

“The State v. The State:” Feuding Prosecutors and the Battle over Post-Conviction Concessions

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One of the persistent questions of criminal law is how prosecutorial authority is allocated among different sovereign entities: Courts and scholars have wrestled time and again with questions of how criminal enforcement power should be divided between federal and state law enforcement. But the balance of power between state and local prosecutors has received far less attention, in large part because, until recently, the allocation of authority has been remarkably consistent: The overwhelming majority of state law enforcement power, by statute and by custom, has been concentrated in the hands of local prosecutors. In most states, state attorneys general have been left with only a few specialized areas of enforcement.

In recent years, however, this largely peaceful power-sharing arrangement has begun to shift in some states, primarily as a result of increased political and geographic polarization and the election of reform-minded prosecutors. These elections, and the reforms these leaders have attempted, have triggered a response from statewide elected officials in many states who have sought to curtail their authority. This Article explores one high-stakes example of this larger trend of increased conflict between state and local prosecutors playing out in a set of dramatic court proceedings: local prosecutors’ concessions of relief to defendants’ claims that they have been wrongfully convicted.

The backdrop to these conflicts is the confluence of two potent movements for criminal justice reform: the innocence movement and the progressive prosecutor movement. Increasing awareness of wrongful convictions, combined with the election of a set of reform-minded prosecutors in several cities, has led to the exonerations of hundreds of individuals. But in several states, state attorneys general have pushed back, seeking to intervene in post-conviction proceedings where local prosecutors wish to concede. The curious and novel set of conflicts that have resulted pit state and local prosecutors against each other and highlight an important gap in the way the legal system handles post-conviction claims. Courts have yet to develop a process

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by which to adjudicate post-conviction cases where prosecutors concede. This Article analyzes a set of these intra-state conflicts in Missouri, Pennsylvania, Tennessee, Maryland, and Utah. It ends with a set of recommendations on how courts should view attorneys general's participation in post-conviction concessions by local prosecutors and a modest proposal for how prosecutors' post-conviction concessions should be structured so as to provide courts with the information they need while not placing too great a burden on the defendant to prove his innocence.

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INTRODUCTION

Five weeks before Marcellus Williams was scheduled to be executed, the St. Louis Prosecuting Attorney, Wesley Bell, offered Williams a plea agreement that would have spared his life.¹ Bell petitioned the court to overturn Williams' murder conviction and the corresponding death sentence on the condition that Williams accept an *Alford* plea to murder and a sentence of life without parole.² Williams, who had always maintained his innocence, would escape the death penalty without having to admit guilt, but he would spend the rest of his life in jail.³ Williams took the deal:⁴ On August 21, 2024, with the blessing of the victim's family, the trial court vacated the first conviction, and Williams tendered an *Alford* plea to the murder and was re-sentenced to life in prison.⁵

But later that day, the Missouri attorney general filed an emergency motion with the State Supreme Court, asserting that the judge who had accepted the parties' agreement had exceeded his legal authority.⁶ The Missouri Supreme

1. See Prosecuting Att'y *ex rel.* Williams v. State, 696 S.W.3d 853, 877 (Mo. 2024) (en banc).

2. See *id.* An *Alford* plea allows a defendant to plead guilty without admitting guilt by merely acknowledging that the state has sufficient evidence to convict him. See North Carolina v. Alford, 400 U.S. 25, 37 (1970).

3. *Innocence Project Statement on the Execution of Marcellus Williams*, INNOCENCE PROJECT (Sep. 24, 2024), <https://innocenceproject.org/news/innocence-project-statement-on-the-execution-of-marcellus-williams>; *Alford*, 400 U.S. at 37. The case against Williams had always been flawed—unsupported by forensic evidence and based primarily on the testimony of two witnesses, both of whom stood to gain by claiming Williams was the killer. Petition for Writ of Certiorari at 1, Williams v. Missouri, 539 U.S. 944 (2024) (No. 24-5561). The witnesses, Williams' ex-girlfriend and former cellmate, said that Williams had confessed to them, *Id.* The most damning evidence against Williams were items that were taken from the victim's husband's home the day of the murder: Williams had sold a laptop belonging to the victim's husband in the days following the murder, although the buyer claimed that Williams had told him he had done so at his girlfriend's behest, a fact the jury was not allowed to hear at trial. See State v. Williams, 97 S.W.3d 462, 467–68 (Mo. 2003) (en banc). Other items belonging to the victim were also found in the trunk of Williams' car. *Id.* at 467. Furthermore, the prosecutor at Williams' trial later testified that he struck at least one potential juror at least partly because he was Black. See Brief for NAACP Legal Defense and Educational Fund, Inc. as Amici Curiae Supporting Petitioner at 3, Williams, 539 U.S. 944 (No. 24-5561).

4. *Who Is Marcellus Williams: Man Facing Execution in Missouri Despite Evidence of Innocence, Prosecutor's Confession of Racial Bias at Trial, and Victim Opposition*, INNOCENCE PROJECT (Aug. 15, 2023), <https://innocenceproject.org/news/who-is-marcellus-williams-man-facing-execution-in-missouri-despite-dna-evidence-supporting-innocence>. These types of arrangements, where defendants who claim their innocence strike deals with prosecutors to have their convictions overturned only to plead guilty again for a lesser sentence, are sometimes referred to as “dark pleas.” See, e.g., Michael P. Donnelly, *The Dark Plea: One of the Most Coercive Abuses of Power Permitted in Criminal Justice System*, 72 CLEVE. ST. L. REV. 125 (2024)

5. INNOCENCE PROJECT, *supra* note 4; see Rachel Lippman & Fred Ehrlich, *Marcellus Williams Gets Off Death Row, Will Serve Life in Prison*, ST. LOUIS PUB. RADIO (Aug. 21, 2024, at 14:57 CT), <https://www.stlpr.org/law-order/2024-08-21/st-louis-county-execution-marcellus-williams>.

6. See Williams, 696 S.W.3d at 870, 876. These emergency petitions are referred to as Petitions for Writ of Prohibition in Missouri. See MO. REV. STAT. § 530.010 (2024) (explaining writ of prohibition was extraordinary remedy under Missouri law).

Court agreed, vacating the agreement and reinstating Williams' death sentence.⁷ Weeks later, Williams was executed by lethal injection.⁸

Williams' case is one illustration of a novel trend in post-conviction proceedings: As some local prosecutors have begun conceding relief in a small but significant number of cases, asking courts to overturn convictions or death sentences that their offices once fought to achieve, state attorneys general are intervening to oppose relief.⁹ The curious set of proceedings that have resulted pit state and local prosecutors against each other and have flummoxed some courts.¹⁰ They also raise a novel set of questions about the nature and structure of prosecutorial authority within the state system, the process by which courts adjudicate claims of wrongful conviction when prosecutors concede, the role crime victims should play in post-conviction proceedings, and the deference with which courts should treat jury verdicts, on the one hand, and prosecutorial concessions on the other.¹¹

The backdrop to this trend is the convergence of two recent and significant movements for reform within the criminal justice system: the innocence movement and the progressive prosecutor movement.¹² Increasing awareness of past prosecutorial error, particularly in capital cases, has led to the creation of conviction integrity units ("CIUs") within local prosecutors' offices, whose role is to investigate cases where defendants allege that they are innocent.¹³ These units also examine police and prosecutorial misconduct.¹⁴ Reform-minded prosecutors, elected in the years after CIUs first began to form, made conviction integrity a crucial piece of their campaign platforms and gave the CIUs within their offices significant power to re-examine and petition the court to overturn old and troubled convictions.¹⁵ These units have been responsible for hundreds of exonerations.¹⁶

But there has also been a backlash.¹⁷ In the last seven years, attorneys general in several states have become involved in more than thirty of these cases

7. *Williams*, 696 S.W.3d at 869 (rejecting Williams' petition for stay of execution).

8. John Fritze, *Marcellus Williams Execution Brings Fresh Scrutiny to Supreme Court's Death Penalty Approach*, CNN (Sep. 28, 2024, at 16:00 ET), <https://www.cnn.com/2024/09/28/politics/supreme-court-death-penalty-marcellus-williams-richard-glossip/index.html>.

9. The Attorney General's status in these cases differs state-by-state—sometimes they participate only as *amicus curiae*, see *infra* Subpart.III.A.2, and in other instances state laws give them the right to intervene as a party to the litigation, see *infra* Subpart.II.A.

10. See *infra* Part.II.

11. See *infra* Part.III.

12. See *infra* Part.I.

13. Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705 (2017).

14. See *infra* Subpart.II.C for a discussion of a case of alleged prosecutorial misconduct.

15. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 327 (2019) (naming strong conviction integrity units as a critical piece of the progressive prosecutor movement).

16. *Conviction Integrity Units*, NAT'L REGISTRY OF EXONERATIONS, <https://exonerationregistry.org/conviction-integrity-units> (last visited Mar. 10, 2026).

17. This Article does not attempt to discuss all of the different types of backlash experienced by progressive prosecutors; it focuses only on cases of alleged wrongful conviction and the conflicts that have resulted from the

across several states—some high-profile, like Adnan Syed and Marcellus Williams, and others below the public radar.¹⁸ Many have involved years of acrimonious litigation. Most of these cases involve newly discovered evidence supporting claims of actual innocence that was not provided to the defense at trial; in a few, like Marcellus Williams' case, local prosecutors have sought ways to commute the defendant's death sentence.¹⁹

Some state lawmakers have taken action as well: The Tennessee legislature passed a law granting sole jurisdiction over all capital post-conviction matters to the attorney general.²⁰ Utah and Missouri, in an attempt to grapple with the problems posed by wrongful convictions, passed legislation providing local prosecutors with a statutory mechanism to concede relief, but the state legislatures also gave the attorney general the right to participate in the resulting litigation, enhancing state power over local criminal proceedings and, perhaps, inadvertently shrinking a defendant's path to exoneration.²¹

Local prosecutors' concessions of relief in post-conviction matters are not an entirely new phenomenon, but they were vanishingly rare until a decade ago. Most courts are accustomed to adversarial post-conviction proceedings.²² After a jury's verdict, the prosecutor's power is diminished, leaving the decision to overturn a conviction or a sentence to the court.²³ The local prosecutor's concession throws the proceeding into an unfamiliar, though not unprecedented, posture: a proceeding that is traditionally adversarial in nature now features two parties who agree on the outcome. This has created an opening for attorneys general to enter the litigation, providing the court with the adversarial process to

litigation of these cases. For a more in-depth discussion of backlash to progressive prosecution more generally, see Rebecca S. Goldstein, *Toplash: Progressive Prosecutors Under Attack from Above*, 61 AM. CRIM. L. REV. 1157, 1163 (2024); Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1676 (2023).

18. Attorneys general have attempted to participate in the following cases: Lavar Brown I (Commonwealth v. Brown, 196 A.3d 130, 142 (Pa. 2018)), Lavar Brown II (Commonwealth v. Brown, No. 32 EM 2023 (Pa. filed May 26, 2023)), Christopher Dunn (State *ex rel.* Bailey v. Sengheiser, 692 S.W.3d 20, 22 (Mo. 2024)), Michael Politte (State *ex rel.* Bailey v. Fulton, 659 S.W.3d 909, 911 (Mo. 2023) (en banc)), Lamar Johnson (State v. Johnson, 617 S.W.3d 439, 441 (Mo. 2021) (en banc)), Kevin Johnson (Johnson v. Kerestes, 683 F. Supp. 3d 452, 461 (E.D. Pa. 2023)), Robert Wharton (Wharton v. Superintendent Graterford SCI, 95 F.4th 140, 145 (3d Cir. 2024)), Marcellus Williams (Prosecuting Att'y *ex rel.* Williams v. State, 696 S.W.3d 853, 867 (Mo. 2024) (en banc)), Kevin Strickland (Strickland v. State, 241 S.W.3d 456, 456 (Mo. Ct. App. 2007)), Donte Perrin (Commonwealth v. Perrin, 291 A.3d 337, 342 (Pa. 2023)), Javier Artache (Artache v. Superintendent SCI Forest, No. 22-1500, 2023 WL 8468613, at*1 (3d Cir. 2023)), and Larry McKay (McKay v. State, No. W2023-01207-CCA-R9-CO, 2024 WL 4404318, at *1 (Tenn. Crim. App. 2024)).

19. See, e.g., *Williams*, 696 S.W.3d at 857; *Wharton*, 95 F.4th at 145; see *infra* Subpart.I.B.1.

20. See *infra* Subpart.III.A.1. When the City of Memphis elected a local prosecutor who did not support the death penalty, the Tennessee legislature stripped local prosecutors of jurisdiction over post-conviction claims involving the death penalty. *Id.*

21. See MO. REV. STAT. § 547.031 (2021) (giving the attorney general the right to receive notice, question witnesses, and make arguments); UTAH CODE ANN. § 78B-9-503 (West 2020) (allowing the attorney general to intervene as a party to the proceeding).

22. See *infra* Subpart.I.A.

23. See *infra* Subpart.I.B.2.

which it has grown accustomed.²⁴ But attorneys general's involvement has also created a new set of problems as courts must decide how to handle the participation of a second prosecutor who is speaking in opposition to the first and what weight to give his arguments.

The novelty of the proceedings may, in fact, be clouding judicial instincts.²⁵ A court's review of a post-conviction claim need not include two parties who disagree on all of the issues before the court. The belief that adversarial testing of each claim is necessary in post-conviction proceedings is at odds with the reality of the American justice system where approximately 95 percent of cases are disposed of with guilty pleas, or, in other words, in proceedings that include no adversarial testing.²⁶ The court's role in these proceedings is to question the parties about the agreement, plumb the record for information, and approve or refuse the arrangement agreed to by the parties. While it is true that after a jury verdict has been rendered, it is the responsibility of the court to decide whether the verdict should stand, this does not mean that courts must engage in a full adversarial process before overturning a conviction.²⁷ In the overwhelming majority of post-conviction concessions, courts can follow a version of the formula they use when accepting a plea bargain and still remain faithful to the values and procedures of the criminal justice system.²⁸

The number of states where these conflicts have occurred reflects an increasing tension between state and local prosecutors, a set of actors that have traditionally worked in concert with each other with minimal friction.²⁹ While both attorneys general and local prosecutors may represent the state in criminal proceedings, in an overwhelming majority of states, local prosecutors, by law or custom, have assumed control over the prosecution of most crime, particularly violent crime.³⁰ Attorneys general's involvement in these post-conviction proceedings are increasingly blurring those traditional lanes of authority, creating conflict and uncertainty between state and local prosecutors who have traditionally worked in partnership.³¹ While there has been a great deal of scholarship about the balance of federal and state prosecutorial authority, few

24. See *infra* Subpart.III.B for a discussion of adversarial process.

25. See *infra* Subpart.III.B.

26. See *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”). Statistics produced by the Pew Research Center and the Department of Justice also suggest that about 95 percent of defendants plead guilty. See Thea Johnson, *Plea Bargain Task Force Report*, 2023 A.B.A. CRIM. JUST. SECTION 1, 36 n.2; SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., U.S. DEP’T OF JUST., FELONY SENTENCES IN STATE COURTS, 2006–STATISTICAL TABLES 1 (rev. 2010).

27. *Commonwealth v. Brown*, 196 A.3d 130, 145–46 (Pa. 2018) (holding that “[t]he scope of prosecutorial [power] changes as a criminal case proceeds” and that at charging, “a prosecutor has almost unfettered power[.]” but after verdict, it is the court who must decide whether a verdict should be set aside).

28. See *infra* Part.IV for a proposal on the legal standards in post-conviction concessions.

29. See *infra* Subpart.I.C.

30. See *infra* Subpart.I.C for more specific details on state laws.

31. See *infra* Subpart.I.C.

scholars have tackled the issues presented by state and local conflicts. The clashes discussed here provide a window into a new landscape of increasing struggle between state and local law enforcement, illustrating how these contests for power impact the sorts of cases that usually make local, but not national, headlines.

This Article builds on three important veins of existing legal scholarship: The first explores the allocation of power between state and local prosecutors in all fifty states, discussing the laws and norms that have created our current system of local control, and comparing it to the federal system;³² the second discusses the seminal role that prosecutors can play in exonerating the innocent;³³ and the third highlights the conflicts between state officials and local prosecutors in response to the progressive prosecution movement.³⁴

The Article proceeds in four parts. Part I discusses the genesis of these conflicts—the convergence of the innocence movement and the progressive prosecutor movement, which have brought about an uptick in post-conviction concessions, explaining some of the initial points of conflict regarding wrongful conviction claims. Part II explores the often-overlapping factors that lead attorneys general to intervene—politics, victims, and the self-interest of specific assistant attorneys general—using cases from Missouri, Maryland, and Pennsylvania to demonstrate these phenomena and the complex web of incentives they create. Part III analyzes the roles different attorneys general have played in post-conviction cases, which have varied in both form and impact. In Tennessee, the attorney general has superseded the local prosecutor in certain cases, by state statute. In other states, like Pennsylvania, he has acted as a third-party *amicus curiae*. In Missouri, his role is a legislatively-created hybrid between the two—a quasi-intervenor who has some, but not all, of the rights of a party. Part III also explores the reason why courts and legislatures have wanted local prosecutors' concessions tested, and examines how the interventions are part of a larger trend that is reshaping the traditional balance of power between state and local prosecutors. Finally, Part IV concludes that in the majority of cases, courts do not require a third party to test the local prosecutor's concessions of relief, and that this interference can be detrimental to the fact-finding process.

32. See generally Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011) (examining state approaches to determine when criminal enforcement authority should lie with local officials versus a centralized state or federal actor).

33. See Elizabeth Webster, *The Prosecutor as a Final Safeguard Against False Convictions: How Prosecutors Assist with Exonerations*, 110 J. CRIM. L. & CRIMINOLOGY 245, 251 (2020) (arguing that prosecutors have become critical to exonerating the wrongfully convicted because the tools available for judicial review are inadequate on their own); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 57–58 (2009) (arguing that prosecutors should play a large role in exoneration efforts).

34. See Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 528 (2020) (assessing the relationship between democracy and the criminal enforcement bureaucracy). See generally Hessick & Su, *supra* note 17 (discussing the growing debate between local prosecutors running for election on the basis of reform and state actors).

In those rare cases where the court deems it necessary, the third party should play the role of *amicus* only. Part IV also proposes a partial solution to the problematic lack of process that courts face when prosecutors concede relief. It suggests that prosecutors be compelled to explain and justify their concession and acknowledge arguments that may cut against their decision, using the standard first laid out in *Anders v. California*.³⁵

In examining these clashes between state and local prosecutors, I reach the conclusion that these types of interventions cannot be prevented but should be discouraged. If courts wish to appoint the attorney general as *amicus* to render an opinion, there is nothing to stop them from doing so,³⁶ but allowing the attorney general to take part in these proceedings often invites politics, personal animus, and confusion into the process, unnecessarily drawing out and complicating legal proceedings. These conflicts not only pose the risk of stymying just exonerations, but also threaten to upset the jurisdictional norms between state and local prosecutors, which have existed with relative equanimity for nearly two hundred years.³⁷

I. A CONUNDRUM IN THE COURTS

Over the past decade, a new sort of hearing, once vanishingly rare, has been popping up in courtrooms across the country. In state and federal habeas proceedings, the prosecutor, who once worked to convict the defendant of the murder for which he is imprisoned, is agreeing with the defendant that his conviction should be overturned.³⁸ A dozen years ago, these prosecutorial concessions were nearly unheard of, but a crop of reform-minded prosecutors have changed the calculus in wrongful conviction litigation in their jurisdictions.³⁹ In a small but significant set of cases, prosecutors have sided with the defendant, conceding that he was wrongfully convicted and agreeing that his conviction should be vacated.⁴⁰ Some of these prosecutors have also made concessions in cases where defendants have been sentenced to die, conceding that the death sentences should be set aside.⁴¹

Some courts have responded with surprise, and even frustration, unsure of how to assess the merits of the defendant's claim without the adversarial testing of the defendant's claim, which the local prosecutor typically provides in habeas

35. 386 U.S. 738, 744 (1967).

36. See *infra* Subpart.II.A.2.

37. See *infra* Subpart.I.C.

38. For examples of these cases, see *infra* Part.II.

39. *Dynamic Graphs*, NAT'L REGISTRY OF EXONERATIONS, <https://exonerationregistry.org> (last visited Mar. 3, 2026) (containing data reports from each of the last ten years, showing a significant uptick in the number of overall exonerations, and specifically, the number of exonerations supported by a subset of CIUs, which has been growing steadily).

40. BAZELON, *supra* note 15, at 234.

41. See, e.g., *Prosecuting Att'y ex. rel. Williams v. State*, 696 S.W.3d 853, 866 (Mo. 2024) (en banc); *Commonwealth v. Brown*, 196 A.3d 130, 137 (Pa. 2018); *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140, 143–44 (3d Cir. 2024) (discussed further in Subpart.III.C).

proceedings.⁴² Courts have struggled to develop a process for the proceedings themselves, wondering aloud whether to allow the parties to stipulate to the facts that have led to their joint conclusion, or conduct evidentiary hearings to assess the facts themselves.⁴³ Some courts have worried that the proceedings are unbalanced—particularly in those cases where victims are vocally opposed to overturning the conviction.⁴⁴

In some cases, the state attorney general has stepped in to fill the role of adversary to the defendant, taking up the mantle of the conviction’s defender.⁴⁵ Most commonly, the attorney general has assumed the role of *amicus curiae*, sometimes at the request of the court.⁴⁶ In Missouri, the attorney general has participated in a quasi-intervenor status, created by the state legislature and expanded by the Missouri Supreme Court.⁴⁷ In a few cases, attorneys general have allied themselves with victims opposed to overturning the conviction, using this relationship as a point of entry into the proceedings.⁴⁸

The strange and novel set of proceedings that have ensued include two prosecutors, one state and one local, both representing the entity that is “the state,” taking opposing positions.⁴⁹ With the addition of the attorney general, the court has an adversary to the defendant, but this has created a set of new problems around prosecutorial authority, process, and standing. Judges must now decide what deference to give this additional advocate’s arguments, which, even if he is “only” an *amicus*, carry added weight because of his title of “chief

42. See, e.g., Commonwealth’s Brief for King’s Bench Respondents at 8, *Commonwealth v. Brown*, No. 32 EM 2023 (Pa. Oct. 8, 2024). “The whole case is in a highly unusual posture,” one judge told the lawyers gathered before him as he contemplated the local prosecutor’s concession, which recommended that he overturn a murder conviction from nearly two decades in the past. “It’s all new to me and it’s—as a result of the Commonwealth taking this position. It doesn’t articulate arguments that can reasonably be made to support the conviction.” *Id.*

43. For further discussion of the process by which convictions are overturned where both parties agree to relief, see *id.* and *infra* Part.IV.

44. See, for example, *infra* Subparts.II.B–C and Subpart.III.C for a discussion of cases involving victims and the judicial response to victim participation.

45. See *infra* Part.II for examples of such cases.

46. See Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 374–75 (2015). All state laws allow for *amicus* participation in some form, although they differ as to whether courts must grant permission for an outside party to participate. See *id.* at 397. However, most state rules of criminal procedure contemplate *amicus curiae* in the appellate level, not at the trial level: many states make no allowance for *amicus curiae* participation in the trial court at all. See Drew Dulberg & Amanda Baird, *Amicus Participation in Trial Courts: Navigating Uncharted Territory*, 68 BOS. BAR J. 1, 48 (Oct. 31, 2024), <https://bostonbar.org/journal/amicus-participation-in-trial-courts-navigating-uncharted-territory>. But regardless of what the rules say, a trial court judge is his own master, and if he wishes to grant a party *amicus* status, there is nothing to prevent him from doing so. See *id.* Federal courts allow *amicus* participation at the trial level, although the Federal Rules of Procedure do not address the practice and some courts have cautioned against it. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 22–23 (2011).

47. See *infra* Subpart.III.B for a discussion of state law in Missouri that gives attorneys general the right to intervene in post-conviction cases where local prosecutors concede relief.

48. See *infra* Subpart.II.B and Subpart.II.C for examples of this phenomenon.

49. See *infra* Subpart.I.C for a discussion of the division of jurisdictional power between state and local prosecutors.

law enforcement officer of the state.”⁵⁰ These conflicts have, in some states, kicked up a set of skirmishes in a larger battle playing out in many states over state versus local prosecutorial power.⁵¹

A. THE ROOTS OF INTRA-PROSECUTORIAL SKIRMISHES: THE INNOCENCE MOVEMENT, CONVICTION INTEGRITY UNITS AND BACKLASH

The last thirty-five years has seen an unprecedented surge in public awareness surrounding wrongful convictions, propelled by advances in DNA technology and the compelling narratives of those who have been wrongfully imprisoned.⁵² The conviction of the innocent, Americans learned, was far more common than had been previously understood.⁵³ These revelations catalyzed the innocence movement, a concerted effort aimed at uncovering historical injustices within the legal system and instituting measures to safeguard against future errors.⁵⁴ The movement has seen significant success in the past few decades, including changing the public’s attitude toward post-conviction cases, and the creation of a set of innocence organizations who represent defendants with innocence claims, free of charge.⁵⁵ These investments have paid off as the number of exonerations has risen significantly over the past fifteen years.⁵⁶

Local prosecutors were not initially supportive of the movement’s goals. Most opposed overturning wrongful convictions, even in the face of overwhelming evidence: A study of 260 exonerations ending in 2012 found that

50. Barkow, *supra* note 32, at 535 (“[T]he state AG is generally perceived as the chief law enforcement officer of the state.”); Johnson v. Mahanoy, 144 F.4th 178, 186 (3d Cir. 2025) (acknowledging the attorney general as “the chief law enforcement officer of the Commonwealth”).

51. See generally Goldstein, *supra* note 17 (stating legal scholars have largely overlooked the fact that conservative state officials, particularly governors and legislators, pose a major obstacle to progressive prosecutors’ effectiveness); Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. ONLINE 150 (2021) (discussing how state legislation has reflected a broader “new preemption” strategy, in which state legislatures curb progressive local governance by stripping discretion from local prosecutors).

52. See, e.g., BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE* xvii (2003) (chronicling multiple stories of uncovering wrongful convictions); Jennifer Boemer, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 WM. MITCHELL L. REV. 1971, 1976 (2001) (discussing the use of DNA testing in exonerations); Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 340–56 (2006) (detailing the story of David Wong, a man wrongfully convicted in 1984 and exonerated in 2004).

53. See ROBERT J. NORRIS, WILLIAM D. HICKS & KEVIN J. MULLINIX, *THE POLITICS OF INNOCENCE* 18 (N.Y.U. Press 2023); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780, 799 (2007) (discussing the extension of the 3.3 to 5 percent wrongful conviction rate for capital rape-murders in the 1980s to other capital and non-capital criminal convictions).

54. For a sense of the movement’s accomplishments, see *Explore the Numbers: The Innocence Project’s Impact*, INNOCENCE PROJECT, <https://innocenceproject.org/exonerations-data> (last visited Mar. 10, 2026), and *Who We Are*, INNOCENCE NETWORK, <https://innocencenetwork.org> (last visited Mar. 10, 2026).

55. CHARLES E. LOEFFLER & TAYLOR MIGLIORI, *WORKING ACROSS THE V: THE PROMISE AND LIMITS OF COLLABORATIVE CONVICTION INTEGRITY WORK*, UNIV. OF PA. QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUST. 5 (n.d.), <https://www.law.upenn.edu/live/files/13394-working-across-the-v-promise-and-limits-of> (describing the expansion of Innocence Organizations after DNA testing became available).

56. For information about the growing number of exonerations, year over year, see NAT’L REGISTRY OF EXONERATIONS, *supra* note 39.

prosecutors' offices overwhelmingly refused to acknowledge wrongful convictions, even where DNA evidence proved the defendant's innocence: Only 9 percent of exonerees received any help from prosecutors.⁵⁷ This was true even though 79 percent of these exonerees had forensic evidence to prove their innocence and 58 percent were able to identify the actual perpetrator.⁵⁸

But the creation and cultivation of CIUs discreet entities within the larger prosecutors' offices that investigate past convictions for miscarriages of justice, slowly began to change this paradigm.⁵⁹ Where wrongful convictions could be investigated from within the prosecutor's office, by attorneys the elected had chosen and using a process he understood, the elected was more likely to consider siding with the accused. Where progressive prosecutors were elected, CIUs became a key component of the work they strove to do in office, and these prosecutors in particular spearheaded hundreds of exonerations.⁶⁰

CIUs had the benefit of process and structure, which could give the elected prosecutor confidence in their accuracy: they developed a set of procedures whereby cases were investigated and reviewed to avoid errors.⁶¹ It is worth noting that CIUs did not handle two cases discussed at length below, in Subparts II(B) and III(C), where courts later found that victims had not received proper notification of prosecutorial concessions.⁶² Had CIUs handled these cases, the mistakes might have been avoided.

There is, perhaps, no elected official with more unchecked power than the local prosecutor,⁶³ and that power is on full display when he seeks to identify

57. Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 ALA. L. REV. 325, 349–50 (2016).

58. *Id.* at 337.

59. BAZELON, *supra* note 15, at 159.

60. See, e.g., Andy Grimm, *Kim Foxx Revamps Cook County Wrongful Conviction Unit, Names Senior Advisor as New Head*, CHI. SUN TIMES (Dec. 6, 2023, at 11:00 PT), <https://chicago.suntimes.com/crime/2023/12/6/23990808/kim-foxx-wrongful-conviction-unit-michelle-mbekeani> (stating that during Foxx's two terms as a state attorney, she vacated more than 200 convictions); *Exonerations*, PHILA. DIST. ATT'Y'S OFF. PUB. DATA DASHBOARD, <https://data.philadao.com/Exonerations.html> (last visited Mar. 10, 2026) (showing that during the Krasner Administration, fifty-three wrongful convictions were overturned); Press Release, Brooklyn Dist. Att'y's Off., Brooklyn District Attorney Publishes Report That Analyzes and Presents the Findings of His Conviction Review Unit (July 9, 2020), <http://www.brooklynda.org/2020/07/09/brooklyn-district-attorney-publishes-report-that-analyzes-and-presents-the-findings-of-his-conviction-review-unit> (discussing Eric Gonzalez's Conviction Review Unit, which has led to the exoneration of dozens of wrongfully convicted individuals).

61. JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE 41–42 (Apr. 2016), <https://www.law.upenn.edu/live/files/5522-cru-final> (laying out a set of standardized, best practices to be followed by conviction integrity units to ensure their accountability and professionalism).

62. See *infra* Subpart.II.B for a discussion of *Syed v. Lee*, 322 A.3d 578 (Md. 2024) and Subpart.III.C for a discussion of *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140 (3d Cir. 2024). In *Syed*, the State's Attorney's Resentencing Unit litigated the office's concession; in *Wharton*, the appellate unit handled the litigation. See Justin Fenton, *How a Public Defender-Turned-Prosecutor Helped Free Adnan Syed*, BALT. BANNER (Sep. 20, 2022, at 06:00 ET), <https://www.thebanner.com/community/criminal-justice/how-a-public-defender-turned-prosecutor-helped-free-adnan-syed-D5V2GNSEYBAL3GJQ4ZGNFEKRSY>.

63. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009); Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1365 (2021) (“[P]rosecutors are critical actors—probably the most important actor, if we had to choose just one—in administering criminal justice policy in America.”).

and overturn wrongful convictions.⁶⁴ There are a litany of ways that local prosecutors can make the process easier: First, some have granted defense attorneys access to prosecutorial and police files, allowing for a kind of post-conviction transparency that was heretofore unknown.⁶⁵ This allows defense counsel to discover evidence that had previously, and unlawfully been withheld.⁶⁶ Second, prosecutors can often waive procedural hurdles and exhaustion claims that prevent many defendants from having their claims heard at all.⁶⁷ Lastly, CIUs can conduct a comprehensive internal review of a case. If they conclude that the defendant is innocent, or that significant constitutional errors were made that undermine the reliability of the verdict, they may choose to side with the defense in favor of overturning a conviction.⁶⁸ This decision leaves the conviction itself undefended and sends a powerful message to the court about the strength of the defendant's claims.

These prosecutorial powers have allowed a small group of prosecutors to reshape the world of wrongful conviction litigation: According to the National Registry of Exonerations, CIUs played a significant role in 63 percent of all exonerations in 2023.⁶⁹ The number of overall exonerations has been increasing over time as a result.⁷⁰ These changes have been so significant that some innocence organizations have even begun intentionally focusing their resources on those jurisdictions where prosecutors have built strong CIUs because they know their clients' claims are more likely to receive careful review.⁷¹ Recognizing CIUs' potential importance in wrongful conviction work, the

64. Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335, 343–44 (2015) (“Even more than with initial charging decisions, prosecutors wield enormous power over whether a defendant claiming wrongful conviction is likely to find a receptive audience.”).

65. See *id.* at 344 (noting that prosecutors' power to provide access to files and reopen investigations can make a defendant's road to exoneration much smoother); see also Samantha Melamed, *The Battle in Philly DA's Office: Conviction Integrity Unit Report Shows Rocky Path to Reform*, PHILA. INQUIRER (June 15, 2021, at 16:49 ET), <https://www.inquirer.com/news/philadelphia-conviction-integrity-unit-da-larry-krasner-patricia-cummings-20210615.html> (noting the Philadelphia DA's Office policy of post-trial open file discovery).

66. See, e.g., *infra* Subpart.II.C.

67. This is particularly true in federal court. The following are considered affirmative defenses and therefore can be waived by prosecutors who do not wish to raise them: statutes of limitation, procedural default claims, exhaustion requirements, and the bar on the retroactive application of new constitutional rules. *Wood v. Milyard*, 566 U.S. 463, 466, 474 (2012) (reversing the circuit court's rejection of a claim as untimely where the state knowingly and intentionally waived the defense) (“A court is not at liberty . . . to bypass, override, or excuse a State's deliberate waiver of [affirmative] defense[s].”). *But cf.* *Johnson v. Mahanoy*, 144 F.4th 178, 197 (3d Cir. 2025) (allowing the district court to reject the local prosecutor's waiver of procedural default where the attorney general, acting as *amicus*, opposed waiver).

68. See *infra* Part.II for examples of such cases.

69. See NAT'L REGISTRY OF EXONERATIONS, 2023 ANNUAL REPORT 3 (2024), <https://exoneratiregistry.org/sites/exoneratiregistry.org/files/documents/2023%20Annual%20Report.pdf>.

70. *Exonerations by Year of Exoneration and Type of Crime*, NAT'L REGISTRY OF EXONERATIONS, <https://exoneratiregistry.org/exonerations-year-exoneration-and-type-crime> (last visited Mar. 10, 2026).

71. LOEFFLER & MIGLIORI, *supra* note 55, at 20–21.

federal government has even begun offering innocence organizations and CIUs grant funding to collaborate with each other.⁷²

But CIUs have also faced criticism from some judges and state officials who have questioned their methods and decision-making.⁷³ These critics argue that prosecutors have become so eager to find the wrongfully convicted that they have abandoned their proper role within the justice system and instead have been captured by the defense bar in a way that undermines the court's truth-seeking function.⁷⁴ The justice system works best, these critics argue, when the parties act in opposition to each other, so that the court can use the adversarial process—each party making the best available argument for their side—to determine the truth.⁷⁵

B. ASSESSING WRONGFUL CONVICTIONS

Defendants who claim that they have been wrongfully convicted typically allege both that they are factually innocent and that their constitutional rights were violated during the course of their prosecution. While a few states allow defendants to bring freestanding claims of innocence that do not include an allegation that the defendant's rights were violated (also referred to as freestanding innocence claims), in many states, this is not enough:⁷⁶ A defendant must also show that a constitutional error occurred during the prosecution.⁷⁷

1. Wrongful Convictions and Claims of Actual Innocence

Most post-conviction claims where prosecutors concede relief involve both an allegation that the defendant's rights were violated, and a strong claim of innocence.⁷⁸ But some cases may have a strong claim of constitutional error and

72. *Id.* at 21.

73. *See, e.g., infra* Subpart.II.B; Subpart.III.A.2.

74. *See infra* Subpart.III.B.

75. *See, e.g.,* Brief for the Office of Attorney General as Amicus Curiae Supporting Petitioners at 3, Commonwealth v. Brown, No. 32 EM 2023 (Pa. filed Aug. 15, 2024) [hereinafter OAG Amicus Brief] (“Where, however, questionable concessions have become endemic, courts should rely on a first principle of our jurisprudence: that opposing advocacy improves outcomes.”).

76. *See* Michael J. Muskat, *Substantive Justice and State Interests in the Aftermath of Herrera v. Collins: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 140 (1996) (noting that in many states, a claim of actual innocence is insufficient, standing alone, to warrant habeas relief).

77. Some states, do allow post-conviction claims with free-standing claims of innocence, including including Iowa, Illinois, Texas, New Mexico, California, and Wyoming. *See* Schmidt v. State, 909 N.W.2d 778, 797 (Iowa 2018); People v. Hogley, 696 N.E.2d 313, 332–33 (Ill. 1998); *Ex parte* Elizondo, 947 S.W.2d 202, 204 (Tex. Crim. App. 1996); Montoya v. Ulibarri, 163 P.3d 476, 483 (N.M. 2007); *In re* Hardy, 163 P.3d 853, 882 (Cal. 2007) (recognizing freestanding claims of innocence but noting the evidentiary burden associated with such claims is high); WYO. STAT. ANN. § 7-12-403 (West 2018). But most states demand that the defendant show that his state or federal constitutional rights were violated in order to prevail. *See, e.g.,* State v. Dean, 645 N.W.2d 528, 533 (Neb. 2002) (“In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights under the U.S. or Nebraska Constitution.”).

78. *See* PHILA. DIST. ATT'YS OFF., OVERTURNING CONVICTIONS—AND AN ERA: CONVICTION INTEGRITY UNIT REPORT, JANUARY 2018–JUNE 2021 8 (n.d.), <https://static1.squarespace.com/static/603fcdd70e4ce16ac>

a weaker claim of actual innocence, or vice versa.⁷⁹ The easiest cases for defendants to win are those where scientific evidence proves (or comes close to proving) a defendant's innocence, and the defendant can also show a constitutional error occurred at trial. These types of cases are relatively rare, however.⁸⁰ At the other end of the spectrum are cases where the legitimacy of the trial has been undermined by a violation of a defendant's constitutional rights, but there is still significant proof of a defendant's involvement in the crime.⁸¹

Most commonly, the claims of innocence and constitutional error are intertwined.⁸² This is often true when the constitutional error that is alleged involves an allegation that police or prosecutors suppressed exculpatory evidence, which would have allowed the defendant to prove his innocence.⁸³ In these cases, when the new evidence is brought to light, suddenly, the case against the defendant looks flimsy.⁸⁴ In these instances, a fact-finder cannot easily separate the claim of misconduct from the claim of innocence because each bolsters the validity of the other.⁸⁵

But in most cases, where there is no new scientific evidence proving the defendant's innocence, there is always an element of doubt: Often no one, except perhaps the defendant, knows with certainty what happened, and this is why these cases have the potential to cause disagreement and division between the system's actors.⁸⁶ Both sides may remain entirely convinced of their initial position: The prosecution believes the defendant is guilty, and if his rights were violated at all, it was merely harmless error. The defense believes the defendant is innocent and was only incarcerated because of a constitutional error.

55f211/t/64a6f5ec0af88026e96a630a/1688663535050/CIU_Report_2021_overturning_convictions.pdf (presenting data on the Philadelphia CIU over a period of three years and five months, including the commitment of the CIU to remedying baseless convictions). See *generally* Dean, 645 N.W.2d at 536 (affirming the district court's denial of an evidentiary hearing for the defendant because he did not specifically allege prosecutorial misconduct).

79. See *infra* Subpart.II.C for an example of a case with a strong constitutional claim but a weaker claim of actual innocence.

80. Forensic testing which can exonerate a defendant is rare. "DNA exonerations," as they are frequently called, are only possible in a small subset of cases where evidence has been properly collected and preserved. See SIMON A. COLE, VANESSA METERKO, SARAH CHU, GLINDA COOPER, JESSICA WEINSTOCK PAREDES, MAURICE POSSLEY & KEN OTTERBOURG, THE CONTRIBUTION OF FORENSIC AND EXPERT EVIDENCE TO DNA EXONERATION CASES 6 (2022), <https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/The%20Contribution%20of%20Forensic%20and%20Expert%20Evidence%20to%20DNA%20Exoneration.pdf>.

81. See *infra* Subpart.II.C for an example of such a case.

82. Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 420 (2018) (describing the conceptual overlap between wrongful conviction and factual innocence).

83. See *id.* at 495.

84. See *infra* Subpart.II.A and Subpart.II.C for examples of such cases.

85. Claims of innocence and claims that exculpatory evidence has been withheld often overlap for another reason: Studies suggest that prosecutors are more likely to withhold evidence when their case against the defendant is weak. See BAZELON, *supra* note 15, at 225 ("Chillingly, prosecutors may be more likely to withhold evidence when proof of guilt is uncertain. If you think the suspect did it but you don't quite have the goods to convict, you may be tempted to put a thumb on the scale.")

86. Litman, *supra* note 82, at 424–25.

As a result, post-conviction proceedings present a particular challenge, as the system grapples with the lack of certainty and the competing interests of finality, on the one hand, and the imperative to correct the justice system's past errors, on the other.⁸⁷ If judgments—particularly the judgments of juries—can be endlessly relitigated, public confidence in the legal system may be undermined, and courts will be forced to adjudicate questions that the passage of time increasingly obscures.⁸⁸ On the other hand, constitutional violations that affect the fundamental fairness of a criminal trial, or newly discovered evidence that casts doubt on a defendant's guilt, cannot be ignored without compromising the fundamental fairness of the proceeding and calling the legitimacy of the criminal justice system into question.⁸⁹

Reform-minded prosecutors have approached these cases differently from their predecessors.⁹⁰ They have not been dissuaded by a lack of complete certainty and have conceded relief in many cases.⁹¹ They argue that all of their concessions, from the most obvious to the more difficult, are in keeping with their larger duty as ministers of justice, to seek just outcomes before and after convictions.⁹² They point to the fact that the law does not require a defendant to prove his innocence, only that it is “more likely than not that no reasonable juror would have found [the defendant] guilty beyond a reasonable doubt.”⁹³ CIUs' critics find fault with their approach, arguing that prosecutors should be entirely sure that the defendant is innocent before they concede relief, regardless of potential errors that may have occurred at trial, because their most important function is to find and punish the guilty.⁹⁴ If these sorts of determinations are to be made, they argue, they should be left to courts, but the prosecutor should continue to fight for the conviction.⁹⁵

87. Phaedra Tanner, *Herrera v. Collins: Assuming the Constitution Prohibits the Execution of an Innocent Person, Is the Needle Worth the Search?*, 1994 UTAH L. REV. 1283, 1309–10 (1994).

88. *Herrera v. Collins*, 506 U.S. 390, 403 (1993) (“[T]he passage of time only diminishes the reliability of criminal adjudications.”).

89. *But see id.* at 404 (“[The] fundamental miscarriage of justice exception . . . is grounded in the ‘equitable discretion’ of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.”).

90. Lissa Griffin & Daisy Mason, *The Prosecutor in the Mirror: Conviction Integrity Units and Brady Claims*, 55 LOY. L.A. L. REV. 1005, 1011–12 (2022) (describing the new approach of Conviction Integrity Units in the offices of progressive prosecutors to claims of innocence).

91. *Miscarriages of Justice: Litigating Beyond Factual Innocence*, ARIZ. STATE UNIV. ACAD. FOR JUST., <https://academyforjustice.asu.edu/miscarriages-of-justice-litigating> (last visited Mar. 8, 2026).

92. Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L.J. 1205, 1209–14 (2000) (discussing the ethical obligations of prosecutors to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963)); *United States v. Bagley*, 473 U.S. 667, 680 (1985) (noting the prosecutor's special role as minister of justice); MODEL RULES OF PRO. CONDUCT r. 3.8 (A.B.A. 2008).

93. *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

94. *See King's Bench Petition of Family Members of Murder Victims Michael Richardson and Robert Crawford at 1*, *Commonwealth v. Brown*, No. 32 EM 2023 (Pa. filed May 26, 2023) (“[U]nlike in a normal criminal case, here the attorneys for the convicted killer and the lawyers representing the prosecution are working together. The lawyers who should be advocates for the victims are literally advocates for their killer.”).

95. *Id.* at 10–12.

These fundamental disagreements about the role of the prosecutor are one of the reasons that attorneys general have become involved in post-conviction proceedings, sometimes summoned by the court to appear as *amicus*, sometimes given standing in the proceedings by legislatures, and sometimes by other means.⁹⁶ They take up the mantle of the defender of the conviction, making the arguments that the local prosecutor has chosen to forego. Their involvement also creates a novel sort of intra-prosecutorial conflict between state and local actors that the courts have not encountered before and, in many cases, are struggling to navigate.⁹⁷

2. Courts Hold the Power to Overturn Convictions

In recent years, when some prosecutors first began to concede relief with some frequency, courts grappled with an initial question: Who should decide whether a conviction or a sentence should be struck down? Up until trial, the law is clear that the prosecutor has discretion over whether to proceed with a case: he may drop the charges if he believes a defendant is innocent, and the case disappears.⁹⁸ But once a jury has returned a verdict of guilty, or a defendant has pled guilty, the prosecutor's discretionary power shrinks.⁹⁹

When progressive prosecutors were first elected in 2017 and began to concede relief in post-conviction cases, few courts had ruled on the scope of prosecutorial power, post-conviction.¹⁰⁰ In Pennsylvania, the issue came before the Supreme Court in 2018 when Philadelphia District Attorney Larry Krasner decided not to defend the death sentence in *Commonwealth v. Brown*.¹⁰¹ Krasner argued that the decision to concede a death sentence belonged to the elected prosecutor, as the representative of the people, because the decision involved factual and policy-based questions that were a “quintessentially prosecutorial function.”¹⁰²

But the Pennsylvania Supreme Court rejected this approach, ruling that once a verdict is final, the authority of the prosecutor is curtailed.¹⁰³

96. See *infra* Part.II for a discussion of the different ways that attorneys general have entered post-conviction proceedings.

97. See, e.g., *infra* Subpart.III.C.

98. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o 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.”); 63(C) AM. JUR. 2D *Prosecuting Attorneys* § 20 (2025).

99. See, e.g., *Commonwealth v. Brown*, 196 A.3d 130, 145 (Pa. 2018).

100. The exception to this was *Young v. United States* where the court ruled that the trial court had the final say as to whether or not a conviction under federal law could be overturned. 315 U.S. 257, 259 (1942).

101. 196 A.3d 130, 141 (Pa. 2018). The defendant in this case, Lavar Brown, is the same defendant whose *other* murder conviction became the subject of controversy years later, and is discussed at length in *infra* Subpart.II.C.

102. *Brown*, 196 A.3d at 142–43 (“[T]he Commonwealth insists that only district attorneys, as a result of their ‘wide grant of prosecutorial discretion,’ have the ‘power to decide whether to seek or continue to seek the death penalty.’”).

103. *Id.* at 146.

Prosecutorial power, at its zenith, the charging stage, shrinks progressively throughout the process and, after judgment in the case is final, is only as great as that of any other advocate.¹⁰⁴ Because the jury's verdict represents "the conscience of the community," once it has been handed down, only the court can set it aside and only when it finds "legal error" has occurred.¹⁰⁵

C. THE STATE ATTORNEY GENERAL AND THE LOCAL PROSECUTOR

Both state and local prosecutors theoretically possess the power to prosecute crimes under state law. Deciding whether this authority should reside with the state attorney general or the local district attorney calls for weighing the benefits of centralized authority on the one hand with those of local control on the other.¹⁰⁶ Traditionally, states have overwhelmingly come down in favor of local control of law enforcement.¹⁰⁷ While attorneys general and local prosecutors both represent the same entity—the state—and both have some law enforcement role, it is the local prosecutor who maintains jurisdiction—either by law or by custom—to prosecute the overwhelming majority of state crimes.¹⁰⁸ Thus, when attorneys general become involved in cases usually handled by local prosecutors, they push against a set of legal norms that exist in nearly every state.¹⁰⁹

The contours of the relationship between local and state prosecutors first took shape in the Jacksonian Era of the 1820s and 30s, when most states amended their constitutions to give local prosecutors primary jurisdiction over local law enforcement, with the hope of making prosecutors more democratically accountable to the local population.¹¹⁰ Before then, prosecutors were neither state nor local, but were usually chosen by the governor and assigned to whichever jurisdiction he chose.¹¹¹

This system of patronage appointments became deeply unpopular during the early nineteenth century, when frustration with public corruption paved the way for a set of statewide reforms that gave the primary authority to prosecute most state crimes to local, elected prosecutors.¹¹² By the beginning of the Civil War, twenty-five of thirty-four states had adopted a system of electing local

104. *Id.* at 145–46.

105. *Id.* at 144.

106. Barkow, *supra* note 32, at 522 (noting that centralizing prosecutorial authority generally leads to more uniform outcomes while local control allows the prosecutor to be more responsive to the needs and preferences of local constituents).

107. *Id.* at 523.

108. *Id.* at 545.

109. *See id.*

110. Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530, 1536 (2012).

111. *Id.* at 1530.

112. *Id.* at 1568.

prosecutors, giving them primary law enforcement authority in their jurisdictions.¹¹³ All but four of the remaining states would soon do the same.¹¹⁴

In the ensuing decades, states also began to elect a state attorney general, often referred to as the state's chief legal officer.¹¹⁵ But the designation of "chief" can be deceiving: In the vast majority of states, the attorney general has no hierarchical authority over local prosecutors and has jurisdiction to prosecute only a small number of offenses.¹¹⁶ In most places, attorneys general have been granted jurisdiction over a limited subset of crimes that require specialized knowledge, including, but not limited to, public corruption, certain white collar and regulatory crimes, election-related crimes, complex grand jury investigations, and cases where the local prosecutor has a conflict of interest.¹¹⁷

There are exceptions to this structure, particularly in very small states, which have no need for multiple prosecutorial entities.¹¹⁸ And, in other states, the attorney general may supersede the local prosecutor in certain instances, by order of the court.¹¹⁹ On the whole, however, the exceptions illustrate the rule of local control.

The preference for local control that created this power sharing arrangement has remained remarkably stable until very recently.¹²⁰ As scholar Rachel Barkow has noted: "[A]t the state level, a preference for local enforcement is a conscious choice, not a dictate of state or constitutional law."¹²¹ The question of who represents the state in post-conviction proceedings before the trial court is, therefore, remarkably simple to answer: It is local prosecutors who retain the authority over these cases unless, as we have seen in Tennessee and Utah, the legislature chooses to adopt a different arrangement.¹²²

113. *Id.*

114. *Id.* The preference for local control was very much in keeping with the thinking of the day: Upon his visit to the United States, Alexis de Tocqueville noted that "the organization of towns and counties in the United States is everywhere based on the same idea, namely, that each is the best judge of what pertains only to itself." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 91 (Arthur Goldhammer trans., Library of America 2004) (1835).

115. Ellis, *supra* note 110, at 1531–36 (discussing how states changed their constitutions beginning in the 1830s so that more attorneys general were elected by popular vote); *see also* Barkow, *supra* note 32, at 535 (noting that state attorney general is generally perceived as chief law enforcement officer in the state).

116. Barkow, *supra* note 32, at 556.

117. *Id.* at 546–50.

118. *Id.* at 561–64 (describing how small states, like Alaska, Rhode Island, and Delaware give more power to state-level prosecutors, but arguing that these models still reflect the general trend towards local preferences, given their small populations).

119. *Id.* at 550.

120. *Id.* at 540 (discussing how state politics lead to a stabilization of the allocation of prosecutorial power between state and local officials).

121. *Id.* at 538. There are exceptions to this: In 1986, Florida vested its attorney general or "statewide prosecutor" with the authority to bring charges in nearly every case where a local prosecutor would have jurisdiction as well. *Id.* at 565. Alabama grants the attorney general the power to supersede local prosecutors with a court's explicit consent, though the authority has been used sparingly. *Id.* at 567.

122. *See infra* Subpart.III.C.

D. QUESTIONS OF LOCAL AND STATE POWER, AND COURT PROCESS

Each of the conflicts where attorneys general have become involved in post-conviction proceedings has a unique set of socio-political dynamics that shape the community where the murder occurred and the local jurisdiction's relationship to state government actors. But while each of the circumstances are different, the cases share a common set of themes: In each, the attorney general is challenging the norm of local control by entering a process that was previously understood to be a local concern.¹²³ This tension runs through every case—each is a struggle between a state and a local actor for authority over the prosecutorial function. One of the larger questions that this Article seeks to answer is whether the conflicts themselves are a product of state overreach, or an appropriate check on local prosecutors who have assumed too much power.

These struggles between local prosecutors and state officials have growing national significance, as they become more common on a host of different issues.¹²⁴ In an ever more geographically and politically polarized country, questions of state and local prosecutorial authority are likely to become increasingly common, as state officials attempt to reign in the power of local prosecutors, and cities attempt to hold onto their traditional authority over local law enforcement.¹²⁵

The cases have other common elements: The adjudication process for prosecutorial concessions is as yet ill-defined. When prosecutors concede relief, courts must grapple with novel questions regarding the adjudication process itself.¹²⁶ They must balance the weight they give to the prosecutor's concession, the deference due to the jury's verdict, and the arguments made by the attorney general without the benefit of a defined set of rules as to how the proceedings should be conducted.¹²⁷

Lastly, many of these cases raise questions about the role of crime victims, who, in at least a few cases, feel betrayed by the local prosecutor's concession of relief.¹²⁸ In most cases, local prosecutors act as a bridge between the victim and the proceeding.¹²⁹ But when local prosecutors concede, crime victims can feel isolated. This is particularly true when the local prosecutor fails to communicate with victims. Sometimes, these victims may form alliances with the attorney general when they agree that the conviction should remain in

123. See *supra* Subpart.I.C.

124. See Goldstein, *supra* note 17, at 1159; Goldrosen, *supra* note 51.

125. See Lauren M. Ouziel, *Prosecutors as Partisans*, 50 *FORDHAM URB. L.J.* 1093, 1100–01 (2023); Goldstein, *supra* note 17, at 1177 (discussing the fact that many efforts to curb the authority of progressive prosecutors have not come from voters, but from statewide officials).

126. See *infra* Part.IV for a discussion of potential ideas about the process courts should follow when prosecutors concede relief.

127. See *infra* Subpart.IV.C for a discussion of the Pennsylvania Supreme Court grant of allocator in order to answer this question.

128. See *infra* Subparts.II.B–C and Subpart.III.D for further discussion of cases involving victims.

129. See *infra* Subpart.III.D.

place.¹³⁰ Courts must grapple with how to give these victims the opportunity to be heard, at least where the law demands it, while not allowing them to play a role so large that they interfere with the court's adjudicatory function.¹³¹

II. CAUSES OF CONFLICT AND MOTIVATIONS OF THE ATTORNEY GENERAL

Embedded in each of the high-stakes post-conviction proceedings discussed below where prosecutors have conceded relief, are a unique set of actors, all of whom have a significant personal or professional stake in the proceeding and are clamoring for the courts' attention. The defendant, around whose claims of wrongful conviction the proceedings revolve and for whom the process itself represents a bridge to freedom. The local prosecutor, who has significant reputational stake in his concession that a man found guilty of murder should now go free. The victim, who may disagree with the local prosecutor's decision to concede.¹³² And, lastly, the attorney general, whose complex and diverse motivations are the focus of this Part.

The motives of the attorney general merit further discussion because he is the party acting outside the typical contours of his jurisdictional role. While he may be summoned by the court to render an opinion, choose to involve himself by asking to be heard, or work with the victim to stymie the process unbeknownst to the court, his objectives provide unique insight into how and why conflicts over post-conviction concessions occur. In those cases where attorneys general have played a part, politics, relationships with victims, and the individual self-interest of the assistant attorneys general assigned to work on the cases have acted as key motivators. The attorney general's involvement usually stems from some combination of these often-overlapping causes, propelling him to act in an area usually reserved for his local counterpart, the local prosecutor.

A. POLITICS: *THE STATE OF MISSOURI V. LAMAR JOHNSON*

There are two types of political conflicts that have led attorneys general to become involved in post-conviction cases where local prosecutors concede relief. The first are partisan.¹³³ Post-conviction matters in Missouri and Tennessee present the clearest examples of this trend. In these instances, the cases themselves have become flashpoints between the offices, and fodder for public conflict. The second type are political conflicts that develop between reform-minded prosecutors and attorneys general who do not trust the local prosecutor's approach. These conflicts are not strictly partisan, but they are political and often personal. Pennsylvania and Maryland best exemplify this trend.¹³⁴

130. See *infra* Subparts.II.B–C for examples of this.

131. See *infra* Subpart.II.B–C.

132. See *infra* Subpart.II.B and Subpart.III.D for further discussion of victims' experience.

133. In this Part, I will highlight a single case where *partisan* politics were the driving force.

134. See *infra* Subpart.III.C.

The case of Lamar Johnson primarily illustrates the former type of partisan conflict. The Missouri Attorney General's response to the repeated, and sometimes unorthodox, attempts of progressive prosecutor Kim Gardner to bring about Johnson's exoneration appear to be deeply rooted in his personal political calculus.¹³⁵

St. Louis Circuit Attorney Kim Gardner was swept into office on a reform platform in 2016.¹³⁶ The city was known for its dysfunctional and punitive criminal justice system: St. Louis received the worst ranking of any city in the country for prosecutorial misconduct from the Fair Sentencing Project.¹³⁷ Gardner built a CIU when she took office, and her new staff chose Lamar Johnson as their first case.¹³⁸ Johnson, convicted of homicide in 1995 and sentenced to life in prison, had been found guilty based on the testimony of a single eyewitness, who had later recanted and who had been paid by the state to testify, unbeknownst to the defense.¹³⁹ There was no physical evidence linking Johnson to the crime, and two other individuals, serving life sentences on a different murder, had come forward and claimed to be the shooters.¹⁴⁰

135. Two attorneys general opposed Johnson's exoneration. The first was Eric Schmitt, who was elected to the U.S. Senate in 2022, in the midst of the conflict over Johnson's exoneration. He was replaced by Andrew Bailey, who then had to run for the office in 2024. Emily Hoerner, *Missouri Supreme Court Denies Latest Appeal of Lamar Johnson, Whom Local Prosecutors Say Is Wrongly Convicted*, INJUSTICE WATCH (Mar. 4, 2021), <https://www.injusticewatch.org/archive/2021/mo-supreme-court-denies-appeal-of-man-prosecutors-say-is-wrongly-convicted>; Jason Rosenbaum, *Eric Schmitt Punches Ticket to U.S. Senate with Victory over Trudy Busch Valentine*, ST. LOUIS PUB. RADIO (Nov. 9, 2022, at 03:14 CT), <https://www.stlpr.org/government-politics-issues/2022-11-08/eric-schmitt-punches-ticket-to-u-s-senate-with-victory-over-trudy-busch-valentine>. Both AGs built their political brand in opposition to the progressive prosecutor movement that Kim Gardner represented. Rudi Keller, *Andrew Bailey Officially Takes Over As Missouri's New Attorney General*, MO. INDEP. (Jan. 3, 2023, at 11:12 CT), <https://missouriindependent.com/2023/01/03/andrew-bailey-officially-takes-over-as-missouris-new-attorney-general>; see Katie Moore, *Missouri Attorney General Works to Ensure Innocence Isn't Always Enough to Get Out of Prison*, MO. INDEP. (Apr. 3, 2025, at 06:00 CT), <https://missouriindependent.com/2025/04/03/missouri-attorney-general-works-to-ensure-innocence-isnt-always-enough-to-get-out-of-prison>; *State v. Johnson*, 617 S.W.3d 439, 449 (Mo. 2021) (Stith, J., concurring) (criticizing Attorney General Schmitt for opposing relief in the ten cases where the Missouri Supreme Court upheld exoneration in lower courts over the last decade and suggesting that the attorney general misunderstood his role). Schmitt and Bailey not only fought Johnson's exoneration, but many others, including Kevin Strickland and Christopher Dunn, which is discussed further in *infra* Subpart.III.B.

136. See Rachel Lippman, *Kim Gardner's Exit Leaves Others to Repair a St. Louis Criminal Court System in Shambles*, ST. LOUIS PUB. RADIO (May 11, 2023, at 05:00 CT), <https://www.stlpr.org/law-order/2023-05-11/kim-gardners-exit-leaves-others-to-repair-a-st-louis-criminal-court-system-in-shambles>.

137. RJ Vogt, *Mo. Exoneration Bid Tests Limits of Prosecutorial Power*, LAW360 (May 17, 2020, at 20:02 ET), <https://www.law360.com/articles/1273899/mo-exoneration-bid-tests-limits-of-prosecutorial-power>.

138. *Id.*

139. See Cir. Att'y *ex. rel.* Johnson v. State, No. 2222-CC09375, at 3–4 (Mo. Cir. Ct. Feb. 14, 2023). Years after the trial, the witness who identified Johnson admitted that he could not identify the two shooters and that he had only named Johnson because the state had paid him to do so. *Id.* Receipts for \$4,000 that the state paid the witness were found in the prosecution's file but had never been shared with the defense. *Id.* at 11, 30. Several years after the shooting, two other men had come forward and signed affidavits, confessing that they had been the shooters. *Id.* at 4.

140. *Johnson*, 617 S.W.3d at 442. A year-long investigation conducted by Gardner's CIU concluded that Johnson was innocent and reached the following conclusions: (1) key state witnesses had perjured themselves, including the sole eyewitness who had recanted his prior testimony that he had seen Johnson shoot the victim; (2) two men had since confessed to the murders and stated that Johnson was not involved; (3) state prosecutors

But despite the weakness of the state's case against Johnson, Gardner and her newly constituted CIU faced a basic procedural obstacle: in 2019, there was no state statute which allowed Gardner to petition the court to vacate Johnson's conviction.¹⁴¹ Johnson himself had filed multiple habeas actions alleging that information had been withheld from him, but these claims had been handled by the attorney general, who has jurisdiction over most appellate and post-conviction matters in Missouri.¹⁴² The attorney general had opposed Johnson's exoneration and continued to withhold exculpatory information.¹⁴³

Gardner used the only tool she had to challenge the case, given the attorney general's appellate jurisdiction: she filed a motion to set aside Johnson's conviction under a state statute that allowed a party to request that a conviction be vacated within twenty-five days of the verdict.¹⁴⁴ The motion was untimely, but, Gardner argued, her office had a duty to file it, because Johnson's ongoing imprisonment was a miscarriage of justice.¹⁴⁵ The judge assigned to hear Gardner's motion appointed the Missouri attorney general to "appear on behalf of the state" and render his opinion on Gardner's motion.¹⁴⁶

The Republican attorney general, who ran for U.S. Senate in 2022 on a platform that he had battled progressive prosecutors,¹⁴⁷ opposed Gardner's motion, arguing that Missouri law gave her no authority to challenge the conviction.¹⁴⁸ The trial court agreed, and in March of 2021, the Missouri Supreme Court upheld the lower court's decision dismissing Gardner's motion to vacate Johnson's conviction.¹⁴⁹

had paid the sole eyewitness to testify and failed to disclose this fact to the defense; (4) prosecutors had failed to disclose another witness's prior criminal record and incentive to testify; (5) former prosecutors and police fabricated evidence against Johnson; and (6) prosecutors had knowingly presented perjured testimony at Johnson's trial. *Id.*

141. *Id.* at 440–41.

142. *Id.* at 439, 441 (noting Johnson filed multiple writs in state and federal court); see MO. REV. STAT. § 27.050 (1972); *id.* § 27.060 (1939); State *ex rel.* Nixon v. Jaynes, 63 S.W.3d 210, 214 (Mo. 2001) (en banc) (describing the purpose of post-conviction remedies).

143. *Johnson*, 617 S.W.3d at 448 (noting the Justice's opinion that Johnson should file another habeas petition, but acknowledging that the attorney general had opposed his prior petitions and that they had been dismissed without a hearing).

144. *Id.* at 441; MO. R. CRIM. P. 29.11–12(b) (stating that a party may file a motion to set aside a conviction within twenty-five days of the guilty verdict, and that such motions may be considered at the court's discretion when the court finds "plain errors affecting substantial rights . . . [resulted in] manifest injustice or miscarriage of justice"). *But see* State *ex rel.* Zahnd v. Van Amburg, 533 S.W.3d 227, 230 (Mo. 2017) (en banc) ("A judgment in a criminal case become final when a sentence is imposed. . . . Therefore, [a] court 'exhausts its jurisdiction' over a criminal case once it imposes a sentence.>").

145. *Johnson*, 617 S.W.3d at 441–42 (citing MO. R. CRIM. P. 29.11).

146. *Id.*

147. See *Missouri AG Protects Gun-toting White Couple, Blocks Wrongfully Convicted Black Man's Release*, KAN. CITY STAR, (July 24, 2020, at 17:40 PT), <https://www.kansascity.com/opinion/editorials/article244398632.html>.

148. *Johnson*, 617 S.W.3d at 442.

149. *Id.* at 445. In a concurring opinion, Justice Stith acknowledged the strength of Johnson's innocence claims and criticized the attorney general for his record of arguing to uphold every conviction challenged during his tenure. *Id.* at 449 (Stith, J., concurring). The attorney general, Justice Stith argued, must understand his role as one of upholding justice. *Id.* at 450. She ended her concurrence on a note of unsupported optimism: "[t]his

Johnson's case had received so much publicity that several months later, the Missouri legislature responded by passing a law allowing the trial prosecutor to "file a motion to vacate [a conviction] at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted."¹⁵⁰ But the new legal remedy came with a caveat: It required that the attorney general be given notice of the hearing, and provided him the opportunity to question witnesses, and make argument.¹⁵¹

After the law was signed, Gardner moved to vacate Johnson's conviction again.¹⁵² The attorney general again opposed the exoneration, raising a set of complex legal challenges about how the proceeding should be conducted.¹⁵³ In the eighteen months that followed, the attorney general raised a series of evidentiary objections, delaying Johnson's hearing on the merits of his innocence claim.¹⁵⁴ When the claim was finally heard, it became a mini-trial, lasting five days.¹⁵⁵ The attorney general opposed the entry of each piece of evidence into the record, refusing even to accept a stipulation as to the date and time of the murder.¹⁵⁶ As one attorney who watched from the gallery commented: "[The] judges don't know how to handle it[.]. . . so the attorney general is just walking all over everyone."¹⁵⁷

Johnson was exonerated in February 2023, four years after Gardner first agreed that he had been wrongfully convicted.¹⁵⁸ By then, the Missouri attorney general had been elected to the United States Senate on a "tough on crime" platform, and his appointed successor, Andrew Bailey, had taken over the opposition to Johnson's exoneration.¹⁵⁹

Court anticipates and expects the attorney general will apply these principles when called upon to consider whether to oppose a petition for writ of habeas corpus or other pleading filed by Mr. Johnson or others." *Id.* According to a study conducted by Injustice Watch, the Missouri attorney general has opposed relief in 27 cases where defendants were later exonerated. Hoerner, *supra* note 135.

150. MO. REV. STAT. § 547.031(1) (2021).

151. *Id.* § 547.031(2).

152. See Jason Rosenbaum, *Prosecutors Battle over Whether Lamar Johnson's Sentence Was a Wrongful Conviction*, NPR, at 03:47 (Dec. 16, 2022, at 16:36 ET), <https://www.npr.org/2022/12/16/1143640096/prosecutors-battle-over-whether-lamar-johnsons-sentence-was-a-wrongful-conviction>.

153. Cir. Att'y *ex. rel.* Johnson v. State, No. 2222-CC09375, at 1–2 (Mo. Cir. Ct. Feb. 14, 2023); Rebecca Rivas, *Missouri AG Office Has Taken Outsized Role in Opposing Wrongful Conviction Cases*, ST. LOUIS PUB. RADIO (Dec. 22, 2022, at 12:57 CT), <https://www.stlpr.org/law-order/2022-12-22/missouri-ag-office-has-taken-outsized-role-in-opposing-wrongful-conviction-cases>.

154. Rivas, *supra* note 153.

155. *Id.*

156. *Id.*

157. *Id.*

158. McKenna Oxenden, *After 27 Years in Prison, Missouri Man's Murder Conviction Is Vacated*, N.Y. TIMES (Feb. 15, 2023), <https://www.nytimes.com/2023/02/15/us/johnson-wrongful-conviction-release.html>.

159. Attorney General Bailey also fought exonerations pursued by local prosecutors, including, but not limited to, the case of Christopher Dunn, which is discussed further in Subpart.III.B. See Rosenbaum, *supra* note 135; Keller, *supra* note 135; *Exonerees Call on Missouri Republican Attorney General to Stop Fighting Innocence Claims*, COURTHOUSE NEWS SERV. (Aug. 1, 2024), <https://www.courthousenews.com/exonerees-call-on-missouri-republican-attorney-general-to-stop-fighting-innocence-claims>.

Gardner won the battle for Johnson's exoneration and was re-elected in 2020, but she was not allowed to serve out her term.¹⁶⁰ In May of 2023, Republican state officials forced her to resign, threatening a state takeover of her office if she did not leave her position.¹⁶¹ Andrew Bailey, the new Missouri Attorney General, led the effort that removed Gardner from office.¹⁶²

The facts of Johnson's exoneration were relatively straightforward in that critical, material evidence had been withheld from him in violation of the law.¹⁶³ Yet, it took Gardner's entire term in office and a new state law to accomplish his exoneration. The case also contributed to the hostility between Gardner and state Republican officials, who eventually drove her out.¹⁶⁴ The drama illustrates how a prosecutor's decision to support a claim of wrongful conviction can become a flashpoint between state and local actors, particularly when they have diverging political interests and constituencies. The attorney general, answering to a different and more conservative electorate than the local prosecutor, staked his position, and later his campaign for higher office, in opposition to Gardner and the sorts of reforms she proposed as a candidate.¹⁶⁵ Gardner, in turn, answered to a different, local electorate in St. Louis, which had supported her proposed reforms and re-elected her in 2020.¹⁶⁶ The saga of Johnson's exoneration became a symbol of a larger battle around Gardner's use of prosecutorial discretion, one in a series of similar and increasingly common clashes between local reform-minded prosecutors and more conservative state officials.¹⁶⁷

B. VICTIMS: *THE STATE V. ADNAN SYED*

Whether and how to allow victims to participate in post-conviction proceedings presents a difficult challenge for courts, particularly when a local prosecutor seeks to overturn a conviction and the victim opposes that

160. Gardner was re-elected as St. Louis Circuit Attorney in 2020. See Kelsey Landis, *Kim Gardner Wins Rematch for St. Louis Circuit Attorney*, KAN. CITY STAR (Aug. 5, 2020, at 00:22 PT), <https://www.kansas-city.com/news/politics-government/election/article244694937.html>.

161. Rebecca Rivas, *Embattled St. Louis Prosecutor Kim Gardner Will Resign June 1*, MO. INDEP. (May 4, 2023, at 17:34 PT), <https://missouriindependent.com/2023/05/04/embattled-st-louis-prosecutor-kim-gardner-will-resign-june-1>.

162. See Rudi Keller, *Missouri AG Faces 'High Bar' in Effort to Oust St. Louis Prosecutor for Neglect of Duties*, MO. INDEP. (Apr. 18, 2023, at 09:35 PT), <https://missouriindependent.com/2023/04/18/missouri-ag-faces-high-bar-in-effort-to-oust-st-louis-prosecutor-for-neglect-of-duties>.

163. See *infra* note 149.

164. Jason Rosenbaum, Rachel Lippmann & Sarah Kellogg, *Kim Gardner to Resign as St. Louis Circuit Attorney, Leaving a Legacy of Turmoil*, ST. LOUIS PUB. RADIO (June 18, 2024, at 12:53 CT), <https://www.stlpr.org/government-politics-issues/2023-05-04/kim-gardner-resigns-st-louis-circuit-attorney-prosecutor>.

165. Lara Bazelon, *A Progressive Prosecutor Pledged to Reform the System. The System's Fighting Back.*, SLATE (Feb. 18, 2020, at 14:09 PT), <https://slate.com/news-and-politics/2020/02/st-louis-prosecutor-kim-gardner-lamar-johnson-innocent.html>.

166. Rudi Keller, *Missouri Prosecutors Decry Bill to Supplant Kim Gardner As St. Louis Circuit Attorney*, MO. INDEP. (Feb. 27, 2023, at 18:38 PT), <https://missouriindependent.com/2023/02/27/missouri-prosecutors-decry-bill-to-supplant-kim-gardner-as-st-louis-circuit-attorney>.

167. Rosenbaum, *supra* note 152.

decision.¹⁶⁸ Victims are not parties in criminal prosecutions, but most states grant them a right to notice of all significant hearings relating to the case, and a right to address the court before sentencing.¹⁶⁹ Most state laws are silent, however, as to the role victims may play in post-conviction proceedings.¹⁷⁰

Though prosecutors do not represent victims, their interests are usually aligned, particularly when a defendant goes to trial, and after he has been convicted and seeks to challenge that conviction.¹⁷¹ But in post-conviction proceedings where prosecutors concede relief, the prosecutor and the victim may no longer be allies, and they can become alienated from each other.¹⁷² This leaves courts with a difficult balance to strike: Should they include victims, who may no longer have anyone to advocate for their perspective? Since victims are not parties in these cases, is there a way to make sure their voices are heard, while not allowing them so much power that their input is unfair to the defendant?¹⁷³

The proceedings that led to Adnan Syed's exoneration illustrate the way that post-conviction processes can go awry when victims are ignored.¹⁷⁴ On

168. See Subpart.II.B for a discussion of another case where victims opposed the conviction's vacatur, accusing the local prosecutor of failing to represent their interests.

169. The birth of the Victims' Rights Movement in the 1970s led most states to recognize a robust set of rights for victims. See Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 257 (2005); Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99, 103 (2020).

170. See, e.g., Paul G. Cassell, *Crime Victims' Rights*, in REFORMING CRIMINAL JUSTICE, VOLUME 1: INTRODUCTION AND CRIMINALIZATION 227 (Erik Luna ed. 2017) (reviewing rights guaranteed in most crime victims laws with no mention of post-conviction process).

171. See, e.g., *Commonwealth v. Price*, 684 A.2d 640, 642 (Pa. Super. Ct. 1996) ("The victim in a criminal case is only a witness; he is not the 'client' of the district attorney. The prosecutor's 'client' is the Commonwealth and the people who live in the Commonwealth.").

172. See Emma Kaufman, *The Past and Persistence of Private Prosecution*, 173 U. PA. L. REV. 89, 91, 124 (2024). While victims were once the primary actors in criminal proceedings at Common Law, by the nineteenth century prosecution of crime had become a function of the state. See *id.* at 97. By then, a common understanding had developed that victims should not be responsible for prosecution, both because of the financial burden that such an arrangement would impose upon them and because they lacked the objectivity necessary to ensure fair and uniform outcomes. See *id.* at 124.

173. Compare MD. CODE ANN., CRIM. PROC. § 8-301.1 (West 2019), with *id.* § 11-104 (West 2017). Under § 8-301.1, Maryland's post-conviction relief statute, victims only have the right to notice and to be present at hearings. However, § 11-104 lays out a much more comprehensive scheme for victim involvement when the prosecutor and victim are allied. The lack of detail in § 8-301.1, as compared to § 11-104, creates confusion regarding the role of victims in post-conviction proceedings.

174. Eight years after the release of the critically acclaimed podcast, *SERIAL: Season 1* (Apple Music, 2014), Syed remained in prison in Maryland, serving a life sentence for the killing of his high school girlfriend, Hae Min Lee. See *'Serial': Season 1*, N.Y. TIMES (Oct. 5, 2022), <https://www.nytimes.com/2022/09/20/podcasts/serial-adnan-syed.html>. Questions had been raised in the court of public opinion regarding Syed's guilt, but his lawyers' efforts to free him had all failed. See *id.* The conviction was based primarily on the testimony of Syed's alleged co-conspirator who testified that he helped Syed transport and bury the body. See *id.* No forensic evidence linked Syed to the crime, and Syed's attorney, who was sick at the time of the trial and died in 2004, failed to investigate Syed's alibi. See Eliana Dockterman, *Serial Witness Stands by Her Alibi for Adnan Syed in New Affidavit*, TIME (Jan. 20, 2015, at 03:57 PT), <https://time.com/3675263/serial-adnan-syed-asia-mcclain>. While the podcast had turned Syed into a celebrity, the state, represented by the attorney general in all post-conviction proceedings, had remained steadfast in its defense of Syed's conviction, and the courts had denied Syed's successive attempts

September 14, 2022, Baltimore State’s Attorney Marilyn Mosby filed a motion to vacate Adnan Syed’s conviction, revealing that her office had suppressed material exculpatory evidence when it prosecuted Syed twenty-two years prior.¹⁷⁵ But, she told the court, because the Maryland attorney general handled all of the appeals and post-conviction petitions in Syed’s case, it was the attorney general who had controlled the file since Syed’s conviction, and was therefore responsible for continuing to withhold critical evidence.¹⁷⁶

Mosby’s motion to exonerate Syed was remarkably short on details, but alleged that Mosby’s staff had searched the file at the attorney general’s office and had discovered two handwritten memoranda that implicated two other suspects in Lee’s death, including information about one man who had threatened to kill Lee shortly before her death.¹⁷⁷ The memoranda had never been shared with the defense.¹⁷⁸ Mosby’s motion did not name the other suspects, claiming that she was prevented from doing so because the investigation into Lee’s killing was still ongoing.¹⁷⁹

Five days later, the trial court held a hearing on the state’s attorney’s motion to set aside the verdict.¹⁸⁰ The victim’s brother, Young Lee, filed a motion to postpone the proceedings, arguing that the family’s right to notice under the Maryland Victim Rights Act had been violated.¹⁸¹ The court denied

at exoneration. *See* Syed v. State, 149 Md. App. 737 (Md. Ct. Spec. App. 2003), *cert. denied*, 827 A.2d 114 (Md. 2003). In 2010, Syed filed a petition for post-conviction relief, which the circuit court denied in 2014. Syed v. State, 181 A.3d 860, 873 (Md. Ct. Spec. App. 2018). Syed filed an application for leave to appeal, which the appellate court granted, ordering a limited remand. *Id.* In 2016, after further proceedings, the circuit court granted the petition and granted Mr. Syed a new trial. *Id.* at 874. The appellate court, in a split decision, held that trial counsel’s failure to investigate a potential alibi witness was deficient performance that resulted in prejudice, and therefore, a new trial was warranted. *Id.* at 866–67, 919. But the Supreme Court of Maryland reversed that decision. State v. Syed, 204 A.3d 139, 165 (Md. 2019), *cert. denied*, 589 U.S. 1080 (2019).

175. Brief of Appellee at 1, Lee v. State, No. 1291 (Md. App. Ct. Jan. 9, 2023). Mosby’s deputy had gone to the attorney general’s office to search the Syed file because of a Maryland law passed in 2021, the Juvenile Restoration Act, which allows local prosecutors to ask the court to resentencing defendants who were juveniles at the time of their crimes. *See* S.B. 494, 2021 Leg., 442nd Sess. (Md. 2021); Jax Miller, *Baltimore’s Top Prosecutor Files Motion to Vacate ‘Serial’ Subject Adnan Syed’s Conviction and Requests New Trial*, OXYGEN TRUE CRIME (Sep. 14, 2022, at 16:27 ET), <https://www.oxygen.com/crime-news/baltimore-moves-vacate-serial-adnan-syed-murder-conviction>.

176. The State’s motion to vacate was filed pursuant to Maryland Rule of Criminal Procedure § 8-301.1, a Maryland law passed in 2019, which gave trial prosecutors the ability to petition the court, at any time, to vacate a conviction when newly discovered evidence “calls into question the integrity of the . . . conviction [and] the interest of justice and fairness justifies vacating the . . . judgment.” MD. CODE ANN., CRIM. PROC. § 8-301.1 (West 2019).

177. Lee v. State, 292 A.3d 348, 356 (Md. App. Ct. 2023).

178. *Id.* at 356–57.

179. *Id.* at 357 (citing the State’s Motion to Vacate).

180. Syed v. Lee, 322 A.3d 578, 678 (Md. 2024). Mosby’s office had called Young Lee before filing the motion to inform him of the decision and emailed him on Friday, September 16, when the court scheduled a hearing for the following Monday. *Id.* at 677–78. Lee lived in California and was unable to attend the hearing on such short notice. *See id.* at 587.

181. *See* MD. CODE ANN., CRIM. PROC. § 8-301.1(d) (West 2019) (“(1) Before a hearing on a motion filed under this section, the victim or victim’s representative shall be notified, as provided under § 11-104 or § 11-503 of this article. (2) A victim or victim’s representative has the right to attend a hearing on a motion filed under this section, as provided under § 11-102 of this article.”); *id.* § 11-102(a) (West 2001) (“If practicable, a victim

the motion to postpone the proceeding, allowing Young Lee only thirty minutes to leave work and participate from his home in California, via Zoom.¹⁸²

At the hearing, the court overturned Syed's conviction, instructing the sheriff to unshackle him in the courtroom.¹⁸³ The only documents entered into evidence were an affidavit by the state's attorney, describing in very general terms the content of what she had found in her search of Syed's file, and a letter from Syed's trial attorney from 2000, requesting that the state provide her with all relevant exculpatory material.¹⁸⁴ The specific allegations against the other two possible suspects were discussed in chambers, off the record.¹⁸⁵

In the days that followed, Mosby revealed another important detail: The prosecutor who had convicted Syed in 2000 was now the chief of the criminal division at the attorney general's office and the supervisor in charge of responding to Syed's post-conviction claims.¹⁸⁶ It had been her responsibility, Mosby claimed, to review the file for potential exculpatory evidence, and she and her staff had intentionally held back the memoranda that had led to Syed's exoneration.¹⁸⁷ This same supervisor had also helped the Lee family retain a lawyer to postpone Syed's hearing, and later, appeal the vacatur of his conviction.¹⁸⁸

Tension between Mosby and Maryland Attorney General Brian Frosh had been simmering for several years, and Syed's exoneration caused it to boil over.¹⁸⁹ Frosh accused Mosby of using Syed's case as a political stunt to increase her popularity because she had been indicted for mortgage fraud in Florida.¹⁹⁰ "We have a crime problem in Maryland, and Maryland courts have repeatedly found that Adnan Syed committed this murder," Frosh told reporters.¹⁹¹ "[I]f [S]tate's [A]ttorney Mosby were concentrating as hard on trying murder cases

or victim's representative who has filed a notification request form under § 11-104 of this subtitle has the right to attend any proceeding in which the right to appear has been granted to a defendant.").

182. *Syed v. Lee*, 322 A.3d at 597.

183. *See* *State v. Syed*, No. 199103042-46 (Md. Cir. Ct. Sep. 19, 2022).

184. *Lee v. State*, 292 A.3d at 364-65.

185. Brief for Appellant at 11, *Lee v. State*, 292 A.3d 348 (Md. Ct. Spec. App. 2023) (No. 199103042-46).

186. Akela Lacy, "Serial" Podcast's Adnan Syed Might Go Back to Prison Because of Toxic Maryland Politics, *THE INTERCEPT* (Aug. 19, 2023, at 06:00 PT), <https://theintercept.com/2023/08/19/serial-adnan-syed-maryland-politics-mosby-frosh>.

187. *Id.*

188. *Id.*

189. Maryland Governor Larry Hogan had also sought to give the state attorney general independent power to investigate and prosecute crime in Baltimore, citing Mosby's lenient plea deals and failures to prosecute certain gun related crimes. *See* Goldstein, *supra* note 17, at 1168.

190. Alex Mann & Lee O. Sanderlin, *War of Words: Maryland AG Brian Frosh, Marilyn Mosby Spar over Evidence That Led to Adnan Syed's Release*, *BALT. SUN* (Sep. 22, 2022, at 06:05 ET), <https://www.baltimore.sun.com/2022/09/21/war-of-words-maryland-ag-brian-frosh-marilyn-mosby-spar-over-evidence-that-led-to-adnan-syeds-release>.

191. Mike Hellgren, "A Surprise to Us": Maryland AG Frosh Slams Mosby, Claims No Evidence Withheld from Adnan Syed's Defense, *CBS NEWS* (Sep. 21, 2022, at 23:30 ET), <https://www.cbsnews.com/baltimore/news/a-surprise-to-us-maryland-ag-frosh-slams-mosby-claims-no-evidence-withheld-from-adnan-syeds-defense>.

and putting murderers behind bars as she has on this case, I think our state would be quite a bit safer.”¹⁹²

Shortly thereafter, the victim’s brother, Young Lee, filed a motion to appeal the court’s decision overturning Syed’s conviction, on the grounds that his rights had been violated under the Maryland Victim Rights Act.¹⁹³ He argued that he had not been granted proper notice of the hearing and that the contents of the State’s motion were so sparse as to present no factual basis for vacating the sentence.¹⁹⁴ Before the court could rule, Mosby dropped all of the charges against Syed.¹⁹⁵

But the Maryland appellate courts agreed to hear Lee’s motion anyway,¹⁹⁶ and once the case was before the appellate court, the attorney general, responsible for all appeals in Maryland, once again assumed jurisdiction: “[T]he state,” now represented by the attorney general, joined Lee’s request to reinstate the verdict against Syed, reversing the position that Mosby had taken before the trial court.¹⁹⁷

The Maryland Supreme Court agreed with Lee, reinstating Syed’s conviction and holding that the proceedings before the trial court had been inadequate.¹⁹⁸ “On remand, Mr. Lee shall be afforded reasonable notice of a new vacatur hearing . . . [and] permitted the opportunity to be heard, among other things, on the merits of the Vacatur Motion after hearing the entirety of the parties’ presentations in support of the motion.”¹⁹⁹

In a surprising twist, the Maryland Supreme Court allowed Syed to remain out of custody pending another hearing to overturn his conviction in the lower court.²⁰⁰ While the court rebuked the trial court’s handling of the vacatur hearing, it did not go so far as to send Syed back to prison. The issue of Syed’s potential reincarceration was resolved in March 2025 when he was resentenced to time served under the Juvenile Resentencing Act.²⁰¹ Syed was seventeen at the time of Lee’s murder, making him eligible for relief under Maryland’s new law, which did not require a guilty plea for a defendant to be resentenced.²⁰² Whether or not Syed will ever be exonerated is still unclear, as Mosby lost her

192. *Id.*

193. Young Lee’s Notice of Appeal, *State v. Syed*, Nos. 1991103042–46, 2022 WL 19299151 (Md. Cir. Ct. Sep. 19, 2022).

194. *Syed v. Lee*, 322 A.3d 578, 597-99 (Md. 2024).

195. *Id.* at 600.

196. Order ¶ 2, *Lee v. State*, 292 A.3d 348 (Md. Ct. Spec. App. 2022) (No. 199103042).

197. See Brief of Appellee, *supra* note 175, at 11, 13.

198. *Syed v. Lee*, 322 A.3d at 632.

199. *Id.* at 633.

200. *Id.* at 600.

201. See *Judge Formally Sentences Adnan Syed to Time Served in “Serial” Podcast Case*, U.S. NEWS & WORLD REP. (Mar. 14, 2025, at 14:39 PT), <https://www.usnews.com/news/us/articles/2025-03-14/judge-formally-sentences-adnan-syed-to-time-served-in-serial-podcast-case>.

202. MD. CODE ANN., CRIM. PROC. §§ 8-110(a)–(b) (West 2025).

bid for re-election.²⁰³ Her replacement, Ivan Bates, withdrew the motion to vacate Syed's conviction.²⁰⁴

Young Lee's desire to take part in Syed's post-conviction proceedings was not unique. Victims in other cases have aggressively pushed to play a role in habeas proceedings where local prosecutors concede relief. In the case of *Commonwealth v. Brown*, in Pennsylvania, discussed further below, the victims asked the trial court tasked with adjudicating the defendant's motion for a new trial to allow them to be parties to the litigation, so that they could defend the conviction.²⁰⁵ In the absence of a party to play the traditional role of prosecutor, the victims asked to assume the role themselves.²⁰⁶ But in allowing victims to actively participate, courts must strike a balance between the rights of the victim and the rights of the defendant. They must also make sure that victims do not become a tool of another interested party, like the attorney general, who may use the victim as a tool to influence the litigation.

In *Brown*, the court denied the victims' motion to intervene as a party,²⁰⁷ but allowed them to participate in proceedings as *amicus*.²⁰⁸ Over the course of a year, the victims' families filed more than 200 pages of briefing material, accompanied by more than 400 pages of exhibits—more than either the defendant or the district attorney.²⁰⁹ Brown's attorneys, surprised by the victims' families' knowledge of the case, became suspicious about who was writing their pleadings, and asked that the court compel the victims' families to reveal the identity of any other parties who were assisting them.²¹⁰ The victims'

203. Brian Witte, *Baltimore Prosecutor Marilyn Mosby Defeated in Primary*, AP NEWS (July 22, 2022, at 18:24 PT), <https://apnews.com/article/2022-midterm-elections-covid-health-general-marilyn-mosby-1742b1a284798e76a89f974cd8c5e497>.

204. See Press Release, Ivan J. Bates, State's Attorney, Office of the State's Attorney for Baltimore City, State's Attorney Announces Withdrawal of Motion to Vacate Judgement in Adnan Syed Case (Feb. 25, 2025), <https://www.stateattorney.org/media-center/press-releases/3042-state-s-attorney-announces-withdrawal-of-motion-to-vacate-judgement-in-adnan-syed-case>.

205. Motion for Intervention by Victims' Families at 12, *Commonwealth v. Brown*, No. CP-51-CR-0407441-2004 (Pa. Ct. Com. Pl. Jan. 24, 2022). Victims' Families also alleged that DA Krasner should be disqualified from handling the case because a former law partner of Krasner's had represented Lavar Brown before he had been affiliated with Krasner's law practice, and a different law partner of Krasner had represented one of the witnesses in the case, Kyonna Lyons, before he had been affiliated with Krasner. This motion was denied. *Id.* at 2–3.

206. There is no legal precedent suggesting that crime victims have the right to intervene in criminal proceedings, although some scholars have advocated for it. See Hannah Gardenswartz, *Can Courts Stop Citizens from Prosecuting Criminal Cases Under the Clean Water Act?*, 19 SUSTAINABLE DEV. L. & POL'Y 11, 11 (2018); Paul G. Cassell & Michael Ray Morris, Jr., *Defining "Victim" Through Harm: Crime Victim Status in the Crime Victims' Rights Act and Other Victims' Rights Enactments*, 61 AM. CRIM. L. REV. 329, 331 (2024).

207. The judge denied that request on July 8, 2022. See Response to the Petition for Exercise of King's Bench Jurisdiction over the Matter Denied by the Philadelphia Court of Common Pleas on May 5, 2023 at 3, 10, *Commonwealth v. Brown*, No. 32 EM 2023 (Pa. June 9, 2023).

208. *Id.* at 3. There is no legal precedent suggesting that crime victims have the right to intervene in criminal proceedings, though some scholars have advocated for it. See Gardenswartz, *supra* note 206; Cassell & Morris, *supra* note 206.

209. Commonwealth's Brief for King's Bench Respondents, *supra* note 42, at 26.

210. Petitioner's Memorandum on the Scope of the PCRA Hearing and Role of Amicus Curiae at 22, *Commonwealth v. Brown*, CP-51-CR-0407441-2004 (Pa. Ct. Com. Pl. Sep. 9, 2022).

families refused, though the rules of appellate practice mandate these disclosures.²¹¹ When ordered by the court,²¹² they revealed that they had received help drafting their pleadings from assistant attorneys general who, like the attorneys in Syed's case, had previously defended Brown's prosecution when they worked as assistant district attorneys.²¹³

After a year of litigation, the court overturned the verdict against Brown.²¹⁴ Three weeks later, the victims' families filed a King's Bench petition to the Pennsylvania Supreme Court, a unique remedy under Pennsylvania law that grants the high court jurisdiction to hear matters of public concern.²¹⁵ The victims' families argued that the proceedings below had been highly irregular and therefore required direct intervention from the high court: "Unlike in a normal criminal case, here the attorneys for the convicted killer and the lawyers representing the prosecution are working together. The lawyers who should be advocates for the victims are literally advocates for their killer."²¹⁶

Once the King's Bench petition had been filed, the Pennsylvania attorney general filed an *amicus* brief before the court, urging them to rein in the power of the Philadelphia district attorney. The Pennsylvania Supreme Court granted a hearing on a single question: "whether, and via what procedure, a common pleas court judge may grant [habeas] relief based upon concessions of the parties."²¹⁷ The court's decision will have a tremendous impact in determining the procedure that trial courts follow when assessing local prosecutors' concessions moving forward, and may set a standard which other states will follow.²¹⁸ At least one justice appears to believe that a place should be made for the attorney general in cases where local prosecutors concede.²¹⁹

211. See PA. R. APP. P. 531(b)(2).

212. Court Order, Commonwealth v. Brown, CP-51-CR-0407441-2004 (Pa. Ct. Com. Pl. Oct. 7, 2022) [hereinafter October 2022 Court Order] ("Amici attorneys . . . are ordered to file a statement of interest compliant with Pa. R.A.P. 531(b)(2) on or before [October 14, 2022].").

213. Statement of Interest of Amicus Curiae, Commonwealth v. Brown, No. CP-51-CR-0407441-2004 (Pa. Ct. Com. Pl. Oct. 14, 2022).

214. Commonwealth's Brief for King's Bench Respondents, *supra* note 42, at 27.

215. See Alexandra Makosky, *The King's Bench Power in Pennsylvania: A Unique Power That Provides Efficient Results*, 101 DICK. L. REV. 671, 674–76 (1997). Today, it can be found under 42 Pa. Cons. Stat. §§ 502, 726. The law gives the high court the "inherent power of removing by certiorari the . . . proceedings of any criminal case from the inferior courts at any stage of the proceedings." Commonwealth v. Onda, 103 A.2d 90, 91 (Pa. 1954) (emphasis removed).

216. Commonwealth's Brief for King's Bench Respondents, *supra* note 42, at 1.

217. Commonwealth v. Brown, No. 32 EM 2023, at 2 (Pa. Apr. 3, 2024). A decision has not yet been rendered in this case.

218. See Part IV for a proposal of how to administer post-conviction proceedings where local prosecutors concede relief.

219. See, e.g., Commonwealth v. Wardlaw, 249 A.3d 937, 955 (Pa. 2021) (Dougherty, J., concurring) ("[T]o ensure the Commonwealth's interests are adequately represented when a legal issue . . . has statewide implications and a county district attorney does not intend to advocate in opposition to the defense position, the district attorney should be required to communicate that decision to the Attorney General. Such a process would afford the Attorney General the opportunity to make a more timely and reasoned assessment of whether his involvement in the case is warranted, either by means of intervention or as an *amicus curiae*.").

In both *Syed* and *Brown*, victims were able to exercise significant power in post-conviction matters and, in so doing, also empowered the attorney general: the victims' appeals provided the attorney general with an opening to become directly involved in the litigation.²²⁰ These cases raise novel questions for courts about what victims' role in post-conviction proceedings should be, and whether and how the attorney general's office can use their relationships with victims to gain a foothold in the litigation, if they choose.²²¹ Both *Syed* and *Brown* represent a significant step forward for victims' rights. Whether victim involvement in the post-conviction process improves the judge's ability to fairly adjudicate the defendant's claims of wrongful conviction is another matter and will be discussed in more depth in Subpart.III.D.

C. PROSECUTORIAL SELF-INTEREST: *THE COMMONWEALTH V. LAVAR BROWN*

Syed and *Brown* share another common element: In both cases, individual assistant attorneys general, who worked to prosecute the defendants during their careers as local prosecutors, went on to fight the defendant's attempts to overturn his conviction from their new position at the attorney general's office.²²² There are at least three cases where these conflicts of interest appear.²²³

In Philadelphia, the attorneys who fought the vacatur of Lavar Brown's conviction had left their positions at the district attorney's office when Larry Krasner was elected and sworn into office in 2018.²²⁴ Krasner had run as a reform candidate, taking over an office that he had repeatedly derided for its "win at all costs" mentality.²²⁵ Krasner quickly fired thirty-one assistant district attorneys, most of whom had held prominent positions within the office, and many more left voluntarily.²²⁶ A dozen of these lawyers accepted jobs with the Pennsylvania attorney general, including two, Cari Mahler and Ron Eisenberg, who had previously handled a post-conviction petition filed on Lavar Brown's behalf, in 2007.²²⁷

Brown filed a second state post-conviction petition in 2020 challenging his homicide conviction by alleging that exculpatory evidence had been withheld from him at trial, and then again during his first post-conviction challenge in

220. For further discussion of victims, see Subpart.III.D.

221. *Id.*

222. This sort of conflict of interest also occurred in the case of Kevin Johnson. See *infra* Subpart.III.C.

223. See *infra* Subpart.III.D for further discussion.

224. Steve Volk, *Philadelphia DA Larry Krasner on Radical Path to Remake Criminal Justice System*, NEWSWEEK (Nov. 9, 2018, at 12:32 ET), <https://www.newsweek.com/philadelphia-da-larry-krasner-radical-path-remake-criminal-justice-system-1194093>.

225. *Id.*

226. See Ryan Briggs, *Year of Uncertainty Sees Top Philly DA Staffers Flee to AG Shapiro*, CITY & STATE PA. (Jan. 18, 2018), <https://www.cityandstatepa.com/politics/2018/01/year-uncertainty-sees-top-philly-da-staffers-flee-ag-shapiro/364820>.

227. *Id.*; Response to the Petition for Exercise of King's Bench Jurisdiction over the Matter Denied by the Philadelphia Court of Common Pleas on May 5, *supra* note 207, at 17 n.6.

2007.²²⁸ As part of the office's new policy to enhance transparency, the district attorney allowed Brown's lawyers access to the prosecution and police files.²²⁹ What they found in the files went far beyond what the defense had originally alleged: emails printed out and saved in the physical file showed that after Brown's first post-conviction petition was filed in 2007, Assistant District Attorney Mahler had discovered that exculpatory information had been suppressed at Brown's trial and that she had told her supervisor, Ron Eisenberg.

Mahler discovered that the two eyewitnesses, whose testimony was the only substantive evidence against Brown, had given prior statements to police where they denied Brown's involvement and that these prior statements were never committed to writing or shared with the defense.²³⁰ In the email exchange saved in the file, Mahler asked the supervisor of the homicide unit why information had been kept secret. He responded: "[A]most all cooperators [sic] and most civilian witnesses don't tell the truth at first. . . . [B]etter detectives don't take notes or write down the obvious lies, but wait until the witness/cooperators are ready to open up before writing it up. We never advise defense attorneys about this."²³¹

Mahler forwarded the email to her boss, Ron Eisenberg, telling him she was "disturbed and offended" by what the office had failed to reveal. Eisenberg responded that the supervisor's "arguments are not completely irrational so we better resolve the conflict."²³² When the District Attorney's Office ("DAO") responded to Brown's lawyers' requests for documents, the information about the witnesses' prior interviews with police was not disclosed.²³³

Upon reviewing the evidence contained in the file that had not been provided to the defense in the first habeas proceeding, relief was conceded and the court agreed to grant Brown a new trial, despite the fact that he acknowledged there was still significant evidence that Brown had been involved in the crime.²³⁴ In responsive pleadings, the DAO told the court that Brown should be retried, but that the magnitude of the office's prior misconduct was too significant to be harmless error, particularly when the case had hinged entirely on the two witnesses' testimony.²³⁵ The DAO claimed that the records showed that the suppression of Brady material had been "neither negligent nor inadvertent [T]his case is a stark example of what can go wrong when

228. Commonwealth's Brief for King's Bench Respondents, *supra* note 42, at 17.

229. *Id.*

230. See Supplement and Amendment to Successor Petition for Writ of Habeas Corpus at Exhibit No. 37, Commonwealth v. Brown, CP-51-CR-0407441-2004 (Pa. Ct. Com. Pl. June 28, 2021).

231. *Id.* at Exhibit No. 37.

232. *Id.* Exhibit No. 40.

233. Commonwealth's Brief for King's Bench Respondents, *supra* note 42, at 6–7.

234. Commonwealth's Response to Petition for Collateral Relief ¶ 138, Commonwealth v. Brown, CP-51-CR-0407441-2004 (Pa. Ct. Com. Pl. Nov. 1, 2021).

235. *Id.* ¶ 24–25.

prosecutors . . . shirk their ethical and constitutional duties in order to obtain and defend convictions.”²³⁶

Shortly after the DAO filed their concession of relief before the trial court, several victims of Brown’s crimes petitioned the court to intervene and were granted the role of *amicus*.²³⁷ These victims included not only the father of the man killed in the robbery-gone-bad that had led to the conviction at issue, but family members from another killing that Brown had participated in and for which he had been sentenced to die.²³⁸ But the lawyers for the victims were not acting alone: Mahler and Eisenberg worked on their behalf to draft the briefs they filed before the trial court.²³⁹

When the trial judge ruled for Brown, overturning his conviction because the DAO had withheld exculpatory evidence, the victims filed for King’s Bench Petition review in the Pennsylvania Supreme Court, asking that the conviction be reinstated.²⁴⁰ The attorney general filed an *amicus* brief, signed by Ron Eisenberg, arguing that Krasner had presided over a “distinctive pattern of problematic concessions” and that, therefore, “additional procedures should be implemented to provide for adversarial advocacy” in all post-conviction concessions involving the Philadelphia DAO.²⁴¹ The district attorney’s concessions, they argued, were “an accusation . . . [against] a predecessor in office.”²⁴² Eisenberg himself was such a predecessor as he had run the appellate unit at the DAO at the time of Brown’s first petition for relief and was alleged to have withheld exculpatory evidence.

The district attorney called his concessions “a painful but necessary course correction to ensure that the office is complying with its prosecutorial duties . . . under *Brady v. Maryland*.”²⁴³ Nor were the events that had led Brown’s conviction to be overturned isolated: Prior administrations, the pleading alleged, had made a practice of suppressing material exculpatory evidence, and the district attorney had an obligation under the rules of professional conduct to remedy those errors.²⁴⁴ Krasner’s claims of misconduct were documented in a report released by his office in 2021, showing that in

236. *Id.* at 4.

237. *See supra* Subpart.II.B.

238. *See* King’s Bench Petition of Family Members of Murder Victims Michael Richardson and Robert Crawford, *supra* note 94, at 2.

239. October 2022 Court Order, *supra* note 212.

240. *See* King’s Bench Petition of Family Members of Murder Victims Michael Richardson and Robert Crawford, *supra* note 94, at 6–7.

241. OAG Amicus Brief, *supra* note 75, at 2.

242. *Id.* at 4.

243. Commonwealth’s Brief for King’s Bench Respondents, *supra* note 42, at 57.

244. PHILA. DIST. ATT’Y’S OFF., *supra* note 78. The American Bar Association’s Rules of Professional Conduct directs prosecutors to disclose all exculpatory evidence to the defense. This obligation is ongoing and extends after the verdict in the case is final. MODEL RULES OF PRO. CONDUCT r. 3.8 (A.B.A. 2020).

twenty-one of the cases where defendants had been exonerated between 2018 and 2021, twenty had involved the withholding of exculpatory evidence.²⁴⁵

Having fought to preserve Brown's conviction as the supervisor of the appellate unit at the DAO, Eisenberg continued that fight from his new perch at the attorney general's office, first working on behalf of the victims, and then as *amicus* before the Pennsylvania Supreme Court. A similar pattern developed in *Syed*, where the prosecutor who had worked to convict Syed in 2000, and withheld memoranda about two other suspects at that time, continued to work on the case when she was later employed by the state attorney general.²⁴⁶ In her new role with the attorney general, she and her team continued to withhold the critical memoranda.²⁴⁷ In both *Syed* and *Brown*, the same prosecutors whom the defendant accused of misconduct had attempted to stymie the convictions' vacatur from their new positions at the attorney general's office.

The nature of these overlapping roles, where the former local prosecutors accused of withholding material evidence continued to work on the cases, reveals a set of ulterior motives. In working to preserve Syed and Brown's convictions, these assistant attorneys general were also fighting to preserve their own reputations.

III. THE ATTORNEY GENERAL AS LITIGANT

This Part examines the post-conviction conflicts between state attorneys general and local prosecutors by analyzing the role played by the attorney general in the different proceedings where they have attempted, or been called upon by the court, to intervene.²⁴⁸ Centering the mode of the attorney general's participation in these proceedings both allows for the examination of the scope and depth of involvement, and to examine the impact that these different roles have on the proceedings themselves.

The attorneys general's role in post-conviction matters where local prosecutors have conceded relief exists on a spectrum, his power governed by both the official role that the court and the legislature allow him to assume, and the clout he is able to leverage in the courtroom. At one extreme, the attorney general may be made a full party to the proceedings, called upon to replace the

245. A report issued by the Philadelphia District Attorney's Office shows that, of the twenty-one exonerations the office helped push through between 2018 and 2021, the office had withheld evidence in twenty of those cases. See PHILA. DIST. ATT'Y'S OFF., *supra* note 78, at 9–10.

246. Rachel Sharp, *Adnan Syed: Serial Podcast Reveals Notes About Another Potential Suspect Led to Conviction Being Tossed*, INDEP. (Sep. 20, 2022, at 12:05 ET), <https://www.the-independent.com/news/world/americas/crime/adnan-syed-new-serial-podcast-episode-b2171197.html>.

247. See *supra* notes 174–175 and accompanying text.

248. In the cases examined here, the attorney general stands in opposition to the local prosecutor, although that needn't always be the case. In the case of death row inmate Richard Glossip, the state attorney general in Oklahoma supported the effort to have Glossip's conviction overturned. See, e.g., Adam Liptak, *Death Row Inmate in Oklahoma Has an Unusual Ally: The State's Attorney General*, N.Y. TIMES (Oct. 8, 2024), <https://www.nytimes.com/2024/10/08/us/oklahoma-richard-glossip-death-penalty-scotus.html>.

local prosecutor altogether, or participate as an equal third party litigant.²⁴⁹ At the other extreme, he participates unofficially, working as an ally to the victims who oppose relief, without the court's knowledge.²⁵⁰ In the middle of the spectrum, the attorney general may play the role of quasi-intervenor, or "*litigating amicus*," as in Missouri, with the right to question witnesses and make argument, or as a simple *amicus curiae*, as he has acted in Pennsylvania.²⁵¹ In each role, the attorney general's participation creates a unique set of questions and potential challenges to courts conducting post-conviction proceedings.

When the attorney general or his staff participate only as the victim's ally, his influence depends upon his ability to utilize the victim's participation to make certain arguments.²⁵² The victim may also act as a wedge, enabling the attorney general's increased involvement: When victims have appealed to a higher court, this has enabled the attorney general to participate freely in the proceedings, either because he then has jurisdiction over appellate litigation (as in Maryland)²⁵³ or because it is common for him to be heard as *amicus curiae* before the appellate courts (as in Pennsylvania).²⁵⁴

Regardless of the role he has been assigned, however, the state attorney general has had remarkable success in influencing post-conviction litigation where he has participated.²⁵⁵ Through the power that has been granted by state legislatures and some courts, he has effectively acted as a check on local prosecutors, sometimes providing courts with information and arguments that the courts want to hear and may be relevant to their decision-making, and other times merely stymying the exoneration process.²⁵⁶

A. WHEN THE ATTORNEY GENERAL BECOMES A PARTY

When the attorney general acts as a full party to post-conviction litigation where the local prosecutor traditionally has jurisdiction, he may do so in one of two ways: He either supersedes local prosecutor altogether, replacing him as the entity representing the state,²⁵⁷ or he becomes a third-party litigant with equal

249. See *infra* Subpart.III.A.

250. See, e.g., *supra* Subparts.II.B–C.

251. See *supra* Subpart.II.A for a discussion of the role played by the attorney general in Missouri and see *infra* Subpart III.C for a discussion of cases where the attorney general has acted as *amicus* in Pennsylvania.

252. See *supra* Subpart.II.C.

253. See *supra* Subpart.II.B.

254. See, e.g., *Commonwealth v. Brown*, 196 A.3d 130, 142 (Pa. 2018) (“[W]e directed our Prothonotary to provide notice of our order to the Attorney General of Pennsylvania and invited him to participate as an *amicus* and file a brief.”); *Commonwealth v. Pacheco*, 263 A.3d 626, 650 (Pa. 2021) (noting participating of attorney general as *amicus*).

255. See *supra* Part.II for examples.

256. For an example of the attorney general providing the court with necessary information, see the discussion of *Wharton v. SCI*. *Infra* Subpart.III.C. For an example of the attorney general acting to stymy exonerations, see *supra* Subpart II.A and *infra* Subpart III.B.

257. See TENN. CODE ANN. § 40-30-114(e)(1) (West 2023) (“In cases where a defendant has been sentenced to death and is seeking collateral review of a conviction or sentence, the attorney general . . . has exclusive control over the state’s defense of the request for collateral review and has all of the authority and discretion that

power as the local prosecutor.²⁵⁸ In either case, the attorney general may only assume this power if he is granted the authority by the state legislature.²⁵⁹ The latter model, contemplated by the post-conviction statute passed in Utah in 2020, has not yet been tested.²⁶⁰

1. Superseding the Local Prosecutor

In 2023, the Tennessee legislature stripped jurisdiction from local prosecutors and assigned it to the state's attorney general in all post-conviction cases where the defendant has been sentenced to death.²⁶¹ Conservative legislators pursued this change to state law after Steven Mulroy, who had expressed opposition to the death penalty, was elected district attorney in Memphis.²⁶²

In early 2023, death row inmate Larry McKay filed a habeas petition in state court, asking the court to set aside his 1982 conviction for homicide.²⁶³ The local district attorney with jurisdiction over the proceeding, newly elected Memphis District Attorney Steven Mulroy, had recently defeated long-serving incumbent Republican prosecutor Amy Weirich by a nine-point margin.²⁶⁴ During the campaign, Mulroy criticized Weirich for her win-at-all-costs approach.²⁶⁵ Mulroy had run as a reformer, telling voters during his campaign that he did not support the death penalty “as a policy matter.”²⁶⁶

the district attorney general would have in non-capital cases as well as any additional authority provided by law. The attorney general . . . is not bound by any stipulations, concessions, or other agreements made by the district attorney general related to a request for collateral review.”)

258. See UTAH CODE ANN. § 78B-9-503(9) (West 2020). While Utah's statute has yet to be tested, it appears to allow the attorney general's participation as an equal third party: [T]he Office of the Attorney General has standing to intervene as of right and to participate as a party in the district court . . .” *Id.* § 78B-9-503(11).

259. Pennsylvania also allows the attorney general to supersede the local prosecutor by order of the court, although this statute appears to apply only to those cases in which the local prosecutor has failed to bring charges that the attorney general believes are warranted. However, the statute has never been successfully invoked. See, e.g., *Carter v. City of Philadelphia*, 181 F.3d 339, 353–54 (3d Cir. 1999) (finding the attorney general's power of supersession is “a narrowly circumscribed power” that requires “cumbersome court proceedings”); *Commonwealth v. Schab*, 383 A.2d 819, 822 (Pa. 1978) (rejecting attorneys general petition to supersede local prosecutor when prosecutor refused to bring charges against a police officer who killed a civilian).

260. See UTAH § 78B-9-503(11).

261. See TENN. § 40-30-1149(c)(1).

262. Evan Mealins, *TN Supreme Court Upholds Law Giving AG More Power in Death Penalty Cases. Why It Matters*, LEAF CHRON. (Feb. 24, 2025, at 12:12 CT), <https://www.theleafchronicle.com/story/news/2025/02/24/tennessee-supreme-court-death-penalty-review-constitutional/79464259007>.

263. McKay had been sentenced to death for two murders that occurred during a robbery in Shelby County Tennessee in 1982. See *State v. McKay*, 680 S.W.2d 447, 448 (Tenn. 1984), *cert. denied*, 470 U.S. 1034 (1985).

264. See also Adrienne Johnson Martin, Brittany Brown & Jacob Steimer, *Steve Mulroy Blows Out Weirich; Tarik Sugarman Wins as Well*, MLK50 (Aug. 5, 2022), <https://mlk50.com/2022/08/05/steve-mulroy-blows-out-weirich-tarik-sugarman-wins-as-well/> (“‘It’s not just a win for me.’ Mulroy said. ‘It’s a win for all grassroots criminal justice reform groups that have been pushing for this kind of change for years.’”).

265. See BAZELON, *supra* note 15, at 19–20 (detailing Weirich's approach as a prosecutor who was unwilling to admit mistakes).

266. Adrian Sainz & Jonathon Mattise, *Death Row Inmate Challenges New Tennessee Post-Conviction Law*, AP NEWS (May 17, 2023, at 22:02 PT), <https://apnews.com/article/tennessee-death-penalty-law-ad435786981ac18cdc357c200da92630>. Despite his concerns about the fairness of capital punishment, Mulroy has sought the death

Thirty days after McKay filed the motion to vacate his sentence, the Tennessee legislature passed a law granting sole jurisdiction over all post-conviction cases where the defendant was sentenced to die to the attorney general.²⁶⁷ McKay challenged the law as unconstitutional, but the Tennessee Supreme Court disagreed, ruling that it was within the legislature's power to grant this limited jurisdiction to the attorney general.²⁶⁸ The attorney general will now be responsible for representing the state in all state habeas actions where the defendant has been sentenced to die.

The Tennessee legislature's action is one example of a larger trend: Some state legislatures have stripped jurisdiction in certain areas from local prosecutors and substituted the attorney general where they disagree with the decision-making of progressive prosecutors.²⁶⁹ In most instances, these actions have been upheld by state courts.²⁷⁰ Where their roles are enumerated in state constitutions, local prosecutors may have some protection from these efforts,²⁷¹ but even then, their specific duties are usually defined by statute, giving the legislature the power to remove their authority over certain types of cases and bestow it on the attorney general.²⁷²

While these new laws have been upheld, they run counter to the principle of local control that has shaped state criminal practice for nearly 200 years.²⁷³ These changes represent a rebalancing of state and local power-sharing that runs counter to the choices made by legislatures in the Jacksonian Era when state laws overwhelmingly vested jurisdiction over most criminal matters with local

penalty while in office. On March 23, 2023, just days before McKay filed his motion for relief, Mulroy announced that his office would seek to execute Ezekiel Kelly, a man accused of killing three and wounding three others in a shooting spree that was broadcast live on Facebook Livestream. In a statement about his decision, Mulroy framed it this way: "I've made no secret of my opposition to capital punishment as a policy matter . . . If I were a legislator, I would vote against it. But as DA, I have to enforce the law as written, even if I disagree with it." See Sybil C. Mitchell, *D.A. Mulroy Parts with His 'Personal Beliefs' to Seek Death Penalty for Ezekiel Kelly*, TRI STATE DEF. (Mar. 31, 2023), <https://tri-statedefender.com/d-a-mulroy-parts-with-his-personal-beliefs-to-seek-death-penalty-for-ezekiel-kelly/03/31>.

267. TENN. CODE ANN. § 40-30-114(c)(1) (West 2023); see Lucas Finton, *Shelby Co. Judge Says Tennessee Attorney General Can Appeal Death Penalty Review Ruling*, COM. APPEAL (Aug. 16, 2023, at 13:55 PM CT), <https://www.commercialappeal.com/story/news/courts/2023/08/16/tn-attorney-general-ok-to-appeal-death-penalty-law-constitutionality/70543045007>.

268. McKay v. State, 706 S.W.3d. 338, 339 (Tenn. 2025).

269. For further discussion of other laws that have stripped power from local prosecutors, see Goldstein, *supra* note 17, at 1163 and Goldrosen, *supra* note 51, at 150–51. See also Krasner v. Henry, 319 A.3d 56, 81 (Pa. Commw. Ct. 2022) (holding that legislation giving jurisdiction to prosecute crimes occurring on or near public transit to state attorney general did not impermissibly infringe on district attorney's power).

270. See Goldstein, *supra* note 17, at 1199.

271. See Hessick & Su, *supra* note 17, at 1682.

272. See Goldrosen, *supra* note 51, at 156 (discussing how the power of local prosecutors is dependent on the state legislature granting such power).

273. See *supra* Subpart I.C for discussion of near-uniform state laws which have granted local prosecutors jurisdiction over the overwhelming majority of criminal prosecutions.

prosecutors.²⁷⁴ In these instances, statewide actors are choosing the law enforcement priorities of local jurisdictions, instead of allowing local officials, who may better represent the values of the local population, to make these decisions.²⁷⁵ The results of these changes can be particularly stark where more progressive jurisdictions exist within the boundaries of more conservative states, and legislatures seek to curb reform efforts by stripping control from local officials.²⁷⁶

2. Attorney General as Third-Party Litigant

While the attorney general has yet to act as a third-party litigant with equal power to the local prosecutor in post-conviction proceedings, Utah's novel 2020 post-conviction relief statute gives the attorney general this power: he may intervene as a third party in post-conviction proceedings where he disagrees with a concession made by the local prosecutor.²⁷⁷ There is no precedent for this arrangement, which allows for the participation of two prosecutors with equal power, both representing the state, to participate in the same case.²⁷⁸

There is, however, persuasive authority cautioning against such an arrangement: In *Saldano v. Roach*, the Fifth Circuit prohibited such an intervention, holding that in any proceeding, "whichever official represents the State exercises exclusive authority."²⁷⁹ In *Saldano*, the roles were reversed, and it was a local prosecutor who asked the court for permission to intervene when the attorney general, who had jurisdiction over the case in federal court, conceded the defendant's sentence of death because of a constitutional error made by the prosecutor during the penalty hearing.²⁸⁰ The *Saldano* Court

274. See *supra* Subpart.I.C for further discussion of historical power-sharing agreement between state and local prosecutors, which has historically favored local control over the prosecutorial function in all but a few types of cases.

275. Barkow, *supra* note 32, at 535.

276. See generally Goldstein, *supra* note 17 (discussing how state legislators and governors attempt to narrow the discretion of prosecutors to prevent the enactment of progressive policies).

277. UTAH CODE ANN. § 78B-9-503 (West 2020).

278. Civil procedure does allow for the intervention of a third party if the party can show: (1) the motion to intervene is timely; (2) the potential intervener asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest. FED. R. CIV. P. 24(a)(2).

279. *Saldano v. Roach*, 363 F.3d 545, 552 (5th Cir. 2004).

280. *Id.* at 549. In 1996, Victor Saldano was convicted of capital murder and sentenced to die in Collin County Texas. *Id.* During the penalty phase of Saldano's trial, the local prosecutor called an expert witness, a psychologist, who opined on twenty-four unweighted factors that he used to determine a defendant's likely future dangerousness. *Id.* One of those factors was race and ethnicity: Saldano, because of his ethnic origin, was more statistically likely to commit further dangerous crimes. *Id.* Saldano's lawyer did not object to this testimony and the sentence was upheld on appeal, because Saldano had waived his right to challenge it. *Id.* The United States Supreme Court granted certiorari, and the attorney general, who was tasked with representing the state in all federal court proceedings, refused to defend the sentence, declining to raise the affirmative defense of procedural default that the local prosecutor had relied upon in state court. *Id.* The Supreme Court vacated the judgement and remanded the case to the Texas Criminal Court of Appeals "for further consideration in light of the confession of error." *Id.*

recognized that the local prosecutor might participate as *amicus*, but drew the line at giving him the powers of a party to the litigation.²⁸¹

Saldano merits further examination for two reasons. First, the prosecutor who attempted to intervene was actually the one who had tried the case and retained jurisdiction in the trial court, meaning that he had a significant and continuing interest in the proceedings. If the sentence were to be overturned, it would be up to this local prosecutor to decide whether or not to seek the death penalty against Saldano a second time.²⁸² Second, through its winding eight-year history of contested litigation, Saldano teaches the lesson that the court's ruling affirms: having two active prosecutors in a single case with opposing positions causes confusion and delay, and costs a great deal in the way of time and resources.²⁸³ It also undermines the notion that a single entity exercises sovereign jurisdiction, and adds enormous complexity to post-conviction proceedings.²⁸⁴ Thus, the Fifth Circuit held that though the district attorney would be impacted by the Court's decision, he did not have a legally recognized interest in Saldano's claim that would allow him to be granted the rights of a full party to the litigation.²⁸⁵

Utah's statute allowing for third party participation appears to be the result of legislative compromise: The original draft, written by legislators in collaboration with the Salt Lake County's district attorney in response to Lamar Johnson's exoneration in Missouri, did not contemplate a specific role for the attorney general.²⁸⁶ Instead, the statute gave local prosecutors the ability to bring alleged wrongful convictions before the court, regardless of the age of the case.²⁸⁷ Previously, there had been no mechanism to address these cases.²⁸⁸ But the Utah Attorney General opposed the initial version of the bill.²⁸⁹ Eventually,

Once again before the Texas Criminal Court of Appeals, the assigned local prosecutor argued that Saldano's claims were procedurally barred, and the Texas courts reinstated the death sentence. *Id.* at 550. Saldano petitioned the federal court for relief under the federal habeas statute. *Id.* The attorney general, called into service again in these proceedings, again confessed error and waived the issue of procedural default. *Id.* This time, the local prosecutor filed an application to intervene, arguing that he had the right to participate because his interests were at issue in the matter before the court. *Id.* The district court denied the local prosecutor's motion to intervene, and he appealed again. *Id.*

281. *Id.*

282. *See Saldano*, 363 F.3d. at 549.

283. *See Cooper v. Newsom*, 13 F.4th 857, 869 (9th Cir. 2021) (holding that district attorneys had no right to intervene in a case regarding the constitutionality of California's method of execution, where the state was represented by the attorney general).

284. *Saldano*, 363 F.3d at 553.

285. *Id.* at 556. Other courts have reached similar conclusions. *See State v. DeShaw*, No. 1 CA-CR 21-0512, 2024 WL 3160590, at *3 (Ariz. Ct. App. June 25, 2024) (denying local prosecutor's motion to intervene where attorney general represented the interests of the state on appeal, but allowing them to participate as *amicus*).

286. *See Utah H. Judiciary Comm. Pub. Minutes* (Mar. 6, 2020), <https://le.utah.gov/MtgMinutes/publicMeetingMinutes.jsp?Com=HSTJUD&meetingId=17052>. (showing addition of attorney general into final version of bill).

287. *Id.*

288. *Id.*

289. *See Sonja Hutson, Wrongfully Convicted? Utah Lawmakers Advance A Bill Encouraging Prosecutors To Look Into It* (Mar. 6, 2020 at 15:48 MST), <https://www.kuer.org/utah-politics/2020-03-06/wrongfully-convicted-utah-lawmakers-advance-a-bill-encouraging-prosecutors-to-look-into-it>.

the attorney general agreed to try to work through a number of his concerns and negotiate a compromise bill.²⁹⁰ The statute that emerged as a result of this compromise gave the attorney general the power to intervene as a party if he disagreed with the decision of the local prosecutor.²⁹¹ How this resolution will function in practice remains to be seen.

B. THE “QUASI-INTERVENOR” OR “LITIGATING AMICUS”

In Missouri, the attorney general may assume the role of “quasi intervenor” or “*litigating amicus*” in certain post-conviction proceedings. In 2021, in response to the Lamar Johnson case, the state legislature giving local prosecutors the ability to bring a post-conviction challenge in cases where they believed the conviction should be overturned.²⁹² This statute gives the attorney general the right of notice and the power to question witnesses and make argument.²⁹³ Since then, Missouri courts have expanded that role, giving the attorney general the right to file motions in the trial court proceedings, and to appeal the decision of the trial court.²⁹⁴ This hybrid position, where the attorney general’s role is greater than an *amicus* but less than a full party, leaves him in a strange liminal space, where the specific contours of his authority in the proceeding are unresolved.²⁹⁵ The Missouri attorney general has exploited this lack of clarity, using it to slow or stymie the exoneration process and expand his role in the process through litigation. Lamar Johnson’s long and acrimonious struggle for exoneration reflected this reality.²⁹⁶ The attorney general raised a host of evidentiary issues and the court, unsure of precisely how to proceed with this new and strange arrangement, allowed the attorney general latitude in making his arguments, drawing out the process and the hearing itself.²⁹⁷

Since Lamar Johnson’s exoneration, Missouri appellate courts have continued to expand the attorney general’s role in post-conviction concessions. In the case of Christopher Dunn, the attorney general fought the exonerated defendants’ release from custody after they had been exonerated, arguing that the Dunn should remain incarcerated while his office contemplated whether or

290. *Id.*

291. UTAH CODE ANN. § 78B-9-503 (Westlaw 2020).

292. MO. REV. STAT. § 547.031(1) (2021).

293. *See id.* § 547.031(2). The Missouri statute gives the attorney general the right of notice, the right to question witnesses and the right to make argument. *Id.*

294. *See State ex rel. Schmitt v. Harrell*, 633 S.W.3d 463, 467 (Mo. Ct. App. 2021) (holding attorney general had right to file such motions as would allow him to meaningfully participate in post-conviction proceeding where local prosecutor conceded relief); *see also In re Cir. Att’y*, 708 S.W.3d 867, 874 (Mo. 2025) (en banc) (finding attorney general had right to appeal the trial court’s vacatur of conviction).

295. *See* Rebecca Rivas, *Prosecutors’ Biggest Roadblock in Wrongful Conviction Cases? Missouri’s Attorney General*, MO. INDEP. (Oct. 6, 2022, at 09:00 PT), <https://missouriindependent.com/2022/10/06/prosecutors-biggest-roadblock-in-wrongful-conviction-cases-missouris-attorney-general> (Missouri’s attorney general described his opposition to all post-conviction matters this way: “It has been and continues to be one of the duties of the attorney general’s office to uphold criminal convictions, and that’s what we’ve worked to do.”).

296. *See supra* Subpart.II.A.

297. *See supra* Subpart.II.A.

not they would attempt to take an appeal.²⁹⁸ When Christopher Dunn was exonerated by a trial court in the summer of 2024, the attorney general petitioned the court to stay his release.²⁹⁹ Dunn was only minutes from being released, dressed in a jacket and tie and signing paperwork, when he received word that the Missouri Supreme Court had stayed his release so that they could assess the attorney general's emergency motion.³⁰⁰ A week later, the court ordered him released.³⁰¹ But several months after that, in February of 2025, the attorney general petitioned the Missouri Supreme Court for the right to appeal Dunn's exoneration.³⁰² In April, the Missouri Supreme Court recognized the attorney general's right to appeal the court's vacatur of Dunn's conviction.³⁰³

The attorney general's continued opposition to vacating prior unsound convictions has a political valence: Andrew Bailey faced a contested Republican primary election in August of 2024—the same summer that he attempted to block Dunn's release and scuttled the plea agreement in Marcellus Williams' case.³⁰⁴ His challenger hailed from the conservative wing of the Republican party, and had repeatedly argued that Bailey had been too lax in his approach to crime.³⁰⁵ Bailey's maneuvers in these cases garnered him media attention, which he likely understood to be helpful with the conservative primary electorate in Missouri.³⁰⁶

The idea of a quasi-intervenor or “litigating amicus” is not altogether unheard of. In the 1990s, a few federal trial courts experimented with giving certain people or groups who were not parties rights beyond those of an *amicus*. But the idea fell out of fashion when the Sixth Circuit prohibited the practice, warning that this sort of “legal hybrid” caused delays and logistical problems for trial courts: “The creation of this legal mutant characterized as the “litigating

298. Shalia Dewan, *A Republican State A.G. Fights to Keep Exonerated Prisoners Behind Bars*, N.Y. TIMES (Aug. 6, 2024), <https://www.nytimes.com/2024/08/05/us/missouri-andrew-bailey-exonerated.html>.

299. *Id.*

300. See *id.* The following week, the high court ruled that Dunn should be treated like any other pretrial defendant, and he was released. *State ex rel. v. Sengheiser*, 692 S.W.3d 20, 26 n.11 (Mo. 2024) (en banc). *Christopher Dunn Freed From Prison After 1991 Murder Conviction Overturned: “There’s a World I Haven’t Seen in 34 Years,”* CBS NEWS (Aug. 1, 2024, at 14:09 ET) [hereinafter *Christopher Dunn Freed From Prison*], <https://www.cbsnews.com/news/christopher-dunn-released-prison-missouri>.

301. *Christopher Dunn Freed From Prison*, *supra* note 300.

302. Danny Wicentowsky, *Christopher Dunn Was Exonerated. The Missouri Attorney General Wants to Put Him Back in Prison*, ST. LOUIS PUB. RADIO (Mar. 12, 2025, at 08:52 CT), <https://www.kcur.org/news/2025-03-12/chris-dunn-was-exonerated-missouris-attorney-general-wants-to-put-him-back-in-prison> (“As long as I’ve worked with them, they have just unqualifiedly been opposed to anyone applying for innocence,” one prominent defense attorney commented.).

303. *In re Cir. Att’y*, 708 S.W.3d 867, 874 (Mo. 2025) (en banc).

304. See *infra* notes 6–7 and accompanying text.

305. *Missouri Woman Who Spent 43 Years in Prison is Free After her Murder Conviction Was Overturned*, CBS NEWS (July 20, 2024, at 13:50 ET), <https://www.cbsnews.com/news/sandra-hemme-freed-conviction-overturned-missouri>.

306. *Id.*; Austin Sarat, *One GOP Attorney General Is Obsessed with Keeping Innocent People Behind Bars. He Just Won His Primary*, SLATE (Aug. 9, 2024, at 13:49 PT), <https://slate.com/news-and-politics/2024/08/missouri-ag-andrew-bailey-wins-primary-rejects-innocence.html>.

amicus curiae” as demonstrated by the cascading acrimony among the participants, if afforded precedential viability, will implicate and erode the future core stability of the American jurisprudence.”³⁰⁷

The “litigating amicus” alters the shape of the proceedings, while avoiding the responsibility that a party would have.³⁰⁸ Confusion over the specific contours of his role makes it easy for him to slow the proceedings down.³⁰⁹ The Missouri statute, which grants the attorney general the authority to act as a quasi intervenor, gives him a critical tool of delay, which he has used to undercut the authority of the local prosecutor and show primary voters he is tough on crime.

The stories from Missouri illustrate the way post-conviction courtroom clashes can become a stage for attorneys general to wage political battles.³¹⁰ As the country becomes increasingly politically polarized, statewide elected officials like the attorney general are increasingly incentivized to appeal to the primary electorate in their party, as opposed to the median voter in their state.³¹¹ In a conservative state like Missouri, Bailey’s greatest challenge to winning reelection was the Republican primary, not the general election that would follow months later, and certainly not the political preferences of the people of a city like St. Louis.³¹² These incentives can skew state actors’ responses to allegations of wrongful conviction and cause intransigence, which, they believe, is to their political benefit.³¹³

All state and local prosecutors are elected officials, but attorneys general may be uniquely susceptible to political pressure.³¹⁴ The office is often seen as a stepping stone to a higher profile, statewide position: one fifteen-year study found that 54 percent of state attorneys general go on to run for governor or United States senator.³¹⁵ Attorneys general are subject to the approval of a different, and more conservative constituency than local prosecutors in most

307. *Michigan v. United States*, 940 F.2d 143, 164 (6th Cir. 1991).

308. *Id.*

309. See *supra* Subpart.II.A for an example of such a case.

310. See Goldstein, *supra* note 17, at 1177 (discussing the ways in which the politics that impact state-wide officials in certain states may incentivize these officials to target certain local prosecutors who support reform).

311. See Jill Kimball, *U.S. Is Polarizing Faster than Other Democracies, Study Finds*, BROWN UNIV. (Jan. 21, 2020), <https://www.brown.edu/news/2020-01-21/polarization>; Matt Grossmann & Rachel Porter, *How Primary Elections Enable Polarized Amateurs*, NISKANEN CTR. (Aug. 24, 2022), <https://www.niskanencenter.org/how-primary-elections-enable-polarized-amateurs>; J.D. RACKEY & MICHAEL THORNING, *HOW PRIMARY ELECTIONS IMPACT BEHAVIOR IN THE U.S. HOUSE OF REPRESENTATIVES 6* (Dec. 2024), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2024/12/BPC_Primarys-and-Governance-Report_Final.pdf

312. See Dewan, *supra* note 298.

313. See Goldstein, *supra* note 17, at 1183 (noting the growing ideological gap between statewide elected officials and local prosecutors in many states, but in Missouri in particular: “Missouri’s status as a red state means that the Republican governors and attorneys general it elects will have policy agendas that diverge from those of progressive prosecutors in large cities.”).

314. Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of the State Attorney General*, 40 PUBLIUS: J. FEDERALISM 597, 597 (2010) (“[T]he office of state attorney general (state AG) is increasingly recognized as a prominent springboard into various higher offices, most frequently, governor or US senator.”).

315. *Id.*

instances,³¹⁶ and sometimes their audience is not just the median state voter, but the primary electorate.³¹⁷ This creates an incentive for attorneys general in conservative states to fight exonerations in bluer cities, as a way to prevent challenges from the right.³¹⁸

C. THE ATTORNEY GENERAL AS *AMICUS CURIAE*

When the attorney general participates in post-conviction proceedings as *amicus curiae*, he does so at the discretion of the trial court.³¹⁹ In this context, his role may be more circumscribed, as he participates as a “friend of the court” and has no right to speak or contribute, beyond what the court chooses to allow.³²⁰ But even from the role of *amicus*, the attorney general can play a decisive role in these post-conviction proceedings: The court may choose to allow the attorney general to make argument, or weigh in on important questions of fact and law.³²¹ In some instances, trial judges have called upon the attorney general when they are dissatisfied with the representations of the local prosecutor. This was the situation in *Wharton v. Superintendent Graterford*, a case where errors made by the Philadelphia DA’s Office have cast a long shadow over the post-conviction concessions of the Philadelphia District Attorney, Larry Krasner.³²²

When the Third Circuit remanded *Wharton* for further proceedings before the district court in 2018, it asked the district court to consider a single, narrow issue: whether Wharton’s previous attorney had provided him with ineffective assistance of counsel during the penalty phase hearing of his capital homicide trial, because he failed to investigate or present evidence of Wharton’s prison adjustment.³²³ By the time the jury sentenced Wharton to die, he had been in jail for eight years and, the lawyers representing him in his habeas claim argued, information about Wharton’s time in jail might have led the jury to spare his life.³²⁴ Wharton had been convicted of the double homicide of Bradley and

316. Hessick & Su, *supra* note 17, at 1700–01.

317. See Goldstein, *supra* note 17, at 1183.

318. There is an important exception to this pattern. In the case of *Oklahoma v. Glossip*, the attorney general, who had jurisdiction over post-conviction claims, conceded relief on Glossip’s claim of wrongful conviction. *Oklahoma v. Glossip*, 529 P.3d 218, 223 (Okla. Crim. App. 2023), *cert. granted*, 144 S. Ct. 691 (2024). We do not yet know whether he will pay a political price for this decision.

319. Many states make no allowance for *amicus curiae* participation in the trial court at all. But regardless of what the rules say, a trial court judge is his own master, and if he wishes to grant a party *amicus* status, there is nothing to prevent him from doing so. See Anderson, *supra* note 46, at 367.

320. *Id.* at 364 (noting that the role and influence of *amicus curiae* depends upon the power that the court chooses to give them).

321. *Wharton v. Superintendent*, 95 F.4th 140, 145 (3d Cir. 2024) (noting that attorneys who litigated the post-conviction matters were supervisors of office’s appellate unit, referred to within the office as the “Law Division”).

322. *Id.*

323. See *Superintendent*, 95 F.4th at 144. The 1992 hearing where Wharton was sentenced to die was actually his second. He was initially sentenced to die in 1985, but that sentence was overturned on appeal due to a mistaken jury instruction. At the time of his second hearing, Wharton had been in custody for eight years.

324. *Id.*

Ferne Hart. Angry over an unpaid debt, Wharton and an accomplice forced their way into the couple's home in January of 1984 at knife-pointed, and robbed and then drowned the couple. Before leaving the house, they turned off the heat, leaving their seven-month-old daughter, Lisa to freeze to death.³²⁵ But Lisa survived.

In 2018, Newly elected District Attorney Larry Krasner chose to concede the penalty phase issue, and allow Wharton to receive a life sentence instead. Filing a notice of concession that noted in only a few words that “following review of this case . . . communication with the victim’s family and notice to Wharton’s counsel” the district attorney had decided to concede relief as to Wharton’s death sentence.³²⁶

But the district court did not accept the Philly DA’s barebones concession, asking instead that the parties to brief the issue of whether relief might be granted without a hearing.³²⁷ Krasner responded that he was choosing to concede the claim, and therefore, there was no longer a controversy for the court to adjudicate. He pointed to another case where a trial court had allowed such a concession without a hearing, arguing that the court should simply impose the life sentence as the prior trial court had done, seven years earlier.³²⁸ The Court did not agree, appointing the Pennsylvania Attorney General to participate as *amicus* and investigate Wharton’s prison adjustment, so that the court could make a decision on the merits instead of accepting the DA’s concession.³²⁹

Prior to Krasner taking office, the Philadelphia District Attorney’s Office and other prosecutors across the state had conceded relief on death penalty claims in a similar manner—with a simple concession of only a few sentences.³³⁰ But Krasner’s concession was treated differently. This may have

325. *Id.*

326. *Id.* at 144–45.

327. Wharton v. Vaughn, No. 01-CV-6049, 2022 WL 1488038, at *4 (E.D. Pa. May 11, 2022).

328. See Order at 1, Thomas v. Horn, No. 00-CV-803 (E.D. Pa. Dec. 20, 2011) (“AND NOW, this 19th day of December, 2011, upon consideration of the above captioned Petition for Writ of Habeas Corpus, other documents and pleadings filed in the case, the opinion and judgment of the United States Court of Appeals for the Third Circuit . . . and the respondents’ notification that they will no longer contest the grant of conditional relief as to petitioner’s sentence of death, it is hereby ORDERED that petitioner’s application for a writ of habeas corpus is conditionally GRANTED AS UNCONTESTED as to petitioner’s sentence of death . . .”).

329. Vaughn, 2022 WL 1488038, at *4.

330. See, e.g., Respondent’s Proposed Order at 1, Lewis v. Horn, No. 00-CV-0802 (E.D. Pa. July 25, 2011); Respondent’s Agreement at 1, Marshall v. Beard, No. 03-CV-795 (E.D. Pa. Jan. 10, 2007); Stipulation and Order at 1, Rivers v. Horn, No. 02-CV-1600 (E.D. Pa. May 10, 2005); Stipulation at 3, Santiago v. Beard, No. 04-CV-1669 (W.D. Pa. May 28, 2009); Order, *supra* note 328; Crews v. Horn, No. 3:98-CV-1464 (M.D. Pa. 2006) (penalty phase relief granted after a stipulation by the defendant and PA Attorney General); Stipulation and Order at 1, Meadows v. Beard, No. 05-CV-0566 (E.D. Pa. Sep. 5, 2016) (Montgomery County DA conceded relief on death penalty by stipulation); see also Commonwealth Response to Petition for Writ of Habeas Corpus at 8, Commonwealth v. Carson, 913 A.2d 220, 267–68 (Pa. 2006) (a state case where the prosecutor was permitted to concede relief as to the death penalty with little explanation after remand); Commonwealth v. Cousar, 154 A.3d 287, 293 (Pa. 2017) (same); Commonwealth v. Diggs, CP-51-CR-0709781-2002 (Pa. Ct. Com. Pl. 2012) (same); Commonwealth v. Dougherty, CP-51-CR-0705371-1999 (Pa. Ct. Com. Pl. 2012) (same); Commonwealth v. Elliott, 80 A.3d 415, 424 n.5 (Pa. 2013) (same); Commonwealth v. Fletcher, CP-51-CR-0709931-2001 (Pa. Ct. Com. Pl. 2011); Commonwealth v. Hanible, 30 A.3d 426, 438 (Pa. 2011) (same);

been due, at least in part, to the Third Circuit's instruction that the trial court review the issue, as well as the facts of the underlying case against Wharton, but it was also almost certainly a result of the anti-death penalty stance that Krasner had taken during the campaign.³³¹ Knowing that the new DA opposed the death penalty on principle, the court was not willing to accept his concession without first evaluating the merits of the defendant's claim.

The attorney general's office, acting as *amicus*, did its own review. They uncovered two facts that the district attorney's appellate unit had overlooked and that damaged the credibility of the DA's concession.³³² First, Wharton had attempted to escape from custody before he was sentenced to die, and was shot in the back while running from police after a hearing at Philadelphia's City Hall, undermining any argument that information about Wharton's prison adjustment would have changed the jury's sentence of death.³³³ Second, though the DA's Office had spoken to family members of Wharton's victims, they had failed to speak to the Hart's daughter, Lisa, who had been a baby at the time the crime was committed, but was now a grown woman in her thirties.³³⁴ The attorney general's office found Lisa, who was opposed to vacating the death sentence.³³⁵

The attorneys within the Philadelphia DAO who handled *Wharton* were not from the office's CIU, but from the appellate division: *Wharton* was not a case where the defendant had a possible innocence claim, but rather a death penalty appeal.³³⁶ While the DAO's CIU had a standard process for victim outreach, including in-person meetings with victims, the office's appellate unit did not have such a protocol. This fact likely contributed to the office's failure to search for Lisa Hart, prior to its concession in the case.³³⁷

The court sanctioned the district attorney and two ADAs who had worked on the case for making "representations to the District Court that lacked

Commonwealth v. Hutchinson, 25 A.3d 277, 284 (Pa. 2011) (same); Commonwealth v. Johnson, CP-51-1300424-2006, 2018 WL 3133226, *2 (Pa. Sup. Ct. 2018) (same); Commonwealth v. Johnson, CP-51-CR-0936052-1991 (Pa. Ct. Com. Pl. 2014) (same).

331. Krasner opposed the death penalty during his campaign for office, but once sworn in, he refused to say whether he would ever seek the death penalty or defend it. See Bobby Allyn, *Larry Krasner Decisively Carries Philly DA Primary, Fending Off Six Challengers*, WHYY PHILA. (May 17, 2017), <https://whyy.org/articles/larry-krasner-decisively-carries-philly-da-primary-fending-off-six-challengers>. But see Max Marin, *Krasner's Softened Rhetoric on Death Penalty Worries Supporters*, CITY & STATE PENN. (Jan. 18, 2018), <https://www.cityandstatepa.com/policy/2018/01/krasnens-softened-rhetoric-death-penalty-worries-supporters/364821>.

332. See *Superintendent*, 95 F.4th at 149 (holding that decision to sanction District Attorney and members of his staff was proper because they had failed in their duty of candor by falsely claiming that they had "carefully reviewed the facts and the law").

333. The DAO supervisors testified that they were unaware of Wharton's escape attempt. *Wharton*, 2022 WL 4133291, at *3.

334. *Superintendent*, 95 F.4th at 145.

335. *Id.*

336. *Id.* (noting that attorneys handling *Wharton* supervised the DAO's "law division," where standard appeals were handled).

337. Interview with Patricia Cummings, Former Chief, DAO CIU (Aug. 21, 2025).

evidentiary support,”³³⁸ ordering Krasner to write a letter of apology to the victims’ family and to provide “a full, balanced explanation” of the facts in all future cases.³³⁹ Wharton’s habeas motion was denied,³⁴⁰ and the case was appealed to the Third Circuit.³⁴¹

The Third Circuit upheld the trial court’s decision and the sanctions imposed on the district attorney, noting that “[c]andor is especially critical when proceedings are non-adversarial.”³⁴² Because the customary checks and balances of adversarial process do not exist when a prosecutor concedes, “the court is entitled to expect an even greater degree of thoroughness and candor.”³⁴³ The Court did not suggest, however, that the attorney general’s participation was necessary in other cases where local prosecutors made concessions, leaving this to the discretion of the trial courts.³⁴⁴

The *Wharton* decision is notable for several reasons. First, it empowered trial courts to question the concessions of local prosecutors when and how they chose, and demonstrated that if prosecutors failed to meet the judge’s standard, the court could seek answers elsewhere.³⁴⁵ Second, *Wharton* showed the weight that the attorney general carries when he participates in post-conviction proceedings, even when he is only an *amicus*. As the chief law enforcement officer in the state, the attorney general wields a kind of authority that a typical *amicus* is unlikely to hold.³⁴⁶ In its opinion, the appellate court acknowledged this, but held that the attorney general’s extraordinary level of participation was appropriate because the AG had aided the court in making “an informed ruling on the issues.”³⁴⁷ Lastly, *Wharton* shows the high cost a local prosecutor can pay when he loses the trust of the court.³⁴⁸ In its wake, other district courts in Pennsylvania have invited the attorney general to participate in post-conviction proceedings where the district attorney has conceded relief, and the Third Circuit

338. *Superintendent*, 95 F.4th at 140. Before issuing sanctions, the trial court conducted a show cause hearing. *Id.* at 146–47.

339. *Id.* at 143. Krasner and the two supervisors who worked on the case were sanctioned under Federal Rule of Criminal Procedure 11(b)(3), which demands that all “factual contentions” contained in a party’s pleadings “have evidentiary support.” FED. R. CRIM. P. 11(b)(3).

340. *Wharton v. Vaughn*, No. 01-CV-6049, 2022 WL 1488038, at *4 (E.D. Pa. May 11, 2022).

341. *Superintendent*, 95 F.4th at 146.

342. *Id.* at 149.

343. *Id.*

344. *Id.* at 145 (noting trial court’s decision to include attorney general in the proceedings when it became dissatisfied with the representations of the local prosecutor).

345. See *supra* note 331 for examples of Pennsylvania courts accepting concessions before *Wharton*.

346. Barkow, *supra* note 32, at 535 (“[T]he state AG is generally perceived as the chief law enforcement officer of the state.”).

347. The level of participation that the *Wharton* Court condoned may raise other problems: The notion of allowing a third party to participate as more than an *amicus* but less than a party was first explored in *Michigan v. United States*, 940 F.2d 143 (6th Cir. 1991).

348. See Brief for Office of Attorney General as Amicus Curiae Supporting Petitioners at 5–7, *Commonwealth v. Brown*, 196 A.3d 130 (Pa. 2018) (using the decision in *Wharton* as a reason that the Pennsylvania Supreme Court should appoint a third party to participate in every case where the Philadelphia District Attorney wishes to concede).

has given them significant latitude in how they adjudicate these concessions.³⁴⁹ It also likely contributed to the Pennsylvania Supreme Court's decision to grant allocatur in *Commonwealth v. Brown*, in order to address the issue of what process trial courts should use in evaluating local prosecutors' concession.³⁵⁰

But the lesson of *Wharton*—that courts are entitled to bring in the attorney general as *amicus* when they have lost faith in the local prosecutor—can be over-learned, particularly when one considers the other lesson one may take from the decision: regardless of how the attorney general's role is defined, his position as the state's chief elected prosecutor will carry significant weight with the court, beyond that of a typical *amicus*.³⁵¹ He is not an ordinary *amicus*, but more like an “*amicus plus*.” In a situation like the one in *Wharton* where the court has lost faith in the local prosecutor's candor, this may be appropriate, but to invite the participation of the attorney general in every post-conviction concession would create an unwarranted level of scrutiny on these concessions, and render the concession itself much less meaningful to the court. By including a second set of prosecutors, the court risks shifting the balance of prosecutorial power between state and local officials. Courts must also be clear-eyed about the attorney general's motivation in participating, as it can be a result of political or personal interests.³⁵² Attorneys general can be a “friend of the court,” but they can also stymie just outcomes and waste resources.³⁵³

Attorneys general frequently bring political or personal baggage to the proceedings. In the cases of *Brown* and *Syed*, the assistant attorneys general who became involved in the post-conviction proceedings were also responsible for holding back material exculpatory information in those cases while they worked as local prosecutors, many years before.³⁵⁴ This poses a conflict of interest. Attorneys general have insisted there is no ethical problem with the arrangement, arguing instead that an attorney's prior work on a case gives him an edge in assessing the claims and is no more than an efficient allocation of the office's resources.³⁵⁵ It is undeniable, however, that these attorneys have a personal

349. See *Johnson v. Mahoney* 144 F.4th 178, 187–88 (3d Cir. 2025) (upholding district court's decision, siding with attorney general who appeared as *amicus*, to reject the DA's waiver of procedural bar and to refuse to accept agreement to lower sentence negotiated between DA and the defendant); *Artache v. Superintendent SCI Forest*, No. 22-1500, 2023 WL 8468613, at 31 (3d Cir. 2023)

350. For further discussion of *Commonwealth v. Brown*, see *supra* Subpart.II.C.

351. *Wharton v. Superintendent*, 95 F.4th 140, 149 (3d Cir. 2024).

352. See, e.g., *supra* Subparts.II.B–C for discussion of cases where assistant attorneys general had a personal reputational stake in protecting defendants' convictions.

353. See *supra* Subparts.II.B–C.

354. See *supra* Subparts.II.B–C.

355. In his pleading to the Third Circuit, Defendant Kevin Johnson alleged that one of the signatories of the attorney general's *amicus* brief opposing relief had “represented the Commonwealth in Johnson's [prior habeas] proceedings and did not disclose the Brady material at issue here,” suggesting that this attorney's ongoing participation in the litigation was inappropriate. Reply Brief of Appellant Kevin Johnson at 6 n.1, *Johnson v. Superintendent*, No. 13-CV-03197 (E.D. Pa. Oct. 23, 2024). The attorney general's office responded angrily to the allegation in a letter to the court: “The Office of Attorney General assigned [this attorney] to assist in this case precisely *because* of her prior experience in this and similar post-conviction matters . . . Lawyers regularly

reputational stake in the outcome of these cases, making their participation ethically questionable.

The Rules of Professional Conduct do not specifically prohibit a prosecutor who is alleged to have committed misconduct from continuing to participate in the post-conviction litigation related to the case.³⁵⁶ However, the practice is out of step with the spirit of the ethics code, which advises lawyers to avoid conflicts of interest of all kinds.³⁵⁷ At a minimum, the assistant attorneys general in *Brown* may have been witnesses to any misconduct, which would prevent them from continuing to work on the case.³⁵⁸ Furthermore, as a matter of policy, assigning the same attorney to work on a case who may have previously withheld evidence presents precisely the sort of situation that CIUs were designed to avoid.³⁵⁹ Even where there is no reason to believe that prosecutors have engaged in misconduct, experts discourage the practice of assigning the prosecutor who tried a case, or defended the case on appeal, from involvement in assessing claims of wrongful conviction.³⁶⁰

Prosecutors, like all lawyers, have certain innate cognitive biases, which attach to cases they have tried or defended in the past.³⁶¹ A prosecutor who has worked on a case closely is often the least likely to acknowledge credible claims of innocence.³⁶² Experts encourage prosecutors cabin off conviction integrity work from the prosecutors who handled the case at trial or on appeal, so that the defendant's claims receive fair and unbiased treatment.³⁶³ As long as it is left to individual prosecutors' offices to police these arrangements, courts should be wary of allowing assistant attorneys general who have worked on the case

participate in appeals of cases in which they participated below, including appeals presenting claims that may be characterized as involving their own misconduct." Letter from Michelle A. Henry, Att'y Gen., Commonwealth Pa., to Patricia S. Dodszeweit, Clerk, 3d Cir. (Nov. 8, 2024) (on file with author) (emphasis added).

356. The Model Rule of Professional Conduct 1.7, adopted by the American Bar Association, forbids attorneys from representing clients whose interests may be adverse to former clients, or to the attorneys themselves. MODEL RULES OF PRO. CONDUCT r. 1.7 (A.B.A. 1980). Given that the attorney general represents the amorphous entity that is "the state," identifying the specific state interest that the assistant attorney general's involvement is undermining is a challenge. "The state's" interests are often in the eyes of the beholder, left to individual prosecutors to define.

357. *Id.*

358. See MODEL RULES OF PRO. CONDUCT r. 3.7 (prohibiting an attorney from acting as an advocate where he is also a witness to underlying case); see also *supra* Subpart.II.C (discussing *Commonwealth v. Brown*).

359. See *Developing a Conflict of Interest Statement for Conviction Integrity Units*, QUATRONE CNT. FAIR ADMIN. JUST., 2, <https://www.law.upenn.edu/live/files/11042-coi-for-prosecutors-best-practices> (last visited Feb. 1, 2025).

360. See, e.g., HOLLWAY, *supra* note 61, at 31.

361. *Id.*

362. Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1604–06 (2006) (explaining how cognitive biases like confirmation bias, selective information processing, believe preservation and the human desire to avoid cognitive dissonance can lead the prosecutors most closely involved in cases to refuse to recognize legitimate claims of innocence).

363. HOLLWAY, *supra* note 61, at 2.

previously from participating again, as their analysis of the defendant's claims may be shaped by bias and self-interest.³⁶⁴

D. WHEN THE ATTORNEY GENERAL PARTICIPATES AS THE VICTIM'S ALLY

The attorney general may influence post-conviction proceedings from the outside, even if he never enters the case as a party, or even as *amicus curiae*.³⁶⁵ By forming an alliance with a victim who opposes a conviction or a sentence's vacatur, the attorney general can influence the proceedings while remaining unseen by the court.³⁶⁶ This lack of transparency is problematic for the court, which is entitled to know the litigants' sources of support.³⁶⁷

These alliances are formed, in part, because of the difficult position in which victims often find themselves when local prosecutors concede. Though the Victims' Rights Movement has won victims greater protections over the last forty years, the system still intentionally holds victims at arm's length, granting them notice of the proceedings and the right to address the court, but not to act as a party to the proceedings.³⁶⁸ Prosecutors frequently become the victim's bridge to the adjudication process, and the victims understand them to represent the victims' interests, even though the legal reality is more complex, because prosecutors represent the state, not the victim.³⁶⁹ When the prosecutor concedes, and victims disagree with that concession, victims may feel that there no one representing their interests in the courtroom.³⁷⁰ For those victims who see local prosecutors' efforts to undo the defendant's conviction as a betrayal, the attorney general can be a tremendous source of aid.³⁷¹

But a victim's limited power in decisions related to a defendant's prosecution is by design: the criminal system does not allow victims to be a party because their visceral closeness to the crime makes objectivity difficult, if not impossible.³⁷² Criminal prosecution is typically the exclusive province of the

364. *Id.*

365. *See supra* Subpart.II.C.

366. *See supra* Subparts.II.B–C.

367. This principle is reflected in the Federal Rules of Appellate Procedure, which demand that *amici* reveal all sources of support. *See* FED. R. APP. P. 29(a)(4)(E); *see also* Anderson, *supra* note 46, at 363 (noting that *amicus curiae* often have motivations beyond simply being a "friend of the court").

368. *See* Kaufman, *supra* note 172, at 92, 111 (noting that while victims were once the primary actors in criminal proceedings at common law, by the nineteenth century, prosecution of crime had become a function of the state). By then, a common understanding had developed that victims should not be responsible for prosecution, both because of the financial burden that such an arrangement would impose upon them, and because they lacked the objectivity necessary to ensure fair and uniform outcomes.

369. *Id.*

370. *See, e.g., supra* Subpart.II.B.

371. In a study conducted by the National Institute of Justice, half of all victims in exoneration cases described the impact of the wrongful conviction as being comparable to, or even worse than, the original victimization. As one victim described it: "Now you have the same feelings of that pain. You have the same scariness. You have the same fear. You have the same panic, but now you have this flood of guilt on top of it." Seri Irazola, Erin Williamson, Julie Stricker & Emily Niedzwiecki, *Addressing the Impact of Wrongful Convictions on Crime Victims*, 274 NAT'L INST. JUST. J., Dec. 2014, at 34–38.

372. *See* Kaufman, *supra* note 172, at 121.

government for this very reason: Victims lack the necessary distance from the crime and its effects to judge the issues fairly.³⁷³ Prosecutors are tasked with acting as the ministers of justice.³⁷⁴ This duty can be obscured where a victim's desires play too central a role in the adjudicatory process. To the extent that the attorney general acts to secretly support the victim's cause, by providing information or helping the victim's advocates, the efforts may allow for a level of involvement in the post-conviction adjudication process that runs counter to the criminal system's larger goals of fairness and efficiency.

While the victim's desire to participate in post-conviction proceedings is born out of a history of trauma and loss, the attorney general's motives can be more complicated.³⁷⁵ When the attorney general quietly coaches or ghostwrites briefs on the victim's behalf, he may be using the victim as a tool for his own political or personal interests. In assessing the arguments made by the litigants, the court should know whose interests are being represented, so that it can assess the credibility of the actors. This is why *amicus* statutes demand that parties who act as *amicus* reveal who has contributed to their efforts.³⁷⁶

In both *Syed* and *Brown*, the attorney general quietly aided the victim, undercutting the local prosecutor while assuming no public responsibility for a case.³⁷⁷ In both cases, it was the victims' attempted interventions that then allowed the attorney general's office to exercise influence over the litigation.³⁷⁸ These types of relationships, when they are not made known to the court, should be discouraged.

IV. THE CITY V. THE STATE

This Part makes a set of limited arguments regarding the process courts follow in post-conviction cases where local prosecutors concede relief. First, it argues that in the vast majority of cases, courts can competently handle local prosecutors' concessions without the help of any third party, and should attempt to do so. Second, courts should appoint an *amicus* to participate and test the representations of the local prosecutor only in those rare instances when the judge has lost faith in the prosecutor's representations in the case before the court. In these instances, courts need not appoint the attorney general, but should consider a more neutral party, who is less likely to have a personal or political stake in the proceeding. Third, it proposes that when local prosecutors wish to concede, they should be held to the standard set by the Supreme Court in *Anders v. California*.³⁷⁹ *Anders* held that when a court-appointed defense attorney is tasked with handling a post-conviction challenge to a defendant's conviction,

373. *Id.* at 89.

374. Medwed, *supra* note 33, at 41.

375. *See* Subparts.II.B–C.

376. *See* FED. R. APP. P. 29(a)(4)(E).

377. *See* Subparts.II.B–C.

378. *Id.*

379. *Anders v. California*, 386 U.S. 738, 744 (1967).

and he finds no meritorious claims, he may petition the court to withdraw, provided that he put his request in writing, and, in doing so, lay out the best argument the defendant could make to challenge his conviction.³⁸⁰ It is then up to the court to examine the record independently and reach a conclusion on the merits.³⁸¹ This section argues that a similar duty should be imposed on a prosecutor who wishes to concede relief: to lay out the best arguments supporting the conviction in his concession, while also explaining why he believes concession is appropriate in this instance.

The question of what process courts should follow in post-conviction concessions is an important one, as the traditional procedures that courts utilize were designed for those instances where prosecutors defend convictions. When prosecutors concede, courts have a great deal of discretion as to how much evidence they ask the parties to present in support of the conviction's vacatur. Some courts have chosen to impose very little oversight, deferring to the local prosecutor's concessions, while others have compelled the parties to prove the wrongfulness of the conviction, fact-by-fact, through witness testimony.³⁸² The former approach, if taken to the extreme, raises potential questions about the proceedings' legitimacy and (in some cases) the treatment of victims, as in the case of Adnan Syed.³⁸³ The latter approach, seen in cases like Lamar Johnson's, risks setting the bar so high that innocent defendants cannot meet it.³⁸⁴ It also risks creating a chilling effect, such that other local prosecutors choose not to pursue vacatur motions, fearing that the process itself will be too onerous and may end in defeat.³⁸⁵ Courts would benefit from a uniform standard to address these cases, ensuring that all of the parties are treated fairly, and that the process does not vary too much from courtroom-to-courtroom.

A. CONCESSIONS RARELY REQUIRE ADVERSARIAL TESTING

The vast majority of prosecutors' post-conviction concessions can be competently handled without the help of an outside, third party. A non-adversarial process, where the court may review all relevant documents,

380. *Id.* (“[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.”).

381. *Id.*

382. *See, e.g., supra* Subparts.II.A–C for examples of how different state courts have handled prosecutors' concessions.

383. *See, e.g., supra* Subpart.II.B.

384. While Lamar Johnson was eventually exonerated, the process took years to achieve. *See supra* Subpart.II.A. This was also true in the cases of Christopher Dunn, who fought for their freedom for years, despite the support of local prosecutors. *See supra* Subpart.III.B. The conviction of Richard Glossip, discussed further in Liptak, *supra* note 248, was recently set aside by the Supreme Court after the Oklahoma Attorney General decided to concede relief after careful review. *See Glossip v. Oklahoma*, 145 S.Ct. 612, 633 (2023).

385. In an interview, Tricia Rojas Bushnell reported that prosecutors she spoke to in Missouri cited the difficulty faced by Kim Gardner in Lamar Johnson's case as a reason why they were anxious to file vacatur motions. Interview with Tricia Rojas Bushnell, Former Exec. Dir. of the Midwest Innocence Project (Oct. 14, 2025).

question the parties, and conduct hearings should they choose to do so, provides an adequate check on local prosecutors in the vast majority of cases. There are exceptions, but in most cases, prosecutors do a thorough job investigating claims of wrongful conviction and the participation of a third party to challenge their findings merely presents another, unnecessary obstacle to the wrongfully convicted defendant.³⁸⁶

By conceding relief, a local prosecutor reverses the position that his office took in the past, and such a change requires an explanation to the court.³⁸⁷ Once a jury has rendered a verdict or a defendant has pled guilty, a prosecutor's discretionary power narrows significantly and it is up to the court, and not the prosecutor, to set aside a final judgement.³⁸⁸ But there is also an important balance that must be struck: The proceeding would benefit from certain guardrails to ensure legitimacy, and to protect against the possible mistakes of the local prosecutor, while not erecting so many obstacles that the wrongfully convicted defendant cannot attain relief. If the bar is set too high, the parties are forced to re-try the case in reverse in order to *prove* the defendant's innocence, which is not the legal standard for attaining relief.³⁸⁹

When attorneys general argue that they should be granted a robust role in all post-conviction proceedings they most commonly argue that a local prosecutor's concession should be tested through adversarial process, to ensure that the jury's verdict is treated with the proper deference, and all non-frivolous arguments on behalf of the conviction are raised.³⁹⁰ But adversarial testing is not a prerequisite to most judicial decision-making in trial courts. The novelty of proceedings in which prosecutors concede, coupled with concerns about the conduct of specific actors, may be impairing courts' judgement around how these proceedings should be conducted.³⁹¹ In fact, adversarial testing is the exception and not the norm in the vast majority of criminal proceedings before trial courts: Less than five percent of cases are subjected to the "crucible of

386. These unnecessary obstacles can be seen most clearly in the cases from Missouri discussed in Subparts.II.A–B, as well as in the case of Richard Glossip, discussed in Liptak, *supra* note *supra* note 248.

387. A change in a party's position receives special scrutiny under the law in other contexts: a witness's prior inconsistent statement, for example, is admissible under exceptions to the hearsay doctrine, provided the witness has the opportunity to explain their change in position. *See* FED. R. EVID. 613.

388. *See, e.g.,* Young v. United States, 315 U.S. 257, 259 (1942); *see also* Commonwealth v. Brown, 196 A.3d 130, 144–46 (Pa. 2018).

389. *See* Schlup v. Delo, 513 U.S. 298, 327 (1995) (holding that a petitioner must prove that it is "more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt").

390. OAG Amicus Brief, *supra* note 75, at 2 ("[P]rosecuting attorneys are . . . entrusted with considerable discretion . . . But that fact provides no basis for a court to give special deference to . . . [their] concessions.").

391. *See* Subpart.I.A for discussion of the formation and the work of conviction integrity units and the novelty of prosecutorial concessions.

cross-examination,”³⁹² lauded as the system’s best tool to separate fact from allegation, and it is only the pretrial defendant who can demand it.³⁹³

Cases that come before trial courts generally falls into two categories: in the first are cases where the parties disagree. Here, courts adjudicate disputes between them by hearing and weighing the parties’ evidence and arguments.³⁹⁴ In the second category are those matters that end with the parties reaching a settlement or agreement. Here, courts’ role is to review the evidence and arguments that the parties present, ask questions, review the record, and then either provide the court’s stamp of approval to the agreement, or refuse to do so.³⁹⁵ An agreement only becomes law if the court is satisfied by the parties’ representations and agrees to their terms.³⁹⁶

Post-conviction concessions take place after judgement in a case is final and are, therefore, different than pretrial settlements and plea agreements: the discretion of the parties shrinks after final judgment and it is the court that is tasked with the decision of whether or not to vacate the conviction.³⁹⁷ However, while it is true that it is the job of the court, and not the prosecutor, to determine whether a conviction should be vacated, this does not mean that the court must always have a party to defend the conviction in order to fairly adjudicate the concession.³⁹⁸ Appointing an *amicus* in every case overcorrects for a lack of adversarial process, ignoring the weight that should be given to the local elected prosecutor’s concession by simply finding a different lawyer to argue the points that the local prosecutor, acting within his discretion, chose to abandon.

The level of scrutiny many courts have used in assessing local prosecutors’ concessions of relief stands in sharp contrast to the how many of those same courts commonly assess the post-conviction claims of defendants who lack the support of the prosecutor.³⁹⁹ In responding to a defendant’s habeas claim, the court need not conduct a hearing before denying the claim, and defendants are not guaranteed the right to counsel.⁴⁰⁰ In the post-conviction context, the

392. Crawford v. Washington, 541 U.S. 36, 61 (2004).

393. See, e.g., William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 455 (2021); Heidi Woessner, *Criminal Law—The Crucible of Adversarial Testing: Ineffective Assistance of Counsel and Unauthorized Concessions of Client’s Guilt*, 24 W. NEW ENG. L. REV. 315, 316 (2002).

394. Woessner, *supra* note 393, at 317.

395. See generally Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining*, 76 COLUM. L. REV. 1059 (1976) (describing differing models of judicial interference and control over plea agreements).

396. *Id.* at 1074.

397. See, e.g., United States v. Young, 315 U.S. 257, 258–59 (1942); Commonwealth v. Brown, 196 A.3d 130, 144–45 (Pa. 2018).

398. Examples of this include the cases of Lamar Johnson, *supra* Subpart.II.A, and Christopher Dunn, *supra* notes 298–303. In these cases, proceedings stretched on for many months in large part because the attorney general claimed the defendants failed to “prove” their innocence.

399. See, e.g., Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

400. See *id.* at 555. Defendants may not even have a right to counsel in the habeas context. See *id.* (explaining that the Court has “never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to do so today”).

balance struck by many courts places greater weight on the deference to the conviction than any rights still possessed by the defendant.

B. WHEN THE COURT NEEDS A THIRD PARTY, THAT PARTY SHOULD BE AN *AMICUS*

Occasionally, there are legitimate reasons for courts to seek to test the local prosecutor's concession. Where the court has determined that the local prosecutor has not been duly diligent, appointing another entity to act as *amicus* and offer an opinion on the parties' agreement may be a sensible and effective way to ensure that the court receives a full picture of the arguments on all sides.⁴⁰¹ This approach has been shown to be more than adequate, while the approach taken in states like Missouri and Utah which have provided the attorney general with a greater role in the proceeding, have been less effective and more time-consuming.⁴⁰² The *Wharton* example shows how courts' discretionary decision-making in appointing *amicus* when they believe it is appropriate provides an adequate check on prosecutors' concessions. The trial court in *Wharton* was able to divine from the parties' filings that the local prosecutor had not met the standard that it deemed necessary to overturn the defendant's death sentence, and it was only then that it sought the counsel of the third party.⁴⁰³

In reviewing the parties' agreement, asking questions, and demanding that the parties present additional information where appropriate, the court has a powerful set of tools to ferret out those agreements it does not wish to accept.⁴⁰⁴ The question of when to summon a third party to test the parties' agreement should be left in the hands of trial judges and not mandated by the legislature or higher courts.

But the attorney general need not be the judge's first choice: a neutral, non-political actor may be better suited for the role of adversarial tester.⁴⁰⁵ The attorney general is a political actor, whose involvement too frequently carries political baggage.⁴⁰⁶ The court could, for example, recruit an attorney in private practice who had previously worked as a prosecutor, to render an independent judgement.⁴⁰⁷ This solution would give the court the "second opinion" it desires

401. See *Wharton v. Vaughn*, 371 F. Supp. 3d 195, 199 (E.D. Pa. 2019) (explaining the court's reason for appointing *amicus*: "I must make an independent determination of the merits . . . and . . . I cannot do so on the current record.").

402. See Subpart.II.A and Subparts.III.A–B for further discussion of Missouri and Utah's legislation which has given a greater role to the attorney general where local prosecutors concede relief.

403. See *supra* Subpart.III.A.1.

404. See *supra* Subpart.II.D.

405. See *supra* Part.II for discussion of the attorney general's complex and often political motives.

406. See *supra* Subpart.I.C for discussion of the role of the attorney general as a statewide elected official with limited jurisdiction over criminal matters in most states.

407. An example of a federal district court appointing an independent *amicus* can be seen in Judge Ho's decision in *United States v. Eric Adams*, where he appointed Paul Clement as *amicus* because of concerns about the conduct of the federal prosecutor. See Michael Rothfield, *Read the Brief that Recommends Dropping the*

without the problem of political gamesmanship that the attorney general's participation often invites.⁴⁰⁸

C. APPROPRIATING *ANDERS*

Important questions of process still remain as to how courts should conduct non-adversarial proceedings where local prosecutors concede. Because these hearings are novel, courts have struggled with several issues, including whether or not to conduct a hearing, and what types of stipulations to accept from the parties.⁴⁰⁹ The Pennsylvania Supreme Court granted allocatur to address these very issues in *Commonwealth v. Brown*, asking the parties—victims, the attorney general, the defendant, and the local prosecutor—to endeavor to answer the following question: “whether, and via what procedure, a common pleas court judge may grant [habeas] relief based upon the concessions of the parties.”⁴¹⁰ A decision in the case has not yet been published.

This Section does not claim a solution to all of the complicated issues of state and local process, victim participation, and political conflict raised in *Brown* and the other cases where prosecutors have conceded relief. Many of the answers should, in this writer's opinion, be left to individual trial court judges, who must make those determinations based upon the individual case before them. A resolution to those larger problems, given the variations of state law and practice, are beyond the power of a single actor, and the scope of this paper.

However, one possible solution to the issue of how courts should proceed when local prosecutors concede relief may be found in *Anders v. California*, where the Supreme Court laid out a process for courts to follow in a different type of post-conviction concession.⁴¹¹ In *Anders*, the Court addressed the problem trial judges confront when a court-appointed defense attorney believes that his client has no meritorious claims to raise on appeal, and wishes to withdraw from the case.⁴¹² In a way, *Anders* presents a mirror image of the problems observed in cases where local prosecutors no longer wish to defend a conviction or a sentence: in both instances, an attorney comes before the court wishing to concede, and the court must determine how to assess his arguments in the absence of an adversary who might test them.⁴¹³

Charges Against Eric Adams, Annotated, N.Y. TIMES (Mar. 7, 2025), <https://www.nytimes.com/interactive/2025/03/07/us/doc-annotation-adams-clement-brief.html>.

408. *See supra* Part.II.

409. *See supra* Part.II.A; King's Bench Petition of Family Members of Murder Victims Michael Richardson and Robert Crawford, *supra* note 94, at 1 (citing open questions of process as a reason that Pennsylvania Supreme Court should take jurisdiction).

410. These are the questions that the Pennsylvania Supreme Court is attempting to answer in its consideration of *Commonwealth v. Brown*. *See* King's Bench Petition of Family Members of Murder Victims Michael Richardson and Robert Crawford, *supra* note 94.

411. 386 U.S. 738, 739 (1967).

412. *Id.*

413. *Id.* (“We are here concerned with the extent of the duty of a court-appointed appellate counsel . . . after that attorney has conscientiously determined that there is no merit to the indigent's appeal.”).

In *Anders*,⁴¹⁴ the Court held that when a court-appointed attorney has determined that his client's claims are wholly frivolous, he must first explain his conclusion to his client and then "he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." It is then the job of "the court—not counsel . . . after a full examination of all the proceedings, to decide whether the case is wholly frivolous."⁴¹⁵ After the court has conducted its own independent review of the record, and allowed the defendant the opportunity to respond, it is tasked with deciding whether to dismiss the appeal, or to appoint a second lawyer to pursue the defendant's potential claims.⁴¹⁶

The Third Circuit has explained obligations imposed by *Anders* this way: counsel has the "dual duties" of satisfying the court that he has thoroughly scoured the record in search of appealable issues, and to explain why the issues are frivolous.⁴¹⁷ The court must then ask two questions: "whether the lawyer really did function as a committed advocate, and whether he misjudged the legitimate appealability of any issue."⁴¹⁸

The *Anders* standard provides a framework for courts to use in considering parties' concessions without the benefit of adversarial testing. The decision also stands for the proposition that courts are more than capable of acting as arbiter, even when there is no dispute between the attorneys who before it.⁴¹⁹ If the standard laid out in *Anders* and its progeny were applied to the conceding

414. Charlie Anders was convicted of felony possession of marijuana in 1958. He wrote to the court that he wished to appeal his conviction but could not afford an attorney. The California District Court of Appeal appointed an attorney, who studied the record and, after speaking to Anders, determined that there were no meritorious claims to raise on appeal. He wrote to the court, advising it of his determination, and that Anders intended to file an appeal on his own behalf. Anders requested another lawyer, but this request was denied and Anders filed his appeal *pro se*. The appellate court unanimously affirmed Anders conviction. Anders appealed again, arguing that he had been denied his right to counsel on appeal and lost in the California courts. The Supreme Court granted certiorari, ruling that the defense attorney's "bare conclusion . . . was not enough" to ensure Anders' right to counsel on appeal. *See id.* at 739–42.

415. *Id.* at 744.

416. *Id.* at 739.

417. *United States v. Marvin*, 211 F.3d 778, 780 (3d Cir. 2000).

418. *Id.*

419. *Anders*, 386 U.S. at 744 ("The court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous"). It must be noted that in the decades that followed the *Anders* decision, defense attorneys struggled with the standard the Court had set for them. *See* Andrew S. Pollis, *Fixing the Broken System of Assessing Criminal Appeals for Frivolousness*, 53 AKRON L. REV. 481, 505 (2019). For a defense attorney to explain claims that he has found meritless to the court, while still protecting his client's interests, is a difficult task. If, as the *Anders* Court imagined, a defendant has a claim that might "arguably support the appeal," a defense attorney walks a fine line when he elucidates that claim, which he has chosen to forego, without undermining any chance his client might have on appeal. *See id.* at 491, 504. This issue disappears, however, if conceding prosecutors are held to the *Anders* standard. While a defense attorney must always strive to zealously represent the interests of his client, the prosecutor does not bear the same obligation to the state as a defense attorney has towards his client. A prosecutor's primary obligation is to seek justice, and therefore he may lay out arguments on both sides with no fear of undermining the state. *See Berger v. United States*, 295 U.S. 78, 78 (1935).

prosecutor, it would compel him to provide the trial court with an explanation of his position, as well as a discussion of the potential arguments that an adversarial party might make in response.⁴²⁰ The brief would be provided to the defendant and to victims with an interest in the case, and time granted for responses to be drafted and submitted to the court.⁴²¹ The final determination as to the merits would then be left to the trial court, which would conduct its own review of the record and come to an independent decision. This structure, would, at a minimum, provide the court with a starting point in its analysis of the claim.

The *Anders* standard is not a panacea for all of the issues courts face in post-conviction concessions. For one thing, when assessing a defendant's potential claims on appeal, an attorney may rely almost exclusively on the trial record.⁴²² In a post-conviction proceeding where a prosecutor concedes, assessing the claims is usually more complicated. One of the thorniest problems courts confront is how much to rely on stipulations drafted by the parties, and how much to insist that the parties prove their stipulations through witness testimony.⁴²³ The limited case law that has addressed this issue has given courts broad discretion as to whether to accept stipulations, and what sorts of stipulations are appropriate.⁴²⁴ The *Anders* framework would allow courts to continue to allow for stipulations on a case-by-case basis, particularly where there is support for the stipulation in the record.⁴²⁵

CONCLUSION

The convergence of the rise of reform-minded prosecutors, coupled with the Innocence Movement's increased ability to effectively screen and represent those who have been wrongfully convicted presents a tremendous set of opportunities to re-examine past convictions that may have been the result of injustice. But to be seen as legitimate, the work must be done carefully and thoughtfully. Recent conflicts around local prosecutors' post-conviction concessions highlight the importance of establishing a set of procedural tools and norms to properly adjudicate these claims. The rising political and geographic polarization that has defined the first few decades of this century makes it increasingly likely that courts will see additional clashes between state and local prosecutors. A careful balance must be struck: if courts routinely choose to allow political actors like the state attorney general to participate, they

420. *Anders*, 386 U.S. at 744.

421. Elsewhere, I have argued that it is unwise to allow victims to act as *amicus* in cases where prosecutors concede relief. *See supra* Subpart.III.C. However, allowing a victim the opportunity to respond to a prosecutor's concession does not grant him any special status, but merely allows him to render an opinion, or, put another way, the right to address the court before a decision is rendered.

422. Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 19 (1999) (“[P]robably the most important thing for an appellate lawyer is to ‘know the record.’”).

423. *See, e.g.*, *Commonwealth v. Perrin*, 291 A.3d 337, 343 (Pa. 2023).

424. *Id.* at 344–45.

425. *United States v. Marvin*, 211 F.3d 778, 780 (3d Cir. 2000).

risk diluting the power of the democratically elected local prosecutor, and inviting unnecessary political conflicts into their courtrooms which may obscure legitimate claims of innocence and wrongful conviction. At the same time, courts must ensure that processes of adjudication they utilize present them with a full picture of the defendants' claims, and any non-frivolous arguments in favor of the conviction.
