IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. _____ E.D. ALLOC. DKT. 200

COMMONWEALTH OF PENNSYLVANIA

V.

ANTHONY WRIGHT
PETITIONER

PETITION FOR ALLOWANCE OF APPEAL

PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE SUPERIOR COURT DATED OCTOBER 17, 2007, AT NO. 1383 EDA 2006, AFFIRMING THE DENIAL OF PCRA RELIEF BY THE HONORABLE D. WEBSTER KEOGH, ENTERED APRIL 20, 2006, NOVEMBER TERM, 1991, BILL NO. 3158-3168, 2/2, (CP 51-CR-1131582-1991).

Sondra R. Rodrigues, Esquire
Attorney for Appellant
2 Penn Center Plaza, Suite 200
Philadelphia, PA 19102
(215) 271 - 0989

Colin Starger, Esquire
Co-Counsel for Appellant
NYU Lawyering Program
245 Sullivan Street
New York, NY 10012
(212) 998 - 6483

Peter J. Neufeld, Esquire,
Craig M. Cooley, Esquire
Innocence Project
100 Fifth Avenue, 3rd Floor
New York, NY 10011
(212) 364 - 5390

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES Page

STATE CASES

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

I. STATEMENT OF JURISDICTION

Jurisdiction for this Appeal is provided for at 42 Pa. C.S.A. §742(a), relating to allowance of appeal from final Orders of the Superior and Commonwealth Courts.

Pursuant to 42 Pa. C.S. §726, relating to extraordinary jurisdiction, the scope of review is plenary as it involves an issue or issues of immediate public importance.

II. ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the Order by the Superior Court, the Honorable Joyce, Panella, and Popovich, entered on October 17, 2007, affirming an Order entered by the Honorable D. Webster Keogh on April 24, 2006, in the Court of Common Pleas, Philadelphia County, Criminal Trial Division, November Term 1991, Nos. 3158-3168, denying appellant's petition for DNA testing pursuant to 42 Pa.C.S.A. § 9543.1. The Judges who authored the Superior Court Opinion are Panella and Popovich, sitting as the Superior Court panel (J.A24020/07).

III. STANDARD OF REVIEW FOR THE INTERMEDIATE COURT

The proper standard and scope are as follows:

An abuse of discretion standard governs the Superior Court's review of the propriety of a grant or denial of a petition for post-conviction DNA testing. *Commonwealth v. Stock*, 679 A.2d 760, 762 (Pa. 1996)

The scope of review when examining a PCRA Court's grant or denial of relief is limited to determining whether the Court's findings are supported by the record and otherwise free of legal error. *E.g.*, *Commonwealth v. Allen*, 732 A.2d 582, 586 (Pa. 1999); 42 Pa.C.S.A. § 9543.

The PCRA provision directly at issue is 42 Pa. C.S.A. § 9543.1(c)(3); this section requires a petitioner seeking DNA testing to:

> (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[.]

IV. QUESTION PRESENTED

Did not the Superior Court err by holding that a petitioner filing a DNA petition pursuant to 42 Pa.C.S.A. § 9543.1 is precluded from obtaining DNA testing because he gave a knowing and voluntary confession?

Answered in the affirmative by the Superior and Commonwealth Courts.

V. STATEMENT OF CASE

A. PROCEDURAL HISTORY

Petitioner, Anthony Wright, is presently before this Honorable Court seeking allowance to appeal the Superior Court's opinion affirming the Common Pleas Court's decision to deny Mr. Wright's motion for DNA testing pursuant to 42 Pa.C.S.A. § 9543.1. *See Commonwealth v. Wright*, —A.2d—, 2007 WL 3013674 (Pa. Super., Oct. 17, 2007).

Mr. Wright seeks DNA testing to establish his actual innocence regarding his June 1993 convictions for first-degree murder, rape, burglary, robbery, and possession of an instrument of crime. The Commonwealth prosecuted Mr. Wright's case as a capital case. The Honorable Eugene H. Clark, Jr. presided over his trial. After conviction, Judge Clark held a penalty hearing to determine if Mr. Wright should be sentenced to death. At his penalty hearing, the jury could not agree on a penalty. Accordingly, pursuant to 42 Pa. C.S.A. §9711(c), Judge Clark sentenced Mr. Wright to a mandatory life sentence.

Following post-trial motions, which Judge Clark denied, he re-imposed the life sentence for the murder conviction, and imposed lesser sentences for the remaining offenses. On August 14, 1995, the Superior Court affirmed Mr. Wright's conviction and sentences. *See Commonwealth v. Wright*, 668 A.2d 1200 (Pa. Super. 1995) (Table). This Court denied Mr. Wright's petition for allowance. Attorney Bernard Siegel represented Mr. Wright at trial and on direct appeal.

On August 13, 1996 Mr. Wright filed a *pro se* PCRA motion. The motion did not raise any DNA issues. Court-appointed PCRA counsel submitted a "no-merit" letter pursuant to *Commonwealth v. Finley*, 550 A.2d 213 (Pa. Super. 1988) (*en banc*) and *Commonwealth v. Turner*, 544 A.2d 927 (Pa. 1988). The PCRA Court accepted counsel's findings and dismissed the PCRA

petition. On September 1, 1999, the Superior Court affirmed the dismissal, *Commonwealth v. Wright*, 747 A.2d 423 (Pa. Super. Ct. 1999) (Table), and this Court denied allowance for appeal on February 24, 2000. *Commonwealth v. Wright*, 751 A.2d 190 (Pa. 2000) (Table).

On July 16, 2005, current counsel, working *pro bono* and with the Innocence Project, filed a motion pursuant to 42 Pa. C.S.A. § 9543.1 on Mr. Wright's behalf seeking DNA testing on the following items: (a) the blood and semen-stained jeans allegedly recovered from Mr. Wright's bedroom; (b) the bloodstained sweatshirt allegedly recovered from Mr. Wright's bedroom; (c) the knife used to murder the victim; (d) the oral, vaginal, and rectal swabs collected during the autopsy; and (e) the blood and semen-stained bed sheet recovered from the crime scene. On November 17, 2005, the PCRA court granted Colin Starger's *pro hac vice* motion so he could serve as Mr. Wright's co-counsel; Mr. Starger is an Innocence Project staff attorney.[1]

On December 20, 2005, the Commonwealth responded to Mr. Wright's request for DNA testing. On January 25, 2006, counsel replied to the Commonwealth's response, and on the same date presented oral arguments before the Honorable D. Webster Keogh. On April 20, 2006, Judge Keogh denied Mr. Wright's motion. Judge Keogh's Order is attached hereto as Exhibit 1. Mr. Wright filed a timely notice of appeal to the Pennsylvania Superior Court. On October 17, 2007, the Superior Court affirmed Judge Keogh's dismissal. The Superior Court panel consisted of the Honorable Joyce, the Honorable Panella, and the Honorable Popovich. The Superior Court's opinion is attached hereto as Exhibit 2. This timely petition for allowance followed.

B. FACTUAL HISTORY

[1]Mr. Starger is no longer an Innocence Project Staff Attorney; his new Innocence Project Staff Attorney is undersigned counsel–Craig M. Cooley.

1. Louise Talley's Rape and Murder: Collection of Forensic Evidence from Crime Scene and Autopsy

On October 19, 1991, police found the body of 77-year-old Louise Talley in an upstairs bedroom of her Philadelphia home; she was bloody and naked, with clothing scattered underneath her. (N.T. 5/26/93, at 55-56, 61; 6/7/93, at 95). She had been raped and murdered, with the cause of death being multiple stab wounds (10) and blunt force injuries. (N.T. 6/2/93, at 114). Investigators recovered a bloodstained metal knife from the scene. (N.T. 5/26/93, at 108-109). The ten stab wounds were consistent with having been made with the bloodstained knife (N.T. 6/2/93, at 125). The Commonwealth argued the knife was in fact the murder weapon (N.T. 6/7/93, at 81-83).

Investigators recovered a stained sheet from Ms. Talley's bed. (N.T. 5/26/93, at 110). The sheet tested positive for the presence of semen, and the seminal stains on the sheet contained spermatozoa. (N.T. 6/3/93, at 31). At the time of the murder, Ms. Talley lived alone. (N.T. 5/26/93, at 48). The Commonwealth argued that the seminal stains proved Mr. Wright raped Ms. Talley before he murdered her. (N.T. 6/7/93, at 95). The medical examiner who performed the autopsy also recovered rape kit samples, including swabs from Ms. Talley's mouth, rectum, and vagina ("rape kit swabs"). (N.T. 6/2/93, at 126). At the time, the swabs tested negative for the presence of acid phosphatase, a presumptive indicator for the presence of semen. (*Id.* at 127-28). In his DNA petition, Mr. Wright sought DNA testing of the knife, semen-stained sheet, and rape-kit swabs.

2. How Mr. Wright Became a Suspect; Collection of Additional Forensic Evidence

On October 19, 1991, a man named John Wilson approached police officers–standing outside the crime scene–and told them "that he had heard that Tony Wright was the person responsible for the killing of Ms. Talley." (N.T. 5/26/93, at 83-84). According to Sergeant Burke, Mr. Wilson

further informed him that Mr. Wright "might be on Bott Street staying with a guy by the name of either St. Ives or St. James." (*Id.* at 84). The investigation led police to a Roland St. James (a.k.a. "Roland S. James"). Police officers apprehended Mr. James and transported him to police headquarters. (*Id.* at 85). After interrogating him, police released Mr. James once he implicated Mr. Wright in Ms. Talley's murder. (*Id.* at 85-86). On the same day, the police also interrogated Mr. James's roommate, John "Buddy" Richardson; again, police released Mr. Richardson after he implicated Mr. Wright in Ms. Talley's murder. (N.T. 6/1/93, at 150-51).

On October 20, 1991, Detective Manuel Santiago located Mr. Wright at his residence–i.e., his mother's home at 1905 Brunner Street. (N.T. 6/2/93, at 14-15). Mr. Wright voluntarily accompanied Detective Santiago to police headquarters, where Detective Santiago interrogated him in Detective Martin Delvin's presence. (*Id.* at 18). According to Detective Santiago, Mr. Wright confessed to Ms. Talley's rape and murder. (*Id.* at 35-39). Detective Devlin wrote a nineteen-page confession, which Mr. Wright signed. Neither Detective Santiago nor Detective Devlin video or audio taped Mr. Wright's interrogation and confession. (*Id.* at 31-32, 39).

The written confession referred to a black sweatshirt with a Chicago Bulls logo, a pair of blue suede jeans, and a pair of black Fila sneakers as the clothes Mr. Wright wore when he raped and murdered Ms. Talley. (*Id.* at 38). Based on this information, Detective Frank Jastrezembski obtained a search warrant for 1905 Brunner Street. (N.T. 6/2/93, at 93-94). Police searched 1905 Brunner Street and recovered a black Chicago Bulls sweatshirt, black Fila sneakers, and a pair of blue suede jeans. (*Id.* at 96).

Forensic examination revealed the presence of human blood on the sweatshirt and jeans. (N.T. 6/3/93, at 33). In addition, the jeans' zipper had a seminal stain with spermatozoa present.

(Id.). Early generation HLA DQ Alpha ("DQ Alpha")[2] DNA typing of the blood on the sweatshirt and jeans was found to be consistent with Ms. Talley's blood. (*Id.* at 70-71). Forensic analysts did not utilize this rudimentary DNA test on the seminal stain because seminal stains had been "troublesome" for the laboratory. (*Id.* at 76). Although excluded as the donor of "A" antigens identified in the seminal stain, the Commonwealth argued that the "A" antigen came from Ms. Talley, and that the semen stain represented a mixture of fluids from Mr. Wright and Ms. Talley. (*Id.* at 34-35, 85). Indeed, during closing arguments, the Commonwealth argued that the semen stain on the jeans unequivocally proved Mr. Wright raped and murdered Ms. Talley. (N.T. 6/7/93, at 87-88). In addition to the abovementioned items, Mr. Wright also sought DNA testing of the sweatshirt and blue jeans in his DNA petition.

3. Trial Evidence

The Commonwealth premised its case against Mr. Wright on four thing: (1) his signed confession; (2) testimony from co-defendants Roland S. James and John "Buddy" Richardson; (3) two eyewitnesses–Gregg Alston and Shawn Nixon–who placed Mr. Wright near the crime scene; and (4) rudimentary DNA tests which linked the clothes allegedly recovered from Mr. Smith's home to the crime scene.

As detailed above, on October 20, 1993, Mr. Wright signed a confession he did not write; the Commonwealth read the confession into the record. (N.T. 6/2/93, at 34-39). The confession described a scenario wherein Mr. Wright accompanied Mr. Richardson to Ms. Talley's house in

[2] DQ Alpha was the very earliest form of modern polymerase-chain-reaction ("PCR") based DNA testing. DQ Alpha testing compared "alleles" (variations) at a single locus. Individuals inherit one allele from each parent, and so two alleles are present at a given DNA locus. While DQ Alpha testing compared alleles at a single locus, modern Short Tandem Repeat ("STR") testing examines alleles at 13 different loci. Thus, STR testing is exponentially more powerful at differentiating between individuals based on a DNA profile. It should be noted that, throughout the trial transcript, the early generation test is referred to as DX alpha testing.

order to rob her for drug money. (*Id.* at 36). Mr. Richardson acted as a lookout as Mr. Wright raped and murdered Ms. Talley. (*Id.*). Mr. Richardson and Mr. Wright then returned to Mr. Richardson's house where they joined Roland S. James and a man named Earl. (*Id.* at 36-37). Mr. James, Mr. Richardson, and Mr. Wright then returned to Ms. Talley's residence and stole two televisions, a clock radio, and some change from her purse. (*Id.* at 37-38). Finally, the trio took all of this stolen property to Mr. James's house. (*Id.* at 38).

Mr. James admitted he had Ms. Talley's T.V. and radio at his 3978 Bott Street residence. (N.T. 6/1/93, at 5, 16, 21-22). However, he contradicted the confession wherein he helped to steal these items directly from Ms. Talley's house with Mr. Richardson after Mr. Wright raped and murdered her. Instead, Mr. James stated that Mr. Wright and Earl brought the T.V. and radio to his house, which Mr. James used as a crack den and place of prostitution. (*Id.* at 16, 33-38). According to Mr. James, Mr. Wright and Earl dropped off the T.V. and radio after an evening walk near Ms. Talley's house, which ended with Mr. James leaving the scene without actually seeing Mr. Wright enter Ms. Talley's residence. (*Id.* at 28, 51). As indicated above, Mr. James implicated Mr. Wright after police interrogated him. (*Id.* at 25).

Mr. Richardson, the then-roommate of Mr. James, presented testimony that contradicted both the confession and Mr. James's testimony. (N.T. 6/1/93, at 141). In his version, Mr. Richardson randomly encountered Mr. Wright on the night of October 18, 1991 at an intersection near Ms. Talley's house. (*Id.* at 142-43). Mr. Wright asked Mr. Richardson to act as a lookout while he entered Ms. Wright's house, but Mr. Richardson refused and left the scene. (*Id.* at 144-45). Mr. Richardson testified he did not see Mr. James with Mr. Wright near Ms. Talley's house, or to going back to the house to steal the televisions. Mr. Richardson testified, however, that he saw two

televisions–presumably those stolen from Ms. Talley's residence–at Mr. James's house the next morning. (*Id.* at 147). Like Mr. James, Mr. Richardson testified he did not see Mr. Wright enter Ms. Talley's residence. (*Id.* at 167). He also admitted he used his house as a crack haven and place of prostitution, and that he implicated Mr. Wright only after police interrogated him. (*Id.* at 150-51, 155).

Two eyewitnesses placed Mr. Wright near Ms. Talley's residence with another man; the witnesses, however, differed on who the other man had been. Gregg Alston testified that at 10 p.m. on October 18, 1991, he was sitting on the corner of Kerbaugh Street and Nice Street and saw Mr. Wright repeatedly "pacing up and down the street" with "that guy named Buddy." (N.T. 6/1/93, at 79-81). According to Mr. Alston, Mr. Wright went into Ms. Talley's house while Mr. Richardson stood outside. (*Id.* at 82). Shawn Nixon also testified to being on the corner of Kerbaugh Street and Nice Street in a group with Mr. Alston. He recalled seeing Mr. Wright enter Ms. Talley's house, but insisted he was with Earl rather than Mr. Richardson. (N.T. 6/2/93, at 74-76). Unlike Mr. Alston's memory of Mr. Richardson acting as a lookout, Mr. Nixon said that Earl left the scene rather than act as a lookout. (*Id.* at 77).

The Commonwealth could not link Mr. Wright to Ms. Talley's murder with the physical evidence collected from her residence–including the bloodstained knife, the blood and semen stained bed sheet, and the rape-kit swabs. In particular, DQ Alpha tests on the knife blade and bed sheet only revealed human blood consistent with Ms. Talley's blood. Thus, to link Mr. Wright to Ms. Talley's murder, the Commonwealth relied on the evidence allegedly recovered from his residence; namely, the jeans and sweatshirt. (*Id.* at 72). According to criminalist Louis Brenner, the genetic profile of the blood found on the jeans and sweatshirt was consistent with Ms. Talley's profile–a

profile, according to criminalist Brenner, which only occurred in 1.4% of the black population. (*Id.* at 73).

Criminalist Brenner performed rudimentary DNA testing on the blood evidence. He failed, however, to subject the vital semen stains–recovered from Ms. Talley's bed sheet and the jeans allegedly recovered from Mr. Wright's residence–to the same DNA tests. Criminalist Brenner explained that this shortcoming was due to a technical limitation–i.e., the then-current technique of obtaining DNA from seminal material was "troublesome" for his lab and did not produce consistent results. (N.T. 6/3/93, at 75-76).[3] Similarly, criminalist Brenner failed to subject the rape-kit swabs or knife handle to DNA tests.

Mr. Smith asserted his innocence at trial and presented an alibi defense. Mr. Wright unequivocally repudiated his confession and testified that detectives physically and psychologically coerced it from him. (N. T. 6/3/93 at 158-59). He further said detectives did not permit him to read the confession *they wrote* before he signed it, and that he signed it under duress. (*Id.* at 159-60). Mr. Wright denied knowing Roland S. James or Buddy Richardson. (*Id.* at 146-47). According to Mr. Wright, on the evening of October 18, 1991, he proceeded from his construction job to his home, and went to a club called N.A. later that night. (*Id.* at 153-54). He stayed at the club until around 4 a.m., went home and fell asleep, and then went shopping the next morning. (*Id.* at 154-55).

Mr. Wright testified he did not own the clothes the police allegedly recovered from his bedroom. (*Id.* at 164). Mr. Wright's mother corroborated his claim; she said the police only removed her son's work uniform, a white jumpsuit, and pictures from the wall and that her son did not own the clothes allegedly recovered from his bedroom. (N.T. 6/3/93, at 128-30).

---

[3]Modern STR DNA suffers from no such technical problem; STR testing is routinely performed on semen stains–particularly old and degraded stains.

VI. STATEMENT OF REASONS FOR ALLOWING THE APPEAL

This appeal should be allowed for special and important reasons. The Superior Court erred by holding that Mr. Wright should be denied DNA testing due to his confession. Although there is a confession, found by the suppression court to be admissible, Mr. Wright vigorously contested its veracity and accuracy at trail, and throughout his petition. At trial, the Commonwealth premised its case upon the confession and rudimentary DNA tests; it stressed the fact that the semen-stained bed sheets provided powerful evidence that Ms. Talley had been raped prior to being murdered. However, no testing was ever performed on the semen-stained sheets, because DNA testing was in its infancy at the time of Mr. Wright's trial. On the other hand, Mr. Wright proclaimed his innocence, presented an alibi defense, and unequivocally repudiated his confession, claiming it was obtained through physical coercion.

As a statutory matter, the Superior Court's opinion is wrong. Mr. Wright satisfied the statute's requirements, averring that exculpatory testing results would prove innocence. The Superior Court, without textual support, perceived a statutory bar against testing in cases where petitioners knowingly and voluntarily confessed. To reach this determination, it conflated the legal determination of a statement's admissibility, with a factual one, the statement's probative, evidentiary value–i.e., its reliability and truthfulness. Thus, it restricted testing on grounds that have little to do with DNA testing's power to produce exculpatory results. As exonerations within this very Commonwealth have repeatedly shown, DNA testing can prove innocence, notwithstanding confessions.

More to the point, as Mr. Wright's petition fits comfortably within the text of 42 Pa.C.S.A.

§ 9543.1, the General Assembly clearly intended for testing in cases such as his. The General Assembly enacted the statute immediately after Bruce Godschalk's DNA exoneration; remarkably, the primary evidence used to convict Mr. Godschalk was his false confession. Finally, the Superior Court's opinion will lead to unjust results–petitioners who can establish their actual innocence will be barred from doing so, thereby increasing the likelihood innocent people will languish in prison.

As a constitutional matter, the Superior Court's opinion is arbitrary and fundamentally unfair. First, the Superior Court arbitrarily incorporated a bar not intended by the General Assembly, thereby denying Mr. Wright his statutorily created "liberty interest." Second, the Superior Court has interpreted 42 Pa.C.S.A. § 9543.1 to permit DNA testing where a petitioner's conviction is premised on eyewitness identification. The same reasons why courts permit DNA testing in identification cases equally apply to confession cases.

As a matter of policy, the Superior Court's decision is inconsistent with several state statutes and court opinions which permit DNA testing even when a petitioner confessed or pled guilty.

The Superior Court's opinion should be reversed, so that Mr. Wright may seek the DNA testing afforded by the statute to prove his long proclaimed actual innocence.

VII. REASONS FOR ALLOWING APPEAL

More than forty years ago, Justice Goldberg wrote: "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964). The question presented in this case not only confronts the issue Justice Goldberg described, it presents a pressing issue concerning the administration of justice in the Commonwealth of Pennsylvania: whether 42 Pa.C.S.A. § 9543.1 bars DNA testing where the petitioner confessed to the offense for which he seeks DNA testing.

A. The Superior Court Committed Legal Error When it Denied Mr. Wright's Petition for Post-Conviction DNA Testing Pursuant to 42 Pa.C.S.A. § 9543.1

1. Mr. Wright Satisfied 42 Pa.C.S.A. § 9543.1's Requirements

Mr. Wright should be granted DNA testing because he satisfied 42 Pa.C.S.A. § 9543.1's requirements.

As the Superior Court correctly noted, Mr. Wright's "motion for post-conviction DNA testing must be evaluated under 42 Pa.Cons.Stat.Ann. § 9543.1." *Commonwealth v. Wright*, —A.2d—, 20007 WL 3013674, at *2 (Pa. Super., Oct. 17, 2007). Pursuant to the statute, a petitioner must:

> (1)(i) specify the evidence to be tested;
>
> (ii) state that the petitioner consents to provide samples of bodily fluid for use in the DNA testing; and
>
> (iii) acknowledge that the applicant understands that, if the motion is granted, any

data obtained from any DNA samples or test results may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against the applicant in other cases.

(2)(I) assert the applicant's actual innocence of the offence for which the applicant was convicted; and. . .

(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.

42 Pa. C.S.A. § 9543.1(c). If a petitioner satisfies these requirements, the court "shall order" DNA testing if it determines that the:

(ii) evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been altered in any material respect; and

(iii) motion is made in a timely manner and for the purpose of demonstrating the applicant's actual innocence and not to delay the execution of sentence or administration of justice.

42 Pa. C.S.A. § 9543.1 (d)(1). The Court may only refuse to order DNA testing if it determines that "there is no reasonable possibility that the testing would produce exculpatory evidence that would establish the [petitioner's] actual innocence of the offense for which [he] was convicted." 42 Pa. C.S.A. § 9543.1 (d)(2)(i).

Mr. Wright's petition satisfies these requirements. Ex. 3. Mr. Wright identified the evidence he wished to test; this included the jeans allegedly recovered from his bedroom, the sweatshirt allegedly recovered from his bedroom, the knife used to murder Ms. Talley, the rape kit swabs, and

the bed sheet. *Id.* at 13. In his verification, Mr. Wright consented to provide biological samples for DNA testing, acknowledged that any data obtained from his biological samples may be used to investigate other offenses, and asserted his actual innocence. *Id.* at 14. Similarly, Mr. Wright established that the DNA technology he wished to employ–STR DNA testing–did not exist when the Commonwealth prosecuted him in 1993. *Id.* at 23-24. While the Commonwealth subjected certain items of evidence to DQ-Alpha DNA testing, such testing is unsophisticated compared to STR DNA TESTING. *See* JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 146 (2d 2005). Mr. Wright also demonstrated that the evidence has been subjected to a proper chain of custody. *Id.* at 24.

Significantly, Mr. Wright established that the identity of Ms. Talley's assailant was an open question at trial. At trial, Mr. Wright repudiated his confession, proclaimed his innocence, and presented an alibi defense. *Id.* at 14 (citing N.T. 6/3/93, at 152-54). *E.g.*, *Commonwealth v. Williams*, 899 A.2d 1060, 1063 (Pa. 2006) (an alibi defense "by its nature" places the assailant's identity at issue); *Commonwealth v. Roxberry*, 602 A.2d 826, 827 (Pa. 1992).[4] Mr. Wright also explained why the informant testimony, eyewitness testimony, and his confession did not negate the identity issue. Ex. 3, at 15-21. Furthermore, Mr. Wright identified several scenarios where exculpatory results would establish his innocence. *Id.* at 21-23. For instance, he explained that STR DNA testing on the rape-kit swabs, bed sheet, knife, or blue jeans could result in isolating: (1) a male profile on one of the items inculpating Roland James or Buddy Richardson as the rapist or murderer; (2) a male profile

[4]Several cases–which pre-date Pennsylvania's DNA testing statute–support the notion that DNA testing should be granted where the petitioner's identity was an issue at trial and exculpatory DNA results could definitively establish the perpetrator's identity. *E.g.*, *Commonwealth v. Robinson*, 682 A.2d 831, 836-37 (Pa. Super. 1996); *Commonwealth v. Reese*, 663 A.2d 206, 208-09 (Pa. Super. 1995); *Commonwealth v. Brison*, 618 A.2d 420, 425 (Pa. Super. 1992).

on one of the items resulting in a DNA database "cold hit" to a convicted murderer or rapist;[5] or (3) a redundant male profile found on two or more items of evidence.[6] Under each scenario, Mr. Wright's actual innocence would be established. *Id.* at 24.[7] Put simply, had the Superior Court conducted the appropriate analysis, it *could not* have determined that "there is not a reasonable possibility that the testing would produce exculpatory evidence that would establish [Mr. Wright's] actual innocence of the offense for which he was convicted." 42 Pa. C.S.A. §9543.1(d)(2)(i).

2. The Superior Court Arbitrarily Conflated a Legal Determination with a Factual Determination of Whether DNA Evidence Can Establish Mr. Wright's Actual Innocence.

Section 9543.1 mandates that courts must make a *factual* determination of whether exculpatory DNA results would establish a petitioner's actual innocence before they grant or deny a petitioner's testing request. This is a fact-intensive inquiry which requires courts to evaluate each item of evidence and determine–individually and collectively–whether exculpatory results would establish actual innocence. The Superior Court failed to conduct a factual determination; instead, it premised its entire analysis on a tangential and irrelevant legal determination–i.e., the admissibility

[5]DNA database "cold hit" cases occur quite frequently. *E.g.*, NAT'L INST. OF JUST., DEP'T OF JUST., USING DNA TO SOLVE COLD CASES (2002) (listing several cases where DNA database "cold hits" solved an unsolved violent crime). As such, it is reasonable to assume a "cold hit" could occur and establish Mr. Wright's actual innocence.

[6]Indeed, redundant DNA results led to Nicholas Yarris's exoneration. *See infra* (discussing Mr. Yarris's death row DNA exoneration in more detail).

[7]A scenario where DNA showed that semen from the jeans *allegedly* recovered from Mr. Wright's residence actually came from Buddy Richardson or Roland James would support Mr. Wright's actual innocence claim and his claim that the clothes did not belong to him. Certainly, finding an informant's DNA on the murder weapon or rape kit swabs would also establish Mr. Wright's actual innocence. The Superior Court committed legal error when it ignored these exculpatory results demonstrating third party guilt. *E.g.*, *House v. Bell*, 126 S.Ct. 2064 (2006) (DNA evidence implicating a third-party played crucial role in demonstrating that petitioner established actual innocence to overcome state procedural default rules); *Holmes v. South Carolina*, 547 U.S. 319 (2006) (reversing murder conviction on direct appeal where evidence of third party guilt was excluded because of the strength of the State's case).

of a knowingly and voluntary confession. In particular, it interpreted the statute to bar DNA testing in "fully litigated" confession cases. The Superior Court's analysis misconstrued the analytical process mandated by the statute and DNA's ability to impact critical factual determinations such as whether a petitioner is actually innocent.

a. The Superior Court's Decision

Nowhere in its opinion does the Superior Court state DNA testing cannot establish Mr. Wright's innocence. More importantly, the Superior Court did not–and indeed, in light of the DNA exonerations, could not–hold that DNA testing could not destroy the probative impact of Mr. Wright's confession. Rather than apply section 9543.1's *factual* inquiry, the Superior Court based its opinion solely on the *legal* determination regarding the admissibility of Mr. Wright's confession:

> For the reasons set forth below, we find that Wright's confession to the murder, rape, and robbery of the victim has been finally litigated, found not to be coerced, and was knowingly and voluntarily given: as such, pursuant to *Commonwealth v. Young*, 873 A.2d 720 (Pa. Super. 2005), *appeal denied*, 568 Pa. 739, 891 A.2d 733 (2005), Wright cannot assert his actual innocence in this PCRA proceeding.

Commonwealth v. Wright, —A.2d—, 20007 WL 3013674, at *1 (Pa. Super., Oct. 17, 2007).

The Superior Court took great pains to chronicle the litigation regarding the admissibility of Mr. Wright's confession:

> Prior to trial, on March 17, 1992, Wright filed a motion to suppress the statement he had given to the police. On December 16, 1992, following a suppression hearing, the trial court found that Wright's confession was knowing and voluntary, and therefore denied Wright's motion, thus allowing Wright's detailed confession given to police to be admitted into evidence at trial.
>
> On June 8, 1993, following a jury trial, Wright was convicted of first-degree murder, burglary, rape, robbery, and possession of an instrument of crime. Thereafter, on January 31, 1994, the trial court sentenced Wright to life imprisonment for his conviction of murder in the first degree. Wright filed a timely direct appeal, which did not raise any issue with respect to the denial of his suppression motion, and this

> Court affirmed the judgment of sentence on August 14, 1995. *See Commonwealth v. Wright*, 668 A.2d 1200 (Pa.Super.1995) (unpublished memorandum). No request for review was filed in our Supreme Court.
>
> Wright then filed a PCRA petition on August 13, 1996. In his petition, Wright did not make any allegations concerning his confession or the denial of his suppression motion. Following the appointment of counsel, a "no-merit" letter was submitted to the PCRA court, pursuant to *Commonwealth v. Turner*, 518 Pa. 491, 544 A.2d 927 (1988), and *Commonwealth v. Finley*, 379 Pa.Super. 390, 550 A.2d 213 (Pa.Super.1988). The PCRA court dismissed the petition on December 1, 1997. Wright appealed, however, this Court subsequently affirmed the dismissal on September 1, 1999. *See Commonwealthv. Wright*, 747 A.2d 423 (Pa.Super.1999) (unpublished memorandum), *appeal denied*, 561 Pa. 696, 751 A.2d 190 (2000). Our Supreme Court denied allowance of appeal on February 24, 2000. *See id.*

Id. at *1-2. According to the Superior Court, Mr. Wright's fundamental error was not the lack of facts supporting his theories of exoneration, but rather his failure to appeal the trial judge's denial of his motion to suppress: "As the Commonwealth aptly notes it its letter brief, Wright's failure to appeal the denial of his suppression motion causes that ruling–that Wright's confession was knowing and voluntary–to be the law of the case." *Id.* at *4 (citation omitted). From this point, the Superior Court made the extraordinary leap that such a determination prohibited DNA testing. Indeed, the Superior Court concluded that DNA testing is prohibited where "a confession... has been 'finally litigated, found not to be coerced, and was knowingly and voluntarily given.'" *Id.* at *4. DNA testing is prohibited because Mr. Wright "is unable to assert his actual innocence." *Id.*

Taken plainly, the Superior Court requires that a petitioner invalidate a legal finding of voluntariness before being permitted to apply for relief. No such requirement can be found within the statute's text. Moreover, the Superior Court's rational is at odds with the statute's purpose. DNA testing can reveal that a confession was false (or truthful) and in so doing prove actual innocence. What DNA testing cannot do is reveal whether a legal determination of voluntariness

was made properly by the trial court. Such constitutional challenges are inapposite to the determination central here: whether testing can prove innocence

b. Factual Determination v. Legal Determination

Whether exculpatory DNA results would establish Mr. Wright's innocence, *see* 42 Pa. C.S.A. §9543.1(c)(3)(ii)(A), is a *fact-intensive* determination. *E.g.*, *Commonwealth v. Smith*, 889 A.2d 582 (Pa. Super. 2005) (pursuant to section 9543.1(d)(2) the court must review the trial record and petitioner's DNA motion before denying or granting testing).[8] Thus, the Superior Court should have reviewed the trial record and Mr. Wright's DNA motion and asked and answered the following questions: (1) if DNA tests prove that the semen on the jeans allegedly recovered from Mr. Wright's bedroom could not have come from him, would such results establish his actual innocence; (2) if DNA tests on the jeans and sweatshirt allegedly recovered from Mr. Wright's bedroom proved that the blood on these items could not have come from Ms. Talley, would such results establish Mr. Wright's actual innocence; (3) if DNA tests on the knife used to murder Ms. Talley excluded Mr. Wright (and Ms. Talley), would such results establish his actual innocence;(4) if a redundant DNA profile is identified on several items of evidence, which excludes Mr. Wright, would such results establish his actual innocence; and (5) if a combination of these results occur, do such results establish Mr. Wright's actual innocence. Ex. 3, at 21-23. Thus, the critical question always revolves around the facts and whether DNA testing can establish a petitioner's actual innocence.

The Superior Court, however, conducted a legal inquiry which is completely irrelevant to the

[8] *See also Commonwealth v. Brison*, 618 A.2d at 425 (granting DNA testing after identifying several facts which could have impaired the eyewitness's identification); *Commonwealth v. Reese*, 663 A.2d 206, 208-09 (Pa. Super. 1995) (granting DNA testing after identifying certain facts regarding eyewitness's identification); *Commonwealth v. Robinson*, 682 A.2d at 838 (remand ordering trial judge to conduct factual inquiry to determine "whether DNA evidence could definitely establish Appellant's innocence.").

actual innocence issue, and DNA's ability to reveal whether a confession is truthful or false. Specifically, it conflated the legal determination of a statement's admissibility, with its actual evidentiary value–i.e., its reliability and truthfulness. By claiming that Mr. Wright's confession prevented him from proving his actual innocence, the Superior Court in effect held that a knowing and voluntary confession prohibits him from challenging the truth of the substantive facts contained within. Such a holding is not only at odds with the statute, it runs afoul of the U.S. Supreme Court and this Court's confession jurisprudence.

A confession must be knowing and voluntary to be admissible. *E.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 285-88 (1991); *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *Commonwealth v. Nestor*, 709 A.2d 879, 802 (Pa. 1998). The voluntariness question "is not whether the defendant would have confessed without interrogation, but whether the interrogation was so manipulative or coercive that it deprived the defendant of his ability to make a free and unconstrained decision to confess." *Commonwealth v. Nestor*, 709 A.2d at 882; *accord Colorado v. Connelly*, 479 U.S. 157, 161 (1986).[9] Consequently, the issue of whether the confession is *accurate* and *truthful* is irrelevant. *E.g.*, *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Rogers v. Richmond*, 365 U.S. 534, 542 (1961). As a result, knowing and voluntary confessions can be (and frequently are) unreliable. *E.g.*, *Colorado v. Connelly*, 479 U.S. at 167.[10] Simply put, "[c]onfessions, even those that have been

[9] *See also Schneckloth v. Bustamonte*, 412 U.S. at 225 ("Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.").

[10] *See also* Welsh S. White, *What is An Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998) (arguing that the voluntariness standard has failed to screen out false confession); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WISC. L. REV. 479 (2006) (same). The recent highly publicized case of John Mark Karr who came forward and confessed (falsely as it turned out), to murdering JonBenet Ramsey, is a case in point. *See* Andrew Murr, *False Confessions: Why Did John Mark Karr Claim He Killed JonBenet Ramsey?*, NEWSWEEK, Aug. 29, 2006.

found to be voluntary, *are not conclusive of guilt*." *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (emphasis added).

Indeed, while the determination of whether a statement is voluntary, and free from coercion, may speak to Fifth Amendment issues, once a statement is admitted parties often contest its truthfulness. Prosecutors may ask a jury to believe the entire statement or certain parts, while defense counsel may argue that the entire statement is untrue or, perhaps, fabricated by detectives. In short, whether an incriminating statement is admissible does not inform the trier of fact that the statement is in fact truthful; it merely represents a determination that the police did not violate the Constitution.

More importantly, by its terms, Section 9543.1 sets out the necessary steps for asserting a claim of innocence in a petition. In addition to establishing a testing plan that would prove actual innocence, a petition must provide a sworn affidavit attesting to the petitioner's actual innocence. *See* 42 Pa. C.S.A. § 9543.1(c)(2)(i). In other words, the General Assembly considered what necessary factual "assertion" of "actual innocence" needed to be made and codified that within the statute. Necessarily, then, it considered a more rigorous standard and rejected it.

Finally, in reaching the conclusion Mr. Wright could not meet his *prima facie* burden of proving actual innocence, the Superior Court, like the lower court before it, confined its entire analysis to the authority of a single sentence in *Commonwealth v. Young*, 873 A.2d 720 (Pa. Super. Ct. 2005), which states "while a confession, in and of itself, generally would not bar [a DNA] request, an appellant cannot assert a claim of actual innocence where, as here, the validity of the confession has been fully litigated, found not to be coerced, and was knowingly and voluntarily given." *Id.* at 727. However, the Superior Court's decision to place all of its analytical eggs in

Young's basket is misplaced. Given the undeniable reality that DNA testing has demonstrated that actually innocent defendants have falsely confessed, *Young's* holding must necessarily be limited to those cases–like *Young* itself–where DNA testing could not possibly trump and disprove the evidentiary facts, including the confession, that established guilt. Read more broadly, *Young's* holding swallows an entire class of cases which plainly fall within the statute's parameters, thereby denying wrongly convicted petitioners access to biological evidence which can prove their innocence and expose their confession's untruthfulness.

Mr. Wright's case represents a classic example where a confession's voluntariness cannot answer the factual question concerning his guilt or innocence. Mr. Wright vigorously claimed his confession was coerced and untruthful. Prior to trial, he moved to suppress his statement, arguing detectives coerced it from him. At trial, he proclaimed his innocence, presented alibi witnesses, and once again claimed his confession was coerced and untruthful. Though he did not prevail at trial, the question under 42 Pa. C.S.A. § 9543.1, is not whether there was evidence to support the verdict (or the admissibility of such evidence); rather, the issue is whether DNA testing can, nonetheless, prove actual innocence. In Mr. Wright's case, DNA testing can do so.[11]

The DNA exonerations have discredited numerous confessions and incriminating statements which trial judges and appellate court deemed knowing, voluntary, and admissible. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, N.C. L. REV. 891 (2004). In Mr. Wright's case, DNA testing can definitively determine whether the semen stain on the jeans allegedly recovered from his bedroom came from him or another individual. Ex. 3, at

[11]The Superior Court, in a previous opinion, even held that the circumstances surrounding Mr. Wright's rape-murder conviction generally warrant DNA testing. For instance, in denying petitioner DNA testing in *Commonwealth v. Brooks,* the Superior Court stated: "*This is not a rape-murder case where the absence of the defendant's semen could prove his innocence*; or a case where there were signs of a struggle and the perpetrator left behind skin, hair, or blood samples." 875 A.2d 1141, 1147 (Pa. Super. 2005) (emphasis added).

21. Similarly, DNA testing can conclusively determine whether the blood identified on the jeans and sweatshirt allegedly recovered from his bedroom came from Ms. Talley or someone else. *Id.* at 22. Finally, DNA testing can definitively determine whether semen on the rape kit swabs came from Mr. Wright or another individual. *Id.*

The Superior Court's decision not to grant testing under 42 Pa. C.S.A. §9543.1 was wrong, and violated the statute's mandate.

3. The Superior Court's Opinion Conflicts with the Statute's Text, the Circumstances Surrounding its Enactment, and Will Lead to Absurd and Unjust Results

a. 42 Pa.C.S.A. § 9543.1's Text Does Not Prohibit DNA Testing Where A Petitioner Confessed

Statutes must be interpreted as is, and courts may not arbitrarily incorporated a limitation not intended by the General Assembly. *E.g., Commonwealth v. Rieck Inv. Corp.*, 213 A.2d 277, 282 (Pa. 1965) ("it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include.").[12] Section 9543.1's text does not prohibit DNA testing where a petitioner confessed. Thus, the Superior Court's opinion arbitrarily erected a barrier which the General Assembly did not intend. Had the General Assembly intended such an prohibition, it could have easily incorporated one into the statute.[13]

---

[12] *See also Altieri v. Allentown Officers and Emp. Retirement Bd.*, 81 A.2d 884, 886 (Pa. 1951) ("It is not for us, by interpretation, to add to the statute a requirement which the Legislature did not see fit to include.")' *Worley v. Augustine*, 456 A.2d 558, 561 (Pa. Super. 1983) (a "court has no power to insert a word into a statutory provision where the Legislature has failed to supply it.").

[13] Case in point, the General Assembly incorporated several explicit requirements, which if not satisfied, prohibit a petitioner from obtaining DNA testing or relief post-testing. For instance, the General Assembly explicitly prohibited DNA testing if the Commonwealth destroyed the sought after evidence in good faith. *See* 42 Pa.C.S.A. §9543.1(a)(1); *accord Commonwealth v. Watson*, 927 A.2d 274, 278 (Pa. Super. 2007); *Commonwealth v. Brooks*, 875 A.2d 1141 (Pa. Super. 2005); *Commonwealth v. McLaughlin*, 835 A.2d 747 (Pa. Super. 2003). Likewise, the General Assembly explicitly prohibited DNA testing if the petitioner failed to pursue DNA testing at trial when DNA technology existed at the time of his trial, the verdict was rendered after January 1, 1995, and the court never refused funds for the testing. *See* 42 Pa.C.S.A. §9543.1(a)(2); *accord Commonwealth v. Williams*, 899

Furthermore, as 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.*, 788 A.2d 955, 962 (Pa. 2001) (citation omitted). For instance, although a petition for DNA testing is considered a PCRA petition, *e.g.*, *Williams v. Erie County District Attorney's Office,* 848 A.2d 967, 969 (Pa. Super. 2004), 42 Pa.C.S.A. §9543.1 "does not say" a petitioner must file his petition within one year of when the date judgment of sentence became final as required by 42 Pa.C.S.A. § 9545(b). The Superior Court panels which have interpreted the statute of limitations question have concluded that because the General Assembly did not incorporate 42 Pa.C.S.A. § 9545(b)'s one-year statute of limitations requirement into 42 Pa.C.S.A. §9543.1, the General Assembly did not intend for 42 Pa.C.S.A. § 9545(b)'s one-year statute of limitations to be applicable to 42 Pa.C.S.A. §9543.1. *E.g.*,*Commonwealth v. Brooks*, 875 A.2d at 1146; *Commonwealth v. McLaughlin,*, 835 A.2d at 750; *Commonwealth v. Weeks,* 831 A.2d 1194, 1196 (Pa. Super. 2003). Thus, because the General Assembly omitted a prohibition regarding confessions, it must be viewed as a purposeful exclusion. *E.g., Commonwealth v. Charles*, 411 A.2d 527, 530 (Pa. Super. 1979). Once viewed as a purposeful exclusion, the Superior Court has no

---

A.2d at 1063. *Commonwealth v. McLaughlin*, 835 A.2d 747 (Pa. Super. 2003). Similarly, the General Assembly explicitly prohibited DNA testing if the petitioner refused to consent "to provide samples of bodily fluid for use in the DNA testing," or refused to "acknowledge" that his DNA samples may be used by law enforcement "in the investigation of other crimes and may be used as evidence against [him] in other cases." 42 Pa.C.S.A. §§9543.1(c)(1)(i),(ii). Furthermore, the General Assembly explicitly prohibited DNA testing if the evidence sought to be tested was "altered in any material respect." 42 Pa.C.S.A. §9543.1(d)(1)(ii). Finally, the General Assembly explicitly prohibited post-conviction relief, if the petitioner failed to file a petition for post-conviction relief–pursuant to 42 Pa.C.S.A. §9543(a)(2)(vi)–within 60 days after receiving his DNA test results. *See* 42 Pa.C.S.A. §9543.1(f)(1).

The General Assembly also made explicit pronouncements regarding the statute's applicability to capital cases. For example, the General Assembly explicitly stated that capital petitioners could use the statute in order to invalidate an aggravating circumstance or develop a mitigating circumstance. *See* 42 Pa.C.S.A. §§9543.1(c)(2)(ii)(A),(B). The General Assembly's explicit acknowledgment regarding capital cases supports Mr. Wright's claim that if the General Assembly intended to prohibit petitioners like Mr. Wright from obtaining DNA testing, it could have easily incorporated this requirement or prohibition into the statute.

authority to erect barriers of its own making; to do so would add a requirement which the legislature did not see fit to include, which "in effects forecloses what is potentially a conclusive means for an indigent defendant to... exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause." *Little v. Streater*, 452 U.S. 1, 12 (1981).

b. Circumstances Surrounding the Statute's Enactment

In "ascertaining... legislative purpose, especially when the act in question is a manifestation of a fundamental policy of the Commonwealth, courts may properly consider the historical setting which gave impetus to its enactment." *Pennsylvania Human Relations Commission v. Chester School Dist.*, 233 A.2d 290, 295 (Pa. 1967). The Superior Court's opinion is completely at odds with circumstances which gave rise to 42 Pa.C.S.A. § 9543.1's enactment. The General Assembly enacted the statute shortly after Bruce Godschalk's DNA exoneration; remarkably, the primary piece of evidence used to convict Mr. Godschalk was his *false confession. See infra* (discussing Mr. Godschalk's case). To put the General Assembly's enactment into proper perspective, this Court must appreciate the scope of the false confession problem nationally and locally. Once the depth and breadth of the problem are appreciated, it is easy to see why the General Assembly *did not* intend to prohibit individuals like Mr. Wright from seeking DNA testing.

(1) False Confessions: The National Experience

As Justice Souter recognized, a significant number of wrongful convictions have "resulted from... false confession[s][.]" *Kansas v. Marsh*, 126 S.Ct. 2516, 2545 (2006) (Souter, J., dissenting). Several recent studies support Justice Souter's claim. For instance, of the first 208 DNA exonerations, 25% involved cases where innocent defendants made incriminating statements, delivered outright confessions, or pled guilty. *See* www.innocenceproject.org (last visited Oct. 24,

2007). Another group of researchers concluded: "In fifty-one of the 340 exonerations between 1989 and 2004–15%–the defendants confessed to crimes they had not committed." Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005). Two other researchers "identified false confession as the leading or primary cause of wrongful conviction in anywhere from 14-25% of the sample cases studied." Drizin & Leo, *supra*, at 902. Similarly, a more recent study found that of the first 200 DNA exonerations, 31(or 16%) involved false confessions which prosecutors introduced at trial. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUMBIA L. REV. (forthcoming 2008). Finally, the Innocence Project's most recent report, which analyzed 23 DNA exonerations from New York State, revealed that in 10 of the 23 cases, "innocence people falsely confessed or admitted to crimes that DNA later proved they did not commit." THE INNOCENCE PROJECT, LESSONS NOT LEARNED, Exc. Summary, at 4 (Oct. 2007). So problematic are false confessions, several states enacted criminal justice commissions to study the problem; several of these commissions issued reports regarding their findings and recommendations for minimizing false confessions.[14]

This research establishes three critical points. First, it demonstrates how often people falsely confess to crimes they did not commit. Second, and more importantly, it demonstrates that individuals who falsely confessed can still establish their actual innocence with DNA testing. And third, the research provides additional evidence that the General Assembly did not intend to prohibit DNA testing in cases where a petitioner confessed.

(2) False Confessions: The Pennsylvania Experience

[14] *E.g.*, WISCONSIN CRIMINAL JUSTICE STUDY COMMISSION, POSITION PAPER ON FALSE CONFESSIONS (2007); CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE: REPORT AND RECOMMENDATIONS REGARDING FALSE CONFESSIONS (2006); ILLINOIS CAPITAL PUNISHMENT COMMISSION, Ch. 2 (2002).

False confessions have resulted in at least three wrongful convictions in Pennsylvania: Bruce Godschalk, Barry Laughman, and Nicholas Yarris's wrongful convictions; Mr. Godschalk's case served as the impetus for 42 Pa.C.S.A. § 9543.1's enactment.

(a) Bruce Godschalk

In 1986 a Montgomery County jury convicted Bruce Godschalk of two rapes which occurred within a month of one another in the same housing complex. Mr. Godschalk confessed to both rapes. Similar to Mr. Wright, the trial judge admitted his confession because he gave it knowingly and voluntarily. Similar to Mr. Wright, the Commonwealth introduced his confession at trial. Similar to Mr. Wright, Mr. Godschalk repudiated his confession, arguing detectives coerced it from him. Similar to Mr. Wright, Mr. Godschalk's convictions were premised in part on his confession. *See Commonwealth v. Godschalk*, 679 A.2d 1295, 1296, 1297 (Pa. Super. 1996). Similar to Mr. Wright, other evidence against Mr. Godschalk included eyewitness testimony, *id.* at 1297, and a jailhouse informant who testified Mr. Godschalk confessed while in jail. *See* David Rudovsky & Seth F. Kramer, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 548 (2002).[15]

Similar to Mr. Wright, Mr. Godschalk sought DNA testing (prior to 42 Pa.C.S.A. § 9543.1's enactment). Similar to Mr. Wright, the PCRA court denied his request, finding that his confession represented "overwhelming evidence of [his] guilt, completely separate from any identification testimony." *Godschalk v. Montgomery County DA's Office*, 177 F.Supp.2d 366, 370 (E.D. Pa. 2001) (quoting PCRA court). Similar to Mr. Wright, the Superior Court affirmed, holding that his

[15]Although Mr. Wright's case did not technically involve a jailhouse informant, it did involve co-defendant testimony, wherein the co-defendants received benefits for testifying against Mr. Wright. Thus, the same *unreliability* concerns which call into question informant testimony, are present here as well–i.e., providing unreliable testimony to garner a benefit from the Commonwealth.

conviction "rest[ed] largely on his own confession[.]" *Commonwealth v. Godschalk*, 679 A.2d at 1297.

Unlike Mr. Wright, Mr. Godschalk filed a § 1983 action in federal court to obtain DNA testing. *See Godschalk v. Montgomery County DA's Office*, 177 F.Supp.2d at 370. The district judge acknowledged that "[t]here is absolutely no evidence in the transcript that plaintiff's confession was obtained through coercion, undue pressure or other improper police interrogation techniques. There is no evidence that the interrogating detective put words in plaintiff's mouth." *Id.* at 369. Despite his confession, the district judge granted his motion. Significantly, the district judge recognized that DNA's "well-known powerful exculpatory effect" could undermine confidence in the jury's conviction –even in the face of "overwhelming evidence" of guilt. *Id.* 370. As the district judge explained:

> [I]f by some chance no matter how remote, DNA testing on the biological evidence excludes plaintiff as the source of the genetic material from the victims, a jury would have to weigh this result against plaintiff's uncoerced detailed confessions to the rapes. *While plaintiff's detailed confessions to the rapes are powerful inculpatory evidence, so to any DNA testing that would exclude plaintiff as the source of the genetic material taken from the victims would be powerful exculpatory evidence.* Such contradictive results could well raise reasonable doubts in the minds of jurors as to plaintiff's guilt.

Id. (emphasis added).

Mr. Godschalk and the Commonwealth sent the biological material to two independent laboratories. When the laboratories tested the semen from both rape kits, both laboratories confirmed a single assailant committed the rapes and that the assailant could not be Mr. Godschalk. *See* Rudovsky & Kramer, *supra*, at 550-51. On February 14, 2002, the Commonwealth dismissed all charges and released Mr. Godschalk from prison. *Id.*

As Mr. Godschalk's case establishes, DNA evidence can prove a petitioner's actual innocence even in cases where: (1) the petitioner confessed; (2) an eyewitness identified him as her assailant; and (3) a jailhouse informant testified that he confessed to him in jail. More importantly, shortly after Mr. Godschalk's exoneration, the General Assembly drafted and enacted 42 Pa. C.S.A. § 9543.1. On July 10, 2002 the General Assembly approved the statute, and on September 10, 2002 the statute took effect. Since the statute's enactment, at least two other Pennsylvanians–Barry Laughman and Nicholas Yarris–have been exonerated of *rape-murder* despite having confessed.

(b) Barry Laughman

In 1987 an Adams County jury convicted Barry Laughman of Edna Laughman's rape-murder. *See Laughman v. Commonwealth*, 2006 WL 709222, *1 (M.D. Pa., March 17, 2006). Similar to Mr. Wright, Mr. Laughman confessed. *Id.*[16] Similar to Mr. Wright, Mr. Laughman moved to suppress his confession prior to trial, claiming detectives coerced it from him. *Id.* Similar to Mr. Wright, the trial judge determined that Mr. Laughman gave his confession knowingly and voluntarily. *Id.* Similar to Mr. Wright, the Commonwealth introduced his confession at trial. *Id.* On appeal, the Superior Court affirmed the trial judge's decision. *Id.*

Similar to Mr. Wright, Mr. Laughman sought DNA testing pursuant to 42 Pa. C.S.A. § 9543.1. Unlike Mr. Wright, however, on June 20, 2003 the Common Pleas court granted his motion–despite his finally litigated confession. *See Laughman v. Commonwealth*, 2006 WL 709222, at *2. The subsequent DNA testing excluded Mr. Laughman as a contributor of the crime scene DNA. *Id.*; John T. Rago, *A Fine Line Between Chaos & Creation: Lessons of Innocence from the*

[16]Mr. Laughman confessed after investigators asked him leading questions, *id.* ("Trooper Holtz is heard reading the confession statement to Plaintiff and asking whether it is correct. Plaintiff's voice is only heard on the tape saying 'yes.'"), whereas Mr. Wright signed a confession written by detectives.

Pennsylvania Eight, 12 WIDENER L. REV. 359, 384-94 (2006). Prosecutors released Mr. Laughman from prison on November 21, 2003, and eventually dismissed all charges on August 26, 2004 after the PCRA court granted him a new trial. *See Charges dropped against man freed from prison by DNA* test, ASSOCIATED PRESS, Aug. 24, 2004.

Similar to Mr. Godschalk's case, the DNA evidence "demolished," *Commonwealth v. Williams*, 899 A.2d at 1064, Mr. Laughman's confession and the other "overwhelming evidence of guilt" introduced by the Commonwealth. Mr. Laughman's case also proves that the Superior Court is wrong, and that DNA testing can prove Mr. Wright's actual innocence, despite his confession.

(c) Nicholas Yarris

In 1981 the Commonwealth charged Nicholas Yarris with attempted murder after assaulting a police officer during a traffic stop. Police officers subsequently placed him in solitary confinement in a Delaware County prison. While in prison, Mr. Yarris learned of Linda Mae Craig's unsolved rape-murder. Hoping to obtain his release from prison, Mr. Yarris told detectives he had information about Ms. Craig's murder; specifically, that he raped Ms. Craig, but that another man murdered her. *See Commonwealth v. Yarris*, 549 A.2d 513, 520 (Pa. 1988). The day after Mr. Yarris incriminated himself, the Commonwealth charged him with kidnapping, raping, and murdering Ms. Craig.

Similar to Mr. Wright, the trial judge admitted his incriminating statements, finding that he made them knowingly and voluntarily. *Id.* Similar to Mr. Wright, the Commonwealth also introduced forensic evidence, eyewitnesses evidence, and informant testimony which "overwhelmingly" proved Mr. Yarris's guilt. *See Commonwealth v. Yarris*, 731 A.2d 581, 583 (Pa. 1999); *Yarris v. County of Delaware*, 465 F.3d 129, 132 (3rd Cir. 2006). Similar to Mr. Wright, a

jury convicted Mr. Yarris of first-degree murder, rape, and kidnapping; unlike Mr. Wright, the jury recommended the death sentence, which the trial judge imposed.

This Court affirmed Mr. Yarris's conviction and death sentence, *see Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988), and the trial judge's decision to admit his confession. *Id.* at 523-24. Shortly thereafter, Mr. Yarris pursued post-conviction DNA testing (prior to 42 Pa. C.S.A. § 9543.1's enactment). Remarkably, in 1989 the PCRA judge granted his request, despite his confession and other evidence supporting his guilt. *See Yarris v. County of Delaware*, 465 F.3d at 133. The testing produced "inconclusive" results. *Id.* In 1989 Mr. Yarris requested additional tests "using a newer and more accurate type of DNA testing known as PCR-enhanced DNA testing." *Id.* Again, the "District Attorney eventually agreed to additional testing of the evidence in September 1992[.]" *Id.* The PCR-based DNA tests also produced inconclusive results. *Id.*

Mr. Yarris sought federal habeas relief. In April 2003, pursuit to federal habeas discovery, the district judge granted Mr. Yarris's third request for DNA testing. *Id.*[17] PCR DNA tests were performed on the gloves found in Ms. Craig's car, her semen-stained clothes, and her fingernail scrapings. The results indicated: (1) Mr. Yarris was not the "habitual user" of the gloves; (2) the semen did not come from Mr. Yarris, but from two unknown males, one of whom was the "habitual user" of the gloves; and (3) the fingernail scrapings came from the "habitual user" of the gloves. *Id.*

On August 19, 2003, the district judge granted Mr. Yarris a new trial. *Id.* On August 26, 2003, the Commonwealth and Mr. Yarris's counsel filed a joint petition requesting that his

[17]Notably, to be granted discovery in federal habeas actions, petitioners must demonstrate "good cause." RULES GOVERNING SECTION 2254 CASES, Rule 6(a). Good cause is shown "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is[] entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (citation omitted). Thus, the fact the district court judge awarded post-conviction DNA testing, meant the DNA testing had the potential to develop facts which could establish his actual innocence–something the Superior Court said was impossible when a petitioner knowingly and voluntarily confessed.

conviction be vacated. *Id.* On September 3, 2003, the PCRA court vacated his conviction and death sentence. On December 9, 2003, the Commonwealth dropped all charges, and on January 16, 2004 the Commonwealth released him from prison. *Id.*

Once again, as Mr. Yarris's case demonstrates, DNA testing can prove a petitioner's actual innocence even in cases where: (1) the petitioner confessed; (2) forensic evidence linked him to the victim; (3) an eyewitness placed him near the murder scene at the time of the murder; and (4) a jailhouse informant testified he confessed to him in jail.

b. Absurd and Unjust Results

Another "required rule of statutory construction provides that in ascertaining legislative intent, the practical results of a particular interpretation may be considered." *Lehigh Valley Co-op. Farmers v. Com., Bureau of Employment Sec. Dept. of Labor and Industry*, 447 A.2d 948, 950 (Pa. 1982). If an interpretation leads to unjust or absurd results, the General Assembly could not have intended such an interpretation. *E.g.*, *Girard Trust Co. v. City of Philadelphia*, 87 A.2d at 277, 279 (Pa. 1952). Simply put, "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S.A § 1922(1).

The Superior Court's decision will lead to absurd, unreasonable, and unjust results. In particular, it increases the likelihood innocent people will languish in jail.[18] Likewise, it increases

[18]Such an outcome is unconstitutional, *e.g., Robinson v. California,* 370 U.S. 660, 667 (1962); *Herrera v. Collins*, 506 U.S. 390, 432 n.2 (1993) (Blackmun, J., dissenting), and fundamentally inconsistent with the principle that "it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). To achieve this objective in today's criminal justice system, due process mandates that where DNA evidence can "demolish" the Commonwealth's case, DNA testing must be pursued so the innocent may be freed and the guilty identified, prosecuted, and punished. *E.g.*, *Wade v. Brady,* 460 F.Supp.2d 226, 248 (D. Mass. 2006).

the likelihood an innocent person may be mistakenly executed.[19] Similarly, is increases the likelihood violent offenders will not be identified, apprehended, prosecuted, and swiftly punished. This in turn may result in violent offenses which could have been easily prevented had DNA testing been timely conducted.[20] The absurdity of these results make clear that the General Assembly *did not* intend to prohibit DNA testing to petitioners who confessed.

B. The Superior Court's Decision Conflicts With Other Post-Conviction DNA Testing Statutes and State Courts Opinions Interpreting These Statutes Regarding Whether a Petitioner's Knowing and Voluntary Confession is an Absolute Bar to Post-Conviction DNA Testing

---

[19]This is not a far-fetched notion; indeed, had the jury agreed on the death penalty, Mr. Wright would be on Pennsylvania's death row fighting to save his life and to prove his innocence. Moreover, of the seven people exonerated in New York since 2000, six "could have received the death penalty if it were an option at the time of their convictions or if prosecutors had sought it, and one of them was charged with a capital crime but escaped the death penalty." INNOCENCE PROJECT, *supra*, at 4. While such an outcome "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), and represents the "quintessential miscarriage of justice," *Schulp v. Delo*, 513 U.S 298, 324-25 (1995), the reasoning which will result in such an outcome is antithetical to the U.S. Supreme Court's death penalty jurisprudence. Death sentences must be premised on considered reasoning rather than whim or mistake. *E.g.*, *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Eddings v. Oklahoma*, 455 U.S. 104, 118-19 (1982) (O'Connor, J., concurring); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 472 (1947) (Burton, J., dissenting) ("Where a life is to be taken, there must be no avoidable error of law or *uncertainty of fact.*") (emphasis added). Not to pursue a scientific technique which can either prevent a "constitutionally intolerable event," *Herrera v. Collins*, 506 U.S. at 419 (O'Connor, J., concurring), or reinforce the Commonwealth's right to legally extinguish a life can hardly be described as considered reasoning; it is more akin to no reasoning at all. *See Kansas v. Marsh*, 126 S.Ct. at 2544 (Souter, J., dissenting) ("Today, a new body of fact must be accounted for in deciding what,... the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.").

[20]For instance, the Innocence Project's most recent report, which studied 23 DNA exonerations from New York, revealed that the DNA results–which exonerated the innocent–also identified the actual perpetrator in 10 of the 23 cases. *See* INNOCENCE PROJECT REPORT, *supra*, at 4. More importantly,

> [i]n nine of those 10 cases, the actual perpetrators... went on to commit additional crimes while an innocent person was in prison. *According to law enforcement reports, five murders, seven rapes, two assaults and one robbery were committed by the actual perpetrators...* and each of those crimes was committed after the wrongful arrest or conviction, so they could have been prevented if wrongful convictions had not happened.

Id. (emphasis added). Furthermore, of the first 165 DNA exonerations nation wide, 47 DNA results not only exposed the wrongful conviction, they identified the true perpetrator once the DNA profiles were run through CODIS or a similar state DNA database. *See* Barry C. Scheck, *Barry Scheck Lectures on Wrongful Convictions*, 54 DRAKE L. REV. 597, 602 (2006).

Under "Pennsylvania law [the judiciary] may consider the interpretation of similar statutes in order to interpret a Pennsylvania statute." *General Elec. Environmental Services, Inc. v. Envirotech Corp.*, 763 F.Supp. 113, 119 (M.D.Pa.1991); *accord Commonwealth, Dep't of Transp. v. Von Altimus*, 410 A.2d 1303, 1305 (Pa. Commw. 1980). Currently, 38 states (including Pennsylvania)[21] and the federal government[22] have DNA testing statutes; of these statutes, *none* explicitly prohibit persons who confessed from obtaining DNA testing. More importantly, an increasing number of state legislatures and courts have either amended their DNA testing statutes to permit individuals who confessed or pled guilty to seek DNA testing, or have interpreted their state's statute to permit DNA testing even if the petitioner confessed or pled guilty. *E.g.*, *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) ("the primary and most reliable indication of consensus is... the pattern of enacted laws.").

1. Federal Statute

In October 2004 the federal government enacted the Innocence Protection Act (IPA) which gives federal (and certain state) petitioners access to DNA testing. *See* 18 U.S.C.A. § 3600. The IPA does not explicitly prohibit DNA testing to individuals who confessed. Instead, the IPA simply mandates that the petitioner identify "a theory of defense that... is not inconsistent with an

[21] *See* Ariz. Rev. Stat. § 13-4240; Ark. Code Ann. §16-112-201; Cal. Pen. Code § 1405; Colo. Rev. Stat §18-1-411); 2003 Ct. Gen. Stat. Ann. § 52- 582; Del. Code. tit. 11, § 4504 ; D.C. Code Ann. § 22- 4133; Fla. Stat. Ann. § 925.11; Ga. Code Ann. § 5-5- 41(c); H.R.S. §§ 844D-121 to 133; Idaho Code § 19-4902; 725 Ill. Comp Stat. Ann. 5/116-3; Ind. Code Ann. § 35-38-7; Iowa Code § 81.10; Kan. Stat. Ann. § 21-2512; Ky. Rev. Stat. § 422.285; La. Code Crim. Proc. Ann. art. 926.1; Me. Rev. Stat. Ann. tit. 15, § 2137; Md. Code Ann., Crim. Proc. § 8-201; Mich. Stat.Ann. § 770.16; Minn. Stat. § 590.01; Mo. Rev. Stat. § 547.035; H.B. 77, 2003 Leg., 58th Reg. Sess. § 1; Neb. Rev. Stat. § 29-4120; A.B. 16, 2003 Leg., 72nd Reg. Sess.; N.J. Stat. Ann. § 2A:84A-32a; N.M. Stat. Ann. § 31-1a-2; N.Y. Crim. Proc. Law § 440.30; N.C. Gen. Stat. § 15A-269; Ohio Rev. Code Ann. § 2953.71; Okla. Stat. Ann. tit. 22, § 1371; Or. Rev. Stat. § 138.510 et seq.; R.I. Gen. Laws § 10-9.1-11; Tenn. Code Ann. § 40-30-403; Tex. Crim. Proc. Code Ann. § 64.03; Utah Code Ann. § 78-35a-301; Va. Code Ann. § 19.2-327.1; Wash. Rev. Code § 10.73.170; W. Va. Code Ann. § 15-2B-14; Wi. Stat. Ann. § 974.07.

[22] *See* 18 U.S.C.A. § 3600.

affirmative defense presented at trial" which, assuming exculpatory results, would "establish [his] actual innocence[.]" 18 U.S.C.A. §§ 3600 (a)(6)(A), (B). Similarly, the IPA mandates: "If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial." 18 U.S.C.A. §§ 3600 (a)(7). Mr. Wright satisfies all three requirements; he proclaimed his innocence and presented an alibi defense; and he explained how exculpatory DNA results would establish his actual innocence. Thus, despite his confession, Mr. Wright qualifies for DNA testing under the IPA.

2. Statute Statutes

In Texas a "convicted person who pleaded guilty or nolo contendere or, whether before or after conviction, made a confession or similar admission in the case *may submit a motion under this chapter*, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea, confession, or admission, as applicable." Tex. Code Crim. Proc. §64.03(b) (emphasis added); *accord Blacklock v. State*, 2007 WL 2781659, at *2 (Tex. Crim. App., Sept. 26, 2007). Similarly, in Florida a "person who has entered a plea of guilty or nolo contendere to a felony prior to July 1, 2006, and has been sentenced by a court established by the laws of this state *may petition that court to order the examination of physical evidence* collected at the time of the investigation of the crime for which he or she has been sentenced that may contain DNA (deoxyribonucleic acid) and that would exonerate that person." Fla. Stat. Ann. §§ 925.11(1)(a)(2) (emphasis added).[23] Furthermore, California's statute says that a defendant cannot waive his "absolute" right to DNA testing even if he pleads guilty. *See* Cal. Penal Code § 1405(m).

[23] *Accord Glenn v. State*, 954 So.2d 732, 733-34 (Fla. 2007) ("The language of section 925.11(1)(a)2. is clear and extends the right to file a motion for postconviction DNA testing not only to those who entered a guilty or nolo contendere plea after the change in the law, but also includes those who entered a plea to a felony before July 1, 2006. Because Appellant filed a facially sufficient motion for postconviction DNA testing, his motion cannot be denied solely on the basis of his 1998 plea.").

Ohio's DNA testing statute also allows petitioners like Mr. Wright to seek DNA testing; it states that an "'application for DNA testing' means a request through postconviction relief for the state to do DNA testing on biological material from whichever of the following is applicable... (2) The case in which the inmate *pleaded guilty or no contest* to the offense for which the inmate is requesting the DNA testing[.]" Ohio Rev. Code Ann. § 2953.71 (emphasis added). Similarly, New Mexico's DNA testing statute states in relevant part: "The petitioner shall show, by the preponderance of the evidence, that... identity was at issue in his case or that if the DNA testing he is requesting had been performed prior to his conviction and the results had been exculpatory, there is a reasonable probability that the petitioner *would not have pled guilty* or been found guilty." N.M. Stat. Ann. § 31-1A-2 (emphasis added). Additionally, under Hawaii's DNA testing statute, the trial judge shall order testing after a hearing if it finds that a "reasonable probability exists that the defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis, *even if the defendant later plead guilty or no contest.*" Hawaii Rev. Stat. § 844D-123 (emphasis added).

Iowa's DNA testing statute requests applicants to state the following: "1. Why the DNA evidence would have changed the outcome of the trial or *invalidated a guilty plea* if DNA profiling had been conducted prior to the conviction." Iowa Code § 81.10 (emphasis added). Furthermore, based on § 81.10, the trial judge shall grant the motion if a list of factors apply including: "The evidence subject to DNA analysis is material to, and not merely cumulative or impeaching of, evidence included in the trial record or admitted to at a *guilty plea proceeding*." *Id.* (emphasis added). Missouri's DNA testing statute also permits DNA testing to individuals who confessed. According to the statute: "Upon the issuance of the order to show cause, the clerk shall notify the

court reporter to prepare and file the transcript of the trial *or the movant's guilty plea* and sentencing hearing if the transcript has not been prepared or filed." Mo. Rev. Stat. §547.035(5) (emphasis added); *accord State v. Weeks*, 140 S.W.3d 39, 41 (Mo. 2004). Finally, West Virginia's DNA testing statute affords petitioners an absolute right to DNA testing–regardless of whether they confessed or pled guilty: "Notwithstanding any other provision of law, the right to file a motion for post-conviction DNA testing provided by this section is absolute and may not be waived. This prohibition applies to, but is not limited to, a *waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre*." W. Va. Code Ann. § 15-2B-14(m) (emphasis added).

3. State Court Decisions

In *In re Bradford*, 165 P.3d 31 (Wash. App. 2007), a Washington jury convicted petitioner of first-degree robbery and rape. The "State's primary evidence was Mr. Bradford's confession that began, 'I probably did it.'" *Id.* at 32, 34. On direct appeal, the "primary issue... was the superior court's refusal to suppress the confession Mr. Bradford gave to police at the end of a lengthy interrogation." *Id.* at 31. The Washington Court of Appeals affirmed. In 2005, after Mr. Bradford completed serving his sentence, he petitioned for DNA testing pursuant to Wash. Rev. Code Ann. § 10.73.170. [24] Despite his confession, the trial judge granted his request. The Washington State Patrol Crime Laboratory tested the mask the assailant placed on the victim's face during the rape. The DNA tests excluded Mr. Bradford; however, another man's DNA was found on the face of the mask and on the sticky side of the tape placed over the mask's eye openings. *Id.* at 31-32. More importantly, despite Mr. Bradford's confession, the trial judge granted him a new trial finding: "It

[24] Wash. Rev. Code Ann. § 10.73.170 is similar to 42 Pa. C.S. § 9543.1; it has an identity requirement and it requires petitioners to demonstrate "the likelihood that the DNA evidence *would demonstrate innocence* on a more probable than not basis." Wash. Rev. Code Ann. § 10.73.170 (3).

makes common-sense that a jury could give weight to the proposition that the person who prepared the mask more likely than not is the person who committed the crime, or that Mr. Bradford, if present, would have left DNA on some surface of the mask. Although the proposition is not error-proof, it has substantial evidentiary appeal and weight to this Court." *Id.* at 33 (quoting trial judge's Order). Furthermore, the trial judge determined that the new DNA evidence would have significantly affected the jury's determination regarding the accuracy and reliability of Mr. Bradford's confession. *Id.* at 34. Simply put, the new DNA evidence would have so undermined the confession's reliability, it is reasonably likely the jury would not have convicted Mr. Bradford. On appeal, the Washington Court of Appeals affirmed; it held that the facts supported the trial judge's "conclusion that the DNA evidence would probably change the result of the trial[.]" *Id.* at 34.

In *People v. Sterling*, 787 N.Y.S.2d 846 (2007), petitioner sought DNA testing to establish he was actually innocent of murder. The court permitted petitioner to pursue mitochondrial DNA testing on a hair even though he confessed. *Id.* at 854. Moreover, petitioner's confession "contained not only certain details verified by the police, but included significant details which the police never released to the public[.]" *Id.* Additionally, the court commented that the appellate court did not find his allegations of coercion credible. *Id.* Finally, the court permitted DNA testing despite the fact petitioner produced extensive evidence during a 1996 evidentiary hearing which indicated another person may have committed the murder:

> Furthermore, despite his extensive efforts to portray Mark Christie as the real killer, the evidence of such theory as presented in the post-verdict motion in 1992, as well as during the hearing held in connection with the post-judgment motion filed in 1996, has been determined to be lacking credibility and fails to provide credible support for defendant's claim that he falsely confessed to police investigators.

Id. at 854. The court granted petitioner's DNA testing request regarding the hair because exculpatory results had the potential to change the outcome of his trial and because of the "People's concession that forensic DNA testing on this hair might prove helpful" to the petitioner's actual innocence claim. *Id.* at 856.

In *Arey v. State*, 929 A.2d 501 (Md. App. Ct. 2007), a jury convicted petitioner of first-degree murder in 1973. At trial, the State introduced, *inter alia,* "the appellant's confession to establish that appellant was involved in [the victim's] murder." *Id.* at 504. In 2002 petitioner moved for DNA testing pursuant to Maryland's DNA testing statute. *Id.* Although the trial judge denied his request, it did so not because of his confession, but because the State said the evidence no longer existed. *Id.* at 507-08. On appeal, the Maryland Court of Appeals reversed; it not only held that the State bore the burden of establishing it no longer possessed the sought after evidence, it also held that petitioner's request for testing should be granted if (and once) the evidence is located. *Id.* at 508-10.

And finally, the Illinois Appellate Court recently held: "We are not prepared to hold... that a guilty plea categorically divests a defendant of the opportunity to later request DNA testing." *People v. Moore*, 869 N.E.2d 177, 185 (Ill. App. 2007); *accord People v. O'Connell*, 850 N.E.2d 278 (Ill. App. 2006) (defendant who entered guilty plea to sexual abuse and murder was granted DNA testing; it was clear that by entering his guilty plea the defendant did not intend to concede identity; instead, he entered the guilty plea because the evidence against him seemed overwhelming).

4. Summary

The abovementioned state court judges and legislatures recognized two obvious facts: (1) innocent people, for what ever reasons, falsely confess, or even plead guilty, to crimes they did not commit; and (2) in order to accurately and quickly identity these unfortunate individuals, DNA

testing can and must be used. Thus, given the national movement toward permitting individuals like Mr. Wright to obtain DNA testing, this Court should grant review and explicitly interpret 42 Pa. C.S.A. § 9543.1 so as not to prohibit DNA testing to petitioners who confessed–like Mr. Wright.

C. The Superior Court Arbitrarily Denied Mr. Wright his State-Created Liberty Interest Pursuant to 42 Pa.C.S.A. § 9543.1

The Superior Court violated Mr. Wright's procedural due process rights. When the General Assembly enacted 42 Pa.C.S.A. § 9543.1, it created a "liberty interest" for Pennsylvania inmates which is entitled to due process protection. *E.g.*, *Wilkenson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies"); *Vitek v. Jones*, 445 U.S. 480, 488 (1980); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).[25] The "due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Vitek v. Jones,* 445 U.S. at 489 (quoting *Wolff v. McDonnell*, 418 U.S. at 557); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). As one federal judge declared: "DNA evidence fundamentally alters the traditional Due Process calculus." *Wade v. Brady*, 460 F.Supp.2d at 248.

It is a well-established due process principle that once a state creates a statutory scheme affecting a litigant's rights and interests, it must provide "'a meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." *Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (quoting *Boddie v. Connecticut*, 401 U.S. at 379); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). A "meaningful" or "fair" opportunity is one in which Mr. Wright can adequately, effectively, and meaningfully develop and present his actual innocence claim. *See Bounds v. Smith*,

[25] *Accord Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.").

430 U.S. 817, 822 (1977). Thus, arbitrary limitations imposed by the Commonwealth or a court, which substantially impede a defendant's ability to adequately, effectively, and meaningfully present his actual innocence claim, violates his procedural due process rights. *E.g.*, *Wade v. Brady,* 460 F.Supp.2d at 250.

For instance, the U.S. Supreme Court has repeatedly held that prison officials must provide inmates with access to reasonable legal resources so they may adequately develop and meaningfully present their claims. *E.g.*, *Procunier v. Martinez*, 416 U.S. 396 (1974); *Johnson v. Avery*, 393 U.S. 483, 490 (1969); *Younger v. Gilmore*, 404 U.S. 15 (1971). While this promise "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims," *Lewis v. Casey*, 518 U.S. 343, 355 (1996), it does require that the Commonwealth provide the *tools* that "inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Id.* In today's DNA-driven criminal justice system, an essential tool needed to adequately and effectively attack a conviction is biological evidence which can establish actual innocence. Accordingly, when the Commonwealth "refuses to provide DNA evidence that could undermine the legitimacy of a prisoner's underlying conviction, the constitutional right to access the courts is also lost." *Wade v. Brady*, 460 F.Supp.2d at 251.

In Pennsylvania, petitioners use 42 Pa.C.S.A. § 9543.1 as a vehicle to develop their actual innocence claim, which can be subsequently incorporated into a PCRA petition pursuant to 42 Pa. C.S.A. § 9541. As a result, if a court arbitrarily dismisses a petitioner's 42 Pa.C.S.A. § 9543.1 motion, the court has failed to afford the petitioner a "meaningful" or "fair" opportunity to demonstrate his actual innocence. The court's arbitrary ruling "in effects forecloses what is

potentially a conclusive means for an indigent defendant to... exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause." *Little v. Streater*, 452 U.S. at 12.

The Superior Court violated these basic due process principles. By prohibiting DNA testing in "fully litigated" confession cases, the Superior Court arbitrarily imposed a limitation which is not supported by the statute's text and was not intended by the General Assembly, *see supra*, which prevents Mr. Wright from adequately, effectively, and meaningfully developing and presenting his actual innocence claim. Fundamentally, where the application of a DNA testing statute is involved, an understanding of DNA's potential is necessary in order for the statute's conferred rights to be constitutionally and soundly applied. The General Assembly, by promulgating such a statute, intended for DNA's "truth-seeking technology" be applied to the facts of a given case. *See* 146 Cong. Rec. S11645-02, at *S11647 (describing "DNA testing" as "truth-seeking technology") (Senator Patrick Leahy's comments). A complete miscalculation regarding DNA's scientific potential is dangerous: it leaves the potentially innocent without access to testing and leaves potential felons at large. Moreover, a failure to understand DNA's significance renders a court's decision to grant or deny testing arbitrary and unsound for future courts and litigants to follow. Without a basic grounding in DNA's scientific potential, courts in Pennsylvania will haphazardly reach conclusions concerning testing and access thereby violating due process. Finally, the arbitrariness of the Superior Court's decision is further highlighted by its treatment of eyewitness cases. The Superior Court has interpreted the statute to permit DNA testing in eyewitness cases; however, the very reasons why DNA testing is appropriate in eyewitness cases are equally applicable to confession cases.

To introduce identifications, a trial judge must make a reliability determination. *E.g., Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) ("reliability is the linchpin in determining the admissibility

of identification testimony"); *Commonwealth v. Doa*, 553 A.2d 416, 424 (Pa. Super. 1989). The trial judge must determine whether the circumstances surrounding the identification created a very real danger that the eyewitness misidentified the defendant. *E.g.*, *Foster v. California*, 394 U.S. 440, 442 (1969); *Simmons v. United States*, 390 U.S. 377, 383 (1968). If the identification is deemed reliable, despite suggestive police tactics, the identification is nonetheless admissible. *See Neil v. Biggers*, 409 U.S. 188, 199 (1972); *Commonwealth v. Doa*, 553 A.2d at 424. Thus, if the identification is introduced at trial, and represents the Commonwealth's primary evidence establishing the defendant's guilt, and the jury finds the defendant guilty, this means two separate entities–the trial judge and jury–evaluated the identification's reliability, and concluded that it was in fact reliable and accurate. Despite these determinations, petitioners can still obtain DNA testing if their conviction is premised on identification evidence.[26] The reasoning for this is simple and three-fold: (1) identifications can be (and quite often are) incorrect–even ones which a trial judge and jury determined to be accurate and admissible;[27] (2) juries are greatly influenced by–reliable and

[26]This was true even before the General Assembly enacted 42 Pa. C.S.A. § 9543.1. *E.g.*, *Commonwealth v. Robinson*, 682 A.2d at 836-38; *Commonwealth v. Reese*, 663 A.2d at 208-09; *Commonwealth v. Brison*, 618 A.2d at 425.

[27]The criminal justice system is well aware of the unreliability of identifications for two reasons: the social science research and the DNA exonerations. The social science research cannot be disputed; certain factors or identification techniques correlate with misidentifications. *E.g.*, BRIAN L. CULTER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995); *United States v. Ash*, 413 U.S. 300, 312 (1973); *United States v. Wade*, 388 U.S. 218 (1967). Similarly, the DNA exonerations cannot be disregarded; misidentifications played a role in 75% of the first 208 DNA exonerations. *See* www.innocenceproject.org (last visited Oct. 31, 2007).

unreliable–identifications;[28] and (3) DNA evidence is far more accurate than identification evidence.[29]

To introduce a confession, the trial judge must make a voluntariness determination. As mentioned, accuracy and reliability are *irrelevant* considerations. Thus, while a confession may be voluntary, *it may be wholly unreliable or inaccurate*. However, despite the fact the accuracy of Mr. Wright's confession represented an open question before trial, and that he vigorously attacked its accuracy and legality at trial, the Superior Court said his confession prevented him from establishing his actual innocence. The Superior Court's reasoning is arbitrary and illogical because the very reasons which makes DNA testing attractive in identification cases are equally applicable to confession cases: (1) confessions can be (and quite often are) false–even ones which a trial judge found knowing and voluntary and a jury found credible;[30] (2) juries are greatly influenced by–true and false–confessions;[31] and (3) DNA evidence is far more accurate than confessions. In short, if post-conviction DNA testing can expose unreliable identifications, it surely can expose false confessions.

---

[28]As the social science and DNA exonerations have repeatedly demonstrated, identification evidence–no matter how unreliable–profoundly impacts juries. *E.g., Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting).

[29]*E.g.*, *Wade v. Brady*, 460 F.Supp.2d at 230; *Cherrix v. Braxton*, 131 F.Supp.2d 756, 767 (E.D. Va. 2001).

[30]Social science research and the DNA exonerations have repeatedly demonstrated the unreliability of confessions. Social scientists have identified certain interrogation methods which can easily produce false confessions. *E.g.*, GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS (2003); SAUL KASSIN, THE PSYCHOLOGY OF CONFESSION EVIDENCE, 52 AM. PSYCHOL. 221 (1997). The DNA exonerations have identified numerous confessions which turned out to be completely false. *See* Drizin & Leo, *supra*.

[31]Because a defendant's confession represents "the most probative and damaging evidence that can be admitted against him," *Arizona v. Fulminante*, 499 U.S. at 292 (citation omitted), "confessions have [a] profound impact on the jury," *Bruton v. United States*, 391 U.S. 123, 140 (1968) (White, J., dissenting); *Cruz v. New York*, 481 U.S. 186, 195 (1987) (White, J., dissenting), "so damaging that a jury should not be expected to ignore it even if told to do so." *Arizona v. Fulminante*, 499 U.S. at 292; *Bruton v. United States*, 391 U.S. at140 (White, J., dissenting).

Thus, there is no rational distinction between identification cases and confession cases–DNA evidence can establish actual innocence in both types of cases regardless of the evidence used to convict the petitioner. As a result, when a PCRA or Superior Court panel grants testing in an eyewitness case, yet denies testing in a confession case, this represents a purely arbitrary decision which "in effects forecloses what is potentially a conclusive means for an indigent defendant to... exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause." *Little v. Streater*, 452 U.S. at 12.

VIII. CONCLUSION

For the foregoing reasons, the petition for allowance should be granted.

Date: 11/16/07

Sondra R. Rodrigues, Esquire
Attorney for Appellant

11-16-07

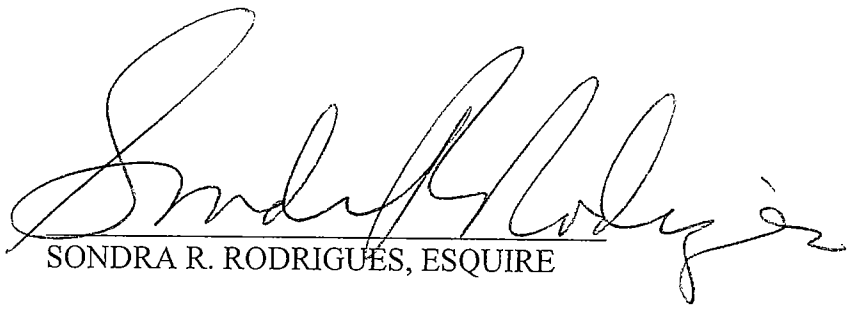
Colin Starger, Esquire
Co-Counsel for Appellant

/s/ *Craig M. Cooley*
Craig M. Cooley
Staff Attorney
The Innocence Project

VERIFICATION

SONDRA R. RODRIGUES, ESQUIRE, VERIFIES AND CERTIFIES THAT SHE IS PRO BONO COUNSEL FOR THE APPELLANT IN THE FOREGOING MATTER AND AS SUCH IS AUTHORIZED TO MAKE THIS VERIFICATION. SHE SWEARS THAT THE FACTS STATED IN THE FOREGOING PETITION/DOCUMENT ARE TRUE AND CORRECT TO THE BEST OF HER KNOWLEDGE, INFORMATION AND BELIEF.

11/16/07



SONDRA R. RODRIGUES, ESQUIRE

CERTIFICATION OF SERVICE

I, SONDRA R. RODRIGUES, ESQUIRE, CERTIFY THAT I AM THIS DAY SERVING A COPY OF THE WITHIN PETITION FOR ALLOWANCE OF APPEAL ON THE FOLLOWING PARTIES:

HUGH BURNS, A.D.A., CHIEF, D.A.'S APPEALS UNIT, OFFICE OF THE DISTRICT ATTORNEY, BY FIRST-CLASS U.S. MAIL, ADDRESSED TO HIM AT 3 SOUTH PENN SQUARE, PHILADELPHIA, PA 19107.

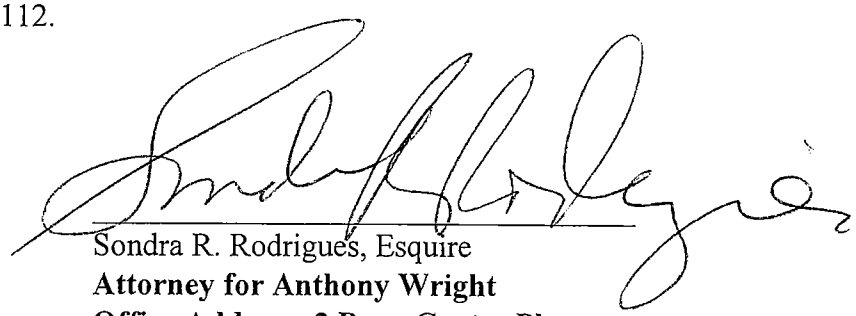
COLIN STARGER, ESQUIRE, CO-COUNSEL FOR APPELLANT, BY FIRST-CLASS U.S. MAIL, ADDRESSED TO HIM AT NYU LAWYERING PROGRAM, 245 SULLIVAN STREET, NEW YORK, NY 10012,

PETER J. NEUFELD, CRAIG M. COOLEY, AND NINA MORRISON, INNOCENCE PROJECT STAFF ATTORNEYS, BY FIRST-CLASS U.S. MAIL, ADDRESSED TO THEM, 100 FIFTH AVENUE, THIRD FLOOR, NEW YORK, NY 10011.

STEVE DRIZIN, AMICUS COUNSEL, BY FIRST-CLASS U.S. MAIL, ADDRESSED TO HIM AT CENTER FOR WRONGFUL CONVICTIONS, 8TH FLOOR, 750 N. LAKE SHORE DRIVE, CHICAGO, IL 60611.

ANTHONY WRIGHT, APPELLANT-PETITIONER, INMATE NO. CC-4053, BY FIRST-CLASS U.S. MAIL, ADDRESSED TO HIM AT SCI HUNTINGDON, 1100 PIKE STREET, HUNTINGDON, PA 16654-1112.

Date: 11/16/07



Sondra R. Rodrigues, Esquire
Attorney for Anthony Wright
Office Address: 2 Penn Center Plaza
Suite 200
Philadelphia, PA 19102
(215) 271 - 0989
(215) 438 - 5501

Preferred Mailing address:
Post Office Box 25267
Philadelphia, PA 19119-0267

IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY
TRIAL DIVISION
CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	NOVEMBER TERM 1991
VS	:	NO. 3158 2/2
ANTHONY WRIGHT	:	

ORDER

AND NOW, this 20th day of April 2006, it is hereby ORDERED and DECREED that, pursuant to 42 Pa. C.S.A. § 9543.1, Defendant's motion for DNA testing entitled *Defendant-Petitioner Anthony Wright's Motion for Post-Conviction DNA Testing* is hereby DENIED.

Under 42 Pa. C.S.A. § 9543.1 the Defendant must present a prima facie case that DNA testing would establish his innocence. Upon consideration of the pleadings and after careful review, based on all the direct and circumstantial evidence, including the admissions by Defendant, the evidence was more than sufficient to prove Defendant's guilt beyond a reasonable doubt. DNA testing would not establish a prima facie case of Defendant's innocence.

The Commonwealth is directed to secure and maintain all physical evidence for possible future action following probable appeal.

BY THE COURT:

D. Webster Keogh, J.
Supervising Judge
Criminal Trial Division

EXHIBIT "A"

Commonwealth v. Anthony Wright **Case Number: 9111-3158**

Type of Order: Petition for DNA Testing

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Court Order upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa. R.Crim.P. 114:

Defense Counsel/Party: Sondra R. Rodriques, Esquire
2 Penn Center Plaza, Suite 200
Philadelphia, PA 19102

Colin Starger, Esquire
Innocence Project
100 Fifth Avenue, 3rd Floor
New York, NY 10011

Type of Service: ( ) Personal (x) First Class Mail Other, please specify:

District Attorney :
Robin Godrey, Esquire
Chief, PCRA Unit
District Attorney's Office
1421 Arch Street
Philadelphia, PA 19102

FILED
APR 2 4 2006
Criminal Appeals Unit
First Judicial District of PA

Type of Service: ( ) Personal (x) First Class Mail Other, please specify:

Additional Counsel/Party:
Anthony Wright
CC 4053
SCI Huntingdon
1100 Pike Street
Huntingdon, PA 16654-1112

Type of Service: ( ) Personal (x) First Class Mail Other, please specify:

Dated: April 24, 2006

Judge's Signature

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CRIMINAL SECTION

COMMONWEALTH

NOVEMBER, 1991
NO. 3158-3168 2/2

v.

ANTHONY WRIGHT

SUPERIOR COURT
NO. 1383 EDA 2006

OPINION

KEOGH, J.

JULY 10, 2006

The Petitioner has filed an appeal of this Court's order, denying his *Motion for Post Conviction DNA Testing.*

I. FACTS AND PROCEDURAL HISTORY

The evidence at trial established that on the evening of October 18, 1991, Petitioner invaded the home of Louise Talley, a seventy-seven year-old widow, and proceeded to rape her, rob her, and stab her to death. The following afternoon, in response to calls from concerned relatives, Philadelphia police officers entered the victim's home and found her nude body on the bedroom floor; she had been stabbed ten times. Additionally, the sheets of her bed were covered with blood and stained with semen. While at the scene, the police were approached by a man who implicated the Petitioner in the killing. Following an investigation, on October 20, 1993, the police contacted Petitioner, who agreed to give a statement. After receiving Miranda warnings,

Petitioner gave a statement in which he confessed to raping, robbing, murdering Ms. Talley, and burglarizing her home.

In his statement, Petitioner noted that he was wearing a black Chicago Bulls sweatshirt, a pair of blue jeans with suede on them, and Fila sneakers. The police obtained a search warrant for Petitioner's home and recovered these items from underneath the mattress in Petitioner's bedroom. The sweatshirt and blue jeans were splattered with blood, and scientific analysis revealed that this blood matched that of the victim and showed characteristics that were shared by only 1.4% of the Black population. The blue jeans also had a stain on the crotch, which although not conclusively identified, appeared consistent with a combination of Petitioner's seminal fluid and the fluids of the victim.

On June 8, 1993, Petitioner was tried before the Honorable Eugene H. Clarke, Jr. sitting with a jury. The Commonwealth introduced overwhelming evidence of guilt, including the testimony of a witnesses with whom Petitioner had discussed killing the victim, testimony of witnesses who saw Petitioner entering the victim's home, Petitioner's confession, and the incriminating evidence seized from Petitioner's residence. The jury convicted Petitioner of murder in the first degree, burglary, rape, robbery, and possession of an instrument of crime. A penalty phase was held on June 9, 1993 and since the jury was unable to decide on a penalty, the court imposed a sentence of life imprisonment for the murder conviction. Post-trial motions were filed and after a hearing denying those motions, Petitioner was sentenced. Petitioner filed a notice of appeal and the Superior Court affirmed the judgment of sentence on August 14, 1995. Allowance of appeal was denied by the Supreme Court.

Petitioner filed his first motion for collateral relief under the Post Conviction Relief Act on August 13, 1996. Counsel was appointed and subsequently filed a no-merit letter. On December 1, 1997, Judge Clarke dismissed the petition. Petitioner filed a notice of appeal and the Superior Court affirmed the dismissal on September 1, 1999. *Allocatur* was denied on February 24, 2000.

On July 16, 2005, Sondra Rodrigues, Esquire, working pro bono with the Innocence Project, filed a motion for post conviction DNA testing, pursuant to the Post Conviction Relief Act, 42 PA.C.S. § 9543.1 on behalf of Petitioner. On April 20, 2006, Petitioner's motion was denied. A timely notice of appeal was filed.

II. DISCUSSION

Pursuant to 42 Pa. C.S. § 9543.1, an applicant for post-conviction DNA testing must meet several requirements. Relevantly, § 9543.1 provides:

> § 9543.1 Post-conviction DNA testing
>
> (a) Motion.--
>
> (1) An individual convicted of a criminal offense in a court of this Commonwealth and serving a term of imprisonment . . . 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[.]

42 Pa. C.S. § 9543.1

In order to warrant an order granting post-conviction forensic DNA testing, Petitioner must present a prima facie case demonstrating that exculpatory results would establish his actual innocence. 42 Pa.C.S. § 9543.1(c)(3)(ii). Moreover, Petitioner must assert his actual innocence. 42 Pa.C.S. § 9543.1(c)(3)(ii)(A). In the instant case, Petitioner has failed to make such a showing in his motion with respect to the convictions for murder and rape. At trial and in subsequent appeals, Petitioner has argued that the trial court erred in not suppressing the confession he signed or the blood stained clothes found in his bedroom. However, Judge Clarke specifically addressed these issues and determined that the confession was not coerced as claimed by Petitioner. Judge Clarke also addresses Petitioner's mother's testimony that the clothes found by the police in Petitioner's bedroom, were not her son's.

Furthermore, the Superior Court has determined that Petitioner's confession was not suspect. The Superior Court has determined that "while a confession, in and of itself, generally would not bar [a DNA] request, 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." *Commonwealth v. Young*, 873 A.2d 720, 727 (Pa. Super. 2005).

Petitioner argues that *Young* is not applicable to this case since Petitioner has challenged his confession throughout the proceedings, and that *Young* is limited to cases where DNA could not prove actual innocence, whereas testing could prove Petitioner's actual innocence. However, contrary to Petitioner's attempts to distinguish *Young* from the present case, the two cases remain very similar. Both Petitioner and Mr. Young confessed to their crimes, both men were identified by witnesses, and numerous items of physical evidence linked them to their crimes. Petitioner argues that a semen sample recovered from the jeans, which could not be conclusively linked to him, should now be tested to exclude him. However, when presented with a similar argument in *Young*[1], the Superior Court concluded that a finally litigated, non-coerced, knowingly and voluntarily given confession, even with inconclusive blood evidence, still fails to meet the *prima facie* requirements set forth in § 9543.1 necessary to entitle a petitioner to a requested DNA testing.

III. CONCLUSION

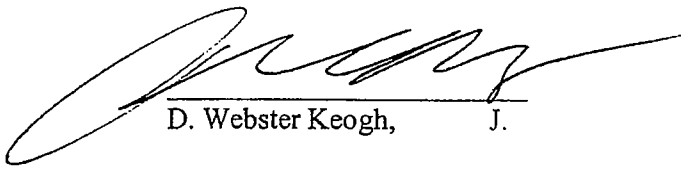
Petitioner fails to present a *prima facie* case demonstrating that DNA testing would establish his actual innocence of the offences for which he was convicted.

---

1 In *Commonwealth v. Young*, 873 A.2d 720, 727 (Pa. Super. 2005), the Commonwealth's expert testified that he had performed analysis on the blood to determine whether the blood was human or animal, and while he was able to determine that it was human, he could not testify that the blood on the articles found in the defendant's home matched the blood type of the victim. In the instant case, the blood found could also not be conclusively linked to the Petitioner.

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. For the reasons set forth above, post-conviction DNA testing was properly denied.

BY THE COURT:



D. Webster Keogh, J.

J.A24020/07

2007 PA Super 312

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ANTHONY WRIGHT, Appellant	:	NO. 1383 EDA 2006

Appeal from the Order Entered April 4, 2006
In the Court of Common Pleas of PHILADELPHIA County
CRIMINAL at No(s): CP#9111-3158-3168 2/2

BEFORE: JOYCE,* PANELLA and POPOVICH, JJ.

OPINION BY PANELLA, J.: Filed: October 17, 2007

¶ 1 Appellant, Anthony Wright, appeals from the order entered on April 4, 2006, by the Honorable D. Webster Keogh, Court of Common Pleas of Philadelphia County, which dismissed his motion for DNA testing filed pursuant to the Post Conviction Relief Act ("PCRA").[1] For the reasons set forth below, we find that Wright's confession to the murder, rape, and robbery of the victim has been finally litigated, found not to be coerced, and was knowingly and voluntarily given; as such, pursuant to ***Commonwealth v. Young***, 873 A.2d 720 (Pa. Super. 2005), ***appeal denied***, 586 Pa. 739, 891 A.2d 733 (2005), Wright cannot assert his actual innocence in this PCRA proceeding. Accordingly, we affirm.

¶ 2 The PCRA court set forth the relevant facts of the case as follows:

> The evidence at trial established that on the evening of October 18, 1991, [Wright] invaded the home of Louise

---

* Judge Joyce did not participate in the consideration or decision of this case.

[1] 42 PA.CONS.STAT.ANN. §§ 9541-9546.

EXHIBIT "B"

> Talley, a seventy-seven[-]year-old widow, and proceeded to rape her, rob her, and stab her to death. The following afternoon, in response to calls from concerned relatives, Philadelphia police officers entered the victim's home and found her nude body on the bedroom floor; she had been stabbed ten times. Additionally, the sheets of her bed were covered with blood and stained with semen. [Additionally, a knife covered with blood was found near her body. N.T. 5/26/93, 90.] While at the scene, the police were approached by a man who implicated the [Wright] in the killing. Following an investigation, on October 20, 1993, the police contacted [Wright], who agreed to give a statement. After receiving Miranda warnings, Petitioner gave a statement in which he confessed to raping, robbing, murdering Ms. Talley, and burglarizing her home.
>
> In his statement, [Wright] noted that he was wearing a black Chicago Bulls sweatshirt, a pair of blue jeans with suede on them, and Fila sneakers. The police obtained a search warrant for Petitioner's home and recovered these items from underneath the mattress in [Wright's] bedroom. The sweatshirt and blue jeans were splattered with blood, and scientific analysis revealed that this blood matched that of the victim and showed characteristics that were shared by only 1.4% of the Black population. The blue jeans also had a stain on the crotch, which although not conclusively identified, appeared consistent with a combination of [Wright's] seminal fluid and the fluids of the victim.

PCRA Court Opinion, 7/10/06, at 1-2 (brackets added).

¶ 3 Prior to trial, on March 17, 1992, Wright filed a motion to suppress the statement he had given to the police. On December 16, 1992, following a suppression hearing, the trial court found that Wright's confession was knowing and voluntary, and therefore denied Wright's motion, thus allowing Wright's detailed confession given to police to be admitted into evidence at trial.

¶ 4 On June 8, 1993, following a jury trial, Wright was convicted of first-degree murder, burglary, rape, robbery, and possession of an instrument of crime. Thereafter, on January 31, 1994, the trial court sentenced Wright to life imprisonment for his conviction of murder in the first degree.[2] Wright filed a timely direct appeal, which did not raise any issue with respect to the denial of his suppression motion, and this Court affirmed the judgment of sentence on August 14, 1995. ***See Commonwealth v. Wright***, 668 A.2d 1200 (Pa. Super. 1995) (unpublished memorandum). No request for review was filed in our Supreme Court.

¶ 5 Wright then filed a PCRA petition on August 13, 1996. In his petition, Wright did not make any allegations concerning his confession or the denial of his suppression motion. Following the appointment of counsel, a "no-merit" letter was submitted to the PCRA court, pursuant to ***Commonwealth v. Turner***, 518 Pa. 491, 544 A.2d 927 (1988), and ***Commonwealth v. Finley***, 550 A.2d 213 (Pa. Super. 1988). The PCRA court dismissed the petition on December 1, 1997. Wright appealed, however, this Court subsequently affirmed the dismissal on September 1, 1999. ***See Commonwealth v. Wright***, 747 A.2d 423 (Pa. Super. 1999) (unpublished memorandum), ***appeal denied***, 561 Pa. 696, 751 A.2d 190 (2000). Our Supreme Court denied allowance of appeal on February 24, 2000. ***See id***.

---

[2] 18 PA.CONS.STAT.ANN. § 2502(a). Wright was sentenced to concurrent terms on the other convictions.

¶ 6 Several years later, on July 15, 2005, Wright filed a motion for post-conviction DNA testing pursuant to 42 PA.CONS.STAT.ANN. § 9543.1. His motion was denied by the PCRA court on April 4, 2006. This timely appeal follows.

¶ 7 In ***Commonwealth v. Williams***, 909 A.2d 383 (Pa. Super. 2006), we set forth the pertinent standard and scope of review:

> Our standard of review regarding a PCRA court's denial of a petition for post-conviction relief is well settled: We must examine whether the record supports the PCRA court's determination, and whether the PCRA court's determination is free of legal error. Our scope of review is limited by the parameters of the PCRA.

Id., at 385 (citations omitted).

¶ 8 Wright's motion for post-conviction DNA testing must be evaluated under 42 PA.CONS.STAT.ANN. § 9543.1, which took effect in 2002. Section 9543.1 provides, in pertinent part, the following:

> **(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.
> (2) The evidence may have been discovered either prior to or after the appellant's conviction. The evidence shall be available for testing as of the date of the motion. If the evidence was discovered prior to the appellant's conviction, the evidence shall not have been subject to the DNA testing requested because the technology for testing was not in existence at the time of the trial or the applicant's counsel did not seek testing at the time of the

> trial in a case where a verdict was rendered on or before January 1, 1995, or the applicant's counsel sought funds from the court to pay for the testing because his client was indigent and the court refused the request despite the client's indigency.
>
> ...
>
> **(c) Requirements.** – In any motion under subsection (a), under penalty of perjury, the applicant shall:
> (2) (i) *assert the applicant's actual innocence of the offense for which the applicant was convicted*; and
> (3) present a prima facie case demonstrating that the:
> (i) identify 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.
>
> ...

42 PA.CONS.STAT.ANN. § 9543.1 (emphasis added).

¶ 9 We have specifically explained that the *prima facie* requirement, found under § 9543.1(c)(3), and reinforced in § 9543.1(d)(2)(i), "requires an appellant to demonstrate that favorable results of the requested DNA testing '*would establish*' the appellant's actual innocence of the crime of conviction." ***Commonwealth v. Heilman***, 867 A.2d 542, 547 (Pa. Super. 2005) (emphasis in original), ***appeal denied***, 583 Pa. 669, 876 A.2d 393 (2005). ***See also Commonwealth v. Smith***, 889 A.2d 582, 584 (Pa. Super. 2005), ***appeal denied***, 588 Pa. 769, 905 A.2d 500 (2006) ("[T]he burden lies with the petitioner to make a *prima facie* case that favorable results from the requested DNA testing would establish his innocence.").

¶ 10 Here, the PCRA court held, relying on ***Commonwealth v. Young***, 873 A.2d 720 (Pa. Super. 2005), ***appeal denied***, 586 Pa. 739, 891 A.2d 733 (2005), that Wright was unable to present a *prima facie* case of his actual innocence as he had confessed to raping, robbing, and murdering the victim. The PCRA court found that Wright's confession had been finally litigated, found not to be the product of coercion, and that it was knowingly and voluntarily given.[3] ***See*** PCRA Court Opinion, 7/10/06, at 4-5.

¶ 11 In ***Young***, this Court held that the denial of Young's motion for DNA testing under § 9543.1 was proper as he had earlier confessed to the crime, *i.e.*, murder. Although Young's confession was not presented into evidence

---

[3] At the conclusion of the suppression hearing, on December 17, 1992, the Honorable Eugene H. Clarke, Jr. entered the following findings of fact and conclusions of law:

> 1. Defendant did knowingly and voluntarily waive his right to the assistance of counsel and his right to remain silent during his custodial interrogation. The defendant was properly warned of these rights by the interrogating officer prior to any interrogation.
>
> 2. The statement given to police at the Police Administration Building was made after defendant was warned of his Miranda rights and was freely and voluntarily given.
>
> 3. The statement of defendant given between 2:15 p.m. and 4:14 p.m. on October 20, 1991, and here identified as Exhibit C-45 was reduced to writing, read and signed by defendant after Miranda warnings and was by a preponderance of the evidence a product of his free will and was voluntarily and freely given.
>
> 4. Although not at issue, the police did comply with the requirements of Commonwealth v. Duncan.

Findings of Fact and Conclusions of Law Re: Defendant's Motion to Suppress Statements, filed 12/17/92, at 2-3.

at trial, the confession was deemed to be voluntary on direct appeal.[4] When Young then requested DNA testing pursuant to § 9543.1, we agreed with the PCRA court that Young did not meet the *prima facie* requirements of § 9543.1, which are necessary to the entitlement of DNA testing. Specifically, we concluded that his earlier confession barred him from asserting a claim of actual innocence as required pursuant to § 9543.1(c)(2)(i). We held the following:

> Although appellant has claimed his innocence in his motion, we find that his confession to the murder bars him from asserting a claim of actual innocence for the offense for which he was convicted. While a confession, in and of itself, generally would not bar such a request, an appellant cannot assert a claim of actual innocence where, as here, the validity of the confession has been finally litigated, found not to be coerced, and was knowingly and voluntarily given.

Id., at 727,[5] *citing* ***Commonwealth v. Starr***, 541 Pa. 564, 574, 664 A.2d 1326, 1331 (1995) (holding that under the law of the case doctrine "a court

---

[4] The PCRA Court in ***Young*** quoted from the decision issued on direct appeal, in pertinent part, as follows:

> No evidence can be found to suggest that appellant was subjected to physical or psychological abuse, nor were any threats or promises utilized to induce his inculpatory statement. Thus appellant's confession, when studied in the light of the ***Christmas*** standard, does not appear to have been an egregious violation of his rights. We conclude that the confession was voluntarily made.

873 A.2d at 726, *quoting* ***Commonwealth v. Young***, 635 A.2d 209 (Pa. Super. 1993) (unpublished memorandum, No. 3312 PHL 1992, filed August 20, 1993, at p. 7), ***appeal denied***, 537 Pa. 632, 642 A.2d 485 (1994).

[5] The Court went on to write, after explicating its holding, reasons why "even if" the "confession did not bar recourse pursuant to Section 9543.1, Appellant would still not be entitled to the relief requested." 873 A.2d at 727. Such a discussion, predicated by the telling phrase "even if," is obviously *obiter dicta*.

involved in the later phases of a litigated matter should not reopen questions decided by another judge of the same court or by a higher court in the earlier phases of the matter").

¶ 12 As the Commonwealth aptly notes in its letter brief, ***see*** Commonwealth's Letter Brief, at 11, Wright's failure to appeal the denial of his suppression motion causes that ruling—that Wright's confession was knowing and voluntary—to be the law of the case.[6] ***See Commonwealth v. Metzer***, 634 A.2d 228, 234 (Pa. Super. 1993) (holding that Commonwealth's failure to appeal trial court ruling excluding evidence means that on retrial such ruling is the law of the case and that such evidence remains inadmissible). ***See also Morgan Guar. Trust Co. of New York v. Mowl***, 705 A.2d 923, 928 (Pa. Super. 1998), ***appeal denied***, 556 Pa. 693, 727 A.2d 1121 (1998); ***Appeal of Clarendon v. F.W. Home Ass'n***, 75 A.2d 171, 173-174 (Pa. Super. 1950). In other words, the validity of the confession has been finally litigated.

¶ 13 In the case *sub judice* we are confronted with a confession that has been "finally litigated, found not to be coerced, and was knowingly and voluntarily given." Accordingly, this case is directly controlled by ***Young*** and Wright is unable to assert his actual innocence. As such, his claim fails.

¶ 14 Order affirmed. Jurisdiction relinquished.

---

[6] "The doctrine means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties in the same case continues to be the law of the case." 1 Standard Pennsylvania Practice 2d § 2:253.

CERTIFICATION OF PRO BONO REPRESENTATION

I, SONDRA R. RODRIGUES, ESQUIRE, CERTIFY THAT I AM REPRESENTING DEFENDANT ANTHONY WRIGHT **ON A PRO BONO BASIS** FOR PURPOSES OF PROCEEDINGS UNDER THE DNA ACT. I HAVE NOT RECEIVED, NOR CONTRACTED TO RECEIVE, DIRECTLY OR INDIRECTLY, ANY COMPENSATION FOR SERVICES IN THIS CASE FROM ANY SOURCE WHATSOEVER.

Date: 7/26/05

Sondra R. Rodrigues, Esquire
Post Office Box 25267
Philadelphia, PA 19119
(215) 271 - 0989

EXHIBIT "C"

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
CRIMINAL DIVISION

COMMONWEALTH OF
PENNSYLVANIA

v.

ANTHONY WRIGHT
Defendant-Applicant

CP No. 9111-3158 2/2

November Term, 1991
No. 3158

Charges: Homicide; Rape.

ORDER

AND NOW, this 17th day of Nov, 2005, the motion of Attorney Colin Starger (a staff attorney for the Innocence Project in New York City and a member in good standing of the Bar of New York State) to appear pro hac vice as an attorney for Anthony Wright for purposes of all matters related to Mr. Wright's request for post-conviction DNA testing is hereby granted.

J.

EXHIBIT "D"

Pa. R.A.P. Rule 555(a)

COMMONWEALTH OF PA. **CRIMINAL TRIAL DIVISION**

V. **CP # 51-CR- 1131582-1991**

ANTHONY WRIGHT

VERIFIED IFP STATEMENT

I do hereby certify this 16th day of November, 2007, that the following information is true and correct to the best of my knowledge and belief:\

1. That I entered my appearance pro bono in the appellant's case on July 26, 2005, and the Court of Common Pleas permitted me to represent him in Forma Pauperis;

2. That there has been no substantial change in the defendant's financial condition since such date; and

3. That the appellant is unable to pay the fees and costs on appeal.

I understand that a false statement or answer to any question in this verified statement will subject me to the penalties provided by law (Misdemeanor of the second degree).

Sondra R. Rodrigues, Esquire
Attorney for the Appellant

EXHIBIT "E"