Received 10/7/2024 1:46:20 PM Supreme Court Eastern District

Filed 10/7/2024 1:46:00 PM Supreme Court Eastern District
32 EM 2023

SUPREME COURT OF PENNSYLVANIA

No. 32 EM 2023

IN RE:

COMMONWEALTH OF PENNSYLVANIA

v.

LAVAR BROWN

BRIEF OF *AMICI CURIAE* THE PENNSYLVANIA INNOCENCE PROJECT AND THE INNOCENCE NETWORK

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October 7, 2024

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Pennsylvania Innocence Project (the "Project") is a nonprofit legal clinic and resource center housed at Temple University's Beasley School of Law and the Thomas R. Kline Law School of Duquesne University. Its board of directors includes, among others, practicing lawyers, law professors, former prosecutors, and wrongly convicted individuals who have been exonerated. Collaborating with pro bono counsel, the Project provides investigative and legal services to indigent prisoners throughout Pennsylvania who have claims of actual innocence that are supported by the results of DNA testing or other powerful exculpatory evidence or have claims that, after a preliminary investigation, evince a substantial potential for discovery of such evidence. Additionally, the Project works to remedy the underlying causes of wrongful convictions to ensure that no one will be convicted and imprisoned for a crime they did not commit. The Project seeks to prevent punishment of innocent people and to prevent wrongdoers from escaping justice because an innocent person was convicted instead.

The Innocence Network (the "Network") is an association of independent organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive

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[1] No party has contributed money to this brief; it has been prepared entirely by *Amici* and their counsel. Pa.R.A.P. 531.

proof of innocence. The Network's current president is Anna Vasquez of the Texas Innocence Project. The 69 current members of the Network represent hundreds of prisoners with innocence claims in 50 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Israel, Italy, the Netherlands, the United Kingdom, and Taiwan.[2] The Network and its members are

[2] The member organizations for amicus brief purposes include the Actual Innocence Clinic at the University of Texas School of Law, After Innocence, Alaska Innocence Project, Arizona Justice Project, Boston College Innocence Program, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Duke Law Center for Criminal Justice and Professional Responsibility, Exoneration Project, George C. Cochran Innocence Project at the University of Mississippi School of Law, Georgia Innocence Project, Hawai'i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Indiana University McKinney Wrongful Conviction Clinic, Innocence Delaware, Inc., Innocence Project, Innocence Project Argentina, Innocence Project at the University of Virginia School of Law, Innocence Project Brasil, Innocence Project London, Innocence Project New Orleans, Innocence Project of Florida, Innocence Project of Texas, Italy Innocence Project, Justicia Reinvindicada Puerto Rico Innocence Project, Korey Wise Innocence Project, Loyola Law School Project for the Innocent, Manchester Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwest Innocence Project, Montana Innocence Project, New England Innocence Project, New York Law School Post-Conviction Innocence Clinic, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Ohio Public Defender Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence Project, Osgoode Hall Innocence Project, Rocky Mountain Innocence Center, Taiwan Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Arizona Innocence Project, University of Baltimore Innocence Project Clinic, University of Baltimore Innocence Project Clinic, University of British Columbia Innocence Project at the Allard School of Law, University of Miami Law Innocence Clinic, Wake Forest University School of Law Innocence and Justice Clinic, Washington Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project, and Witness to Innocence.

also dedicated to improving the reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal legal system to provide relief to prisoners wrongfully convicted and to prevent future wrongful convictions.

Wrongful convictions are a nationwide problem, but Pennsylvania has an especially high rate of wrongful conviction. Prosecutors' offices across the Commonwealth and the country have become more open to collaborative review of potentially wrongful convictions, in some cases opening "Conviction Integrity Units" ("CIUs") to revisit cases in which new evidence or law calls a prior conviction into question. *Amici* believe that such initiatives are important and that prosecutors' ability to revisit convictions and confess error in appropriate cases is essential to facilitating just outcomes and ensuring fulfillment of prosecutors' ethical obligations as ministers of justice. *See* Pa. R.P.C. 3.8.

INTRODUCTION

The Court has instructed the parties to brief whether, and via what procedure, PCRA courts may grant relief based upon parties' concessions. In *Amici*'s view, the Court's existing precedents, including its prior review of this case in *Commonwealth v. Brown*, 196 A.3d 130 (Pa. 2018), offer sufficient guidance, balancing recognition of concessions' important function in criminal proceedings with the need to preserve

courts' role as final—and independent—legal arbiters. Reshaping current PCRA procedures to address the uncommon circumstance in which a party confesses error is unnecessary and will harm those wrongfully convicted without any countervailing benefit to the Commonwealth.

Amici recognize the Court's interest in preventing Pennsylvania's courts from becoming "rubber stamps" for parties' agreements, especially when they pertain to something as weighty as a criminal conviction. *Amici* also understand the Court's concern that post-conviction proceedings be insulated from "changing tides of the election cycles." *Brown*, 196 A.3d at 149. Yet *Brown* adequately addressed these concerns, and courts have responded. Concessions occur across the Commonwealth—not just in Philadelphia—and trial courts do not rubber-stamp them. Instead, a comprehensive review of cases involving government concessions in post-conviction proceedings demonstrates that courts since *Brown* reliably conduct meaningful, independent PCRA review.

The PCRA's purpose is to provide relief for the wrongly convicted. *See* 42 Pa. C.S. § 9542. Yet, data demonstrates that wrongfully convicted individuals awaiting disposition of their PCRA petitions often wait years for resolution. Thus, the innocent spend more time incarcerated, victims endure years of litigation without finality, and the guilty continue to evade potential accountability. Prosecutors can and should facilitate the prompt resolution of PCRA petitions where they come to

recognize error in the way a case was proven or tried, or in which the law was applied. Nearly 60 years ago, Justice Brennan called on states to promulgate post-conviction procedures that would be "swift and simple," "fair and just." *Case v. Nebraska*, 381 U.S. 336, 345–47 (1965) (Brennan, J., concurring). *Amici* urge the Court to recognize that existing procedures regarding concessions already facilitate these twin goals.

ARGUMENT

I. Prosecutorial Concessions Play an Important Role in the Criminal Legal System.

As this Court previously recognized in this case, prosecutors lawfully wield enormous discretion in determining what cases to bring and how to try them. *Brown*, 196 A.3d at 145. This discretion narrows after a conviction becomes final. *Id.* at 146. It is because of the "public trust" that we place in law enforcement officers that our highest court "requires that [prosecutors] be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Young v. U.S.*, 315 U.S. 257, 258 (1942). While such confessions cannot usurp the judge's role by automatically undoing a verdict, they are entitled to "great weight." *Id.*; *see also Commonwealth v. Cox*, 204 A.3d 371, 387 (Pa. 2019) (noting that, under *Brown*, courts may consider confessions for their "persuasive value").

This makes sense. Prosecutors have unique access to facts and evidence concerning the cases they try. Often, it is the prosecutor alone who possesses

exculpatory evidence not revealed before conviction, or facts related to previous prosecutorial or law enforcement conduct that undermined the truth-seeking process. Put differently, it is often prosecutors who are best positioned to recognize that an injustice has occurred and to aid in its correction.[3]

Five recent cases across the Commonwealth in which the Project was involved highlight the important function of confessions of error in facilitating the exoneration of wrongfully convicted individuals. But as discussed below, where prosecutors acknowledged and acted upon serious error, (1) they did not then automatically consent to the relief sought; and (2) the reviewing judge did not then rubber-stamp the proposed relief.[4]

- **Lewis Fogle** (Indiana County, CP-32-CR-0000083-1981, Martin, J.)[5]: Lewis Fogle was convicted in 1982 for the murder and rape of a teenage girl. *See* 06/24/2015 PCRA Pet'n, 2. His identification was based in part on

[3] The recent proliferation of CIUs, as well as prosecutors' increasing willingness to review older convictions, even without a formal CIU, speaks to this reality. Since 2003, CIUs nationwide have contributed to the exoneration of at least 775 individuals, including 42 in Pennsylvania, which currently has at least four CIUs—in Chester, Centre, and Philadelphia Counties, and at the Attorney General's Office. *See* Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7bFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7d&FilterField1=Group&FilterValue1=CIU (accessed Oct. 7, 2024).

[4] For each Project case discussed in this brief, we provide the docket number and judges presiding at the relevant times; some dockets have been sealed or expunged.

[5] Lewis Fogle," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4756 (accessed Oct. 7, 2024).

testimony obtained through hypnotism. *Id.* By the time Mr. Fogle stood trial, men imprisoned with him came forward to testify that he confessed. *Id.* No forensic or physical evidence incriminated him. *Id.* at 2–3. Mr. Fogle was sentenced to life imprisonment. *Id.* at 4. After multiple unsuccessful appeals and motions for DNA testing, in 2010 Mr. Fogle secured the Commonwealth's agreement to DNA testing. *Id.* at 3. Initial tests proved inconclusive, but in 2015 sperm cells found on the victim revealed the DNA profile of an unknown male—not Mr. Fogle. *Id.* The Commonwealth joined with Mr. Fogle's lawyers in a motion to vacate Mr. Fogle's convictions, which the court granted. *See* 07/29/2015 Joint Stipulation. Mr. Fogle served more than 34 years wrongly incarcerated.

- **Donte Rollins** (Philadelphia County, CP-51-CR-051332-2006, Means, J.; Superior Court, No. 3499 EDA 2016, Gantman, Bender, Lazarus, JJ. (*per curiam*))[6]: Donte Rollins was convicted of attempted murder when he was 18 years old. *See* 12/20/2016 Super Ct. Opinion, 1. Mr. Rollins' appeals were denied. *Commonwealth v. Rollins*, 1285 EDA 2008 (Pa. Super. Oct. 18, 2010); *Commonwealth v. Rollins*, 620 EAL 2010 (Pa. Dec. 5, 2011). Nevertheless, Mr. Rollins maintained his innocence. *See* 11/20/2016 App. for Relief, 4. In 2013, the Project assisted Mr. Rollins in pursuing PCRA relief, alleging that his trial counsel was ineffective for failing to investigate and present his alibi. *Id.* at 3. The petition led the Philadelphia County District Attorney Office ("DAO") to reinvestigate the case and ultimately agree, after an evidentiary hearing, that the conviction should be vacated and that further live witness PCRA testimony was unnecessary.[7] *See* 12/20/2016 Super. Ct. Opinion, 3 (noting "extensive and cooperative joint review"). However, the PCRA court called additional witnesses itself and denied relief. *Id.* In December 2016, following an appeal to the Superior Court, Mr. Rollins' petition was granted, and the charges against him were dismissed. *Id.* Mr. Rollins served ten years wrongly incarcerated.

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[6] "Donte Rollins," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5060 (accessed Oct. 7, 2024).

[7] Hugh Burns, a signatory on the Attorney General's ("AG's") *amicus* brief opposing such joint proposed resolutions, represented the Commonwealth in Mr. Rollins' appeal and agreed that the PCRA court's denial of relief warranted summary reversal. *Compare* AG Brief, 58, *with* Docket Sheet, 3499 EDA 2016.

- **Marshall Hale** (Philadelphia County, CP-51-CR-0326571-1984, Brinkley, J.; Superior Court, No. 2940 EDA 2014, Olson, Ott, JJ., Stevens, P.J.E.)[8]: Marshall Hale was convicted in 1984 of raping a teenage girl, even though the prosecution possessed biological evidence excluding him as the rapist. *See* 9/23/2016 Super. Ct. Opinion, 2, 8, 14. The defense did not discover this evidence until 2010. *Id.* at 14, 23–24. For seven more years, the Commonwealth opposed relief. However, when the Project took Mr. Hale's case to the Philadelphia County DAO's Conviction Review Unit in 2017, the unit reviewed Mr. Hale's case and agreed that his convictions should be vacated based on the suppression of the exculpatory biological evidence. The Commonwealth subsequently recommended that Mr. Hale be granted PCRA relief and, when the court did so, moved to dismiss Mr. Hale's charges, which motion was granted.[9] Mr. Hale served 33 years wrongly incarcerated. In 2019, the City of Philadelphia agreed to pay Mr. Hale $3 million to compensate him.

- **Lorenzo Johnson** (Dauphin County, CP-22-CR-1544-1996, Clarke, S.J.)[10]: Lorenzo Johnson was convicted of first-degree murder in 1997 as an accomplice to the fatal shooting of Tarajay Williams. No physical evidence tied Mr. Johnson to the crime, and only one witness implicated him, testifying that she saw Mr. Johnson's friend shoot the victim while Mr. Johnson served as a lookout. *See* N.T. 07/11/2017, 7–8. In 2011, the Third Circuit vacated Mr. Johnson's conviction due to insufficient evidence. *Johnson v. Mechling*, 446 F. App'x 531 (3d Cir. 2011). However, the Supreme Court reinstated Mr. Johnson's conviction without briefing or argument, and he returned to prison. *Coleman v. Johnson*, 566 U.S. 650 (2012). With the Project's assistance, Mr. Johnson uncovered previously suppressed evidence related to the prosecution's key witness and pursued PCRA relief based on *Brady* violations. In 2017, after years of contested litigation, the AG's Office offered Mr. Johnson a deal to vacate his first-degree murder conviction in exchange for

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[8] "Marshall Hale," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5173 (accessed Oct. 7, 2024).

[9] *See* Quattrone Center for the Fair Administration of Justice, *Report of the Philadelphia Event Review Committee on the Wrongful Conviction of Marshall Hale*, 29 (Sept. 2023), https://www.law.upenn.edu/live/files/13016-quattrone-centermarshall-haleser-reportpdf (accessed Oct. 7, 2024)

[10] "Lorenzo Johnson," Pennsylvania Innocence Project, https://painnocence.org/LorenzoJohnson (accessed Oct. 7, 2024).

Mr. Johnson pleading no contest to lesser charges—precisely the kind of resolution it now apparently decries. *See* 07/11/2-17 N.T., 3. The court accepted the proposal. Mr. Johnson served 22 years wrongly incarcerated.

- **Daniel Carnevale** (Allegheny County, CP-02-CR-0015299-2006, McDaniel, J.)[11]: Daniel Carnevale was convicted of second-degree murder, arson, aggravated assault, and burglary in connection with a 1993 fire at a residential building in Pittsburgh. *See* 01/25/2019 Ans. to PCRA Pet., 3. Mr. Carnevale pursued both federal and state relief, but the courts denied his petitions. *Id.* at 2. In 2018, with the Project's assistance, Mr. Carnevale retained a fire investigation expert to re-examine the evidence, who found that the trial expert's report was flawed, that many of the techniques employed had since been discredited, and that the fire was likely accidental. *Id.* at 15. The Project filed a PCRA petition, which the Commonwealth opposed, but after prosecutors learned that there was a note in the trial fire expert's files showing prior chemical analysis was "meaningless," the prosecution indicated that it would not oppose PCRA relief. *Compare id.* at 2 *with* 11/15/2019 Am. Ans. to PCRA Pet. In 2019, the court granted a new trial. 12/16/2019 Order. After additional investigation, prosecutors moved to dismiss the charges, which the court granted. *See* 03/17/2020 Nolle Prosequi. Mr. Carnevale served 13 years wrongly incarcerated.

These cases underscore prosecutors' essential and ongoing responsibility to review prior convictions and confess error where appropriate to facilitate the prompt release of those wrongfully convicted. They also underscore that confessions of error occur across the Commonwealth, across administrations, and are not just rubber-stamped by the courts. Additional examples below further elucidate this last point.

[11] "Daniel Carnevale," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5710 (accessed Oct. 7, 2024).

II. This Court's Decision in *Brown* Articulated a Workable Standard for Evaluating Concessions in PCRA Proceedings.

A. Courts are Heeding *Brown*'s Clear Rule.

In *Brown*, this Court advanced a workable rule to prevent trial courts from acting as "rubber stamps" of district attorneys' determinations on the merits of PCRA petitions. 196 A.3d at 149; *see also Commonwealth v. Chimenti*, 507 A.2d 79, 83 (Pa. 1986) (vacating order that would reduce hearing judge to "rubber stamp" performing only "ministerial function"). *Amici* acknowledge that a rule requiring courts to cede judicial authority to district attorney offices is contrary to courts' independent role. *See Brown*, 196 A.3d at 149. But no such rule exists under this Court's existing precedent and no such practice exists in the Commonwealth.

Brown's command is clear: a district attorney cannot, by confessing error, compel a court to make a legal conclusion without independent judicial review. *See id.* at 146 ("a district attorney's concession of error is not a substitute for independent judicial review"); *see also Commonwealth v. Pacheco*, 263 A.3d 626, 665–66 (Pa. 2021) ("[A] party can[not] remove a legal issue from judicial review by assent.") (Wecht, J., concurring in part); *Cox*, 204 A.3d at 387 (independently reviewing concession in light of intervening U.S. Supreme Court precedent, noting that, under *Brown*, "confessions of error by the Commonwealth are not binding on a reviewing court but may be considered for their persuasive value"); *Commonwealth v. Wright*, 14 A.3d 798, 808 (Pa. 2011) (independently reviewing Commonwealth's concession

that Superior Court improperly applied *per se* rule in PCRA proceeding). *Brown*'s guidance accords with U.S. Supreme Court precedent. *See Sibron v. New York*, 392 U.S. 40, 58–59, 62–65 (1968) (independently reviewing and ultimately agreeing with confession of error as to constitutionality of conviction); *Young*, 315 U.S. at 258–61 (independently considering and ultimately endorsing confession of error as to interpretation of Anti-Narcotic statute).

Brown's rule also extends to dispositive legal conclusions masquerading as factual stipulations, or stipulations regarding witness credibility, which trial courts need not (and often do not) accept. *See Commonwealth v. Perrin*, 291 A.3d 337, 344–46 (Pa. 2023). Under *Brown* and its progeny, parties cannot bind the court to legal conclusions or findings of fact that are "inherently and traditionally the prerogative of the court." *Id.* at 345.

Both state and federal courts across the Commonwealth have heeded *Brown*'s instruction to conduct independent post-conviction review; sometimes they accept concessions and sometimes they do not. They are not acting as rubber stamps. *See, e.g.*, *Commonwealth v. Dilliplane*, 305 A.3d 1011, 2023 WL 6209655, at *1 (Pa. Super. Sept. 25, 2023) (independently reviewing and ultimately accepting Commonwealth's concession that evidence must be suppressed, citing *Brown* for proposition that concession was not "dispositive"); *Commonwealth v. Taylor*, 279 A.3d 1279, 2022 WL 1639550, at *5 n.7 (Pa. Super. May 24, 2022) (reviewing

whether PCRA petition was "timely" despite Commonwealth's concession on the issue, noting Court was "obligated to conduct an independent judicial review" and remanding for additional factual development); *Commonwealth v. Ruffin*, No. 3044 EDA 2022, 2024 WL 2048889, at *2 (Pa. Super. May 8, 2024) (upon review of plea bargain, a portion of which government conceded was illegal, awarding *greater* relief to petitioner by invalidating entire plea); *Wharton v. Superintendent Graterford SCI*, 95 F.4th 140, 144–45, 150 (3d Cir. 2024) (approving district court's rejection of district attorney's unexplained concession and affirming imposition of mild sanctions for "evading" *Brown*).

B. The Attorney General Mischaracterizes the Project's Cases Demonstrating that Courts Since *Brown* Are Conducting Independent Review.

Despite this, the AG's *amicus* brief cites numerous cases in which the Project is currently or has been involved as part of a list of supposedly "untested concessions" that it claims require additional procedures beyond those articulated in *Brown* and other precedents. *See generally* AG Br. 15–30. However, many of the AG's characterizations of these cases are inaccurate or incomplete, made apparently without regard to the reputational harm caused to Project clients even though the AG expresses concern about reputational harms to investigating detectives.[12]

[12] The cases include only those from Philadelphia handpicked by the AG, apparently to meet its "untested concessions" criteria, and do not, for example, include Project

Of the resolved cases the AG discusses, all but one concluded after *Brown* was decided, and all demonstrate trial courts' maintenance of independent judicial review following concessions. As to ongoing cases cited, the AG's reliance on them is inappropriate and misplaced. The outcome of these cases remains uncertain, as do the conclusions that can be drawn from them. And, the AG's commentary on them here infringes on courts' independence in deciding them. Regardless, these cases if anything further suggest that courts are *not* rubber-stamping the Commonwealth's concessions.

Resolved Cases

- **Dontia Patterson** (CP-51-CR-0012287-2007, Geroff, J. (PCRA); Streeter Lewis, J. (*nolle pros*))[13]: The AG mentions only that: the Commonwealth conceded that Mr. Patterson's conviction should be overturned; his PCRA petition was granted; and his charges were nol prossed. *See* AG Br. 15. The AG fails to note that Mr. Patterson's first trial resulted in a hung jury, or that, in support of dismissing the charges, the DAO's Homicide Unit detailed the investigation leading to its position, including: its review of previously suppressed files; attempts to interview a key witness from Mr. Patterson's second trial, who the Unit had discovered had

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cases where the Philadelphia DAO recommended relief only after a full and contested evidentiary hearing. *See, e.g.*, *Commonwealth v. Gaskins*, CP-51-CR-0638541-1989. Indeed, further supporting the point that concessions are neither untested nor rubber-stamped, in a Project case resolved after the AG's brief was filed, the DAO did not recommend a resolution to the Court until after a full evidentiary hearing; once it did so, the PCRA court rejected the parties' recommendation of a no-contest plea and insisted on a guilty plea. *Commonwealth v. Dawkins*, CP-51-CR-0807922-2005.

[13] "Dontia Patterson," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5330 (accessed Oct. 7, 2024).

significant motives for incriminating Mr. Patterson but who was uncooperative and refused to be interviewed; and an interview with a key witness who the Unit found to be credible who told police that Mr. Patterson was *not* the shooter, but whose testimony was never presented at trial. *See* 05/15/2018 *Nolle Prosequi*. Notably, the DAO's investigation began before District Attorney ("DA") Krasner assumed office. *Id.* at 8–11. Mr. Patterson served 11 years wrongly incarcerated.

- **Chester Hollman** (CP-51-CR-0933111-1991, Bright, J.)[14]: The AG mentions only that: the Commonwealth conceded through joint stipulations of fact that Mr. Hollman's conviction should be overturned; his PCRA petition was granted; and his charges were nol prossed. AG Br. 17. This fails to acknowledge that: the DAO's post-conviction investigation included DNA testing excluding Mr. Hollman; the DAO expressly offered to participate in an evidentiary hearing; and following Mr. Hollman's exoneration, he received $9.8 million from the City of Philadelphia to settle his civil claims.[15] *See* 06/24/2019 Ans. to PCRA Pet., 5. Mr. Hollman served 25 years wrongly incarcerated.

- **John Miller** (E.D. Pa., No. 12-0742, Brody, J. (habeas); CP-51-CR-101301-1997, Ransom, J. (*nolle pros*))[16]: The AG mentions that the Commonwealth conceded that Mr. Miller's conviction should be overturned and that his writ for habeas corpus relief was granted. AG Br. 18. This fails to acknowledge that Mr. Miller obtained a favorable report and recommendation ("R&R") from the magistrate judge without the Commonwealth's support. *See* 06/12/2019 R&R. The Commonwealth reviewed its police investigation files only after this report and submitted a statement of non-objection, which the District Court subsequently adopted in an order specifically noting its "careful and independent consideration" of

[14] "Chester Hollman III," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=559 (accessed Oct. 7, 2024).

[15] City of Philadelphia Press Release, Dec. 30, 2020, https://www.phila.gov/2020-12-31-city-and-chester-hollman-announce-settlement-of-wrongful-conviction/ (accessed Oct. 7, 2024).

[16] "John Miller," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5596 (accessed Oct. 7, 2024).

the pleadings, report and recommendations. *See* 07/01/2019 Order. Finally, the AG's brief fails to mention that the City of Philadelphia settled Mr. Miller's civil suit for wrongful conviction for $4.6 million. Mr. Miller served 22 years wrongly incarcerated.

- **Willie Veasy** (CP-51-CR-641521-1992, Tucker, J.)[17]: The AG mentions only that: the Commonwealth conceded by joint stipulation that Mr. Veasy's conviction should be overturned; his petition was granted; and his charges were nol prossed. AG Br. 19. This does not acknowledge that the DAO's recommendation for relief cited *Brown* in noting that its agreement did not obligate the court to set aside the verdict. *See* 10/01/2019 Ans. to Second Am. PCRA Pet, ¶ 38. Further, the AG does not acknowledge that two former law enforcement officers retained as experts, one by the Commonwealth and the other by Mr. Veasy, concurred upon review that certain inculpatory information reported by law enforcement officials was inherently unreliable. *See* 10/01/2019 Joint Stipulation of Facts, ¶¶ 77–80. Nor does the AG mention that some of the detectives involved in Mr. Veasy's case themselves now face criminal trials for perjury related to eliciting false confessions.[18] Finally, the AG does not acknowledge that the City of Philadelphia settled Mr. Veasy's civil suit for wrongful conviction for $5 million. Mr. Veasy served 27 years wrongly incarcerated.

- **Andrew Swainson** (CP-51-CR-0431311-1988, Robbins New, J. (PCRA); Tucker, J. (*nolle pros*))[19]: The AG mentions only that the Commonwealth conceded that Mr. Swainson's conviction should be overturned, that his petition was granted and his charges were nol prossed. AG Br. 20. It does not acknowledge that: the PCRA court *refused* the parties' joint requests to expedite its decision; the DAO offered to participate in an evidentiary hearing if the Court deemed it necessary to assess a key trial

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[17] "Willie Veasy," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5624 (accessed Oct. 7, 2024).

[18] "3 retired Philadelphia detectives to stand trial in perjury case stemming from 2016 exoneration," *WHYY*, https://whyy.org/articles/philadelphia-detectives-trial-perjury-2016-exoneration/ (accessed Oct. 7, 2024).

[19] "Andrew Swainson," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5763 (accessed Oct. 7, 2024).

witness's credibility; or that the DAO involved the victim's sister in the PCRA process. *See* 04/15/2020 Order Denying Mot. for Extraordinary Relief; 02/20/2020 Ans. to Am. Pet. for PCRA Relief, ¶ 130. The victim's sister attended Mr. Swainson's PCRA hearing and chose not to make a statement. 06/12/2020 N.T., 8–9, 21, 24. Mr. Swainson served 31 years wrongly incarcerated.

- **William Johnson** (E.D. Pa., No. 12-5156, Brody, J. (habeas); CP-51-CR-1202272-2005, Ransom, J. (*nolle pros*))[20]: The AG mentions only that: the Commonwealth conceded that Mr. Johnson's conviction should be overturned; his writ of habeas corpus was granted; and his charges were nol prossed. AG Br. 27. It does not acknowledge that since Mr. Johnson's direct appeal of his conviction, the Commonwealth conceded that his confrontation clause rights were violated at trial. *Johnson v. Lamas*, 850 F.3d 119, 132 (3d Cir. 2017); 09/29/2022 Habeas Mot., ¶ 6. The Commonwealth's only change in position was to concede in subsequent litigation that the error was not harmless, based upon its review of previously suppressed documents contradicting prior representations that the DAO had made to courts. 03/13/2023 Order, 1. Further, in granting relief on Mr. Johnson's writ, Judge Brody, who had previously denied habeas relief to Mr. Johnson, expressly noted her "careful review" of the parties' submissions. *Id.* Upon remand, the state court accepted the Commonwealth's nolle prosequi. 06/14/202 Nolle Prosequi. Mr. Johnson served 18 years wrongly incarcerated.

- **David Sparks** (CP-51-CR-0001327-2007, DiClaudio, J.)[21]: The AG mentions only that: the Commonwealth conceded that Mr. Sparks' conviction should be overturned; his petition was granted; and his charges were nol prossed. AG Br. 28. It fails to mention that the DAO consulted with the trial prosecutor, former Assistant DA James Berardinelli, showing him previously undisclosed police documents suggesting that another individual shot the victim. 07/24/2024 Response to PCRA Pet'n, 24. Upon review, Mr. Berardinelli informed investigators that he had never seen the documents and

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[20] "William Johnson," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6610 (accessed Oct. 7, 2024).

[21] "David Sparks," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6698 (accessed Oct. 7, 2024).

that if he had, he would have turned them over as *Brady* material. *Id.* Further, the DAO conducted a post-conviction investigation, attempting to contact both witnesses who implicated Mr. Sparks at trial. *Id.* at 25 n.22. One witness was unreachable, but the other maintained her recantation previously provided to the defense. *Id.* Mr. Sparks served 17 years wrongly incarcerated.

- **Edward Ramirez** (CP-51-CR-0903912-1996, DiClaudio, J.)[22]: The AG mentions only that: the Commonwealth conceded that Mr. Ramirez's conviction should be overturned; his petition was granted; and his charges were nol prossed. AG Br. 28. It fails to acknowledge exculpatory DNA evidence or that the former lead homicide investigator in Mr. Ramirez's case shared his belief with a defense investigator that Mr. Ramirez was innocent. 08/01/2023 Response to PCRA Pet'n, 4, 20 n.8, 43. Mr. Ramirez served 27 years wrongly incarcerated.

- **Montrell Oliver** (E.D. Pa., No. 16-5537, Goldberg, J. (habeas); CP-51-CR-0400362-1997, McDermott, J. (*nolle pros*))[23]: The AG notes that the Commonwealth conceded that Mr. Oliver's conviction should be overturned and acknowledges that the District Court granted Mr. Oliver's writ of habeas corpus following an evidentiary hearing. AG Br. 22. Notably, while the DAO had argued that an evidentiary hearing to determine two alibi witnesses's credibility was unnecessary, the District Court rejected this suggestion and ordered that the hearing take place. *See* 01/09/2024 Op., 3–5. Following the hearing, during which the Commonwealth cross-examined Mr. Oliver's witnesses, the magistrate judge issued an amended R&R confirming her belief that relief should be granted and finding Mr. Oliver's alibi witnesses credible. *Id.* at 6. Judge Goldberg, who has rejected the DAO's concessions in other cases, *see, e.g.*, *Wharton v. Vaughn*, No. CV 01-6049, 2020 WL 733107, at *4–5. (E.D. Pa. Feb. 12, 2020), granted relief following his "own independent review of the record" and Judge Hey's recommendations. 01/09/2024 Op., at 7. The state court nol prossed the charges against Mr.

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[22] "Edward Ramirez," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6711 (accessed Oct. 7, 2024).

[23] "Montrell Oliver," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6831 (accessed Oct. 7, 2024).

Oliver upon remand. 06/13/2023 Nolle Prosequi. Mr. Oliver served more than 25 years wrongly incarcerated and on parole.

- **Charles Rice** (E.D. Pa., No. 22-5105, Quiñones Alejandro, J. (habeas); CP-51-CR-0013974-2011, 0013976-2011, 0013978-2011, 0013980-2011, Eisenhower, J. (*nolle pros*))[24]: The AG mentions only that: the Commonwealth conceded that Mr. Rice's conviction should be overturned; his writ for habeas relief was granted; his charges were nol prossed. AG Br. 28. It fails to mention that the District Court, in adopting the magistrate judge's R&R, which "thoroughly addressed" Mr. Rice's *Strickland* claim, specifically noted her own "thorough independent review of the record." 11/27/2023 Order, n.1. Further, it fails to acknowledge that the DAO only decided to nol pross Mr. Rice's charges following an extensive investigation by its Gun Violence Task Force.[25]

- **Harold Staten** (CP-51-CR-0434111-1986, DiClaudio, J.)[26]: The AG mentions only that: the Commonwealth conceded that Mr. Staten's conviction should be overturned; his petition was granted; and that his charges were nol prossed. AG Br. 29. The AG fails to acknowledge that the trial court itself commented during Mr. Staten's bench trial that it was "not an easy case." 01/23/2024 Ans. to PCRA Pet'n, 16. More importantly, the AG fails to note that two fire experts, one engaged by Mr. Staten and the other by the DAO, agreed that prior expert conclusions that the fire was intentionally set were unsupportable based on available evidence and modern fire investigation standards. *Id.* at 21–22.

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[24] "Charles Rice," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6778 (accessed Oct. 7, 2024).

[25] "DA's Office Declines to Re-Try Charles Rice Following Gun Violence Task Force Investigation," Philadelphia DAO, Mar. 18, 2024, https://phillyda.org/news/das-office-declines-to-re-try-charles-rice-following-gun-violence-task-force-investigation/ (accessed Oct. 7, 2024).

[26] "Harold Staten," Nat'l Registry, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6756 (accessed Oct. 7, 2024).

- **William Bailey** (CP-51-CR-0300391-1987, DiClaudio, J.)[27]: The AG mentions only that: the Commonwealth conceded that Mr. Bailey's conviction should be overturned; his petition was granted; he pled guilty to a lesser charge; and he was released.[28] AG Br. 29. It fails to note the DAO's extensive post-conviction investigation, including interviewing 10 fact witnesses. 03/28/2013 Commw. Ans., 10–11. Further, in recommending resolution through Mr. Bailey's lesser *Alford* plea, the Commonwealth expressly acknowledged the Court's discretion to reject the proposal, and that the parties' "agreement alone" could not obligate a court to set aside a verdict. *Id.* at 2 n.3.

Cases in which Litigation is Ongoing

- **Kevin Johnson** (E.D. Pa., No. 13-3197, Robreno, J. (habeas); 3d Cir., No. 23-1531 (appeal)): The AG cites Mr. Johnson's case as an example of an "unreliable" concession in which the Commonwealth conceded various issues and proposed a negotiated settlement to resentence Mr. Johnson for lesser charges. AG Br. 5, 8–9. The AG admits that the district court *declined* to accept the parties' proposed settlement, having also referred the proposed settlement to the AG as *amicus curiae*. *Id.* at 8, 33; 10/11/2022 Order. The AG fails to acknowledge that, although it denied relief, the District Court granted a certificate of appealability because Mr. Johnson had made a "substantial showing of the denial of a constitutional right." 08/29/2023 Order. Further, the AG posits disputed issues as facts, such as whether Mr. Johnson was familiar with certain eyewitnesses. AG Br. 9–10. The AG also does not apprise this Court that Assistant AG Cari Mahler, one of the signatories to its *amicus* brief in Mr. Johnson's pending Third Circuit appeal, based in part on claims of prosecutorial misconduct, was involved in defending Mr. Johnson's conviction in PCRA proceedings while employed by the Philadelphia DAO. *Compare* Doc. 53, AG 3d Cir. *Amicus* Br., 1, 52 *with* 07/22/2016 Commw. Mot. to Dismiss PCRA Pet'n.

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[27] "The Need for Interrogation Reform," Pennsylvania Innocence Project, https://painnocence.org/Blog-Item-The-Need-For-Interrogation-Reform (accessed Oct. 7, 2024).

[28] Plea deals are not just common across the criminal legal system, but fundamental to how it functions. Plea bargaining accounts for roughly 95% of criminal convictions. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012).

- **Derek Murchison** (13 EAP 2024): The AG's discussion of Mr. Murchison's case supports the Project's argument. The AG notes that the PCRA court *rejected* Mr. Murchison's and the Commonwealth's proposed resolution based on new DNA testing and that this denial was affirmed on appeal. AG Br. 18. Now, Mr. Murchison's case is before this Court on the issue of whether the PCRA court applied the proper legal standard in evaluating his PCRA claim based on new DNA evidence. 03/20/2024 Order. The AG fails to mention that, in its *amicus* brief in Mr. Murchison's case, it *agreed* with Mr. Murchison, the Philadelphia DAO, and the Innocence Network on the proper legal standard. *See* 07/08/2024 AG *Amicus* Br., 18, 21.

Contrary to the AG's position, the Project's cases that it cites demonstrate that courts since *Brown* have maintained independence in the face of prosecutorial concessions. These cases demonstrate that courts sometimes adopt the Commonwealth's concessions, and sometimes do not when they find the record lacking. Similarly, courts sometimes find an evidentiary hearing to be necessary, and sometimes do not. Sometimes courts grant precisely the relief recommended by the Commonwealth, sometimes they craft a different remedy, and sometimes they deny relief. But where courts do grant relief, they consistently acknowledge that they have independently reviewed the record in forming their conclusion. This Court need not change what already works, nor infuse doubt into trial courts' reasoned judgments.

III. Imposing Additional Procedure Is Unnecessary and Potentially Harmful.

There have been some calls to add procedural mechanisms to PCRA proceedings in which the Commonwealth concedes a legal issue. *See Commonwealth v. Wardlaw*, 249 A.3d 937, 954 (Pa. 2021) (Dougherty, J.,

concurring) (suggesting Procedural Rules Committees devise process for notifying AG where district attorney concedes legal issue). The AG apparently concurs, calling for a "special process" in instances where an "unusual pattern of problematic concessions has appeared." AG Br. 45.

However, in *Amici*'s view, further procedural requirements are unnecessary and potentially harmful.

First, as discussed above, *Brown* makes clear that a district attorney's concession of a *legal* issue does not bind the court. Courts already can and *do* conduct their own independent review of the merits of PCRA petitions.

Second, courts already have ample tools and discretion to seek further input on legal issues in a case. Trial courts may invite *amici* to participate in post-conviction proceedings, as demonstrated by this case and many others. *See* Pa. R.A.P. 531; *Brown*, 196 A.3d at 142; *Wharton*, 2020 WL 733107, at *5 (inviting AG to participate as *amicus* where Court sought input on "important issue" in habeas proceeding). Further, trial courts may order an evidentiary hearing to obtain facts relevant to the disposition of a PCRA petition, without being required to accept the parties' credibility determinations. *See Perrin*, 291 A.3d at 344–46.

Third, those with a claimed interest in post-conviction proceedings already have mechanisms by which to voice their interests, by, for example, participating as *amici*. *See* Pa. R.C.P. No. 2327. Further, crime victims and their families have federal

and state statutory rights to be heard at proceedings involving sentencing or release. *See* 18 P.S. § 11.201(4); 18 U.S.C. § 3771(a); *see also Commonwealth v. Ralston,* 293 A.3d 645, 2023 WL 2253331, at *6–7 (Pa. Super. Feb. 28, 2023) (finding trial court's reliance on victim testimony at re-sentencing was not disproportionate); *Wharton,* 2020 WL 733107 at *7–8 (discussing victims' right to participate in post-conviction proceedings).[29]

Imposing a rule—especially a *per se* rule—mandating further process in all PCRA proceedings where the Commonwealth confesses error would cause harm and do no good. Data shows that, under present law, PCRA proceedings often remain pending for "two, three, or even four years." Donald J. Harris, Kim Nieves and Thomas M. Place, *Dispatch and Delay: Post Conviction Relief Act Litigation in Non-Capital Cases*, 41 Duq. L. Rev. 467, 492 (2003); *see also Commonwealth v. Holmes*,

[29] Nor should the Court take as a given that victims' families universally oppose post-conviction relief. *See, e.g.*, *Commonwealth v. Walker*, 92 A.3d 766, 779–80 (Pa. 2014) (acknowledging that incorrect identifications of alleged perpetrators "can be traumatizing for a victim, as well"); Brief of Family Members and Loved Ones of Victims Killed by Murder as *Amici Curiae* Supporting Appellants, *Commonwealth v. Lee*, 3 WAP 2024 (asserting unconstitutionality of life without parole as a sentence for felony murder). In cases cited by the AG, the DAO has consulted the victim's family. For example, In Andrew Swainson's case, the victim's sister attended the PCRA hearing by Zoom from the DAO but declined to speak; in Walter Ogrod's case, the victim's family supported relief. *See supra* pp. 15–16; "Philly agrees to $9.1 million settlement for man exonerated in 1988 slaying of 4-year-old girl," *The Philadelphia Inquirer*, Nov. 4, 2023, https://www.inquirer.com/news/philadelphia/walter-ogrod-barbara-jean-horn-lawsuit-settlement-20231103.html#loaded (accessed Oct. 7, 2024).

79 A.3d 562, 579 (Pa. 2013) ("[F]ew if any initial PCRA petitions proceed to final judgment (including appeal) within a year of the sentence."); *Commonwealth v. Renchenski*, 52 A.3d 251, 260 (Pa. 2012) (noting "troubling" delay caused in part by PCRA court's failure to appoint counsel for "almost three years"). In *Amici*'s experience, the process can take far longer. For example, in the unresolved cases discussed by the AG, Kevin Johnson's habeas proceedings have been pending since 2013, and Derek Murchison's PCRA petition has been pending since 2015.

This is already an egregious amount of time to make innocent and illegally sentenced petitioners wait. *See Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346, 1350 (Pa. 1991) ("As courts are fond of repeating, justice delayed is justice denied.") (cleaned up); *see also Dispatch and Delay*, *supra*, at 467 (noting that "delays exacerbate the miscarriage of justice," and can "forestall closure for both the victim and the community"). Mandating additional processes, whether in the form of required inclusion of other law enforcement agencies as *amici* or mandatory evidentiary hearings, without regard to the circumstances of a particular case, would delay justice while impinging upon PCRA courts' discretion and the strong deference to which it is entitled. *See Perrin*, 291 A.3d at 342; 42 Pa. C.S. § 9542 *et seq.*; Pa. R. Crim. P. 909(B)(2) (concerning trial courts' discretion to order evidentiary hearing in death penalty cases).

For many of the reasons stated above, the AG's proposal of a "special process" for cases involving an "unusual pattern of problematic concessions," AG Br. 45, is unwise.[30] *First*, the AG offers no clear test by which a court could evaluate whether an "unusual pattern" exists, notwithstanding that identifying such a pattern would necessarily require inquiry into a large volume of cases, further delaying the individual case at issue. *Second*, a *per se* rule requiring an evidentiary hearing where a claim for relief is "premised on claims of fact," AG Br. 49, makes little sense when many PCRA petitions revolve purely on documentary evidence, such as those involving *Brady* claims. *Third,* the AG's proposal would largely *reduce* trial courts' independence by forcing them to exercise discretionary powers they already have, which directly contradicts the spirit of *Brown*. *See* 196 A.3d at 146 (disapproving "instruct[ing] a court" to take a particular course of action in a PCRA proceeding).

Finally, the language of the AG's proposal is broad, referring only generally to patterns of "problematic concessions" without defining the kinds of concessions that might constitute a pattern. Concessions by prosecutors are hardly limited to near-dispositive issues, instead extending to agreements to provide discovery, to

[30] This is especially true to the extent that the AG's proposal is tailored to the alleged conduct of a single office holder. *See* AG Br. 15–30 (enumerating 115 instances of allegedly "untested concessions," citing only cases involving the current Philadelphia DAO). It makes little sense to adopt a state-wide rule based upon the alleged conduct of one office. Indeed, such rulemaking in response to a single official is precisely what *Brown* sought to avoid. *Cf. Brown*, 196 A.3d at 149 (seeking to avoid "flux" caused by "changing tides of election cycles").

conduct forensic or DNA testing, and the like. Requiring extra involvement by the court to question concessions, big or small, would deprive trial courts of their discretion while saddling them with additional burdens. *See Commonwealth v. Sullivan*, 371 A.2d 468, 475 n. 7 (Pa. 1977) (dismissing proposed procedure to require additional factfinding where "its only effect" would be to "cause unnecessary delays and create additional burdens on the judicial process without any benefits to the administration of criminal justice.").

CONCLUSION

In a system where prosecutors enjoy substantial discretion to determine which cases proceed, how they are proved, and even when the death penalty is sought, it is essential that courts facilitate and even encourage law enforcement officials to confess error when they find it. *See Young*, 315 U.S. at 258. This does not mean abdicating the judicial role. Judges remain the final arbiters of the law, with tools available to them to make fully informed decisions. *Amici* urge this Court to preserve trial courts' current discretion regarding how to handle confessions of error in post-conviction cases.

Respectfully submitted,

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October 7, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App. P. 531(b)(3) and Pa. R. App. P. 2135(d), this is to certify that the foregoing Brief of *Amicus Curiae* the Pennsylvania Innocence Project and the Innocence Network complies with the word count limit set forth in Rule 531(b)(3). This Brief contains 6,933 words, excluding those sections exempted by Pa. R. App. P. 2135(b).

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that requires filing confidential information and documents differently than non-confidential information and documents.

By: /s/ *John S. Stapleton*
John S. Stapleton, PA ID 200872

October 7, 2024

CERTIFICATE OF SERVICE

I certify that on October 7, 2024 a true and correct copy of the foregoing Brief of *Amici Curiae* The Pennsylvania Innocence Project and The Innocence Network was served on the parties via PACFile and that within 7 days, I will file paper copies with the Pennsylvania Supreme Court.

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