In Giving It No Weight At All.

This Court has long held that "[t]he considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but [this Court's] judicial obligations compel us to examine independently the errors

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[7] When a local district attorney in New York confessed error, rather than the prosecutorial official with statewide authority, this Court averred it would not "accept [the local prosecutor's] view blindly." *Sibron v. New York*, 392 U.S. 40, 58-59 (1968); *Cf. People v. Gilmour*, 98 N.Y.2d 126, 131 n.7, 746 N.Y.S.2d 114, 117, 773 N.E.2d 479, 482 (2002) ("To be sure, the [New York] Attorney General enjoys a sweeping statutory array of prosecutorial and other law-enforcement authority[.]"); *contrast* the OAGT's more limited authority, discussed *supra*. Further, the State here never asked the TCCA to blindly accept its confession of error—merely to give it the chance to explain its position and the deference due under *Young*.

confessed." *Young*, 315 U.S. at 259.[8] The TCCA has likewise held, "[t]he considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed." *Saldano*, 70 S.W.3d at 884 (citing *Young*). Thus, while an independent review of the record is necessary, a confession of error by the official with authority to prosecute the case "is entitled to great weight." *Id.*; *Young*, 315 U.S. at 259.[9]

Curiously, the very fact that Petitioner, the convicting court, and the Government all agreed about certain factual findings—instead of lending weight to those findings—seems to have led the TCCA to conclude that it need not reexamine them nor their underlying evidence. This approach contradicts this

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[8] TDCJ urges via its amicus that this Court should not accept Petitioner's invitation to overrule *Young*. TDCJ.18. TDCJ presents a strawman. Petitioner has not asked this Court to overrule *Young*. The parties instead implore the Court to enforce *Young's* holding.

[9] *See, e.g., Ex parte Tiede*, 448 S.W.3d 456, 456 (Tex. Crim. App. 2014) (granting relief in habeas case where "newly available relevant scientific evidence … contradicts the scientific evidence relied upon by the State at trial, and … false evidence … presented at trial thus undermin[ed] confidence in the verdict at sentencing," the convicting court, after conducting a live hearing and based upon an extensive record, recommended that the applicant be granted a new punishment hearing, and the State agreed); *Rogers v. United States*, 422 U.S. 35, 42 (1975) (Marshall, J., concurring) (explaining that relief was granted where, after certiorari was granted and after the petitioner's brief was filed, the Solicitor General confessed error); *Casey v. United States*, 343 U.S. 808, 808 (1952) (deferring to the Government's confession of error leading to a new trial where accepting the confession would not establish "any precedent").

Court's remand order which directed the TCCA to consider the State's concession of error and *did not exempt facts and evidence already considered by the convicting court*. It also belies *Young* and its progeny mandating that the State's confession be accorded "great weight."

Upon remand of Petitioner's case, the TCCA minimized the State's confession of error and avoided specific facts discussed by the State, explaining, "[t]he State offered nothing that was not already before us when we denied relief." *Escobar II*, 676 S.W.3d at 673. The TCCA then listed the convicting court's findings touching on contamination without individually addressing any of the content of those findings or the State's concerns. *Id.* The TCCA opined, "the State's articulated, special concern about the possibility of contamination does not support the false-evidence claim [Petitioner] brought to the Supreme Court." *Id.*20a. In so holding, the TCCA excluded from its review the evidence pointing to a high risk of contamination highlighted by the State in its initial cert response brief. In essence, the TCCA jettisoned any deferential review on remand. Instead, the TCCA substituted its own cherry-picked selection of inculpatory postconviction information without acknowledging the evidence that eroded its salience (see Section B *infra*).

In sum, prosecutors determined through postconviction review that the substantial dangers of cross-contamination specific to this case amounted to a "perfect storm" of factors undermining not only the testimony of the APD Lab witnesses, but the integrity of the jury's guilty verdict.

B. The TCCA Erred In Holding There Was No Due Process Violation. Petitioner Has Shown A Reasonable Likelihood That The Use Of False, Misleading, And Unreliable DNA Evidence To Secure His Conviction Could Have Affected The Jury's Judgment.

1. The TCCA Used The Wrong Materiality Test.

This Court's precedent is clear concerning the proper materiality test for a false-evidence error: "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury[.]'" *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing *Napue*, 360 U.S. at 271) (emphasis added). In determining materiality, the evidence is considered "collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). Further, testimony that, "taken as a whole" gives the jury a "false impression" satisfies *Napue's* first prong. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957).

The TCCA agreed with the convicting court that at least some of the State's trial evidence was false: "The evidence that has been shown to be false relates to statistical probability estimates for certain DNA mixtures." *Escobar II*, 676 S.W.3d at 674. However, diverging from this Court's precedent, the TCCA imposed a new materiality test of its own design:

> [Petitioner] has not shown a due process violation; because he has not shown certain evidence to be false, and other evidence that has been shown to be false is not material because there is no reasonable likelihood that the outcome would have changed *if the false*

> *evidence had been replaced with accurate evidence.*
>
> ***
>
> But as we explained in our prior order, *correctly revised estimates would still inculpate [Petitioner]* for some of the mixtures, and there were two single-source results unaffected by the flaws in mixed-sample interpretation.[10]

Id. at 665, 674 (emphasis added). Thus, the TCCA envisioned a trial in which the false and misleading DNA testimony would be replaced with "correctly revised estimates" which "would still inculpate [Petitioner] for some of the mixtures," while omitting those facts which might erode the "correctly revised estimates." *Id.* at 674. TDCJ backs up the TCCA by pointing to various seemingly inculpatory facts offered without mentioning other facts which would reduce their salience and provide context.[11]

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[10] It is unclear to which "single-source results" the TCCA referred here. In any event, serious cross-contamination concerns and other documented problems with all of the DNA evidence are described in Part B(3) below.

[11] For example, TDCJ makes much of Petitioner's alleged out-of-court admission that he got into a fight with "an 'old lady.'" TDCJ.4. However, TDCJ's quote does not tell the whole story. The witness actually stated that, when he asked Petitioner why he had gone over to "the apartment on Steck," Petitioner "said well, I had a fight with the old lady, I am going over there." 24RR170,176. Thus, it appears that Petitioner was using a slang term to refer to the argument that he had that night with *his* 'old lady,' i.e., his girlfriend, Zoe Lopez Moreno. *Cf.* THE URBAN DICTIONARY, *Old Lady*,

By focusing on cherry-picked postconviction "accurate evidence" not available at trial and ignoring the other postconviction evidence undermining it, the materiality test the TCCA employed here was novel and improper. Instead, the TCCA should have required Petitioner to demonstrate a reasonable likelihood that the false and misleading testimony at trial, considered collectively with the other evidence, affected the judgment of the jury.

2. Petitioner's Due Process Claim Falls Solidly Within This Court's Precedent.

The TCCA stated that "the convicting court made no finding that the use of the false evidence by the State was 'knowing' but relied on Texas caselaw (*Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009) for the proposition that knowing or unknowing use by the State was irrelevant." *Escobar II*, 676 S.W.3d at n.10; *see also* TDCJ.18. In fact, Petitioner relied on federal precedent and Texas's interpretation of federal precedent, e.g., *Napue* and *Chabot*, in alleging that his due process rights were violated by the State's use of unreliable, misleading, and false DNA testimony. *See* Pet.App.51a. And the convicting court relied only on federal due process cases in its finding (No. 404) that the State's use of "unreliable and misleading DNA evidence violated [Petitioner's] due process rights by undermining the fundamental fairness of his trial." Pet.App.171a,216a; *see, e.g. Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016) (noting that "the introduction of faulty evidence

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https://www.urbandictionary.com/define.php?term=old%20lady (last visited May 10, 2024) ("old lady: a slang term for girlfriend or someone you are interested in.").

violates a petitioner's due process right to a fundamentally fair trial" even if it does not "specifically qualify as 'false testimony'"; "[n]othing compels a different rule for a challenge brought … to expert testimony about discredited forensic principles or other junk science") (citations omitted).

Further, this Court has long held that knowledge of law enforcement partners will be imputed to prosecutors—an "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[12] *Kyles*, 514 U.S. at 437. And "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence," suppression of material evidence affecting the witness's credibility will justify a new trial "irrespective of the good faith or bad faith" of the prosecutor. *Giglio*, 405 U.S. at 153-54 (reversing a conviction where a principal government witness testified that he had not been offered immunity and the prosecutor who tried the case did not know that the testimony was false).

3. Summary Of Evidence Considered By The State In Deciding That False, Unreliable, And Misleading DNA Testimony Undermined The Fundamental Fairness Of Petitioner's Trial

The following represents a summary of some of the many facts considered by the State in determining that a due process violation occurred.

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[12] In Petitioner's case, the APD Lab was housed in, and operated by, law enforcement. Pet.App.3a,35a.

a. DNA Evidence and Cross-Contamination

- Because Petitioner was a stranger to the victim and there were no known eyewitnesses, the State relied heavily on DNA evidence and other forensic evidence. Pet.App42a-43a,45a-46a. At the beginning of trial, prosecutors told the jury that "the science of DNA does tell us who is connected to this crime." 22RR50. The State's expert witnesses assured the jury that the APD Lab's practices were scientifically sound, and its results properly validated, but postconviction evidence revealed this was not true. *See* Pet.App.44a,58a-62a.The State devoted about a third of the State's closing arguments addressed the DNA evidence. 28RR21-39,61-78.
- The APD Lab collected, packaged, and stored all the evidence and conducted serology and initial DNA testing on the evidentiary samples from Petitioner's Polo shoes, Nautica Shirt, Lee jeans, and the doorknob lock from the crime scene. Pet.App.145a. Additional DNA testing was conducted by a private laboratory, Fairfax Identity Laboratories (Fairfax Lab), which confirmed some of the APD Lab's results. Pet.App.44a. Postconviction evidence calls the work done by both labs into question. *Id.*
- An independent audit of the APD Lab performed by the TFSC led to the APD Lab's shutdown in 2016 and a Texas Department of Public Safety (DPS) evaluation of the APD Lab's casework—including the work of two APD Lab senior analysts, Diana Morales and Elizabeth Morris, who testified and performed serology and some

DNA testing on critical evidence in Petitioner's case. Pet.App.49a,81a-82a.

- Per recalculations done by Mitotyping Technologies (Mitotyping), [13] five DNA samples originally tested by Fairfax Lab are now considered inconclusive. Pet.App.121a,149a; 30HR232. These include the sample from the doorknob lock, a sample from Petitioner's left Polo shoe, and three from Petitioner's Nautica shirt. Pet.App.121a,149a; 28HR1860-63.
- The TCCA and TDCJ point to Mitotyping's recalculations of statistics for the Mazda samples (Items 7 and 8), asserting that these items were still inculpatory. TDCJ.8-9; *Escobar I*, No. WR-81,574-02, at *6-*7; *see also* 20RR105. However, DNA expert Dr. Dan Krane found that Items 7 and 8 should have been deemed inconclusive (20HR107,194,120-21). He noted:
    - The samples exhibited signs of allelic dropout, allele stacking, and saturation, exacerbated by excessive injection times, 20HR73-74,83,108-09,116-21;
    - The samples were degraded and there was no way to determine the total number of contributors—possibly "two or three or more additional contributors to the sample," 20HR60,62-66,73-74,86,89-93,120,163;
    - The lab had no validation studies for mixtures of three or more people and—according to the lab's own SOPs—they

[13] Mitotyping took over Fairfax Lab and performed recalculations for some evidence in this case.

should not have recalculated Items 7 and 8, 20HR75-76,83-86,104,107,120-21.[14]

- In addition, though the State's postconviction DNA expert, Dr. Bruce Budowle, reviewed electropherograms at a hearing, he admitted that the lab did not have "good validation studies," conceded that Item 8 was "at least a three person mixture," and, per the lab's protocols, mixtures of this type should not be interpreted. *Id.*147a-148a.[15]
- After the TFSC audit, DPS endeavored to retrain APD Lab analysts; however, Morales and Morris failed to successfully complete the serology portion of the DPS training and never advanced to the

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[14] A DNA analyst with Mitotyping Lab, Ross Kirkendoll, explained in 2020 that "[w]hen Mitotyping took over Fairfax, neither lab had done any validation work on DNA interpretation procedures for mixtures containing more than two contributors." 30HR231. Kirkendoll observed that, when the lab "interpreted DNA mixtures with three or more people" using "validations conducted with only two-person mixtures," the "analysts were essentially using practices which were not scientifically sound to reach their conclusions." *Id.*232.

[15] In its amicus brief, TDCJ asserts that Budowle, "confirmed the overwhelming likelihood of [Petitioner's] guilt." TDCJ.8. TDCJ falls prey to what this Court has described as the "Prosecutor's Fallacy" by implicitly assuming that the random match probability or combined probability of inclusion is the same as the probability that Petitioner is guilty. *Cf. McDaniel v. Brown*, 558 U.S. 120, 128 (2010); *see also* Inn.Network.Br.9. Further, his reviews were confined to the testing data and consisted primarily of looking at the order in which samples were handled. Pet.App.137a. Accordingly, Budowle at one point testified that he could not "answer one way or the other" as to whether any cross-contamination "happened beforehand." 29HR196.

DNA testing portion. *Id.*83a-84a; 28HR2232-40. They were reassigned to administrative roles. *Id.*84a.; 30HR244-45. A DPS Lab official averred, "DPS cannot have their name associated with any work product that may come from the APD DNA section as it currently stands." 28HR2233.

- Morales accumulated five contamination incidents between October 2008 and April 2010 (the same time frame as her work on Petitioner's case). Pet.App.87a. The DPS Crime Laboratory Director later stated that this many contamination incidents was "not normal" and DPS would have removed such an analyst from casework. 30HR245. Morales swabbed the inside doorknob lock from the crime scene and performed serology on other key evidence. Pet.App.44a. The DNA test result from the doorknob swab was arguably the single most important piece of forensic evidence in Petitioner's trial, placing Petitioner inside the victim's apartment. 28RR36-37.
- The DPS trainer found "very concerning" Morales's "resistance to adhere to the FBI DNA Quality Assurance Standard 6, which states that two analysts cannot be working on cases at the same time on the same bench." 30HR1327. The DPS trainer explained that it was "imperative" that if two analysts were working "in the same room at the same time, a barrier needed to be created to physically separate the areas used for screening the two cases to prevent contamination," yet Morales was observed during training with another analyst screening samples "on the same bench at the same time without a barrier." *Id.*

- The DPS trainer's fears are especially concerning because of the postconviction evidence in this case that, after seizing items from Petitioner's mother's apartment, APD crime scene technician Stacy Wells secured these items in Drying Room G—the same drying room in which bloody evidence from the crime scene was being stored. *Id.*1442.
- Documentation suggests Wells then simultaneously checked out items from an evidence locker (including Petitioner's polo shoes and jeans) and Drying Room G for packaging during an overlapping timeframe. *Id.* 1442-44. Again, her notes did not document any precautions taken to prevent cross-contamination. *Id.*
- Defense expert Keith Inman, a criminalist with over forty years of experience, examined the documentation in this case and noted that Wells's handling of the evidence from the drying room and the evidence locker simultaneously "increased the risk" that items containing bloody evidence from the crime scene as well as items collected from Petitioner's mother's residence "could have come in close proximity to items from the locker, increasing the likelihood of cross-contamination." *Id.*1444.
- Inman explained the risk of contamination presented by failing to cover a bloody item, whether wet or dried: "[i]t is well accepted within the forensic science community that dried blood has a tendency to flake off in extremely small quantities, giving rise to the phrase 'blood dust.'… as bloody evidence is handled, the amount of blood dust created increases." *Id.*1441.

- In fact, Wells had been verbally counseled by her APD supervisor shortly before this offense for not properly securing packaged evidence for transport with tape and not writing anything on the evidence bags. *Id.*1753-54. She received another written reprimand in 2009 for improperly labeling and handling evidence and failing to properly document chain of custody. *Id.*1755-56. Finally, in March 2010, APD leadership listed among the grounds for termination that she had falsely stated—and testified—that she had a Master of Science Degree. *Id.*1757-58.
- Morris, who performed some of the serology and DNA testing on key forensic evidence, was found to have been involved in at least nine documented contamination incidents between 2006 and 2015, impacting more than thirty cases and encompassing the time frame of her work on Petitioner's case. 28HR1842. In one incident, Morris developed a major DNA profile on an evidentiary item consistent with another lab employee. 30HR1436. Morris was repeatedly reminded to change her gloves and "continued to experience contamination in her casework." *Id.*1435.
- A DPS trainer decried Morris's refusal to use a tube decapper to reduce the risk of contamination. 30HR1345. The DPS trainer stated that the behaviors she observed in Morris's serology work "would have definitely caused me concern regarding her ability to adhere to best practices in DNA analysis," noting that, "It is very easy to cause contamination or have things go wrong in DNA analysis." *Id*1326.

- In Petitioner's case, Morris violated best practices when she processed high-quantity DNA swabs from the crime scene and the victim's fingernail clippings at the same time as low-quantity DNA samples taken from Petitioner's clothing, which "significantly increased the risk of contamination." 28HR1843; Pet.App.144a.
- When Morris noticed that a seal was coming apart on the package of a bloody carpet cutting from the scene, she resealed the package and later indicated that she did not consider the compromised seal to be an issue. Pet.App.143a.
- The APD Lab's initial handling of the evidence potentially compromised items tested "downstream" by other labs:

> [M]ultiple items were not properly packaged by the APD lab. Prior to DNA testing, APD analysts noted that the evidence bags containing the Nautica shirt (Item 78) and the carpet cutting (Item 44) were coming apart. Upon receiving the Mazda samples from APD, Fairfax analyst Fahrner noted that the package appeared to have been opened and resealed. Records also indicate that the Polo shoes and carpet cutting were sent to [DPS] for shoe impression analysis before these items were screened and tested for DNA. A crime scene specialist removed the Polo shoes from the central evidence locker four days before transferring them to DPS, and the location of the shoes during that period is unknown.
>
> These circumstances increase the risk of contamination and raise important

> questions about whether the lab was following proper evidence handling and chain of custody practices in compliance with accreditation standards. Furthermore, because all evidence samples were initially collected and processed by the APD lab. the risk that the DNA samples tested by Fairfax were also compromised cannot be eliminated.

28HR1843; Pet.App.145a.

b. Latent Print on Lotion Bottle

In addition, the State's other (non-DNA) evidence had significant weaknesses. For example, the APD latent print examiner who testified at trial was initially unable "to identify any of the latent prints in this case" and could not "make an identification to" Petitioner regarding a print in blood on the lotion bottle. 27RR11,69. The jury learned that the examiner changed her mind upon reexamining the print mid-trial after a prosecutor requested a reexamination. *See* 27RR11-12. The APD examiner reviewed the complex, partial print again and ultimately testified that, though she had obtained a different result in 2009, she now believed that the print on the front of the lotion bottle was "identical" to the edge of the middle joint of Petitioner's left ring finger; and another APD examiner agreed. 27RR74-75,96.

The convicting court found that "complex" prints like this one should be subjected to blind verification to reduce the risk of confirmation bias and ensure reliable results. Pet.App.192a-197a. The convicting court did not find that Petitioner's complex-print ground alone entitled him to relief. *Id.*200a. However,

because the materiality of false evidence turns on a collective review of the record, the weaknesses of the remaining evidence before the jury—including this print—should be considered. *See Kyles*, 115 S. Ct. at 1567.

c. Testimony of Zoe Lopez Moreno

The TCCA and TDCJ emphasize the testimony of Petitioner's estranged girlfriend Zoe Lopez Moreno that she overheard the sounds of a rape ("screaming and screaming"). However, the record reveals Lopez Moreno was extremely upset and angry with Petitioner and her version of what she heard changed over time after conversations with her son and Petitioner's sister. 23RR80,84-85119-20,183; 35RR144-415. First, Lopez Moreno complained that Petitioner let her hear him having sex with someone else to make her jealous: "I called him pissed off cause he left me there n yea he picked up the phone so I could hear them fkn—and earlier he was just telln me he loved me Nancy I am so hurt.... its seriously over between me n ur Bro[.]" 35RR144. Later, after corresponding with others, Lopez Moreno began to state that Petitioner may have raped someone. *Id.* But even then, she continued texting with Petitioner and went to work for her Monday shift until investigators showed up at her workplace. 23RR85,112-16.

d. Cell Towers

Postconviction expert testimony indicated that it was not possible to specifically pinpoint the location of Petitioner's phone in relation to the cell towers based on the trial evidence, which omitted the "azimuth" of the cell towers' sectors as well as which individual sectors were used. Pet.App.201a-06a. And

as Petitioner lived in the same apartment complex as the victim, the cell tower evidence merely showed that he was in the general vicinity of his own apartment or "a multitude of possible locations at the time of the calls." *Id.*201a-10a.

e. Bloody Shoe Print

Trial testimony established that Petitioner's shoe could not be excluded as a "possible source" of an apparent shoe print in bloody carpet at the crime scene. 25RR34. However, the State's witness was only able to assess general "class characteristics" for this shoe print. 25RR40,47,50-55. The State's expert could not determine the shoe size, did not know which shoe types had this tread pattern, and could not determine the brand of shoe. 25RR47,50-55,57. The record shows there could have been thousands of similar shoes in the Austin area. *Id.*50-51,57; Pet.App.43a,156a.

f. Affidavit of Trial Attorneys

After learning of the problems with the State's forensic evidence, Petitioner's trial attorneys opined:

> [T]he evidentiary picture would have changed from twelve incriminating DNA samples to 10 samples tainted by APD issues, and only two samples—the Mazda car samples—that were not tested by the APD DNA lab but still collected and handled by the larger APD Forensic Science Division, which was plagued by its own woes. Furthermore, it is our understanding that those two Mazda samples, which were mixed samples, would now be declared inconclusive based on the scientific developments in mixture interpretation.

30HR1899-1900.

The attorneys also discussed the weaknesses of the State's other forensic evidence and emphasized the importance of the DNA evidence to the jury:

> We also know that the jurors were preoccupied with the DNA evidence at trial. Indeed, during the guilt-phase deliberations, the jurors requested to see the DNA results and the court allowed them to view the exhibits relating to the APD and Fairfax testing. In addition, we are aware that one of the sitting jurors testified in an earlier post-conviction proceeding that he was "on the fence" as to Mr. Escobar's guilt, but that the DNA evidence was the "sealing factor."

*Id.*1900.

Trial counsel said that, had they known what they know today, they would have "employ[ed] an entirely different strategy that would have enabled [them] to effectively undermine the evidence the jury appeared to find most persuasive." *Id.* The convicting court considered their affidavit and found this strategy would have been fruitful and there was "a strong likelihood that all of the DNA results generated by the APD DNA Lab would have been excluded." Pet.App.151a.

CONCLUSION

The State complied with its constitutional and statutory duties to rectify an injustice and remedy false evidence by conceding error. Yet the TCCA gave the State's viewpoint no weight. The TCCA erred in finding no reasonable likelihood that the prosecution's use of false, misleading, and unreliable DNA evidence could have affected the jury's judgment and in disregarding evidence of an intolerably high risk of cross-contamination.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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