

**[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 WECHT**

**DECIDED: October 17, 2018**

Following his conviction in 2005, Lavar Brown was sentenced to death. He exhausted his direct appeal rights, and then sought review pursuant to the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-46. The Commonwealth opposed Brown's claims before the PCRA court, and the PCRA court denied relief. While Brown's appeal of that denial was pending, the Commonwealth reevaluated its position with respect to Brown's claim that his trial counsel provided ineffective assistance during the penalty phase of his trial. Based upon its reevaluation, the Commonwealth, before this Court, now agrees with Brown with respect to this claim. This unusual circumstance presents our Court with the opportunity to explore the extent, if any, to which we are bound by the Commonwealth's confession of error.

The Majority holds that this Court is not bound by the Commonwealth's confession of error. The Majority's conclusion rests upon its consideration of the respective roles of

the prosecutor and the courts, and upon the finality of a jury's verdict absent a judicial finding of legal error. I agree with much of the Majority's analysis as it pertains to *this* Court's review of the PCRA court's denial of relief in this case, and I accordingly concur in today's result.

Unlike the Majority, I would eschew broad pronouncements in this case about a hypothetical scenario not presented in which the Commonwealth confesses error *directly to the PCRA court itself*. In such circumstances, it may be appropriate for the PCRA court to defer to the Commonwealth's confession of error. Accordingly, I distance myself from any suggestion that a confession of error can have no impact on a trial court's review of the issues before it. Maj. Op. at 19.<sup>1</sup>

To be eligible for relief under the PCRA, a petitioner must satisfy certain criteria including, as relevant here, a showing that the conviction or sentence resulted from the ineffective assistance of counsel that "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). If the PCRA court "rules in favor of the petitioner, it shall order appropriate relief. . . ." 42 Pa.C.S. § 9546(a). In ruling on the petition, the PCRA court must make a decision in favor of one party or another. Unlike the Majority, I do not believe that requiring a judicial ruling on a claim of error resolves whether the PCRA court may premise its ruling upon the parties' stipulation or the Commonwealth's confession of error, or must instead delve into a merits review of an undisputed claim. Rather, a ruling is simply a finding in favor of one of the parties before the court, whatever that ruling's basis.

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<sup>1</sup> While I refer herein generally to PCRA courts in view of the circumstances of this case, there is in principle no reason why a common pleas court might not encounter a similar development outside of a post-conviction context. For example, the Commonwealth may concede before a trial court that a defendant's confession was obtained in violation of *Miranda v. Arizona*, 396 U.S. 868 (1969), or that the Commonwealth withheld evidence that forms the basis of a defendant's claim under *Brady v. Maryland*, 373 U.S. 83 (1963).

The PCRA court is tasked with considering the facts before it and resolving factual disputes. If there is no factual dispute because the Commonwealth and the petitioner are in agreement regarding the petitioner's entitlement to relief, then the role of the PCRA court is to resolve the legal implications of these facts. If the Commonwealth and the petitioner agree about the legal consequences, then it may be appropriate for the PCRA court to afford a quantum of weight to the Commonwealth's confession of error.<sup>2</sup>

Prosecutors in this Commonwealth have a general obligation to seek justice. See *Berger v. United States*, 295 U.S. 78, 88 (1935); *Commonwealth v. Chmiel*, 173 A.3d 617, 631 (Pa. 2017) (Donohue, J., concurring). The Commonwealth's reevaluation of criminal convictions is consistent with this general obligation. When a petitioner's life hangs in the balance, the prosecutor has a heightened obligation to continue to review the merits of the case. Accordingly, when confronted with a PCRA petition alleging that the petitioner is eligible for relief under the PCRA, it is a valid exercise of discretion for a prosecutor to determine whether to contest the claims before the PCRA court. The Commonwealth's

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<sup>2</sup> My point is that a persuasive confession of error by the Commonwealth may, in circumstances that are not presently before us, obviate the need for the PCRA court to delve into the undisputed merits of a particular claim. Similarly, the Attorney General's position is that a prosecutor's confession of error may be persuasive, or even highly persuasive, depending upon the circumstances of the case. Attorney General's Brief at 19. I agree. Justice Dougherty asserts that he agrees as well, yet in the same paragraph would foreclose any possibility whatsoever that the PCRA court ever could accept a prosecutor's confession or the parties' stipulation without "independently review[ing] the confessed error to ensure it meets the strict requirements of the PCRA." Concurring Opinion (Dougherty, J.) at 3. These expressions seem to conflict with one another. Permitting the court's "acceptance" of a confession of error only when the court first conducts an independent evaluation and concludes that the confession is well-founded is not "accepting" the confession of error at all. To the contrary, Justice Dougherty would require the PCRA court to conduct an independent judicial evaluation with or without the confession of error. Concurring Opinion (Dougherty, J.) at 3. For Justice Dougherty, a confession of error, standing alone, has no impact on the case whatsoever. If, and only if, the PCRA court first corroborates and endorses the Commonwealth's confession of error will the confession matter at all. Under this view, there is no deference.

concession that a defendant's judgment of sentence does not serve the interests of justice may, in some instances, be entitled to deference by the PCRA court.

Although a confession of error may be entitled to a level of deference when it is presented to the PCRA court, the same is not true where (as here) it is presented to this Court for the first time on appeal from the PCRA court's order. In resolving an appeal under the PCRA, the role of this Court is to examine whether the PCRA court's ruling is supported by the record and free from legal error. *Commonwealth v. Mitchell*, 105 A.3d 1257, 1265 (Pa. 2014). When the PCRA court resolves a claim without the benefit of the Commonwealth's confession of error, our standard of review remains the same. To overcome the PCRA court's judgment, the parties would have to demonstrate on the merits that the judgment resulted from legal error. A confession of error does not displace this Court's obligation to examine the PCRA court's order in a manner consistent with our established standard of review.

Accordingly, I agree with the Majority that there is no basis for this Court to disturb the PCRA court's order absent a finding of legal error. In today's case, the Commonwealth has established no such error. That suffices to dispose of the appeal before us. But the future could bring other cases. We should not foreclose them now. I believe that we must remain open to the possibility that it may be appropriate for a PCRA court to accept a future confession of error and defer to the prosecutor's judgment that justice has not been served by the conviction under the circumstances there presented. Our law should not rule out such possibilities.