

SUPREME COURT OF PENNSYLVANIA

No. 12 EAP 2021

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

DANIEL J. DOUGHERTY,

Appellant.

**BRIEF OF *AMICUS CURIAE*
THE PENNSYLVANIA INNOCENCE PROJECT**

Appeal from the Judgment of the Superior Court of Pennsylvania dated November 23, 2020, No. 1377 EDA 2019, Affirming the April 8, 2019 Order of Sentence the Court of Common Pleas of Philadelphia County at No. CP-51-CR-0705371-1999

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INTEREST STATEMENT OF *AMICUS CURIAE*

Amicus curiae the Pennsylvania Innocence Project (the “Project”) is a nonprofit legal clinic and resource center with offices at Temple University’s Beasley School of Law and the Duquesne University School of Law. Its board of directors and advisory committee include, among others, practicing lawyers, law professors, former United States Attorneys, former state prosecutors, and wrongly-convicted individuals who have been exonerated. In collaboration with private counsel who serve *pro bono*, the Project provides investigative and legal services to indigent prisoners throughout the Commonwealth of Pennsylvania. These individuals have claims of actual innocence that are supported by the results of DNA testing or other powerful exculpatory evidence or have claims that, after a preliminary investigation, evince a substantial potential for discovery of such evidence. Additionally, the Project works to remedy the underlying causes of wrongful convictions to ensure that no one will be convicted and imprisoned for a crime he or she did not commit. The Project seeks to ensure that the innocent are not punished and that no wrongdoer will escape justice because an innocent person was convicted in his or her place.

This case is of particular importance to the Project because it illustrates a longstanding issue affecting wrongly-convicted individuals whose convictions have been overturned and who are facing retrial: whether the Commonwealth can

admit the defendant's prior testimony at retrial where that testimony was induced by a constitutional violation.

This issue is of particular importance to the Project as our clients are often granted relief due to the ineffective assistance of their trial counsel or other constitutional violations such as the suppression of exculpatory evidence. Those clients, and other defendants whose convictions are vacated due to constitutional violations in their original trials, have a fundamental right to litigate on a clean slate if they are retried, without the admission of prior testimony impelled by the constitutional violation.

The Project thus has a significant interest in the outcome of this litigation. The Project files its *amicus* brief to request that this Court extend the protections of *Harrison v. United States*, 392 U.S. 219 (1968), and *Commonwealth v. Mangini*, 425 A.2d 734 (Pa. 1981), to require the exclusion of prior testimony impelled by a constitutional violation, particularly by the ineffective assistance of counsel.

Amicus curiae respectfully submits this brief to the Court to address the public importance of this issue apart from and beyond the immediate interests of the parties to this case.

SUMMARY OF ARGUMENT

With increased attention being paid to the problem of wrongful convictions and the corresponding efforts to remedy this problem, such as the creation of Conviction Integrity Units, more and more convictions are being overturned due to constitutional defects. Defendants in these cases find themselves returned to a pre-trial status; many of them may be tried again, and many face difficult decisions regarding whether to risk trial or accept a plea deal. It is critical for this Court to clarify that, in that situation, defendants are not burdened with decisions made during their constitutionally-defective first trials, particularly the decision to testify. As a matter of fundamental fairness, this Court should protect defendants from the taint of their original trials by not allowing, at a retrial, the admission of prior testimony that stems from any violation of the defendant's constitutional rights.

ARGUMENT

The increasing number of convictions vacated due to constitutional defects, and thus the increasing number of potential retrials, requires this Court to clarify that defendants should not be burdened with decisions from their constitutionally-defective first trials.

In recent years, wrongful convictions have received increased attention, resulting in the creation and proliferation of innocence organizations like ours, as well as of Conviction Integrity Units (CIUs) based in prosecutors' offices. CIUs are designed to unearth wrongful convictions, and often discover constitutional

violations in the form of suppressed *Brady* material. There are currently 82 CIUs nationwide, including at least four in Pennsylvania—in Philadelphia County, Chester County, and Centre County, as well as in the Attorney General’s Office.¹

An active CIU has a noticeable effect on exonerations. For example, Philadelphia County established a Conviction Review Unit in 2014.² That Unit was responsible for 3 exonerations, which occurred in 2016 and 2017.³ In 2018, the number of exonerations was 2—in 2019, when the CIU became more active, the number skyrocketed to 13, and in 2020, it was 9.⁴ This mirrors the trend across the country. The rate of exonerations has been steadily increasing.⁵ In total, more

¹ See National Registry of Exonerations, Conviction Integrity Units, *available at* <https://www.law.umich.edu/special/exoneration/pages/conviction-integrity-units.aspx> (last visited May 2, 2021).

² Chris Palmer, *Justice on hold: To Philly DA’s Conviction Review Unit, no one is innocent*, THE PHILADELPHIA INQUIRER (Nov. 19, 2016), *available at* https://www.inquirer.com/philly/news/20161120_To_Philly_s_Conviction_Review_Unit_no_one_is_innocent.html (last visited May 4, 2021).

³ See Philadelphia District Attorney’s Office Public Data Dashboard, *available at* <https://data.philadao.com/Exonerations.html> (last visited May 4, 2021).

⁴ See National Registry of Exonerations, Exonerations by State, *available at* <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited May 2, 2021).

⁵ See National Registry of Exonerations, Exonerations by Year: DNA and Non-DNA, *available at* <https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> (last visited May 2, 2021).

than 2,779 people have been exonerated since 1989.⁶ In Pennsylvania, 97 people have been exonerated since 1989.⁷

However, not every person whose conviction is vacated due to a constitutional defect is actually exonerated—many face the very real possibility of a retrial, as the *Dougherty* case illustrates. The Project has represented two clients through retrial, one who is currently facing a retrial, and one whose case resolved at pre-trial motions. This experience is mirrored by the Innocence Network, whose members report a trend of innocent defendants facing retrials rather than having their charges dismissed after the conviction is overturned.

The current law allowing prior testimony to be used at a retrial, particularly in combination with related rules like the application of the law-of-the-case doctrine to pre-trial rulings, shapes not only the retrial but also defendants' decisions about whether to risk the retrial. Increasingly, prosecutors are offering plea deals that allow the defendant to avoid the risk of a retrial, but saddle them

⁶ See National Registry of Exonerations, *available at* <https://www.law.umich.edu/special/exoneration/pages/about.aspx> (last visited May 5, 2021).

⁷ See National Registry of Exonerations, Pennsylvania Search, *available at* <https://www.law.umich.edu/special/exoneration/pages/browse.aspx?view={b8342ae7-6520-4a32-8a06-4b326208baf8}&filterfield1=state&filtervalue1=pennsylvania> (last visited May 5, 2021).

with a conviction and often onerous parole conditions.⁸ These deals avoid the time and labor of a trial for the government, and allow the defendant to come home from prison. With the increase in popularity of the no-contest plea, these deals look more favorable to a wrongfully-convicted person facing retrial. However, the collateral consequences of a no-contest plea are no different from a guilty plea. At any stage in a prosecution, the government has asymmetrical power in plea bargaining;⁹ this is all the more true when a defendant facing retrial knows his prior testimony may be admitted.

This Court must therefore clarify the law regarding whether a defendant's prior testimony can be used at retrial where a constitutional defect impelled the testimony for two reasons: first, so that prosecutors have less leverage in trying to force pleas at this stage; and, second, so that defendants who exercise their constitutional right to a trial actually have the clean slate this Court has said a new trial is supposed to represent.¹⁰ Precedent from the United States Supreme Court,

⁸ See Megan Rose, *The Freedom Plea: How Prosecutors Deny Exonerations by Dangling the Prison Keys*, PROPUBLICA, September 7, 2018, available at <https://www.propublica.org/article/freedom-plea-prosecutors-deny-exonerations-dangling-prison-keys> (last visited May 2, 2021).

⁹ See, e.g., Dylan Walsh, *Why Criminal Courts Are So Dependent on Plea Bargaining: Side effects include inordinately powerful prosecutors and infrequent access to jury trials*, THE ATLANTIC (May 2, 2017), available at <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> (last visited May 4, 2021).

¹⁰ *Commonwealth v. Paddy*, 800 A.2d 294, 311 (Pa. 2002).

the Third Circuit, and this Court compel the conclusion that, where a constitutional defect induced a defendant's testimony, that testimony should be excluded from a retrial.

As the United States Supreme Court held in *Harrison v. United States*, testimony linked to a constitutional error is fruit of the poisonous tree.¹¹ The Third Circuit has applied this reasoning to hold that *any* constitutional violation that impels a defendant to testify is fruit of the poisonous tree, and therefore inadmissible.¹² In doing so, the Third Circuit highlighted both the importance of deterring all constitutional violations, as well as the difficulty in teasing apart motives for testifying, finding that *Harrison* “mandated what is essentially an exclusionary rule inquiry where there appears to be *a link* between a constitutional violation and a defendant's subsequent decision to testify.”¹³ Similarly, in *Commonwealth v. Mangini*, this Court recognized the fundamental unfairness of burdening a defendant with the constitutionally-ineffective performance of his prior counsel.¹⁴ While the Court declined to adopt a *per se* exclusionary rule, it emphasized that “the use in the present trial of the very testimony which has been

¹¹ *Harrison v. United States*, 392 U.S. 219, 222 (1968).

¹² *United States v. Pelullo*, 173 F.3d 131, 136 (3d Cir. 1999).

¹³ *Id.* (emphasis added).

¹⁴ *See Commonwealth v. Mangini*, 425 A.2d 734, 738 (Pa. 1981).

indelibly stamped with prior counsel's ineffectiveness is offensive to our sense of justice and the notion of fair play."¹⁵

This rule makes sense. All manner of constitutional violations can result in the overturning of an innocent person's conviction. And all manner of constitutional violations could cause a defendant to make the difficult decision to testify at trial. In *Pelullo*, it was withheld exculpatory evidence relating to his defense.¹⁶ In *Mangini*, it was the testimony of another witness, admitted through the inadequate performance of trial counsel.¹⁷ In this case, trial counsel's ineffective failure to prepare for, cross-examine, or refute with a defense expert, the Commonwealth's key witness, forced the defendant to testify. Once the Superior Court overturned his conviction due to counsel's ineffectiveness, Mr. Dougherty should have been free from the errors of prior counsel. Instead, he was saddled with his testimony from the constitutionally-deficient first trial through two more trials.

This Court has said that a retrial is supposed to "wipe[] the slate clean."¹⁸ Just this year, it has also emphasized that the "constitutionally protected right" of a

¹⁵ *Id.* at 738.

¹⁶ *Pelullo*, 173 F.3d at 140.

¹⁷ *Mangini*, 425 A.2d at 213.

¹⁸ *Paddy*, 800 A.2d at 311.

defendant to “present a complete defense” is central to the values of our adversarial system.¹⁹ That right is no less potent at retrial. The right to present a complete defense should include the right to make new strategy decisions on the clean slate of a retrial. Not only does the rule we suggest here make retrials fair if they occur, it also changes the calculus as to whether or not to accept a plea agreement. Saddled with prior testimony admitted because of a constitutional error, it might be wise to accept a plea deal to a crime you did not commit. Free from the mantle of the deficient first trial, defendants can more easily exercise their Sixth Amendment right to a jury trial.

Binding a defendant to the strategy choices of the original trial, particularly the repercussions of constitutionally-defective representation, destabilizes the rules of fundamental fairness and due process that are supposed to protect the accused.²⁰ While it is impossible, even with hindsight, to completely tease out the motives that underly a defendant’s critical decision to testify, what is clear is that the strategy, advice and guidance of counsel is crucial to that decision.²¹ Why then, should a defendant who was not effectively represented be forced to bear the consequences of his counsel’s deficient performance even after the court has

¹⁹ *Commonwealth v. Yale*, No. 9 MAP 2020, 2021 WL 1681026, at *14, 16 (Pa. Apr. 29, 2021); *see also Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006).

²⁰ *Holmes*, 547 U.S. at 324-25.

²¹ *Harrison*, 392 U.S. at 222; *Pelullo*, 173 F.3d at 136.

recognized the prejudice to the defendant of that performance? To do so is fundamentally unfair, and for that reason this Court should extend exclusionary protection to prior testimony by the defendant when that decision is linked to *any* constitutional violation. Such a holding would clearly bring Pennsylvania in line with the Third Circuit and protect the wrongly convicted facing retrial.

CONCLUSION

This Court should take action to remedy this longstanding problem and provide protection to defendants facing retrial where any constitutional violation impelled their decision to testify at the original trial. Under the current framework, the constitutional errors that plagued the original trial continue to taint the retrial. It is our experience, and the experience of the Innocence Network as a whole, that the advice, decisions, and action or inaction of ineffective trial counsel are inextricably linked to the decision to testify. Currently, that decision haunts a defendant even after a conviction has been overturned. Despite the clear importance of the exclusionary rule, the current scheme fails to protect the constitutional rights of defendants facing retrial and fails to dissuade the government from offering illegal evidence. This gives enormous power to the government in pressuring a defendant to take a plea rather than risk a retrial. The unfairness of the current rule is illustrated by the Project's and Innocence Network's experience, and the case currently before the Court.

The Project urges the Court to take advantage of the opportunity presented by this case to resolve this issue, ensuring that the wrongly convicted facing retrial actually have a clean slate from which to litigate free from the constitutional errors of their original trial. The Project proposes extending the protections of *Harrison* and *Mangini* to any constitutional violation that is linked to the decision to testify, mirroring the Third Circuit in *Pelullo*. This solution is fully within the Court's authority and would provide a workable procedure to protect a defendant's right not to be prejudiced by the constitutional errors of a first trial at retrial.

Dated: May 5, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Pa. R. App. P. 531(b)(3) and Pa. R. App. P. 2135(d), this is to certify that the foregoing Brief of *Amicus Curiae* the Pennsylvania Innocence Project complies with the word count limit set forth in Rule 531(b)(3). This Brief contains **2,287** words, excluding those sections exempted by Pa. R. App. P. 2135(b).

Dated: May 5, 2021

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document (Brief of *Amicus Curiae* the Pennsylvania Innocence Project) upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R. App. P. 121 and will within 7 days file paper copies with the Pennsylvania Supreme Court:

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