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NOTE

CONFESSIONS WITHOUT CONSEQUENCE: THE CASE FOR ATTORNEY GENERAL DEFERENCE

*Alexander W. Wilfert**

*The Supreme Court’s recent decisions in *Glossip v. Oklahoma* and *Escobar v. Texas* have surfaced an understudied and increasingly consequential phenomenon in American criminal law: the prosecutorial confession of error. Anglo-American courts have recognized such confessions for centuries, and *Young v. United States* commands that federal courts afford them “great weight.” Yet judicial practice has grown increasingly inconsistent—most acutely at the state level, where courts routinely treat confessions as ordinary litigation positions rather than as the considered judgment of the sovereign’s chief law officers. This dysfunction reaches its apex when the confessor is a state attorney general, whose constitutional authority, democratic legitimacy, and investigative capacity distinguish them from every other prosecutorial actor. *Glossip* illustrates the problem starkly: the Oklahoma Attorney General confessed error in a capital case after a comprehensive independent*

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investigation, only to have the Oklahoma Court of Criminal Appeals dismiss the confession as “not based in law or fact.”

Pulling from state case law that the literature has largely ignored, this Note argues that the current approach cannot be defended. It proposes a structured four-factor framework—merits, motives, institutional credibility, and equities—designed to restore coherence to confession-of-error doctrine, to vindicate the unique institutional role of state attorneys general, and to ensure that when the State concedes its case cannot stand, the judiciary listens.

INTRODUCTION.....	1155
I. DOCTRINAL FOUNDATIONS AND EVOLUTION.....	1158
A. <i>Defining the Confession: What It Is and What It Isn't</i>	1158
B. <i>Doctrinal Evolution: Young and the “Great Weight” Standard</i>	1163
II. MODERN APPROACH: A DOCTRINE IGNORED	1165
A. <i>State Court Practice: The Absence of Meaningful Deference</i>	1167
B. <i>The Limits of Federal Review</i>	1170
III. BEYOND CASE-BY-CASE CONFUSION: THE ARGUMENT FOR ATTORNEY GENERAL DEFERENCE.....	1174
A. <i>Justifying Deference Writ Large</i>	1175
B. <i>Argument for Attorney General Deference</i>	1177
1. <i>Constitutional Structure and the Attorney General’s Role</i>	1177
2. <i>Democratic Legitimacy of Attorneys General</i>	1179
3. <i>Institutional Competence and Investigative Capacity</i>	1180
4. <i>Confessions of Error as Institutional Virtue</i>	1182
IV. SOLVING THE PROBLEM: A STRUCTURED FRAMEWORK.....	1184
A. <i>The Proposed Framework</i>	1185
1. <i>The Merits Factor: Evaluating the Substance of the Confession</i>	1185
2. <i>The Motives Factor: Assessing Strategic Considerations</i>	1187
3. <i>The Institutional Credibility Factor: Weighing the Confessor’s Authority</i>	1189
4. <i>The Equities Factor: Focusing on Gravity and Systemic Impact</i>	1191

2026]	<i>Confessions Without Consequence</i>	1155
	5. <i>Reconciling Competing Factors: A Hierarchy of Considerations</i>	1192
	B. <i>Application of the Framework</i>	1194
	1. <i>Glossip v. Oklahoma: An Example of Maximal Deference</i>	1194
	2. <i>Escobar v. Texas: Navigating Divided Executive Authority</i>	1196
	3. <i>The Krasner Cases: Defining the Boundaries of Deference</i>	1198
	C. <i>Anticipating Objections</i>	1200
	1. <i>Judicial Independence and Institutional Roles</i>	1200
	2. <i>Democratic Legitimacy and Prosecutorial Overreach</i>	1201
	3. <i>Victims' Rights and Public Trust</i>	1202
	CONCLUSION.....	1203

INTRODUCTION

When Oklahoma Attorney General Gentner Drummond reviewed Richard Glossip’s capital murder case, he formally confessed error.¹ Following an independent investigation commissioned by the state legislature,² Drummond concluded that prosecutorial misconduct had fatally compromised Glossip’s conviction. The Oklahoma Court of Criminal Appeals (“OCCA”) responded with dismissiveness, stating that “[t]he State’s concession is not based in law or fact.”³ The OCCA offered little explanation for this rejection and ultimately declined to vacate Glossip’s death sentence.⁴ This extraordinary rejection of a confession of error reflects a doctrine overlooked, where state court approaches to prosecutorial confessions remain inconsistent and underdeveloped as lives hang in the balance.⁵ Weeks later, the Texas

¹ *Glossip v. Oklahoma*, 145 S. Ct. 612, 623–27 (2025) (describing the Attorney General’s confession of error, including acknowledgment of prosecutorial misconduct and failure to correct false testimony under *Napue v. Illinois*, 360 U.S. 264 (1959)).

² See *id.* at 621 (describing an independent investigation conducted by law firm Reed Smith).

³ *Glossip v. State*, 2023 OK CR 5, ¶ 25, 529 P.3d 218, 226.

⁴ See *id.* ¶ 12.

⁵ Ironically, Oklahoma had adopted a highly deferential regime, granting relief in all 298 cases involving confessions of error between 1908 and 2022, before departing from that century-long practice in this very case, underscoring the doctrine’s current instability. See, e.g., Brief of the National Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 2, *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025) (No. 22-7466) [hereinafter

Court of Criminal Appeals (“TCCA”) followed suit,⁶ rejecting the Travis County District Attorney’s confession in Areli Escobar’s capital case even though the Supreme Court had previously remanded the case “in light of the confession of error.”⁷ Escobar then returned to the Supreme Court, with one question presented squarely addressing the confession-of-error component—namely, whether the Fourteenth Amendment’s Due Process Clause requires reversal when “a capital conviction is so infected with errors that the State no longer seeks to defend it.”⁸ The Supreme Court denied certiorari, leaving the doctrinal issue alive and unwell.⁹

Glossip and *Escobar* reveal a deference doctrine unadopted in state courts. At the federal level, *Young v. United States* asks that courts give “great weight” to confessions of error by federal prosecutors.¹⁰ But the established analogs in state courts oftentimes prove toothless.¹¹ When state courts continue to imprison defendants despite credible confessions of error by state prosecutors, they undermine notions of fundamental fairness, separation of powers principles, and predictability in the law.¹²

NACDL Brief] (“Indeed, in all 298 cases involving confessions of error between 1908 and 2022, the OCCA ultimately granted relief to the defendant.”).

⁶ *Ex parte Escobar*, 676 S.W.3d 664, 672–75 (Tex. Crim. App. 2023).

⁷ *Escobar v. Texas*, 143 S. Ct. 557 (2023) (mem.).

⁸ Petition for a Writ of Certiorari at i, *Escobar v. Texas*, 145 S. Ct. 1423 (2025) (mem.) (No. 23-934).

⁹ *Escobar*, 145 S. Ct. at 1423 (denying certiorari).

¹⁰ *Young v. United States*, 315 U.S. 257, 258–59 (1942) (“The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed.”).

¹¹ The TCCA exemplifies this judicial resistance. While dutifully reciting that confessions are entitled to “great weight”—if acknowledged at all—the TCCA proceeds to reject them outright, typifying the broader failure to honor deference principles in criminal post-conviction litigation. See, e.g., *Ex parte Escobar*, 676 S.W.3d at 672, 674–75 (acknowledging that “the State’s confession of error in a criminal case is important and carries great weight” but that “we are not bound by it” and rejecting the Travis County District Attorney’s confession despite the prosecution’s reexamination finding due process violations based on false DNA evidence (quoting *Estrada v. State*, 313 S.W.3d 274, 286 (Tex. Crim. App. 2010))); *Rogers v. State*, 594 S.W.3d 432, 434–35 (Tex. App. 2019) (conducting independent review before rejecting the State’s confession); *infra* Part II (examining state court treatments of confessions of error across a variety of states).

¹² Federal courts apply the doctrine with similar inconsistency, with most circuits showing little deference. See, e.g., *United States v. Ramirez*, 606 F.3d 396, 398 (7th Cir. 2010) (indicating that the correct standard given the facts and circumstances in the case was plain error); *United States v. Cheek*, 94 F.3d 136, 140 (4th Cir. 1996) (stating that the government’s opinion concerning a defendant’s right to a new trial did not bind the court); *United States v. Vasquez*, 85 F.3d 59, 60 (2d Cir. 1996) (acknowledging that the

State courts compound this dysfunction by overlooking institutional distinctions within the prosecutorial hierarchy. Although prosecutors generally warrant some degree of deference when confessing error, confessions by attorneys general—who are elected officials with statewide constitutional authority to represent the sovereign—should receive heightened deference. This Note argues for such meaningful deference to attorney general confessions, but the Court’s decision in *Glossip* reflects a more fundamental concern: state courts’ refusal to honor *any* prosecutorial confession, even when both parties agree that a conviction cannot stand.¹³ While some state courts do formally acknowledge the attorney general’s position, they do not discuss the attorney general’s uniquely situated legal role and do not provide the meaningful deference this Note argues for.¹⁴ This institutional blindness reduces all prosecutorial confessions to mere litigation positions, ignoring the unique democratic, constitutional, and functional virtues that distinguish state attorneys general from sovereign litigators at every other level—local, state, and federal.¹⁵

This Note addresses a critical gap in both scholarship and case law. While existing literature examines the Solicitor General’s confessions before the Supreme Court, practically no scholarship examines the confessions of state attorneys general in state court or state prosecutorial confessions writ large¹⁶—despite their increasing relevance across

government’s concession of error and desire to vacate a sentence do not automatically govern an appellate court’s ruling).

¹³ Advisory Opinions: A Dispatch Podcast, Blockbuster Cases, The Dispatch, at 45:15 (July 10, 2025), <https://thedispatch.com/podcast/advisoryopinions/blockbuster-cases/> [<https://perma.cc/SX7G-GVK3>] (featuring Professor Daniel Epps arguing that the case was a “cause célèbre” and that the Court recognized the injustice of the *Glossip* case and tried to find an equitable outcome).

¹⁴ See, e.g., *Marks v. State*, 496 P.2d 66, 67–68 (Alaska 1972); *People v. Hayes*, 699 P.2d 1259, 1263 (Cal. 1985) (acknowledging the Attorney General’s confession of error and, after independent review, concluding that the record “fully supports” the confession, without explaining why the Attorney General’s institutional role warranted consideration); *State v. Maes*, 665 P.2d 1169, 1171–72 (N.M. Ct. App. 1983) (quoting *Marks* for the proposition that courts must undertake independent review despite a confession—illustrating cross-jurisdictional adoption of the independent-review standard without engagement with the confessor’s institutional role).

¹⁵ See *infra* Section III.B for a discussion of these virtues.

¹⁶ See Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 *Fordham L. Rev.* 3027, 3029–30 (2013) (examining the Solicitor General’s practice before the Supreme Court); see also Charles L. Maak, Note, *The Confession of Error*, 1968 *Utah L. Rev.* 286, 287 (surveying state and federal confession-of-error practices); Alexander L. Merritt, Note,

criminal contexts.¹⁷ The Note undertakes an extensive review of state case law and federal appellate decisions originating in state court. It reveals that state courts consistently deny what this Note terms “meaningful deference” to executive admissions, particularly those from state attorneys general despite their distinctive institutional position.

The Note proposes a structured framework to replace the ad hoc approach currently governing confession doctrine. The absence of principled evaluative standards produces unpredictability and inequality when courts review prosecutorial confessions. A uniform analytical framework—built on four weighted factors—provides a blueprint without dictating outcomes or stripping state courts of institutional autonomy. By offering courts a common set of considerations adaptable to varied state procedures, this framework ensures that deference has substantive meaning across jurisdictions while highlighting why state attorneys general merit unique treatment.

The Note proceeds in four parts. Part I defines confession-of-error doctrine and examines its development. Part II surveys the modern landscape. Part III emphasizes the indeterminate nature of modern judicial approaches. Part IV proposes a manageable framework and applies it to high-profile cases while anticipating objections.

I. DOCTRINAL FOUNDATIONS AND EVOLUTION

To understand how state courts arrived at this moment of doctrinal ambiguity, Part I defines the confession-of-error concept, distinguishes it from related doctrines, and surveys the historical treatment of confessions.¹⁸

A. Defining the Confession: What It Is and What It Isn't

Meaningful deference requires a clear definition of confession of error—a threshold question the Supreme Court and legal scholarship

Confession of Error by Administrative Agencies, 67 Wash. & Lee L. Rev. 1197, 1198–99 (2010) (analyzing confession of error in the administrative law context).

¹⁷ See *infra* Part III (discussing *Glossip* and *Escobar* as two major recent cases).

¹⁸ This Note brackets the complex thicket of habeas doctrine and procedural waivers. While procedural waivers may serve as vehicles for confession, this analysis addresses the confession principle itself, not jurisdictional mechanics. The analysis also foregrounds interjurisdictional dynamics such as the adequate and independent state grounds doctrine. See *infra* Part II (addressing how federal court doctrines complicate federal review of state court denials of confession-based relief).

have largely left unresolved.¹⁹ A confession of error, as defined in this Note, requires three elements: (1) acknowledgment of specific legal or factual error undermining the judgment,²⁰ (2) an explicit request for reversal of the government's previous litigation position,²¹ and (3) submission by an official authorized to represent the sovereign's legal interests.²²

These three elements establish the confession of error as a distinctly appellate phenomenon, one that occurs on both the state and federal levels, presupposes a final judgment, and does not require automatic reversal.²³ Critically, they may arise on direct appeal,²⁴ in petitions for discretionary review (including certiorari),²⁵ or during post-conviction and collateral proceedings such as habeas corpus or coram nobis actions.²⁶ With respect to element one, the acknowledgment must identify concrete errors that undermine part or all of the judgment—not

¹⁹ For rare attempts at systematic definition, see Maak, *supra* note 16, at 287–88 (noting that a confession of error generally occurs when the government concedes that the lower court decided a legal issue erroneously); Michael T. Morley, *Avoiding Adversarial Adjudication*, 41 Fla. St. U. L. Rev. 291, 304–12 (2014) (tracing doctrinal evolution and identifying structural elements of confessions of error).

²⁰ See *Sheridan v. United States*, 312 U.S. 654, 654 (1941) (per curiam) (“On the Government’s confession of error, its motion to reverse is granted.”); see also *Loveland v. United States*, 278 U.S. 665, 665 (1929) (mem.) (“Judgment reversed on confession of error . . .”).

²¹ See *United States v. Blaszczyk*, 56 F.4th 230, 233 (2d Cir. 2022) (vacating convictions in light of the government’s confession of error and request for reversal); *Casey v. United States*, 343 U.S. 808, 808 (1952) (per curiam) (vacating judgment after the government confessed error and sought reversal); Katyal, *supra* note 16, at 3030 (noting that a confession of error entails asking a federal court to hear the case to rule against the government).

²² See *Petite v. United States*, 361 U.S. 529, 530–31 (1960) (per curiam) (accepting the Solicitor General’s confession of error and vacating judgment); *Saldano v. State*, 70 S.W.3d 873, 883 (Tex. Crim. App. 2002) (en banc) (holding that district attorneys possess constitutional and statutory authority to represent the state in criminal appeals); *Sibron v. New York*, 392 U.S. 40, 58–59 (1968) (distinguishing confessions by local officials from those made by an official authorized to speak for the State as a whole).

²³ See *Walls v. State*, 560 A.2d 1038, 1052 (Del. 1989) (“However, ‘[a] confession of error does not require the reversal of the judgment of conviction in the trial court.’” (alteration in original) (emphasis omitted) (quoting *Weddington v. State*, 545 A.2d 607, 612 (Del. 1988))).

²⁴ See *Schlagel v. State*, 13 P.3d 275, 276 (Alaska Ct. App. 2000).

²⁵ See *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (recognizing the Court’s practice of granting, vacating, or remanding cases based on confessions of error by the Solicitor General and state attorneys general).

²⁶ See *Commonwealth v. Brown*, 196 A.3d 130, 136–37 (Pa. 2018) (assessing confession of error in state collateral review posture).

merely disagreement with reasoning or dicta.²⁷ A determinative factual finding or legal conclusion upon which the prosecution's argument rests must be conceded.²⁸ For element two, the confession should explicitly seek reversal. Passive acknowledgment without requesting relief is insufficient.²⁹ This ensures the government makes an affirmative procedural step rather than merely declining to defend the judgment below. As element three indicates, a confession must come from an official with constitutional or statutory authority. At the federal level, this means the Solicitor General or a U.S. Attorney representing the United States.³⁰ At the state level, this refers to the Attorney General, District Attorney, and other prosecutors representing the state or locality.³¹ The confession can apply in both the criminal and civil contexts.³² This Note focuses on criminal appeals, particularly in the post-conviction context, where the prosecutor's dual role as advocate and minister of justice creates unique tensions.³³ The equities in the

²⁷ See *Neale v. State*, 525 S.W.3d 800, 804 (Tex. App. 2017) (addressing a partial confession where the State “concede[d] error as to the third and fourth issues” but not the entire conviction).

²⁸ See *Maak*, supra note 16, at 287–89 (summarizing confessions admitted on appeal into different legal or factual issues).

²⁹ See *Katyal*, supra note 16, at 3030 (describing a confession of error as “the Solicitor General telling a court . . . ‘You know that case we won, Court? We shouldn’t have won that case. We should have actually lost that case. So please take this case, Supreme Court, on certiorari, agree to hear the case, and rule against the government.’”).

³⁰ See *Penner v. United States*, 399 U.S. 522, 522 (1970) (per curiam) (granting certiorari, vacating judgment, and remanding a case on the basis of the Solicitor General’s confession of error); see also *United States v. Blaszcak*, 56 F.4th 230, 236 (2d Cir. 2022) (noting the U.S. Attorney’s Office confessing error “at the direction of the Solicitor General’s Office” (quoting Brief on Remand for the United States of America at 8, *Blaszcak*, 56 F.4th 230 (No. 18-2811(L)))).

³¹ See *Saldano v. State*, 70 S.W.3d 873, 883 (Tex. Crim. App. 2002) (en banc) (holding that district attorneys—not the attorney general—possess authority to represent the state in criminal appeals); cf. *Sibron v. New York*, 392 U.S. 40, 58 (1968) (distinguishing confessions by local district attorneys from those made by officials authorized to speak for the state as a whole).

³² See, e.g., *Atkins v. United States*, 556 F.2d 1028, 1095–96 (Ct. Cl. 1977) (Kashiwa, J., concurring in part and dissenting in part) (applying the confession-of-error doctrine in a civil tax refund case, demonstrating the practice’s occasional but atypical extension beyond criminal contexts); see also *In re Guardianship of Gallop*, 453 N.W.2d 616, 616–17 (S.D. 1990) (applying confession of error in the civil family law context).

³³ See *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 573 (Fla. 2005) (highlighting the ethical complications with confessions of error, underscoring that “[t]he heart of all legal ethics is in the lawyer’s duty of candor to a tribunal,” which can be “counter-intuitive, cutting against the lawyer’s principal role as an advocate”); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary

criminal context are especially stark: defendants' liberty often hangs in the balance, and in capital cases, confessions of constitutional error carry life-or-death consequences.

Because confessions operate at the contested intersection of executive prerogative and judicial authority, it is useful to distinguish them from adjacent but functionally distinct doctrines that similarly involve executive litigation decisions. Only true confessions of error—formal acknowledgments of specific error with requests for reversal—merit meaningful deference.

Confessions of error should first be distinguished from the government's duty to defend duly enacted laws. The duty to defend creates a presumption that government attorneys will advance the best available arguments supporting a statute's validity, even when the administration disagrees with the underlying policy.³⁴ When the executive declines to defend, that decision falls along a spectrum. At one end lies strategic non-defense: the government withdraws from litigation without admitting error, as California did in *Hollingsworth v. Perry* by refusing to defend Proposition 8.³⁵ At the spectrum's opposite end lies formal confession of error: an explicit acknowledgment that the government's prior position was legally or factually wrong, accompanied by a request for judicial relief.³⁶ This distinction carries doctrinal weight. Strategic non-defense preserves the government's ability to defend similar provisions in future cases, while confession of error represents an institutional judgment that the government was wrong and compels direct judicial engagement.

Confession of error must also be separated from the broader, forward-looking exercise of prosecutorial discretion. This discretion reflects proactive policy choices about which charges to file, which pleas to

party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”)

³⁴ Compare Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 *Ind. L.J.* 513, 515 (2015) (arguing for a strong duty to defend), with Case Western Reserve University School of Law, *How the Separation of Powers Informs the Executive Duty to Defend the Law*, at 15:20 (YouTube, Oct. 6, 2014), <https://www.youtube.com/watch?v=cBiCmH3kjGY> [<https://perma.cc/9VAS-2EMR>] (featuring Judge William H. Pryor Jr. arguing that attorneys general may exercise independent constitutional judgment).

³⁵ 570 U.S. 693, 705–06 (2013) (holding that initiative proponents lacked Article III standing to appeal when state officials declined to defend).

³⁶ See, e.g., *Glossip v. Oklahoma*, 145 S. Ct. 612, 623–24 (2025) (addressing Oklahoma Attorney General's formal confession of error identifying specific *due process* violations in a capital case).

accept, and where to allocate resources.³⁷ In this mode, prosecutors may decline further litigation without admitting fault.³⁸ Confession of error, by contrast, carries a backward-looking admission that the government was wrong. While prosecutors retain discretion over whether to continue defending a conviction, professional responsibility rules may impose a duty to speak once they determine that a conviction rests on legal or factual error.³⁹ Unlike routine discretionary choices justified by resource allocation or policy preference,⁴⁰ a confession of error represents an affirmative in-court acknowledgment that the government should not have prevailed.⁴¹

Unlike these litigation-centered doctrines, executive clemency operates through a wholly separate constitutional channel that bypasses judicial review entirely. The pardon power—rooted in Article II for federal offenses and state constitutional analogs—functions as an executive remedy in most states requiring minimal judicial approval.⁴² While clemency decisions may be motivated by doubts about guilt or fairness, the mechanics differ fundamentally from those of confessions

³⁷ See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (recognizing broad prosecutorial charging discretion); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *Stan. L. Rev.* 869, 871, 876–77 (2009) (noting that federal prosecutors wield enormous power through their authority to make charging decisions, enter cooperation agreements, accept pleas, and often dictate sentences or sentencing ranges).

³⁸ *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“[T]he decision whether or not to prosecute . . . generally rests entirely in [the prosecutor’s] discretion.” (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))).

³⁹ *Crim. Just. Standards for the Prosecution Function* § 3-1.2(b) (A.B.A. 4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/ [<https://perma.cc/TVU8-MCWM>].

⁴⁰ See Barkow, *supra* note 37, at 875–80 (describing the forward-looking, policy-driven nature of prosecutorial discretion over charging and resource-allocation decisions).

⁴¹ See *State v. Smith*, 797 A.2d 1073, 1073 (R.I. 2002) (“In future cases wherein the state moves to sustain a defendant’s appeal and to vacate a judgment of conviction, the state’s motion shall be accompanied by a confession of error specifically denoting the error asserted as a basis for reversal.”).

⁴² See U.S. Const. art. II, § 2, cl. 1 (“[The President] shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”); see, e.g., Va. Const. art. V, § 12 (“The Governor shall have power to . . . grant reprieves and pardons after conviction . . .”); see also *Collateral Consequences Res. Ctr.*, 50-State Comparison: Pardon Policy & Practice, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-characteristics-of-pardon-authorities-2/> [<https://perma.cc/ZR34-PRHU>] (last updated July 2025) (cataloging pardon administration across all fifty states).

of error.⁴³ A governor, believing the law was wrongly applied, might pardon someone, but that act neither adjudicates error nor alters the conviction's legal validity.⁴⁴ Confession of error, by contrast, invites the judiciary to exercise its power to vacate or reverse a judgment based on acknowledged legal or factual defect.

B. Doctrinal Evolution: Young and the “Great Weight” Standard

With confession of error now defined and distinguished from adjacent doctrines, the question shifts from identification to application: What weight should courts assign to prosecutorial admissions of error? Anglo-American courts answered this question consistently for centuries, treating executive confessions as nearly dispositive until *Young v. United States* recalibrated—but did not abandon—that deferential tradition in 1942.⁴⁵

The tradition began in England. In *Rex v. Wilkes*, the Attorney General acknowledged that seditious libel charges against a Member of Parliament could not be sustained.⁴⁶ The King's Bench ultimately accepted the confession.⁴⁷ The King's Bench acceptance demonstrated an early recognition of the government attorney's ability to confess and their duty of candor to the tribunal. American courts—both federal and state—adopted a more deferential approach. At the federal level, the Supreme Court treated confessions as largely self-executing, reversing with no independent review.⁴⁸ When the government confessed error,

⁴³ See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 Harv. L. Rev. 1332, 1345–46 (2008) (explaining the mechanics of clemency and its function in administrative law).

⁴⁴ See *Nixon v. United States*, 506 U.S. 224, 232 (1993) (“[T]he granting of a pardon is in no sense an overturning of a judgement of conviction by some other tribunal . . .”). The Virginia Governor's executive reprieves serve as an example of the various forms of executive clemency, e.g., Commonwealth of Va. Off. of the Governor, *List of Pardons, Commutations, Reprieves and Other Forms of Clemency*, S. Doc. No. 163-2 (2025), <https://r.ga.lis.virginia.gov/Published/2025/SD2/PDF> [<https://perma.cc/US7D-Z2RH>] (listing the Virginia Governor's pardons, commutations, and other forms of executive clemency).

⁴⁵ 315 U.S. 257, 258–59 (1942).

⁴⁶ *Rex v. Wilkes* (1770) 98 Eng. Rep. 327, 329; 4 Burr. 2527, 2531.

⁴⁷ *Id.*

⁴⁸ See Morley, *supra* note 19, at 304, 310 (noting that the “earliest reported Supreme Court cases involving confessions of error from the Government, dating from the end of the nineteenth century through the early 1940s, accept them as a matter of course” and explaining the Court's current practice of deferential review).

the Court simply granted the motion with formulaic language.⁴⁹ In *Cook v. United States*, for example, then-Solicitor General William Howard Taft conceded the improper admission of hearsay, prompting automatic reversal.⁵⁰ Such deference reflected institutional trust in the government's assessment and the notion that government attorneys, unlike private litigants, bear obligations transcending adversarial victory. By the early twentieth century, some state courts had begun following suit, deferring to prosecutorial confessions.⁵¹

The Supreme Court fundamentally altered how federal courts evaluate prosecutorial confessions of error in *Young v. United States*.⁵² The case arose from a physician's conviction under the Harrison Anti-Narcotic Act for failing to keep records of exempt preparations administered to patients to whom he personally attended.⁵³ The government confessed that the conviction was erroneous because the statute's record-keeping requirement did not apply to physicians treating their own patients.⁵⁴ Rather than simply accepting the government's concession and reversing like previous cases, the Court used this case to delineate the proper judicial response to prosecutorial confessions of error. Justice Murphy's opinion established that confessions are "entitled to great weight, but . . . judicial obligations compel [the Court] to examine independently the errors confessed."⁵⁵

The Court then applied this principle by engaging in its own statutory analysis before agreeing with the government's position.⁵⁶

⁴⁹ See *Luckey v. United States*, 163 U.S. 692, 692 (1896) (mem.) (reversing upon the government's confession of error); *Sherwin v. United States*, 312 U.S. 654, 654 (1941) (per curiam) (same); *Loveland v. United States*, 278 U.S. 665, 665 (1929) (mem.) (same); *United States ex rel. Fink v. Tod*, 267 U.S. 571, 571 (1925) (mem.) (same); *Kornmann v. United States*, 248 U.S. 594, 594 (1918) (mem.) (same).

⁵⁰ 138 U.S. 157, 184, 185 (1891) ("The representatives of the government, in this court, frankly concede, as it was their duty to do, that this action of the court below was so erroneous as to entitle the defendants to a reversal.")

⁵¹ See, e.g., *People v. Lewis*, 59 P. 830, 830 (Cal. 1899) (per curiam) (reversing upon the attorney general's confession of error); *Harris v. Commonwealth*, 68 S.E. 834, 834 (1909) (per curiam) (same); *Zancannelli v. People*, 165 P. 612, 612 (Colo. 1917) (per curiam) (same); see also Maak, *supra* note 16, at 290 & n.34 (surveying state court treatment and identifying six jurisdictions that "dispose of the appeal through reliance upon the confession alone").

⁵² 315 U.S. 257, 257 (1942).

⁵³ *Id.*

⁵⁴ *Id.* at 259.

⁵⁵ *Id.* at 258–59.

⁵⁶ *Id.* at 259–61.

Underpinning the modern framework was an institutional duty: “The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent.”⁵⁷ This approach—termed “meaningful deference” by this Note because of the balanced approach *Young* contemplates—supplanted the pre-*Young* era’s reflexive deference.⁵⁸ Executive admissions would be respected but not uncritically accepted.

Later cases elucidated the doctrinal shift. *Sibron v. New York*, a case originating in state court, reiterated that “great weight” does not relieve the Court of independent judgment.⁵⁹ *Casey v. United States* emphasized that accepting a confession “would not involve the establishment of any precedent,” thus preserving judicial flexibility.⁶⁰ Previewing later debates, Justice Douglas warned in dissent that some confessions may be strategic “maneuver[s] to save one case at the expense of another,” underscoring the need for scrutiny of motive as well as substance.⁶¹ Properly understood, *Young* and its progeny require federal courts to meaningfully consider executive admissions, neither treating confessions as empty formalities nor accepting them uncritically. And state courts should follow their lead. Yet, as this Note illustrates, this tension between respecting the government’s position while preserving critical judicial review remains difficult for state courts to navigate.

II. MODERN APPROACH: A DOCTRINE IGNORED

Eight decades after *Young* and the historical practice it reflected, the confession-of-error doctrine is at its lowest ebb. State and federal courts in observed jurisdictions struggle to articulate coherent standards for evaluating prosecutorial confessions. That struggle reflects a deeper failure to engage with the rationale underlying deference. Some courts conduct searching independent review, treating confessions as ordinary

⁵⁷ *Id.* at 258; see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The government’s] interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”).

⁵⁸ For another useful framing, see Transcript of Oral Argument at 55–56, *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025) (No. 22-7466) (statement of Paul D. Clement, counsel for Respondent) (describing the confession-of-error standard as “respectful consideration”).

⁵⁹ 392 U.S. 40, 58 (1968).

⁶⁰ 343 U.S. 808, 808 (1952) (*per curiam*).

⁶¹ *Id.* at 812 (Douglas, J., dissenting).

litigant arguments rather than as the considered judgment of an executive official.⁶² Other courts, by contrast, appear to grant relief with little to no explanation.⁶³ Almost none wrestle with why deference matters or when it is warranted.⁶⁴ The dysfunction is particularly acute in surveyed state courts, where the absence of binding federal standards leaves confession doctrine rudderless—and where the consequences are most severe. Federal review of state convictions operates within narrow constraints that make state courts the primary, often final, site of error correction.⁶⁵ When state courts disregard their own prosecutors' confessions of error, delayed justice often becomes denied justice. Current practice also reveals a deeper oversight: who confesses. Both line prosecutors and state attorneys general bring relevant institutional knowledge and legal responsibility that warrant judicial consideration. But current practice overlooks a meaningful distinction: state attorneys

⁶² See, e.g., *State v. Veikoso*, 74 P.3d 575, 577–78 (Haw. 2003) (“[A]ppellate courts have an independent duty first to ascertain that the confession of error is supported by the record and well-founded in law . . .” (internal quotation marks omitted) (quoting *State v. Hoang*, 3 P.3d 499, 502 (Haw. 2000))); see also *State v. Warholc*, 897 A.2d 569, 585 n.11 (Conn. 2006) (“Even if the state maintained its concession, we would not be bound by it.”); *State v. Warren*, 419 N.W.2d 795, 799 (Minn. 1988) (“The state’s concession, however, is based on a misconception of how factual basis may be determined and, therefore, we decline to be bound by it. We see no reason why we may not see what is in plain sight simply because the state has chosen not to.”); *State v. Martinez*, 979 P.2d 718, 726 (N.M. 1999) (“[A]ppellate courts in New Mexico are not bound by the Attorney General’s concession of an issue in a criminal appeal.”).

⁶³ Interestingly, Oklahoma was one of these states before *Glossip*. See NACDL Brief, supra note 5, at 2 (“Indeed, in all 298 cases involving confessions of error between 1908 and 2022, the OCCA ultimately granted relief to the defendant.”). This also appears to be the disposition of Utah courts: *State v. Sevastopoulos*, 2021 UT 70, ¶ 21, 502 P.3d 290, 294 (briefly mentioning the State’s confession to miscalculating electronic transfers); the Vermont courts: *State v. Vezina*, 2015 VT 56, ¶¶ 20–21, 199 Vt. 175, 121 A.3d 1195 (noting the Court’s practice to remand without discussion); and a Kansas intermediate court in an unpublished decision: *State v. Tubbs*, 342 P.3d 678, No. 110,617, 2015 WL 569382, at *1 (Kan. Ct. App. 2015) (unpublished table decision) (per curiam) (accepting confession making case moot).

⁶⁴ Compare *Commonwealth v. Dilliplane*, 305 A.3d 1011, No. 1672 MDA 2022, 2023 WL 6209655, at *1 (Pa. Super. Ct. 2023) (unpublished table decision) (analyzing deference based off the Commonwealth’s necessity to explain its position, the absence of jury verdict, and prosecutorial policy shift), and *Commonwealth v. Brown*, 196 A.3d 130, 143, 149 (Pa. 2018) (examining how prosecutorial discretion narrows post-verdict and rejecting confession that would reduce courts to “mere rubber stamps”), with *Thornton v. People*, 716 P.2d 1115, 1115 (Colo. 1986) (en banc) (per curiam) (accepting the State’s confession “in the interests of justice” without analysis).

⁶⁵ See *Foster v. Chatman*, 578 U.S. 488, 520 (2016) (Alito, J., concurring in the judgment) (noting the narrowness of federal review due to finality principles).

general occupy a unique constitutional position with statewide enforcement authority that warrants heightened deference.

Drawing on an examination of state court decisions across multiple jurisdictions, this Part demonstrates that courts consistently deny meaningful deference to confessions of error.⁶⁶ First, it demonstrates how state courts, in many jurisdictions, fail to meaningfully engage with prosecutorial acknowledgments of error. Second, it clarifies the constitutional and structural boundaries between state and federal courts, explaining why the absence of state court engagement creates problems that federal review cannot remedy—making principled state court deference essential, not optional. The solution this Note proposes—a uniform framework providing heightened deference to attorney general confessions—responds directly to this state court dysfunction. By recognizing the unique institutional authority of attorneys general and establishing clear standards for when their confessions warrant deference, the framework would restore coherence to a doctrine that has lost its moorings.⁶⁷

A. State Court Practice: The Absence of Meaningful Deference

State courts deny meaningful deference to confessions of error, treating them as ordinary litigation positions rather than institutional admissions from the sovereign. In these cases, courts conduct independent review of the merits—examining the record and legal

⁶⁶ This Part is based on a survey of confession-of-error decisions from state courts and federal courts reviewing state convictions. The survey was conducted by searching the term “confession of error” in case law databases, examining decisions from every state supreme court and, where the state’s appellate structure warranted, relevant intermediate appellate courts. In jurisdictions with extensive confession-of-error practice, such as Florida, the author reviewed a substantial majority of available cases rather than every decision. Several methodological limitations should be noted. First, the survey captures only cases using the specific term “confession of error” and does not account for functionally equivalent practices described by other terminology, such as “concession of error.” Second, because the survey is largely limited to reported cases, it necessarily excludes cases resolved through summary dispositions or dismissals without published opinion. While not exhaustive, the survey provides a representative cross-jurisdictional overview of current practice.

⁶⁷ While the arguments in Part II could apply to district attorney confessions, this Note focuses on attorney general confessions because deference is at its apex when the state’s chief legal officer acknowledges error. District attorneys warrant consideration too, but their localized authority and case-specific involvement distinguish them from attorneys general, who speak for the state as a whole. The Note addresses district attorney confessions where relevant—particularly when an attorney general has also confessed or when the district attorney serves as the state’s representative in criminal appeal proceedings.

questions de novo—in a manner functionally indistinguishable from how they evaluate any other appellant’s claims. Texas exemplifies this approach. In *Saldano v. State*, the Texas Court of Criminal Appeals established that while confessions are “entitled to great weight,” they remain “not conclusive.”⁶⁸ The court proceeded to conduct independent examination of both law and fact, ultimately affirming the lower court’s affirmance of conviction despite the Attorney General’s confession.⁶⁹ *Rogers v. State* and *Neale v. State* followed the same pattern: courts quoted *Young*’s deferential advisory language, acknowledged the confession, then conducted independent review that afforded the State’s position no discernible weight.⁷⁰ In *Neale*, the court went further, denying a joint motion to reverse and remand despite both parties agreeing that error had occurred, finding after independent review that “no reversible error” existed.⁷¹ What makes this pattern particularly troubling is that in each case, the State had conducted comprehensive case reviews, identified specific legal or factual errors warranting reversal, and exercised their prosecutorial judgment to confess. Yet the courts supplied no meaningful explanation for why the executive’s factual findings and legal conclusions deserved displacement by judicial second-guessing.

This pattern extends far beyond Texas. The rhetoric varies slightly—some jurisdictions emphasize their obligation to perform the judicial function, while others note they are “not bound” by executive concessions.⁷² Yet the operational reality is uniform: courts conduct

⁶⁸ 70 S.W.3d 873, 884 (Tex. Crim. App. 2002) (en banc) (quoting *Young v. United States*, 315 U.S. 257, 258 (1942)).

⁶⁹ *Id.* at 884–87.

⁷⁰ See *Rogers v. State*, 594 S.W.3d 432, 434 (Tex. App. 2019) (“The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed.”). State courts may engage with *Young* for prudential reasons. See generally M. Jason Hale, *Federal Questions, State Courts, and the Lockstep Doctrine*, 57 *Case W. Rsrv. L. Rev.* 927, 933–34 (2007) (describing how some state courts invoke federal precedent for prudential reasons such as maintaining “harmonious federal-state relationships” while retaining ultimate interpretive independence).

⁷¹ *Neale v. State*, 525 S.W.3d 800, 804 (Tex. App. 2017).

⁷² For examples of other state court decisions, see, e.g., *Commonwealth v. Poirier*, 935 N.E.2d 1273, 1276 (Mass. 2010) (giving weight to the government’s confession but independently examining the errors confessed); *In re K.A.*, 915 S.E.2d 520, 528 (W. Va. 2025) (“[W]e are not bound by the DHS’s confession of error and must independently review the record to determine if the confession of error is correct”); *State v. Hardin*, 429 S.W.3d 417, 421 n.4 (Mo. 2014) (en banc) (emphasizing that “this Court is not bound

plenary review, reassessing fact and law, with the confession functioning as little more than an opening brief. The executive's acknowledgment of error receives no apparent weight in the analysis.

A small subset of courts dutifully grant confessions without merits review.⁷³ These courts accept confessions without articulating any standard for evaluation or explanation of why deference is warranted.⁷⁴ This reflexive approach, while defendant-friendly, undermines institutional legitimacy. Without articulated standards, courts cannot distinguish well-founded confessions from strategic ones, cannot explain to the public why convictions are being vacated, and do not communicate principled approaches for handling confessions. The absence of reasoning makes these grants appear arbitrary—as though courts are abdicating their responsibility to the executive rather than thoughtfully administering their own institutional responsibilities.

A handful of available state court decisions have gestured toward evaluating factors that might inform deference decisions, but these efforts remain fragmentary and inconsistent. A meaningful inquiry into prosecutorial motive represents one component courts should assess when evaluating confessions.⁷⁵ For example, the Supreme Court of Pennsylvania in *Commonwealth v. Brown* examined, in part, whether political motivations undermined a confession's credibility.⁷⁶ Yet *Brown* stopped short of comprehensive analysis, focusing almost exclusively on electoral timing without examining the confession's substantive merits, the confessing official's institutional authority, or broader equitable considerations.⁷⁷ Virginia appellate courts have approached the question differently, distinguishing between legal and factual confessions and

by the Attorney General's confession of error" and conducting independent analysis); *State v. Veikoso*, 74 P.3d 575, 577–78 (Haw. 2003) (noting that "appellate courts have an independent duty" to ensure the confession of error is supported by the record).

⁷³ South Dakota appears to be one example. See *State v. Pierce*, 220 N.W.2d 254, 254–55 (S.D. 1974) (concluding that the State "correctly conceded" that defendant's motion for a directed verdict of acquittal "should have been granted by the trial court"). Vermont is another. See *State v. Vezina*, 2015 VT 56, ¶ 20, 199 Vt. 175, 121 A.3d 1195 ("When the State has confessed error, this Court's usual past practice has been to reverse and remand on the error that has been confessed without discussion.").

⁷⁴ See, e.g., *Pierce*, 220 N.W.2d at 254–55.

⁷⁵ *Commonwealth v. Brown*, 196 A.3d 130, 146 (Pa. 2018); see *infra* Section IV.B (discussing how the prosecutorial motive underlying confessions is analyzed in three Pennsylvania cases).

⁷⁶ *Brown*, 196 A.3d at 150.

⁷⁷ *Id.* at 149.

suggesting that different standards might apply depending on the nature of the acknowledged error.⁷⁸ Justice Viviano of the Supreme Court of Michigan built on this distinction by writing separately in a case to “lay out an explanation” for how courts should address confessions along this axis and concluding that “plausible” errors warrant relief.⁷⁹ Alaska’s appellate courts have implicitly shown another relevant consideration: the institutional authority of the Attorney General.⁸⁰ These scattered doctrinal threads—motive analysis, error-type distinctions, institutional authority, plausibility standards—hint at a more complete framework without achieving one. No jurisdiction has articulated a coherent, systematic approach that integrates these considerations into a principled deference standard.

B. The Limits of Federal Review

The absence of meaningful deference at the state level creates a structural problem. When state courts fail to defer to confessions of error, they often render the final judgment on the validity of a conviction. Federal courts rarely intervene to correct state criminal judgments, and when they do, their review is narrow.⁸¹ This reality makes state courts the primary—often final—forum for error correction, underscoring the need for a principled deferential approach at the state level.⁸²

Federal review operates under two well-trodden paths in this context, each narrow and limited. Supreme Court direct review under 28 U.S.C. § 1257(a) requires a federal question not foreclosed by adequate and independent state grounds—a jurisdictional limitation that eliminates

⁷⁸ See *Copeland v. Commonwealth*, 664 S.E.2d 528, 529 (Va. Ct. App. 2008) (emphasizing that the court would “never” accept confessions “if the issue were a pure question of law”); *Logan v. Commonwealth*, 622 S.E.2d 771, 773 (Va. Ct. App. 2005) (en banc) (distinguishing between legal and factual errors and refusing to defer on legal errors); *Jones v. Commonwealth*, 795 S.E.2d 705, 723 n.27 (Va. 2017) (“Every aspect of the Attorney General’s change of position, however, involves purely legal issues on which we must give our de novo judgment.”).

⁷⁹ *People v. Hernandez*, 965 N.W.2d 554, 554–55 (Mich. 2021) (Viviano, J., concurring).

⁸⁰ *Schlagel v. State*, 13 P.3d 275, 276 (Alaska Ct. App. 2000) (affirming that confessions by the Attorney General are entitled to great weight).

⁸¹ Eve Brensike Primus, *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-Court Criminal Convictions*, 61 *Ariz. L. Rev.* 291, 292, 294, 298 (2019).

⁸² See, e.g., Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 *Notre Dame L. Rev.* 443, 444 (2017) (recognizing that a lack of federal habeas relief has put state post-conviction relief into the foreground).

many state criminal law cases at the outset.⁸³ When a state court rests its judgment on a valid state procedural rule applied evenhandedly, the Supreme Court cannot reach the federal question regardless of its merits.⁸⁴

Collateral review through federal habeas corpus under 28 U.S.C. § 2254 presents different obstacles. While the adequate and independent state grounds doctrine does not technically bar federal habeas jurisdiction,⁸⁵ state procedural defaults can still preclude relief unless the petitioner demonstrates cause for the default and actual prejudice resulting from the alleged constitutional violation.⁸⁶ And for claims instead adjudicated on the merits in state court, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) imposes a high barrier. AEDPA, specifically § 2254(d)(1), places a “new constraint”⁸⁷ on a federal habeas court’s power to grant relief, modifying the previous regime in favor of a deferential standard that requires federal courts to uphold state decisions unless they are “contrary to, or involved an unreasonable application of, clearly established Federal law.”⁸⁸ Critically, “unreasonable” does not mean merely erroneous—state court

⁸³ See *Michigan v. Long*, 463 U.S. 1032, 1040–42 (1983) (holding that Supreme Court review of state court decisions requires a federal question and is barred where the state court rests its judgment on adequate and independent state grounds).

⁸⁴ See, e.g., *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (explaining that the Court lacks jurisdiction where state judgment rests on adequate and independent state grounds (citing *Harris v. Reed*, 489 U.S. 255, 260 (1989))); see also *Cruz v. Arizona*, 143 S. Ct. 650, 660 (2023) (holding that a state procedural rule applied in a novel manner to defeat federal rights does not constitute an adequate state ground).

⁸⁵ See *Fay v. Noia*, 372 U.S. 391, 398–99, 426, 429 (1963) (holding that the adequate and independent state grounds doctrine is “a function of the limitations of *appellate* review” that has no application to habeas corpus proceedings). This aspect of *Fay* remains good law even after *Wainwright v. Sykes* modified other portions. See *Wainwright v. Sykes*, 433 U.S. 72, 85, 87–88 (1977).

⁸⁶ See *Sykes*, 433 U.S. at 87–91 (replacing *Fay*’s “deliberate bypass” standard with the cause-and-prejudice requirement); see also *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (defining “cause” as “some objective factor external to the defense”).

⁸⁷ *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (“In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.”).

⁸⁸ 28 U.S.C. § 2254(d)(1). Again, AEDPA applies to claims “adjudicated on the merits” in state court—i.e., claims heard and decided, as distinguished from claims defaulted under *Sykes*. *Id.* § 2254(d).

decisions can be reasonably wrong and still unreviewable under § 2254(d)(1).⁸⁹

Because federal review of state convictions is so constrained, the burden falls on state courts to engage meaningfully with prosecutorial confessions of error. Yet that engagement is often absent—a gap that becomes visible only in extraordinary cases. In *Glossip v. Oklahoma*, Attorney General Drummond confessed constitutional error because of violations under *Brady v. Maryland* and *Napue v. Illinois*, yet the OCCA rejected the confession.⁹⁰ Only direct Supreme Court intervention compelled reconsideration.⁹¹ *Escobar v. Texas* followed a similar pattern. There, despite the Travis County District Attorney confessing that, under due process of law, flawed DNA evidence undermined a previous conviction, the Texas Court of Criminal Appeals dismissed the confession.⁹² And as with *Glossip v. Oklahoma*, only direct Supreme Court intervention compelled the state court to reconsider.⁹³ In both instances, the confession mechanism—designed to enable swift internal correction—failed entirely, requiring extraordinary federal intervention to remedy errors the state itself had already acknowledged.

These cases expose a structural problem. The confession mechanism cannot serve its intended function when state courts treat prosecutorial acknowledgments of error as mere litigation positions rather than as the considered judgment of the sovereign’s chief law enforcement officer. Because federal oversight is narrow and deferential, meaningful state court deference is not merely advisable—it is the primary, often only, mechanism capable of ensuring timely correction before federal review becomes either unavailable or ineffectual.

The pervasive failure by courts to provide meaningful deference obscures a rarely considered but essential question: *who* is confessing?⁹⁴

⁸⁹ See *Williams*, 529 U.S. at 410–11 (establishing that “unreasonable” requires more than mere error); *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (clarifying that relief requires error “beyond any possibility for fair-minded disagreement”).

⁹⁰ *Glossip v. Oklahoma*, 145 S. Ct. 612, 623–24 (2025); see *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression of exculpatory evidence by the prosecution violates due process); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (discussing that a conviction obtained through false testimony violates due process when the prosecution knew or should have known of the falsity).

⁹¹ *Glossip v. Oklahoma*, 144 S. Ct. 691, 691–92 (2024) (mem.).

⁹² *Ex parte Escobar*, 676 S.W.3d 664, 674–75 (Tex. Crim. App. 2023).

⁹³ *Escobar v. Texas*, 143 S. Ct. 557, 557 (2023) (mem.).

⁹⁴ Although the Supreme Court has recognized the distinct status of the attorney general as the sovereign’s legal voice as opposed to a line prosecutor, see *Sibron v. New York*, 392

Recognizing that state structures vary, this Note focuses on confessions where the attorney general acts in their legal capacity as the state's chief law officer charged with handling criminal appeals.⁹⁵ In such cases, a line prosecutor's case-specific concession, while still entitled to deference, carries different institutional weight than the considered judgment of the state's chief law enforcement officer. State courts rarely engage with this, conducting the same searching review regardless of the confessor.⁹⁶ This is a mistake. Part III confronts this oversight directly, arguing that attorney general confessions warrant heightened deference as the authoritative voice of the state's chief law enforcement officer.

Before proceeding to the deference argument, one initial counterargument bears recognition and dismissal. Some might argue that confessions already receive sufficient deference by securing otherwise unavailable appellate review. In other words, because a confession of error opens the courthouse doors for further review, it has a functional impact even if it receives no substantive deference. The confession is thus a procedural tool.⁹⁷ But, this defense fails on a few levels. First, the premise is procedurally questionable. Criminal

U.S. 40, 58 (1968) (distinguishing “a state official” from an officer of “one political subdivision within the State”), state courts seem to only do so implicitly. California and Alaska are two examples: *People v. Clark*, 542 P.3d 1085, 1090 (Cal. 2024) (accepting the Attorney General's confession without discussing why Attorney General status might warrant particular deference); *Marks v. State*, 496 P.2d 66, 67–68 (Alaska 1972) (same).

⁹⁵ Chris Toth, Adam Eisenstein & Salini Nandipati, *Criminal Justice*, in *State Attorneys General Powers and Responsibilities* 359, 373–77 tbl. 17-2 (Emily Myers ed., 4th ed. 2018) (cataloging state-by-state criminal appellate authority and showing that in most states, the attorney general handles all criminal appeals regardless of which prosecuting authority handled the case at trial).

⁹⁶ *Marks*, 496 P.2d at 67–68 (acknowledging the Attorney General's confession without discussion of their position). But see *Saldano v. State*, 70 S.W.3d 873, 883 (Tex. Crim. App. 2002) (en banc) (holding that district attorneys, and not the attorney general, possess authority to represent the state in criminal appeals and certiorari proceedings).

⁹⁷ Justice Ketanji Brown Jackson's questioning at oral argument in *Glossip* illustrated, in part, this conflation problem. When a state simultaneously waives a procedural bar and confesses error on the merits, courts may improperly reject the waiver *because* they disagree with the confession—treating two independent acts as a single indivisible one. The OCCA's approach in *Glossip* exemplified this error: the court rejected both the State's procedural waiver and its substantive confession without engaging with either on its own terms. See Transcript of Oral Argument at 66–67, *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025) (No. 22-7466).

defendants generally enjoy the right to an appeal on direct review,⁹⁸ and in some jurisdictions they hold statutory entitlements to seek post-conviction or habeas relief, irrespective of the prosecution's stance.⁹⁹ For example, the OCCA was obliged to review Glossip's successive application whether or not Attorney General Drummond confessed error based on Oklahoma statute.¹⁰⁰

Second, this interpretation of the value of a confession misunderstands the locus of the deferential mandate exemplified in *Young* and other cases. *Young* requires giving deference to the confession during the court's *substantive analysis*, rather than merely viewing the confession as the means to access appellate review.¹⁰¹ The distinction matters: state courts must give weight to the confession when evaluating the merits, not simply use it to reach the merits. Third, this reading defeats a confession's functional purpose. When the sovereign declares that a conviction should not stand, courts that reject the confession force continued imprisonment over the state's own objection.

III. BEYOND CASE-BY-CASE CONFUSION: THE ARGUMENT FOR ATTORNEY GENERAL DEFERENCE

The current doctrine fails at the threshold: courts routinely decline to give confessions meaningful weight. *Glossip* crystallized this problem. When even a state attorney general's confession of error in a capital case cannot secure meaningful judicial review, the deference doctrine has fundamentally failed. This Part lays the groundwork for a structured alternative, establishing why state attorneys general merit presumptive deference.

⁹⁸ See, e.g., Okla. Stat. tit. 22, § 1051(A) (2025) ("An appeal to the Court of Criminal Appeals may be taken by the defendant, as a matter of right from any judgment against the defendant . . ."); N.Y. Crim. Proc. Law § 450.10(1) (McKinney 2025) (granting defendant an appeal as of right from a judgment).

⁹⁹ See Okla. Stat. tit. 22, § 1080 (2025); see also Tex. Code Crim. Proc. Ann. art. 11.07 (West 2025). Of course, these statutory entitlements are sharply constrained: federal habeas petitions are limited by exhaustion, procedural default, statutes of limitation, and restrictions on successive petitions. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217–20.

¹⁰⁰ See Okla. Stat. tit. 22, § 1089(D)(4), (D)(8) (2025) (allowing the OCCA to review and rule upon successive post-conviction applications when certain statutory conditions or exceptions are met, independent of the prosecution's position).

¹⁰¹ See, e.g., *Young v. United States*, 315 U.S. 257, 258–59 (1942) (citing *Parlton v. United States*, 75 F.2d 772, 773 (D.C. Cir. 1935)).

A. Justifying Deference Writ Large

Deference to executive determinations pervades American law, including at the state level. While the most prominent examples arise in federal contexts like foreign affairs or administrative law,¹⁰² state courts can apply analogous principles to state executive actors.¹⁰³ Most relevant here, state courts do defer to prosecutorial discretion over charging decisions¹⁰⁴ and plea negotiations.¹⁰⁵ This architecture reflects core structural realities: the executive branch possesses superior factual access, policy expertise, and direct political responsibility for criminal enforcement. To the extent that courts routinely credit forward-looking executive judgments about law application and policy choices, their reflexive skepticism toward backward-looking error corrections represents an unprincipled doctrinal move demanding reconciliation.

Confessions of error specifically enjoy a distinguished historical pedigree.¹⁰⁶ This tradition recognized that when the sovereign admitted error, courts should treat that admission as weighty evidence warranting relief. Modern Supreme Court doctrine reflects this principle in moderated form. *Young* unambiguously commands that courts give

¹⁰² See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (according weight to agency interpretations’ “power to persuade”); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (emphasizing reliance on executive representations in foreign affairs).

¹⁰³ See Martha Kinsella & Benjamin Lerude, *Judicial Deference to Agency Expertise in the States*, *State Ct. Rep.* (June 28, 2024), <https://statecourtreport.org/our-work/analysis-opinion/judicial-deference-agency-expertise-states> [<https://perma.cc/42F9-FLSY>] (finding that a majority of states provide “substantial or appreciable deference to agency actions”).

¹⁰⁴ For examples of various states, see *Commonwealth v. Brown*, 196 A.3d 130, 145–46 (Pa. 2018) (discussing how prosecutorial discretion is broad at the beginning of a case); *In re Padget*, 678 P.2d 870, 873 (Wyo. 1984) (holding that under the Wyoming Constitution, the judiciary can only be involved post-charging decision); *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005) (“[U]nless the prosecutor abuses his or her discretion or demonstrates improper intent, ‘the judiciary is powerless to interfere with the prosecutor’s charging authority.’” (quoting *State v. Krotzer*, 548 N.W.2d 252, 254 (Minn. 1996))); see also *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (describing several rationales underpinning judicial deference to the decisions of prosecutors).

¹⁰⁵ See Dylan R. McDonough, Note, *In the Shadow of the Bench: Judicial Discretion to Reject Plea Agreements*, 57 *Colum J.L. & Soc. Probs.* 633, 649–52 (2024) (identifying states that bar or limit judicial participation in plea negotiations); see also *People v. Orin*, 533 P.2d 193, 197 (Cal. 1975) (en banc) (“However, the court has no authority to substitute itself as the representative of the People in the negotiation process . . .”).

¹⁰⁶ See, e.g., *Hohenstein v. Hedden*, 149 U.S. 776, 776 (1893); *Ballin v. Magone*, 140 U.S. 670, 670 (1891).

“great weight” to confessions before considering independent review,¹⁰⁷ while even *Sibron*—arguably miscited as mandating independent review¹⁰⁸—explicitly preserves deference for confessions supported by adequate reasoning.¹⁰⁹

Functional considerations continue to support deference. Prosecutors possess superior knowledge of trial dynamics, investigative realities, and evidentiary weaknesses that appellate courts reviewing cold records cannot replicate.¹¹⁰ The confession itself signals prosecutorial judgment that conviction integrity has been compromised—a determination courts should presumptively credit rather than second-guess. The Supreme Court’s established practice of grants, vacates, and remands further demonstrates institutional comfort with executive error acknowledgment driving outcomes.¹¹¹ Yet contemporary doctrine treats these precedents as anomalies rather than exemplars, encouraging independent review that contradicts historical practice, precedent, and the functional logic underlying deference principles across diverse legal domains.¹¹²

¹⁰⁷ *Young v. United States*, 315 U.S. 257, 258–59 (citing *Parlton v. United States*, 75 F.2d 772 (D.C. Cir. 1935)).

¹⁰⁸ For a federal example of using *Sibron* to reject deference and conduct untethered analysis, see *Every v. Blackburn*, 781 F.2d 1138, 1141 (5th Cir. 1986) (denying the State’s “erroneous confession of error”). For state examples, see, e.g., *Commonwealth v. Poirier*, 935 N.E.2d 1273, 1275 (Mass. 2010) (granting confessions of error “great weight” but conducting an independent examination (quoting *Sibron v. New York*, 392 U.S. 40, 58 (1968))); *McCollum v. State*, 2014-KA-01522-COA (¶ 19), 186 So. 3d 948, 953 (Miss. Ct. App. 2016) (holding that courts must examine the record independently of a confession of error); *State v. Warren*, 419 N.W.2d 795, 799 (Minn. 1988) (same).

¹⁰⁹ *Sibron*, 392 U.S. at 58 (citing *Young*, 315 U.S. at 258).

¹¹⁰ See Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1193 (1995) (arguing that appellate courts are institutionally ill-equipped to assess guilt from the record alone because “many events of trial pass without casting so much as a shadow upon the printed transcript”).

¹¹¹ *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167–68 (1996) (per curiam).

¹¹² See *Morley*, supra note 19, at 304–06 (detailing early Supreme Court confession-of-error practice and observing that “the far more common practice prior to the 1940s was for the Court to simply reverse based on the confession of error without considering the merits or establishing a precedent”); see, e.g., *Luckey v. United States*, 163 U.S. 692, 692 (1896) (mem.) (reversing upon the government’s confession of error); *Sherwin v. United States*, 312 U.S. 654, 654 (1941) (per curiam) (same); *Loveland v. United States*, 278 U.S. 665, 665 (1929) (mem.) (same); *Kornmann v. United States*, 248 U.S. 594, 594 (1918) (mem.) (same). To be sure, pre-*Young* practice was not entirely uniform. See *Maak*, supra note 16, at 290–92 (noting that while most courts reversed upon confession, a small number conducted some form of merits review in rare circumstances). This Note does not advocate a return to automatic, unquestioning acceptance of confessions. Rather, the claim is that *Young* itself struck a principled balance—requiring courts to give confessions “great weight” before

B. Argument for Attorney General Deference

Turning to attorney general deference specifically, this Section explains why their confessions warrant significant deference. First, it examines the unique constitutional architecture that distinguishes attorneys general from all other government actors. Second, it shows how democratic legitimacy reinforces their error-correction function. Third, it demonstrates their superior institutional competence through investigative resources and statewide perspective. Finally, it addresses why meaningful deference serves systemic integrity and institutional virtue.

1. Constitutional Structure and the Attorney General's Role

State attorneys general occupy a unique constitutional position that ought to lend particular weight to their confessions of error. As “chief legal officer[s],” they are charged with upholding the state constitution, must comply with the Federal Constitution, and assume a sovereign obligation to ensure justice.¹¹³ An attorney general’s authority can be distributed differently across states: centralized in some while more decentralized in others.¹¹⁴ However, the attorney general is usually the ultimate legal voice of the sovereign in litigation.¹¹⁵ Their common law roots are recognized as well.¹¹⁶ And so too, their constitutional stature.¹¹⁷ These dual constitutional and common law foundations

proceeding to review—that contemporary courts have abandoned in favor of plenary reassessment that affords confessions no discernible weight. See *Young*, 315 U.S. at 258–59.

¹¹³ Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 *Colum. L. Rev.* 1998, 2002 (2001); see also Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 *U. Fla. J.L. & Pub. Pol’y* 1, 6–7 (1993) (noting the state attorney general’s role “in providing legal advice to the governor and state agencies and in enforcement of state laws”).

¹¹⁴ See generally Toth et al., *supra* note 95 (discussing and analyzing various state models of prosecutorial authority).

¹¹⁵ See *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266–67 (Mass. 1977); see also *Hodge v. Commonwealth*, 116 S.W.3d 463, 474 (Ky. 2003) (“[T]he Attorney General is the chief law officer and chief prosecutor of the Commonwealth . . .”).

¹¹⁶ *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268–71 (5th Cir. 1976) (affirming the authority of a state attorney general to litigate without express statutory authority and recognizing the position’s common law roots). But see *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal. 1981) (en banc) (rejecting the California Attorney General’s common law authority (first citing Cal. Const. art. V, § 1; and then citing Cal. Const. art. V, § 13)).

¹¹⁷ For an overview of their constitutional and wider legal authority, see Matheson, *supra* note 113, at 3–14 (outlining the constitutional structure and duties of state attorneys general).

provide attorneys general with institutional legitimacy that differentiates their legal judgments from those of any other government actors.

Thus, a confession of error by the attorney general implicates the kind of “sovereign interests” the Supreme Court recognized in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*: namely, the state’s power to create and enforce its own legal code.¹¹⁸ These confessions represent not just litigation tactics, but institutional judgments about the constitutional integrity of the state’s own criminal process. They also implicate quasi-sovereign interests in maintaining public confidence in the fairness of justice, which *Snapp* characterized as essential to the well-being of the citizenry.¹¹⁹ Taken together, the sovereign and quasi-sovereign concerns help explain why courts should afford meaningful weight to an attorney general’s confession of error. These confessions reflect the state’s highest law enforcement authority acknowledging a potential failure in fulfilling its common law, statutory, and constitutional legal obligations.

Attorney general confessions of error also serve as a constitutional check within the state’s system of separated powers. By reassessing convictions and acknowledging error, the attorney general performs a critical oversight function, checking both prior prosecutorial conduct and potential judicial mistakes.¹²⁰ Far from undermining judicial independence, meaningful judicial consideration of such confessions respects the attorney general’s constitutional role as the executive’s chief legal conscience. *Buck v. Davis* exemplifies how institutional correction through confession of error serves the public interest.¹²¹ There, Texas Attorney General John Cornyn had acknowledged, fifteen years before the Supreme Court’s intervention, that racial bias had infected numerous capital sentencing proceedings.¹²² Such willingness to confess past errors, particularly when acknowledging constitutional violations of this magnitude, strengthens public confidence in the justice system’s capacity for accountability and reinforces its institutional legitimacy.

¹¹⁸ 458 U.S. 592, 601 (1982) (“Two sovereign interests are easily identified: First, the exercise of sovereign power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal . . .”).

¹¹⁹ *Id.* at 602 (“Quasi-sovereign interests . . . consist of a set of interests that the State has in the well-being of its populace.”).

¹²⁰ See Toth et al., *supra* note 95, at 364.

¹²¹ 580 U.S. 100, 124–25 (2017).

¹²² *Id.* (noting the “remarkable” nature of the Texas Attorney General’s confession that racial bias had infected the sentencing phase of numerous capital cases).

2. *Democratic Legitimacy of Attorneys General*

Attorneys general are uniquely positioned within the American legal system on a second front. Forty-three attorneys general are elected statewide, giving them a direct mandate from the full electorate to represent both the state and its citizens.¹²³ For the seven unelected attorneys general, the argument is moderated since they remain legally authoritative but lack the same democratic foundation. In the context of confessions of error, these dual considerations—democratic legitimacy and institutional stewardship—distinguish the attorney general’s judgment from the Solicitor General or line prosecutors.¹²⁴ Legislative designation of their powers and duties also lends statutory credence to their authority.¹²⁵

Unlike district attorneys, who represent specific jurisdictions and often reflect localized interests, attorneys general represent the state as a whole and safeguard its legal interests.¹²⁶ Their perspective should transcend individual cases to encompass broader concerns for systemic integrity and the rule of law. To be sure, elected local prosecutors

¹²³ The states that do not have separately elected executive officers aside from the governor are Alaska, Hawaii, Maine, New Hampshire, New Jersey, Tennessee, and Wyoming. See *State Attorneys General: Powers and Responsibilities* 15 (Lynne M. Ross ed., 1990); see also Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 *Colum. J.L. & Soc. Probs.* 365, 369–72 (2005) (discussing the numerous elected executive officers).

¹²⁴ In *Escobar v. Texas*, the Texas Attorney General, speaking for the Correctional Institutions Division, explicitly disagreed with the Travis County District Attorney’s confession of error. He emphasized that the confession reflected a localized political judgment, not the sovereign position of the State of Texas. See *Amicus Curiae Brief of the Correctional Institutions Division of the Texas Department of Criminal Justice in Opposition to Petition at 1–3, 9–10, Escobar v. Texas*, 145 S. Ct. 1423 (2025) (mem.) (No. 23-934) [hereinafter *AG Paxton Brief*].

¹²⁵ *Prosecuting Att’y ex rel. Williams v. State*, 696 S.W.3d 853, 866–67 (Mo. 2024) (en banc) (concluding that Missouri’s statutory scheme prevents local prosecutors from unilaterally conceding constitutional error). The court highlighted an important statutory grant to the Attorney General, an additional source of legal authority. Mo. Rev. Stat. § 547.031(4) grants the Attorney General authority to intervene and move to dismiss prosecutorial motions to vacate. Meanwhile, § 27.050 designates the Attorney General to “appear on behalf of the state in the court of appeals and in the supreme court and have the management of and represent the state in all appeals to which the state is a party.” *Williams*, 696 S.W.3d at 867 (quoting Mo. Rev. Stat. § 27.050 (2024)).

¹²⁶ See Matheson, *supra* note 113, at 3 (noting that attorneys general typically advise state officials, represent the state in litigation, enforce state law, and, in some states, supervise local prosecutors); see also *Mem’l Hosp. Ass’n, Inc. v. Knutson*, 722 P.2d 1093, 1097 (Kan. 1986) (noting that where there is a public interest, the Attorney General has a right to intervene).

possess their own form of democratic legitimacy that warrants consideration by state courts by virtue of their electoral mandate. But where their power is localized, tied to county or district constituencies, the attorney general's confession reflects the considered position of the state as a whole.

Federal prosecutors, though they represent the United States, also lack comparable democratic legitimacy. Their authority flows downward from the executive branch, not upward from the people.¹²⁷ While their views may reflect federal priorities, they do not carry the same democratic imprimatur as a state attorney general. Nor do they speak for a sovereign entity in the same sense. The state, unlike a federal agency, possesses *inherent* constitutional authority to structure and enforce its own criminal laws combined with electoral weight.¹²⁸ Courts should give that judgment meaningful consideration not as a matter of deference to individual prosecutorial discretion, but as recognition of the role the attorney general plays within our federalist system.¹²⁹ For brevity's sake, this Note does not examine the full scope of an attorney general's authority or the sovereignty relationship with the governor.¹³⁰

3. Institutional Competence and Investigative Capacity

Attorneys general possess investigative tools that courts, bound to the adversarial record and prohibited from independent fact finding,

¹²⁷ U.S. Attorneys are appointed by the President with Senate confirmation and may be removed at will by the President. See 28 U.S.C. § 541; *Myers v. United States*, 272 U.S. 52, 135 (1926) (recognizing plenary presidential removal power over executive officers). They are not elected and do not represent any particular constituency within the states.

¹²⁸ See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (reaffirming state sovereignty over areas like criminal law enforcement); see also *New York v. United States*, 505 U.S. 144, 181 (1992) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

¹²⁹ See *Lynch*, supra note 113, at 2002 (tracing the expansive powers of state attorneys general to their common law roots).

¹³⁰ See, e.g., Haw. Rev. Stat. § 28-1 (2025) (“The attorney general shall appear for the State personally or by deputy, in all the courts of record, in all cases criminal or civil in which the State may be a party, or be interested, and may in like manner appear in the district courts in such cases.”); *Hodge v. Commonwealth*, 116 S.W.3d 463, 474 (Ky. 2003) (“[T]he Attorney General is the chief law officer and chief prosecutor of the Commonwealth . . .”). But see *Perdue v. Baker*, 586 S.E.2d 606, 609, 614 (Ga. 2003) (explaining that while the Attorney General is the chief legal officer of the state, neither the Attorney General nor the Governor has the exclusive power to decide the State's interest in litigation).

inherently lack.¹³¹ They can deploy law enforcement partnerships, internal investigators, and subpoena power to access prosecution files, witness interviews, and forensic evidence unavailable on appellate review.¹³² This capacity can prove critical for detecting post-trial prosecutorial misconduct like *Brady* violations or *Napue* infractions.¹³³

The *Glossip* case demonstrates this institutional advantage. Attorney General Drummond's investigation—reviewing 146,000 pages of documents—uncovered previously withheld evidence contradicting the State's key witness.¹³⁴ Courts conducting record-based review cannot duplicate such comprehensive fact finding given their resource constraints and institutional design.¹³⁵ Drummond's collaboration with state lawmakers to commission an independent investigation further enhanced the confession's thoroughness and legitimacy. This approach demonstrates how attorneys general can leverage institutional partnerships. They can also leverage interoffice tools—including Conviction Review Units—to identify errors beyond the reach of traditional adversarial review.¹³⁶

¹³¹ See Morley, *supra* note 19, at 333–34 (“Appellate courts generally are not equipped to accept new evidence . . .”); see also *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (reaffirming that appellate courts “rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present” (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008))); Model Code of Jud. Conduct r. 2.9(C) (A.B.A. 2020) (“A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”).

¹³² For an excellent review, see Toth et al., *supra* note 95.

¹³³ See Cynthia E. Jones, A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence, 100 *J. Crim. L. & Criminology* 415, 433–34 (2010) (discussing institutional barriers to judicial discovery of *Brady* violations).

¹³⁴ Report from Rex Duncan, Indep. Couns., to Gentner Drummond, Okla. Att’y Gen. (Apr. 3, 2023), https://oklahoma.gov/content/dam/ok/en/oag/news-documents/2023/april/glossip_report_4.3.2023_redacted.pdf [<https://perma.cc/DR34-GATK>].

¹³⁵ See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all [favorable] evidence and make disclosure when the point of ‘reasonable probability’ is reached.”).

¹³⁶ Conviction Integrity Units are specialized units within prosecutors’ offices tasked with independently reinvestigating potentially wrongful convictions. John Holloway, Quattrone Ctr. for the Fair Admin. of Just., Conviction Review Units: A National Perspective 10 (2016) (describing the power of Conviction Review Units as an independent tool for fact investigation).

Importantly, this flips the justified critique that prosecutors wield asymmetric power through charging decisions and plea bargaining.¹³⁷ When the government confesses error, it relinquishes rather than asserts power. The concern shifts from prosecutorial overreach to prosecutorial accountability. When the state's chief legal officer, after thorough investigation, concludes that error undermined a conviction, that judgment reflects institutional advantages courts lack and the prosecutor's ethical obligation. This approach also promotes judicial efficiency by avoiding protracted litigation of errors, particularly in capital cases where delay compounds injustice.¹³⁸

4. Confessions of Error as Institutional Virtue

When attorneys general publicly disavow prior prosecutorial positions, such acts reflect institutional strength, not failure. These confessions prioritize system integrity over adversarial victory and deserve careful judicial attention.¹³⁹

The 2011 acknowledgment that the government misled the Supreme Court in *Korematsu v. United States* exemplifies this general principle.¹⁴⁰ Acting Solicitor General Katyal's formal confession furthered rather than undermined the Justice Department's legitimacy by righting a profound moral wrong, affirming the value of institutional self-correction. So too for attorneys general who confess error in the face of institutional pressure to maintain a conviction. As the Innocence Project has documented, law enforcement actors often *resist* exoneration, and their openness to new evidence narrows after a conviction has been secured.¹⁴¹ Confessing error under such pressure demonstrates institutional integrity. The attorney general possesses

¹³⁷ See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 148–51 (2004) (discussing systemic costs of protracted litigation in wrongful conviction cases).

¹³⁸ See *id.* at 148–49.

¹³⁹ State attorneys general have confessed error in only eight murder cases since 1908 in Oklahoma, demonstrating the extraordinary nature of such concessions. See NACDL Brief, *supra* note 5, at 5.

¹⁴⁰ Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, U.S. Dep't of Just. Blog (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/2AQY-DCH6]; see *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁴¹ Brief for the Innocence Project as Amicus Curiae Supporting Petitioner at 5, *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025) (No. 22-7466).

unique, broad authority to balance competing interests: justice, finality, public safety, and victims' rights. When continued enforcement undermines these interests, the attorney general should act.¹⁴²

After all, the justice system will inevitably produce errors.¹⁴³ What matters is how institutions respond. Meaningful judicial engagement with well-supported confessions creates essential systemic incentives: it encourages prosecutorial candor. Dismissive treatment chills that impulse, entrenches litigation, and erodes public confidence.¹⁴⁴ This dynamic aligns with prosecutors' ethical framework. Model Rule 3.8(h) requires prosecutors who know of clear and convincing evidence that a defendant was convicted of a crime they did not commit to "seek to remedy the conviction."¹⁴⁵ But Rule 3.8(h) addresses only actual innocence—not the full range of serious errors that may warrant a confession.¹⁴⁶ Confessions can involve *Brady* violations, undisclosed false testimony, or other prosecutorial misconduct that undermines confidence in the conviction without necessarily establishing

¹⁴² See, e.g., *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977) (acknowledging the Attorney General's independent and longstanding common law authority even against other executive agencies); see also Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 *Yale L.J.* 2100, 2125 (2015) ("The common law power to represent the public authorizes many attorneys general to file suits on behalf of the people. . . . Attorneys general have also invoked their common law authority 'to represent the public interest' when filing lawsuits challenging the validity of state law." (quoting Brief of Thurbert E. Baker et al. as Amici Curiae in Support of Respondent at 6, *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (No. 03SA147))); *Salazar*, 79 P.3d at 1229–31 (en banc) (recognizing the Attorney General's duty to consider broader constitutional values when determining which state interests to advance); cf. *State v. Lead Indus. Ass'n*, 951 A.2d 428, 471–72 (R.I. 2008) (discussing the Attorney General's "common law duty to represent the public interest" (quoting *Newport Realty, Inc. v. Lynch*, 878 A.2d 1021, 1032 (R.I. 2005))).

¹⁴³ See Brief of Amicus Curiae the Innocence Project in Support of Petitioner Richard Eugene Glossip at 4, 13, 17, *Glossip*, 145 S. Ct. 612 (No. 22-7466) (arguing that confessions of error reflect institutional integrity, and judicial recognition of such confessions fosters candor and public trust in the justice system).

¹⁴⁴ See *id.* at 17.

¹⁴⁵ Model Rules of Pro. Conduct r. 3.8(h) (A.B.A. 2023).

¹⁴⁶ Rule 3.8(h) applies only upon "clear and convincing evidence" that "a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit." Rule 3.8(g) is triggered at a lower threshold—when a prosecutor knows of "new, credible and material evidence creating a reasonable likelihood" that a convicted defendant did not commit the offense. See *id.* rs. 3.8(g)–(h); see also *id.* r. 3.8 cmts. [7]–[9] (clarifying that the focus is on actual innocence).

innocence.¹⁴⁷ For these errors, complementary ethical obligations supply the foundation: Rule 8.4(d) prohibits conduct “prejudicial to the administration of justice,” and a prosecutor’s silence about known serious errors is difficult to reconcile with “the responsibility of a minister of justice” that Comment 1 to Rule 3.8 describes.¹⁴⁸ Rule 3.8(d) separately requires prosecutors to disclose all evidence or information “that tends to negate the guilt of the accused”—a duty with no temporal limitation that extends beyond constitutional *Brady* requirements.¹⁴⁹ Although adoption of this rule varies by state jurisdiction, its baseline principle underscores the duty of candor and error correction common to state and federal prosecutors alike.¹⁵⁰ Courts that meaningfully consider such confessions uphold not only the state’s constitutional obligations but also the ethical framework that defines the prosecutorial role.

IV. SOLVING THE PROBLEM: A STRUCTURED FRAMEWORK

Outlining the virtues of attorney general deference is the first step. Courts need a structured framework to evaluate when such deference is warranted and when countervailing concerns justify departure. They

¹⁴⁷ Some of these errors may trigger disclosure duties under Rule 3.3(a)(3) or Rule 3.3(b), though those obligations expire when the time for review of the proceeding ends. See *id.* rs. 3.3(a)(3), (b). Rule 3.4 prohibits the underlying misconduct but does not independently impose a duty of post-conviction disclosure. *Id.* r. 3.4. Nothing in these limitations, however, prevents an attorney general from voluntarily disclosing such errors to a court.

¹⁴⁸ *Id.* r. 8.4(d). A prosecutor who remains silent about serious errors arguably engages in “conduct that is prejudicial to the administration of justice,” particularly given the prosecutor’s special role as “a minister of justice and not simply that of an advocate.” *Id.* r. 3.8 cmt. [1]; see also *Crim. Just. Standards for the Prosecution Function* § 3-8.1 (A.B.A. 4th ed. 2017) (“The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.”).

¹⁴⁹ Model Rules of Pro. Conduct r. 3.8(d) (A.B.A. 2023). Although Rule 3.8(d) is framed as a pretrial disclosure obligation, its text contains no temporal limitation, and the breadth of its command—requiring disclosure of all information that “tends to negate the guilt of the accused or mitigates the offense”—arguably encompasses post-conviction disclosure of errors that could be grounds for setting aside a judgment.

¹⁵⁰ Wisconsin has formally incorporated this duty into its Rules of Professional Conduct. *Wis. Rules of Pro. Conduct for Att’ys SCR 20:3.8(h)* (State Bar of Wis. 2017) (requiring that a “prosecutor shall seek to remedy the conviction”); see also *Mass. Rules of Pro. Conduct r. 3.8(j)* (2025) (“When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor’s office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.”).

have rightly been concerned about unqualified acceptance.¹⁵¹ Yet the frequent reaction to reflexively reject or accept confessions has produced the very incoherence documented throughout this Note. What the doctrine requires—and what Part IV proposes—is a framework that respects an attorney general’s unique role while preserving meaningful judicial review. Only through such structured analysis can courts move beyond case-by-case confusion toward principled, predictable outcomes that honor both executive accountability and judicial independence.

A. The Proposed Framework

1. The Merits Factor: Evaluating the Substance of the Confession

The first and most important factor courts should consider is the substantive merit of the confession itself. To what extent does the confession address a specific, identifiable error that undermines confidence in the underlying judgment? Courts should examine whether the error is legal or factual.¹⁵² They should also assess whether the confession rests on a clear articulation of the alleged error and its materiality.¹⁵³

When evaluating the merits, courts ought to distinguish between different types of confessed errors. Errors of law, such as sentencing or sufficiency of the evidence claims, generally fall within the core judicial function and thus warrant much closer scrutiny.¹⁵⁴ By contrast,

¹⁵¹ See, e.g., *Commonwealth v. Brown*, 196 A.3d 130, 149 (Pa. 2018) (refusing to “rubber stamp[]” a prosecutor’s confession of error and emphasizing that judicial review must remain independent).

¹⁵² The Supreme Court appeared concerned about this in *Glossip v. Oklahoma*. See Transcript of Oral Argument at 55, *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025) (No. 22-7466) (statement of Sotomayor, J.) (“The court has to be satisfied that there’s a basis in law and fact for the confession, correct?”).

¹⁵³ See *State v. Smith*, 797 A.2d 1073, 1073 (R.I. 2002) (mem.) (“In future cases wherein the state moves to sustain a defendant’s appeal and to vacate a judgment of conviction, the state’s motion shall be accompanied by a confession of error specifically denoting the error asserted as a basis for reversal . . . for the Court’s independent consideration of the asserted error . . .”).

¹⁵⁴ See *Logan v. Commonwealth*, 622 S.E.2d 771, 773 (Va. Ct. App. 2005) (“Because the law applies to all alike [and] cannot be subordinated to the private opinions of litigants,” an “entirely different paradigm” governs factual questions unique to the parties, thus recognizing the maxim that “[a] party can concede the facts but cannot concede the law.” (quoting *Cofield v. Nuckles*, 387 S.E.2d 493, 498 (Va. 1990))); see also *Baker v. Carr*, 369 U.S. 186, 217 (1962) (distinguishing legal questions suitable for judicial resolution from political questions involving fact-intensive policy matters like foreign relations).

confessions based on prosecutorial misconduct or newly discovered evidence often rely on the executive branch's superior investigative capacities and institutional access to case files, witnesses, and evidence.¹⁵⁵ These fact-bound confessions deserve considerably greater deference. As previously discussed, prosecutors possess unique knowledge of their case's factual records and wider context that courts cannot readily assess independently. Accordingly, when an attorney general confesses error based on factual investigation rather than legal interpretation, courts should presume the confession's validity absent clear evidence of bad motives.¹⁵⁶

This legal-factual distinction plays out in practice. Justice Viviano's opinions in two Michigan Supreme Court cases illustrate the principle. In *People v. Altantawi*, Justice Viviano dissented from the court's acceptance of a prosecutorial confession regarding a *Miranda* waiver that lacked any plausible legal basis.¹⁵⁷ Then, in *People v. Hernandez*, he issued a similar warning that the judiciary must not "dispose of a case merely on the basis of a prosecutor's confession of error without some determination that the confession was meritorious."¹⁵⁸ Yet in *Hernandez*, he concurred when the prosecution properly conceded that the trial court abused its discretion in imposing life without parole—a confession grounded in clear precedent and substantial evidence.¹⁵⁹ Together, these opinions support the structured framework this Note advocates: courts must weigh confessions for plausibility and legal

¹⁵⁵ See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all [favorable] evidence . . ."); see also *United States v. Weber*, 721 F.2d 266, 268 (9th Cir. 1983) (per curiam) ("In deciding whether to initiate or terminate a prosecution the prosecutor has access to and must take into consideration a wide range of information that may not be competent evidence at trial. No doubt this is part of the reason the prosecutor must be given wide latitude in making those decisions.").

¹⁵⁶ See *Miller v. Fenton*, 474 U.S. 104, 113–14 (1985) (noting that the methodology for distinguishing questions of fact from questions of law "has been, to say the least, elusive" but that the distinction often turns on which institutional actor "is better positioned" to resolve the issue); *Comm'r v. Duberstein*, 363 U.S. 278, 289 (1960) (explaining that factual determinations require "the application of the fact-finding tribunal's experience with the mainsprings of human conduct"); see also Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 237 (1985) (noting the difficulties of identifying the proper decision-maker for law declaration or fact identification).

¹⁵⁷ 954 N.W.2d 518, 521 (Mich. 2021) (Viviano, J., dissenting).

¹⁵⁸ 965 N.W.2d 554, 554–55 (Mich. 2021) (Viviano, J., concurring).

¹⁵⁹ *Id.* at 556.

grounding, preserving judicial independence while giving appropriate weight to executive acknowledgments of error.

The clarity and specificity of the confession likewise influence the merits analysis. Confessions that identify precise errors with clear remedial implications (e.g., a specific *Brady* violation) merit greater deference than vague or conclusory statements.¹⁶⁰ The *Glossip* confession exemplifies this specificity: the Oklahoma Attorney General identified not only the type of error but also the exact undisclosed evidence that contradicted the prosecution's key witness.¹⁶¹

2. *The Motives Factor: Assessing Strategic Considerations*

Courts should next examine potential strategic motivations behind the confession. While most confessions reflect genuine recognition of error, some may serve improper ends. Perhaps the government confesses in an attempt to avoid Supreme Court review of an issue.¹⁶² Or perhaps the attorney general seeks to carry out generalized policy disagreements about punishment for nonviolent crime, police misconduct, or other salient political topics.¹⁶³

¹⁶⁰ For a useful example of merits analysis being applied through the harmless error doctrine, see *Neale v. State*, 525 S.W.3d 800, 810–12 (Tex. App. 2017).

¹⁶¹ *Glossip v. Oklahoma*, 145 S. Ct. 612, 618, 626 (2025) (noting that the Oklahoma Attorney General identified specific due process violations, including the State's failure to disclose and correct false testimony from its key witness, and described the precise exculpatory evidence uncovered by an independent investigation).

¹⁶² Recall Justice Douglas's dissent in *Casey v. United States*, 343 U.S. 808, 812 (1952) (Douglas, J., dissenting) (warning that a confession "may disclose a maneuver to save one case at the expense of another").

¹⁶³ See Xerxes Wilson, News J., AG Jennings Tells Prosecutors to Seek Lesser Prison Sentences for Some Crimes, Del. Online (Feb. 19, 2019, at 17:53 ET), <https://www.delawareonline.com/story/news/2019/02/18/ag-jennings-tells-prosecutors-seek-lesser-sentences-some-crimes/2903402002/> [<https://perma.cc/JUR8-7Q8X>] (describing policy changes initiated by Delaware Attorney General Kathy Jennings to reduce incarceration for certain offenses); see also Mississippi Attorney General Asks Court to Overturn Manslaughter Conviction of Former Police Officer, Associated Press (July 11, 2023, at 13:56 ET), <https://apnews.com/article/mississippi-police-officer-convicted-appeal-ef87a4c72aac4074caf1f17aba72e454> [<https://perma.cc/P4UC-V2AY>] (reporting that the Mississippi Attorney General asked the state appellate court to reverse a conviction of a former police officer, despite the case having gone through trial and sentencing); Chris Palmer, A Supervisor In Philly DA Larry Krasner's Office Has Been Disbarred In Federal Court, Phila. Inquirer (Dec. 11, 2025, at 12:55 ET), <https://www.inquirer.com/crime/assistant-district-attorney-paul-george-disbarred-federal-court-20251211.html> (documenting the protracted legal fight after District Attorney Larry Krasner vowed to never pursue the death penalty and confessed error in *Wharton v. Vaughn*, 371 F. Supp. 3d 195, 201 (E.D. Pa. 2019)).

Several indicators suggest improper strategic motivation. First, does it reflect a generalized legal or policy disagreement with the conviction?¹⁶⁴ Second, was the confession preceded by thorough investigation?¹⁶⁵ Third, does the timing of the confession suggest an effort to manipulate judicial review or an attempt to preserve favorable precedent?¹⁶⁶ As discussed below, the Pennsylvania cases that worked their way through the state and federal courts offer particularly instructive examples here.¹⁶⁷

Not all strategic considerations are improper. Attorneys general must allocate resources, ensure consistent enforcement, and coordinate statewide policy.¹⁶⁸ Thus, courts should distinguish between appropriate considerations of institutional priorities and inappropriate attempts to short-circuit appellate review or implement policy through confession rather than legislation.

In practice, improper strategic motivation is likely apparent from the surrounding political environment and on the face of a confession. If not obvious, courts still apply a presumption of good faith, requiring clear evidence before concluding that a confession has been offered for improper purposes.¹⁶⁹

¹⁶⁴ See, e.g., *Commonwealth v. Brown*, 196 A.3d 130, 149 (Pa. 2018) (rejecting a confession based on newly elected leadership’s opposition to imposing a death sentence rather than specific error).

¹⁶⁵ See, e.g., *Wharton*, 371 F. Supp. 3d at 201 (“To accept that view ‘blindly’ and summarily grant habeas relief without independently reviewing the merits of the remaining claim would be an abdication of my responsibility to perform the judicial function.”).

¹⁶⁶ See, e.g., *Johnson v. Mahanoy*, 144 F.4th 178, 187 (3d Cir. 2025) (identifying an attempt to “evade judicial review” through strategic packaging of procedural waivers with confessions); see also *Casey*, 343 U.S. at 809 (Douglas, J., dissenting) (voicing concern for gamesmanship in confessing error to avoid unfavorable precedent).

¹⁶⁷ See *infra* Section IV.B (analyzing *Commonwealth v. Brown* and related cases demonstrating the interplay of political transition, investigation depth, and institutional disagreement).

¹⁶⁸ See generally Attorney General Dave Sunday’s Full Submitted Budget Request Testimony to Pa. House Appropriations Committee, Commonwealth of Pa. Off. of Att’y Gen. (Feb. 26, 2025), <https://www.attorneygeneral.gov/taking-action/attorney-general-dave-sundays-full-submitted-budget-request-testimony-to-pa-house-appropriations-committee/> [<https://perma.cc/99EG-G8JD>] (outlining how the Attorney General must allocate resources across “key priorities such as representing Commonwealth agencies, recovering revenue for the state, combatting illegal guns and the opioid epidemic, safeguarding communities from child predators, protecting Pennsylvanians from scams and human trafficking, and targeting public corruption”).

¹⁶⁹ See *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (“The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.”). For

3. The Institutional Credibility Factor: Weighing the Confessor's Authority

The third factor examines the institutional credibility of the confessing official. This inquiry has three dimensions: the confessor's legal authority, accountability mechanisms, and the depth of their investigative involvement in the case.

State courts should first assess whether the confessor possesses constitutional and statutory authority to speak for the state in the matter at hand. While Part III established that attorneys general generally occupy the apex of state prosecutorial authority, statutory schemes vary. Texas's *Saldano v. State* illustrates this complexity thoughtfully. The Court of Criminal Appeals held that district attorneys—not the Texas Attorney General—possess constitutional and statutory authority to represent the state in criminal appeals, including certiorari proceedings before the United States Supreme Court.¹⁷⁰ The court derived its authority from historical practice, Texas constitutional text, and statutory design—demonstrating that institutional credibility requires formal legal grounding.¹⁷¹ Where states vest such authority in district attorneys through clear constitutional or statutory provisions, their confessions carry comparable institutional weight.¹⁷²

Beyond formal authority, courts should consider the confessor's position within the state's democratic and prosecutorial hierarchy. The Supreme Court's treatment of confessions by the Solicitor General provides the model: such confessions receive special weight,¹⁷³ arguably

an example of longstanding state law adoption, see *In re Marcellus' Estate*, 58 N.E. 796, 798 (N.Y. 1900) (“The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done.”).

¹⁷⁰ *Saldano v. State*, 70 S.W.3d 873, 878, 883 (Tex. Crim. App. 2002) (en banc) (holding that district attorneys, and not the attorney general, possess authority to represent the state in criminal appeals and certiorari proceedings).

¹⁷¹ *Id.* at 877–78 (tracing Texas's “deliberately ‘fractured’” prosecutorial system from the 1876 Constitution through 1923 statutory changes, concluding that “[t]he office of attorney general of Texas has never had authority to institute a criminal prosecution” and “since [1923] it has had no authority to represent the State in a criminal case in any court, except when a county or district attorney requests it to assist”).

¹⁷² Cf. *Sibron v. New York*, 392 U.S. 40, 58 (1968) (declining to defer to a confession of error made by a local district attorney, emphasizing that the confession was not made by a state-level legal officer).

¹⁷³ See Note, *Confession of Error by the Solicitor General*, 74 Mich. L. Rev. 1067, 1071–72 (1976) (observing that the Solicitor General's confession of error has been received by the Court with great respect); see also *Young v. United States*, 315 U.S. 257, 258 (1942)

because the office exercises centralized control over government litigation and ensures the United States speaks before the Court with a single voice. State attorneys general should command similar deference. In *Buck v. Davis*, the Court supported this notion when it deemed the Texas Attorney General’s confession of error in multiple capital cases as “remarkable” and worthy of substantial weight.¹⁷⁴ Similarly, *Sibron* distinguished between confessions by local prosecutors and those by state-level officials with broader democratic mandates.¹⁷⁵ This distinction becomes critical when prosecutors disagree. In *Johnson v. Mahanoy*, Judge Bibas rightly observed that “[w]hen a DA asks a federal court to bless an extraordinary agreement that the state judiciary would reject and that the state’s top law-enforcement officer opposes, comity cuts the other way.”¹⁷⁶ These cases demonstrate that hierarchical position matters—not as empty formalism, but because higher officials speak with greater democratic legitimacy and legal authority.¹⁷⁷

Finally, courts should examine whether the confession follows from meaningful investigation or merely reflects litigation tactics. A confession following comprehensive legislative or executive review warrants greater deference than one made without substantive inquiry.¹⁷⁸

(“The considered judgment of the law enforcement officers . . . is entitled to great weight”); Seth P. Waxman, Solic. Gen. of the U.S., Address to the Supreme Court Historical Society: The Solicitor General in Historical Context (June 1, 1998), <https://www.justice.gov/osg/solicitor-general-historical-context> [<https://perma.cc/CS8Z-FGSX>] (explaining that the Solicitor General’s responsibility is to “ensure that the United States speaks in court with a single voice—a voice that speaks on behalf of the rule of law”). Courts have acknowledged that this centralized role engenders a form of “special credence” in the Solicitor General’s representations. See *Hirabayashi v. United States*, 828 F.2d 591, 602 (9th Cir. 1987) (noting the “special credence” the Supreme Court afforded the Solicitor General’s factual representations).

¹⁷⁴ *Buck v. Davis*, 580 U.S. 100, 125 (2017) (“These were remarkable steps. It is not every day that a State seeks to vacate the sentences of five defendants found guilty of capital murder.”).

¹⁷⁵ *Sibron*, 392 U.S. at 58.

¹⁷⁶ 144 F.4th 178, 187 (3d Cir. 2025).

¹⁷⁷ See *Prosecuting Att’y ex rel. Williams v. State*, 696 S.W.3d 853, 867 (Mo. 2024) (en banc) (citing Mo. Rev. Stat. § 27.050 (2024) to hold that it grants the attorney general the right to intervene when local prosecutors confess error, recognizing that the Attorney General “shall appear on behalf of the state” in appellate matters); Mo. Rev. Stat. § 547.031(4) (2025) (granting the Attorney General intervention rights in prosecutor-initiated appeals).

¹⁷⁸ Compare *Ex parte Escobar*, 676 S.W.3d 664, 666, 669 (Tex. Crim. App. 2023) (confessing after extensive investigation into forensic practices), with *Commonwealth v. Brown*, 196 A.3d 130, 149 (Pa. 2018) (rejecting a confession based on policy disagreement rather than specific investigative findings).

This distinction helps courts differentiate confessions grounded in newly discovered evidence or legal analysis from those motivated by political transitions or strategic reversals.¹⁷⁹

4. The Equities Factor: Focusing on Gravity and Systemic Impact

The equities factor centers two determinative considerations that provide courts with principled guidance: the gravity of potential harm and systemic effects. This approach focuses judicial attention on constitutionally significant interests whilst mindful that other equitable concerns are at play.¹⁸⁰

The gravity of potential harm presents the most compelling equitable consideration. In capital cases, where an erroneous conviction results in irreversible execution, the equities factor weighs most heavily in favor of deference.¹⁸¹ “[D]eath is different” in both its severity and finality.¹⁸² Similarly, cases involving substantial deprivations of liberty warrant heightened deference to government concessions, keeping in mind that credible claims of innocence exist.¹⁸³

Systemic effects provide a second concrete equitable consideration. State courts should evaluate whether their treatment of confessions reflects principled consistency rather than ad hoc disposition. When courts accept some confessions but reject others presenting comparable

¹⁷⁹ In *Glossip*, the Attorney General’s confession followed his direction for public investigation; in the Pennsylvania cases, it followed an election. Compare *Glossip v. Oklahoma*, 145 S. Ct. 612, 641 (2025) (Thomas, J., dissenting) (noting that the confession followed the Attorney General’s direction for public investigation), with *Wharton v. Vaughn*, 371 F. Supp. 3d 195, 201–02 (E.D. Pa. 2019) (remarking that the “District Attorney’s Office initially opposed a [state Post-Conviction Relief Act] petition . . . only to concede the petition after a change of administration”), and *Brown*, 196 A.3d at 149 (“[The District Attorney’s Office] cannot now seek to implement a different result based upon the differing views of the current office holder with respect to the prior exercise of prosecutorial discretion.”).

¹⁸⁰ Interests such as finality, victims’ rights, and separation of powers, to name a few. These considerations are discussed more fully *infra* Section IV.C.

¹⁸¹ See *Zant v. Stephens*, 462 U.S. 862, 887–88 (1983) (noting that the “qualitative difference between death and other penalties” requires “a greater degree of reliability” (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion))).

¹⁸² *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion).

¹⁸³ See *Hicks v. United States*, 582 U.S. 924, 926 (2017) (Gorsuch, J., concurring) (“[T]he lone peril in the present case seems to me the possibility that we might permit the government to deny someone his liberty longer than the law permits only because we refuse to correct an obvious judicial error.”); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality opinion) (emphasizing that even in difficult cases, liberty deprivations require meaningful judicial safeguards).

indicia of facts or legal issues, without articulating the basis for distinguishing between them, they undermine confidence in the judicial process itself.¹⁸⁴ Conversely, accepting confessions may promote uniformity in the application of constitutional protections, particularly where the error reflects a pattern of violations rather than an isolated incident.¹⁸⁵ The confession's potential impact on prosecutorial incentives also merits consideration. Accepting confessions that acknowledge serious constitutional violations encourages future disclosure while creating constructive pressure for improved practices.¹⁸⁶

It is important to distinguish this systemic impact concept from the motives factor previously discussed. While the motives factor asks *why* the confession occurred, the equities factor examines *what would follow* from accepting it. Motives turn on intent—whether the confession reflects principled error correction or political and legal expedience. Equities turn on consequences—whether granting relief would reinforce or undermine systemic legitimacy, consistency, or public trust.

5. Reconciling Competing Factors: A Hierarchy of Considerations

State courts evaluating confessions of error will inevitably confront cases where the four factors point in competing directions. This framework provides a blueprint for analysis, not a rigid formula demanding mechanical application. Although a totality of the

¹⁸⁴ See *Belcher v. State*, 464 P.3d 1013, 1032 (Nev. 2020) (Stiglich, J., concurring in part and dissenting in part) (“While there were exceptions to the stringent application of the rule, there was no rubric employed to ensure consistency in deciding whether to find a confession of error in a particular case.”). Even if there is no precedential effect, see *supra* text accompanying note 60, the logic of *stare decisis* supports consistency. See *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (emphasizing that *stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles” and “contributes to the actual and perceived integrity of the judicial process”); *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986) (“[*Stare decisis*] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”).

¹⁸⁵ See *Vasquez*, 474 U.S. at 265–66 (explaining that consistent judicial standards ensure law develops “in a principled and intelligible fashion” rather than “erratically,” thereby contributing to “the integrity of our constitutional system of government”). Courts that accept some confessions while rejecting others that present similar facts or legal issues—without articulating the basis for distinction—develop confession doctrine in precisely the erratic, unprincipled manner the Court has cautioned against.

¹⁸⁶ See *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (noting the importance of prosecutorial disclosure obligations for the proper functioning of the adversarial system).

circumstances approach remains necessary, a principled hierarchy of considerations can guide courts in resolving these tensions while preserving judicial independence.

First, the merits factor must receive primacy in the analysis. A confession that lacks substantive merit cannot be salvaged by institutional credentials or equitable considerations, no matter how compelling. Courts should always ask whether the confession identifies a genuine legal or factual error that materially affected the proceedings.¹⁸⁷

Second, once the merits factor is satisfied, institutional authority generally deserves consideration. Because state attorneys general occupy an institutional position distinct from any other stakeholder, state courts should require substantial evidence of improper motivation before discounting a thoroughly investigated confession on strategic grounds.¹⁸⁸ This presumption of institutional integrity reflects both separation of powers principles and practical realities about institutional competence in post-conviction proceedings.

Third, in capital cases, equitable considerations assume heightened constitutional significance. The irreversible nature of execution creates a judicial imperative that tips the scale toward meaningful consideration of credible confessions.¹⁸⁹ On the other hand, baseless confessions cannot justify vacating a death sentence on the basis of the merits put forward.¹⁹⁰ The death penalty context requires courts to scrutinize

¹⁸⁷ See Transcript of Oral Argument at 55, *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025) (No. 22-7466) (statement of Sotomayor, J.) (“The court has to be satisfied that there’s a basis in law and fact for the confession, correct?”). Justice Sotomayor presumably based this question off the OCCA’s finding that the confession was stunted by the state’s procedural bar because it lacked a basis in law or fact. *Glossip*, 145 S. Ct. at 624; see also *F.V.R. v. State*, 731 So. 2d 862, 863 (Fla. Dist. Ct. App. 1999) (per curiam) (affirming the confession because the State conceded “there is no legal or factual bases in the record”).

¹⁸⁸ See *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 110 (W. Va. 2002) (“This [executive] separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands.”).

¹⁸⁹ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”).

¹⁹⁰ See *Herrera v. Collins*, 506 U.S. 390, 417–19 (1993) (rejecting an innocence claim absent clear evidence, emphasizing that equitable considerations must be grounded in a credible showing).

confessions much more carefully and be certain in their review.¹⁹¹ The equitable factor tips the scale when other factors are in equipoise, not when they decisively point toward rejection.

Fourth, state courts can address the particularly delicate task of assessing motives. Distinguishing between legitimate policy evolution and improper strategic manipulation requires careful factual inquiry without descending into partisan second-guessing. Courts should focus on the objective indicators discussed rather than subjective assessments of prosecutorial good faith.¹⁹² This approach preserves judicial neutrality while still screening for the most egregious strategic abuses.

B. Application of the Framework

Having outlined a framework, this Part seeks to clarify the four-factor model by applying it to recent high-profile cases where confessions of error proved controversial.

1. Glossip v. Oklahoma: An Example of Maximal Deference

In *Glossip*, Attorney General Drummond confessed error after a comprehensive investigation revealed that the prosecution had withheld evidence contradicting its key witness's testimony and had failed to correct that witness's false statements.¹⁹³ The case arose from a 1998 capital conviction for murder-for-hire that had been affirmed on direct appeal and through multiple rounds of post-conviction proceedings.¹⁹⁴ After taking office, the Attorney General conducted an internal review of *Glossip*'s case and concluded that significant prosecutorial errors had occurred in *Glossip*'s trial.¹⁹⁵ The Attorney General filed a confession of error with the OCCA, urging the court to vacate the conviction and remand for further proceedings.¹⁹⁶ The OCCA rejected this confession

¹⁹¹ See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (“[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.”).

¹⁹² See *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) (“A judge could not properly refuse to enforce a statute because he thought the legislators were acting in bad faith . . . ; it is hard to see, therefore, how he could properly refuse to dismiss a prosecution merely because he was convinced that the prosecutor was acting in bad faith or contrary to the public interest.”).

¹⁹³ *Glossip v. Oklahoma*, 145 S. Ct. 612, 623, 628 (2025).

¹⁹⁴ See *id.* at 636–37, 639 (Thomas, J., dissenting).

¹⁹⁵ *Id.* at 641, 644.

¹⁹⁶ *Id.* at 623–24 (majority opinion).

with minimal explanation, stating only that it was “not based in law or fact.”¹⁹⁷

Under the proposed framework, this rejection appears fundamentally flawed. The merits factor strongly favors deference. Drummond’s confession identified specific *Napue* violations, with newly discovered evidence directly contradicting Justin Sneed’s testimony, which was the State’s only direct evidence of Glossip’s guilt.¹⁹⁸ Rather than resting on speculative theories, the confession highlighted concrete factual discoveries.¹⁹⁹ Astonishingly, the OCCA offered no substantive engagement with the evidence presented.²⁰⁰

The motives factor reveals no apparent strategic reason to question the confession. This was not a last-minute tactical maneuver; it came after years of defending the conviction through multiple appeals.²⁰¹ The Attorney General seemed sensibly focused on preventing a miscarriage of justice.

The institutional credibility factor also supports deference. The confession came from Oklahoma’s highest legal officer *and* followed a transparent re-evaluation of the State’s case. When multiple branches of government converge in acknowledging error—the legislature authorizing investigation and the executive accepting its findings—such institutional consensus demands almost absolute judicial respect.²⁰²

Finally, the equities prong powerfully favors accepting the confession. Glossip faced execution for a crime for which he may not have been responsible. The State’s case rested on Sneed’s credibility.²⁰³ In these circumstances, the gravity of potential harm weighed decisively against allowing an execution to proceed based on testimony secured through prosecutorial misconduct. The OCCA’s rejection without meaningful analysis contravened all four factors and represented a gross failing of our legal system.

¹⁹⁷ Id. at 624 (quoting *Glossip v. State*, 2023 OK CR 5, ¶ 25, 529 P.3d 218, 226).

¹⁹⁸ Id. at 623, 628.

¹⁹⁹ For example, the prosecution knew Sneed was receiving psychiatric treatment yet allowed him to testify falsely. Id. at 627.

²⁰⁰ *Glossip v. State*, 2023 OK CR 5, ¶¶ 19–23.

²⁰¹ *Glossip v. Oklahoma*, 145 S. Ct. at 639–40 (Thomas, J., dissenting).

²⁰² Brief for Kenneth T. Cuccinelli, II, Former Attorney General of the Commonwealth of Virginia, as Amicus Curiae Supporting Petitioner at 19, *Glossip*, 145 S. Ct. 612 (No. 22-7466) (arguing that judicial deference to a state attorney general’s confession of error is “at its zenith” when the confession is lawful, deliberate, and supported by a comprehensive investigation).

²⁰³ *Glossip*, 145 S. Ct. at 629.

2. *Escobar v. Texas: Navigating Divided Executive Authority*

Escobar v. Texas arose from the 2009 murder of Bianca Maldonado Hernandez in Austin, Texas, for which Areli Escobar was convicted and sentenced to death.²⁰⁴ The prosecution's case relied on DNA evidence linking Escobar to the victim's body, which was later called into question because of errors in the Austin Police Department DNA lab and the reliability of aspects of the testing.²⁰⁵ In Escobar's second state habeas proceeding, the habeas court conducted a multi-year evidentiary hearing²⁰⁶ and concluded that the DNA evidence at trial was false, misleading, and unreliable due to flawed statistical calculations²⁰⁷ and potential contamination that undermined the integrity of the evidence.²⁰⁸ Following those findings, the District Attorney confessed error and agreed a new trial should be granted, asserting that the State's use of the flawed forensic evidence violated due process.²⁰⁹ The trial judge agreed, finding that DNA contamination rendered the evidence unreliable and violated due process.²¹⁰ The TCCA ultimately rejected the confession and denied relief, concluding that the record did not establish a constitutional violation warranting reversal.²¹¹

The merits factor weighs strongly in favor of deference to the District Attorney's confession. This forensic science error exemplifies precisely the kind of mistake that remains opaque to judges and juries during trial. When prosecutors later discover such fundamental evidentiary problems, they are uniquely positioned to evaluate how significantly these errors undermined the trial's integrity.²¹²

The motives factor similarly supports deference. The District Attorney's position emerged from a methodical review of scientific and

²⁰⁴ Petition for a Writ of Certiorari, *supra* note 8, at 4–5.

²⁰⁵ *Id.* at 7–8.

²⁰⁶ *Id.* at 10–11.

²⁰⁷ *Ex parte Escobar*, 676 S.W.3d 664, 669, 675 (Tex. Crim. App. 2023).

²⁰⁸ Petition for a Writ of Certiorari, *supra* note 8, at 3, 12, 19 (describing the Travis County District Attorney's confession of error based on flawed DNA analysis and the habeas court's finding that contamination rendered the DNA evidence unreliable and in violation of due process).

²⁰⁹ *Id.* at 21.

²¹⁰ *Id.* at 19.

²¹¹ *Ex parte Escobar*, 676 S.W.3d at 674–75; Petition for a Writ of Certiorari, *supra* note 8, at 33.

²¹² Cf. *State v. Josey*, 674 A.2d 996, 1005 (N.J. Super. Ct. App. Div. 1996) (declining to credit the prosecutor's changed position where the trial judge's factual findings were well-supported by the record).

evidentiary integrity for this case, extensively outlining its concerns.²¹³ The confession did not appear to serve any strategic advantage but reflected a considered judgment about prosecutorial obligations.

The institutional factor makes *Escobar* particularly interesting and illustrative. Under Texas law, the District Attorney deliberately serves as the constitutional representative of the state in habeas proceedings.²¹⁴ In *Escobar*, that design mattered in a concrete way: the Travis County District Attorney, acting as the State's designated representative, confessed error and supported relief.²¹⁵ Meanwhile, Texas Attorney General Ken Paxton, who did not control the State's position, filed an amicus brief opposing relief at the Supreme Court rather than directly representing the state.²¹⁶ This institutional design affects the confession's weight. In Texas, where the District Attorney represents the state as the sovereign, their legal authority is in opposition to the Attorney General's electoral legitimacy. This leaves the Texas courts weighing up the competing interests.

However, the equities in *Escobar* weighed heavily toward meaningful consideration of the confession. *Escobar* faced execution based on forensic evidence that both the habeas court and the District Attorney determined was unreliable.²¹⁷ The irreversible nature of capital punishment, combined with serious doubts about the evidence, created a compelling case for judicial deference.²¹⁸ Moreover, the procedural dynamics were troubling. The TCCA effectively disregarded both the habeas court's factual findings and the District Attorney's (i.e., the State's) confession without substantial engagement with either.²¹⁹ The result: *Escobar* remains on death row. This cursory dismissal, along with

²¹³ See Petition for a Writ of Certiorari, supra note 8, at 12–18 (discussing the habeas court's findings of contamination errors, unscientific testing and analysis, and suspect- and victim-driven bias).

²¹⁴ See *Saldano v. State*, 70 S.W.3d 873, 876–84 (Tex. Crim. App. 2002) (en banc) (discussing the District Attorney's role in criminal appeals); see also Tex. Code Crim. Proc. Ann. art. 2A.102 (West 2025) (“Each district attorney shall represent the state in all criminal cases in the district courts of the attorney's district and in appeals from those cases.”).

²¹⁵ AG Paxton Brief, supra note 124, at 2.

²¹⁶ *Id.* at 1.

²¹⁷ Petition for a Writ of Certiorari, supra note 8, at 3, 6, 10, 12, 19, 21, 24.

²¹⁸ See *id.* at 3 (“After all, the injustice of allowing a capital sentence to be carried out where the conviction followed the prosecution's own admitted use of false, misleading, and unreliable DNA evidence and testimony would be nearly unfathomable.”).

²¹⁹ See *Escobar v. Texas*, 143 S. Ct. 557, 557 (2023) (mem.) (remanding “in light of the confession of error by Texas”).

the procedural oscillation, undermines confidence in the system's ability to self-correct.

3. *The Krasner Cases: Defining the Boundaries of Deference*

While *Glossip* and *Escobar* illustrate varying degrees of deference to prosecutorial confessions, *Commonwealth v. Brown*, *Wharton v. Superintendent Graterford SCI*, and most recently *Johnson v. Mahanoy* form a series of Pennsylvania cases where state and federal courts properly rejected confessions due to procedural deficiencies.²²⁰ These cases establish the outer limits of the deference due to these confessions.

In each case, Philadelphia District Attorney Larry Krasner's office confessed error.²²¹ Both the federal and state courts found the prosecutors' confessions lacked sufficient evidentiary support. In *Brown*, the Supreme Court of Pennsylvania determined that the District Attorney failed to demonstrate substantive legal error underlying its confession.²²² The case involved a capital conviction for a murder, where the District Attorney later confessed error on claims of ineffective assistance of counsel without identifying any new exculpatory evidence or constitutional violation.²²³ Similarly, in *Wharton*, the Third Circuit affirmed sanctions against the Philadelphia District Attorney's office for conceding ineffective assistance of counsel for the defendant without adequately investigating contradictory evidence.²²⁴ The District Attorney's office claimed to have "carefully reviewed the facts" but missed Wharton's escape attempt and serious prison misconduct records, appearing to have taken Wharton's evidence at face value.²²⁵

The courts identified questionable motives that further diminished the confessions' persuasive weight. In *Brown*, the Pennsylvania Supreme Court noted that the District Attorney appeared to be using confession of error as a tactical maneuver to functionally commute a death sentence through procedural means rather than on legal grounds.²²⁶ In *Wharton*,

²²⁰ *Commonwealth v. Brown*, 196 A.3d 130, 146, 149 (Pa. 2018); *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140, 144–45 (3d Cir. 2024); *Johnson v. Mahanoy*, 144 F.4th 178, 187–88 (3d Cir. 2025).

²²¹ *Brown*, 196 A.3d at 146, 149; *Wharton*, 95 F.4th at 144–45; *Mahanoy*, 144 F.4th at 187–88.

²²² *Brown*, 196 A.3d at 144, 149.

²²³ *Id.* at 137, 141–43.

²²⁴ *Wharton*, 95 F.4th at 144–46.

²²⁵ *Id.* at 145 (emphasis omitted).

²²⁶ *Brown*, 196 A.3d at 146.

the Third Circuit identified an apparent pattern suggesting the District Attorney's office was attempting to bypass the Pennsylvania Supreme Court's *Brown* decision in a federal forum "that may be unfamiliar with its strictures."²²⁷

The institutional dimension of these cases stands in stark contrast to *Escobar*, providing a useful lesson. The Pennsylvania Supreme Court determined that the District Attorney's authority narrows significantly after conviction.²²⁸ When the District Attorney confessed error without conducting a thorough investigation, the district court appointed then Pennsylvania Attorney General Josh Shapiro as amicus curiae.²²⁹ Shapiro's office uncovered the escape attempt and disciplinary history while clarifying to the district court that most victims' family members vehemently opposed the District Attorney's position.²³⁰

Despite the capital context, the equities could not overcome these fundamental deficiencies. The Pennsylvania Supreme Court recognized that a "representative cross section of the community" had made "the enormously difficult decision of whether to impose the death sentence," and that neither parties' agreement nor judicial fiat could properly displace that verdict absent legal error.²³¹ The Third Circuit similarly affirmed that despite high stakes, prosecutors remain bound by their duty of candor which had been violated by failing to reasonably investigate and misrepresenting the office's communication with the victim's family.²³²

The persistence and escalation of these legal maneuvers became undeniable by 2025. In *Johnson v. Mahanoy*, Judge Bibas confronted yet another Philadelphia District Attorney confession. The court identified it as part of a "striking pattern" of over 100 overturned convictions "untested by the adversarial process."²³³ The confession coupled with strategic waivers were designed to "clear [the defendant's] pathway to habeas relief."²³⁴ Under the framework, three main factors counseled rejection: inadequate merits, strategic motivation to

²²⁷ *Wharton*, 95 F.4th at 150.

²²⁸ *Brown*, 196 A.3d at 146 ("After trial and the entry of a capital verdict, however, a district attorney's prosecutorial discretion narrows significantly.").

²²⁹ *Wharton*, 95 F.4th at 145.

²³⁰ *Id.*

²³¹ *Brown*, 196 A.3d at 144.

²³² *Wharton*, 95 F.4th at 148–49.

²³³ *Johnson v. Mahanoy*, 144 F.4th 178, 187 (3d Cir. 2025).

²³⁴ *Id.*

circumvent state procedural constraints, and diminished institutional credibility post-*Brown*.

These cases demonstrate how the four-factor framework functions when multiple elements weigh against deference. As Pennsylvania Attorney General Shapiro articulated when opposing District Attorney Krasner's maneuvers, a confession of error is "properly viewed not as dispositive, but as persuasive, often highly persuasive," provided it satisfies the foundational criteria of merits review.²³⁵ Irrespective of the merits of the District Attorney's position on capital punishment, and there are many, the use of confessions to provide relief in place of clemency or other mechanisms represents a fundamental distortion of confessional authority.

C. Anticipating Objections

These cases reveal both the utility and limits of judicial deference to confessions of error. Still, a framework that contemplates heightened respect for executive admissions and a reduced role for the judiciary should answer objections. This Section addresses potential critiques, including threats to judicial independence, prosecutorial overreach, finality, and victims' rights.

1. Judicial Independence and Institutional Roles

Critics like Texas Attorney General Paxton contend that presumptive deference to an Attorney General's (or District Attorney's, in Texas's case) confession threatens judicial independence by allowing executive officials to effectively nullify judgments or operate a pseudo-pardon power.²³⁶ This objection reflects a real concern: that courts risk ceding judicial authority to the executive. As Judge Learned Hand said, "It is bad enough to have the Supreme Court reverse you, but I will be damned if I will be reversed by some Solicitor General."²³⁷ According to this view, courts abdicate their constitutional duty when they defer to executive determinations about legal error.²³⁸

²³⁵ *Brown*, 196 A.3d at 194 (Dougherty, J., concurring) (emphasis omitted).

²³⁶ See AG Paxton Brief, *supra* note 124, at 15–16.

²³⁷ Archibald Cox, *The Government in the Supreme Court*, 44 *Chi. Bar Rec.* 221, 224–25 (1963).

²³⁸ See AG Paxton Brief, *supra* note 124, at 11–12, 15–16 (suggesting courts' independent review is foundational to the separation of powers principle).

This objection fundamentally misunderstands the framework's operation. The proposed approach *preserves* judicial authority by requiring courts to independently analyze each confession under specific factors rather than automatically accepting executive positions. Courts retain both the power and responsibility to reject confessions as they often do. The structured analysis proposed here respects the judiciary's constitutional role while also acknowledging the unique position of attorneys general in identifying error. The question, then, remains whether meaningful deference is warranted, mindful of the concerns about judicial displacement.

2. Democratic Legitimacy and Prosecutorial Overreach

A more substantial objection centers on democratic accountability and potential prosecutorial overreach. Critics argue that confessions of error may become tools of political signaling rather than legal integrity.²³⁹ Common examples could include “progressive” prosecutors seeking to overturn capital cases or “conservative” prosecutors avoiding police misconduct prosecutions. Skeptics may view those moves as ideological posturing disguised as principle. The danger is prosecutorial policymaking through selective confession, eroding democratic confidence in both prosecutorial neutrality and judicial finality.²⁴⁰

This concern warrants serious consideration, but it does not justify wholesale rejection of the framework. The motives factor addresses this risk by requiring courts to scrutinize whether a confession stems from principled legal analysis or partisan expedience. Recall again the Third Circuit properly rejecting a confession that was issued after a change in political administration and that lacked substantive investigative

²³⁹ See Brief Amicus Curiae of Victim Family Members Derek Van Treese et al. in Opposition to the Petition at 3, 9, *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025) (No. 22-7466) [hereinafter Van Treese Family Brief] (suggesting the Oklahoma Attorney General had political motives for reviewing Glossip's conviction).

²⁴⁰ See *id.* at 3, 5, 22 (identifying harm caused by political efforts to overturn a capital conviction and the negative impact on public confidence in judicial finality); see also Paul Cassell, What Is the Significance of an Attorney General's Confession of Error in a State Capital Case?, *Volokh Conspiracy* (June 6, 2023, at 10:30 ET), <https://reason.com/volokh/2023/06/06/amicus-brief-filed-for-victims-family-members-in-the-gossip-case/> [<https://perma.cc/C46E-T3SQ>] (arguing that the Attorney General's confession of error had no evidentiary basis).

support.²⁴¹ The framework empowers courts to distinguish principled error correction from ideological maneuvering through exactly this type of contextual analysis. Professional obligations—as demonstrated by the Third Circuit’s sanctions in *Wharton*—further constrain abuse and reinforce the framework’s safeguards against partisan manipulation.²⁴²

Moreover, the objection that confessions of error are undemocratic misunderstands the constitutional role of attorneys general. In almost every state, attorneys general are independently elected officials who derive their authority directly from voters, the state constitution, and statute.²⁴³ They are empowered, far more than courts, to carry out the executive function of implementing their understanding of the law.²⁴⁴ These confessions are not undemocratic subversions. They are expressions of democratic accountability channeled through legal obligations. A likely response would then be that courts also have the legitimacy to implement *their* understanding of the law.²⁴⁵ And that is correct.²⁴⁶ This meaningful but not absolute deference framework, in fact, promotes interbranch dialogue rather than executive dominance.

3. *Victims’ Rights and Public Trust*

A final salient objection to confessions of error emphasizes the potential harm to victims and the destabilizing effects on finality. Especially in capital cases, confessions may reopen emotional wounds, undermine long-settled convictions, and retraumatize survivors.²⁴⁷ These concerns are real and deserve weight under the framework’s equities prong. Courts should consider the impact on victims’ families

²⁴¹ *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140, 149, 151 (3d Cir. 2024); see also *Commonwealth v. Brown*, 196 A.3d 130, 149 (Pa. 2018) (“Elections alone cannot occasion efforts to reverse the result of judicial proceedings obtained by the prior office holder.”).

²⁴² *Wharton*, 95 F.4th at 151.

²⁴³ Emily Myers, *Qualifications, Selection and Term*, in *State Attorneys General Powers and Responsibilities*, supra note 95, at 12, 12–13, 23–25.

²⁴⁴ See Emily Myers, *Status in State Government*, in *State Attorneys General Powers and Responsibilities*, supra note 95, at 47, 49–50.

²⁴⁵ See AG Paxton Brief, supra note 124, at 11–12 (arguing that courts have a judicial obligation to independently review judgments).

²⁴⁶ See *Young v. United States*, 315 U.S. 257, 258–59 (1942) (emphasizing that while courts may credit executive representations, they retain independent responsibility for safeguarding the public interest).

²⁴⁷ See Van Treese Family Brief, supra note 239, at 19–21 (discussing the harm exacerbated by drawn-out criminal justice proceedings).

and the value of settled judgments. But victims' interests, however compelling, cannot override constitutional imperatives. Courts conduct this balancing act constantly.²⁴⁸ Where the state's highest legal officer concludes that a conviction cannot stand or go forward, that judgment necessarily implicates systemic integrity and commands careful judicial engagement.

Critics also argue that deference to executive confessions may undermine legal certainty or destabilize precedent.²⁴⁹ But these finality concerns are not categorically dispositive. The timing of a confession may inform its credibility, but it should not control the analysis. As the Court held in *Buck v. Davis*, "the State's interest in finality deserves little weight" when racial bias, and thus constitutional error, infects a capital sentence.²⁵⁰ If a confession arises from thorough reexamination and implicates fundamental fairness, rigid adherence to finality risks perpetuating injustice. More broadly, concerns about public confidence cut in both directions. A legal system that clings to error in the name of closure risks undermining legitimacy more than one that openly acknowledges and corrects its mistakes.²⁵¹

CONCLUSION

This Note has established three propositions. First, confessions of error represent a neglected form of deference, one that existing doctrine recognizes in theory but denies in practice. Second, this neglect reaches its apex when state attorneys general confess error in their own courts. Third, meaningful deference requires a structured analytical framework that courts currently lack. The proposed four-factor framework provides that structure without mandating outcomes or stripping courts of independence, offering a principled path forward. The cases examined here expose a disturbing reality: in both *Glossip* and *Escobar*, state officials confessed error in capital cases, yet state courts rejected those confessions and affirmed death sentences. Defendants face execution

²⁴⁸ See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (reaffirming that while victim impact evidence is relevant, it cannot override a defendant's constitutional protections).

²⁴⁹ See AG Paxton Brief, *supra* note 124, at 14, 16.

²⁵⁰ *Buck v. Davis*, 580 U.S. 100, 126 (2017).

²⁵¹ See Brandon L. Garrett, *Judging Innocence*, 108 *Colum. L. Rev.* 55, 94, 107, 110 n.200 (2008) (finding that courts routinely failed to address factual deficiencies in wrongful conviction cases and often denied relief by deeming errors harmless, thereby undermining public confidence in the criminal system).

despite both parties acknowledging error, with courts alone insisting the convictions stand. The stakes could not be starker.

A coherent confession-of-error doctrine serves the system's essential capacity for self-correction. State courts often provide the last opportunity for error correction, particularly in capital cases where federal review is severely constrained. When courts reflexively reject well-founded confessions, they undermine both the executive's capacity for institutional accountability and the judiciary's own legitimacy. By implementing the framework proposed here, state courts can fulfill their constitutional obligation to ensure justice while respecting coordinate branch determinations rooted in superior institutional knowledge. In a legal system that claims commitment to getting it right, meaningful deference to confessions of error is not optional—it is essential.