

IN THE SUPREME COURT OF PENNSYLVANIA
DOCKET NO. ___ EAL 2021

DONTE ROLLINS
Petitioner-Appellant,

v.

NINO V. TINARI
Respondent-Appellee,

Petition for Allowance of Appeal from the Order of the Superior Court, No. 1552 EDA 2020, dated May 20, 2021, affirming the Order dated July 29, 2020 by the Court of Common Pleas of Philadelphia County, Civil Division, Case ID No. 181202082, Granting Defendant's Motion for Judgment on the Pleadings

**BRIEF OF *AMICI CURIAE* THE INNOCENCE NETWORK AND THE
PENNSYLVANIA INNOCENCE PROJECT IN SUPPORT OF THE
PETITION FOR ALLOWANCE OF APPEAL OF
PETITIONER-APPELLANT DONTE ROLLINS**

**THE PENNSYLVANIA INNOCENCE
PROJECT**

Nilam A. Sanghvi (# 209989)
Temple University Beasley School of Law
1515 Market Street, Suite 300
Philadelphia, PA 191022

BONI, ZACK & SNYDER LLC

Michael J. Boni (# 52983)
Joshua D. Snyder (# 88657)
John E. Sindoni (# 91729)
Benjamin J. Eichel (# 307078)
15 St. Asaphs Road
Bala Cynwyd, PA 19004

**Counsel for *Amici Curiae* The Innocence Network &
The Pennsylvania Innocence Project**

TABLE OF CONTENTS

	Page
STATEMENT OF IDENTITY AND INTEREST OF <i>AMICI</i>	1
INTRODUCTION	2
REASONS FOR GRANTING LEAVE TO APPEAL	6
I. EXONERATED INDIVIDUALS SHOULD BE PERMITTED TO RECOVER LEGAL REMEDIES UNDER PENNSYLVANIA LAW AFTER EXONERATION	6
II. THE POLICY CONCERNS UNDERLYING <i>BAILEY</i> ARE BETTER ADDRESSED BY PRESERVING, RATHER THAN FORELOSING, POST-EXONERATION LEGAL REMEDIES	11
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
Cases	
<i>Adkins v. Dixon</i> , 482 S.E.2d 797 (Va. 1997)	10
<i>Bailey v. Tucker</i> , 621 A.2d 108 (Pa. 1993).....	<i>passim</i>
<i>Britt v. Legal Aid Soc’y, Inc.</i> , 741 N.E.2d 109 (N.Y. 2000)	9, 10
<i>Commonwealth v. Dancer</i> , 331 A.2d 435 (Pa. 1975).....	8
<i>Commonwealth v. Grant</i> , 813 A.2d 726 (Pa. 2002).....	8, 9
<i>Commonwealth v. Hubbard</i> , 372 A.2d 687 (Pa. 1977).....	8, 9
<i>Heck v. Humphrey</i> , 512 U.S. 477 (1994)	7, 8, 10
<i>Steele v. Kehoe</i> , 747 So. 2d 931 (Fla. 1999)	10
<i>Ulakovic v. Metropolitan Life Ins. Co.</i> , 16 A.2d 41 (Pa. 1940).....	13

STATEMENT OF IDENTITY AND INTEREST OF *AMICI*

Amici curiae are the Innocence Network (the “Network”) and the Pennsylvania Innocence Project (the “Project”).¹

The Network is an association of independent organizations dedicated to providing *pro bono* legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 67 current members of the Network represent hundreds of prisoners with innocence claims in 49 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Israel, Italy, the Netherlands, the United Kingdom, and Taiwan.² The Innocence Network and its members are also

¹ No person or entity other than *amici* and their counsel paid in whole or in part for the preparation of this brief. Nor did any person or entity other than *amici* and their counsel author this brief in whole or in part.

² Along with the Project, the member organizations for *amicus* brief purposes include the Actual Innocence Clinic at the University of Texas School of Law, After Innocence, Alaska Innocence Project, Arizona Justice Project, Boston College Innocence Program, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Duke Law Center for Criminal Justice and Professional Responsibility, Exoneration Project, George C. Cochran Innocence Project at the University of Mississippi School of Law, Georgia Innocence Project, Great North Innocence Project, Hawai’i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Indiana University McKinney Wrongful Conviction Clinic, Innocence Project, Innocence Project Argentina, Innocence Project at the University of Virginia School of Law, Innocence Project Brasil, Innocence Project London, Innocence Project New Orleans, Innocence Project of Florida, Innocence Project of Texas, Italy Innocence Project, Justicia Reinvidicada Puerto Rico Innocence Project, Korey Wise Innocence Project, Loyola Law School Project for the Innocent, Manchester Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwest Innocence Project, Montana Innocence Project, New England Innocence Project, New York Law School Post-Conviction Innocence Clinic, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Ohio Public Defender Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence

dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

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 includes, among others, practicing lawyers, law professors, former state and federal prosecutors, including a former United States Attorney and a former acting District Attorney of Philadelphia, and a wrongly-convicted individual who has 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

Project, Osgoode Hall Innocence Project, Rocky Mountain Innocence Center, Taiwan Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Arizona Innocence Project, University of Baltimore Innocence Project Clinic, University of Baltimore Innocence Project Clinic, University of British Columbia Innocence Project at the Allard School of Law, University of Miami Law Innocence Clinic, Wake Forest University School of Law Innocence and Justice Clinic, Washington Innocence Project, West Virginia Innocence Project, Wisconsin Innocence Project, and Witness to Innocence.

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 they 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. The Project also provides reentry services; all Pennsylvania exonerees are eligible.

Amici advocate for laws that adequately compensate innocent people for the harm experienced by wrongful convictions. This case is particularly important to *amici*, as they believe that society has an obligation to provide prompt and compassionate assistance to exonerated individuals, and that the failure to fairly compensate exonerated persons makes it more difficult for them to reenter society.

INTRODUCTION

While still a teenager, Petitioner-Plaintiff, Donte Rollins, was arrested, tried, and convicted for a crime he did not commit. Although he had no prior criminal record, Mr. Rollins was misidentified as the shooter of a six-year-old boy who was tragically paralyzed by gunfire.³ Mr. Rollins was sentenced to serve from 62.5 to 125 years in prison. From December 4, 2007, when the jury rendered its jury

³ Along with Michael Wiseman, the Project's attorneys served as co-counsel to Mr. Rollins in certain post-conviction proceedings.

verdict, until his case was *nolle prossed* on December 21, 2016, Mr. Rollins was behind bars: he was incarcerated for 9 years and 17 days. Mr. Rollins now seeks to obtain civil redress for the alleged negligence of his trial counsel. Yet Mr. Rollins is foreclosed on timeliness grounds, under the Superior Court's opinion applying this Court's precedent in *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993), because he filed his suit within two years of his exoneration rather than two years of the termination of his relationship with his trial counsel.

Amici respectfully submit that this Court should grant review to revisit its opinion in *Bailey* so that Pennsylvania law can appropriately take into account the extraordinary circumstances of exoneration in the professional liability context. While *amici* take no position on the merits of the underlying professional negligence claim, they urge that a straightforward procedure where professional negligence claims accrue upon exoneration would far better promote judicial economy while affording much needed redress to exonerated persons in Pennsylvania.

In urging the Court to grant review of this appeal, *amici* note two particularly important considerations impacting people in the position of Petitioner. First, unlike the vast majority of states, Pennsylvania does not have a statute or other established mechanism by which a falsely convicted and imprisoned

individual can receive compensation when they are exonerated and released.⁴ The plight of individuals in this situation is worsened in Pennsylvania by the presence of a practical bar to their bringing meritorious professional negligence claims once they have been exonerated.⁵ For this reason alone, the Court's formulation of a workable, equitable rule to govern the timeliness of malpractice claims brought against criminal defense counsel is strikingly important.

Second, in the decades since *Bailey*, the increased use of DNA testing, advances in forensic science, and the creation of innocence organizations, including the Network and the Project, as well as Conviction Integrity Units, have all brought into focus the sad and alarming fact that wrongful convictions occur with real frequency, including in Pennsylvania. The University of California Irvine Newkirk Center for Science & Society, the University of Michigan Law School and the Michigan State University College of Law jointly maintain a database of

⁴ The federal government, the District of Columbia, and 36 states have compensation statutes of some form, while Pennsylvania is among the 14 states that do not have compensation laws. *See* <https://innocenceproject.org/compensating-wrongly-convicted/> (last visited June 18, 2021).

⁵ In addition, exonerated individuals face numerous obstacles in seeking remedies under 42 U.S.C § 1983. This is especially the case for those individuals bringing claims based on ineffective assistance of counsel, as such acts do not constitute official misconduct that would be actionable under § 1983. Further, many other potential defendants, such as prosecutors, are afforded broad immunity, and plaintiffs face the hurdle of establishing a pattern or practice of constitutional violations.

such cases, known as the National Registry on Exonerations.⁶ A search of Pennsylvania cases in that database shows that 98 individuals have been exonerated from 1990 to date, and that in 36 of those cases an inadequate legal defense contributed to their wrongful convictions. If it grants review, the Court will be in a position to afford such individuals the opportunity to pursue remedies in Pennsylvania's civil justice system.

REASONS FOR GRANTING LEAVE TO APPEAL

I. EXONERATED INDIVIDUALS SHOULD BE PERMITTED TO RECOVER CIVIL LEGAL REMEDIES UNDER PENNSYLVANIA LAW AFTER EXONERATION.

In *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993), this Court announced the key standards that continue to govern legal malpractice actions against criminal defense attorneys in Pennsylvania. In defining the elements of such a claim, the Court emphasized that a favorable post-trial disposition of the criminal case is a necessary and mandatory element. *Id.* at 115. As to the issues of timeliness and the date upon which a claim accrues, *Bailey* explained that the statute of limitations period “commences at the time the harm is suffered or, if appropriate, at the time the alleged malpractice is discovered. In the context of a criminal malpractice

⁶ See <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited June 18, 2021).

action, the time when the harm is suffered will, in the typical case, be easily identifiable, i.e., the date of sentencing.” *Id.* at 115-16 (footnote omitted).

Further, as to “the date a defendant becomes aware that his counsel may have been responsible for the harm” this Court identified “[t]he appropriate starting point [as] the termination of the attorney-client relationship, since at that point the aggrieved defendant is aware of the injury (i.e., the conviction), and is on clear notice to investigate any alternate cause of that harm which he believes to exist.” *Id.* at 116. Thus, under *Bailey*, incarcerated individuals are required to file civil malpractice claims within two years of their sentencing and/or the termination of their relationships with their trial counsel. The statute of limitations thus frequently expires long before incarcerated individuals have any idea that they may eventually succeed in securing post-conviction relief action and be exonerated.

After *Bailey* was decided, the United States Supreme Court and this Court, among others, adopted rules governing analogous actions brought by defendants seeking post-conviction relief. A little more than a year later, in *Heck v. Humphrey*, 512 U.S. 477 (1994), where a state prisoner challenged the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983, the U.S. Supreme Court held:

In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C.] § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ... or called into question by a federal court's issuance of a writ of habeas corpus.

Id. at 486-87 (footnote omitted). Thus, the *Heck* Court, in addressing federal civil rights claims, held that a criminal defendant cannot prevail without first obtaining a favorable disposition of his criminal case. Unlike *Bailey*, however, *Heck* established a bright-line rule, and a straightforward procedural ordering: a cause of action for compensatory relief arising from an unconstitutional conviction *should begin to accrue only once the underlying conviction has been invalidated*. *Id.* at 489-90.

Bailey also arose during a different era in the relevant jurisprudence in the Commonwealth. Specifically, *Bailey* was decided when Pennsylvania's now-overturned precedent required that a convicted criminal defendant raise a claim of ineffectiveness at the time that the arguably ineffective lawyer was replaced. *See Commonwealth v. Hubbard*, 372 A.2d 687 (Pa. 1977); *see also Commonwealth v. Dancer*, 331 A.2d 435 (Pa. 1975). In *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), this Court announced a different, less stringent, and more practicable rule, reasoning:

In the twenty-five plus years since *Dancer* and *Hubbard*, we have learned that time is necessary for a petitioner to discover and fully develop claims related to trial counsel ineffectiveness. Deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel.

Accordingly, for the reasons stated herein, *we overrule Hubbard to the extent that it requires that trial counsel's ineffectiveness be raised at that time when a petitioner obtains new counsel or those claims will be deemed waived.*

Id. at 737-38 (emphasis added). Necessarily, these meaningful changes in the judge-made law were not before the Court at the time *Bailey* was decided.

Likewise, post-*Heck*, courts in other jurisdictions have recognized that actions brought to remedy alleged malpractice by criminal defense counsel should follow a sequential approach where malpractice or malicious prosecution claims accrue and therefore may only be brought after the conclusion of the underlying post-conviction proceedings. For example, the New York Court of Appeals has explained:

In order to open the door for even a colorable claim of innocence, criminal defendants must free themselves of the conviction, for the conviction precludes those potential plaintiffs from asserting innocence in a civil suit. Contrary to defendants' contentions, [plaintiff's] cause of action for legal malpractice against defendants could not have accrued on the date when he requested new counsel. Indeed, the cause of action could not accrue while plaintiff's conviction remained a jural fact. *Accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a*

complaint. Thus, we agree with plaintiff that his cause of action against defendants could not possibly have accrued until he was able to assert the element of his innocence.

Britt v. Legal Aid Soc’y, Inc., 741 N.E.2d 109, 112 (N.Y. 2000) (internal quotation marks and citations omitted) (emphasis added); *see also Steele v. Kehoe*, 747 So. 2d 931, 933 (Fla. 1999) (“we find that we should follow the majority rule and hold that a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action. We also *hold that the statute of limitations on the malpractice action has not commenced until the defendant has obtained final appellate or postconviction relief.*”) (emphasis added); *Adkins v. Dixon*, 482 S.E.2d 797, 801 (Va. 1997) (“the statute of limitations does not begin to run until termination of the post-conviction proceeding”).

This Court should grant review to address whether Pennsylvania should adopt a rule that parallels *Heck*, *Grant*, and other precedent, in order for an exonerated person’s malpractice claims to remain timely when they are first asserted after establishing innocence.

II. THE POLICY CONCERNS UNDERLYING *BAILEY* ARE BETTER ADDRESSED BY PRESERVING, RATHER THAN FORECLOSING, POST-EXONERATION LEGAL REMEDIES.

As reflected in the reasoning of the majority and concurring opinions, the *Bailey* Court recognized that finding the right balance between competing policy interests is especially challenging in the context of legal malpractice actions brought by criminal defendants. As they relate to individuals who have proven their innocence, those policy considerations strongly favor a procedural rule that does not require them to bring two actions at the same time: one to gain their freedom and another to recover damages.

First, the *Bailey* Court was concerned about frivolous malpractice actions giving rise to “increased insurance premiums for such practitioners” with such costs “passed on to the system at large, because there will be fewer attorneys to represent a greater number of clients.” *Id.* at 114. The rule the Court adopted, however, in fact provides an incentive for this type of filing, as *Bailey* effectively encourages the filing of malpractice actions as early as possible, although there may be little or no realistic prospect for obtaining relief from the underlying conviction. Indeed, under *Bailey*, conscientious practitioners are forced to advise their clients to pursue malpractice claims to preserve their rights, even when their post-conviction investigation is just beginning or the likelihood of success on an ineffectiveness claims is highly uncertain. As such, it all but invites non-

meritorious actions that give rise to elevated insurance costs for practitioners—the very thing *Bailey* aimed to prevent.

Although not adopted by the *Bailey* majority, a sequential approach, where claims accrue only upon obtaining relief from the underlying conviction, would conserve judicial resources. Unburdened by premature and unnecessary cases, courts could confine their efforts to adjudicating the relatively narrow, but highly significant, universe of cases that have resulted in a favorable disposition of the criminal case. Put differently, having exoneration serve as the trigger date furthers the goal of limiting filings in “our already overburdened judicial system by clogging the courts and judge’s dockets with legal malpractice claims that lack a key element of the claim, i.e., the finding of ineffectiveness.” *Id.* at 122 (Larsen, J., concurring and dissenting); *see also id.* (Papadakos, J., concurring) (“[T]ime will tell what mischief, if any, will be visited upon our courts by the premature filing of complaints by every defendant following sentencing and the change of lawyers....”).

Second, *Bailey*’s majority opinion suggests that filing a placeholder malpractice action, to be stayed until the conclusion of appellate or post-conviction proceedings, presents a workable procedural approach to preserving rights vis-à-vis the statute of limitations. *Id.* at 115 n.13 (Nix, C.J.). In practice, such an approach is highly problematic, not only for the innocent and typically still

incarcerated plaintiff, but also for non-negligent counsel, who must endure a lengthy wait for vindication while the threat of liability hangs over them. And while such a filing would put counsel on notice of a claim, they very likely would have received such notice already in connection with post-trial or post-conviction proceedings. In any event, because the claim would almost certainly remain stagnant for years, its filing would not serve many of the primary purposes of the statute of limitations. *See Ulakovic v. Metropolitan Life Ins. Co.*, 16 A.2d 41, 42-43 (Pa. 1940) (“It has always been the policy of the law to expedite litigation and not to encourage long delays.... Witnesses disappear or remove to distant parts and the entire aspect of the parties on both sides may change with the lapse of time”).

Innocent persons wrongfully convicted, many of whom lack financial resources or much ability (due to their incarceration) to investigate malpractice claims, are currently called upon to fight two extremely fraught battles at once—securing their freedom while also preserving their right to seek compensation. Some individuals may reasonably decide it is simply not possible to do both at the same time, and give up on an otherwise meritorious malpractice claim, particularly where pursuing one’s freedom is, with good reason, the prime concern. Pursuing a malpractice action before exoneration is rendered all the more formidable by the likely practical effects of bringing such a case. Criminal defense attorneys who have been sued by their former clients are unlikely to be willing to assist in

continuing an effort to regain their former client's liberty. Understandably, an individual who has been wrongfully convicted will be reluctant to "burn bridges" with their former counsel, who, although ineffective, may well still be called upon to cooperate during the course of a direct appeal or post-conviction proceedings, including, potentially, as a key fact witness.

Significantly, these policy considerations are not at all at odds with the goal of promoting judicial economy. Handling these matters sequentially, i.e., having malpractice claims accrue only when there is an exoneration, will serve to (1) reduce the incentive to file non-meritorious (or even frivolous) malpractice claims; (2) establish a bright-line test for timeliness; and, accordingly, (3) enable courts to focus their resources on only those claims that satisfy an exoneration requirement. Moreover, the potential availability of post-exoneration damages will further incentivize criminal defense attorneys to provide their most zealous representation at trial, thus benefitting—along with their clients—courts and prosecutors, insofar as they would need to grapple with fewer post-conviction ineffective assistance of counsel claims.

CONCLUSION

For all of these reasons, this Court's review is plainly warranted to address the critical issue of whether Pennsylvania should adopt a rule that provides that a professional negligence claim by a criminal defendant against their former defense counsel accrues only after the criminal defendant has been exonerated.

Dated: June 18, 2021

Respectfully submitted,

/s/Joshua D. Snyder

Michael J. Boni (# 52983)

Joshua D. Snyder (# 88657)

John E. Sindoni (# 91729)

Benjamin J. Eichel (# 307078)

BONI, ZACK & SNYDER LLC

15 St. Asaphs Road

Bala Cynwyd, PA 19004

THE PENNSYLVANIA INNOCENCE
PROJECT

Nilam A. Sanghvi (# 209989)

Temple University Beasley School of Law

1515 Market Street, Suite 300

Philadelphia, PA 191022

*Counsel for Amici Curiae The Innocence
Network & The Pennsylvania Innocence
Project*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the word count limitations of Pennsylvania Rule of Appellate Procedure 531(b)(3) because this brief has 3,319 words as calculated by the Word Count feature of Microsoft Word.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: June 18, 2021

/s/ Joshua D. Snyder
Joshua D. Snyder