No. 23-934

In the Supreme Court of the United States

ARELI CARBAJAL ESCOBAR,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the to the Texas Court of Criminal Appeals

BRIEF OF AMICI CURIAE FORMER STATE ATTORNEYS GENERAL, UNITED STATES ATTORNEYS, AND PROSECUTORS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici all served as state attorneys general, United States Attorneys, and state prosecutors.

The Honorable Timothy K. Lewis served as a judge on the United States Court of Appeals for the Third Circuit and on the United States District Court for the Western

[1] Counsel for all parties received notice of amici curiae's intent to file this brief 10 days before its due date. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amici, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

District of Pennsylvania. Before being appointed to the federal bench, Judge Lewis served as an Assistant U.S. Attorney for the Western District of Pennsylvania and as an Assistant District Attorney in Allegheny County, Pennsylvania.

W.J. Michael Cody served as Attorney General for the State of Tennessee and as the United States Attorney for the Western District of Tennessee.

Rufus Lige Edmisten served as Attorney General and Secretary of State and for the State of North Carolina.[2]

Amici have devoted substantial portions of their lives to the administration of justice and the protection of public safety, recognizing these to be some of the most important and consequential functions in government service. Amici realize that properly discharging those responsibilities requires that prosecutors admit when they have made mistakes, and try to fix them, even when that means working to overturn a hard-fought conviction. With the benefit of their shared experience, amici understand that such efforts to correct injustices are vital to protect the integrity of the justice system and to retain the public's trust. And anything that stands in the way of those efforts threatens the prosecution's mission.

Amici write to express their concern that the judgment of the court below presents just such an obstacle to the

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[2] Glenn F. Ivey, who signed the previous version of this brief, now serves Maryland's Fourth Congressional District in the United States House of Representatives. He has also served as State's Attorney for Prince George's County, Maryland, and as Assistant United States Attorney for the District of Columbia.

pursuit of justice. The Texas Court of Criminal Appeals failed to give appropriate weight to the prosecutor's confession of error in this case, making the judgment below an irrevocable barrier to prosecutors' efforts to ensure that justice is done. Amici worry that as a consequence of that ruling, a man will soon be executed at the hands of an unwilling State, on the basis of evidence that is unreliable, improper, and likely false. That decision cannot be the last word on this issue. Certiorari is warranted.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Prosecutors have a special duty to seek justice." *Connick* v. *Thompson*, 563 U.S. 51, 65-66 (2011) (internal quotation omitted). Usually, for prosecutors, that means ensuring that wrongdoers are tried, convicted, and appropriately punished. But sometimes seeking justice means preventing *injustice*. And that can mean confessing error and seeing that a wrongful conviction is overturned.

The prosecution's responsibility for confessing error is a solemn one—not undertaken lightly. Prosecutors do not frequently confess error. But when they do, their concerns deserve a judicial audience ready and willing to hear their confession. By virtue of prosecutors' unique position in the justice system, which requires them to pursue justice above winning, prosecutors should not be stymied in obtaining justice for the accused. And by virtue of their intimate familiarity with a case, prosecutors are perhaps better situated than anyone else (certainly better than courts) to determine when a problem with a conviction becomes important enough to justify overturning it.

Yet the Texas Court of Criminal Appeals failed to give due regard to the prosecution's confession of error in this case. And that error went to the core of the case against

Petitioner. This was a case where there were no eyewitnesses to the crime and the accused had no known relationship with the victim, other than residing in the same apartment complex—along with hundreds of other people. DNA evidence provided the only definitive-seeming means of putting Petitioner at the scene of the crime.

But after Petitioner was convicted of capital murder, that DNA evidence proved to be anything but definitive. The prosecution learned that it came from a laboratory whose personnel proved so obstinate in refusing to update their data-calculation methods that the laboratory lost accreditation and had to be closed. And in the ensuing investigation, state and local agencies discovered that the laboratory personnel who handled the DNA evidence in Petitioner's case had such a documented problem of contaminating evidence, and such a demonstrated pro-conviction bias, as to bring into question the accuracy of every sample they had ever tested.

After a comprehensive reexamination of the forensic evidence to address these concerns, prosecutors recognized that Escobar should be granted a new trial because his conviction was secured in violation of his right to due process under the Fourteenth Amendment to the U.S. Constitution. See Brief of Respondent Texas in Support, *Escobar* v. *Texas*, No. 21-1601 (U.S. Sept. 28, 2022) (citing *Napue v. Illinois*, 360 U.S. 264 (1959); *Ex parte Chabot,* 300 S.W.3d 768 (Tex. Crim. App. 2009)). The prosecution therefore joined the defense in asking the Texas Court of Criminal Appeals to reverse Escobar's conviction on habeas review.

But the Texas court refused, declaring the faulty DNA evidence to be immaterial—at first without even addressing the prosecution's considered judgment to the contrary.

Pet. App. 26a-34a. Even after this Court ordered the Texas court to consider[] *** the confession of error by Texas" (Pet. App. 23a), the lower court offered the confession nothing but lip service, concluding that the evidence still supported its previous decision. Indeed, the Texas court spent more time criticizing the State's confession of error rather than heeding it.

That is not good enough. There is no more carful deliberation than the one that leads to a change of heart from the prosecution to join the defense. And there is no office more well-situated to demand a new trial for a criminal suspect than the one that developed the case to put him way. The Court should have listened to the State rather than turn this troublesome case away. Now a defendant whom the State of Texas no longer wishes to prosecute, for a crime the State believes he may not have committed, is set to be executed, under a judgment that the State was unwilling to defend.

The Court must again stop this runaway train. The prosecution's confession of constitutional error suggests this case is deserving of this Court's close attention, perhaps by plenary review. The refusal of the court below to give deference to that confession of error, as well as the serious constitutional violations of the accused's rights that led up to that confession, should require reversal.

ARGUMENT

I. The Court of Criminal Appeals' failure to give due regard to the prosecution's confession of error makes review appropriate.

The prosecutor's role in our system of justice is unique. Prosecutors are more than mere adversaries pitched in ceaseless battle with the defense. Instead, the prosecutor

is "an administrator of justice, a zealous advocate, and an officer of the court"—all in one. American Bar Association (ABA) Standard 3-1.2(a)—*Functions and Duties of the Prosecutor*. The prosecutor's job is thus "not merely to convict," or to win at all costs. *Connick*, 563 U.S. at 65-66; see also LSBA, Articles of Incorporation, Art. 16, EC 7–13 (1971); ABA Standards for Criminal Justice 3–1.1(c) (2d ed. 1980). Instead, the prosecution "wins its point whenever justice is done its citizens in the courts"—including for the accused. See Hon. Archibald Cox, *The Government in the Supreme Court*, 44 Chi. B. Rec. 221, 223 (1963) (quoting Solicitor General Frederick W. Lehman).

The prosecutor's role as guardian of justice imbues the office with extraordinary powers. Prosecutors enjoy tremendous discretion about what charges to pursue and what sentence to recommend. See, e.g., Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 Colum. L. Rev. 1655, 1692–1703 (2010) (describing how discretionary decisions by police officers and prosecutors lead to processing arrests in a way that diverges from determinations of guilt and innocence). And their charging and sentencing decisions are properly immunized from outside interference "because their actions are protected in the interest of public policy, so long as the actions are taken as part of their official duties." Clair A. Cripe & Michael G. Pearlman, *Legal Aspects of Corrections Management* 312 (2005).

Yet because the office of the prosecutor has such power, making it the hinge point around which so much in our justice system depends, members of the office are imbued with extraordinary responsibilities, as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as

compelling as its obligation to govern at all." *Berger* v. *United States*, 295 U.S. 78, 88 (1935) (emphasis added). In the line of cases beginning with *Brady* v. *Maryland*, 373 U.S. 83 (1963), for example, the Court has held prosecutors to higher standards of conduct than ordinary counsel because a prosecutor is "the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'" *United States* v. *Agurs*, 427 U.S. 97, 111 (1976)(quoting *Berger*, 295 U.S. at 88).

And one of the most extraordinary of the prosecutor's responsibilities is the duty to confess error. Prosecutors are not permitted to wait for the defense or the courts to correct legal wrongs; they are ethically required to proactively address problems themselves. As the ABA makes clear: "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction." ABA Model Rules of Professional Conduct, Rule 3.8—*Special Responsibilities of a Prosecutor*.[3]

When prosecutors confess error, courts should give those confessions careful consideration. Just as the "special significance to the prosecutor's obligation to serve the cause of justice" heaps greater responsibilities upon the

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[3] See also ABA, *Criminal Justice Standards for the Prosecution Function* 3-8.1 (4th ed. 2017) ("The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred."); Nat'l Dist. Attorneys' Ass'n, *National Prosecution Standards* § 6-1.3 (3d ed. 2009) ("If a prosecutor learns that material evidence previously presented by the prosecutor is false, the prosecutor shall take reasonable remedial measures to prevent prejudice caused by the false evidence.")

prosecutor than on private counsel—so too should the office enjoy special deference in its efforts to fulfil those responsibilities. *Arizona* v. *Youngblood*, 488 U.S. 51, 64 n.2 (1988)(quoting *Agurs*, 427 U.S. at 111). And while "[t]he public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error," that public trust also means that their confessions should enjoy due respect by other arms of the justice system, as the voice of the sovereign seeking to ensure the law's impartial application. *Young v. United States*, 315 U.S. 257, 258 (1942).

Beyond these systematic reasons why courts should give deference to prosecutors' confessions of error, there are practical reasons too. Prosecutors do not confess error lightly. Surveys estimate that the prosecution and police are a guiding force in only about "22 percent of exonerations," because until they realize the error, prosecutors are usually working zealously to convict. See Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 Alb. L. Rev. 325, 365 (2016). It takes overwhelming evidence to change their minds. And just as prosecutors' inside knowledge of the case, and intimate knowledge of the accused and the victims, make them especially zealous in pursuing convictions, it also gives them specialized knowledge that no court can match in determining whether an error in obtaining a conviction is material. "The considered judgment" of the prosecution "that reversible error has been committed" is therefore "entitled to great weight." *Young*, 315 U.S. at 258. And courts should normally accept a prosecutor's confession of error alone as grounds to reverse a conviction.

Most often they do. Courts "almost always agree with the reason the government gives for its confession * * * in

part because a court is probably more inclined to trust the government when the government is arguing against its own interests." See Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 Marq. L. Rev. 477, 483–484 (2009). Courts' tendency to follow the prosecutor's lead in overturning convictions extends even to this Court, which ordinarily grants, vacates, and remands a case "without an independent examination of the merits when the Government, as respondent, confesses error in the judgment below." *Nunez* v. *United States*, 554 U.S. 911, 911 (2008) (Scalia, J., dissenting). See also Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 Yale L. J. 1442, 1443 (1969) (noting that historically, the Solicitor General's confessions of error have been "generally dispositive"). Prosecutorial confessions of error are therefore given almost unquestioned deference.

Yet in this case, the Texas court refused to give the State's confession of error *any* deference. The court simply rejected the State's confession because it offered no evidence that "was not already before [the court] when [it] denied relief [in *Escobar I*]." Accordingly, the court found the confession to be no different from the factual record and errors found by trial court on habeas review. Pet.App.19a. The court never mentioned the fact that the prosecution had undertaken a "comprehensive reexamination of the forensic evidence and claims" in Escobar's case in response to the trial court's habeas decision. Brief in Support, *Escobar I*, *supra*, at 2 (Sept. 28, 2022). The court made no note of the fact that the State's findings directly contradicted the court's previous conclusion that the "*general* deficiencies discoveries in the [state] audit" found by the trial court were not connected to anything

that "*specifically* affected the DNA results in [this] particular case." Pet. App. 31a (emphasis added). The court refused to recognize the significance of the State's change of heart that took place after that review—recommending that Escobar should receive a new trial after previously resisting that effort. And the court gave no regard for the special duty of the prosecution to seek justice, or the special hands-on competence that prosecutors have in handling evidence that requires giving special weight to their confessions of error. In short, it refused to grant any deference to the State's confession *at all*.

What is worse, the Texas court spent more time criticizing the prosecution's confession of error than considering it. And much of that criticism is completely off-base. In claiming that the State's confession of error offered nothing new to the issue of whether Escobar should be granted a new trial, the court overlooked that the State had requested opportunities to file additional briefing and further develop the factual record—both before and after this Court ordered a remand—specifically because of its concerns that it had not previously had an opportunity to "detail the State's analysis of each item of forensic evidence relied upon by the State at [Escobar's] trial or explore in depth the materiality of the State's undermined DNA evidence relative to all the other evidence at trial." Pet. App. 226a. Yet the Texas court repeatedly denied those requests. Pet. App. 218, 244a, 247a, 252a-253a, 255a, 258a.

Accordingly, the case for plenary review of this case is compelling. It is rare enough for a court to affirm a conviction in the face of the prosecution's confession of error—making this case deserving of close scrutiny for that reason alone. The case for close scrutiny only grows

stronger where, as here, the accused's life is at stake. And where, as here, a lower court affirms a conviction without granting *any deference* to prosecutors' confession, much less providing that confession the attention it deserves, the result can only be deemed suspect. That alone justifies this Court's review.

II. Review is also appropriate because the decision below represents a miscarriage of justice in this capital case.

More troubling still is the Texas court's treatment of DNA evidence that proved so false, unreliable, and misleading that it caused prosecutors to change their minds about the propriety of a conviction they had pursued for years. As the State of Texas discovered after Petitioner's conviction, the DNA evidence in Petitioner's case was handled by a laboratory so unconcerned with the accuracy of its work that it refused to follow state directives on "mixture interpretation methods" that had been shown to produce "dramatic changes" in results over previous methods. Pet. App. 48a, 68a. And that was only the beginning of the problems that were discovered when the lab was investigated by state and local agencies. State auditors uncovered "significant contamination events," discovered that the labs leadership "'did not have the scientific and technical knowledge necessary' to lead the lab," and learned the senior DNA analysists who handled the DNA evidence in Petitioner's case were found to have a "suspect and victim-driven bias" that led them to work backward from the goal of obtaining a conviction and make the data line up accordingly. Pet. 11 (quoting Pet. App. 73a-74a, 76a-87a). These problems eventually led to the lab being closed and affected the integrity of every sample handled by the personnel who developed the evidence in Petitioner's case.

There is significant evidence that these shoddy methods affected Escobar's case as well. Pet. 12-14 (citing Pet. App. 104a & n.9, 105a & n.10, 127a-128a, 144a-145a, 146a).

Given these errors, none of the DNA evidence in this case could show that the blood at the scene belonged to Petitioner, or the blood on Petitioner's clothes or in his car to the victim. Yet the DNA evidence nevertheless lies at the very center of this case and played a starring role in prosecutors' efforts to convict Petitioner of capital murder. This was a case in which there was no eyewitness to the crime, Petitioner had no known relationship with the victim, and aside from the DNA evidence, there was nothing to place Escobar at the scene of the crime other than a highly suspect "partial, low quality latent print that purportedly 'matched' the joint of [Petitioner]'s left finger" (Pet. 20, quoting Pet. App. 156a), and "substantially incomplete" cell-tower evidence that—at best—could be interpreted as placing Escobar in the apartment complex where he and the victim both lived. Pet. 20 (quoting Pet. App. 156a).

Everything else depended upon circumstance. There were shoe prints at the murder scene that purported to "match" Pumas belonging to Petitioner along with thousands of other people in the Austin area. Pet. 20 (citing Pet. App. 156a. There were blood stains on Petitioner's clothing that could have been from two different fights Petitioner claimed to have been engaged in (one of which was corroborated by other witnesses). Pet. App. 157a. And there was a phone call that Escobar's jealous ex-girlfriend claimed she had with Escobar in which she thought she heard a woman in the background—although her story changed on what this supposed woman was supposed to have been doing. Compare Pet. 8-9 (quoting Pet. App.

157a) (in which the girlfriend claimed to have heard him having "consensual sex" with a woman) with Pet. 9 (quoting Pet. App. 157a (in which she claimed to have heard "a woman screaming and screaming and screaming and screaming and just screaming").

The only thing that could make the blood on Petitioner's clothing match the victim's blood, and therefore the only thing that could have placed Petitioner at the scene of the crime, would have been the DNA evidence. That is why prosecutors "told the jury they were lucky" to have the DNA evidence, and that the it served as a "key piece" of the "puzzle" proving that Escobar committed capital murder. Pet. 6 (quoting Pet. App. 45a-46a). That is also why one juror claimed to have been "on the fence" about Escobar's guilt "all the way up to when the DNA evidence was submitted to the jury," Pet. 20 (quoting Pet. App. 156a-158a), and other jurors were equally likely to have been taken in, given the powerful effect "that DNA evidence, and scientific evidence in general," has on jurors. Pet. App. 156a.

Yet the Texas court rejected all of this evidence even after this Court ordered it to reconsider its decision in *Escobar I*—over the dissents of three justices. Pet. App. 1a, 17a-22a. The Texas court focused solely on the fact that a different lab from the original faulty lab concluded that DNA samples collected from Escobar's shoes and his car matched the victim. Pet. App. 21a. But that analysis ignored compelling evidence that the shoes had been exposed to cross-contamination from items wet with the victim's blood. Pet.App.101a-108a. And Petitioner's own expert had concluded that the samples from the Mazda, which had been collected from the original, faulty lab (Pet.

App. 146a) were too degraded to retest, which is why the habeas court rejected them, Pet. App. 146a, 147a-148a.

The court below likewise ignored the key role the DNA evidence played in making the entire "puzzle" of the case fit together. These are unpersuasive reasons to dismiss the faulty DNA evidence as "immaterial," much less to cast aside the prosecutors' conclusion that this evidence *was* material. And this is another reason plenary review and reversal is appropriate.

CONCLUSION

The Court should summarily reverse the judgment below and remand or, alternatively, grant the petition and set the case for argument.

Respectfully submitted,

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