

No. 21-1601

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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In the Supreme Court of the United States

No. 21-1061

ARELI CARBAJAL ESCOBAR,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

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

INTEREST OF AMICI CURIAE¹

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

¹ Counsel for all parties received notice of amici curiae's intent to file this brief 10 days before its due date, and both Petitioner and Respondent have consented to the filing of this brief. 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.

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 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.

Glenn F. Ivey is the Democratic nominee in the 2022 election to represent 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.

Armando Rosquete served as an Assistant United States Attorney for the Southern District of Florida.

Amici have devoted substantial portions of their lives to the administration of justice and the protection of public safety, and they recognize 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. The Texas Court of Criminal Appeals failed to give appropriate weight to the prosecutor's confession of error in this case, and therefore presents an irrevocable barrier standing in the way of prosecutors' efforts to ensure that justice is done. Amici worry that as a consequence, a man will soon be executed at the hands of an unwilling State, on the basis of unreliable, improper, and false evidence. That makes this the extraordinary case that justifies summary reversal.

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 (and certainly better situated than courts) to determine when a problem with a

conviction becomes important enough to justify overturning that conviction.

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.

The prosecutors therefore recognized “that Applicant [should] be granted a new trial because [Petitioner]’s conviction was secured in violation of [his] right to due process under the Fourteenth Amendment to the U.S. Constitution.” Pet. App. at 187a-188a (citing *Brady v. Maryland*, 373 U.S. 83 (1963); *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—without even addressing the prosecution’s considered judgment to the contrary. 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 stop this runaway train. The prosecution’s confession of constitutional error alone suggests this case is deserving of this Court’s close attention, perhaps by plenary review. The refusal of the court below to even consider that confession of error, as well as the serious constitutional violations of the accused’s rights that led up to that confession, makes this case deserving of summary reversal.

ARGUMENT

I. The Court of Criminal Appeals’ failure to give due regard to the prosecution’s confession of error makes summary reversal 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 prosecutors have traditionally been among the small category of decision makers, including legislators, jurors, judges, and presidents, who enjoy absolute immunity “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*.

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

Accordingly, it will be the rare case that a court affirms 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 even *noting* the prosecutors' confession, much less providing that confession the attention it deserves, the result can only be deemed suspect. That alone justifies summary reversal.

II. Summary reversal 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. 11 (quoting Pet. App. 41a). 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 issues," discovered that the labs leadership "did not have the scientific and technical knowledge necessary" to lead the lab," and learned the senior DNA analysts 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. 13 (quoting Pet. App. 43a, 46a-48a, 52a-54a). 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.

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. 31, quoting Pet. App. 128a), 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 (*id.* 31, quoting Pet. App. 178a-179a).

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. 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. 18a. 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. App. 17a, 128a-129a (in which the girlfriend claimed to have heard him having “consensual sex” with a woman) with Pet. App. 128a-129a (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 forensic evidence served as pieces of a puzzle that taken together, showed [petitioner] committed capital murder.” Pet. 5 (quoting Pet. App. 18a, 185a). 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. 3 (quoting Pet. App. 127a), 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. 127a.

Yet the Texas court rejected Escobar’s habeas challenge to his conviction, claiming the faulty DNA evidence was not “material.” Pet. App. 7a. The court explained that “some” of the DNA evidence had been “recalculated” according to the appropriate mixture protocols. *Id.* at 7a. But the mixture protocols were only the top-most layer of the many problems with the lab’s handling of the DNA evidence. The Court did not, and could not, account for the problems with contamination and bias that rendered the

samples entirely unreliable—problems that could not be solved by recalibrating the mixture analysis.

The court below also claimed that the false DNA evidence was immaterial when the “State also relied on” other circumstantial and forensic evidence in the case—without ever addressing the serious problems with that other evidence (Pet. 26), or the key role the DNA evidence played in making the entire “puzzle” of the case fit together. These are unpersuasive reasons to suggest the DNA evidence was “immaterial,” much less to cast aside without mention the prosecutors’ conclusion that this evidence *was* material. And this is another reason summary reversal is appropriate. See Pet. 28 (citing *Wearry v. Cain*, 577 U.S. 385 (2016)).

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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