

No. 23-2531

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

KEVIN F. JOHNSON,

Appellant,

v.

SUPERINTENDENT, MAHANOEY SCI; DISTRICT ATTORNEY OF PHILADELPHIA,

Appellees.

On Appeal from a Final Order of the
United States District Court for the Eastern District of Pennsylvania
Case No. 2:13-cv-3197, Hon. Eduardo C. Robreno (Ret.)

**BRIEF OF FAIR AND JUST PROSECUTION AS AMICUS CURIAE
SUPPORTING APPELLANT AND REHEARING**

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INTERESTS OF THE AMICUS CURIAE

Amicus Fair and Just Prosecution (“FJP”), a project of the Tides Center, brings together elected prosecutors collectively representing 20% of Americans as part of a network of leaders committed to a justice system grounded in fairness, compassion, and fiscal responsibility. FJP believes that prosecutors must use their discretion to pursue justice, which includes conceding relief when appropriate. FJP maintains that when prosecutors conclude that constitutional violations have so compromised a conviction that its legitimacy is called into question, such determinations warrant substantial judicial respect. FJP has a considerable interest in courts continuing to defer to prosecutors’ exercise of discretion, and respecting prosecutors’ traditional role in the justice system. The issues here bear on that interest.¹

SUMMARY OF ARGUMENT

Prosecutors have long enjoyed considerable discretion in pursuing their constitutional and ethical mandate to seek justice. That includes, in appropriate cases, conceding post-conviction relief. By inventing a “narrow and extraordinary circumstance” exception allowing courts to reject such concessions, Slip Op. at 12, the Panel not only ignores case law addressing waiver and forfeiture, but invades that longstanding province of prosecutorial discretion. The majority’s view that this case “reflects a breakdown of the adversarial process,” Slip Op. at 14, misunderstands the

¹ No counsel for a Party authored this brief in whole or in part. No person or entity, other than *Amicus* or its counsel, made a monetary contribution for the preparation or submission of this brief.

role of prosecutors in the justice system. And by eroding prosecutorial discretion, the panel opinion risks undermining the system beyond one county. The full Court should rehear this case *en banc* to avoid such a result.

ARGUMENT

I. A prosecutor’s primary duty is to seek justice.

Prosecutors have a unique role in the justice system, distinct from that of any other party. The prosecutor’s overarching duty is to seek justice rather than to win convictions at all costs. *See Berger v. United States*, 295 U.S. 78, 88 (1935); *United States v. Agurs*, 427 U.S. 97, 111-12 (1976) (“the attorney for the sovereign . . . must always be faithful to his client’s overriding interest that justice shall be done”). Courts evaluating a prosecutor’s exercise of discretion to concede error or waive defenses must engage with *Berger* and grapple with the “several times” that the Supreme Court has explained “the ‘special role played by the American prosecutor in the search for truth in criminal trials.’” *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (collecting cases) (internal citations omitted). The panel majority declined to do so in this case, acknowledging *Berger* with nothing more than a “to be sure[.]” Slip Op. at 13.

The Supreme Court has discussed prosecutors’ “duty to refrain from improper methods calculated to produce a wrongful conviction,” *Cone v. Bell*, 556 U.S. 449, 469 (2009), and has addressed many examples where a prosecutor’s desire to convict must yield to the greater responsibility to seek justice. *E.g. Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (prosecutors cannot win convictions through false testimony); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutors have a duty to correct false testimony

they do not elicit). State courts, including those of Pennsylvania, have also recognized this unique ethical responsibility of prosecutors. The “prosecutor has a special and distinctive role in our system of justice. Unlike other lawyers, the prosecutor is more than a zealous advocate for a client. The prosecutor bears as well the high and non-delegable duty of ensuring a fair process for the defendant and of comporting himself or herself always in a manner consistent with a position of public trust.” *Office of Disciplinary Counsel v. Fina*, 225 A.3d 568, 570 (Pa. 2020) (Wecht, J., concurring); *Commonwealth v. Starks*, 387 A.2d 829, 831 (Pa. 1978) (discussing the prosecutor’s responsibility to “seek justice within the bounds of the law, not merely to convict”).

Ethics rules governing professional conduct clearly document prosecutors’ essential duty, instructing that a minister of justice does not seek convictions at all costs.² Both the ABA Criminal Justice Standards for the Prosecution Function (“Prosecution Function Standards”) and the standards of the National District Attorneys Association affirm this ethical mandate. ABA Prosecution Function Standard 3-1.2(b) (“[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, and not to convict”); National District Attorneys Association, National Prosecution Standards, Standard 1-1.11 (3d ed.) (“[t]he primary responsibility of a prosecutor is to seek justice”). The standards that specifically apply

² Courts often look to professional norms when considering the scope of prosecutors’ and other attorneys’ obligations. *E.g. Nix v. Whiteside*, 475 U.S. 157, 166-71 (1986) (discussing “accepted norms of professional conduct”); *United States v. Young*, 470 U.S. 1, 7-9 (1985) (discussing norms in the context of analyzing whether a prosecutor had made an improper argument); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (same).

to both the Philadelphia DAO and the Pennsylvania AG also stress that prosecutors must first and foremost uphold justice. Pennsylvania Rule of Professional Conduct 3.8, cmt. 1. (explaining that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate”); *see also Commonwealth v. Chmiel*, 173 A.3d 617, 631 (Pa. 2017) (Donohue, J., concurring) (discussing how the Supreme Court of Pennsylvania “has codified the ‘Special Responsibilities of a Prosecutor’ to provide that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

Prosecutors’ duty to seek justice above all derives from the power and role that prosecutors have in the criminal justice system. That power, if wielded solely to win, has enormous potential for devastating consequences: upholding unconstitutional, unfair, and wrongful convictions.

II. Prosecutors’ duty to seek justice extends beyond conviction to the post-conviction context.

The prosecutor’s duty to seek justice does not end at the verdict. It continues in post-conviction proceedings, in no small part because of the ongoing liberty deprivation—if a prosecutor discovers that a jury convicted a criminal defendant at a tainted trial tainted by a violation of that defendant’s constitutional rights and that the defendant therefore continues to serve an invalid sentence, the prosecutor has a duty to exercise her discretion to correct that injustice. Indeed, the duty adheres even outside of post-conviction proceedings—a prosecutor who discovers a *Brady* violation, for example, has a duty to address that regardless. *See, e.g., In re Jenkins*, 535 P.3d 1057, 1067 (Cal. 2023) (collecting cases). Prosecutors should—and the Philadelphia

DAO and others across the Commonwealth do—defend valid convictions. But when it is discovered that a conviction was secured through unconstitutional or unfair practices, the integrity of that conviction is at issue and prosecutors must not defend that conviction.

The panel majority’s concern at the “more than 100 convictions” that the Attorney General suggests have been overturned through Philadelphia DAO concessions is misplaced, in part because of how the Philadelphia DAO has exercised its discretion to fulfill those obligations. Historically, the prosecution and police have played a key role in only about “22 percent of exonerations,” because until they realize the error, prosecutors are usually working zealously to convict or defend convictions. *See* Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 Alb. L. Rev. 325, 365 (2016). Recently, however, some prosecutors’ offices have developed Conviction Integrity Units or Conviction Review Units. The Philadelphia DAO’s is not unique; since the first CIU opened in the mid-2000s, more than 80 jurisdictions across the country have created one. 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). Such units often address problems caused by longstanding practice—Pennsylvania, for example, has long been the only state not to fund indigent defense at the state level. *See* Christopher Welsh, *Pennsylvania is the only state that doesn’t fund public defenders. That needs to change.*, The Philadelphia Inquirer (Oct. 11, 2021). Pennsylvania’s lack of defense funding has historically left defense counsel—in Philadelphia and elsewhere—without resources to conduct robust independent investigations, and thus reliant

upon prosecutors to fulfill their *Brady* obligations and otherwise follow their ethical and constitutional duties. Citing the number of concessions of error to justify restricting prosecutorial discretion penalizes prosecutors for affirmatively fulfilling their constitutional obligations, and for factors affecting invalid convictions potentially outside of their control.

III. A prosecutor’s duty includes an affirmative obligation to confess error in appropriate cases.

The panel majority goes astray in part by treating the Philadelphia DAO’s concessions differently—pointing to “a breakdown in the adversarial process” as a basis for courts to reject prosecutorial concessions in the habeas context. Slip Op. at 13. But an ostensible lack of adversariness characterizes *any* concession, and prosecutors retain their discretion to make them. Confessions of error are not only proper, but may actually be required under certain circumstances. Prosecutors have always had a responsibility to “confess error” when they discover that constitutional error may necessitate setting aside a conviction. *See Young v. United States*, 315 U.S. 257, 258 (1942) (referring to law enforcement officials’ duty to “confess error when . . . a miscarriage of justice may result from their remaining silent”); *United States v. Koubriti*, 336 F.Supp.2d 676, 679 (E.D. Mich. 2004) (referring to a prosecutor’s confession of error as the “legally and ethically correct decision”). Prosecutors’ willingness to undertake this responsibility is an essential aspect of their duties as ministers of justice and helps justify the special trust that courts and the public place in them. As the Attorney General explained to the Supreme Court in *Miranda v. Arizona* more than a half century ago:

Our adversary system, as such, is not completely adversary even at the trial stage in a criminal prosecution because . . . the duty of the prosecution is not simply to go out and convict, but it is to see that justice is done. In my short time, I have gotten as much satisfaction out of the cases in which I was compelled to confess error in a case where a man had been deprived of his rights of due process as I got satisfaction out of being upheld in a tight case in court.

Miranda v. Arizona, Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 864 (Phillip B. Kurland et al. eds., 1975), quoted in *Why Should Prosecutors Seek Justice?*, 26 Fordham. Urb. L.J. at 615.

The prosecution's responsibility to confess error is solemn, and not undertaken lightly. When prosecutors doubt the constitutionality of convictions, their concerns deserve a judicial audience ready and willing to hear them. Courts must not stymie prosecutors from their obligation to pursue justice, even after a conviction is secured. And by virtue of their intimate familiarity with a case, prosecutors are perhaps better situated than anyone else (and certainly better situated than courts) to determine when a problem with a conviction becomes important to remedy. See Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 Marq. L. Rev. 477, 483–484 (2009); *Prosecutors and Professional Regulation*, 25 Geo. J. Legal Ethics at 891 (quoting prosecutor association observing that “the overwhelming majority of prosecutors across the country have acted to remedy wrongful convictions when they became known”).

For these same reasons, a prosecutor's decision to waive procedural defenses in post-conviction proceedings, to make way for a merits review, should receive equivalent judicial deference when the prosecutor believes constitutional error may have tainted the underlying conviction. Prosecutorial ethics rules specify that

prosecutors “need not, however, invoke every possible defense to a collateral attack” on a conviction, and “should consider potential negotiated dispositions or other remedies[.]” ABA Prosecution Function Standard 3-8.5. And importantly, a concession on the merits does not automatically follow from prosecutor’s exercise of discretion to waive defenses. Prosecutors routinely acknowledge potential error and waive procedural barriers to enable merits review while maintaining their position on the ultimate relief requested, allowing courts to fully examine the merits of constitutional claims—the Philadelphia DAO does this regularly. *See, e.g., Simmons v. Garman*, No. 19-2624 (E.D. Pa.) (waiving exhaustion defense, successfully opposing ultimate relief); *Montgomery v. Krasner*, No. 22-3155 (E.D. Pa.) (waiving exhaustion defense, opposing on merits); *Harvey v. Terra*, No. 23-4539 (waiving SOL defense, opposing relief); *Sawyer v. Smith*, No. 18-2024 (E.D. Pa.) (waiving all procedural defenses, opposing on merits); *Long v. McGinley*, No. 19-3192 (E.D. Pa.) (waiving exhaustion defense, opposing on merits); *Friedland v. Zaken*, No. 21-5404 (E.D. Pa.) (waiving procedural defenses, successfully opposing relief on merits).

IV. Arguing to uphold unjust convictions harms public safety by eroding trust in the legal system.

The duty to seek justice rather than merely secure legal victories serves communities in multiple ways. Most directly, it corrects harms inflicted on the individual community members who were convicted by unfair or unjust prosecutions. But more broadly, it maintains community trust in the integrity of the legal system, which helps keep our communities safe.

Restraining prosecutors' abilities to rectify unconstitutional and unjust convictions undermines public confidence in the legal system, a system which "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). It creates the impression that the legal system is unwilling to admit when it is wrong, and that it is unfair. And when communities do not think the system is fair or trustworthy, they may be reluctant to engage with it. Research demonstrates that when the public does not trust law enforcement and prosecutors, community members become less willing to report crimes, serve as witnesses, testify in cases, and generally accept judicial system authority. *See, e.g.*, 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); 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). They do this even at the expense of their own personal safety. Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 *CUNY L. REV.* 148, 159 (2019) ("Many people avoid calling the police, even when in danger, wanting to avoid future encounters, especially after high-profile police violence."). This unwillingness to engage with law enforcement undermines the capacity of police and prosecutors to fulfill their duties to protect the community, creating broader risks to public welfare and making communities less safe.

CONCLUSION

For all of these reasons, in addition to the reasons discussed in Appellant Johnson's Petition for Review, the panel should rehear this case, or the full court should rehear the case *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 2,456 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.66.1, set in Century Schoolbook 12-point type; and

(iii) was scanned for viruses prior to submission.

I further certify that I am a member in good standing of the bar of the Third Circuit.

/s/ Jim Davy

Jim Davy

CERTIFICATE OF SERVICE

I certify that on Sept. 11, 2025, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

I further certify that if asked, within the required time, I will serve paper copies of this brief upon the Clerk of Court.

I further certify that any paper copies would be identical to the electronically-filed version of the brief.

/s/ Jim Davy

Jim Davy