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No. 84739-8

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

BOBBY R. THOMPSON,

Respondent.

(CORRECTED)

BRIEF OF *AMICI CURIAE* THE INNOCENCE NETWORK AND THE
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
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I. INTRODUCTION AND INTEREST OF AMICUS

The Innocence Network is an affiliation of more than sixty organizations dedicated to providing pro bono legal and investigative services to convicted individuals seeking to prove their innocence. The Washington Association of Criminal Defense Lawyers is a professional bar association founded in 1987 with over 1000 members, including private criminal defense lawyers, public defenders, and related professionals. WACDL's mission is to improve the quality and administration of justice, preserve fairness, and promote a rational and humane criminal justice system.

The Innocence Network and WACDL seek status as *amici curiae* because they believe that DNA testing should be granted under Washington's DNA testing statute, RCW 10.73.170, when a defendant has confessed to the underlying crime but favorable DNA test results will produce compelling evidence of that person's innocence.¹

To be sure, confessions constitute important—and persuasive—evidence. But their very persuasiveness compels careful attention to their veracity. In considering whether an applicant for DNA testing under

¹ A statement given by Mr. Thompson was not introduced at trial or subject to a CR 3.5 hearing to determine whether the statement was taken in violation of *Miranda v. Arizona*, 364 U.S., 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Thompson disagrees that his statement is a "confession." For purposes of this brief only, we assume that it is.

RCW 10.73.170 satisfies his *prima facie* burden, Washington courts are directed to conduct a factual inquiry: the court must look to whether “viewed in light of all evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis.” *State v. Riofta*, 166 Wn.2d 358, 367-68, 209 P.3d 467 (2009). This requires the court to *assume* that DNA testing will exclude the defendant as the source of critical items of forensic evidence and then to consider, in light of the entire trial record and any newly discovered evidence, whether such exculpatory results would establish his actual innocence of the crime. *Id.* at 369.

In this case, the Court is considering whether a confession made by Mr. Thompson should bar DNA testing. The national and Washington experience confirm that even a confession that is considered “voluntary” does not conclusively establish actual guilt. Defendants provided with access to DNA testing have been able to demonstrate that the substance of their confessions is false. These DNA exoneration cases—particularly when considered alongside social science research identifying the “voluntary” circumstances under which innocent people confess falsely—provide powerful evidence that confession evidence is not as reliable as it seems. Because the results of modern DNA testing far exceed the evidentiary and probative value of even reliable-seeming confessions,

amici urge this Court to hold that the existence of a confession does not preclude the use of DNA testing that could establish actual innocence.

II. ARGUMENT

The increasing number of post-conviction DNA exonerations over the last two decades raises new questions about whether confession evidence is always as reliable as it seems. The objectivity and precision of modern DNA testing has been credited with revealing that, at times, innocent people can and do confess to crimes they did not commit.

Two basic propositions are clear from exonerations across the country and in Washington: (1) innocent people have confessed to crimes they did not commit; and (2) exculpatory DNA tests and other evidence have undermined the reliability of confessions. Yet, until recently, some courts have been reluctant to grant post-conviction motions for DNA testing when there is confession evidence. As experience continues to confirm that this evidence does not conclusively establish guilt and is not a failsafe predictor of the truth, this reluctance is fading. In February, the Pennsylvania Supreme Court held that even a voluntary confession does not constitute a *per se* bar to obtaining DNA testing and re-issued its fifty-year-old admonition that “a confession of the commission of a crime is not sufficient, in and of itself to convict.... We need not be reminded of the countless situations where persons confess to crimes of which they are

innocent....” *Commonwealth v. Wright*, No. 21 EAP 2008, slip op. at 30 (Pa. Feb. 23, 2011) (citing *Commonwealth v. Conklin*, 160 A.2d 566, 568 (Pa. 1960)) (complete opinion is attached as Ex. A).

Similar Washington experience compels a similar result here. To preclude DNA testing solely because the defendant tendered a confession contradicts the intent of Washington’s DNA testing statute.

A. WHY INNOCENT PEOPLE CONFESS

A false confession is an admission to a criminal act that the confessor did not commit. Contrary to the belief that innocent people do not confess to crimes that they have not committed, history provides numerous examples of false confessions that have lead to the conviction and imprisonment of the innocent.

1. Types of False Confessions

The false confession phenomenon—particularly what makes an innocent person confess to a crime he has not committed—has been well studied over the years.

A voluntary confession occurs without any undue pressure. After Charles Lindberg’s baby was kidnapped in 1932, approximately 200 people confessed to the crime. *See* J. Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, March 30, 1998, at A-1. When Elizabeth Short, the actress known as “Black Dahlia,” was

murdered in 1947, more than 50 men and women confessed. *See* S. M. Kassin, *Police-Induced Confessions: Risk Factors and Recommendations*, AM. PSYCHOL. SOC'Y/DIVISION 41 OF THE AM. PSYCHOL. ASS'N 14 (2009). In 2006, after the murder of JonBenet Ramsey, John Mark Karr voluntarily claimed responsibility. J. Bosman, *Reflection and Red Faces After the Ramsey Storm*, N.Y. TIMES, Aug. 30, 2006, at E-3. The reasons for false confessions such as these are numerous—pathological desire for attention or self-punishment; feelings of guilt over prior transgressions; delusions; or a desire to protect the real perpetrator. Kassin, *The Psychology of Confessions*, ANNU. REV. LAW SOC. SCI. 2008, at 13.3.

Other false confessions can be induced through police interrogation and other tactics. Kassin, *Police Induced Confessions* at 14. In these cases, a suspect acquiesces to a demand for a confession to escape a stressful situation, avoid punishment, or gain an implied reward. *Id.* Notorious examples include the 1989 Central Park jogger rape case in which five New York City teenagers confessed to the rape because they wanted to go home after a lengthy interrogation. All five teenagers were convicted but exonerated thirteen years later by DNA evidence. *People v. Wise*, 752 N.Y.S.2d 837, 847 (N.Y.Sup. 2002).

Other false confessions are made by innocent, but vulnerable (*e.g.*, anxious, fatigued, or confused) suspects who come to believe that they

must have committed the crime. Kassin, *The Psychology of Confessions* at 13.3; S.M. Kassin, *The Psychology of Confession Evidence*, AM. PSYCHOL. 52, 221-233 (1997). For instance 14-year-old Michael Crowe confessed to stabbing his sister after a series of interrogations during which he was presented with compelling false evidence, saying "I'm not sure how I did it. All I know is I did it." Charges were later dropped when a neighbor was found with the victim's blood on his clothing. S.A Drizin & B. Colgan, *Tales From the Juvenile Confession Front: A Guide to how Standard Police Interrogation Tactics can Produce Coerced and False Confessions From Juvenile Suspects*, in *Interrogations, Confessions, and Entrapment* 127-162 (G.D. Lassiter ed. 2004).

2. The Interrogation Process

Modern police interrogations also contribute to the "false confession" psychological phenomenon through a two-step process of manipulation. R.J. Ofshe & R.A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DEN. L. REV. 979, 989-90 (1997). The first step is designed to reduce the suspect's subjective self-confidence that he will not make it through the interrogation without being arrested. *Id.* at 1004-05. He is persuaded that he was caught with incontrovertible evidence of his guilt, that no reasonable person could come to any other conclusion and there is no way out of his predicament.

Id., The second step elicits an admission by persuading the suspect that the benefits of compliance and confession outweigh the cost of resistance and denial. *Id.* at 1050-106.

Other interrogation tactics, such as the use of false evidence and minimization (the process of providing moral justification or excuses for the crime) increase the risk of false confessions, as do certain dispositional risk factors, such as adolescence, immaturity,² and cognitive and intellectual disabilities.³ *See generally id.*

Although social scientists and historians have long noted the existence of and studied the common causes of false confessions, it is modern DNA testing, with its capacity to alter the evidentiary landscape and disprove even voluntary confessions, which has revealed to the public the danger of putting too much faith in a confession.

B. NATIONAL EXPERIENCE OF FALSE CONFESSION CASES

According to data collected and analyzed by the Innocence Project, 42 of the first 252 post-conviction DNA exonerations involve false confessions to rape or murder. B. L. Garrett, *The Substance of False*

² Numerous high-profile cases, such as the Central Park jogger case discussed above, fall into this category. Kassir, *Police Induced Confessions* at 19.

³ In *Atkins v. Virginia*, the U.S. Supreme Court cited the possibility of false confessions in their decision to exclude people with cognitive and intellectual disabilities from capital punishment. 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

Confessions, 62 STAN. L. REV. 1051, 1052 (2010). The high percentage of proven wrongful convictions based primarily on confessions later shown to be false demonstrates the importance of post-conviction DNA testing.

1. Freddie Peacock

Freddie Peacock was convicted in 1976 of rape. A.G. Sulzenberger, *Vindication Now Arrives After a Battle of 28 Years*, N.Y. TIMES, Feb. 4, 2010.⁴ His conviction was based primarily on his confession: "I did it. I did it. I raped the girl, I did it." Although Peacock was unable to provide details of the crime, including where, when or how it had occurred, and later recanted and maintained his innocence, he was convicted. He appealed his case unsuccessfully six times.

After his release on parole in 1982, Peacock fought to clear his name. Thirty-three years after conviction, Peacock was exonerated by DNA evidence that proved his innocence. Peacock's case demonstrates that the interrogation process need not be long or drawn out, and the statement need not be complete, to be highly incriminating and false.

2. Earl Washington, Jr.

While being interrogated for unrelated crimes, Earl Washington, Jr. confessed to the rape and murder of Rebecca Williams. *See*

⁴ Additional facts regarding Freddie Peacock's confession and exoneration can be found at http://www.innocenceproject.org/Content/Background_on_Freddie_Peacocks_Case.php.

Washington v. Wilmore, 407 F.3d 274, 276 (4th Cir. 2005).⁵ Police officers interviewed Washington for approximately one hour, from which they produced a written statement ostensibly acquired by writing out the questions asked of Washington and his answers. *Id.* He was later convicted and sentenced to death.

Although DNA testing conducted in 1993 revealed that the perpetrator's genetic material contained a particular marker not possessed by the victim, her husband, or Washington, Washington's request for a pardon was denied: "a review of the trial evidence [including Washington's confession,] reveals that he had knowledge of evidence relating to the crime which it can be argued only the perpetrator would have known." *Id.* at 277. Seven years later, additional DNA testing conclusively excluded Washington as the perpetrator, and, on the basis of these results, Washington was given an absolute pardon. *Id.*⁶

3. Chris Ochoa/Richard Danziger

Christopher Ochoa pled guilty to rape and murder of Nancy DePriest and implicated his friend Richard Danziger. Police questioned

⁵ Washington's confessions to other crimes about which he was questioned were thrown out. E. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1092 (2001).

⁶ Although facts known only to perpetrator are generally perceived as hallmarks that a confession is true, DNA testing can disprove (and has disproved) such confessions. These cases demonstrate the imprecise nature of the interrogation process. The facts usually come from the police, fed to the defendant often inadvertently. Only through DNA testing is the falsity of the statement revealed. *See, e.g., Warney v. New York*, slip op. at 3 (N. Y. App. 2011) (attached as Ex. B.)

Ochoa and Danziger separately, observing that Danziger seemed to know many private details about the crime. *See Danziger v. State*, No. 3-90-086-CR (Tex. Ct. App. 1991). Ochoa was interrogated in two separate 12 hour sessions sandwiched between a weekend of confinement in a hotel room. *See* K. A. Findley and J. Pray, *Lessons from the Innocent*, WIS. ACAD. REV. 33, 34 (Fall 2001). He was told that he would get the death penalty if he did not confess and implicate Danziger, and that Danziger was ready to implicate Ochoa. *Id.* Terrified, Ochoa confessed and agreed to plead guilty and testify against Danziger. R. Earle and C. Case, Jr., *The Prosecutorial Mandate See that Justice is Done*, 86 JUDICATURE 69, 72 (2002). Ochoa later protested to his attorney that the confession was false, but he was counseled that the only way to avoid execution was to accept a plea offer. Findley & Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, WIS. L. REV. 291, 332 (2006). Both men were convicted and sentenced to life in prison.

Eight years later, Achim Marino wrote letters to the police and prosecutors confessing to the murder of DePriest, describing the details of the crime that fit the observed facts exactly. Earl and Case, *supra*, at 72. Confronted with Marino's confession, Ochoa maintained his guilt because he feared jeopardizing his chances for parole. *Id.* In 2002, DNA evidence exonerated Ochoa and Danziger, and inculpated Marino.

4. Frank Sterling

In 1988, a 74-year-old victim was murdered in Rochester, New York.⁷ The police investigation focused on people with a connection to the victim, including Sterling, whose brother had been convicted of attempting to sexually assault the victim. Sterling had no criminal record and an alibi. Sterling voluntarily participated in police interviews, consistently denying any involvement in the murder. Two and half years of investigation produced no charges. A new investigative team brought Sterling back in for another interview (after Sterling's 36-hour shift driving a truck). The interview began in the afternoon and continued into the night and the next morning. The police used hypnosis and shared with Sterling many details of the crime. Sterling maintained his innocence, but interrogators insisted that he had committed the murder and would feel better if he let out his anger, telling him that the victim "deserved what she got," and that "we're here for you, we still care for you." Sterling eventually confessed. Although he immediately recanted his confession, he was charged with murder and convicted, based primarily on his confession.

⁷ All facts regarding Frank Sterling's confession and exoneration are available at www.innocenceproject.org/Content/Frank_Sterling.php.

DNA evidence later exonerated Sterling after he spent nearly 18 years in prison for a murder that he confessed to committing.

5. John Kenneth Watkins

John Kenneth Watkins confessed to rape and accepted a plea bargain rather than going to trial and risking a long prison sentence.⁸ While in prison, Watkins' requests for post-conviction DNA testing were rejected twice by the courts. Finally in 2009, DNA testing was performed on the rape kit and confirmed that Watkins was not the perpetrator. He was exonerated in 2010 after spending nearly seven years in prison.

C. WASHINGTON EXPERIENCE OF FALSE CONFESSIONS

In Washington, there are many instances where defendants who confessed to serious crimes were later proven innocent by incontrovertible evidence, including post-conviction DNA testing.

1. Ted Bradford

Post-conviction DNA testing led to Ted Bradford's exoneration after he spent nearly ten years in prison after being convicted of rape and burglary. C. Bristol, *Prosecutors Refile Rape Charge Against Man Cleared by DNA*, YAKIMA HERALD-REPUBLIC, Oct. 14, 2008. Bradford confessed to the charges after eight and a half hours of interrogation

⁸ Facts regarding John Kenneth Watkin's confession and exoneration are available at http://www.innocenceproject.org/Content/John_Kenneth_Watkins.php.

(although there were “significant discrepancies between the taped confession and the actual crime”). *State v. Bradford*, 95 Wn. App. 935, 943, 978 P.2d 534, 538 (1999). The detective repeatedly told Bradford during the interrogation: “I am not going to allow you to deny this anymore,” and that “I was not going to leave the room and that [Bradford] needed to tell me the truth.” *Id.* at 941, 978 P.2d at 538. When Bradford expressed a desire to return to work, the detective “told him .. he would talk to the prosecutor about getting Bradford out of jail so that he could return to work.” 95 Wn. App. at 941. Bradford then gave a statement confessing to the rape.

The state’s primary evidence at trial was the confession. *In re Bradford*, 140 Wn. App. 124, 127, 165 P.3d 31, 32 (2007). The jury convicted him despite factual errors in the confession, evidence that he was at work at the time of the rape (corroborated by pay stubs and by his coworkers who remembered teasing him about his vasectomy that took place later that day), and the victim’s description of her rapist as six feet tall (Bradford is about five feet seven). *Bradford*, 95 Wn. App. at 942-43.

After post-conviction DNA testing revealed new exculpatory evidence, Bradford’s conviction was vacated. *In re Bradford*, 140 Wn. App. at 126-28. Although Bradford had already served his sentence from the vacated conviction, prosecutors re-filed the charges against him. C.

Bristol, *Prosecutors Refile Rape Charge Against Man Cleared by DNA*,
YAKIMA HERALD-REPUBLIC, Oct. 14, 2008.

During the re-trial, Bradford testified that he confessed because he wanted to leave the interrogation room and was certain that he would be cleared once "biological evidence" was tested. M. Morey, *Rape Defendant Maintains Innocence*, Yakima Herald-Republic, Feb. 11, 2010. He also testified that details in his confession came from statements made by the detectives during the interrogation. A false confessions expert testified that the interrogation and confession featured many attributes common to false confessions. *Id.* The jury acquitted Bradford after deliberating for only five hours. M. Morey, *The Nightmare Continues, Even After Acquittal on Rape Charge*, YAKIMA HERALD-REPUBLIC, Nov. 18, 2010.

2. Gabriel Baddeley

Gabriel Baddeley pleaded guilty to second-degree arson in 2002 after confessing to starting a fire the previous year at a nearby high school. R. Courtney, *Man with Fetal Alcohol Effect Cleared of Arson*, Yakima Herald-Republic, Apr. 3, 2004. His case was dismissed in 2004, when another person confessed to the crime. *Id.* Baddeley and his mother explained that his Fetal Alcohol Effect causes him to be easily influenced and very susceptible to falsely confessing during an interrogation. *Id.*

Baddeley, then 19, was arrested and questioned about the crime after telling a friend that he was in the school the night before the fire. He later said he remembered little about the night the fire occurred, only recalling drinking at a friend's house, walking by the school, and waking up near one of the portable classrooms at the school. He confessed during his initial questioning because he knew that "if [he] didn't tell them what they wanted to hear, [he] was going to be stuck there forever." *Id.* Baddeley pleaded guilty to avoid a harsher sentence, and he was sentenced to three months in jail and more than \$600,000 in restitution, part of which he paid before his conviction was vacated. *Id.*

3. The Wenatchee Cases

In 1994 and 1995, police, state workers, and prosecutors launched an investigation that eventually led to 29,726 criminal counts against 43 people in Wenatchee. M. Barber, *Prosecutor Now Wants Freedom for Defendant*, Seattle Post-Intelligencer, Feb. 26, 1999, A1. ("Barber, *Freedom for Defendant*") The defendants were accused of participating in a widespread network of molesting and raping children.

Subsequent investigations uncovered major deficiencies in the investigation and child interviewing process, including a lack of medical or other evidence to support the allegations. A. Schneider & M. Barber, *Children Sacrificed for the Case*, Seattle Post-Intelligencer, Feb. 23, 1998,

A6. Many of the convictions were later vacated and prison sentences shortened due to these and other defects. Barber, *Freedom for Defendant*, *supra* According to press reports, “officials now say no child sex rings were found in Wenatchee.” M. Barber, *Wenatchee Woman Convicted in Sex-Abuse Cases is Freed*, Seattle Post-Intelligencer, March 5, 1998, A1 (Barber, *Wenatchee Woman Freed*”).

a. Henry Cunningham

Henry Cunningham lived with his wife and three of their children. During treatment for drug and behavioral problems, their youngest daughter claimed she had been sexually abused by Cunningham. *Cunningham v. City of Wenatchee*, 345 F.3d 802, 805-806 (9th Cir. 2003). Cunningham voluntarily went to the police department and was interviewed by Detective Robert Perez. During the interrogation, Perez told Cunningham that he knew he had committed sexual abuse against his daughter, and that if he didn’t confess, she would be forced to testify. Cunningham, who suffered from bipolar illness and took medication to control his symptoms, eventually confessed. Barber, *Freedom for Defendant; Cunningham*, 345 F.3d at 805-06.

Cunningham’s two older daughters denied any sexual abuse. Perez then interviewed Cunningham’s youngest daughter, who initially denied the abuse, then recounted incidents of abuse after Perez told her she would

stay at in-patient treatment until she disclosed her father's abuse.

Cunningham, 345 F.3d at 805-806. She described "bizarre family group sex acts and fantastic tales of being hypnotized by her father and taught to read the minds of animals." Barber, *Freedom for Defendant*. After these disclosures, Perez re-interviewed the oldest daughters, who eventually accused their father of sex abuse. *Id.* Cunningham pled guilty after his defense attorney failed to conduct any investigation. *Id.*

Cunningham later filed a personal restraint petition claiming ineffective assistance of counsel, for among other things, failure to interview his psychiatrist, who had information that would have established the unreliability of Cunningham's confession. Post-conviction interviews of Cunningham's co-workers at his workplace also revealed that the allegations of repeated abuse were impossible. *Id.* The State conceded that Cunningham's trial counsel was ineffective. *Id.* After serving five years in prison, the appellate court vacated his conviction, and the charges were dropped. *Cunningham*, 345 F.3d at 806.

b. Linda Miller

After three of Linda Miller's children were taken into custody by Child Protective Services, she fled with her fourth to Canada (she was refused entry and stayed overnight in Tonasket). The next day, after just one hour of sleep, she was arrested and returned to Wenatchee for

questioning, arriving just past midnight. Miller signed a confession describing “bizarre sexual activities at four locations with several adults and children” drafted by the detective after the all-night interrogation. *State v. Miller*, 86 Wn. App. 1064, 1997 WL 328740 (1997) (unpublished opinion). Although Miller denied the events described in the confession, the trial court determined that it was voluntary, and she was convicted. *Id.*

On appeal, Miller’s conviction was vacated, based on the cumulative effect of three evidentiary errors, including a denial of funding for an expert witness on false confessions. The court also found that Miller had been deprived of food and sleep, her children had been taken from her, and she faced threats of losing custody altogether. Given the combination of these circumstances, “any person would be uncomfortably tired.” *Id.* After her release, Miller entered an Alford plea to three misdemeanor counts and served no additional prison time. Barber, *Wenatchee Woman Freed*.

c. Harold and Idella Everett

Harold and Idella Everett entered Alford pleas to charges of sexual abuse after accusations made by two of their children. *Everett v. Perez*, 78 F.Supp.2d 1134, 1135 (E.D. Wash. 1999). The Everetts filed personal restraint petitions based on new evidence that the allegations resulted from improper child interviewing techniques. After a consolidated reference

hearing, the court found that improper techniques had been used, and the detectives “‘bullied’ Mrs. Everett, who has limited mental capacity, into confessing to sexual abuse.” *Everett v. Abbey*, 108 Wn.App. 521, 525, 31 P.3d 721, 723-24 (2001). The court stated that no rational trier of fact would believe many of the allegations of abuse. *Id.* at 525.

The Everetts’ petitions were granted, and they withdrew their pleas. No charges were re-filed. A. Schneider, *Freedom Ensured for Wenatchee Couple*, SEATTLE POST-INTELLIGENCER, Sept. 23, 1998, A1.

d. Doris Green

Doris Green was a 34 year-old mother of four children working in the fruit orchards of the Wenatchee Valley when she was accused of horrific acts of sexual abuse and rape. J. McMurtrie, *Unconscionable Contracting for Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed-Fee Contracts*, 39 U. MICH. J.L. REFORM 773, 794 (2006). Green’s ordeal began when Detective Perez interviewed her in connection with other cases. *Id.* The interview soon turned confrontational and Perez became abusive; threatening to take away Green’s children if she did not confess to the crimes. *Id.* After hours of interrogation, a typewritten statement was placed in front of Green for her signature. *Id.* Green, who is marginally literate, asked to have the statement read, and her request was refused. She then signed it. *Id.*

Green began immediately writing to her lawyer, vigorously asserting that Perez fabricated her alleged confession. The confession was admitted at trial; Green was convicted and sentenced to over 23 years in prison. J. McMurtrie, *Justice – A Cautionary Tale – the Wenatchee Cases*, 4 BUTTERWORTHS FAM. L.J. 15 (2002). After serving five years, Green's conviction was vacated when a veteran of the police force confirmed that Detective Perez yelled at Green during the interrogation. *Id.* at 18. The charges were dismissed. *Id.*

III. CONCLUSION

For the reasons set forth above, *amici* urge the Court to recognize that a confession does not establish guilt conclusively and that numerous psychological factors may cause innocent suspects to give false confessions. Confessions, therefore, should not bar post-conviction DNA testing, which can often demonstrate the innocence of the accused.

DATED this 5th day of April, 2011. Resubmitted on April 11, 2011.

GRAHAM & DUNN PC

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Exhibit A

[J-20-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, GREENSPAN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 21 EAP 2008
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered on October 17, 2007 at No.
	:	1383 EDA 2006, affirming the Order of the
v.	:	Court of Common Pleas, Philadelphia
	:	County, Criminal Division, dated April 20,
	:	2006 at No. CP-51-CR-1131582-1991
ANTHONY WRIGHT,	:	
	:	
Appellant	:	
	:	
	:	ARGUED: April 14, 2009

OPINION

MADAME JUSTICE TODD

DECIDED: February 23, 2011

This case presents the question of whether a convicted person who seeks court-ordered DNA testing under the "Postconviction DNA Testing Act," 42 Pa.C.S.A. § 9543.1, is precluded by his confession, which was ruled to be voluntary and admitted into evidence against him at trial, from establishing a *prima facie* case demonstrating that DNA testing would establish his actual innocence. After careful review, we conclude that a confession, even if previously and finally adjudicated as voluntary, does not constitute a *per se* bar to establishing a *prima facie* case, and the convicted person may, therefore, obtain DNA testing under Section 9543.1 if he or she meets all of this statute's pertinent requirements. Accordingly, we vacate the Superior Court's order and remand this case for further proceedings in accordance with this opinion.

The record reveals the following factual background in this matter. On Saturday, October 19, 1991, members of the Philadelphia Police Department went to the home of the victim, Louise Talley, a 77-year-old widow who lived alone at 3959 Nice Street in Philadelphia, in order to check on her at the request of concerned family members who had been unable to contact her. Relatives who had gathered outside granted the officers access to the home. As the officers entered, one of them saw what appeared to be a bloody fingerprint on the screen door,¹ and the officers observed that the first floor of the house appeared to have been ransacked, with couch cushions on the floor and furniture drawers open.

After checking the first floor and the basement, the officers proceeded to the second floor, where they discovered the unclothed body of the victim face down on her bedroom floor covered in blood. Strewn about the victim were various items of bloody clothing, including her nylon stockings, girdle, and shoes. Underneath her body was her blood-soaked empty purse, blouse, bra, and a housecoat. Situated inside the folds of the housecoat was a kitchen knife encrusted in blood. The victim's bedspread was also saturated with blood, and a fitted bed sheet covering her mattress was heavily stained with a mixture of blood and semen.

Some of the responding officers present on the scene were approached by an individual who told them "he had heard that [Appellant] Tony Wright was the person responsible for the killing of Ms. Talley," and "he might be on Bott Street staying with a guy

¹ Crime scene investigators subsequently performed a fingerprint "lift" on this and other partial prints located on the frame of the storm door and its window, which were compared to Appellant's fingerprints, but no match was obtained. N.T. Trial, 5/26/93 at 109.

by the name of either St. Ives or St. James." N.T. Trial, 5/26/93, at 73. Subsequently, two officers and a detective went to a home at 3978 Bott Street where Roland Saint James ("St. James") resided, along with his roommate, John "Buddy" Richardson. N.T. Trial, 6/1/93, at 6, 20. This home was located about 300 feet from the victim's house. St. James admitted at trial that he rented rooms of this residence to others so they could smoke crack cocaine, and, also, that he would help others procure it from local dealers. Id. at 8, 34-37.

St. James was placed in handcuffs and taken to the police station by the officers, one of whom informed him that he was the "primary suspect." Id. at 57-58. After interrogation, St. James, who was wanted on an outstanding bench warrant, gave a statement, which was typed by detectives and later signed by him. In this statement, St. James alleged Appellant had told him that sometime on the night of Friday, October 10 he had "stabbed a woman." Id. at 69, 72, 75. After he gave his statement to the police, St. James was released. Id. at 60.

According to St. James' trial testimony, St. James claimed that Appellant, then age 20, arrived at his house on the afternoon of Friday, October 18 and repeatedly entered and left the residence all afternoon and evening, all the while using crack cocaine and spending time with various women who were on the premises. Id. at 7, 34, 42, 74. Appellant told him he was robbing drug dealers to get the money to pay for the crack and that he had an argument with his mother that evening. Id. at 19. He noticed Appellant wearing a white t-shirt with the word "Pennant" on it and that this t-shirt had a "little blood" on it, but also stated that Appellant did not have his shirt on for most of the night. Id. at 19, 47. Later in his testimony, St. James conceded that he might have told police at the time of his

interrogation that Appellant was wearing gray sweat pants, white sneakers, and a light colored jacket. Id. at 49.

St. James, who admitted to heavily using crack himself during this time, testified further that: sometime late Friday night or early Saturday morning, between the hours of 12:00 a.m. and 1:00 a.m., he left the house with Appellant to buy additional crack, id. at 8-9; Appellant had told him he was moving from his mother's home and needed help in taking his television and radio out of the house in order to sell them, id. at 9-10; he accompanied Appellant to the victim's residence on Nice Street, whereupon Appellant told him he had to go in and get the television and radio, id. at 11; he did not want to go in to the house, so he left Appellant standing in front of the victim's house on the sidewalk, id. at 29; and Appellant followed him back to his house, stayed a short time, and left again. id. at 17.

St. James also claimed that, later on Saturday morning, sometime before 2:00 a.m., Appellant arrived at his door with another individual known as "Earl," id. at 15; Earl was carrying a large portable television and Appellant was carrying a radio, id. at 16; St. James kept the items, averring that Appellant and Earl had asked him to hold them for sale until later that morning, id. at 14; St. James subsequently gave the television to another individual to be sold and put the radio in the trash, id. at 22, 56; several hours later, around 5:00 a.m., he received a bloody white t-shirt from his roommate, Richardson, who St. James says carried it downstairs to him, id. at 20-21; and St. James remembered that he "freaked out" at the sight of the bloody shirt. id. at 21.

The police took Richardson to the station in handcuffs for questioning on Saturday morning, and he remained there until 3:00 a.m. the following morning. Id. at 150. He was

released after he gave a statement to police regarding his whereabouts and his interactions with Appellant on Friday night. Id. at 151. At trial, Richardson testified that, while he was out walking that night, he encountered Appellant, whom he claimed to have only briefly met twice before, at the intersection of Nice and Kerbaugh Streets, sometime after 8:00 p.m. Richardson stated that Appellant was alone and dressed in a red sweatshirt and carrying a white t-shirt rolled up in a ball.² Id. at 169-170. Richardson asserted that Appellant "asked me to go down the street on Nice Street and to be a look-out at a house because he said he had the keys to the house and that he wanted to go in there and get some T.V.s out." Id. at 144. According to Richardson, once Appellant pointed out the house, he refused to go along with Appellant's plan and tried to dissuade him because, in his words, he "knew the lady," and he did not "break in houses." Id. At this point, Richardson claimed Appellant told him, "look, well, I guess I have to go in there myself and if I go in there, if anything happen [sic] I'm going to have to kill her, you know." Id. at 145. Richardson professed to have left the scene at that point to go to a local bar and only returned to St. James' home around 6:00 a.m. to go to work. Id.

In regard to the t-shirt St. James claimed Richardson carried down the stairs, Richardson testified he found the shirt on his return to the house located on a counter top under a window in the dining room, and that St. James told him to put the shirt in a bag, take it down the street and put it into the trash since the garbage truck was coming. Id. at 148-49.

² Richardson could not identify the t-shirt as the same one which he alleged to have found in St. James' house later that morning. Id. at 171.

On the afternoon of Sunday, October 20 police went to Appellant's house, and they were granted admittance by Appellant's mother, Marilyn Martin. Id. at 15. According to Detective Santiago, they saw Appellant sitting on a couch and told him they were investigating the murder of the victim. Detective Santiago asked Appellant if he would accompany them to the Police Administration Building to be interviewed, and he agreed. Upon arrival, Detective Santiago took Appellant upstairs to the Homicide Division and told him that they would be charging him with the murder of the victim. Id. at 25. Thereafter, Detective Santiago read Appellant his Miranda rights, and he had Appellant write yes or no answers to written questions on a form relating to his understanding of those rights, as well as initialing each of his answers. Id. at 27. Santiago testified that Appellant then gave a statement, which was not recorded by audio or visual means but, instead, was typewritten by another detective.

According to this nine-page transcription, Appellant recounted the following series of events to the detectives: Appellant went to St. James' house on Friday night and then left there and met Richardson at the corner of Kerbaugh and Bott streets. He told Richardson that he needed money for drugs and was going to rob the victim and get it, but that he would have to kill her since she knew him. Richardson agreed to be a lookout and waited for him. Around midnight, Appellant went to the victim's house and knocked on her door. Once she answered, Appellant barged into her home and took her upstairs to the second floor, pausing only to grab a kitchen knife from the kitchen. Upon reaching the second floor, Appellant asked her to remove her clothes so he could tie her up. When she began to struggle Appellant stabbed her; however, before stabbing her, he had sex with her on the

floor of the bedroom, but he did not ejaculate. Appellant then became scared and fled from the house, but left the knife in the room. Id. at 34-39.

Richardson was waiting outside, and Appellant motioned for him to go to Bott Street. Appellant then met with him, St. James, and Earl at St. James' house and told them he "had to kill [the victim] because she knows me," after which all four decided to go back to her home and "get her stuff." Id. at 37. They removed a television and clock radio from the room and a little black purse and took the items back to St. James' house. Appellant spent the rest of the night at St. James' house. Appellant described the clothes he was wearing that evening as a black sweatshirt with "Chicago Bills [sic]," blue jeans with suede on them, and black FILA sneakers. Id. at 68. He informed the police that these items could be found in his bedroom at his home. Id.

Detective Santiago testified that Appellant, who had completed the tenth grade, read all nine pages and signed them. Id. at 40. Detective Santiago estimated that they were in the room with Appellant for not more than 1-1/2 to 2 hours, after which they placed Appellant under arrest and charged him with the homicide of the victim.³ Id. at 39. He was the only individual charged with homicide in connection with her death. Id. at 42.

The police next obtained a search warrant for Appellant's home, which they executed on Sunday afternoon. Appellant's mother granted the officers entrance to the residence and, in response to their request, directed the officers to her son's bedroom on the second floor. Id. at 96. She remained downstairs as the officers conducted their search of Appellant's room. One of the detectives who participated in the search, Detective

³ Appellant was additionally charged with, and tried for, the offenses of burglary, rape, robbery, and possession of instruments of crime.

Frank Jastrzembki, testified that between the box spring and mattress of Appellant's bed they found, and took custody of, a black Chicago Bulls sweatshirt with white trim and a pair of blue jeans with a suede front. N.T. 6/2/93, at 98. The sweatshirt and jeans were both stained with blood, and the jeans also contained a seminal stain in the front zipper region. Additionally the police seized a pair of black FILA sneakers laying on the floor.

After being held for trial on all charges, Appellant filed a motion to suppress this evidence on the grounds his confession was involuntary and made as the result of physical and psychological coercion and deceitful police conduct, which he alleged occurred after he indicated he did not wish to speak with police. He also asserted that he did not receive Miranda warnings, nor did he understand any of the things the police wrote down or which he signed. A suppression hearing was held on December 16, 1992, before the Honorable Eugene H. Clarke, following which Judge Clarke denied the motion. Appellant's capital trial took place from May 26 through June 8, 1993. At trial, Appellant's confession was admitted into evidence against him and read to the jury.

In addition to the testimony of the witnesses as described above, the Commonwealth also presented at trial the testimony of two witnesses present on the street near the victim's home on the night of her murder, Greg Alston and Shawn Nixon. Alston, related that around 10:00 p.m. on the night of Friday, October 18 he and two other youths were sitting on the corner of Kerbaugh and Nice Streets. Alston testified he saw Appellant "pacing up and down the street" four times for about seven minutes with a man he identified as Richardson. N.T. Trial, 6/1/93 at 81, 83. Alston stated that he then observed Appellant knock on the door of the victim's home and go in while Richardson waited outside. Id. at 82. Alston's companion, Nixon, testified that he also recalled seeing Appellant walk up and

down the street and go in the victim's house. However, Nixon specifically denied that it was Richardson, whom he knew, with Appellant. Rather he identified Appellant's companion as Earl. N.T. Trial, 6/2/93, at 75-76.

Assistant Medical Examiner Edwin Lieberman, who conducted the autopsy on the victim the morning of Sunday, October 20 testified that her death was caused by multiple stab wounds, coupled with blunt force injuries. Id. at 114. Because of the dimension of the wounds, and their depth of penetration, Dr. Lieberman opined that they were likely inflicted by a similar class of knife as the knife recovered from the folds of the victim's housecoat. Id. at 116-123.

Dr. Lieberman could not conclusively determine the time of the victim's death, and estimated that she died sometime within a time period of 36 hours before she was pronounced dead at 4:30 p.m. on Saturday, October 19. N.T. Trial, 6/2/93, at 112, 132. Dr. Lieberman additionally informed the jury that the results of acid phosphatase tests on swabs taken from the victim's vagina, rectum, and mouth during the autopsy were negative. He told the jury that the presence of acid phosphatase would indicate a "scenario of sexual activity," provided the male did not have a vasectomy or was not wearing a condom. Id. at 127.

The jury further heard testimony from criminalist Louis Brenner regarding the results of forensic testing he performed on pieces of evidence introduced at trial. Brenner conducted conventional ABO blood type testing⁴ of the bloodstains on the knife found

⁴ The ABO blood typing system groups human blood into four well recognized basic blood types A, B, O, and AB which are named for specific antigens found in the cell membranes of red blood cells. 3 Forensic Sciences § 29.07[b] (Cyril H. Wecht ed., Lexis Nexis 2008) (hereinafter "Forensic Sciences").

under the victim's bathrobe, the fitted sheet on her bed, and the sweatshirt and jeans which the detectives testified were taken from underneath Appellant's bed. He related that he found only the presence of the victim's blood type, type A, on all of these items. N.T. Trial, 6/3/93, at 30-33.

Brenner also subjected the semen stain found in the crotch area of the jeans to the same blood type testing. Brenner testified that Appellant had blood type O and was a secretor.⁵ N.T. Trial, 6/3/93, at 40-41. He could not, however, determine whether the victim was a secretor or non-secretor. Id. at 30, 42. Brenner told the jury that he found A and H antigens in the semen stain on the jeans and explained that the presence of the A antigen indicated that a type O secretor like Appellant could not have been solely responsible for the stain. Id. at 33-35. However, Brenner also informed the jury that a stain containing a mixture of fluids from an A secretor and an O secretor could also appear to have originated only from the individual with the A blood type, since both individuals produce the H antigen in their respective bodily fluids, but there is no O antigen in the bodily fluid of a secretor with type O blood. Id. Brenner indicated that it was therefore not possible using this testing method to determine if the stain on the jeans was from more

⁵ Approximately 75 percent of individuals in the total human population are considered secretors, which means, with the exception of those with blood type O, their specific blood type antigen can be found in large quantities in other bodily fluids, such as saliva, sweat, gastric juices and semen. The bodily fluids of all secretors, including those with blood type O, also contain a substance known as antigen H. Thus, bodily fluids, such as sperm, from a type O secretor will contain only antigen H, whereas the bodily fluids of secretors with type A blood will contain antigen A and antigen H, those with type B blood, antigen B and antigen H, and those with type AB blood, antigen AB and antigen H. The remaining twenty five percent of the population are classified as non-secretors, and their bodily fluids contain neither their blood type antigen nor the H antigen. Forensic Sciences supra at n.5.

than one person, or, if it was a mixed sample, to differentiate the various people who may have contributed to it. Id. at 85.

Brenner also related that he conducted early generation DNA testing, known as HLA-DQ α , on these same bloodstains, and all were found to contain only the victim's specific genotype.⁶ Brenner told the jury that this genotype was present in only five percent of the population and further estimated the probability of finding this specific genotype in

⁶ The fundamental scientific principles undergirding DNA tests were derived from the work of Nobel Prize-winning molecular biologists Watson and Crick, who famously determined that an intact human DNA molecule took the shape of a double helix, which resembles a twisted spring or spiral staircase consisting of two entwined strands, each containing the amino acids cytosine, guanine, thymine, and adenine, which are known as bases. These bases are situated in each strand in a linear fashion like linked cars of a train. The two strands are held together by bonds which form across the strands between each of the bases in the individual strands. These bonds obey certain biochemical rules; thus, adenine bonds only with thymine and cytosine with guanine. Once the two separate bases have bonded, they are referred to as base pairs. U.S. Dept. of Justice, Principles of Forensic DNA for Officers of the Court (2009), at 6-7, available at <http://forensic.dna.gov>.

In cells with nuclei such as skin, sperm, or white blood cells, the DNA is packaged within chromosomes located in the nucleus. Certain portions of the DNA material in chromosomes are called genes, and segments thereof are considered "coding" regions since they direct a cell's manufacture of proteins and, thus, they determine an individual's particular physical attributes and characteristics such as eye color, hair color and left or right-handedness. N.T. Trial, 6/3/93, at 50-55; John Butler, Forensic DNA Typing 22-23 (Elsevier 2d. ed. 2006). A gene also contains non-coding sequences of base pairs which do not directly control the manufacture of proteins, and other segments of base pairs in the chromosome between genes are non-coding as well. Both the non-coding portion of certain genes and other non-coding areas of chromosomes vary significantly between individuals, and, thus, are utilized as DNA markers for identity testing. The position on a chromosome where a particular DNA marker can be found is known as a locus. The form of DNA marker observed at each chromosomal locus examined in a DNA test is considered an allele. Since chromosomes occur in pairs, with one chromosome inherited from the mother and one from the father, there will be two alleles for a specific chromosomal locus, one derived from each parent. The designation of two alleles at a particular locus is referred to as a genotype. HLA-DQ α testing focuses on only one specific locus on human chromosome number six. The base pair sequence at this locus has six known alleles, which can combine to form 21 separate genotypes. N.T. Trial, 6/3/93, at 56-61; Butler, at 22-23; Norah Rudin, Keith Inman, An Introduction to Forensic DNA Analysis 43, (CRC Press 2d ed. 2002).

combination with type A blood in the African American population, of which the victim was a member, to be approximately 1.4 percent. Id. at 73. On cross-examination, he acknowledged that the test results could not definitively establish that the bloodstains came only from the victim. Id. at 85.

Brenner, however, admitted to not subjecting the seminal stains found on the sheet and the crotch area of the jeans to HLA-DQ α testing. He indicated that his lab was having difficulty using then extant techniques to obtain genetic material from seminal stains for accurate testing. He expressed dissatisfaction with the results obtained from such testing efforts, and he did not deem them "consistently complete." Id. at 75-76. Hence, he did not want to test a seminal stain since he did not feel comfortable that this testing method would yield results which could be admissible as evidence. Id.

Appellant's mother testified on his behalf. She recalled that she was present during the search of her house by detectives and acknowledged directing them to her son's room. However, she averred that the detectives, after intensively searching the room, came back down the stairs carrying only a white jumpsuit, which she stated Appellant routinely wore to work, as well as pictures of his girlfriend and child, which he had hanging on his bedroom wall. Id. at 128-129. She claimed that she did not see the detectives remove a sweatshirt, jeans, or sneakers, and denied that her son ever owned such items Id. at 130.

Appellant testified in his own defense. He categorically denied killing the victim, sexually assaulting her, or taking things from her house. Id. at 145. He asserted he did not know St. James or Richardson or any of the other witnesses who testified, and he claimed to have never been in St. James' house. Id. at 146-148. Appellant related that on Friday, October 18 he went to work at 7:00 a.m. and came home around 5:00 or 5:30 p.m. Id. at

152. He recounted that, later that evening, around 11:30 p.m., he went with a friend to a local night club and remained there until 4:00 a.m., after which he returned home and went to bed. Id. He stated that on Saturday he awoke around 10:00 a.m., went shopping with some friends, and then, afterward, went with them to a concert at Cheyney University.

He recalled awaking at about 10:00 a.m. on Sunday and watching a football game on television when the detectives came to his house to question him. He remembered going to the station with them at their request, but averred that he had no knowledge they were investigating the victim's death until they told him. He testified he repeatedly denied killing the victim during a lengthy five hour interrogation, but he changed his mind and agreed to confess after the detectives threatened him with physical harm. Id. He recalls signing a number of sheets, which he did not read, at the detective's request. Id. at 161-162. Although he acknowledged that the signature on the confession entered into evidence against him at trial was his, he claimed he never read the factual details of the confession until it was shown to him in preparation for trial. Id. at 164.

Appellant admitted to possessing a white jumpsuit, which he wore for work, but flatly denied owning the relevant sweatshirt, jeans, or shoes. Id. at 153, 164-165. He avowed the shoes could not have been his since his shoe size was 9-1/2 and the shoes admitted into evidence were size 11. Id. at 171. In addition, he professed to wearing a size 38 pants, which was two sizes larger than the jeans entered into evidence. Id. at 172.

After hearing all of the aforementioned testimony, the jury returned a verdict of guilty on all counts. Although the Commonwealth sought the death penalty, the jury could not unanimously agree on that punishment. As a result, the trial court imposed a sentence of life imprisonment.

On direct appeal, the Superior Court affirmed Appellant's judgment of sentence. He filed no petition for allowance of appeal to our Court. In August 1996, Appellant filed a *pro se* petition under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541-46, raising three issues alleging trial counsel's ineffectiveness, which was denied, and this denial was upheld by the Superior Court. Our Court later denied Appellant's petition for allowance of appeal.

Thereafter, our legislature enacted Section 9543.1, which took effect on September 9, 2002. Appellant, represented *pro bono* by new counsel, Sondra Rodrigues, Esq., as well as attorneys from the Innocence Project of Brandeis University in New York, admitted *pro hac vice*, filed a motion under this statute on July 15, 2005, asserting that he was innocent of the rape and murder of the victim. Appellant requested a form of more advanced DNA testing known as Short Tandem Repeat ("STR") Analysis,⁷ which he averred was not available for forensic use until 1999. Contending such testing could demonstrate his actual innocence, Appellant requested the PCRA court grant him permission to test the semen and bloodstains found on the jeans, the fitted sheet taken from the victim's bed, the bloodstain on the sweatshirt, the handle of the kitchen knife, and the oral, vaginal, and rectal swabs taken during the victim's autopsy. Appellant asserted that testing of this evidence, which is preserved, had the potential to demonstrate that he was not the source

⁷ STR Analysis determines the number of repeating sequences of two to five base pairs present at multiple chromosomal loci. Typically, at least 13 separate chromosomal loci are examined in standard STR Analysis, since this is the minimum number required for test results to be included in CODIS ("Combined DNA Indexing System") the national DNA database maintained by the FBI. Because of the multiplicity of chromosomal loci used in this type of testing, and the fact that 8 to 20 alleles may potentially occur in the population for each chromosomal locus, it is statistically improbable for any two random individuals in the world, except identical twins, to share the same DNA profile obtained from this test. (continued...)

of the perpetrator's DNA. He also alleged that, if tested, the results could be entered into national DNA databases for the purpose of finding the actual individual who committed the crimes.

The PCRA court, the Honorable D. Webster Keogh, denied Appellant's motion for testing on July 10, 2006. In his opinion in support of his order, Judge Keogh noted that Judge Clarke, in his previous ruling on Appellant's suppression motion, determined Appellant's confession was not coerced. Trial Court Opinion, 7/10/2006, at 4. Contrary to the PCRA court's statement in its opinion, Petitioner did not further raise the issue of the propriety of Judge Clarke's ruling in either his direct appeal, his prior PCRA petition, or his appeal from the denial of that petition. See Commonwealth v. Wright, No. 00487 Philadelphia 1994, unpublished memorandum at 1-2 (Pa. Super. filed August 14, 1995); Commonwealth v. Wright, No. 5228 Philadelphia 1997, unpublished memorandum at 7-9 (Pa. Super. filed Sept. 1, 1999) (enumerating and discussing issues). Because 42 Pa.C.S.A. § 9543.1(c)(3)(ii)(A) requires an applicant for DNA testing to "present a *prima facie* case demonstrating that the: . . . DNA testing of the specific evidence, assuming exculpatory results, would establish: . . . the applicant's actual innocence," Judge Keogh deemed Judge Clarke's finding that the confession was not coerced as precluding Appellant from making out a *prima facie* case, pursuant to the Superior Court decision in Commonwealth v. Young, 873 A.2d 720 (Pa. Super. 2005) (ruling that an individual was not entitled to DNA testing under Section 9543.1 where he had confessed to the crime, and the confession was determined to be voluntary), discussed at greater length infra. Moreover,

(...continued)

Principles of Forensic DNA for Officers of the Court, supra at n.7, 54-58.

Judge Keogh also noted that, under Section 9543.1(d)(2)(i), a court "shall not order DNA testing if, after review of the record, the court determines there is no reasonable probability that testing would produce exculpatory evidence that would establish . . . actual innocence," and he determined that "[t]here is no such reasonable possibility in this case." Trial Court Opinion, 7/10/2006, at 6.

On appeal, the Superior Court, in a published decision, Commonwealth v. Wright, 935 A.2d 542 (Pa. Super. 2007), also discussed infra, agreed Young was controlling and, as a result, affirmed Judge Keogh's denial of Appellant's petition. Appellant subsequently petitioned our Court for review, which we granted, solely limited to the question of whether a voluntary confession precluded an individual from establishing a *prima facie* case of his innocence in order to obtain DNA testing under Section 9543.1. See Commonwealth v. Wright, 597 Pa. 233, 951 A.2d 263 (2008) (order).

We note that the Commonwealth has candidly conceded in its brief to our Court that the Superior Court was wrong to adopt a *per se* rule barring a convicted defendant who gave a confession, subsequently deemed legally voluntary, from asserting actual innocence of the crime for which he or she was convicted in order to obtain DNA testing under Section 9543.1. See Commonwealth's Brief at 13. However, even though the parties agree on this essential point, we are obliged to conduct our own independent review of the decisions of the lower courts and, thus, for purposes of that review, we presently summarize Appellant's arguments raised in his brief to our Court.

Appellant argues that the fact that his suppression motion was decided adversely to him, and his confession ruled to be voluntary, does not preclude him from obtaining DNA testing under Section 9543.1. He avers that the question of the admissibility of his

confession as evidence has nothing to do with the question of whether he is entitled to utilize previously unavailable DNA testing in order to prove that the factual substance of the confession was false and that he did not rape or murder the victim. He points out that the rules barring the admission of involuntary confessions at trial are grounded in an individual's guarantee of due process under the Fifth and Fourteenth Amendments to the United States Constitution, and the United States Supreme Court has repeatedly held that the accuracy of the facts contained in the statements is irrelevant to the question of admissibility. See Appellant's Brief at 19 (citing, *inter alia*, Lisenba v. California, 314 U.S. 219, 236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."); Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that, even though a statement given by an individual in the grip of schizophrenic hallucinations may be proved to be unreliable, unless the statement was the product of police coercion, it cannot be deemed involuntary and, thus, the due process clause of the Fourteenth Amendment does not prohibit the statement's admission into evidence)).

Appellant notes it is this dichotomy between the question of the voluntariness of a confession and the question of its veracity which provides the reason why a defendant in Pennsylvania under Pa.R.Crim.P. 581(J)⁸ may dispute the underlying truthfulness of a

⁸ Rule of Criminal Procedure 581(J) provides:

If the court determines that the evidence shall not be suppressed, such determination shall be final, conclusive, and binding at trial, except upon a showing of evidence which was theretofore unavailable, but nothing herein shall prevent a defendant from opposing such evidence at trial upon any ground except its suppressibility.

Pa.R.Crim.P. 581(J).

confession at trial, even if the confession has previously been deemed admissible. Appellant points out that he did, in fact, challenge the truthfulness of his confession at his trial, and he repudiated it, claiming it was made out of fear for his safety. Hence, Appellant contends the Superior Court erred in concluding that, because his confession was ruled admissible, it was also finally determinative of his guilt. By contrast, he maintains the DNA testing he sought would provide powerful evidence on this ultimate central factual question.

Appellant specifically cites and discusses three Pennsylvania cases—those of Bruce Godschalk, Nicholas Yarris and Barry Laughman—as illustrative of the danger of using a finally litigated ruling of a confession’s voluntariness to bar subsequent DNA testing to prove actual innocence. Appellant contends that, in all three of these cases, innocent individuals gave confessions to police for crimes they did not commit and, even though DNA testing established that none of them had participated in the crimes for which they were convicted, their confessions all included distinct details of those crimes which had not been released to the public. Further, all of these individuals sought to have their confessions suppressed as either involuntary or violative of the Fifth Amendment right against self-incrimination and the Sixth Amendment right to the assistance of counsel. However, in each of the cases, the defendant's confession was deemed admissible by the trial court, and this finding of admissibility was upheld in post-conviction challenges. All three individuals were convicted after trials at which their confessions were used as a key piece of evidence against them, and their convictions were subsequently affirmed on appellate review. Appellant notes that it was only through the use of post-conviction DNA testing that these imprisoned individuals, one of whom was subject to a death sentence,

were able to demonstrate their innocence of the crimes for which they had been convicted.⁹

Appellant avers these three cases provide dramatic illustrations of what he terms “the

⁹ Godschalk gave an audiotaped confession to two rapes in which he explicitly waived his Miranda rights. This confession was admitted as evidence at trial against him, despite his recantation of it, and he was convicted and sentenced to 10-20 years incarceration. Godschalk later sought DNA testing, but because his case arose before the enactment of Section 9543.1, he made his request under the PCRA with an assertion that his trial counsel was ineffective for failing to request such testing. The PCRA court denied the request, citing the fact that his confession was valid and admissible and, in its opinion, was “overwhelming evidence of [his] guilt” since it contained details of the rapes which were not publicly available. *Id.* at 367 (citing Commonwealth v. Godschalk, 679 A.2d 1295 (Pa. Super. 1996)). Godschalk subsequently sought DNA testing by filing an action under 42 U.S.C. § 1983 in the Eastern District of Pennsylvania. The District Court granted the requested testing despite what it viewed as overwhelming evidence, reasoning that he was entitled to testing as long as there was a chance, “no matter how remote,” the testing could prove his innocence. *Id.* at 370. The testing ordered by the court subsequently showed the semen recovered from rape kits taken from the victims was not his, and he was released from prison.

Yarris was charged with abducting, raping, and murdering a woman who was returning from her job at a shopping mall. Yarris, who was in prison on an unrelated charge, made a number of incriminating statements to prison correction officials, police interrogators and a fellow inmate, indicating his involvement in aspects of the crime. These statements, which included details not revealed to the public about the victim’s car, together with ABO blood testing evidence, and eyewitnesses accounts of Yarris’ alleged stalking of the victim prior to her murder, furnished the basis for his conviction and a sentence of death. Our Court affirmed his conviction on appeal, finding, *inter alia*, that his motion to suppress statements given to detectives during interrogation—including one in which he admitted to raping but not murdering the victim—was properly denied since he had either volunteered the information to detectives without prompting, or had waived his Miranda rights prior to giving the statements. Commonwealth v. Yarris, 519 Pa. 571, 549 A.2d 513 (1988). Subsequent DNA testing on gloves found in the victim’s car, semen stains on the victim’s underpants, and fingernail scrapings were exculpatory and excluded Yarris as the source of the material. The test found the presence of two other DNA profiles from two different individuals. These test results caused all charges against Yarris to be dropped, followed by his release from death row. Yarris v. County of Delaware, 465 F.3d 129 (3d. Cir. 2006).

Laughman was tried, convicted, and sentenced to life in prison for the rape, robbery, and murder of his 85-year-old aunt. The key piece of evidence against Laughman, who was mildly retarded, was a confession police officers obtained after an hour of interrogation. The confession, which was audiotaped, was recited by one of the investigating officers who then asked him if it was correct, and Laughman was heard on the tape to answer yes. Laughman sought to suppress the evidence, and, even though the trial court found that he had a low IQ and was unable to comprehend his written Miranda warnings, the court (continued...)

fallacy” of the Superior Court’s reasoning that confessions in and of themselves provide irrefutable evidence of guilt when their voluntariness has been finally litigated. Appellant’s Brief at 36.

Appellant assails the Superior Court’s interpretation of the text of Section 9543.1 as violative of the rules of statutory interpretation which require courts to refrain from adding provisions to statutes which the legislature has not included. He notes that nowhere in the plain meaning of the statutory text is there an express prohibition against DNA testing for individuals who have confessed, nor is there any indication from the statutory language that such a confession would automatically preclude a convicted individual from establishing a *prima facie* case of his or her innocence. Appellant notes that the statute does contain express restrictions barring a court’s grant of DNA testing in certain situations such as where the technology existed for such testing at the time of trial and was not utilized. Appellant contends that, had the legislature wished to enact a prohibition in cases where a defendant has confessed, it could easily have done so; therefore, its omission must be viewed as deliberate and indicative of its intent not to bar defendants who have confessed from access to DNA testing to establish their actual innocence.

(...continued)

nevertheless rejected his contention that his confession was involuntary. The judgment of sentence was affirmed on direct appeal by both the Superior Court and our Court. Laughman thereafter filed a number of petitions under the PCRA, in order to obtain DNA testing of semen samples taken from the victim; however these efforts were unsuccessful. Following the enactment of Section 9543.1, the trial court allowed him to obtain DNA testing which excluded him as the source of the semen. The trial court subsequently dismissed the charges against him and released him from prison. Laughman v. Pennsylvania, 2007 WL 2345295 (M.D. Pa. filed August 16, 2007).

Appellant further observes that this section was passed in the aftermath of well-publicized exonerations by DNA testing of individuals who had confessed to crimes, especially that of Godschalk. He directs our attention to the remarks made by Senator Stewart Greenleaf, the Chairman of the Pennsylvania Senate Judiciary Committee, who conducted a hearing in 2001 on the subject of post conviction exonerations, and who was principal sponsor of this legislation, as evidence of the General Assembly's intent to facilitate broad access to post conviction DNA testing having the scientific potential to demonstrate actual innocence with its enactment of Section 9543.1.¹⁰ Appellant contends that the Superior Court's interpretation in Young and the case at bar creates an artificial barrier to DNA testing in contravention of the legislature's intent.

¹⁰ Senator Greenleaf gave the following remarks from the Senate floor on the occasion of the passage of Section 9543.1:

It is a bill that came out of the hearing of the Committee on Judiciary on the death penalty moratorium, and as we were going through that process, we found that Pennsylvania does not have easy access to DNA testing for those persons on death row or other crimes they are charged with to have access to that type of testing. This legislation would provide that testing and provide a payment process for it and a process in which an individual could easily present their case, and a judge could then decide whether they would be allowed to have the testing or not, and they would be allowed to have it if the evidence would prove their innocence, or if you are on death row to prove that they were innocent of the crime and/or that an aggravating circumstance was not justified . . . [A]s we have seen in the press, there are occasions when DNA is used to convict an individual, and, of course, there are occasions when DNA can convincingly establish the innocence of an individual. And so we will now join 13 other States in this nation that will provide for this process and to make sure that we do not have anyone in our prisons or on death row who is innocent.

Floor Statement of Senator Stewart Greenleaf, Senate Journal, 6/19/01, page 745.

Additionally, Appellant points out that, at present, 42 other states, the District of Columbia, and the federal government have enacted statutes providing for post conviction DNA testing, and none of those statutes expressly bars DNA testing in cases where there is a confession—even if it has been ruled voluntary. Appellant underscores the fact that the Superior Court decision in Young is a distinct anomaly in the body of jurisprudence interpreting the other state and federal DNA testing statutes, as it is the only decision to interpret a DNA testing statute to automatically exclude those who have voluntarily confessed from utilizing legislatively established procedures for obtaining testing.

Appellant argues that the categorical bar to DNA testing articulated by Young for defendants whose confessions were deemed voluntary would deny actually innocent individuals access to the DNA testing they could utilize to prove their claims of innocence. This, Appellant argues, would result in the “unjust and absurd” result of innocent individuals being wrongfully incarcerated for lengthy terms or, like Nicholas Yarris, subjected to potential execution. Appellant’s Brief at 46.¹¹ He maintains such consequences constitute “the quintessential miscarriage of justice.” Id. at 46-47.¹²

¹¹ To buttress his contention that existence of a confession, in and of itself, does not provide conclusive evidence of guilt, Appellant cites studies of reversals of convictions resulting from DNA testing, which he claims have shown innocent people have falsely confessed to crimes they did not commit. See Appellant’s Brief at 24-26 (citing, *inter alia*, Garrett, Brandon L., Judging Innocence, 108 Colum. L. Rev. 55, 76 (2008); Garrett, Brandon L., The Substance of False Confessions, 62 Stanford Law Review 1051 (2010); Drizin and Leo, False Confessions in the Post-DNA World, 82 N.C.L.Rev. 891, 956 (2004)).

¹² Appellant also contends that, by enacting Section 9543.1, the state has created a right to DNA testing for convicted defendants to establish their actual innocence and that he also has a recognized right under the Sixth Amendment to the United States Constitution to present a defense that a third party committed the crime for which he has been accused no matter how inculpatory the evidence against him appears. He asserts that the Superior Court’s construction of Section 9543.1 in Young impedes both rights. Appellant’s Brief at (continued...)

After conducting our own independent review, we agree with the parties and conclude that the Superior Court erred in Young by announcing such a sweeping preclusion. Correspondingly, we hold that the reliance on Young by the Superior Court panel below necessitates reversal. For the reasons that follow, we expressly disavow Young and overrule the decision of the Superior Court in the present matter.

The pertinent statutory language at issue provides as follows:

§ 9543.1. Postconviction DNA testing

(a) Motion.—

(1) An individual convicted of a criminal offense in a court of this Commonwealth and serving a term of imprisonment or awaiting execution because of a sentence of death may apply by making a written motion to the sentencing court for the performance of forensic DNA testing on specific evidence that is related to the investigation or prosecution that resulted in the judgment of conviction.

* * *

(c) Requirements.—In any motion under subsection (a), under penalty of perjury, the applicant shall:

* * *

(3) present a *prima facie* case demonstrating that the:

(i) identity of or the participation in the crime by the perpetrator was at issue in the proceedings that resulted in the applicant's conviction and sentencing; and

(ii) DNA testing of the specific evidence, assuming exculpatory results, would establish:

(A) the applicant's actual innocence of the offense for which the applicant was convicted;

(...continued)

50-53. Since our decision today is grounded on principles of statutory interpretation, we need not address these claims.

42 Pa.C.S.A. § 9543.1.¹³

We begin our discussion by reviewing the rationale employed by the Superior Court in Young and in the case *sub judice* in construing these statutory provisions. In Young, the appellant, a juvenile, was convicted of the crimes of second-degree murder, robbery, and other offenses for the stabbing of his next door neighbor, whose bloodied body was found laying against her kitchen door. In addition to the eyewitness testimony of the decedent's young son, who saw Young threaten his mother in her bedroom while brandishing a knife and later fleeing from the premises, the trial evidence included a knife, shoes, pants and a washcloth containing human blood recovered from Young's house. Young also gave a full confession to the crime to police, but the Commonwealth did not introduce this confession into evidence at trial.

In Young's direct appeal to the Superior Court and our Court, he never challenged the voluntariness of his confession. However, in subsequent PCHA¹⁴ proceedings, he argued that the trial court erred in admitting the physical evidence against him since it was "the fruit of the poisonous tree" of his involuntary confession. This claim was rejected by the trial court and that decision was affirmed on appeal by the Superior Court.

Young next filed a petition under Section 9543.1, requesting DNA testing on the items of physical evidence taken from his home, which the trial court denied. The PCRA court reasoned that neither the identity of the perpetrator of the crime, nor the question of Young's actual innocence, was at issue at any time before, during, or after trial. The PCRA

¹³ With respect to the requirements of subsection (c)(3)(i), the parties herein do not dispute that the identity of the perpetrator of the rape and murder of the victim was the central issue in Appellant's trial.

¹⁴ Post Conviction Hearing Act, 42 Pa.C.S.A. §§ 9541-9551 (repealed), the predecessor to (continued...)

court based its conclusion on the fact that, in his PCHA appeal, the Superior Court concluded his confession was voluntary, as well as the victim's son's observation of Young menacing his mother with the knife shortly before her death, and the physical evidence of the blood stained items found in Young's house. The PCRA court concluded all of these factors constituted "overwhelming indicia of guilt," which left "virtually no doubt as to the identity of the perpetrator." Young, 873 A.2d at 726.

A panel of the Superior Court, in an opinion authored by Judge Hudock, and joined by Judges Montemuro and Kelly, rejected the PCRA court's finding that identity was never at issue. The panel noted that Young's trial attorney engaged in extensive cross-examination of the Commonwealth's witnesses in order to dispute both their identification of Young and the other evidence linking him to the crimes, as well as argued to the jury that the son's identification took place only after the police and district attorney improperly suggested to him that Appellant murdered his mother. The panel additionally observed that the blood evidence taken from the home was never identified as the same blood type as the victim, as the PCRA court had inaccurately found.

Nevertheless, despite these erroneous factual conclusions, the panel agreed with the PCRA court that Young could not meet the *prima facie* requirements of Section 9543.1 for DNA testing. The panel acknowledged Young's claim of innocence in his Section 9543.1 petition but found his confession to the murder barred him from asserting a claim of actual innocence since "the validity of the confession [was] finally litigated, found not to be coerced, and was knowingly and voluntarily given." Young, 873 A.2d at 727 (citing

(...continued)
the PCRA.

Commonwealth v. Starr, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995)). The panel also noted, in dicta, that, even if the confession did not preclude Young from seeking DNA testing under Section 9543.1, he was not entitled to relief, because any exculpatory results arising from the DNA testing would not be enough to establish Young's actual innocence of the murder given the eyewitness testimony of the victim's son.

In the instant case, the Superior Court panel opinion, authored by Judge Panella and joined by Judge Popovich,¹⁵ specifically relied on Young to affirm Judge Keogh's denial of Appellant's petition. The panel ruled Appellant's failure to appeal the ruling of the suppression court that his confession was knowing and voluntary caused that ruling to become "the law of the case." Wright, 935 A.2d at 547. Consequently, it reasoned that, because the confession was "finally litigated, found not to be coerced, and was knowingly and voluntarily given . . . [,] this case is directly controlled by Young and [Appellant] is unable to assert his actual innocence." Id. The panel did not address the trial court's alternative finding that there was no reasonable possibility that DNA testing would produce exculpatory evidence establishing Appellant's actual innocence of the crimes for which he was convicted.

In considering the propriety of these rulings, we are guided by our well established standard of review of an order denying post-conviction relief. Our task is to examine whether the lower court's rulings are supported by the evidence of record as well as whether they are free from legal error. Commonwealth v. Morales, 549 Pa. 400, 408, 701 A.2d 516, 520 (1997). To resolve the question of whether a confession, the voluntariness

¹⁵ Judge Joyce heard oral argument in the case but did not participate in the final decision.

of which has been fully and finally litigated in prior proceedings, precludes a convicted person from subsequently presenting a *prima facie* case that exculpatory results obtained from DNA testing of items of evidence would establish his or her actual innocence, requires us to interpret the relevant language of Section 9543.1. Because statutory interpretation is a matter of law, our standard of review is *de novo*, and our scope of review is plenary. Commonwealth v. McClintic, 589 Pa. 465, 472, 909 A.2d 1241, 1245 (2006). Consequently, we are not bound by the lower court's conclusions regarding the proper meaning of the applicable provisions of this statute. See Commonwealth v. Kyle, 582 Pa. 624, 632, 874 A.2d 12, 17 (2005) (holding that our Court owes no duty of deference to the legal conclusions of lower courts regarding an issue of statutory construction).

Our review is further governed by the Statutory Construction Act, 1 Pa.C.S.A. §§ 1501 *et seq.*, under which our paramount interpretative task is to give effect to the intent of our General Assembly in enacting the particular legislation under review. See 1 Pa.C.S.A. § 1921(a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions."); Nationwide Ins. Co. v. Schneider, 599 Pa. 131, 143, 960 A.2d 442, 448 (2008). Generally, the best indication of the General Assembly's intent may be found in the plain language of the statute. Martin v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing, 588 Pa. 429, 438, 905 A.2d 438, 443 (2006). In this regard, "it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include." Commonwealth v. Rieck Investment Corp., 419 Pa. 52, 59-60, 213 A.2d 277, 282 (1965). Consequently, "[a]s a matter of statutory interpretation, although one is admonished to listen attentively to what a

statute says[;] [o]ne must also listen attentively to what it does not say.” Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co., 567 Pa. 514, 525, 788 A.2d 955, 962 (2001) (internal quotations omitted).

Applying these principles to the case before us, the plain language of subsections (c)(3)(i) and (c)(3)(ii)(A), read together, establishes two basic requirements a convicted individual requesting DNA testing, who also meets the requirements set forth in Section 9543.1(a), is obliged to establish in his or her written motion: 1) a *prima facie* case demonstrating that identity of the perpetrator of the crime was at issue at trial, and 2) a *prima facie* case that DNA testing of the specific evidence identified in the motion, assuming it yields exculpatory results, would establish his or her actual innocence of the crime for which he or she was convicted. Nowhere in subsections (c)(3)(i) or (c)(3)(ii)(A), or in any of the other provisions of Section 9543.1, did the legislature include an explicit prohibition to prevent a convicted individual who has confessed to a crime, and who otherwise meets all of the statutory requirements, from obtaining DNA testing, merely because of the existence of the confession. Neither do we perceive any reasonable reading of the entirety of the text of Section 9543.1 which would impliedly support such a restrictive construction. Consequently, absent any such express or implicit direction by the legislature, it was improper for the Superior Court to judicially engraft such a barrier to DNA testing into this statute.

The critical flaw in the Superior Court’s reasoning in Young, and in its decision in the present matter, was its legal conclusion that a finally litigated ruling on the voluntariness of a confession was also fully and completely determinative of the factual accuracy of the confession and, thus, dispositive of the issue of actual guilt or innocence. This was

improper since the issue of the voluntariness of a confession—i.e. whether it was obtained in a manner which did not violate the due process rights of the defendant under the United States and Pennsylvania Constitutions—is entirely separate from the issue of whether a defendant's admissions in the confession conclusively establish, factually, that he or she committed the acts which form the basis for his or her conviction. As these are two separate and distinct questions, the resolution of each involves fundamentally different considerations.

When a court is called upon to determine whether a confession is voluntary and, hence, admissible at trial, it examines the totality of the circumstances surrounding the confession to ascertain whether it is “the product of an essentially free and unconstrained choice by its maker.” Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973). In making this inquiry, a court is not concerned with the issue of whether the substance of the confession is true. See Rogers v. Richmond, 365 U.S. 534, 544 (1961) (expressly disapproving of judging the admissibility of a confession under the United States Constitution by utilizing a standard which considers the probable truth or falsity of the confession and instead emphasizing that the question of admissibility is “a question to be answered with complete disregard of whether or not [the defendant] in fact spoke the truth.”); Jackson v. Denno, 378 U.S. 368, 377 (1964) (holding the determination of the voluntariness of a confession is “a determination uninfluenced by the truth or falsity of the confession.”); Commonwealth v. Bracey, 501 Pa. 356, 365, 461 A.2d 775, 779 (1983) (holding that question of whether a confession was coerced was not to be resolved by considering the truth or falsity of the confession). Rather, a court is constrained to examine only whether an individual's confession was the product of coercion, duress, or the use of

other measures by interrogators deliberately calculated to overcome his or her free will. See Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (“[I]f [a defendant’s] will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.”); Colorado v. Connelly, 479 U.S. at 164 (“Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law.”).

Conversely, the question of the veracity of the factual matters contained in a confession, and their bearing on the substantive issue of the defendant’s guilt or innocence, is an entirely separate inquiry altogether. As our Court cautioned five decades ago: “[A] confession of the commission of a crime is not sufficient, in and of itself, to convict. . . . We need not be reminded of the countless situations where persons confess to crimes of which they are innocent, either out of a desire to cover up for the guilty person or because of a psychological urge to do so.” Commonwealth v. Conklin, 399 Pa. 512, 514-515, 160 A.2d 566, 568 (1960). Our Court’s observation of the reality of this curious aspect of human behavior has not lost its force of truth with the intervening passage of time.¹⁶

¹⁶ Amicus, the American Psychological Association (“APA”), contends in its brief there have been many historical instances when innocent people volunteered confessions to crimes they did not commit, including the nearly 200 people who came forward to say that they kidnapped Charles Lindbergh’s baby, and the more recent well-publicized confession of John Mark Karr to the murder of JonBenet Ramsey. Amicus Brief for APA at 8. The APA enumerates a variety of reasons why innocent people might voluntarily confess, such as an individual’s desire for media attention or public notoriety, guilty feelings or delusions of involvement, a belief that they will benefit by the act of confession, or the confessor is motivated by a desire to protect a parent, child, or someone else. Id.

Relying on the results of various research studies, the APA identifies two factors it believes to be primary reasons for false confessions resulting from the interrogation process. The first factor it cites is interrogation tactics which can lead innocent people to confess in order to end the interrogation process. According to the APA, such tactics can involve: (a) isolating and cutting off the person being interrogated from his or her support (continued...)

Further, even if a confession has properly been admitted into evidence at trial, a finder of fact is still not compelled to believe the matters contained in the confession and to automatically return a verdict of guilty, since the confession is not decisive of the issue of the defendant's guilt or innocence. See Crane v. Kentucky, 476 U.S. 683, 689 (1986) ("Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise unworthy of belief.'"). The finder of fact remains the final arbiter of the question of the veracity of the matters contained in the confession and is wholly free to decide its impact, if any, on the central question of the defendant's guilt or innocence.¹⁷ Commonwealth v. Ewell, 456 Pa. 589, 593, 319 A.2d 153, 156 (1974) ("A

(...continued)

structure of family and friends and then confronting the person with strong accusations of guilt which the interrogator claims are supported with evidence, even though some of this evidence may not even exist, resulting in strong feelings of despair; (b) wearing the interrogated person down with lengthy interrogations; (c) the interrogator pretending to minimize the severity of the offense and to provide sympathy or moral justification for the questioned individual's actions; and (d) the interrogator suggesting to the individual that he or she would be treated with leniency if he or she confesses.

The second factor the APA discusses in its brief is the vulnerability of certain groups of people to interrogation, particularly juveniles or intellectually impaired individuals, because those individuals do not comprehend what they are confessing to or even the nature of the questions being asked of them. Id. at 8-15 (citing, *inter alia*, Inbau, Criminal Interrogation and Confessions (Jones and Bartlett, 3d. ed. 2001)); Ofshe and Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Den. U.L. Rev. 979 (1997); Zulawski and Wicklander, Practical Aspects of Interview and Interrogation (CRC Press 1993); Leo, R. Inside the Interrogation Room, 86 J.Crim.L. and Criminology 266 (Winter 1996); Leo and Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim.L. and Criminology 266 (Winter 1998)).

¹⁷ The standard jury instructions trial judges across this Commonwealth frequently utilize to instruct juries on their deliberations further illustrate the clear distinction between the question of the voluntariness of a confession, and the question of whether the confession is truthful and determinative of guilt. Juries are explicitly instructed to consider both questions separately. See, e.g., Pennsylvania Suggested Standard Jury Instruction § 3.04 (continued...)

defendant's voluntary out-of-court statement is merely another piece of evidence to be considered in resolving the ultimate issue of guilt or innocence, and jurors can attach as much or as little weight to it as they see fit."). Ultimately, the finder of fact is free to choose to believe all, part, or none of the contents of a confession in arriving at its verdict. Commonwealth v. Sherwood, 603 Pa. 92, 109, 982 A.2d 483, 493 (2009) ("[A] jury or a trial Court can believe all or a part of or none of a defendant's statements, confessions or testimony."); Commonwealth v. Williams, 176 A.2d 911, 918 (Pa. Super. 1962) ("[A] jury is not *required* to accept a confession as true even if it is voluntarily made." (emphasis original)).

The Superior Court was, therefore, in error to hold that a finally litigated ruling that a confession was uncoerced and, hence, voluntary, should also be treated as a final determination as to the truth of that confession and, thus, decisive of the convicted individual's guilt. The "law of the case" doctrine which we discussed in Starr, supra, and which was relied on by the Superior Court in Young as the basis for its holding, does not compel such a conclusion. In Starr, we emphasized that, under the law of the case doctrine, "a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter." Starr, 541 Pa. at 574, 664 A.2d at 1331. However, this doctrine

(...continued)

(instructing the jury that they are not to consider a defendant's statement unless they find the defendant made the statement voluntarily) and § 3.05 (instructing the jury that once they have determined a defendant has made a statement voluntarily they may then consider the statement as evidence and consider the circumstances of its making, as well as all the other evidence in the case, to judge its truthfulness and how much weight it has on the question of the defendant's guilt).

applies only when a court is later asked to consider the **same** question decided by another court of equivalent or higher jurisdiction. In re DeFacto Condemnation and Taking of Lands of WBF Associates, L.P. ex.rel. Lehigh-Northampton Airport Authority, 588 Pa. 242, 268, 903 A.2d 1192, 1207 (2006). Because, as we have discussed, the question of the voluntariness of a defendant's confession and the question of the defendant's actual guilt or innocence are fundamentally different issues, a finally litigated ruling that a confession has been given knowingly and voluntarily is not binding on courts in subsequent phases of the case considering the wholly separate question of whether DNA testing may establish an individual's actual innocence, the confession notwithstanding. Consequently, we hereby disapprove Young, and we reverse the panel decision below. We now hold that a confession, in and of itself, is not a *per se* bar under Section 9543.1(c)(3) to a convicted individual establishing a *prima facie* case that DNA testing would establish actual innocence of the crime for which he or she was convicted, even if the voluntariness of that confession has been fully and finally litigated.

As noted previously, the PCRA court indicated in its opinion in support of its dismissal of Appellant's motion that, under Young, it considered the previous ruling that Appellant's confession was voluntary as barring, as a categorical matter, Appellant from establishing a *prima facie* case for DNA testing. Thus, it did not consider whether Appellant's specific factual allegations in his motion for DNA testing established a *prima facie* case of his innocence of the rape and murder of the victim. It is therefore necessary

to remand this case to the PCRA court so that it may consider this question in the first instance.¹⁸

Additionally, as mentioned above, the PCRA court concluded its opinion by stating there was no reasonable possibility that Appellant's requested DNA testing would produce exculpatory evidence establishing his actual innocence, as required by Section 9543.1(d)(2)(i).¹⁹ The following represents the entirety of the PCRA Court's rationale for this conclusion:

Petitioner fails to present a *prima facie* case demonstrating that DNA testing would establish his actual innocence of the [offenses] for which he was convicted. Pursuant to 42 Pa.C.S. § 9543.1(d)(2)(i), this Court shall not order DNA testing if, after review of the record, the court determines there is no reasonable possibility that testing would produce exculpatory evidence that would establish the Petitioner's actual innocence of the offense for which he was convicted. There is no such reasonable possibility in this case.

Trial Court Opinion, 7/10/06, at 5-6. It appears, then, that the PCRA Court may have considered the *per se* bar of Young to Appellant's establishment of a *prima facie* case of

¹⁸ As noted above, see supra note 13, the parties do not dispute that the identity of the perpetrator was at issue at trial, since Appellant repeatedly asserted at trial he was not the person who raped and murdered the victim or otherwise participated in any of the crimes which were committed that evening.

¹⁹ This subsection provides:

(d) Order--

* * *

(2) The court shall not order the testing requested in a motion under subsection (a) if, after review of the record of the applicant's trial, the court determines that there is **no reasonable possibility** that the testing would produce exculpatory evidence that:

(i) would establish the applicant's actual innocence of the offense for which the applicant was convicted;

42 Pa.C.S.A. § 9543.1(d) (emphasis supplied).

his innocence as also operating to prevent him from demonstrating a reasonable possibility of his innocence under Section 9543.1(d)(2)(i). The Superior Court panel below did not address this issue in its opinion, having relied on Young to conclude that Appellant was precluded by his confession from establishing a *prima facie* case that DNA testing would establish his actual innocence. Consequently, because the lower courts did not adequately address the question of whether Appellant met the requirements of Section 9543.1(d)(2)(i), and in light of our present holding that a confession is not a *per se* bar to a convicted individual's ability to seek DNA testing to prove his or her actual innocence, the PCRA court is to consider this question, anew, upon remand.

Order reversed. Case remanded to the Superior Court for remand to the PCRA court. Jurisdiction relinquished.

Former Justice Greenspan did not participate in the decision of this case.

Mr. Chief Justice Castille and Messrs. Justice Saylor, Baer and McCaffery join the opinion.

Mr. Chief Justice Castille files a concurring opinion.

Mr. Justice Eakin files a concurring and dissenting opinion.

[J-20-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 21 EAP 2008
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered on October 17, 2007 at No.
	:	1383 EDA 2006, affirming the Order of the
v.	:	Court of Common Pleas of Philadelphia
	:	County, Criminal Division, entered on April
	:	20, 2006 at No. CP-51-CR-1131582-1991
ANTHONY WRIGHT,	:	
	:	
	:	935 A.2d 542 (Pa. Super. 2007)
Appellant	:	
	:	ARGUED: April 14, 2009

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE

DECIDED: February 23, 2011

I join Madame Justice Todd's Majority Opinion in its entirety. I write separately only to express the following point.

In summarizing appellant's arguments, the Majority notes the reliance upon secondary sources regarding exonerations across the nation and, specifically, three Pennsylvania state prosecutions involving defendants named Godschalk, Yarris, and Laughman. Majority Slip Op. at 18-19 & n. 9. The Majority sets forth both appellant's arguments and the federal decisions in those cases in a descriptive manner, without purporting to endorse the descriptions, which I believe is the proper course. I have no difficulty with the notion of false confessions, or with the reality that there are persons who have confessed, and have been convicted, who were actually innocent. In addition, of course, I see the wisdom in a statute that allows for DNA testing on collateral attack, to support a claim of actual innocence. I am wary, however, of accepting at face value

characterizations of cases as representing determinations of “actual innocence” or “exoneration” when no such judicial finding has been made. Moreover, I am cognizant of the litigation incentive at work, both in defense advocacy and in the persons and organizations providing supporting studies and literature, to exaggerate the significance of what are usually judicial determinations that fall short of a finding of “actual innocence.” A grant of a new trial, like a subsequent prosecutorial determination not to re-prosecute, does not necessarily represent a determination of actual innocence.¹

¹ There is authority suggesting that many anti-death penalty studies promoting “exonerations” or “actual innocence” include in their numbers cases where defendants were acquitted, prosecutors chose not to re-try, some reversible error occurred, or some other type of legal insufficiency led to the defendant’s release. These defendants were not, however, necessarily declared actually innocent. See generally Ward A. Campbell, *Exoneration Inflation: Justice Scalia’s Concurrence in Kansas v. Marsh*, IACJ Journal, Summer 2008, at 49-63.

[J-20-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 21 EAP 2008

Appellee

v.

ANTHONY WRIGHT,

Appellant

:
: Appeal from the Order of the Superior
: Court entered on October 17, 2007 at No.
: 1383 EDA 2006, affirming the Order of the
: Court of Common Pleas, Philadelphia
: County, Criminal Division, dated April 20,
: 2006 at No. CP-51-CR-1131582-1991

:
: ARGUED: April 14, 2009
:

CONCURRING AND DISSENTING OPINION

MR. JUSTICE EAKIN

DECIDED: February 23, 2011

We granted allocatur to clarify the holding in Commonwealth v. Young, 873 A.2d 720 (Pa. Super. 2005), and address whether a voluntary confession precludes a prima facie finding that exculpatory results from DNA testing would establish actual innocence, as required under 42 Pa.C.S. § 9543.1. See Commonwealth v. Wright, 951 A.2d 263 (Pa. 2008). I join the majority's holding insofar as it disapproves Young, which held "an appellant cannot assert a claim of actual innocence where ... the validity of the confession has been finally litigated, found not to be coerced, and was knowingly and voluntarily given." Young, at 727 (citation omitted). I also join the majority's holding:

a confession, in and of itself, is not a per se bar under [§] 9543.1(c)(3) to a convicted individual establishing a prima facie case that the DNA testing being requested would establish actual innocence of the crime for which he or she was convicted, even if the voluntariness of that confession has been fully and finally litigated.

Majority Slip Op., at 38. I dissent because I would affirm the Superior Court on an alternative basis.

A confession is just one aspect of the measure of evidence which may preclude a finding of innocence under 42 Pa.C.S. § 9543.1. While it is not a per se bar to establishing innocence, a confession which has been deemed voluntary may lend itself to such a conclusion. The circumstances surrounding the confession may also contribute to the measure of evidence sufficient to overcome § 9543.1's innocence requirement. A confession is, after all, just a piece of the evidentiary record. See Commonwealth v. Young, 767 A.2d 1072, 1077 (Pa. Super. 2001) (Eakin, J., dissenting). The measure of evidence precluding an actual finding of innocence should be determined by an evaluation of the totality of the circumstances, the test which guides most criminal procedure determinations.¹

Appellant confessed to raping, robbing, and murdering the victim, as well as burglarizing her home. In this statement, Appellant noted he was wearing a black Chicago Bulls sweatshirt, a pair of blue jeans, and Fila sneakers. Police recovered these items from Appellant's home. Tests revealed the sweatshirt and jeans were

¹ See, e.g., Commonwealth v. Housman, 986 A.2d 822, 840-41 (Pa. 2009) (applying totality of circumstances in determining confession's voluntariness); Commonwealth v. Patton, 985 A.2d 1283, 1288 n.3 (Pa. 2009) ("we do not favor per se rules in error review"); Commonwealth v. Allshouse, 985 A.2d 847, 871 (Pa. 2009) (Baer, J., concurring) (applying totality of circumstances in determining whether statement elicited at custodial interrogation); Commonwealth v. Sherwood, 982 A.2d 483, 501 n.29 (Pa. 2009) (determining probable cause); Commonwealth v. Spatz, 896 A.2d 1191, 1211-14 (Pa. 2006) (determining whether prosecution used peremptory challenges to exclude women); Commonwealth v. Davido, 868 A.2d 431, 438-39 (Pa. 2005) (determining whether defendant invoked right to self-representation); Commonwealth v. Flanagan, 854 A.2d 489, 500-04 (Pa. 2004) (determining plea's validity); Commonwealth v. Reid, 811 A.2d 530, 545-46 (Pa. 2002) (determining voluntariness of consent to search); In re D.M., 781 A.2d 1161, 1163-64 (Pa. 2001) (determining reasonable suspicion); Commonwealth v. Fisher, 769 A.2d 1116, 1127-28 (Pa. 2001) (determining independent basis for identification).

splattered with the victim's blood. The jeans also had a stain on the crotch, which appeared consistent with a combination of Appellant's seminal fluid and the victim's bodily fluids; however, the source of the fluid could not be conclusively identified because of the limitations of DNA testing in 1991.

Appellant filed a motion to suppress his statement, but the suppression court concluded it was knowing and voluntary. At trial, the Commonwealth presented Appellant's confession, DNA evidence establishing the victim's blood was found on the jeans in Appellant's possession, eyewitness testimony from two people who saw Appellant enter the victim's home the night of the murder, and testimony from two witnesses to whom Appellant made inculpatory statements. Notwithstanding its misplaced reliance on Young, the Superior Court suggested the evidence was overwhelming. I agree.

This is not a case where the evidence Appellant seeks to have tested will point to the actual killer. The stain on Appellant's jeans, regardless of origin, cannot show Appellant did not rape and murder the victim; DNA evidence establishing the stain was not Appellant's would not demonstrate his actual innocence. As Chief Justice Roberts indicated in District Attorney's Office for The Third Jud. Dist. v. Osborne, 129 S.Ct. 2308, 2316 (2009), "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." Id. (citation omitted). Appellant has been found guilty. "[O]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." Id., at 2320 (citation omitted). Appellant's access to DNA testing is not without its limits, and here, the evidence precludes the finding of innocence required by the statute.

Accordingly, I would not remand for further proceedings, but would affirm the denial of relief.



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Exhibit B

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This opinion is uncorrected and subject to revision before
publication in the New York Reports.

No. 35
Douglas Warney,
 Appellant,
 v.
State of New York,
 Respondent.

Peter J. Neufeld, for appellant.
Alison J. Nathan, for respondent.
American Psychological Association; Innocence Network,
amici curiae.

CIPARICK, J.:

Claimant Douglas Warney spent over nine years incarcerated for a murder he did not commit. The primary evidence against him was a confession that contained non-public details about the crime. Warney now seeks damages under Court of Claims Act § 8-b, the Unjust Conviction and Imprisonment Act. We

conclude that Warney's confession as well as other statements and actions the State attributes to him do not, on the facts as alleged here, warrant dismissal of his claim on the ground that he caused or brought about his conviction.

The facts as stated in the claim and record below are as follows. On January 3, 1996, Rochester Police Department (RPD) officers found William Beason dead in his home, stabbed 19 times in the neck and chest. The following day, Warney called the RPD to provide information about the murder, and was interviewed in his home by an officer. According to the officer's trial testimony, Warney told her that he had been shoveling snow outside "William's" house when he saw his cousin go inside, and that the cousin later admitted to Warney that he had killed Beason.

Warney alleges that he has an IQ of 68, was in special education until he dropped out of school in eighth grade, and was suffering at the time of the Beason investigation from AIDS-related dementia. Additionally, the RPD was aware of his mental condition when they began questioning him about the Beason murder, as officers had transported Warney to a psychiatric facility two weeks earlier for pulling fire alarms and reporting false incidents to the police.

On January 6, 1996, two RPD officers brought Warney to the police station for questioning. The claim alleges that they used "escalating coercive tactics to force . . . Warney to make

statements or admissions concerning the murder," and one of them verbally abused and threatened him. It further alleges that the officers denied Warney's request for an attorney.

Warney gave a series of increasingly inculpatory statements, initially blaming his cousin, but eventually confessing to murdering Beason on his own. He signed a detailed written confession stating that, acting alone, he had stabbed Beason repeatedly. The confession contained numerous details that allegedly corroborate crime scene evidence that the RPD had intentionally held back from the public.¹ The claim alleges that the officers fed these details to Warney, creating "a false sense of the confession's reliability," and coerced him into adopting the detailed confession as his own.

At central booking, an officer not involved in the investigation asked Warney how he was doing. According to the officer's testimony, he responded, "not good. I've got a body," slang for having killed someone. In contrast, Warney testified

¹ These corroborating details include: (1) that Beason was cooking chicken and mashed potatoes at the time of his murder; (2) that Beason was wearing a red-striped nightshirt; (3) that Beason was stabbed "about 15 or more" times with a 12-inch serrated knife; (4) that Beason's throat was slit; (5) that Beason's body was left on his bed, face up and eyes open; (6) that the perpetrator was wounded; (7) that the perpetrator cleaned his wound with "a paper towel," which he discarded in the toilet; (8) that the perpetrator put intensive care lotion on his wound; and (9) that the back door and basement door were locked. Additionally, evidence was introduced at trial that Warney orally "confessed" that, prior to the murder, he and Beason had been watching a pornographic tape featuring two men.

that he said, "I'm being charged with a body."

On February 13, 1996, a grand jury indicted Warney on two counts of second degree murder. Before trial, Supreme Court denied Warney's motion to suppress his statements to police, finding that he "initiated most contacts with the police and then freely volunteered information to them," that he never requested an attorney, and that "no threats or promises were ever made to [him] and no fraud or tricks were used to solicit statements." At trial, Warney's signed confession was the primary evidence against him, although he testified that it was coerced and manufactured by the police. The prosecutor emphasized that the confession contained details that, in his words during closing, "only the killer would have known about."

Warney was convicted of both second degree murder counts on February 12, 1997. Supreme Court sentenced him on February 27, 1997 to imprisonment for 25 years to life on each count, to run concurrently. The Appellate Division affirmed (People v Warney, 299 AD2d 956 [4th Dept 2002]) and leave to this Court was denied (93 NY2d 633 [2003]).

Warney consistently maintained his innocence and sought to conduct DNA testing on biological crime scene evidence. Although his application to access this evidence was denied, the People submitted the material for testing, which resulted in a DNA profile that did not match Warney. In March 2006, nine years after Warney's conviction, the Combined DNA Indexing System

(CODIS) database yielded a match, a man named Eldred Johnson. The RPD discovered that fingerprints from the crime scene matched Johnson's and, on May 11, 2006, Johnson confessed that, acting alone, he had murdered Beason.² As a result, on May 16, 2006, Supreme Court vacated Warney's conviction and set aside his sentence pursuant to CPL 440.10 (1) (g) on the grounds of newly discovered evidence.

Warney now seeks damages under Court of Claims Act § 8-b for the years he spent wrongly incarcerated. His claim alleges that he "did not cause or contribute to his own wrongful arrest, conviction, or incarceration," but rather his conviction "was the direct result of the intentional and malicious actions of members of the [RPD] who fabricated and coerced a false confession from . . . a man whom they knew had a history of serious mental health problems." The State moved to dismiss the claim for failing to state facts in sufficient detail to demonstrate that Warney is likely to succeed at trial in proving that he did not bring about his own conviction.

Court of Claims granted the State's motion and dismissed the claim. It was "not convinced" that only the perpetrator and police could have known many of the details contained in the confession, and noted that Warney "does not indicate how he was coerced by police to give a false

² Johnson pleaded guilty to second degree murder in March 2007.

confession." Moreover, the court held that Warney, "by his own actions, which included calling the police to tell them he had information about the murder, trying to frame an innocent man for the crime, and . . . volunteering that he had 'a body' . . . did cause or bring about his own conviction." Warney appealed.

The Appellate Division affirmed, reasoning that a criminal defendant who gave an uncoerced false confession that was presented to the jury at trial could not subsequently bring an action under section 8-b, and that Warney failed to adequately allege that his confession was coerced (see Warney v State of New York, 70 AD3d 1475, 1476 [4th Dept 2010]). The Appellate Division also found that Warney brought about his own conviction by making other incriminating statements, and by approaching the police falsely claiming to have information about the murder (see id.). We granted Warney leave to appeal and now reverse.

Court of Claims Act (CCA) § 8-b, the Unjust Conviction and Imprisonment Act, provides a mechanism for "innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned . . . to recover damages against the state" (CCA § 8-b [1]; see also Ivey v State of New York, 80 NY2d 474, 479 [1992]). It offers claimants who meet its strict pleading and evidentiary burdens "an available avenue of redress over and above the existing tort remedies" (CCA § 8-b [1]).

To present a claim under the statute, a claimant must

"establish by documentary evidence" that (a) the claimant was convicted of a crime, sentenced to a term of imprisonment, and served at least part of the sentence; (b) the claimant was pardoned on the ground of innocence or, alternatively, the conviction was reversed or vacated and the accusatory instrument was dismissed; and (c) the claim is not time-barred (CCA § 8-b [3]). Here, the State does not dispute that Warney met this initial burden.

The statute further requires that the claim "state facts in sufficient detail to permit the court to find that claimant is likely to succeed" in meeting his or her burden at trial of proving by clear and convincing evidence that, as relevant here, (a) "he did not commit any of the acts charged in the accusatory instrument" and (b) that "he did not by his own conduct cause or bring about his conviction" (CCA § 8-b [4]). "If the court finds after reading the claim that claimant is not likely to succeed at trial, it shall dismiss the claim" (CCA § 8-b [4]).

The parties here debate whether, in addition to being sufficiently detailed, the allegations in the pleading must have evidentiary support. We now clarify that no such support is necessary, except where expressly indicated by the statute. Although a claimant must submit documentary evidence supporting certain facts pursuant to CCA § 8-b (3), the pleading standard articulated in CCA § 8-b (4) lacks any analogous requirement.

Because the State, in waiving its sovereign immunity from suit, has consented to have its liability "determined in accordance with the same rules of law as applied to actions in the supreme court," except where superseded by the Court of Claims Act or Uniform Rules of the Court of Claims (CCA § 8; see also 22 NYCRR 206.1 [c] [matters not covered by the CCA or Uniform Rules of the Court of Claims are governed by the CPLR]), we presume that the familiar standard governing motions to dismiss in Supreme Court is appropriate here (see CPLR 3211). Therefore, Court of Claims, like other trial courts, should "accept the facts as alleged in the [claim] as true" (Leon v Martinez, 84 NY2d 83, 87 [1994]).

Of course, section 8-b still imposes a higher pleading standard than the CPLR. Court of Claims must consider whether the allegations are sufficiently detailed to demonstrate a likelihood of success at trial (see CCA § 8-b [4]). "[T]he allegations in the claim must be of such character that, if believed, they would clearly and convincingly establish the elements of the claim, so as to set forth a cause of action" (Solomon v State of New York, 146 AD2d 439, 442 [1st Dept 1989]). In evaluating the likelihood of success at trial, Court of Claims should avoid making credibility and factual determinations (see Klemm v State of New York, 170 AD2d 438, 439 [2d Dept 1991] ["In the absence of serious flaws in a . . . statement of facts, the weighing of the evidence is more appropriately a function to be

exercised at the actual trial"], quoting Dozier v State of New York, 134 AD2d 759, 761 [3d Dept 1987]; Solomon, 146 AD2d at 445 [Court of Claims erred in "assess(ing) the credibility of the evidence (and) weighing . . . the evidence (which) is more appropriately a function to be exercised at the actual trial"])). In short, a claimant who meets the evidentiary burdens described in CCA § 8-b (3) and makes detailed allegations with respect to the elements described in section 8-b (4) is entitled to an opportunity to prove the allegations at trial (CCA § 8-b [5]). With these principles in mind, we turn to the claim at issue here.

Court of Claims' dismissal was based in large part on factual determinations that were inappropriate at this stage of the litigation. First, although Warney alleges in detail that his confession was coerced, the court concluded that "the evidence presented" did not "indicate" that it was. The court was "not convinced" that, as Warney alleges, "only the police and the true perpetrator could have known many of the factual details" in the confession. These findings were premature; the proper inquiry was whether Warney's allegations, if true, demonstrate a likelihood of success at trial, not whether they were supported by convincing evidence. As the State concedes, a coerced false confession does not bar recovery under section 8-b because it is not the claimant's "own conduct" within the meaning

of the statute.³ Assuming the truth of Warney's allegations, as we must, the police used "coercive tactics" and threats to induce his confession. The allegations describe how no member of the public other than the perpetrator could have known all the details contained in the confession -- whether negligently or through intentional manipulation, police misconduct led to the inclusion of these details in Warney's statement. Thus, Warney has adequately pleaded that he was coerced into adopting the false confession.⁴

Second, Court of Claims determined that Warney's statement to an RPD officer, "I've got a body," which was introduced against him at trial, was conduct contributing to his conviction. Warney has never admitted to making that statement, however, and his claim alleges that, as he maintained at trial, he actually said "I'm being charged with a body." Accepting

³ Warney argues that the word "conduct" in the statute should be read as "misconduct," as this reading is in line with clear Legislative intent (see 1984 Report of NY Law Rev Commn, 1984 McKinney's Session Laws of NY at 2932 [claimant should "have to establish that he did not cause or bring about his prosecution by reason of his own misconduct"]). Because he alleges that no conduct of his brought about his conviction, however, we find it unnecessary to consider whether such conduct must rise to the level of misconduct.

⁴ The State contends that since Supreme Court ruled at a suppression hearing prior to the criminal trial that the confession was voluntarily given, it cannot be found in this action to have been coerced. We reject that contention and conclude that although the statement was admissible at the criminal trial, the judge there lacked many of the facts now stated in Warney's claim. Most importantly, the question of coercion must now be viewed in light of Warney's innocence.

Warney's allegations as true, we presume that he never made this inculpatory statement. Determining what Warney said is purely a credibility determination, pitting his account against the officer's. The officer's testimony is no more or less convincing, at this pleading stage, than Warney's account of the conversation.

The State further argues that Warney's initial interactions with the RPD ought to bar him from recovery. We disagree. A claimant's statutory obligation to prove that "he did not . . . cause or bring about his own conviction" (CCA § 8-b [4]) could conceivably be read as barring recovery when any action by the claimant caused or brought about the underlying conviction, no matter how indirectly. This reading, however, would bar recovery by every innocent claimant who inadvertently and unforeseeably played some small role in the chain of events leading to his or her conviction. Instead, as we have previously suggested, a claimant's conduct bars recovery under the statute only if it was the "proximate cause of conviction" (Ivey, 80 NY2d at 482). Warney's early conversations with the RPD, as the events are described in his claim, did not cause or bring about his conviction within the meaning of the statute. While Warney acknowledges that he initiated contact with the RPD, triggering the questioning that ultimately led to his false confession and conviction, he alleges that he was "severely mentally impaired," and that the RPD knew of his mental illness. Moreover, it was

the RPD's alleged mishandling of the ensuing investigation that ultimately resulted in Warney's conviction.

In sum, the courts below inappropriately made credibility and factual findings, dismissing Warney's claim without giving him the opportunity to prove his detailed allegations that he did not cause or bring about his conviction. Because these allegations, taken as true, demonstrate a likelihood of success at trial, Warney is entitled to proceed with his claim, secure discovery, and obtain a disposition on the merits.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the defendant's motion to dismiss the claim denied.

Douglas Warney v State of New York

No. 35

SMITH, J. (concurring):

I agree with the result the majority reaches, and have no major quarrel with the general principles it states. I write separately to emphasize that the application of those principles in this case is easy, because this claimant appears, on the present record, to have an exceptionally strong case. Our

decision today should not be read as implying that any claimant can, by skillful pleading, get a significantly weaker case past a motion to dismiss.

I

It may not be obvious from the majority opinion how compelling a case Warney's statement of claim presents. His confession, now known to be false, included a number of facts -- many of them recited in the majority's footnote 1 -- known only to the police and to the real murderer. It seems highly likely that the inclusion of these facts is the reason Warney was convicted. How, the prosecutor at Warney's trial asked rhetorically, could Warney have known these facts if he were innocent?

"How would he have known about a tissue wrapped in the form of a bandage if he hadn't had been in Mr. Beason's bathroom? Only the killer would have known about that and about the knife and about the towel with the blood on it and about the video tapes."

"[H]e knew how Mr. Beason was dressed, and he described a nightshirt . . . The defendant says he's cooking dinner, and he's particular about it, cooking chicken . . . Now, who could possibly know these things if you hadn't been inside the house, inside the kitchen?"

"The defendant described the knife as being twelve inches, with ridges. I think [forensic testimony] said it was thirteen inches with the serrated blade."

Now that his innocence has been established, Warney echoes the prosecutor's question: How indeed could he have known all these facts? It is hard to imagine an answer other than that he learned them from the police. In short, the details set forth in Warney's 41-page statement of his claim, with 58 pages of annexed exhibits, point strongly to the conclusion that the police took advantage of Warney's mental frailties to manipulate him into giving a confession that contained seemingly powerful evidence corroborating its truthfulness -- when in fact, the police knew, the corroboration was worthless.

The majority correctly holds that this sort of police conduct, if proved at trial, would be sufficient to show that Warney "did not by his own conduct cause or bring about his conviction" (Court of Claims Act § 8-b [4] [b]). In general, a claimant who gives an uncoerced confession to a crime he did not commit should be found to have caused his own conviction (see Report of the Law Revision Commission to the Governor on Redress for Innocent Persons Unjustly Convicted and Subsequently Imprisoned [hereafter Commission Report], 1984 Session Laws 2900, 2932 [listing "falsely giving an uncoerced confession of guilt" as among the acts of misconduct that justify rejecting a claim]). But a confession cannot fairly be called "uncoerced" that results from the sort of calculated manipulation that appears to be present here -- even if the police did not actually beat or torture the confessor, or threaten to do so. Thus, while

Warney's claim does include the general allegation that the police threatened him "both physically and otherwise," I view this allegation as unnecessary -- and, if it stood alone, obviously insufficient -- to prevent dismissal of Warney's claim. The majority opinion, as I interpret it, does not disagree.

Of course it would be wrong to assume that the State cannot refute Warney's assertions. Claims that appear strong at the pleading stage do not always win. But I have no hesitation in concluding that Warney's claim states facts "in sufficient detail to permit the court to find that claimant is likely to succeed at trial" (Court of Claims Act § 8-b [4]). The contrary decisions of the courts below seem to me not just "premature," as the majority says (majority op at 9), but simply wrong.

II

I have emphasized the strength of Warney's claim because I am concerned that some of the majority's generalizations, made in the context of this very strong claim, will be misunderstood as requiring courts to uphold much weaker ones. I agree that, as a general matter, a claimant need not actually present his evidence as part of his claim; detailed allegations are enough. And I also agree that CPLR 3211 applies in actions under Court of Claims Act § 8-b, except to the extent that section 8-b imposes a more stringent pleading standard; thus, where there is a bona fide factual dispute, the claimant's allegations should be taken as true. That does not mean,

however, that allegations implausible or unconvincing on their face are sufficient to prevent dismissal of a claim for unjust conviction and imprisonment. So to hold would be to read out of the statute provisions that the Legislature wrote in, in an attempt to balance two important, and competing, goals: to compensate people who have been unjustly convicted, but also to protect the State against the administrative burden, and the cost of nuisance settlements, that could result from having to litigate a large number of false claims.

In pursuit of the latter goal, the Legislature strengthened the tests normally applied to gauge the sufficiency of pleadings, requiring not only that a claim be stated in "detail" -- itself a significant departure from the normal rule -- but "in sufficient detail to permit the court to find that claimant is likely to succeed at trial" (Court of Claims Act § 8-b [4]). Lest anyone miss the point, the Legislature added this sentence: "If the court finds after reading the claim that claimant is not likely to succeed at trial, it shall dismiss the claim, either on its own motion or on the motion of the state" (id.). The Report of the Law Revision Commission accompanying the proposed legislation that became Court of Claims Act § 8-b makes quite clear that this provision should have real teeth. The legislation is based, the Commission said, on:

"a careful balancing between the goal of compensating one who has been unjustly convicted and imprisoned, and society's dual interest of ensuring that only the innocent

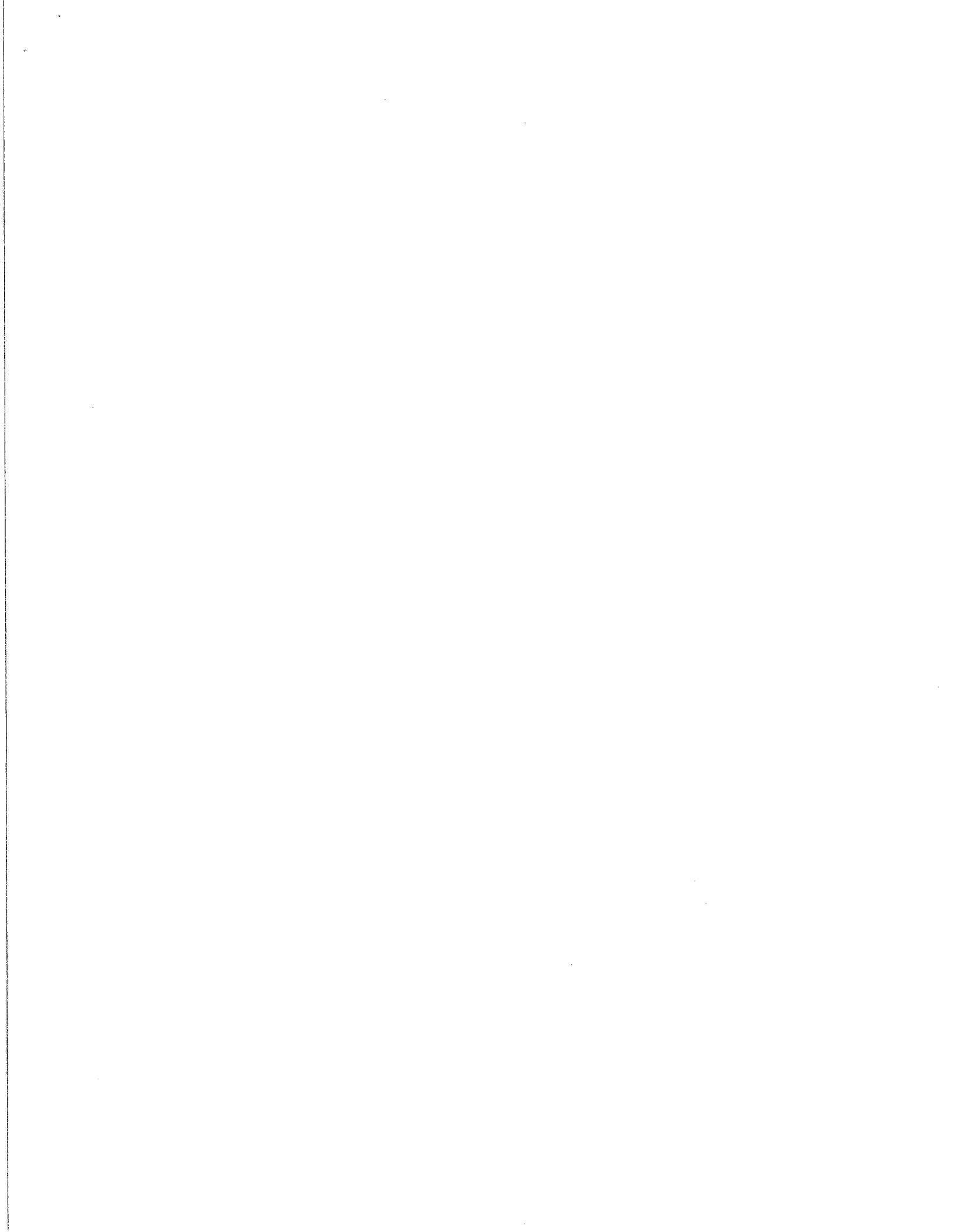
recover and of preventing the filing of frivolous claims. With respect to the latter, the Commission is most sensitive to the needs of the criminal justice system in that it does not want to overburden the staffs of the Attorney General and the District Attorneys with the defense of frivolous claims."

(Commission Report at 2926.)

The Commission added: "Consequently . . . most cases will not survive a motion to dismiss. The few exceptions will be the ones appropriate for a full hearing on the claim of innocence" (id. at 2930). No one should conclude from today's decision that we have opened a loophole that will defeat this legislative goal.

* * * * *
Order reversed, with costs, and defendant's motion to dismiss the claim denied. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Pigott and Jones concur. Judge Smith concurs in result in an opinion in which Judges Graffeo and Read concur.

Decided March 31, 2011



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