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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Texas Court of Criminal Appeals has ordered the execution of a man the State itself acknowledges was convicted on false evidence and may well be innocent. The State admits that investigators largely ignored an alternative suspect, who was in a recently filed paternity dispute with the victim when she was killed on that person's birthday, after he'd been out gambling, at a time during which he had no alibi. *See* Brief of Respondent State of Texas in Support ("Resp.") 12-13 & n.3. The alternative suspect had previously been charged with statutorily raping the victim, *see* Supp.HCR16, and was convicted of another violent crime committed soon after the murder in this case, Resp.12-13 & n.3.[1] The State further concedes that it had framed its entire case around false and misleading DNA evidence, which secured Petitioner's conviction: "At the beginning of trial, prosecutors told the jury that 'the science of DNA does tell us who is connected to this crime.'" Resp.26 (quoting 22RR50).

Former State Attorneys General, United States Attorneys, and Prosecutors; The Innocence Network and the Center for Integrity in Forensic Sciences, Inc.; and the American Bar Association support certiorari and agree with the relief the parties seek. Corrections Officers from the agency that oversees the prison where Petitioner is incarcerated oppose certiorari and dispute the State's confession of error. *See Amicus Curiae* Brief of the Correctional Institutions Division

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[1] Petitioner uses the same citation conventions as the State. *See* Resp.3, n.2.

of the Texas Department of Criminal Justice in Opposition to Petition ("Corr. Officers' Br.").

The Corrections Officers had no role in the prosecution of Petitioner or the present state habeas proceedings, so they do not fully appreciate the vast record. They do not even try to defend the CCA's failure to address the habeas court's critical findings that the DNA samples collected from Petitioner's Mazda and Polo shoes were subject to cross-contamination and otherwise too degraded to recalculate the probability that *anyone* was a contributor. *See* Pet.3, 12-17, 27, 34-35; Resp.27-35. Even if that were the only unreliable DNA evidence the prosecution presented to the jury—and it is not—it would be enough to require a new trial before sending Petitioner to his death. Yet even the CCA agrees that *none* of the other DNA evidence was valid. *See* Pet.App.21a.

Instead, the Corrections Officers begin by highlighting a seemingly inculpatory text message sent by Petitioner's ex-girlfriend Zoe the night of the crime. *See* Corr. Officers' Br.1-2. But critically, they fail to acknowledge the text she sent to her friend the next day recognizing that Petitioner was with a woman who was *not* being assaulted during their phone call: "i don't think he hurt that girl cause she was not sayn stop or n e thing she definitely was enjoyn it." 35RR144-45; *see* Resp.34. The Corrections Officers also misleadingly quote Petitioner as contemporaneously admitting to "a fight with an 'old lady,'" Corr. Officers' Br.4, ignoring that the victim was 17 and omitting that the actual quote was that he had been fighting with "*the* old lady," 24RR169-70 (emphasis added)—an obvious reference to his

girlfriend Zoe and hardly an admission that he raped and killed a 17-year-old.

The Corrections Officers also suggest that review is inappropriate because Petitioner has not been required to show that the prosecution knew its evidence was false and unreliable at the time of trial, something they say is needed to establish a federal due process violation. Corr. Officers' Br.18-19. But the CCA did not deny relief on this basis. And to the extent the Corrections Officers imply that Texas applies a less demanding rule as a matter of state law, they are mistaken: The CCA does not require proof of knowledge because it construes this Court's federal due process precedent to forbid execution of a man based on false evidence no matter the State's culpability. *See Ex parte Chabot*, 300 S.W.3d 768, 770-71 (Tex. Crim. App. 2009) ("the Due Process Clause of the Fourteenth Amendment is violated … when the State has unknowingly presented" false, material evidence); Resp.24-25. This Court has never held to the contrary, and its decisions reflect the CCA's view. *E.g.*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (discussing *Napue* and holding that Due Process is violated "irrespective of the good faith or bad faith of the prosecution," when evidence undisclosed to the defense "is material either to guilt or to punishment"). Besides, even in the jurisdictions that require the prosecutor to knowingly present false or misleading evidence to establish a due process violation, knowledge is imputed to the prosecution when, as here, state officials engage in misconduct to procure or present the defective evidence. *See, e.g.*, *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977).

The Corrections Officers offer no other sound basis to deny review. They do not dispute that this case presents the second Question Presented this Court granted certiorari to decide in *Glossip*. Yet they oppose granting (or even holding) the Petition because they think this Court granted review of that Question in *Glossip* without meaning to decide it. *See* Corr. Officers' Br.17 (speculating that the "Court presumably granted certiorari in *Glossip*" simply "to address case-specific arguments"). But assuming the Court knew what it was doing when it granted both Questions, the rationale for taking this case as a companion to *Glossip* has recently become much stronger: In his brief on the merits, Mr. Glossip "no longer presses a standalone claim under *Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.)." *See* Brief for Petitioner at i & n.*, *Glossip v. Oklahoma*, No. 22-7466 (Apr. 23, 2024). Thus, *only* this case presents a vehicle for resolving that Question.

I. This Case Is A Companion To *Glossip*.

The Petition explained why this case is a companion to *Glossip*. The second Question Presented in *Glossip* is the same as the first Question Presented here. Pet.27-28. There appears to be no reason for Justice Gorsuch to recuse from this case as he has in *Glossip*. Pet.28. There may be procedural hurdles preventing the Court from reaching the second Question in *Glossip* that are not present here. Pet.28-29. And in this case, the court and parties closest to the record and facts all agree that Petitioner is entitled to habeas relief because all the DNA evidence used to convict him was false, misleading, and otherwise unreliable. Pet.29-30. Indeed, the argument for this case to be granted as a companion

has only strengthened since the Petition was filed. On the merits, Mr. Glossip no longer presses any argument under the second Question he asked this Court to decide. *See supra* p.4.

None of the Corrections Officers' uninformed views to the contrary is persuasive. Ultimately, they are arguments about why Petitioner should lose on the merits, not why the Court should decline to grant certiorari to decide the merits.

First, the Corrections Officers argue that the "Court presumably granted certiorari in *Glossip*" on *both* Questions Presented there merely "to address case-specific arguments." Corr. Officers' Br.17. This rank speculation makes no sense. If the Court were only interested in addressing the case-specific arguments in *Glossip*, it could have granted review of only the first Question Presented.[2] *But see* Order, *Glossip v. Oklahoma*, No. 22-7466 (Jan. 22, 2024). The Court chose instead also to review: "Whether due process of law requires reversal, where a capital

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[2] The first Question in *Glossip* is:

> 1. a. Whether the State's suppression of the key prosecution witness's admission he was under the care of a psychiatrist and failure to correct that witness's false testimony about that care and related diagnosis violate the due process of law. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).
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> b. Whether the entirety of the suppressed evidence must be considered when assessing the materiality of *Brady* and *Napue* claims. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

See Petition for Certiorari at i, *Glossip v. Oklahoma*, No. 22-7466 (May 4, 2023).

conviction is so infected with errors that the State no longer seeks to defend it. *See Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.)." *See* Petition, *Glossip v. Oklahoma*, *supra*, at i. If this Court continues to want to decide that Question, this case may now be the only vehicle for doing so.

Second, the Corrections Officers argue that because the Court "presumably" granted *Glossip* "to address case-specific arguments," the Court did not grant the second Question "to revisit *Young* [*v. United States*, 315 U.S. 257 (1942)]." Corr. Officers' Br.17. But no one asks the Court to overrule *Young*. *Contra id.* at 14-17. Rather, the parties argue that the CCA failed to faithfully apply *Young*.

The opening pages of the Petition acknowledge that "confessions of error do not 'relieve this Court of the performance of the judicial function.'" Pet.2 (quoting *Sibron v. New York*, 392 U.S. 40, 58 (1968)). Instead, Petitioner and the State argue that the CCA gave zero weight to the State's confession, despite *Young*'s contrary requirement. Pet.32-33; Resp.19-21; *see* 315 U.S. at 258 ("The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight ...."). The Corrections Officers have nothing to say about the CCA's steadfast refusal to allow the State to brief its confession at any stage, even on remand from this Court's GVR. *See* Pet.24-26, 30-32; Resp.10-15.

Third, the Corrections Officers imply throughout their brief that the State's confession ought to be given less weight because it came from a local prosecutor. *See* Corr. Officers' Br.2-3, 9-10, 13, 16-17. The Corrections Officers have cited no authority to support this radical theory, and Petitioner has found

none. They seem to assume this Court gives great deference to confessions of error in criminal cases solely out of respect for state sovereignty or separation of powers.

Even if that is true, the Corrections Officers admit that Texas "delegates power" to the District Attorney to represent the State as sovereign in this case. Corr. Officers' Br.16. The DA's office extensively reviewed the evidence and, in its capacity as the sole representative of the State of Texas, recommends relief. Resp.1, 5-6, 17-18. The office did not confess error because the current DA is against the death penalty. *Contra* Corr. Officers' Br.9-10. Indeed, this is the office's only confession of error in a capital case during the current DA's tenure, and its reasoning is extremely detailed and fact-bound. *See* Resp.17. Meanwhile, it appears that the Corrections Officers' position is a reflexive opposition to relief instead of a response to the voluminous record of evidentiary blunders.

To the extent this Court gives different weight to different kinds of confessions, the distinction is not whether it is the local prosecutor who concedes as opposed to a law enforcer elected statewide. When the Court has rejected confessions of error, it is often in the context of legal rather than factual concessions—as the cases cited by the Corrections Officers show. *E.g.*, *Sibron*, 392 U.S. at 58-59 (rejecting State's concession as to constitutionality of state criminal statute); *Garcia v. United States*, 469 U.S. 70, 78-79 (1984) (rejecting prior concession by federal government as to interpretation of a federal criminal statute); *see also Young*, 315 U.S. at 259-61 (agreeing with federal government's interpretation of the

phrase "dispensing physician" within a federal criminal statute).

Thus, deference should be at its zenith when, as here, the confession is based on a review of the evidence and how it was presented by the prosecution, rather than any legal interpretation. *See, e.g.*, *Rogers v. United States*, 422 U.S. 35, 42 (1975) (Marshall, J., concurring) (recognizing that the Court accepted the federal government's confession of error on an issue calling into question the reliability of the jury's verdict despite the issue never having been raised below). On the other hand, the judicial obligation to independently review the basis of a confession is at its apex when it is based on a conceded legal interpretation of the statute of conviction—for example, when a conviction was obtained based on what the government believes is an unconstitutional criminal statute. *Cf.* Corr. Officers' Br.16 (quoting *Graham v. Florida*, 560 U.S. 48, 67 (2010)).

This case does not implicate the interpretation or constitutionality of a statute. The State has made no concession as to the interpretation of any law. Instead, the State admits only that its use of undisputedly false and misleading DNA evidence was possibly relevant to the jury's decision. Resp.25-36. The office that presented such evidence to obtain a conviction is best positioned to make that judgment. Public faith is undermined when elected judges decide for themselves that the State must execute a prisoner despite the prosecuting office's opposite conclusion. Granting the Petition gives this Court the opportunity to explain *Young* in a starkly different context and in an era when the use of false and misleading DNA evidence can easily mislead a jury to

convict someone of capital murder and recommend a sentence of death.

II. This Case Is An Excellent Vehicle To Decide The Questions Presented.

The Petition explained, and the State agrees, that this is a good vehicle to decide the Questions Presented. Pet.27-30; Resp.24-25. The Corrections Officers' contrary arguments lack merit.

First, the Corrections Officers argue this is a bad vehicle to decide the first Question Presented because "Escobar did not present the question to the CCA, much less argue that *Young* should be overruled." Corr. Officers' Br.18. As already discussed, the parties are not asking the Court to overrule *Young* but to apply it, as the CCA failed to do. *Supra* p.6. And there is no dispute that Petitioner has long argued that the CCA was wrong to essentially ignore the State's confession. *See* Petition for Certiorari at 25-27, 33, 35, *Escobar v. Texas*, No. 21-1601 (June 24, 2022).

Second, the Corrections Officers argue this is a bad vehicle to decide the second Question Presented because "although Escobar at least cited *Napue* below, he did not—as required—allege that Texas *knowingly* used false evidence." Corr. Officers' Br.18 (citations omitted). "Instead," they argue, "he relied on Texas's more defendant-friendly rule that due process may also limit a State's *unknowing* use of false evidence." *Ibid.*

That issue is irrelevant, since the CCA decided the federal claim solely based on materiality. Whether knowledge was required was not an issue raised by either party, and it is unnecessary to reach in order to resolve either Question Presented. In all

events, the Corrections Officers do not dispute that the CCA was interpreting the *federal* standard when it held in *Ex parte Chabot* "that the Due Process Clause of the Fourteenth Amendment is violated … when the State has unknowingly presented" false or misleading evidence. *See* 300 S.W.3d at 770-71; Resp.24-25. Other courts agree, although the question is the subject of a circuit conflict.[3]

The Corrections Officers disagree with the CCA's interpretation but ultimately admit this Court has never held to the contrary. *See* Corr. Officers' Br.18-19. Indeed, when discussing *Napue* in *Brady v. Maryland*, this Court held that the "good faith or bad faith of the prosecution" is irrelevant to whether the defendant's right to Due Process is violated. *See* 373 U.S. at 87.

None of this makes the case a poor vehicle for resolving the Questions Presented. Even in jurisdictions that require the prosecutor to know he is presenting false or misleading evidence, that knowledge is imputed to the prosecution when, as here, state officials engage in misconduct to procure or present false or misleading evidence that is potentially important to the jury's consideration of

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[3] *Compare United States v. Young*, 17 F.3d 1201, 1203-04 (9th Cir. 1994) (actual knowledge is not required), *and Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988) (same), *with Jacobs v. Singletary*, 952 F.2d 1282, 1287 n.3 (11th Cir. 1992) (knowledge is required), *United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980) (same), *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 674 (7th Cir. 1980) (same), *Burks v. Egeler*, 512 F.2d 221, 229 (6th Cir. 1975) (same), *Reed v. United States*, 438 F.2d 1154, 1155 (10th Cir. 1971) (per curiam) (same), *and Holt v. United States*, 303 F.2d 791, 794 (8th Cir. 1962) (same).

guilt or punishment. *See, e.g.*, *Schneider*, 552 F.2d at 595 ("If the state through its law enforcement agents suborns perjury for use at the trial, a constitutional due process claim would not be defeated merely because the prosecuting attorney was not personally aware of this prosecutorial activity."); *People v. Martin*, 264 N.E.2d 147, 148 (Ill. 1970) ("And where, as here, the falsity lies in the testimony of a law enforcement officer giving evidence favorable to the prosecution, ... it matters not that the prosecuting attorney himself does not have knowledge of the falsity, inasmuch as the prosecution is charged with the knowledge of its agents including the police." (cleaned up)); *see also United States v. Kaufmann*, 783 F.2d 708, 709 n.5 (7th Cir. 1986) (collecting cases holding that law enforcement knowledge suffices and flagging zero cases to the contrary).

Applying this Court's decision in *Pyle v. Kansas*, 317 U.S. 213 (1942), the Third Circuit has held that the "knowledge" of falsity need not be "brought home to the prosecuting officers." *Curran v. Delaware*, 259 F.2d 707, 712-13 (3d Cir. 1958) (concluding that the "knowingly false testimony of [a] Detective ... was sufficient" to establish a federal due process violation). In *Pyle*, the Court remanded for a determination of whether perjured evidence was used "with the knowledge of *Kansas authorities*," based on the petitioner's claim that witnesses gave testimony "under threat by local authorities at St. John, Kansas and the Kansas State Police." 317 U.S. at 215-16 (emphasis added).

Thus, the State concedes that any official misconduct by the APD Lab's technicians is imputed to the prosecution. Resp.25 & n.12 (citing *Kyles v.*

Whitley, 514 U.S. 419, 437 (1995)). There is no impediment to reviewing the Questions Presented.

CONCLUSION

The Petition should be granted or, at a minimum, held.

Respectfully submitted,

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