

**[J-77-2017] [MO: Donohue, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 728 CAP
	:	
Appellee	:	Appeal from the Order dated
	:	6/24/2016 in the Court of Common
	:	Pleas, Philadelphia County, Criminal
v.	:	Division at No. CP-51-CR-0208091-
	:	2004
	:	
LAVAR D. BROWN,	:	SUBMITTED: September 29, 2017
	:	
Appellant	:	

**CONCURRING OPINION**

**JUSTICE DOUGHERTY**

**DECIDED: October 17, 2018**

I join the majority’s well-reasoned opinion in all respects. I write separately only to further address the Philadelphia District Attorney’s Office’s newly-minted “confession of error,” and its extraordinary assertion this Court is required to vacate appellant’s death sentence simply because it now agrees with appellant such relief is due.

It is a long-standing and venerable rule that a party’s “[c]onfessions of errors are, of course, entitled to and given great weight, but they do not ‘relieve this Court of the performance of the judicial function.’” *Sibron v. New York*, 392 U.S. 40, 58 (1968), *quoting Young v. United States*, 315 U.S. 257, 258 (1942). Notwithstanding this settled principle, which this Court has consistently adhered to, the District Attorney claims that “when a prosecutor makes a reasoned **fact and policy-based** decision not to defend a particular conviction or sentence, it is proper for the Court to remand for the imposition of the agreed-upon relief” without conducting an independent review of the claim’s merit.

District Attorney's Brief at 3 (emphasis added). That is a remarkable proposition, and one that finds no support in the law, as the majority properly concludes.

The statutory requirements for obtaining relief under the PCRA are straightforward and crystal clear: a petitioner "must plead and prove by a preponderance of the evidence" that "the conviction or sentence resulted from one or more" of the delineated categories of **legal error**. 42 Pa.C.S. §9543(a)(2). These statutory commands are not mere suggestions. Moreover, the District Attorney's late show of support for appellant cannot change the express dictates of the statute. This, of course, is not to say that a district attorney may never agree that a petitioner's claim warrants relief under the PCRA. As the Attorney General cogently explains, a "prosecutor is of course privileged to take a position on that claim; indeed, duty requires that he or she do so, in accordance with her good faith understanding of the applicable law. But the statute does not empower her to assume the role of the court, which is to decide." Attorney General's Brief at 10.

The majority agrees with this reasoning, which is why I join its opinion in full. However, given the widespread implications of the District Attorney's position in this case and the potential for recurrence in others, I believe a few observations are in order.

In my view, the fundamental principles of law and statutory commands discussed above and in the majority opinion extend far beyond the circumstances of this particular case. For one thing, although this case comes to us on our capital appeal docket, nothing in the majority's analysis hinges on the capital nature of the case. Thus, the result we reach in this particular capital case would be precisely the same if, for example, a district attorney "stipulated" or "confessed" that a life sentence was no longer appropriate for a defendant previously convicted of second-degree murder because the district attorney no longer believed that punishment fit that crime. In other words, if the court is not first satisfied some legal error has been proven, it must deny relief, notwithstanding the unity

of the parties' position the sentence should be vacated. This rule would apply in any criminal case, no matter the crime involved.

Second, I view the principles of law articulated by the majority as applying to all courts in this Commonwealth, rather than just reviewing courts. In this regard, I disagree with Justice Wecht's suggestion the Court should leave open the possibility that a PCRA court, as opposed to a court sitting in an appellate capacity, "may premise its ruling upon the parties' stipulation or the Commonwealth's confession of error[.]" Concurring Opinion, slip op. at 2 (Wecht, J.). Again, I agree with the Attorney General that "a prosecutor's confession of error is properly viewed **not as dispositive**, but as persuasive, often highly persuasive." Attorney General's Brief at 3 (emphasis added).<sup>1</sup> Thus, while a prosecutor's confession as to the merit of a claim for post-conviction relief would generally be worthy of a PCRA court's respect, it would not absolve the court of its judicial duty to independently review the confessed error to ensure it meets the strict requirements of the PCRA.<sup>2</sup>

To hold otherwise would be to bless local district attorneys and PCRA courts with a commutation power that does not lawfully belong to them. See Majority Opinion, slip

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<sup>1</sup> As the Attorney General aptly illustrates, the persuasive effect of a district attorney's confession of error will be greater, or lesser, depending on the credibility of the advocate:

A confession of error, for example, may be especially credible, because prosecutors generally seek to uphold their convictions, and when on occasion they do otherwise, their concession will carry great weight. If, on the other hand, a district attorney confesses error in a large number of cases, or in a particular category of crime, the courts may begin to suspect that the confessions are not assessments of legal merit, but serve instead as an indirect way to implement policy choices that are no longer the prosecutor's to make.

Attorney General's Brief at 19.

<sup>2</sup> Indeed, as this case proves, a confession of error by a district attorney, no matter how well intentioned, may in fact be incorrect. It is for this reason judicial obligations compel all courts in this Commonwealth to examine independently the errors confessed before summarily granting relief.

op. at 15 (“neither the parties, by agreement, nor [a court], absent a finding of legal error, have the power or ability to order that the jury’s verdict be commuted”); see also PA. CONST. art. IV, §9 (“the Governor shall have power . . . to grant reprieves, commutation of sentences and pardons”). Indeed, in the past this Court has not hesitated to exercise its extraordinary judicial power to step in when the parties combine to set aside an otherwise lawful jury verdict or sentence and a court authorizes such an agreement in the absence of legal authority to do so. See *Commonwealth v. Chimenti*, 507 A.2d 79 (Pa. 1986) (exercising plenary jurisdiction and reversing where Philadelphia District Attorney’s Office struck a deal, which it effectuated by appellate motion, to vacate Chimenti’s first-degree murder conviction and replace it with a conviction for murder generally); see also 42 Pa.C.S. §726 (“Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.”). Simply put, there is no exception in the law that allows a PCRA court to avoid the performance of its judicial function, even in the face of a confession of error by the government, and this Court has not and will not tolerate subversion of the proper judicial process or the requirements of the PCRA.<sup>3</sup> The requirement that post-conviction relief may be afforded only where there exists legal error is clear, and it precludes blind acceptance of a “confession of error” by any court in this Commonwealth.

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<sup>3</sup> For this reason, I find the District Attorney’s contention this Court should “at a minimum [ ] remand the case to the PCRA court for further consideration in light of the parties’ agreement that sentencing relief is appropriate[,]” District Attorney’s Brief at 9, troubling. Under the facts of this case, where the District Attorney presents nothing new that was not already presented to the PCRA court, beyond the fact of its confession, there is simply no basis in law for the PCRA court to reach a different conclusion than the one the majority reaches here.

With these observations, I join the majority's opinion.

Justice Baer joins this concurring opinion.