SJC to revisit erroneous conviction law

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Few consequences in the law are as troubling as the incarceration of a person for a crime he did not commit.

Traditional statutory and common-law remedies have failed to address the problem adequately, and so in 2004 the Legislature enacted G.L.c. 258D. The statute provides an avenue for erroneously convicted individuals to seek damages and other relief from the state, regardless of any official wrongdoing.

Over the past nine years, the Supreme Judicial Court has interpreted the statute twice. In a pair of cases decided on the same day in 2010, the court addressed the threshold question of when a claimant may be eligible to pursue relief. See *Drumgold v. Commonwealth*, 458 Mass. 367 (2010); *Guzman v. Commonwealth*, 458 Mass. 354 (2010).

In the underlying criminal cases, Shawn Drumgold's conviction for murder and Humberto Guzman's convictions for various drug offenses were reversed for similar reasons. Exculpatory evidence was omitted that would have undermined the credibility of key identification witnesses. See *Drumgold*, 458 Mass. at 372-375; *Guzman*, 458 Mass. at 362-365.

Because the missing evidence directly implicated whether Drumgold and Guzman committed the crimes, both men were eligible to obtain relief under Chapter 258D. See *Drumgold*, 458 Mass. at 378; *Guzman*, 458 Mass. at 365.

This court year, the SJC will revisit Chapter 258D's eligibility provision in the case of *Irwin v. Commonwealth* (SJC-11260). Unlike the convictions of Drumgold and Guzman, the conviction of John Irwin (for indecent assault and battery on a child under 14) was reversed not because exculpatory evidence was absent from his criminal trial but because purportedly inculpatory evidence was wrongly admitted. See *Commonwealth v. Irwin*, 72 Mass. App. Ct. 643, 651-656 (2008).

The commonwealth introduced evidence of Irwin's pre-arrest silence, ostensibly to show his consciousness of guilt. See *id*. at 648-654. But no foundation was established to suggest his silence was anything other than perfectly normal under the circumstances. See *id*. at 648-650, 656. His silence, therefore, proved nothing.

Is a plaintiff like Irwin eligible for relief under Chapter 258D when his conviction was reversed not because of undisclosed exculpatory evidence but because of false inculpatory evidence?

The SJC should say "yes."

The alleged crime

One July evening in 2003, Irwin was visiting the apartment of a friend, Virginia Griffin, her boyfriend and the couple's two young sons (Paul and Brian). Also visiting the apartment were a 6-year-old girl (the complainant), her brother and her mother.

As the evening progressed, the children fell asleep on the floor watching movies, and Irwin left the apartment. Griffin moved the complainant to a bed in the apartment's only bedroom while the complainant's mother and brother left the apartment for the night. Griffin and her boyfriend slept on the floor in the living room adjacent to the bedroom. In the morning, Irwin returned to the apartment; he had his own key.

What happened next was a matter of dispute at trial. According to the complainant, she awoke in the morning to find Irwin in her bed. Allegedly, at his suggestion she touched his penis. The complainant

then ran to Griffin and her boyfriend, and Griffin called the police.

Griffin and Irwin contradicted the complainant's story. According to Griffin, she awoke as soon as Irwin returned to the apartment in the morning. She saw him enter the bedroom briefly to retrieve something from a closet and then walk into the bathroom.

Irwin testified that he had returned to the apartment to get some money from a pocket in his jacket, which hung in the bedroom closet. Griffin began arguing with Irwin because he had not called before coming over. When Irwin refused to leave or to give Griffin back her apartment key, she called the police.

A responding officer removed Irwin from the apartment. That officer neither testified at trial nor, apparently, was he aware of the alleged incident involving the complainant.

Griffin testified that about two hours after Irwin had left, the complainant told her that "some strange guy" was in the bedroom and "wanted her to touch his Charlie." But Griffin saw no one in the bedroom. Believing the complainant's remarks "didn't make sense," Griffin said nothing to the complainant's mother. Griffin also denied calling the police in response to the complainant's story.

Another witness for the defense was the complainant's father. He said that during the afternoon following the alleged incident, the complainant told him that "Paul's father John made me touch his Charlie." Paul's father was Griffin's boyfriend, not Irwin.

Misuse of defendant's pre-arrest silence

A detective testified for the commonwealth that although Irwin had agreed to meet with him in September 2003, Irwin missed the interview. The detective further said that Irwin was not interviewed until January 2004, after several unsuccessful attempts to contact him, primarily by the detective's asking Griffin to tell Irwin to call him.

Building on its insinuation of Irwin's consciousness of guilt, the state, on cross-examination of Griffin, elicited that she had told Irwin about the allegations against him. And on cross-examination of Irwin, the prosecutor questioned why he had not spoken with the detective earlier than he did.

Finally, the prosecutor suggested in closing argument, yet again, that Irwin's delay in speaking with the police showed he was guilty.

Defendant's conviction reversed

The Appeals Court reversed Irwin's conviction on the ground that the commonwealth unfairly used his pre-arrest silence to attack his credibility and thus suggest his guilt. See *Irwin*, 72 Mass. App. Ct. at 655.

The commonwealth had no basis for using Irwin's delay in speaking with the police, "except in furtherance of the impermissible theory that [it] showed consciousness of guilt." *Id*. at 656.

Besides violating Irwin's privilege against self-incrimination, the state's error miscast Irwin's silence as evidence of guilt when in reality it was entirely innocuous for a person in his shoes. See *id*. at 648-654, citing, inter alia, *Commonwealth v. Nickerson*, 386 Mass. 54, 59-62 (1982).

Moreover, the commonwealth relied heavily on its improper tactic to obtain a conviction. See *id*. at 656. A previous trial, completed two days earlier, resulted in a hung jury. See *id*. For the second trial, the commonwealth focused more sharply on Irwin's delay in speaking with the police and made that delay a theme of its closing argument; no mention of Irwin's silence was made in closing argument in the first trial. See *id*.

Eligibility under Chapter 258D

Nothing in Chapter 258D limits eligibility for relief to claimants exonerated by exculpatory evidence. The test for eligibility is whether the claimant's conviction was reversed "on grounds which tend to establish [his] innocence." G.L.c. 258D, §1(B)(ii).

The statute places no categorical restriction on the type of "grounds" that can tend to show a claimant's innocence. In contrast, of the 29 jurisdictions that have statutes authorizing compensation

for wrongful convictions, three limit compensation to claimants exonerated by DNA evidence. The Massachusetts statute contains no comparable limit.

Of course, if a conviction were reversed solely because of a procedural or evidentiary error in admitting otherwise valid inculpatory evidence, the claimant would not be eligible. See *Guzman*, 458 Mass. at 358-359 & n.6.

For example, a drug certificate admitted in violation of a defendant's confrontation rights, while perhaps warranting a reversal of the conviction, would not alone indicate the evidence was something other than illegal drugs. See *id*. at 358 n.6.

But what if a claimant was convicted based on fabricated evidence of the sort that chemist Annie Dookhan is alleged to have manufactured? A person wrongfully convicted under those circumstances should not be deemed ineligible under G.L.c. 258D simply because his conviction was reversed due to false inculpatory evidence rather than omitted exculpatory evidence. True, the evidence of fabrication could itself be considered "exculpatory," but the more direct way to understand the error would be that the commonwealth's evidence used to convict the defendant was false.

Irwin's case, in principle, is no different. His pre-arrest silence lacked any probative value as consciousness of guilt evidence because it was totally commonplace. And yet the commonwealth passed it off as though it was incriminating.

Admittedly, there was no omitted exculpatory evidence of fabrication because the state did not literally fabricate Irwin's silence. But the state did manufacture an impermissible inference that Irwin's silence proved his guilt — silence that was not even admissible in the first place.

As in *Drumgold* and *Guzman*, the error in Irwin's criminal trial bore directly on whether he was misidentified as the perpetrator. See *Irwin*, 72 Mass. App. Ct. at 654-655. The commonwealth misrepresented Irwin's silence as consciousness of guilt to help prove that Irwin, rather than someone else, committed the alleged assault. Because the commonwealth's error implicated whether Irwin is innocent, he should be deemed eligible to obtain relief for his erroneous conviction.

Irwin's case presents an apt occasion for the SJC to expand on the analysis it outlined in *Drumgold* and *Guzman*. In doing so, the court should hold that a claimant can be eligible under G.L.c. 258D when his conviction was reversed because of false inculpatory evidence.

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