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Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
1 First Street Northeast
Washington, D.C. 20543

Re: Areli Escobar v. State of Texas, No. 23-934 ***CAPITAL CASE***

Dear Mr. Harris:

Respondent State of Texas writes to apprise the Court of further considerations following its recent decision in *Glossip v. Oklahoma*, 604 U. S. ___ (2025). Undersigned counsel respectfully requests that you circulate this letter to the Court for its consideration.

State's confession of error entitled to "great weight"

When this Court originally granted certiorari in *Glossip*, one of the Questions Presented—later dropped by the parties—inquired "[w]hether due process of law requires reversal, where a capital conviction is so infected with errors that the State no longer seeks to defend it." The Oklahoma court had held that the State's concession of error was not "based in law or fact," but this Court ultimately found "ample evidence" to support Oklahoma's confession of error. *Glossip*, slip op., at 2, 26. Petitioner Escobar raised a parallel question and Respondent rephrased it, asking whether the Texas Court of Criminal Appeals (TCCA) "erred in refusing to allow the State to explain its changed position and giving no weight to the State's confession of error."

This Court has for the better part of a century held that, though the reviewing court must perform its "judicial function," "[c]onfessions of error are, of course, entitled to and given great weight." *Sibron v. New York*, 392 U.S. 40, 58 (1968) (citing *Young v. United States*, 315 U.S. 257, 258 (1942)). No less venerable is this Court's mandate to prosecutors to correct what they know to be false and to "elicit the truth":

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. 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 v. Illinois, 360 U.S. 264, 269-70 (1959) (citations omitted); *see also Glossip*, slip op., at 23 (citing *Napue*, 360 U. S. at 269-70) ("[T]he Due Process Clause imposes 'the responsibility and duty to correct' false testimony on 'representatives of the State[.]'"). These holdings rest on the foundational principle that the government's attorney represents:

> a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935).[1]

In its decision on remand, the TCCA briefly acknowledged this line of precedent but nonetheless essentially accorded the State's concession of error no deference. The TCCA broadly dispensed with the State's concerns about the integrity of its forensic evidence without individually addressing those concerns. *Escobar*, 676 S.W.3d at 673-74. Additionally, the TCCA criticized the State for not bringing forth new facts beyond those covered by the convicting court's thorough and lengthy findings. *Id.* Especially given that the TCCA dismissed a joint motion to stay proceedings for further evidentiary development (Pet.App.229a,242a), this requirement is not supported by federal law. *Cf. Glossip*, slip. op., at 25 (declining to address amicus's argument that relied "heavily on extra-record materials not properly before the Court"). Also, the requirement does not

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1 Texas law also requires that prosecutors concede error, correct false evidence, and work to ensure that justice is done. *See, e.g.*, Tex. Code Crim. Proc. art. 2A.101 (formerly art. 2.01) ("(a) The primary duty of an attorney representing the state … is not to convict but to see that justice is done. (b) An attorney representing the state … may not suppress facts or conceal witnesses capable of establishing the innocence of the defendant."). "The prosecutor's constitutional duty to correct known false evidence is well established both in law and in the professional regulations which govern prosecutorial conduct…. the prosecutor is more than a mere advocate, but a fiduciary to fundamental principles of fairness." *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989). A newly amended Texas disciplinary rule defines affirmative disclosure obligations when a prosecutor learns of "new and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted." Tex. Disciplinary Rules Prof'l Conduct R. 3.09(f).

comply with this Court's remand order which directed "further consideration in light of the confession of error by Texas in its brief filed on September 28, 2022." Pet.App.24a. Moreover, the TCCA constructed an insurmountable hurdle—faulting the State for its failure to brief arguments, while denying the State's motions to submit briefing. *Escobar*, 676 S.W.3d at 673-74; *see also* Pet.App.218a,257a,258a,263a.

The above circumstances set the stage for this Court to address the question presented in both cases but not yet answered. Should this Court choose not to address the issue here, lower courts may continue to disregard or even—like the TCCA—devalue the State's carefully considered concessions.

State ground not independent if "intertwined with questions of federal law"

The TCCA noted that Escobar cited *Napue v. Illinois*, 360 U.S. 264 (1959), but relied on Texas caselaw. *Ex parte Escobar*, 676 S.W.3d 664, 667 n.4 (Tex. Crim. App. 2023) (citing *Ex parte Chabot*, 300 S.W.3d 768 (Tex. Crim. App. 2009)). This Court in *Glossip* reiterated that "[a] state ground of decision is independent only when it does not depend on a federal holding… and also is not intertwined with questions of federal law." *Glossip*, slip op., at 13 (citations omitted). This Court examined the Oklahoma Court of Criminal Appeals' (OCCA's) application of a state procedural bar, finding that the OCCA's decision turned on a determination of whether federal constitutional error had occurred. *Id.* at 13-14. The same is true here. Escobar raised a federal due process ground, the trial court recommended granting relief on that ground, and the TCCA decided a question of federal constitutional law: "[n]othing presented in the certiorari proceedings or to us afterwards changes our conclusion that Applicant has not shown a due process violation[.]" *Ex parte Escobar*, 676 S.W.3d at 666.

A flawed analysis

On remand, the TCCA found some of the enumerated DNA evidence—concerning statistical probability estimates for certain DNA mixtures—to be false. *Id.* at 674. On the other hand, the TCCA found other evidence "has impeachment value but does not establish that the DNA testing results were false." *Id.* The TCCA speculated that "correctly revised estimates would still inculpate Applicant for some of the mixtures," and focused on two isolated single-source results "unaffected by the flaws in mixed-sample interpretation." *Id.*

This Court's materiality analysis in *Glossip* exemplifies *Napue's* requirements and illuminates some of the problems with the TCCA's insufficient review:

1. A materiality analysis "asks what a reasonable decisionmaker would have done with the new evidence." *Glossip*, slip op., at 21. The *Glossip* dissent argued that

"the false testimony must itself have directly affected the trial's outcome to be material under *Napue*." *Id.* at 24. But this Court explained that "materiality instead always requires courts to assess whether 'the error complained of' could have contributed to the verdict—"the prosecutor's failure to correct [the] false testimony [was] the relevant error, so the Court ask[ed] whether a correction could have made a material difference." *Id.*

2. "This Court has not required an evidentiary record free of doubt to find a *Napue* violation in any case, much less when [a prosecutor] confesses that his own office erroneously obtained a capital conviction." *Id.* at 27. Evidence can be false and material "even if it 'goes only to the credibility of the witness' ... indeed, '[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence.'" *Id.* at 19.
3. As detailed in the State's response brief to Escobar's petition, Petitioner's new evidence included information that would correct, contradict, or impeach the credibility of the State's forensic witnesses at trial, such as:
    a. The Austin Police Department's DNA Lab (APD Lab) involved in this case was subsequently shut down following a state audit into its practices. Pet.App.80a. And two of the lab's analysts—who testified about their testing and serology work in this case—had an unusually large number of documented contamination incidents during the same period they worked with the evidence in this case.[2] *Id.* 76a,87a-91a; 28HR1842-43; 30HR245,1435-36. These analysts did not successfully complete retraining by Texas's Department of Public Safety (DPS) and can no longer work as DNA analysts in Texas. Pet.App.81a-84a; 28HR2232-38. During the attempted retraining, the analysts exhibited practices known to result in contamination and resisted FBI quality assurance standards to a degree that alarmed the DPS trainers. *Id.*; 30HR1326-27,1345.
    b. Five of the DNA samples the State relied upon at trial are now considered "inconclusive."Pet.App.121a,149a; 30HR232. The now-inconclusive items include the sample from the "doorknob lock," which was the only DNA result arguably placing Escobar inside the victim's apartment. 28RR36-37.
    c. An APD Lab crime scene technician's handling of the bloody evidence taken from the crime scene, in combination with Escobar's personal items from his home, created an increased "likelihood of cross-contamination."

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2 *Cf. Kyles v. Whitley*, 514 U.S. 419, 437-38 ("[T]he 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.").

30HR1441-44. This same technician—a State trial witness—was reprimanded for improperly handling evidence at the time and later terminated for testifying falsely about her credentials. *Id.*1753-58.

d. Even the DNA evidence in this case tested by other labs was first handled and packaged—sometimes improperly—by the APD Lab, raising the risk of cross-contamination and undermining the "downstream" testing results. 28HR1843; Pet.App.143a,145a.

4. Escobar's trial attorneys, after reviewing the postconviction evidence, opined that, had they known this information, 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." 30HR1900. Yet the TCCA did not consider—and indeed expressly neglected—the powerful impeachment value of the new evidence with respect to the State's witnesses. *Ex parte Escobar*, 676 S.W.3d at 674; *but see Glossip*, slip op., at 19.
5. "[P]rejudice 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"; "additional conduct by the prosecution further undermines confidence in the verdict." *Glossip*, slip op., at 21. A state court errs in evaluating "the materiality of each piece of evidence in isolation rather than cumulatively." *Wearry v. Cain*, 577 U.S. 385, 394 (2016).
6. In *Escobar*, the TCCA used a 'divide-and-conquer' approach, heavily weighing certain test results while devaluing others, without considering the cumulative impact of the false and misleading evidence. *Ex parte Escobar*, 676 S.W.3d at 671-75. Also, the TCCA emphasized other evidence with concerns that merit evaluation—such as a print on a lotion bottle at the scene. *Id.* at 668. After previously being unable to identify the low-quality print, an analyst abruptly changed her testimony to "identical" to Escobar after a prosecutor asked for a mid-trial comparison of unidentified prints. 27RR10-12,69,74-75.
7. In *Glossip*, this Court noted that a discredited theory "was an important part of the prosecution's case and featured prominently in its opening and closing statements." *Glossip*, slip op., at 20. Likewise, in *Escobar*, the State leaned heavily on the DNA evidence in its opening and closing statements, devoting about a third of its closing arguments to this subject. 22RR50-51; 28RR21-39,61-78. In fact, a juror testified in an earlier proceeding that he was "on the fence" as to guilt, but the DNA evidence was the "sealing factor." Pet.App.155a-56a; 30HR1899-1900.

Conclusion

"[T]he touchstone of due process analysis," this Court has recognized, "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). And "the aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" *Id.* (citations omitted). Accordingly, this Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Wearry*, 577 U.S. at 392 (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule" and a new trial "is required" if the witness's "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*, *supra*, at 271); *see also Duggan*, 778 S.W.2d at 469 ("[F]alse evidence, left uncorrected, can mislead the factfinder … diverting due process from its intended progression toward a just and fair trial.").

In sum, as a representative of a sovereignty with an obligation to ensure that justice is done, a prosecutor's duty to correct material false testimony should not end with the jury's verdict. And his conscientious efforts to remedy the State's substantive missteps should be entitled to reasonable deference, not dismissal.

With appreciation,

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Certificate of Service

By my signature above, I certify that on February 28, 2025, a copy of this letter brief was sent by email to the following counsel for Petitioner:

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