No. 18-6258

IN THE SUPREME COURT
OF THE UNITED STATES

..... ♦ .....

STEVEN LAZAR,
Petitioner,
vs.

SUPERINTENDENT FAYETTE SCI *et al*
Respondent(s)

..... ♦ .....

REPLY TO RESPONSE IN OPPOSITION

..... ♦ .....

Steven Lazar, JN-2439
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CERTIFICATE OF COMPLIANCE

No. 18-6258

STEVEN LAZAR,
Petitioner

vs.

SUPERINTENDENT FAYETTE SCI *et al*,
Respondent(s)

As require by Supreme Court Rule 33.1(g), I certify that the reply contains 3, 012 words excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the forgoing is true and correct.

Executed on January 16, 2019.

_____
Steven Lazar

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MARK CAPOZZA, SUPERINTENDENT OF
SCI FAYETTE *et al*
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♦

REPLY TO RESPONSE IN OPPOSITION

♦

Introduction:

The Respondents' brief in opposition is, perhaps, the strongest proof petitioner can provide to show why certiorari should be granted. The question petitioner presented to this Court was whether the previous courts misconstrued the difference between a confession's voluntariness and its reliability as well their attached burdens of proof. In reply, the Respondents argue that "[m]atters of credibility and weight are for the jury and are not under consideration in habeas." (Brief in Opposition at pg. 11). This simply has no bearing whatsoever on the question at hand, but instead underscores the need for

clarity on the issue as petitioner highlights below.

A. Brief Factual Background of Legal Parameters

While suffering from acute methadone withdrawal symptoms petitioner was interrogated for over thirty hours by multiple homicide detectives. The interrogation was neither audio nor video recorded. After allegedly providing two confessions describing two different accounts of the crime, petitioner was rushed to a nearby hospital where he was treated for withdrawal symptoms and psychiatric problems. While at the hospital petitioner complained to emergency room personnel that his interrogators were mistreating and "taunting" him. At the time of his interrogation, petitioner was 22 years old, suffered from learning disabilities, and had a history of psychiatric disorders.

At a subsequent suppression hearing, petitioner attempted to argue that under the totality of circumstances, his confession was involuntary because it was given while petitioner was experiencing acute methadone withdrawal symptoms.[1] If unsuccessful, petitioner planned to argue to the jury that his

[1] It should be noted, included with the methadone withdrawal evidence, petitioner also planned to highlight his youth, educational difficulties, psychiatric history, the number of interrogators, and the duration of the interrogation.

confession was inaccurate, unreliable, and unworthy as proof beyond a reasonable doubt due to his dire condition. Petitioner hired an expert on methadone treatment to help effectuate these goals.

Unfortunately, petitioner's expert never testified and the suppression court and jury were never informed of the methadone withdrawal. Instead, the prosecution introduced records showing that petitioner had *stopped* taking his methadone one month prior to his interrogation, and therefore, could not have been suffering from withdrawal. Furthermore, despite petitioner's post-confession hospitalization, the interrogating officers told the jury that petitioner was medically and emotionally stable throughout the entire interrogation process. On collateral review, however, it was revealed that the methadone attendance records used at trial were incorrect. The correct records, uncovered by post-conviction counsel, showed that petitioner had actually been receiving his methadone up until the day prior to the interrogation.

In the state and federal court, petitioner raised a claim that his trial attorney was ineffective when he failed to secure the correct records from the methadone maintenance program where petitioner was a patient. Petitioner's claim included two prejudice components. One, in light of the new methadone withdrawal evidence there is a reasonable

probability that the suppression court and jury's determination of the confession's voluntariness would have been different. Second, the withdrawal evidence would have affected the jury's determination of the confession's *reliability* and its worthiness as proof beyond a reasonable doubt of guilt. (See Appendix "A" - issue as outlined in the initial post-conviction petition and on federal habeas).

The state courts, however, solely viewed the claim through the lens of whether the new withdrawal evidence would have affected the confession's voluntariness. The state post-conviction court, seemingly unaware of the difference between a confession's voluntariness and its weight as probative evidence at a trial, ignored the "reliability" facet of petitioner's claim:

> **THE COURT**: Here is the other thing and I just put this out there. Could you be going through withdrawal—he is trying to show that he is going through withdrawal, he is not going through withdrawal. Can you be going through withdrawal and still give a voluntary statement?. Under the totality of circumstances, yes. It depends on the totality. **So that is what the Court needs to look at**. (Closing comments by Philadelphia Court of Common Pleas

> Judge at the Post-Conviction hearing. (Emphasis added.) (See Appendix "B".))

On appeal, the Pennsylvania Superior Court reiterated these sentiments, but did not further expound on the reliability facet of petitioner's claim.[2]

B. Voluntariness and Reliability are Different Both in their Identity and Standards of Proof.

The Respondents correctly note that "[o]nce the suppression court and then the jury found the statement voluntary, it was up to the jury to decide whether it was worthy of belief, and how much weight to give it." (Brief in Opposition at pg. 13). However, what the Respondents fail to appreciate, or possibly comprehend, is that a confession's voluntariness and its reliability are entirely different inquiries, particularly in regards to their attached burdens of proof.

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[2] "The PCRA court preliminarily noted that a person could be experiencing opiate withdrawal and still give a voluntary statement. It viewed withdrawal as 'but one circumstance to consider in the totality-of-the-circumstances test' for determining whether a statement is voluntary." (See Pennsylvania Superior Court Opinion in *Commonwealth v. Lazar*, 2191 EDA 2013, at p. 13, attached as Appendix "C" and the Philadelphia Court of Common Pleas decision attached as appendix "D".)

The voluntariness test applied by the state courts in connection with petitioner's ineffective assistance of counsel claim is a markedly more demanding standard to meet than simply showing that the confession was unreliable evidence in light of petitioner suffering from methadone withdrawal during his interrogation.

Whether a confession is voluntary is determined by the totality of the circumstances. Some of these circumstances include "the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." *Withrow v. Williams*, 507 U.S. 680, 693 (U.S. 1992). However, "none of these various factors is to be considered in isolation, nor may the determination rest solely upon any one circumstance [.]" *United States v. Wertz*, 625 F.2d 1128, 1134 (4th Cir. 1980).

A confession is involuntary if the circumstances demonstrate that police coercion or overreaching has overborne the accused's will. *Dickerson v. United States*, 330 U.S. 428, 434 (U.S. 2000). However, a confession's reliability, unreliability, falsehood, or truthfulness has nothing to do with the determination of voluntariness. *Jackson v. Denno*, 378 U.S. 368, 376 (U.S. 1964).

At least two highly regarded federal jurists have acknowledged anxiety over their ability to affirmatively conclude whether a confession is voluntary or not. In *Johnson v. Trigg*, 28 F.3d 639, 641 (7th Cir. 1994), Chief Judge, Richard Posner, of the Seventh Circuit Court of Appeals stated "[w]e confess uncertainty about what it means to say a confession is coerced or (equivalently) involuntary." Likewise, former Chief Judge of the Ninth Circuit Court of Appeals, Alex Kozinski, stated that "[d]ifficulties of proof and subtleties of interrogation ... [make] it impossible in most cases for the judiciary to decide with confidence whether [a] defendant ... voluntarily confessed." *Doody v. Ryan*, 649 F.3d 986, 1024 (9th Cir. 2011)[3]

This Court has recognized that when an interrogator provides *Miranda* warnings and receives a wavier, it "has generally produced a virtual ticket of admissibility [.]" *Missouri v. Seibert*, 542 U.S. 600, 608-609 (U.S. 2004).[4] Put simply, it is much harder to

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[3] Judge Kozinski was paraphrasing from Justice Marshall's dissent in *New York v. Quarels*, 467 U.S. 649, 683 (U.S. 1984).

[4] Also see *Berkemer v. McCarty*, 468 U.S. 420, 433, n. 20 (U.S. 1984) "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare."; *Deweaver v. Runnels*, 556 F.3d 995, 1003 (9th Cir. 2009) ("[I]f interrogators obtained a confession after Miranda warnings and a valid wavier, the confession was likely voluntary."); *United States v. Dickerson*, 166 F.3d 667, 693 (4th Cir. 1999)("Federal courts rarely find

refute a confession's voluntariness than it is to merely challenge its unreliability. In fact, "very few incriminating statements, custodial or otherwise, are held to be involuntary [.]" *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990).

The question of whether a confession is reliable evidence worthy of proof of guilt beyond a reasonable doubt is an entirely separate inquiry from a voluntariness test. *Crane v. Kentucky*, 476 US 683, 688 (US 1986) (A confession's credibility and reliability as opposed to a voluntary test are separate inquiries.)

To make matters more confusing, a confession's voluntariness and its reliability are diametrically different in respect to the burden of proof that attaches to each. A prosecutor need only prove that a confession is voluntary by a preponderance of the evidence. *Lego v. Twomey*, 404 US 477, 485, 488 (US 1972). In comparison, at a trial, a prosecutor owns the onerous burden of proving beyond a reasonable doubt that the confession, along with any other evidence, proves the defendant is guilty. *In re Winship*, 397 US 358 (U.S. 1970). Add to this equation the overarching goals of the Fifth Amendment of protecting the fairness[5] of trials and assuring that trustworthy[6] evidence goes before triers

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confessions obtained in technical compliance with Miranda to be involuntary under the Fifth Amendment.").

[5] *Schneckloth v. Bustamonte*, 412 U.S. 218 (U.S. 1973).

[6] *Oregon v. Elstad*, 470 U.S. 298, 308 (U.S. 1985).

of facts, and it is understandable why jurists are issuing opposing opinions.[7]

In the case at hand, the state and federal courts evaluated the reliability facet of petitioner's claim under the voluntariness test. This resulted in a higher (and *erroneous*) burden being placed on petitioner with respect to his obligation to prove that there was a reasonable probability that but for counsel's errors the result of the "proceeding" would have been different. See *Strickland v. Washington*, 466 U.S. 668 (U.S. 1984).

It is important to note the instruction that was provided at petitioner's trial:

> Where voluntariness is an issue the prosecution has the burden of proving by a preponderance of the evidence, that is more than likely than not, that the statement was voluntary.
>
> .....
>
> In deciding whether the statement was voluntary you should put aside any opinion you may have regarding the

[7] Under Rule 10 (a) of this Court (Considerations Governing Review on Certiorari) this conflict would qualify as compelling reason for this Court to grant certiorari—"a United States court of appeals has entered a decision in conflict with the decision of another United Sates court of appeals on the same important matter."

> truthfulness of the statement. You should not let yourself be influenced by an opinion that the statement is true or that it is false. **N.T. 5/11, 19-20.**

Essentially, the states courts' misunderstanding resulted in the reliability facet of petitioner's claim being weighed against the above instruction which explicitly told the jury *not* to take into account the confession's reliability.

C. Conflict among the Judiciary

Some Courts have found that voluntariness and reliability share a unique kinship. On several occasions the District Court for the District of Columbia has found that a confession's falsity and unreliability are legitimate reasons for suppression. In *United States v. Karake*, 443 F.Supp.2d 8, 50-51 (D.D.C. 2006), the D.C. Court ruled that "[w]hile a confession obtained by means of torture may be excluded on due process grounds as inconsistent with the fundamental principles of liberty and justice which lie at the base of all American civil and political institutions, another legitimate reason to suppress it is the likelihood that the confession is untrue."

Again in 2010, that same Court in *Sabry Mohammad Ebrahim Al-Qurashi v. Obama*, 733 F.Supp.2d 69, 78 (D.D.C. 2010), opined that "[w]hen a criminal suspect is subject to a coercive

interrogation and then confesses or incriminates someone else, courts may properly exclude such exculpatory statements because of their probable unreliability, and the concomitant likelihood that the confession is untrue."[8]

The confessions in the above decisions were excluded on basis of their involuntariness rather than under the Federal Rules of Evidence governing relevancy. Significantly, these decisions relied on federal law as determined by this Court in *Brown v. Mississippi*, 297 U.S. 278, 286 (U.S. 1936), *Blackburn v. Alabama*, 361 U.S. 199, 207 (U.S. 1960), *Rogers v. Richmond*, 365 U.S 534 (U.S. 1961) *Jackson v. Denno*, 378 U.S. 368, 386 (U.S. 1964), and *Linkletter v. Walker*, 381 U.S. 618, 638 (U.S. 1965).

Other Courts, however, citing the identical decisions, have found that "United Supreme Court precedent on point not unequivocal." In *Dassey v. Dittman*, 877 F.3d 297, 317 (7th Cir. 2017), the Seventh Circuit Court of Appeals highlighted first that in *Blackburn v. Alabama*, *supra* this Court "considered the unreliability of the confession in determining whether a mentally ill defendant's confession was voluntary." Next, the *Dassey* Court observed that the High Court in *Jackson v. Denno*, *supra,* held that "the reliability of a confession has nothing to do with its voluntariness."

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[8] See also *Bostan v. Obama*, 674 F.Supp.2d 9, 30, D.D.C. 2009) (Same).

The *Dassey* Court then noted that in *Colorado v. Connelly*, 479 U.S. 157, 167 (U.S. 1986) this Court ruled that the question of a confession's reliability is distinct from that of its voluntariness. The inconsistent nature of these three separate, yet, controlling decisions compelled the *Dassey* Court to conclude that the law on this subject was not clearly established.

Conversely, that same Circuit, in an unabrogated decision, found the law concerning the subject to be clearly established. "[B]ecause involuntary confessions are 'to an unascertained extent' untrustworthy ... we consider the reliability of Conner's confession as a factor in the totality test." *Conner v. McBride*, 375 F.3d 643, 652 (7th Cir. 2004)[9] But see *Aliman v. Village of Hanover Park*, 662 F.3d 897, 906 (7th Cir. 2011), there Chief Judge, Richard Posner, stated in unequivocal terms that "[t]he question of coercion is separate from the question of reliability." However, just a decade prior to *Aliman*, the same jurist nonetheless, found that, "[o]ne possible definition of a confession inadmissible because coerced would be that it had been extracted in circumstances that cast serious doubt on its reliability." *Johnson*, *supra*, at 641.

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[9] *Conner* quotes an earlier Seventh Circuit decision in *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) stating that "[c]onfessions wrung out of their makers may be less reliable than voluntary confessions ...").

A similar contest exists in the other circuits as well. The First Circuit has stated that "[h]istorically the requirement that admissible confessions be 'voluntary' reflected a variety of values; these included deterring coercion, [and] assuring reliability of confessions [.]" *United States v. Boskic*, 545 F.3d 69, 78 (1st Cir. 2008). The Third Circuit is similar, "[t]he voluntariness standard is intended to ensure the reliability of incriminating statements and to deter improper police conduct." *Choi Chun Lam v. Kelchner*, 264 F.3d 256, 264 (3d. Cir. 2002).[10]

The Fourth Circuit, on the other hand, holds that "[a] determination of voluntariness is inadequate if the trial judge considers the truth or reliability of the confession in deciding whether or not it was freely made." *Doby v. South Carolina Dept. of Corr.*, 802 F.2d 718, 721 (4th Cir. 1986). Also see *United States v. McKithen*, 10 Fed. Appx. 217, 218 (4th Cir. 2001) (The truth of a confession is not a factor for a court to consider in determining whether it was voluntary.) Similarly, the Ninth Circuit holds that the voluntariness inquiry focuses not on the truth or falsity of a confession, but rather on the coercive nature of the interrogation. *United States v. Preston*, 751 F.3d 1008, 1017-18 (9th Cir. 2014).

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[10] Citing *Miller v. Fenton*, 474 U.S. 104, 110 (U.S. 1985); Lafave et al. 2 Criminal Procedure § 6.2(b), p. 444 (2d ed. West 1999).

Petitioner's point here is that there is clearly a conflict among the judiciary concerning the difference between confessional reliability and voluntariness. Petitioner's case would make for a perfect vehicle to clear up this discrepancy.

D. Why Now

The difference between voluntariness and reliability in the context of confessions has become muddled. The result is that the standards of proof for each are being conflated by appellate courts and perplexed jurists are issuing opinions that only exacerbate the problem. This Court should accept this case to articulate what is clearly established and to refresh the judiciary's understanding of voluntariness in comparison to reliability. Accepting this case will also provide an opportunity for this Court to explain if reliability, unreliability, truthfulness, or falsity are permissible factors to be considered within the totality of circumstances test.

The last time this Court expounded on the difference between a confession's voluntariness relative to its reliability was more than 30 years ago in *Colorado v. Connelly*, 479 U.S. 157 (U.S. 1986). Since then, much has changed. From a societal, medical, law enforcement, and jurisprudential standpoint, our understanding of confessions in 2018 is radically different from that of our understanding in 1986. According to the National Registry of Exonerations,

roughly half of the individuals who have been exonerated following murder convictions involving DNA made a false confession.[11] This is one of the reasons false confessions have been coined a phenomenon.

With the advent of DNA technology ushering the release of hundreds of innocent men and women from prison, the issue of the "false confession" has entered the arena of national concern. Where DNA science cannot be used to either tie a defendant to a crime or absolve him of guilt, the law governing the extraction and use of confessions takes on an even greater significance. In petitioner's case, the prosecution portrayed petitioner's confession as 'the crème d la crème' of prosecutorial proof. This Court now knows what petitioner's jury *did not:* that the prosecution's key evidence was not the product of a healthy person. Rather, it was the statement of a person suffering from mental and physical distress as the result of acute methadone withdrawal. Condoning this type of inhumane interrogation technique does a disservice to the entire system. To quote a distinguished jurist, "[w]hen courts bend over backwards to salvage evidence extracted by

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[11] The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (Click "Murder" in "Crime" field; click "Present" button in "False Confession" field; click "Present" button in the "DNA" field. See *Reeves v. SCI*, 897 F.3d 154, 172 (3d. Cir. 2018).

questionable methods, they encourage police to take such shortcuts rather than doing the arduous legwork required to obtained hard evidence."[12]

Conclusion

For the forgoing reasons, Petitioner requests that the writ for certiorari be granted.

Respectfully submitted,

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[12] *Sessoms v. Grounds*, 776 F.3d 615, 631 (9th Cir. 2014) (C.J. Alex Kozinski dissenting)

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PROOF OF SERVICE

I, Steven Lazar, do swear and declare that on this date of January 16, 2019, as required by the Supreme Court Rule 29 that I have served the enclosed REPLY TO RESPONSE IN OPPOSITON on each party to the above proceeding or that that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage, or delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

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Supreme Court of the United States
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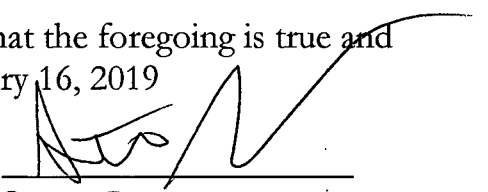
I declare under of perjury that the foregoing is true and correct. Executed on January 16, 2019



Steven Lazar