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

## SUPPLEMENTAL BRIEF FOR THE PETITIONER


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## SUPPLEMENTAL BRIEF FOR THE PETITIONER

This Court granted certiorari in *Glossip v. Oklahoma* to resolve the Question: "Whether due process of law requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it. *See Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.)." Petition for Certiorari at i, *Glossip v. Oklahoma*, No. 22-7466 (U.S. May 4, 2023); Order, No. 22-7466 (U.S. Jan. 22, 2024). That Question, also raised in this petition, Pet.1, remains unanswered because the parties in *Glossip* elected not to pursue it at the merits stage. *See* Brief for Petitioner at i & n.*, *Glossip v. Oklahoma*, No. 22-7466 (U.S. Apr. 23, 2024). This case squarely presents that unresolved Question, and the Texas Court of Criminal Appeals' decision proves why this Court's intervention is essential.

Petitioner Areli Escobar was convicted and sentenced to death based on forensic DNA evidence the State now admits was false, misleading, and unreliable. Recognizing the magnitude of the error, the Travis County District Attorney's Office—the very office that prosecuted Escobar—formally confessed error, abandoned its defense of the conviction, and urged relief. After the TCCA nonetheless reaffirmed Escobar's conviction and death sentence without even acknowledging the State's confession, this Court vacated the judgment and remanded with instructions that the TCCA give "further consideration in light of the confession of error by Texas." *See* Pet.App.23a-25a. But on remand, the TCCA refused to give that confession any weight, denied the State's motion to brief its position, and

reiterated its prior ruling as if the State's confession had never happened.

That defiance of this Court's GVR order in *Escobar I* is troubling enough. But the TCCA went further: It applied an incorrect harmless error analysis, flipping the burden of proof onto Escobar and glossing over the prosecution's acknowledgment that it could not meet its burden to justify the conviction.

This case thus presents the Question *Glossip* left open in its sharpest form. The State's confession of error is based not merely on a prosecution's failure to correct the perjured testimony of a third-party witness, but on false, misleading, and unreliable forensic science developed and presented by the State itself. Indeed, the Austin Police Department's forensic laboratory that generated and presented the evidence was so unreliable that it was permanently shuttered. The TCCA should not be permitted to set aside the government's admission that it used false and misleading evidence generated by the State itself to send an innocent man to his death, particularly when the TCCA's contrary reasoning does not withstand even modest scrutiny and the remaining evidence is patently insufficient to sustain the conviction.

## I. The Unresolved Question The Court Granted In *Glossip* Still Warrants This Court's Review.

This Court has already decided that the first Question Presented by this petition warrants review, having granted certiorari to decide it in *Glossip*.

Nothing in the intervening months has arisen that should cause this Court to reconsider that decision.[1]

### A. This case squarely presents the Question that the parties abandoned in *Glossip*.

The unresolved Question in *Glossip* is squarely presented here: The TCCA refused to give any weight to the State's confession of error, disregarding Texas's acknowledgment that Escobar's conviction was secured through false, misleading, and unreliable forensic evidence.

Despite the State's formal admission that Escobar's trial was tainted by scientifically discredited DNA testimony, the TCCA not only reaffirmed its denial of relief but also actively obstructed the State's efforts to clarify its position. On remand from this Court, the TCCA denied Texas's motion for merits briefing, refused to allow the State to elaborate why it had confessed error, and dismissed a joint request from both parties to stay proceedings and permit further evidentiary development—including any further development related to the State's investigation of an alternative suspect. *See* Resp.10. Rather than conduct the meaningful reconsideration this Court's GVR order required, the TCCA treated the State's confession as an afterthought—affirming its original decision on the same grounds, disregarding the very basis of the

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[1] If anything, it is even more important to address the Question in this case because the TCCA defied this Court's instruction in *Escobar I* to consider the State's confession on remand. *See, e.g.*, *Moore v. Texas*, 586 U.S. 133, 143 (2019) (per curiam) (Roberts, C.J., concurring).

confession, and faulting the State for not submitting additional argument after preventing it from doing so. *See* Pet.24-27; Resp.7-9; *see also* Resp.10-21.

Indeed, this case presents an even stronger vehicle than *Glossip* to resolve how courts should treat a State's postconviction confession of error.

*First*, the State's confession here is particularly compelling because it arises from its own misconduct in creating the false and misleading evidence. The false DNA evidence was analyzed, prepared, and presented by employees of the Austin Police Department's crime lab whose work is fairly viewed as part of the prosecution. The State thus is not merely conceding that a third-party witness lied, as in *Glossip*; it is admitting that its own forensic evidence was so fatally flawed that continuing to rely on it to support Escobar's conviction would be unjust. *See* Resp.10-12. The TCCA's refusal to credit this admission—let alone permit the State to explain it—only underscores the urgent need for this Court's intervention.

*Second*, the Court already indicated in *Escobar I* that the State's confession of error should have been a meaningful factor in the due process analysis. Yet the TCCA didn't just disregard the confession on remand; it imposed procedural barriers to prevent its full consideration. A state court is not free to dismiss a prosecutor's confession of error without engaging with its substance, especially when this Court returns the case to the state court with the express instruction to reconsider its decision in light of the confession.

### B. The Question *Glossip* did not reach remains important.

The question of how much deference courts must give to a State's confession of error extends beyond Escobar's case. Prosecutorial confessions of error, while rare, occur in a wide range of contexts—including cases involving forensic error (as here), *Brady* violations, and third-party witness perjury (as in *Glossip*). Allowing state courts to ignore or minimize a State's admission that a conviction is constitutionally infirm raises serious due process concerns and risks entrenching wrongful convictions even when the prosecuting authority has acknowledged the injustice.

This concern is especially pronounced in cases like Escobar's, where the State's confession is based on its admission that the forensic evidence developed *by the State* and presented to the jury was false, unreliable, and misleading. Forensic evidence is often uniquely persuasive to jurors, particularly when presented as scientific proof of guilt. DNA evidence carries an almost unparalleled weight in the minds of jurors, as the State itself acknowledged in its closing arguments at Escobar's trial. When the very forensic evidence used to secure a conviction is later exposed as unreliable by the same government that developed and introduced it, the need for relief is at its apex.

## II. The TCCA's Harmless Error Analysis Is Plainly Wrong.

Certiorari is also warranted because the TCCA has ordered the execution of a man who is likely innocent, convicted on false and unreliable forensic

testimony and a smattering of other circumstantial evidence that cannot support a capital conviction.

### A. The State has already conceded that it cannot meet its burden to prove that the *Napue* violation was harmless beyond a reasonable doubt.

The TCCA applied the wrong legal standard in evaluating whether Escobar's conviction was tainted by the prosecution's reliance on false forensic evidence. Once a *Napue* violation has been established, a new trial is required unless the prosecution "'prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *See Glossip v. Oklahoma*, No. 22-7466, slip op.17 (U.S. Feb. 25, 2025) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). The standard does not require absolute certainty that the false evidence changed the outcome. *See ibid.* ("This Court has not required an evidentiary record free of doubt to find a *Napue* violation."). Instead, "a new trial is warranted so long as the false testimony '*may* have had an *effect* on the outcome of the trial.'" *Ibid.* (citation omitted; emphasis added). Accordingly, this Court found that the *Napue* error in *Glossip* "prejudiced the defense," and held that "Glossip is entitled to a new trial." *Id.*22.

In this case, the TCCA both misdescribed and misapplied these standards. Rather than ask whether the State had sustained its burden of proving beyond a reasonable doubt that the false evidence did not "contribute" to, or have an "effect" on, the verdict, the court affirmed petitioner's death sentence because it believed that, on balance, there was no "reasonable

likelihood that the outcome would have changed." *See* Pet.App.2a; *see also id.*21a (false evidence "did not create a reasonable likelihood of a different outcome"). But the question is not whether the outcome would have been the same if the perjured testimony were replaced with an honest accounting. Pet.33-34. That is why *Glossip* rejected the claim "that the false testimony must itself have directly affected the trial's outcome to be material under *Napue*." *See* slip op.24. The prejudice analysis "instead always requires courts to assess whether 'the error complained of' could have contributed to the verdict." *Ibid.* (citation omitted).

Had the TCCA asked the right question, it is difficult to see how a *Napue* error can be set aside when, as here, the government "beneficiary of the constitutional error" doesn't just fail to attempt "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *see Glossip*, slip op.17 (citation omitted), but affirmatively concedes that it cannot do so. The prosecution is uniquely positioned to understand the likely impact of the false evidence the State itself put together. And due respect for our justice system's separation of prosecutorial and judicial functions strongly counsels against judges taking on the prosecutor's role of vouching for the validity of the prosecution's evidence, rather than neutrally assessing the arguments of the parties before them.

In any event, as discussed next, the State's confession of error, and thus its concession that it cannot meet its burden to prove harmlessness beyond a reasonable doubt, is well-founded.

### B. Ample evidence supports the State's confession of error in this Court.

The State has carefully detailed why the DNA evidence the State itself prepared and then used to convict Escobar was unreliable and materially false and misleading, and why its remaining evidence was insufficient to support a conviction. *See* Brief of Respondent State of Texas in Support ("Resp."). Given the weight the prosecution placed on the false DNA evidence at trial, there is no legitimate argument that the presentation was "harmless." Yet the TCCA summarily rejected the State's explanation without addressing all the State's well-founded concerns.

1. The record leaves no doubt that the false forensic evidence was essential to Escobar's conviction.

At trial, the State framed its entire case around DNA evidence, arguing that it was the "key" to proving guilt. *See* Pet.App.45a-46a (quoting 28RR 26-37). At the start of trial, prosecutors told the jury that "the science of DNA does tell us who is connected to this crime," and that the DNA evidence proved Escobar's guilt. *See* Resp.26 (quoting 22RR50). In its closing, the prosecution "told the jury they were lucky because they got to hear DNA evidence, and that each individual DNA sample was a 'key piece' of the puzzle proving Mr. Escobar's culpability." Pet.App.45a-46a (quoting 28RR26-37). Prosecutors repeatedly emphasized that the DNA evidence was scientifically sound and reliable, contrasting it with the other circumstantial evidence. *See ibid.* The DNA was presented as proof beyond reasonable doubt, with the prosecution arguing to the jury "that the 'forensics alone' and the 'science of all this' was sufficient in and

of itself to support a guilty verdict." *See id.*155a (quoting 28RR39).

2. The TCCA did not dispute that at least some of the DNA evidence was false or that DNA was the central feature of the prosecution's case. Instead, it reaffirmed the conviction based on just two supposedly unaffected pieces of DNA evidence from which Escobar and the victim purportedly could not be excluded as potential contributors and a handful of other circumstantial evidence that the State admits is insufficient to prove petitioner's guilt.

To start, the DNA evidence the TCCA cited—purportedly found in samples collected from Escobar's shoes and in a car, *see* Pet.App.31a-32a—was the product of a lab so plagued by *pervasive* contamination issues and scientifically indefensible forensic practices that Texas officials shut it down and barred the analysts who worked on Escobar's case from further casework. *See* Pet.10-12, 15-17, 19-20. Expert reports confirm that the DNA conclusions presented at trial are no longer scientifically valid, and new forensic analysis has undermined the integrity of every key sample used to implicate Escobar. *Id.*12-17. This includes the two pieces of evidence the TCCA relied on. Indeed, the State admitted that the samples from the shoes and the car were subject to a specific, serious risk of cross-contamination, a concession the TCCA failed to acknowledge or address. *See* Resp.27-35; *see also* Pet.27, 34-35.

The remaining circumstantial evidence was insubstantial. Cell tower evidence consistent with Escobar's phone being in the general apartment complex in which both he and the victim lived (along

with many others) at the time of the crime. Pet.37; Resp.34-35. A shoe print that "could not be excluded as a 'possible source'" of a partial print in the victim's apartment that matched thousands of other shoes, and for which the State's expert "could not determine the brand," or even "the shoe size" or "which shoe types had this tread pattern." Pet.37 (citation omitted); Resp.35 (quoting 25RR34, 47, 50-55, 57). And the ever-evolving story of Escobar's ex-girlfriend, who initially told friends "it was 'over' between" them because she heard him having "consensual sex" with another woman, only to claim two years later that she heard a woman "screaming and screaming and screaming and screaming" over the phone. Pet.9 (quoting Pet.App.157a); Resp.34.

In *Glossip*, this Court held that when the government secures a conviction using false evidence, Due Process demands a full and fair reckoning of the entire record—not an after-the-fact effort to patch the holes with whatever scraps remain. *See, e.g.*, slip op.22 (holding that prejudice analysis "requires a 'cumulative evaluation' of all the evidence, whether or not that evidence is before the Court in the form of an independent claim for relief," and finding such "documents reinforce our conclusion that the *Napue* error here prejudiced the defense"). The TCCA's contrary approach isn't just wrong; it's indefensible.

### C. The alternative grounds for affirmance offered by amici corrections officers do not provide a basis for denial.

The amicus brief filed by the Texas Department of Criminal Justice's Correctional Institutions Division argued that certiorari should be denied

because a *Napue* violation in a false DNA case requires proof of prosecutorial intent. That argument is legally incorrect, factually unsupported, and entirely beside the point. *See* Cert. Reply 5-10.

*First*, as the United States often points out, "when an issue resolved by a court of appeals warrants review, the existence of a potential alternative ground to defend the judgment is not a barrier to review—particularly where, as here, that ground ... was not addressed by the court of appeals." *See, e.g.*, Gov't Pet. Reply, *Comm'r v. Estate of Jelke*, No. 07-1582 (U.S. Sept. 3, 2008), 2008 WL 4066478, at *9. This Court regularly grants certiorari to review harmless error decisions on the assumption that the lower court's finding of constitutional error was correct. *See, e.g.*, *Fry v. Pliler*, 551 U.S. 112, 116 n.1 (2007); *Rose v. Clark*, 478 U.S. 570, 576 n.5 (1986); *United States v. Hasting*, 461 U.S. 499, 506 n.4 (1983); *Harrington v. California*, 395 U.S. 250, 253 (1969).

Here, the TCCA did not base its decision on the absence of prosecutorial knowledge, but on its conclusion that any error was harmless regardless of the State's views. For the reasons discussed, that conclusion warrants review. If the Court reverses, the TCCA can consider, if appropriate, whether the habeas courts' finding of a due process violation misunderstood any knowledge requirement.[2]

*Second*, *Glossip* did not resolve the knowledge question relevant here, which involves false evidence

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[2] The court may well conclude it need not resolve that question because, under "Texas caselaw, ... a due-process violation could be based on the State's unknowing use of false evidence." *See* Pet.App.3a n.4.

directly from forensic experts acting as agents of the prosecution, not the perjured testimony of a third-party witness.

*Third*, even if knowledge were required, the requirement would be satisfied. The knowledge of law enforcement is imputed to the prosecution for due process purposes. *See* Resp.25 (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Giglio v. United States*, 405 U.S. 150, 153-54 (1972)). Here, the false evidence was prepared and presented by the Austin Police Department's DNA analysts. And the prosecution had access to internal forensic audits, lab reports, and records detailing contamination issues at the lab years before Escobar's trial. *E.g.*, *Glossip*, slip op.18 (knowledge where "prosecution almost certainly had access to Sneed's medical file," which made his perjury evident).[3]

The TCCA never addressed any of these issues because it applied the wrong harmless error standard and failed to give any weight to the State's confession of error. This Court should grant certiorari, resolve the deference and harmless error questions, and remand to allow the TCCA to resolve any other remaining issues as may be appropriate.

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[3] If necessary, Escobar should be allowed to further develop the record on knowledge, given that knowledge has not been required under binding Texas precedent. *See* Pet.App.5a n.10 ("Regarding the false-evidence claim, the convicting court made no finding that the use of the false evidence by the State was 'knowing' but relied on Texas caselaw for the proposition that knowing or unknowing use by the State was irrelevant.").

## CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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