No. 32 EM 2023

IN THE SUPREME COURT
OF THE COMMONWEALTH OF PENNSYLVANIA

Commonwealth of Pennsylvania,

v.

Lavar Brown.

Petition of: Family Members of Murder Victims Michael Richardson and Robert Crawford

King's Bench Petition granted April 3, 2024 to review the May 5, 2023 Order of the Philadelphia County Court of Common Pleas in CP-51-CR-0407441-2004, vacating the judgment of sentence entered October 4, 2004

BRIEF OF 41 CURRENT AND FORMER ELECTED PROSECUTORS AND ATTRONEYS GENERAL, FORMER UNITED STATES ATTORNEYS, AND FORMER DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST STATEMENT OF *AMICI CURIAE*

Amici curiae are a group of 41 current and former elected prosecutors and Attorneys General, and former United States Attorneys and federal officials who are committed to protecting the integrity of our justice system. A full list of Amici is attached as Appendix A.[1]

As elected prosecutors and Attorneys General past and present and former federal prosecutors and officials, amici have a deep understanding of the important role that prosecutorial discretion plays in the criminal justice system. As part of that discretion, prosecutors must be able to acknowledge when errors were made and a conviction is unsupported by evidence or unjust. The prosecutor's interest "in a criminal prosecution is," after all, "not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). This critical responsibility does not end at the moment of conviction.

Amici believe that a prosecutor's determination that constitutional errors have so infected a conviction that its integrity is undermined and a retrial is necessary deserves great deference. Moreover, amici are concerned that eroding a prosecutor's ability to correct unjust convictions sends a deeply problematic message to the

[1] No party or counsel in this matter authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

community about what the legal system values and upends the traditional role and responsibility of prosecutors to ensure that justice should be done.

This case presents issues of national importance. Amici, who bring decades of experience as criminal justice leaders from around the country, have an interest in preserving the proper role of the prosecutor and the integrity of the legal system. Amici offer our views here respectfully as friends of the Court.

SUMMARY OF ARGUMENT

A prosecutor's primary obligation is to ensure that justice is done. *Berger*, 295 U.S. at 88. Prosecutors are entrusted with enormous discretion to pursue justice and fulfill their obligation to do justice. The power to determine whom to prosecute and what to charge exists solely within the power of the executive. Thus, broad prosecutorial discretion and independence is a foundational principle of the criminal legal system and allows the government to protect the integrity of the legal system.

Consistent with their obligation to pursue justice, many prosecutors have begun to revisit past convictions or have formed Conviction Integrity Units (CIUs) staffed with prosecutors tasked with reviewing cases that involve plausible claims of innocence or where the conviction was secured through unreliable or unconstitutional means. In those cases, prosecutors are now seeking to reinvestigate those convictions and, where appropriate, to seek a fair retrial untainted by constitutional error. These acts are commensurate with our foundational principle of

separation of powers as well as a prosecutor's obligation as a minister of justice, and they are integral to a legal system worthy of the public's trust.

When a prosecutor determines that they must admit error in a case, that admission deserves significant deference by the courts. Prosecutors do not admit error unless there is good reason to do so. Sufficient guardrails are already in place to ensure that the admission of error is based on the facts of the case and consistent with the law. Mandating additional procedures in post-conviction cases where prosecutors admit error would be unwise and unnecessary. Limiting a prosecutor's ability to admit error or allowing a third party to act in opposition to the prosecutor and defend those convictions would upend the proper role of the prosecutor in the criminal legal system. It would also undermine public confidence in the criminal legal system and the democratic nature of elections. When this occurs, public safety is negatively impacted as the local community may become hesitant to engage with a system they believe is corrupt and will not self-correct. Thus, a prosecutor's ability to use their discretion to correct past wrongs is directly tied to their ability to protect their community.

ARGUMENT

I. A Prosecutor's Primary Obligation Is to Serve the Interests of Justice, and They Have Broad Discretion to Achieve Those Ends.

Prosecutors have a special duty to seek justice, not merely to serve as advocates for conviction. *See Berger*, 295 U.S. at 88 ("The [prosecutor] is the representative not of any 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. Agurs*, 427 U.S. 97, 111-12 (1976) ("For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that justice shall be done." (internal quotation marks omitted)).

This role is unique in our judicial system. While other lawyers are bound to represent their specific client, prosecutors are tasked with achieving the just resolution of a case on behalf of the public. As the Supreme Court recognized in *Berger*, this means that the prosecutor "is in a peculiar way and very definite sense the servant of the law." 295 U.S. at 88.[2] A prosecutor's duty "is as much . . . to refrain from improper methods calculated to produce wrongful convictions as it is

[2] *See also* Gerard E. Lynch, *Prosecution: Prosecutorial Discretion*, Encyclopedia of Crime & Justice (2002) https://www.encyclopedia.com/law/legal-and-political-magazines/prosecution-prosecutorial-discretion (observing that "the prosecutor is not merely the attorney who represents society's interest in court, but also the public official whose job it is to decide, as a substantive matter, the extent of society's interest in seeking punishment.").

to use every legitimate means to bring about a just one." *Id.*; *see also Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("We have several times underscored the special role played by the American prosecutor in the search for truth in criminal trials." (internal quotation marks omitted)).

In a criminal trial, the purpose of the adversarial system is to ensure that the defendant's rights are protected from government overreach regardless of the defendant's guilt or innocence.[3] It is designed to give the defense the opportunity to challenge all aspects of the government's case before the government can take away liberty. Therefore, seeking justice means not simply securing convictions, but pursuing the truth and protecting the innocent, and prosecutors are uniquely obliged to protect these interests. As Justice White once wrote, "[l]aw enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. . . . To this extent, our so-called adversary system is not adversary at all; nor should it be." *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., concurring in part); *see also State v. Boyd*, 233 S.E.2d 710, 713 (W.Va. 1977) ("The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must . . . set a tone of fairness and impartiality."); *The Supreme Court,*

[3] *See Kimmelman v. Morrison,* 477 U.S. 365, 379-80 (1986); *Morales v. Greiner*, 273 F.Supp.2d 236, 249-50 (E.D.N.Y. 2003).

2009 Term – Leading Cases, 124 Harv. L. Rev. 360, 367 (2010) ("[T]he prosecutor occupies a quasi-judicial position in which the goal is not to win a case, but [to see] that justice shall be done.").

This is reinforced in the American Bar Association Standards on prosecutorial conduct and the Rules of Professional Conduct. Both make clear that a prosecutor is not simply an advocate or ordinary adversary, but has a responsibility to promote fairness and justice. The American Bar Association explains that a prosecutor's "primary duty" is to "seek justice within the bounds of the law, not merely to convict." The ABA Criminal Justice Standards for the Prosecution Function 3-1.2(a), for example, provide that "[t]he prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system." *Id*. at 3-1.2(f). The Model Rules state that "[t]he responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." Model Code of Prof'l Responsibility EC 7-13 (1983); *see also* Model Rules of Prof'l Conduct R. 3.8 cmt. (2010) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

Courts across the country have reinforced the prosecutorial duty to act as a "minister of justice."[4] This Court, for instance, "has codified the 'Special

[4] *See, e.g.*, *Caudill v. Com.*, 374 S.W.3d 301, 309 (Ky. 2012) ("Unlike other attorneys, '[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.'"); *State v. Torres*, 279 P.3d 740, 746 (N.M. 2012) (noting local rules codifying "the duty of

Responsibilities of a Prosecutor' to provide that '[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.'" *Commonwealth v. Chmiel*, 173 A.3d 617, 631 (Pa. 2017) (Donohue, J., concurring) (citing Pennsylvania Rules of Professional Conduct 3.8 (comment)).

These important responsibilities are commensurate with the significant power prosecutors wield. "'A District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to discontinue a case.'" *Commonwealth v. Stipetich*, 652 A.2d 1294, 1295 (Pa. 1995) (quoting *Commonwealth v. DiPasquale*, 246 A.2d 430, 432 (Pa. 1968)). Prosecutors are thus vested with the power to, among other things, to decide: whom to investigate; whom to charge and what charges to bring; whether to negotiate the terms of a guilty plea; when to grant immunity from prosecution; whether to drop charges or continue a

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a prosecutor as a 'minister of justice'"); *Domingo-Gomez v. People*, 125 P.3d 1043, 1055 (Colo. 2005) ("Prosecutors, who are enforcers of the law, have higher ethical duties than other lawyers because they are ministers of justice, not just advocates."); *People v. Jones*, 662 N.W.2d 376, 381 (Mich. 2003) ("A prosecutor has the responsibility of a minister of justice, not simply that of an advocate."); *Attorney Grievance Comm'n of Maryland v. Gansler*, 835 A.2d 548, 572 (Md. 2003) ("Prosecutors are held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice."); *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) ("[T]he prosecutor is a 'minister of justice' whose obligation is 'to guard the rights of the accused as well as to enforce the rights of the public.'"); *Aldridge v. State*, 470 S.W.2d 42, 46 (Tenn. Crim. App. 1971) ("a public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty").

case to trial; what sentence to seek; and whether to agree that a conviction or sentence should be vacated.

Ensuring justice is done means more than merely behaving appropriately at trial and refraining from unethical behavior. Rather, a prosecutor must actively work to ensure that the entire proceeding has integrity and that a defendant's rights are protected. Prosecutors are required to ensure a defendant has counsel present before speaking to them, for example, and are bound to work towards a resolution that maintains a defendant's speedy trial right. Additionally, prosecutors are charged with knowledge of any *Brady* information that might be within the possession of the police or a forensic examiner. Ignorance is no excuse. The prosecutor must seek out that material to ensure that the trial is fair. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995). "[A]n inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure." *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

Broad, independent prosecutorial discretion allows the government to protect the integrity of the system. This discretion is critical to ensuring that unjust cases do not move forward and that unjust convictions are not allowed to stand. Courts understand the importance of that independent exercise of discretion, and until recently, rarely questioned it. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 465, 465 (1996) ("so long as the prosecutor has probable cause to believe that the accused

committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." (citing *Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978)).

Prosecutorial independence is fundamental to the operation of the criminal justice system and bedrock constitutional principles. "The discretion of whom to prosecute and what offense(s) to charge is rooted in the separation of governmental powers doctrine." *Commonwealth v. Slick*, 639 A.2d 482, 487 (Pa. Super. 1994). Determining whom to prosecute and what to charge is "a central part of the executive function." *Id.* (citing *United States v. Schwartz*, 787 F.2d 257, 266 (7th Cir. 1986)). "A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them. Prosecutorial discretion resides in the executive, not in the judicial, branch[.]" *United States v. Giannattasio,* 979 F.2d 98, 100 (7th Cir. 1992); *see also Wayte v. United States*, 470 U.S. 598, 607 (1985) ("This broad [prosecutorial] discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.").

Additionally, in exercising their discretion, prosecutors remain accountable to their community. The election of prosecutors at the local level allows constituents to infuse their views into the system. *See, e.g.*, Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 731 (1996) ("The history of the development of the office of prosecutor has the clear theme … of 'local

representation applying local standards to the enforcement of essentially local laws.'"). Many voters have elected prosecutors who promised to look back at past convictions secured through unfair or unconstitutional means or where there are plausible claims of innocence.[5] Restricting a democratically-elected prosecutor's ability to do this work would not only seriously impair their ability to exercise their discretion in their pursuit of justice and thereby violate separation of powers, but it would also diminish the community's voice in the criminal legal system.

II. A Prosecutor's Obligation to Pursue Justice Continues in the Post-Conviction Context.

The pursuit of justice requires that a prosecutor admit to facts and claims where appropriate, including at the post-conviction phase. Refusal to do so, when the decision is supported by the office's investigation into the case, would be inconsistent with the prosecutor's ethical and constitutional obligations.

A prosecutor's duty to pursue justice does not end after conviction and sentencing. Indeed, a prosecutor is often obligated "to withdraw charges when [he]

[5] *See, e.g.*, George Joseph, *Most Manhattan DA Candidates Promise A Mass Conviction Purge*, Gothamist (May 13, 2021), https://gothamist.com/news/most-manhattan-da-candidates-promise-mass-conviction-purge-once-office; *What Would the Democratic Candidates for Queens DA Do If Elected?*, Spectrum News NY1 (June 24, 2019), https://ny1.com/nyc/all-boroughs/politics/2019/06/19/queens-da-candidates-on-the-issues-democrats-new-york-city; Drew Favakah, *Chatham DA faces Democratic challenger at forum hosted by League of Women's Voters*, Savannah Morning News (May 1, 2024), https://www.savannahnow.com/story/news/politics/elections/local/2024/05/01/chatham-county-district-attorney-candidates-discuss-platforms-at-forum/73511608007/.

concludes, after investigation, that the prosecution lacks a legal basis." *In re Wilson*, 879 A.2d 199, 211-12 (Pa. Super. 2005). While prosecutorial discretion is most commonly exercised early in a case, the duty to ensure that justice is served is ongoing. Accordingly, where a prosecutor determines that a conviction or sentence does not serve the interests of justice, the prosecutor is not only permitted, but indeed has a duty to reverse course. *See, e.g.*, *Commonwealth v. DiPasquale*, 246 A.2d 430, 432 (Pa. 1968) (reaffirming that a District Attorney "has a [g]eneral and widely recognized power" to decide "whether and when to continue or discontinue a case").

The legal system recognizes that prosecutors have a duty to seek justice in post-conviction proceedings. Specifically, several state and federal courts have held that the state's *Brady* obligations continue in post-conviction. *See, e.g.*, *In re Jenkins*, 525 P.3d 1057, 1067 (Cal. 2023) (collecting cases). Likewise, recognizing the important role that prosecutors play in correcting erroneous convictions or sentences, many legislators have expanded avenues for prosecutors to revisit problematic cases. Many states, for example, have passed "second-look" laws, which allow for prosecutors to examine wrongfully obtained convictions and sentences and seek relief for those who have already been convicted.[6] Other states

[6] *See* Becky Feldman, *The Second Look Movement: A Review of the Nation's Sentence Review Laws*, The Sentencing Project (May 15, 2024), https://www.sentencingproject.org/reports/the-second-look-movement-a-review-of-the-nations-sentence-review-laws/; Daniel Landsman, *A Second Chance Starts with a Second Look: The Case for Reconsideration of Lengthy Prison Sentences,* Families for Justice Reform, https://famm.org/wp-content/uploads/2019/07/Second-Look-White-Paper.pdf; Marco Poggio, *Minnesota Joins Prosecutor-Led Resentencing Law*

have increased prosecutors' avenues for challenging convictions obtained with the use of flawed forensic science.[7]

The prevailing professional standards for prosecutors in post-conviction also make clear that a prosecutor should admit error and seek to reverse a conviction where appropriate. The National Prosecution Standards promulgated by the National District Attorneys Association state that a prosecutor "shall not assert or contest an issue on collateral review unless there is a basis in law and fact for doing so." National Prosecution Standards, 4th ed. 9-1.6 (Nat'l District Att'y Ass'n 2023). Standard 9-1.3 also states that "[t]he prosecutor should defend a *legally obtained* conviction and a properly assessed punishment unless new evidence is received that credibly calls the conviction or sentence into question." (emphasis added). In a situation in which the prosecutor finds that the conviction is not supported or was obtained through unjust means, the commentary further explains that the prosecutor's role as a minister of justice means that he or she should "support the reversal or any conviction for the crime of which the person was erroneously convicted." National Prosecution Standards, 4th ed. 9-1.6 (Nat'l District Att'y Ass'n 2023).

Movement, Law 360 (June 23, 2023), https://www.law360.com/articles/1680599/minnesota-joins-prosecutor-led-resentencing-law-movement.

[7] *See* Valena E. Beety, *Changed Science Writs and State Habeas Relief,* Houston Law Review, Vol. 57 I. 3 (2020); Maurice Chammah, *Bill Aims to Address Changing Science in Criminal Appeals*, Tex. Trib. (Feb. 4, 2013), https://www.texastribune.org/2013/02/04/criminal-justice-advocates-renew-call-flawed-scien/.

The American Bar Association's Model Rules of Professional Conduct similarly state that if a prosecutor "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted," the prosecutor should, among other things, "undertake further investigation" to determine whether the defendant was wrongfully convicted. Model Rules of Prof'l Conduct R. 3.8(g) (2010). In addition, the Model Rules require a prosecutor to "seek to remedy the conviction" if there is evidence establishing that a defendant in the prosecutor's jurisdiction was wrongfully convicted. Model Rules of Prof'l Conduct R. 3.8(h) (2010).

Case law also makes clear that prosecutors must admit error when the law and facts support it. The United States Supreme Court acknowledged long ago that a prosecutor has a duty to admit error when mistakes at trial tainted a conviction. *See Cook v. United States*, 138 U.S. 157, 185 (1891) ("The representatives of the government, in this court, frankly concede, as it was their duty to do, that this action of the court below was so erroneous as to entitle the defendants to a reversal."). As this Court has acknowledged, "'[t]he 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.'" *Commonwealth v. Brown*, 196 A.3d 130, 148 (Pa. 2018) (quoting *Young v. United States*, 315 U.S. 257, 258-59 (1942)).

Recognizing the important role that post-conviction review plays in their work, many prosecutors have developed Conviction Integrity Units (CIUs) or Conviction Review Units (CRUs). Since the first CIU was created in the mid-2000s, more than 80 such units have been launched across the country.[8] These units are typically charged with reviewing not only convictions in which the person is innocent, but also those marred by unreliable evidence where prosecutors know that guilt could not have been proven beyond a reasonable doubt without the use of unreliable, flawed testimony or forensic evidence.[9] CIUs are an important mechanism for reassuring the community that the prosecutor is committed to seeking justice at every point in a criminal case.

When prosecutors determine they are obligated to admit facts or errors, they act consistently with their ethical duties and responsibilities. Further, by acknowledging that past mistakes can irreparably taint a conviction and working to undo that harm, prosecutors uphold the integrity of the criminal legal system. In a country guided by the integrity of the rule of law, it is unacceptable for a prosecutor to ignore his or her obligation to correct injustices simply because a conviction exists. The exact number of wrongful convictions in this country is unknown (and

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[8] Allison D. Redlich, James R. Acker, Catherine L. Bonventre, & Robert J. Norris, *Wrongful Convictions: The Literature, The Issues, And the Unheard Voices*, National Institute of Justice, 29, (Dec. 2023), https://www.ojp.gov/pdffiles1/nij/251446.pdf.

[9] Fair and Just Prosecution, *Conviction Integrity Units and Internal Accountability Mechanisms* (September 2017), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2017/09/FJPBrief.ConvictionIntegrity.9.25.pdf.

unknowable). Research, however, suggests that the wrongful conviction rate in capital cases is about 4-5%, and the wrongful conviction rate in a general state prison population is 6%.[10] As discussed *infra*, no community could possibly trust a system that does not require its chief law enforcement officer to correct these injustices.

III. A Prosecutor's Independent Determination That a Constitutional Error Occurred Deserves Significant Deference by the Courts and that Deference Should Be Reflected in the Post-Conviction Process.

The United States Supreme Court has made clear that a prosecutor's confession of error deserves significant deference by the courts. *See, e.g.*, *Young v. United States*, 315 U.S. 257, 258 (1942) ("The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight . . ."), *Sibron v. New York,* 392 U.S. 40, 60 (1968) ("Confessions of error are, of course, entitled to and given great weight[.]"); *cf. Marino v. Ragen*, 322 U.S. 561, 562-63 (1947) (granting relief where the state conceded facts and confessed error). This Court has cited and relied upon *Sibron* and *Young*, and several justices of this Court have expressly stated their agreement with the proposition that confessions of error deserve significant deference by the courts. *See Commonwealth v. Brown,* 196

[10] *See* Samuel R. Gross et.al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, PNAS vol. 111 n.20 (May 20, 2014), https://www.pnas.org/doi/pdf/10.1073/pnas.1306417111; Charles Loeffler, et. al., *Measuring Self-Reported Wrongful Convictions Among Prisoners*, 35 J. of Quantitative Criminology, 259 (2019); Allison D. Redlich, James R. Acker, Catherine L. Bonventre, & Robert J. Norris, *Wrongful Convictions: The Literature, The Issues, and the Unheard Voices*, National Institute of Justice, 12 (Dec. 2023), https://www.ojp.gov/pdffiles1/nij/251446.pdf.

A.3d 130, 148 (Pa. 2018); *id.* at 195 (Dougherty, J., concurring) ("I agree with the Attorney General that 'a prosecutor's confession of error is properly viewed not as dispositive, but as persuasive, often highly persuasive.'"); *id.* at 197 (Wecht, J., concurring) ("I believe that we must remain open to the possibility that it may be appropriate for a PCRA court to accept a future confession of error and defer to the prosecutor's judgment that justice has not been served by the conviction under the circumstances there presented.")

There is good reason why courts should defer to prosecutors when they uncover errors made by their offices and make the difficult decision that they must admit error and request a new, fair trial. Prosecutors do not stipulate to facts, admit error, or urge a court to order a new trial free of constitutional error without first conducting a rigorous review of the case and conducting their own investigation, which may include a "preliminary hurdle of . . . identification and location of all case-related information, including documents, potential witnesses, biological materials or information."[11] Prosecutors working in CIUs are often specially required to be "familiar with the types of errors that have been known to occur in criminal cases, and to receive training on the situations in which those errors have occurred, to help them identify potential 'weak spots' in the underlying case that

[11] John Hollway, *Conviction Review Units: A National Perspective,* University of Pennsylvania (2016), 53-54.

might have contributed to a mistaken finding of guilt."[12] Prosecutors are thus deeply familiar with both the facts of their own cases and the legal issues governing claims that a person is actually innocent or a conviction was irreparably tainted by constitutional error.[13]

While deference to a prosecutor's determination of error must be given "great weight," the Court ultimately makes an independent determination about whether relief should be granted. *See, e.g.*, *Commonwealth v. Brown*, 196 A.3d 130, 148 (Pa. 2018). A judge does not have to automatically agree that a conviction or a sentence be overturned. Rather, as neutral arbiters in our criminal legal system, judges have the responsibility to conduct "independent judicial review" before accepting a confession of error. *Id*. at 320 ("[A] district attorney's concession of error is not a substitute for independent judicial review.").

Moreover, serious hurdles must be cleared in order to overturn a conviction. Following a direct appeal, the courthouse doors are closed to most, and people can only find their way back in the narrowest of cases. *See, e.g.*, 42 Pa.C.S. §§ 9541 *et seq*. (describing the pleading standards, burdens of proof, and other limitations on post-conviction relief); *see also Shinn v. Ramirez*, 596 U.S. 366, 377-78 (2022)

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[12] *Id.* at 53.

[13] Fair and Just Prosecution, *Conviction Integrity Units and Internal Accountability Mechanisms* (September 2017), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2017/09/FJPBrief.ConvictionIntegrity.9.25.pdf, *see also* Innocence Project, *Conviction Integrity Unit Best Practices* (September 2016), https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf.

(describing the strict limits placed on state prisoners who seek post-conviction relief in federal courts). When a case has navigated this extraordinarily difficult path and arrived at a stage where resolution of the case is at hand, there has been not only a significant expenditure of resources and time by both parties and the courts, but also a thorough review of the facts and circumstances of the case.

Further, the current procedures also allow any interested parties to participate in a case by filing an amicus curiae brief. *See* 210 Pa. Code R. 531. The long-standing role of amicus curiae is to "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties . . ." U.S. Supreme Ct. R. 37.1. Permitting interested non-parties to offer their perspectives to the court while maintaining the proper role of the prosecutor is consistent with longstanding criminal practice and serves the interests of justice.

Given the guardrails already in place in post-conviction litigation, Petitioners' and the Attorney General's proposed additional procedures are unwise and unnecessary. The Petitioners' suggest that where the prosecutor has admitted error Courts must request live witnesses,[14] appoint intervenor status to interested parties, and/or specifically provide prosecutors or the police the opportunity to be heard if

[14] This will be an impossible requirement to satisfy given the age of many cases in post-conviction and the unavailability of witnesses due to death, disappearance, or incapacitation.

they are accused of misconduct in any case in which the prosecution admits error.[15] Traditionally, the community is bound by the decision making of the prosecutor, including whether and how to defend a conviction or sentence in post-conviction. These proposed procedures—especially the appointment or intervention of a third party specifically for the purpose of usurping the prosecutor's role and defending a conviction that the prosecutor deems indefensible—would mark a significant departure from the traditional functioning of the criminal legal system, including the bedrock principle that prosecutorial discretion "resides in the executive, not in the judicial, branch[.]" *United States v. Giannattasio,* 979 F.2d 98, 100 (7th Cir. 1992).

Given post-conviction courts' significant authority and discretion to aid them in the exercise of the requisite independent judicial review, mandating additional procedures will unnecessarily tie the courts' hands. Petitioner's proposed procedures, if adopted and mandated, would force the court to conduct hearings even in situations the court does not find necessary to do so, either because of stipulated facts or overwhelming evidence of error. Additionally, mandating certain procedures would force courts to expend additional resources on a case, as every hearing with live witness testimony requires court personnel. Ultimately, the Petitioners' and Attorney General's request for additional post-conviction procedures implies that

[15] Opening Brief of Family Members of Murder Victims Michael Richardson and Robert Crawford at 57, 59-60, 72.

courts cannot or will not manage their own dockets appropriately or be trusted to fulfill their role competently and compellingly as neutral arbiters.

The proposed procedures will also unnecessarily—and problematically—saddle prosecutors, undermining the administration of justice. As noted, prosecutors who admit error in a particular case have already spent considerable time and resources to reach the conclusion that they must, consistent with their professional and ethical responsibilities, admit error. Elected prosecutors already must make difficult choices about where to devote their limited time and financial resources.[16] Mandating additional procedures will force prosecutors to expend far more time and money on cases that are already incredibly resource intensive.[17] The result will be fewer resources for even the worthiest of cases and likely less justice for all as a result.

The additional procedures requested are also duplicative and inefficient. By the time a case reaches the post-conviction stage, multiple prosecutors have already conducted a thorough review of a case, and judges have already listened to and evaluated that evidence. Adding a third-party litigant, who would require time to become acquainted with facts, evidence, and work previously done on the case,

[16] This is especially true for money already devoted to reviewing past cases. *See* Hollway, *supra*, at 32. ("[B]udgeting in most DA's Offices is a zero-sum game**.** Every dollar committed to a CRU to review potentially erroneous convictions is a dollar not available to promote the DA's other initiatives.").
[17] *Id.*

would simply redo what has already been done and would necessarily slow the post-conviction process,[18] which will also delay a fair retrial untainted by unconstitutional errors. Any delay in a fair retrial deprives victims of a final resolution of the case and closure, only prolonging their suffering. Moreover, delaying resolution of a post-conviction case would ultimately make it more difficult for the prosecutor to pursue a retrial because witnesses may no longer be available and memories fade.[19]

Further, the proposed procedures raise numerous questions. There is no explanation of when they would be deployed or who would be responsible for providing the financial resources for additional attorneys, experts, and witness time that may result from a third party intervening in a case. In addition, the prospect of intervention to defend a conviction raises the question of whether third parties would be able to intervene in cases in which they believe a defendant is wrongfully convicted. It is unclear what would restrict another interested party from intervening

[18] The post-conviction process is already lengthy and fraught for people seeking relief from wrongful convictions. A recent analysis shows that for death-sentenced exonerees, the length of time between a wrongful conviction and death sentence and exoneration has tripled in the past twenty years, likely because of "procedural rules restricting prisoner appeals and resistance by state officials to credible claims of innocence." Death Penalty Information Center, *New Analysis: Innocent Death-Sentenced Prisoners Wait Longer than Ever for Exoneration*, (Aug. 13, 2024), https://deathpenaltyinfo.org/analysis-innocent-death-sentenced-prisoners-wait-longer-than-ever-for-exoneration.

[19] A more troubling effect of delaying resolution of a case involving a wrongful conviction is that in cases where the post-conviction petitioner is actually innocent and another person committed the underlying offense, there are often "new harms inflicted by the individual who actually committed the crime," including violent crimes. *See* Allison D. Redlich, James R. Acker, Catherine L. Bonventre, & Robert J. Norris, *Wrongful Convictions: The Literature, The Issues, And the Unheard Voices*, National Institute of Justice, 30 (Dec. 2023), https://www.ojp.gov/pdffiles1/nij/251446.pdf.

on behalf of a defendant seeking a new trial or sentencing should they, for instance, disagree with the prosecutor's assessment that the conviction should stand. A system in which a third party can only intervene to defend a conviction and not overturn it would be inherently unequal and violate principles of fundamental fairness.

The assumption underlying the requested additional procedures is that adding another litigant or requiring a hearing would inevitably show that the prosecutor was wrong to admit error. But there has been no showing that any of the proposed additional procedures would improve the process or change the outcome in any case. The requested additional procedures would likely, in the best case scenario, distort and delay a plain conclusion that a new trial should not be granted, and in the worst, prevent relief when the law and justice mandate it.

Local prosecutors, whose proper role in the criminal legal system is to represent their community in the pursuit of justice, are in the best position to determine whether it is appropriate to admit error in a particular case. Post-conviction procedures should reflect this and give significant deference to prosecutors who take the extraordinary step of admitting that they must try to correct a past mistake. A justice system that seeks to limit this step risks undermining its legitimacy.

IV. Additional Procedures that Limit a Prosecutor's Ability to Correct Past Mistakes Would Erode Public Confidence in the Legal System and Adversely Impact Public Safety.

Limiting a prosecutor's ability to correct unconstitutional and unjust convictions, especially in a case where the prosecutor admits to error because they doubt the integrity of the conviction, would subvert the justice system and undermine public confidence in it. The anti-democratic nature of creating a procedure to add a third party to challenge the position of the locally-elected prosecutor further erodes trust in the legal system. Such erosion of trust and faith in the justice system and justice-system actors harms public safety.

Prosecutors depend upon public trust to realize their mission of upholding justice and promoting public safety for all members of the community. The United States Supreme Court recognized this in the relationship between the public and the Courts, writing that "justice must satisfy the appearance of justice." *Offut v. United States*, 348 U.S. 11, 14 (1954). Our legal system "depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445-46 (2015). Research and experience also shows that when individuals have confidence in legal authorities and view the police, the courts, and the law as legitimate, they are more likely to report crimes, cooperate as witnesses,

and accept police and judicial system authority.[20] In contrast, when the public does not trust law enforcement and prosecutors, community members may be less willing to report crimes, serve as witnesses, testify in cases, and generally accept police and judicial system authority.[21] This reluctance hampers the ability of the police and prosecutors to fulfill their public safety obligations.[22]

Requiring prosecutors to act with the sole purpose of defending convictions – or appointing a third party for that express role – sends a troubling message that the legal system's singular objective is to keep people in jail and prison. People

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[20] *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263 (2008), https://kb.osu.edu/server/api/core/bitstreams/9f207de7-8f1e-550b-bae1-be261bd741f7/content (hereinafter: Tyler & Fagan) ("[Findings] demonstrate that people are more willing to cooperate with the police when they view the police as legitimate social authorities. If people view the police as more legitimate, they are more likely to report crimes in their neighborhood. In addition, minority group members are more likely to work with neighborhood groups."); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psych., Pub. Pol'y & L. 78, 78-79 (2014), https://law.yale.edu/sites/default/files/area/center/justice/document/ssrnpopularlegitimacy.pdf ("The most important finding of this study is that legitimacy plays a significant role in motivating law related behavior. The prior role of legitimacy in shaping compliance is replicated, as is the role of legitimacy in encouraging cooperation, including ceding power to the state and helping to address problems of crime and social order. In addition, legitimacy is shown to have a role in motivating empowerment, e.g. in building social capital and facilitating social, political and economic development.").

[21] *See* Tyler & Fagan, supra, at 265 ("Hence, procedural injustice leads to lowered legitimacy and diminished cooperation with the police."); German Lopez, *Police Have to Repair Community Trust to Effectively do Their Job*, Vox (Nov. 14, 2018), https://www.vox.com/identities/2016/8/13/17938262/police-shootings-brutality-black-on-black-crime.

[22] *See In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence,* Giffords Law Center to Prevent Gun Violence (Sept. 9, 2021), https://giffords.org/report/in-pursuit-of-peace-building-police-community-trust-to-break-the-cycle-of-violence/ (violent crime rates increase in areas with a lack of public trust in law enforcement).

rightfully presume that the legal system will prioritize undoing past wrongs and, critically, that the prosecutor is responsible for correcting past mistakes. Undermining a prosecutor's discretion to make that difficult choice would show the public that the legal system has a preference to allow unjust convictions to stand uncorrected. This erodes public trust in the local prosecutor.

Additionally, permitting a third party to act as a prosecutor is an anti-democratic circumvention of the will of voters and thus further erodes public trust in the justice system. District Attorneys are locally-elected by the people they serve, and they run on platforms which often include promises to implement certain policies and priorities. Just as they can be elected by their constituents to pursue harsher sentences, they can be elected to devote resources to correcting past mistakes by investigating wrongful convictions or unconstitutional practices.[23] Voters, who have become increasingly educated about the injustices at play in the criminal legal system, can choose to elect a prosecutor who promises to abide by their duty to admit error when appropriate, and not delay justice by fighting to uphold a conviction he or she cannot defend. However, if a third party can step into the role of the prosecutor when they do not agree with the elected prosecutor's approach and defend the very convictions the elected prosecutor has identified as seriously flawed, the people's

[23] Rebecca Blair & Miriam Aroni Krinsky, *Why Attacks on Prosecutorial Discretion are Attacks on Democracy*, 61 American Criminal Law Review (2024).

power of choice would be rendered obsolete. Our system is unique in the mandate it gives to voters to shape their local criminal legal system by electing a prosecutor that carries out their vision of justice for their district. This well-established democratic principle would be completely undermined if the Petitioners' and Attorney General's proposed procedures were adopted.[24]

In sum, when the community does not think the system is fair or responsive to their needs and priorities, they may not feel compelled to participate in it. This is especially true when the legal system places significant roadblocks before prosecutors who are attempting to fulfill their obligations to seek justice and correct past mistakes. This limits the ability of police and prosecutors to seek justice and promote public safety, making everyone less safe.

[24] Although the Attorney General in Pennsylvania is a statewide elected position, the election of local District Attorneys may more directly reflect a local community's criminal justice priorities.

CONCLUSION

The integrity of the legal system is best protected when prosecutors are allowed to adhere to their obligations to reevaluate an unjust case and present their argument to the court about why it should be overturned. Requiring additional procedures, including permitting a third party to take an adversarial stance and defend every previous conviction, even when there is a strong basis to believe it is wrongful or tainted, would upend prosecutors' role, destabilize their lawful authority, and undermine the will of the voters who elected them. Moreover, this interference in prosecutorial discretion would send a clear message that the system is more interested in convictions than justice.

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE AND SERVICE

I certify that the foregoing brief contains 6,648 words and thus complies with the word count limitation of Rule 2135 of the Pennsylvania Rules of Appellate Procedure. The word count was determined with Microsoft Word.

I certify that this brief complies with rules requiring that confidential or non-public information be filed differently than non-confidential or public information.

I hereby certify that on this 7th day of October, 2024, a true and correct copy of the foregoing Brief of *Amici Curiae* was served on the parties via PACFile and that within 7 days, I will file paper copies with the Pennsylvania Supreme Court.

Respectfully submitted,

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APPENDIX A

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