

Court of Appeals
of the
State of New York

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DOUGLAS WARNEY,

Claimant-Petitioner,

– against –

THE STATE OF NEW YORK,

Defendant-Respondent.

AMICUS BRIEF IN SUPPORT OF CLAIMANT

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The Innocence Network respectfully submits this *amicus* brief in support of Claimant-Petitioner Douglas Warney’s appeal of the dismissal of his claims seeking damages for unjust conviction and imprisonment under the New York Unjust Conviction Act, Court of Claims Act § 8-b(5)(d) (McKinney 2007) [hereinafter, “Section 8-b”]. As set forth more fully below, the Innocence Network urges this Court to reverse the lower court decisions and reinstate Mr. Warney’s claims because permitting those decisions to stand would improperly and unjustly preclude a large class of exonerees from recovering for their wrongful convictions and thereby frustrate the remedial purposes of Section 8-b.

PRELIMINARY STATEMENT

The primary basis for Judge Minarik’s decision dismissing Mr. Warney’s claims—and the crux of the State’s argument—is that a defendant who was wrongfully convicted cannot recover under Section 8-b if his conviction was caused, at least in part, by his own confession. The State reasons that Section 8-b bars recovery for a defendant whose own conduct caused or brought about his own conviction, and that a defendant, such as Mr. Warney, whose “confession” previously was found to be voluntary and therefore, according to the State, “uncoerced,”¹ necessarily must have caused his own conviction.

The problem with the State’s argument is that it would bar from relief *every* exoneree who has been convicted based on evidence of a confession, since every such defendant would, in some respect, have lost a prior challenge to the voluntariness of his confession. But we

¹ Although the Law Revision Commission offers “an uncoerced confession of guilt” as one example of the type of misconduct that could foreclose recovery under Section 8-b, 1984 Report of N.Y. Law Revision Committee, *reprinted in* 1984 McKinney’s Session Laws of N.Y. 2899, 2932, Section 8-b itself does not identify an “uncoerced” confession as grounds for precluding recovery—and in fact contains no reference to confessions at all. Court of Claims Act § 8-b. Rather, the Legislature “left open to the judiciary the task of determining on a case-by-case basis what conduct would make a claimant eligible to recover damages for unjust conviction and imprisonment.” *Rogers v. State of New York*, 181 Misc.2d 683, 686, 694 N.Y.S.2d 874, 877 (Ct. Cl. 1999). See *Brief for Claimant-Petitioner Douglas Warney* at 31-32.

now know that a substantial percentage of wrongfully convicted defendants falsely confess, and empirical evidence on the typical nature and circumstances of these false confessions demonstrates that they cannot be considered either “uncoerced” or the result of the defendants’ own misconduct, even when those confessions were properly admitted in the underlying trials.

Mr. Warney’s confession incriminated him because it included details that an innocent man could not have known. Whether those details made it into Mr. Warney’s confession because of police malfeasance or mere police carelessness, the one thing that we do know—and that the State has not seriously contested—is that those facts could not have come from Mr. Warney. In this respect, Mr. Warney’s situation provides the perfect example of why the State’s argument is flawed. Sadly, however, his circumstances are not unique.

The list of exonerees who have been wrongfully convicted based on false confessions is long and growing. Section III.A below profiles all of the DNA exonerees in New York who were wrongfully convicted based on their own false confessions. This class of exonerees is made up of victims, like Mr. Warney, who generally come from a particularly vulnerable portion of the population, often suffering from mental disability or mental illness, and who could never be compensated for their wrongful convictions if the State’s arguments were accepted by this Court. As we learn more about why defendants falsely confess—and as a fortunate few of those defendants are exonerated by conclusive evidence such as DNA testing—the courts must permit those exonerees to pursue claims under Section 8-b and establish that their confessions, although seemingly voluntary, should not, in fact, be interpreted as misconduct that would bar recovery under Section 8-b.

INTEREST OF AMICUS

The Innocence Network is an association of organizations dedicated to providing

pro bono legal counsel and investigative services to indigent prisoners whose actual innocence may be established in post-conviction proceedings. Its members operate in every state and the District of Columbia, representing hundreds of prisoners. The Innocence Network and its members are also dedicated to working to redress the causes of wrongful convictions and to improving the accuracy and reliability of the criminal justice system in future cases. As set forth in its motion for *Amicus Curiae* relief, the Innocence Network believes that this brief, which is based on its experience with DNA exonerations, including those involving false confessions, would be of assistance to the Court, pursuant to 22 N.Y.C.R.R. 500.23(4)(iii).

ARGUMENT

I. Introduction

Since 1989, post-conviction DNA testing has freed 261 innocent people nationwide, 37 of them in New York. See The Innocence Project, *Know the Cases*, <http://www.innocenceproject.org/know/> (last visited December 7, 2010); The Innocence Project, *Know the Cases*, <http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=NY&cause=&perpetrator=&compensation=&conviction=&x=40&y=7> (last visited December 22, 2010). DNA testing has been a major factor in prompting reform of the criminal justice system. It has provided scientific proof that our system convicts and sentences innocent people, and that wrongful convictions are not isolated or rare events. DNA testing has opened a window into wrongful convictions so that we may study their causes and propose remedies to minimize the chances that innocent people will be convicted.

Relevant to the case at hand, the work of the Innocence Network has helped to

expose the problem of false confessions as a major source of wrongful convictions.² According to data collected by the Innocence Project and posted on its website, false confession evidence has played a role in 64 of the 261 DNA exonerations³ to date, indicating that *almost one in four defendants nationwide who are known to have been wrongfully convicted and have been exonerated based on DNA evidence confessed to a crime that they did not commit. See The Innocence Project, Know the Cases,*

<http://www.innocenceproject.org/know/SearchProfiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=False+Confessions+%2F+Admissions&perpetrator=&compensation=&conviction=&x=16&y=3> (last visited December 7, 2010). In New York the figure is even higher: 10 of 37 DNA exonerations statewide involved a false confession or admission. *See The Innocence Project, Know the Cases,*

<http://www.innocenceproject.org/know/SearchProfiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=NY&cause=False+Confessions+%2F+Admissions&perpetrator=&compensation=&conviction=&x=35&y=4> (last visited December 21, 2010). Like Mr. Warney's statements, many of those "confessions" included non-public facts that an innocent person could not have known. The fact that the suspects who purportedly confessed to non-public facts were later found innocent

² See also New York City Bar Association, *Undoing Time: A Proposal for Compensation for Wrongful Imprisonment of Innocent Individuals* (Oct. 2010) [hereinafter "Undoing Time"] available at www.nycbar.org/pdf/report/uploads/20072010-UndoingTimeAProposalforCompensationforWrongfulImprisonment.pdf (citing false confessions as a "leading cause[] of wrongful convictions"); Editorial, *True and Untrue Confessions*, N.Y. TIMES, Jan 12, 2008 (same).

³ In a comprehensive study covering both DNA and non-DNA exonerations between 1989 and 2003, 15% of exonerees nationwide were found to have made false confessions. Samuel L. Gross *et al.*, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005). Prior studies have found that cases involving false confessions account for between 14% and 25% of wrongful convictions. Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 905-06 (2004) (listing findings from prior studies).

establishes that the confessions must have been contaminated in some way, likely during a custodial interrogation.

Under the rulings of the lower courts in this case, these innocent individuals would be automatically foreclosed from any compensation for their wrongful conviction and incarceration, even if they did not engage in any culpable conduct contributing to their conviction. The Innocence Network believes that the existence *vel non* of a false confession—regardless of whether it was previously found to be voluntary—should not end the inquiry when it comes to remedial statutes like Section 8-b. Rather, there should be a full hearing and a finding of culpable conduct—actual wrongdoing—by the claimant underlying a confession before it can serve as a bar to recovery. Moreover, at a minimum, an exoneree such as Mr. Warney should be given an opportunity to develop his claim through discovery, since it cannot be that some of the most vulnerable exonerees—who have already suffered undeservedly at the hands of the State—are automatically barred from even *pursuing* a claim for compensation under Section 8-b.

The State’s position on appeal conflates “voluntariness” as it relates to admissibility with whether a confession was “uncoerced” such that it might bar recovery under Section 8-b. By so doing, the State distorts the purpose of Section 8-b, which is to compensate wrongfully convicted defendants, and ignores the empirical evidence regarding how a confession, such as Mr. Warney’s, can be contaminated without traditional “coercion.”

II. The Purpose of Section 8-b

In urging the implementation of Section 8-b, the Law Revision Commission concluded that “[i]nnocent persons who have been unjustly convicted and subsequently imprisoned should have available an avenue of redress which, to the extent possible, compensates them for the damages they have suffered.” 1984 Report of N.Y. Law Revision

Committee (“Commission Report”), *reprinted in* 1984 McKinney’s Session Laws of N.Y. 2899, 2901. A new basis for an unjust conviction claim was needed because the existing common law torts of malicious prosecution and false imprisonment each required an exoneree to bear the heavy burden of showing fault. *Id.* at 2901, 2907-08, 2910. The Commission recognized that “while some unjust convictions are the result of prosecutorial misconduct, and thus can be avoided, the vast majority of unjust convictions derive from human frailties that are ineradicable.” *Id.* at 2902. Section 8-b would address this reality by removing the element of fault. The new statute reflected that “it is the State’s obligation, and no one else’s, to do what justice and morality demand when an innocent person is convicted of a crime he did not commit.” *Id.* at 2923.⁴ Accordingly, the Commission noted, an exoneree would not have to “prove that someone’s *culpable* act led to his conviction.” *Id.* at 2932 (emphasis added).

This did not mean that every exonerated defendant could recover for his wrongful conviction. First and foremost, the exoneree would have to establish actual innocence, and not merely that his conviction had been infirm. *Id.* at 2930-31. Second, he would have to show that “he did not by his own conduct cause or bring about his conviction.” *Id.* at 2929.

In opposing Mr. Warney’s appeal, the State seizes on this second requirement of the now-enacted statute, arguing that *any* conduct by a defendant that contributes to his conviction makes him ineligible to recover under Section 8-b. The State’s argument ignores, however, the Law Revision Commission’s clear indication that only “misconduct” by an innocent defendant could serve as a basis to deny him relief. As the Commission explained, “the

⁴ In its review of compensation statutes, the New York City Bar Association echoed this goal, noting “in order for the [criminal] system to be equitable as a whole, it is necessary that the exoneree be monetarily compensated. A just government cannot wrongfully deprive its citizens of life, liberty or property without compensation.” *Undoing Time*, at 5. *See also* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 74 (1999) (“The state whose actions have put individuals in prison for crimes they did not commit owes a debt to those who through no fault of their own have lost years and opportunity. The debt should be recognized and paid.”).

person seeking damages should also have to establish that he did not cause or bring about his prosecution by reason of his own *misconduct*.” *Id.* at 2932 (emphasis added). The Commission added that “[t]his requirement is necessary to ensure that one is not rewarded for his own *misconduct*.” *Id.* (emphasis added). By ignoring the distinction between conduct and misconduct, the State asks the Court to preclude an overly broad category of exonerees from ever pursuing a claim under Section 8-b. There is no reason to conclude that the legislature intended such a draconian result, nor is there any justification to automatically exclude the large percentage of exonerees who were wrongfully convicted based on their own false confessions.

III. The Empirical Evidence Regarding False Confessions

Mr. Warney’s case is tragic, but unfortunately not unique. In New York,⁵ over one in four DNA exonerations have involved false confessions. *See* The Innocence Project, *Know the Cases*, <http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=NY&cause=False+Confessions+%2F+Admissions&perpetrator=&compensation=&conviction=&x=35&y=4> (last visited December 21, 2010). The cases in which exonerees were wrongfully convicted based on their own false confessions tend to have several factors in common. These factors include vulnerable defendants who are young and/or have limited mental capabilities, confessions made during custodial interrogations, confessions that were upheld before, during and after trial as voluntary and reliable, and, perhaps most relevant to the instant case,

⁵ One New York exoneree, Marty Tankleff, testified before the New York State Senate Democratic Task Force on Criminal Justice Reform in 2008. After Tankleff’s address, then-State Senator and Attorney General-Elect Eric Schneiderman offered an apology. “I cannot say enough how much all of us in public service and in government are really embarrassed and upset by what happened to you. . . . I’m sorry it took so long.” Zachary R. Dowdy, *Tankleff pushes for video recording of interrogations*, NEWSDAY, July 3, 2008, available at http://www.nysba.org/Content/NavigationMenu63/TaskForceonWrongfulConvictions/Wrongful_Convictions.htm.

confessions that purportedly included incriminating facts that could not have been known by an innocent person.

A. Profiles of Other New York Exonerees

Below are profiles of all of the other DNA exonerees who were convicted in New York based largely on their own false confessions. These profiles demonstrate that the circumstances of such exonerees counsel for a more nuanced interpretation of Section 8-b than the lower courts gave it in this case.

1. Jeffrey Deskovic

In 1990, Jeffrey Deskovic was convicted of raping and murdering 15-year-old Angela Correa in Westchester County. At the time of the crime, he “was a 16-year-old Peekskill High School sophomore who struggled socially, academically, and emotionally. From a young age, Deskovic ‘received emotional and psychological counseling and treatment . . . for a variety of psychological symptoms, including anxiety, depression, and, for a time, complaints of hearing voices.’” *Deskovic v. City of Peekskill*, No. 07-CV-8150, 2009 U.S. Dist. LEXIS 71911 at *8 (S.D.N.Y. Aug. 12, 2009) (internal citations omitted); *see also* Leslie Crocker Snyder, *et al.*, Westchester County Dist. Attorney, *Report on the Conviction of Jeffrey Deskovic*, 6-7 (2007), available at <http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf> [hereinafter “Deskovic Report”] (“Ample evidence existed in the record demonstrating Deskovic’s psychological vulnerabilities.”). Deskovic spoke with the authorities about Angela Correa’s murder on seven separate occasions between December 12, 1989 and January 25, 1990. *People v. Deskovic*, 201 A.D.2d 579, 579, 607 N.Y.S.2d 957, 957-58 (2d Dep’t 1994); *see also* Deskovic Report at 2, 12.

On January 25, Deskovic voluntarily submitted to a polygraph, as requested by the police. He arrived at police headquarters alone at about 9:30am, without either a lawyer, his mother, a friend or

family member. He was driven to Brewster, N.Y. by Detectives McIntyre and Levine. The polygraph was administered by police investigator Stephens. Deskovic was questioned sporadically until 5pm, at which time Deskovic asked for Det. McIntyre, after being informed he had failed the exam. Deskovic “confessed” to McIntyre that he killed Angela, fell on the floor in a fetal position, where McIntyre physically comforted him by holding Deskovic’s head on his lap and rubbing his back. During the course of eliciting ‘background’ information, Stephens learned that Deskovic “sometimes hears voices and they make me do things I shouldn’t.” The entire day’s session was not tape recorded.

Deskovic Report at 2. As with Mr. Warney, “[m]uch of the prosecution’s effort to persuade the jury that Deskovic’s statements established his guilt hinged on the argument that Deskovic knew things about the crime that only the killer could know (e.g., crime scene details, the existence of a note, found with Correa’s body, to Freddy Claxton, another high school classmate).” *Id.* at 5. In affirming his conviction—and the admissibility of his confession—the appellate division determined that “[t]here was overwhelming evidence of the defendant’s guilt in the form of the defendant’s own multiple inculpatory statements, as corroborated by such physical evidence as the victim’s autopsy findings.” *Deskovic*, 201 A.D.2d at 580; 607 N.Y.S.2d at 958.

In 2006, a new Westchester District Attorney, Janet DiFiore, agreed to conduct DNA testing and then consented to “Deskovic’s release when the sample matched that of a man serving a life sentence for an unrelated murder. That man subsequently confessed to raping and killing Angela Correa.”⁶ Deskovic Report at 3.

2. Freddie Peacock

In 1976, Freddie Peacock was convicted of first-degree rape in Monroe County. In 2010, 28 years after he was released from prison, Peacock was exonerated by DNA evidence. Peacock has severe mental illness and has been hospitalized for it several times. *See Innocence*

⁶ Notably, the State opted to settle Deskovic’s subsequent Section 8-b claim.

Project, *Background on Freddie Peacock's Case*, available at

http://www.innocenceproject.org/Content/Background_on_Freddie_Peacocks_Case.php (last visited December 7, 2010).

“After initially denying involvement, Mr. Peacock, who had received diagnoses of schizophrenia and bipolar disorder and had not taken his medication in five months, confessed during a police interrogation that was not recorded.” A.G. Sulzberger, *Vindication Now Arrives After a Battle of 28 Years*, N.Y. TIMES, Feb. 4, 2010. Peacock “could tell the police only, ‘I did it, I did it. I raped a girl. I did it.’” Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1084 (2010) [hereinafter “Garrett, *Substance*”] (quoting Trial Tr. at 270, *People v. Peacock*, No. 989-76 (N.Y. Sup. Ct. Dec. 13, 1976)). Peacock could not tell the officers where, when or how the victim was raped. The detective acknowledged that Peacock “couldn’t recall the details” of how the crime took place, although he tried during the interrogation to supply him with details, including the identity of the victim. *Id.* at 1085 (quoting Trial Tr. at 276-78, *People v. Peacock*, No. 989-76 (N.Y. Sup. Ct. Dec. 13, 1976)). Nevertheless, the fact of his confession proved critical to upholding his conviction:

During the trial two prosecution witnesses were permitted, over objection, to testify concerning an out-of-court statement made by the complainant in which she identified the defendant as the man who had raped her. Absent a claim of recent fabrication such testimony improperly bolsters the complainant’s credibility and is inadmissible. *However, in light of the strong evidence of guilt, including defendant’s confession, we find the error to be harmless.*

People v. Peacock, 70 A.D.2d 781, 417 N.Y.S.2d 339, 340 (4th Dep’t 1979) (emphasis added) (internal citations omitted).

3. Frank Sterling

In 1992, Frank Sterling was convicted of murdering Viola Manville in Monroe County. Sterling was 25 years old and had no criminal record or history of violent behavior. J.

Mot. to Vacate and Dismiss Indictment, *People v. Sterling*, No. 624/91, at 2 (Sup. Ct. Monroe County 2010). “In November, 1988, Sterling went voluntarily to the Police for questioning. He denied any involvement in the murder, and provided a detailed description of his whereabouts on the day of the murder.” *Id.* at 2.

Sterling subsequently confessed after working a 36-hour trucking shift followed by 12 hours in police custody for interrogation. *Id.* at 2-3. Although the ultimate confession was videotaped, the hours of interview and interrogation that preceded were not. *Id.* Sterling’s “confession contained not only certain details verified by the police, but included significant details which the police never released to the public during the investigation: a description of the jacket worn by the victim at the time she was murdered and the fact that she had been shot.” *People v. Sterling*, 6 Misc.3d 712, 724, 787 N.Y.S.2d 846, 854 (County Ct. Monroe County 2004), *aff’d*, 37 A.D.3d 1158, 827 N.Y.S.2d 920 (4th Dep’t 2007). On appeal from his conviction, Sterling unsuccessfully “argue[d] that Supreme Court erred in denying his pretrial motion to exclude from trial his statements to the police on the ground that they were the product of hypnosis and therefore unreliable.” *People v. Sterling*, 209 A.D.2d 1006, 1006, 619 N.Y.S.2d 448, 448 (4th Dep’t 1994).

In 2010, Sterling was exonerated after 18 years in prison when DNA evidence identified a different assailant, who then confessed to the crime. *See generally* Innocence Project, *Frank Sterling*, at http://www.innocenceproject.org/Content/Frank_Sterling.php (last visited December 7, 2010).

4. John Kogut

In 1986, John Kogut was convicted of the murder and rape of 16-year-old Theresa Fusco in Nassau County. In 2003, his conviction was vacated on the basis of DNA evidence, and a subsequent bench trial resulted in his acquittal. *Kogut v. County of Nassau*, Nos. 06-CV-

6694, 06-CV-6720, 2009 U.S. Dist. LEXIS 116354 at *9 (E.D.N.Y. Dec. 11, 2009). “While originally denying involvement in the death and rape of the victim, the defendant subsequently made numerous inculpatory statements after he was informed by the police that they were having trouble with the results of his polygraph test.” *People v. Kogut*, 176 A.D.2d 757, 575 N.Y.S.2d 96 (2d Dep’t 1991). He gave a detailed confession during interrogation, where it took “15 plus hours to produce the written statement.” *People v. Kogut*, 10 Misc.3d 305, 309, 806 N.Y.S.2d 366, 370 (Sup. Ct. Nassau County 2005). Kogut alleged that he was “deprived of food and sleep, was prevented from speaking with his girlfriend, may have been under the influence of alcohol and/or drugs, was confronted with persistent denials of his claim of innocence, and may have been misled as to the results of the lie detector test.” *Id.* Kogut sought to suppress his statements, *id.*, and testified at trial that “[n]othing was asked of me. Everything was told to me.” Garrett, *Substance*, 62 STAN. L. REV. at 1091 (quoting Trial Tr. at 824, *People v. Kogut*, No. 61029 (N.Y. Sup. Ct. May 13, 1986)). Examples of non-public or corroborated facts allegedly provided by Kogut included a description of the victim, a description of the victim’s death by strangling, the location of the victim’s body, the location of the victim’s jewelry, and the color of pants, jackets, and blankets found at the crime scene. *Id.* at app. at 7.

5. Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Kharey Wise

In 1990, in what became known as the “Central Park Jogger” case, Antron McCray, 15, Kevin Richardson, 14, Yusef Salaam, 15, Raymond Santana, 14, and Kharey Wise, “a learning disabled sixteen-year-old with low intelligence and no prior experience with the criminal justice system,” *People v. Wise*, 204 A.D.2d 133, 134, 612 N.Y.S.2d 117, 118 (1st Dep’t 1994), were convicted of the rape and assault of a 29-year-old woman in New York County.

Raymond Santana and Kevin Richardson, as well as a number of other youths, were apprehended at approximately 10:15 p.m. on April 19, [1989] after police officers responding to reports concerning some of the incidents [in Central Park] spotted them on the western outskirts of the park. Antron McCray, Yusef Salaam, and Kharey Wise were brought in for questioning on April 20, 1989, after they had been identified by other youths as having been present at or participants in some of the events in the park. Each of the defendants was questioned by detectives and made one or more statements. All five of the defendants implicated themselves in a number of the crimes which had occurred in the park. None of them admitted actually raping the Central Park jogger, but each gave an account of events in which he made himself an accomplice to the crime.

Affirmation of Assistant District Attorney Nancy Ryan in Response to Mot. To Vacate Jgmt. Of Conviction, at 4-5 [hereinafter "Ryan Aff."]. "Kevin Richardson and Antron McCray each made one written and one videotaped statement. Raymond Santana made two written statements, with a supplement to one of them, and a videotaped statement. Yusef Salaam made one oral, unrecorded, unsigned statement. Kharey Wise made two written and two videotaped statements." *Id.* at 12 n.*.

All the defendants filed motions to suppress their statements, which were denied. *Id.* at 10. "[T]he People's case at both trials rested almost entirely on the statements made by the defendants." *Id.* at 12. While "the accounts given by the defendants differ[ed] on significant details, such as who initiated the attack, who knocked the victim down, who held her, who raped her, what weapons were used during the attack, and when, in the sequence of the events, the attack took place," *People v. Wise*, 194 Misc.2d 481, 492, 752 N.Y.S.2d 837, 846 (Sup. Ct. N.Y. County 2002), each of the defendants purportedly provided non-public or corroborated facts during their confessions. McCray described the female jogger and the clothes she was wearing, described how she was attacked (with a pipe), gave the location of the attack as "by reservoir," and described the rape. Garrett, *Substance*, 62 STAN. L. REV. at app. at 10. Kevin Richardson

described the victim and the clothes she was wearing, described the crime scene, and stated that the jogger was hit with a pipe. *Id.* Yusef Salaam gave “a detailed inculpatory statement in which he admitted using a pipe to beat the male jogger, as well as the female jogger, when she resisted one of his accomplices. Details of this statement were corroborated overwhelmingly by substantial physical evidence.” *People v. Salaam*, 187 A.D.2d 363, 590 N.Y.S.2d 195 (1st Dep’t 1992). Salaam also allegedly provided the information that the female jogger’s clothes were partially removed. Garrett, *Substance*, 62 STAN. L. REV. at app. at 13. Raymond Santana also described the victim and clothes she was wearing, and provided a description of the attack and his involvement in it. *Id.* at app. at 14.

Finally, Kharey Wise asserted that he was “told what facts to put into his written statements and [that] information was withheld from him and his family.” *McCray v. City of New York*, Nos. 03 CIV. 9685, 03 CIV. 9974, 03 CIV. 10080, 2007 U.S. Dist. LEXIS 90875 at *17-18 (S.D.N.Y. Dec. 11, 2007). Among the facts that Wise allegedly provided were a description of the victim’s clothes (colors), a description of the attack on the victim, and that the victim was gagged. Garrett, *Substance*, 62 STAN. L. REV. at app. at 17. Wise, along with McCray and Salaam, claimed that

the questioning was prolonged and coercive and it was exploitative of [their] youth and . . . lack of familiarity with the criminal justice system. Interrogators allegedly isolated, intimidated and manipulated [Wise, McCray and Salaam]; they were suggestive and deceitful, they made false promises to [Wise, McCray and Salaam] and they shaped the contents of [Wise, McCray and Salaam’s] statements before those statements were formally recorded. [Wise, McCray and Salaam] were sleep deprived. [Police officers] also manipulated [Wise, McCray and Salaam] and their family members, “turning the family members into interrogators.”

McCray, 2007 U.S. Dist. LEXIS 90875 at *18.

In early 2002, after nearly all of the teenagers had served their sentences,

convicted rapist and murderer Matias Reyes confessed that he and he alone had assaulted the Central Park jogger. Ryan Aff. at 17. “On May 8, 2002, the District Attorney’s Office was notified that Reyes’ DNA matched the DNA taken from the sock that had been found at the Central Park crime scene.” *Id.* at 18. Reyes’s knowledge of the crime was found to be consistent with the facts of the Central Park assault. *Id.* 18-19. In addition, no contemporaneous or prior connection could be made between Reyes and the boys convicted of the Central Park jogger assault. *Id.* at 19-21. The District Attorney’s Office, following a thorough reinvestigation, consented to the defendants’ motions to set aside the verdicts on all the charges of which they were convicted. *Id.* at 2.

6. Analysis of Profiles

Each of the New York exonerees profiled above was convicted in large part because of a confession given following a custodial interrogation. Moreover, each of the confessions, with the exception of Freddie Peacock’s, was bolstered considerably by the presence of critical, non-public facts which likely were not known to anyone other than the perpetrator(s) and the police. Perhaps most disturbingly, all of these false confessions withstood trial scrutiny followed by appellate and/or post-conviction scrutiny until DNA testing established the exoneree’s innocence. Garrett, *Substance* at 1060-61. In other words, all of these confessions were found to be “uncoerced” or “voluntary,” as the State now uses those terms on appeal, yet each of them led to wrongful convictions. This is not uncommon, nor are these problems limited to New York. *See also id.* at 1060 & n.48 (explaining that “DNA exonerations [are] only a subset of false confessions identified by researchers” and that “[o]ver the last two decades, scholars, social scientists, and writers have identified at least 250 cases in which they determined that people likely falsely confessed to crimes”); Fred E. Inbau, *et al.*, *Criminal Interrogation and Confessions*, 412 (4th ed. 2004) [hereinafter “Inbau”] (“In a review of 350

trials occurring during the twentieth century involving persons believed to have been innocent, 49 of those cases (14 percent) involved a possible false confession.”).

B. The Garrett Study

A recently published article in the Stanford Law Review, also cited above, surveyed forty cases around the country in which innocent defendants were convicted following a false confession. Garrett, *Substance*, at 1051. All of these defendants had been exonerated by DNA testing. In the cases examined, “innocent people not only falsely confessed, but they also offered surprisingly rich, detailed, and accurate information.” *Id.* at 1054. In at least 36 of the cases studied, the exoneree supposedly confessed to a series of specific details concerning how the crime occurred, including “inside information” that only the perpetrator could have known. *Id.* Often this fact was the primary cause of the exoneree’s conviction. *Id.* at 1057 (“The nonpublic facts contained in confession statements then became the centerpiece of the State’s case.”). Under the State’s theory on this appeal, none of these wrongfully convicted individuals could pursue a claim under Section 8-b.

All of the exonerees in the Garrett Study had waived their *Miranda* rights, and in every case in which an exoneree moved to suppress a confession, the court ruled that the confession was voluntary and admissible. *Id.* at 1058. Like Mr. Warney, none of the exonerees in the study had counsel at the time of their confessions. *Id.* Most were vulnerable juveniles or mentally disabled individuals, with 17 (or 43%) of the exonerees being mentally ill, mentally retarded or borderline mentally retarded. *Id.* at 1058, 1064. Most were subjected to long and sometimes highly aggressive—yet apparently lawful—interrogations. *Id.* at 1058. Eight of the exonerees reportedly made self-incriminating statements voluntarily to the authorities prior to interrogation. *Id.* at 1059-60.

Of particular note on this appeal, the vast majority of the confessions demonstrate

another reason why they cannot be considered uncoerced: police conduct contaminating the exonerees' confessions with detailed facts that purportedly could have come only from the true perpetrators. Of the 38 cases in which transcripts were obtained, 36, or 97%, involved confessions that reportedly included specific details about how the crime occurred. *Id.* at 1066. Whether this contamination was caused by police misconduct or mere police negligence, the facts could not have been "volunteered" by the exoneree in any of the cases for the very reason that inclusion of these facts supposedly made the confessions so incriminating: an innocent person who did not have access to non-public information could not have known these facts. For the purposes of Section 8-b, a confession should not be considered "uncoerced" where police misconduct has contaminated it by inserting incriminating, non-public facts that purportedly could have come only from the true perpetrator.

IV. The Mere Fact that a Confession Was Deemed "Voluntary" for Purposes of Admitting It at a Criminal Trial Does Not Mean that It Was "Uncoerced" So as to Bar Section 8-b Relief

As the above case studies demonstrate, the mere fact that a confession was deemed "voluntary," and therefore admissible at a criminal trial, does not mean that it was "uncoerced" such that it might preclude an exoneree from recovering under Section 8-b. For one thing, as the admission at trial of numerous false, contaminated confessions suggests, judicial findings of voluntariness are not always correct.⁷ The question whether a confession was voluntary is often based on a credibility contest between the suspect and the police officers who

⁷ This is all the more true given that courts, in evaluating whether a confession is voluntary, will ask whether the tactics used by the police are so coercive as to "raise the danger that it would induce a false confession," *People v. Green*, 73 A.D.3d 805, 900 N.Y.S.2d 397, 398 (2d Dep't 2010), or of such a nature that they "create a substantial risk that the defendant might falsely incriminate himself," *People v. Camacho*, 70 A.D.3d 1393, 1394, 894 N.Y.S.2d 680, 681 (2d Dep't 2010).

took the confession, and the officers are more likely to win.⁸ And even false confessions that are, perhaps, properly found voluntary by the trial court should not necessarily be understood to be uncoerced for the purposes of a Section 8-b claim. While a false confession *can* be uncoerced—such as when a defendant intentionally inculcates himself to protect someone else—the confessions described above were the product of lengthy interrogations in which the police employed a range of strategies to induce a confession. Garrett, *Substance* at 1063. Many were likely induced by this police pressure, such as what have been described as “stress compliant” confessions, in which the subject succumbs to the stress of the interrogation process. *Id.*⁹ According to the Garrett Study, “[p]ressures brought to bear on these exonerees ranged from threats combined with offers of leniency, to threats of physical force. Many described harrowing interrogations lasting many hours or days. Several described verbal or physical abuse.” *Id.* at 1064. As the leading manual on police interrogations notes, “the only true ‘voluntary’ confession is one that the suspect offers independent of any police questioning.” Inbau, at 413. Even the Supreme Court has acknowledged that “the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk” of constitutional violations. *Dickerson v. United States*, 530 U.S. 428, 435 (2000).

The presence of non-public facts in a false confession, at minimum, gives rise to an inference that the police were not simply passive recipients of the confession. Rather, it indicates that the police were, knowingly or not, actively involved in creating the false

⁸ See Steven A. Drizin and Melissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 638-39 (2004) (advocating for videotaping interrogations).

⁹ For more information on the reasons people falsely confess see generally Brief for *Amicus Curiae* The American Psychological Association in Support of Claimant; Richard J. Ofshe and Richard A. Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997); see also Inbau, at 411-16 (reviewing reasons for false confessions).

confession. Ultimately, police conduct that causes an innocent suspect to relay non-public incriminating facts as part of his confession so strongly demonstrates the influence of police on the confession that this Court should recognize it as coercive. Basic investigative training prohibits police officers from contaminating a confession by feeding or leaking crucial facts. As Garrett noted, “[f]eeding facts contaminates a confession because if the suspect is told how the crime happened, then the police cannot ever again properly test the suspect’s knowledge.” *Id.* at 1066. Contaminating a statement has another insidious impact: once a defendant has given a detailed confession, the police often stop their investigation, meaning that not only do they fail to investigate glaring inconsistencies that might appear in a confession, they also stop looking for the real perpetrator of the crime.

V. The Impact of the State’s Appellate Arguments on Exonerated Defendants

The State’s arguments on this appeal, if accepted, would disqualify all of the individuals profiled above from recovering under Section 8-b.¹⁰ An interpretation of Section 8-b under which a wrongfully convicted defendant may never recover if his own confession played a causal role in his conviction would undermine the legislature’s intent of providing compensation to innocent persons who were wrongfully convicted through no wrongdoing of their own. It would require a claimant to establish a form of “coercion” that is both based on an antiquated interpretation and inconsistent with what we know about why and how innocent persons falsely confess. A confession like Mr. Warney’s that was contaminated during custodial investigation cannot be considered uncoerced, even if it was “voluntary” in a constitutional sense.

For this reason, proponents of compensation statutes have urged that caution be

¹⁰ The State’s choice to settle Jeffrey Deskovic’s Section 8-b claim illustrates that a false confession does not necessarily render a person undeserving of compensation under Section 8-b and also demonstrates the arbitrariness of the position the State has staked out in this case.

taken in drafting or construing clauses like the one in the New York statute limiting relief to those innocent people who “did not by [their] own conduct cause or bring about [their] conviction.” Commission Report at 2929. *See, e.g.,* Bernhard, *When Justice Fails*, 6 U. CHI. L. SCH. ROUNDTABLE at 108-09 (“Statutes should be carefully drafted, however, so as not to preclude a claimant, who was coerced into falsely confessing or who entered an Alford plea, from filing a claim.”) (footnote omitted). For example, the New York City Bar, in proposing a model statute that, consistent with the New York statute, precludes recovery by someone who, *inter alia*, “falsely giv[es] an uncoerced confession of guilt,” *Undoing Time*, at 50, argues that “a coerced confession even if not *per se* unconstitutional or other self-incriminating events after the commission of the alleged crime should not disqualify a claimant,” *id.* at 16. The American Bar Association drafted its model compensation statute to provide that “[t]he claimant’s own misconduct should not have substantially contributed to the conviction. A false confession or guilty plea does not automatically bar recovery.” Am. Bar Ass’n Section of Criminal Justice, *Report to the House of Delegates*, 1 (2005), available at <http://www.abanet.org/crimjust/policy/my05108a.pdf>. Professor Adele Bernhard, who has written frequently about compensation statutes, goes further, stating:

[I]t no longer seems rational to consider all false confessions as misconduct, because multiple exonerations prove that innocent people falsely implicate themselves, despite gaining nothing for themselves in the process.

....

The mere existence of an inculpatory statement or a confession should never defeat a claim. Only an uncoerced false confession specifically intended to distort the truth-seeking function of the police investigation should prevent recovery. In determining whether a confession was the product of coercion, courts should presume all false confessions to be the product of coercion unless they can be shown otherwise by clear and convincing evidence. Moreover, the results of a pretrial ruling on the admissibility of the

confession should be irrelevant. The standard applied to determine admissibility at trial is whether the statement was “voluntarily made.” In determining voluntariness, coercive techniques are not necessarily determinative. As a result, although police interrogation techniques may create false confessions, they do not always render confessions “involuntary” as a matter of law or inadmissible at trial. Thus, in the end, veracity is not a factor in the determination of admissibility, and consequently, a pretrial ruling on admissibility should play no role in deciding whether to award compensation.

Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 718-21 (Summer 2004) (footnotes omitted). These views should inform the Court on the proper way to interpret Section 8-b, particularly since the clear intent of the legislature in enacting the statute was to provide compensation to exonerees without requiring them to show fault.

Just as significant, the State’s reading of the statute would impose all of these undue restrictions at the pleading stage of the case, before the exoneree even has the opportunity to investigate his claim through discovery from the state actors who, in fact, caused his wrongful conviction. If adopted, the State’s arguments would have a material, detrimental impact on a substantial percentage of potential claimants whom Section 8-b was meant to protect. The Court should reject the State’s arguments and prevent this unjust result.

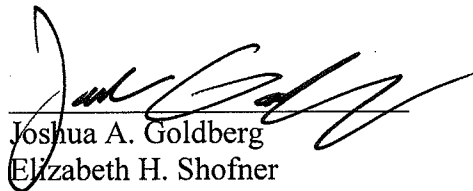
CONCLUSION

For the foregoing reasons, the Innocence Network urges that, at a minimum, the Court hold that a false confession is not an automatic bar to recovery under the Unjust Conviction Act, Court of Claims Act § 8-b, but rather that there must be some culpable conduct by the claimant underlying the confession before it can preclude recovery. Further, the

Innocence Network respectfully requests that Douglas Warney be given an opportunity to have a factual hearing to determine the merits of his claim.

Respectfully submitted,

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