

No. 23-2511

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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JOHN JUNIOR TAYLOR,

Petitioner–Appellant,

v.

SUPERINTENDENT DALLAS SCI, et al.,

Respondents–Appellees.

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On Appeal from a Final Judgment of the  
United States District Court for the Middle District of Pennsylvania  
Case No. 1:18-cv-910, Hon. Jennifer P. Wilson

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**BRIEF OF THE PENNSYLVANIA INNOCENCE PROJECT  
AND THE INNOCENCE NETWORK AS AMICI CURIAE SUPPORTING  
APPELLANT AND REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Amici are nonprofit organizations. They have no parent corporation, and no publicly held corporation owns any portion of them,

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## INTERESTS OF THE AMICI CURIAE<sup>1</sup>

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 state and federal prosecutors, and wrongly-convicted individuals who have been exonerated. Collaborating with *pro bono* private counsel, the Project provides investigative and legal services to indigent prisoners throughout 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 they did not commit. The Project seeks to prevent punishment of innocent people, and to prevent wrongdoers from escaping justice because an innocent person was convicted instead.

This case is of particular importance to the Project because, as explained below, our Commonwealth has a longstanding issue with ineffective assistance of counsel, including conflicted counsel, that drives wrongful convictions at a far higher rate than the national average. The Project has a significant interest in the outcome of this litigation, and in the proper development of habeas corpus case law in this forum.

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<sup>1</sup> *Amici* file this brief with the consent of the Parties. No Party has contributed money to this brief, and it has been prepared entirely by *Amici* and their counsel.

The Project files this *amicus* brief to request that the Court reverse with instructions for the District Court to issue the writ.

The Innocence Network (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 current president of the Innocence Network is Anna Vasquez of the Texas Innocence Project. The 69 current members of the Network represent hundreds of prisoners with innocence claims in 50 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.<sup>2</sup> The Innocence Network and its

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<sup>2</sup> The member organizations for the purposes of this amicus brief include 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; Connecticut Innocence Project/Post-Conviction Unit; Duke Center for Criminal Justice and Professional Responsibility; Exoneration Initiative; George C. Cochran Innocence Project at the University of Mississippi School of Law; Georgia Innocence Project; Hawai'i Innocence Project; Idaho Innocence Project; Illinois Innocence Project; Indiana University McKinney Wrongful Conviction Clinic; Innocence Delaware; Innocence Project; Innocence Project Argentina; Innocence Project at 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; 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 Project; Osgoode Hall Innocence Project; Proyecto Inocencia de Puerto Rico; Rocky Mountain Innocence Center; Taiwan Innocence Project; Thurgood Marshall School of Law Innocence Project; University of Arizona Innocence Project; University of British Columbia Innocence Project at the Allard School of Law; University of Miami Law Innocence

members are also 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.

## INTRODUCTION

Mr. Taylor and the PACDL *Amici* offer outcome-determinative legal arguments on why an actual conflict of interest fundamentally undermines representation so thoroughly that a habeas petitioner need not also establish prejudice under *Strickland*. Where an attorney represents both the jailhouse informant who serves as the main witness and the criminal defendant in the same case, an actual conflict exists that the attorney cannot cure by withdrawing his appearance from the informant witness's own case just seven days before the criminal defendant's trial. In the vast majority of such cases—perhaps all of them—the conflict has an adverse effect that virtually ensures ineffective assistance of counsel. The Commonwealth's appellate and PCRA courts' willingness to countenance such a conflict in this case falls short of what the Constitution requires, and the writ must issue.

*Amici* The Pennsylvania Innocence Project and The Innocence Network write separately, however, to provide important context for the legal issue presented to the Court here. One part of that context involves the effect of conflicted counsel on

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Clinic; Wake Forest University Law School Innocence and Justice Clinic; Washington Innocence Project; West Virginia Innocence Project; and Wisconsin Innocence Project.



criminal representation. While the legal issue at stake here involves the question of legal innocence, ineffective assistance of counsel in general and conflicted counsel in particular drive wrongful convictions of actually innocent people. In *Amici*'s considerable observation and experience, ineffective assistance of counsel contributes to a startling share of wrongful convictions nationally, and an even greater share of wrongful convictions in the Commonwealth of Pennsylvania. And while ineffective assistance takes numerous forms, defense counsel laboring under a clear, actual conflict of interest is not a merely academic question; numerous wrongful convictions across the country have been caused by exactly that. *Amici* offer several egregious examples of this problem to underscore the stakes of any opinion this Court writes in Mr. Taylor's case.

Relatedly, Mr. Taylor specifically stands as a potential example of exactly that type of wrongful conviction that stems from ineffective assistance on the part of conflicted counsel. Because of the legal issues on appeal and the fundamental unfairness occasioned by his trial counsel's actual conflict of interest, the Opening Brief does not delve deeply into the potential that Mr. Taylor is actually innocent of the offense of which Dauphin County convicted him. But that potential, as with many cases involving conflicted counsel, is high. Mr. Taylor's case bears many of the known hallmarks of a wrongful conviction. His conviction turned almost exclusively on the testimony of the prosecution's star informant witness, whom his counsel—who had long represented that witness and took business referrals from him—declined to thoroughly cross-examine. Beyond that testimony, virtually no evidence linked Mr. Taylor to the murder; forensic evidence did not support the prosecution's theory of

conviction; the other purported eyewitness failed to identify Mr. Taylor on two different occasions; police declined to investigate alternative suspects; and his counsel did not investigate (and therefore also did not present at trial) Mr. Taylor's alibi. Taken together, the ineffective assistance of counsel here, including his counsel's actual conflict of interest, may have resulted in Mr. Taylor's wrongful conviction. This Court should remain cognizant of the effect that counsel's conflict of interest had on the presentation of Mr. Taylor's defense, and should reverse with instructions for the District Court to issue the writ.

### **ARGUMENT**

#### **I. Ineffective assistance of counsel contributes to a substantial share of wrongful convictions, and conflicted counsel exemplifies such ineffective assistance.**

In *Amici*'s considerable experience, ineffective assistance of counsel contributes to a substantial share of all wrongful convictions—and data bear out that experience. Indeed, because of a variety of factors, the share of wrongful convictions driven by (or at least involving) clear ineffective assistance of counsel in Pennsylvania far exceeds the national average. While ineffective assistance of counsel can take many forms—as this Court, which hears numerous habeas appeals every year, surely knows—the type of ineffective assistance at issue in this case is particularly pernicious. Defense counsel with a clear, actual conflict of interest fundamentally undermines that counsel's entire representation, as this Court's sister Circuits have recognized and explained. *Amici* underscore this by offering several relevant examples from recent exonerations, which demonstrate the structural nature of the constitutional error

created by conflicted counsel. *Amici* provide this context to urge this Court to adopt the standard set out by Petitioner and the PACDL *amici*, and to reverse the District Court’s denial of the writ to Mr. Taylor in this case.

**A. Ineffective assistance of counsel contributes to a startling share of wrongful convictions, and Pennsylvania’s rate far exceeds the national average.**

This Court should consider the role that ineffective assistance of counsel plays in wrongful convictions. The National Registry of Exonerations, a national clearinghouse run by three national research universities and their law schools, has comprehensively tracked exonerations nationwide since 1989—as of this writing, 3,418 of them. *See* National Registry of Exonerations, About Us (last accessed Nov. 14, 2023).<sup>3</sup> The Registry not only tracks these exonerations, but categorizes them by type and feature—for example, factors that contributed to the wrongful conviction, the manner of exoneration, or the presence or absence of DNA evidence, among other things. And through that tracking, the Registry’s data demonstrate that roughly 27% of those exonerations—929 of 3,418—have involved ineffective assistance of counsel. *See* National Registry of Exonerations, Search Tool (last accessed Nov. 14, 2023).<sup>4</sup> While that high national rate should concern anyone, Pennsylvania’s rate,

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<sup>3</sup> *Available at:*

<https://www.law.umich.edu/special/exoneration/Pages/mission.aspx>.

<sup>4</sup> *Available at:*

<https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7bFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7d&FilterField1=ILD&FilterValue1=8%5FILD>.

This link pre-filters the full registry for “Inadequate Legal Defense,” abbreviated “ILD” in the last column and a reasonable proxy for ineffective assistance of counsel.

alarmingly, far outpaces it. In the Commonwealth, more than 40% of all exonerations in the Registry involve ineffective assistance of counsel. *See id.*<sup>5</sup> This could owe to, among other things, the Commonwealth being the only state in the country not to fund indigent public defense at the state level, which leads different counties to fund public defense at widely divergent rates and results in defense that varies in quality by location of prosecution. *See* Christopher Welsh, *Pennsylvania is the only state that doesn't fund public defenders. That needs to change.*, *The Philadelphia Inquirer* (Oct. 11, 2021).<sup>6</sup> But regardless of the reason, ineffective assistance of counsel directly contributes to wrongful convictions, and in few places as readily as in Pennsylvania.

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<sup>5</sup> This number can be calculated by dividing the total number of Pennsylvania exonerations, 120, *see* <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ST&FilterValue1=PA;> by the number of Pennsylvania exonerations tagged as involving ILD, 49, *see* <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=ILD&FilterValue1=8%5FILD&FilterField2=ST&FilterValue2=PA.>

These links pre-filter for those searches. 49 divided by 120 is 40.83%.

<sup>6</sup> *Available at:* <https://www.inquirer.com/opinion/commentary/public-defenders-funding-pennsylvania-20211011.html>.

This problem has persisted for years, despite long-standing calls to change how Pennsylvania funds indigent defense. *See, e.g.*, A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania, Report of the Task Force and Advisory Committee on Services to Indigent Criminal Defendants, at 11 (Dec. 2011) (“Recommendation 7, Funding: Funding for the agency should be provided primarily by the Commonwealth from the general fund”), *available at:* <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-265-indigent%20defense.pdf>.

**B. As numerous courts have recognized, conflicted counsel is a stark example of ineffective assistance.**

While ineffective assistance of counsel takes many forms, directly conflicted counsel is perhaps the starkest example of it. Several of this Court’s sister Circuits have long recognized that the conflict at issue here—trial counsel Gutkin simultaneously representing both Mr. Taylor and, until just seven days before trial, the jailhouse informant witness who served as the lynchpin of the entire prosecution case—can violate a criminal defendant’s right to effective counsel. This makes sense: “The problem that arises when one attorney represents both the defendant and the prosecution witness is that the attorney may have privileged information obtained from the witness that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client.” *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir. 1980) (reversing district court determination that the petitioner had not been denied effective assistance of counsel). In such situations, “counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information.” *Id.* (quoting *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975)).<sup>7</sup> That overcompensation and failure to cross-examine fully is exactly what happened here.

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<sup>7</sup> In a related context, the Second Circuit has held that a conflict of interest that prevents an attorney from aggressively cross-examining a witness can amount to ineffective assistance that might dictate a habeas grant. *See Lace v. United States*, 736 F.2d 48, 49 (2d Cir. 1984) (per curiam) (involving actual conflict where defense attorney’s brother was a prosecution witness, and rejecting the district court’s formalistic conclusion that such a conflict did not matter because there had not been “been any indication to the court that Clifford Steele represented his brother Wayne in an attorney and client relationship”).

As Mr. Taylor notes, a lawyer does not cure that conflict by dropping one client shortly before the other client’s trial. The danger that a counsel’s actual conflict will undermine representation “is certainly no less true during the pretrial phase.” *United States v. Sheperd*, 27 F.4th 1075, 1080 (5th Cir. 2022). The pretrial phase matters not only because of preparations for trial itself but because, as the Fifth Circuit observed, to hinge the right to effective, conflict-free counsel on a trial occurring would eviscerate the right because the overwhelming majority of cases resolve by plea. *Id.*; see also *Dennis v. Sec’y, Pa. Dep’t of Corr.*, 834 F.3d 263, 322 (3d Cir. 2016) (en banc) (quoting *United States v. Wade*, 388 U.S. 218, 236-37 (1967), and characterizing pretrial process as “a critical stage” of prosecution). And in such cases, because of the typical effect of actual conflicts, Courts do not require *Strickland* prejudice—generally it takes something less, such as, in a case involving “related representation,” merely that “the prior representation of the witness [] was relevant to petitioner's later case.” *Freund v. Butterworth*, 165 F.3d 839, 859 (11th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 817 (1999); see also *United States v. Williams*, 902 F.3d 1328, 1332 (11th Cir. 2018) (requiring only an “adverse effect” from defense counsel’s representation of a prosecution witness, and noting that a petitioner could demonstrate such an effect merely by showing a “plausible alternative defense strategy or tactic that might have been pursued”).

Besides those Circuits, numerous other courts have recognized the constitutional violation inherent to conflicted counsel. District Courts in the Seventh Circuit, for example, have applied *Ross* to issue writs of habeas corpus when an attorney has represented both a defendant and a witness at the same criminal trial. See, e.g.,

*Cowell v. Duckworth*, 512 F.Supp. 371, 375 (N.D. Ind. 1981) (noting that “Cowell’s lawyer had an actual conflict of interest between his representation of the accused and two of the prosecution witnesses” and subsequently “refus[ing] to indulge in nice calculations as to the amount of prejudice attributable to the conflict”). Other district courts have similarly granted writs of habeas corpus where a defense attorney has an actual conflict involving a prosecution witness. As the Eastern District of New York explained in granting one such petition, “[i]t takes no great imagination to detect the potential dangers that faced the petitioner by being defended by an attorney who was also representing an important prosecution witness.” *United States v. LaVallee*, 282 F.Supp. 968, 971 (E.D.N.Y. 1968). The Massachusetts Supreme Court has similarly explained why, “during cross-examination” of a witness by a lawyer who represents both the witness and the defendant, the attorney “will confront a genuine conflict of interest” and thus, such a conflict will result in “successful petitions for habeas corpus.” *Commonwealth v. Goldman*, 480 N.E.2d 1023, 1032 (Mass. 1985) (collecting cases).

**C. *Amici* regularly encounter tragic wrongful convictions involving conflicted counsel.**

Direct conflicts of interest violate the Sixth Amendment’s right to counsel, and as *Amici* member organizations regularly see, those conflicts lead to wrongful convictions. Often these situations of conflicted counsel owe to attorneys failing to adhere to the rules of professional conduct. But professional rules do not set out the Constitutional standard; as described below, these cases sometimes involve conduct allowed under then-existing rules or induced by judges at criminal trials—

underscoring the importance of independently assessing these petitions against the relevant Constitutional requirement for effective assistance. *Amici* can share several tragic examples of exonerations in cases involving actual conflicts that date back decades, in cases that include but are not limited to:

**Doris Green**, exonerated in the state of Washington in 1999. Ms. Green's case implicated a since-amended rule of professional conduct that allowed indigent defense counsel appointed on a flat-fee basis to withdraw because of an actual conflict, but to sub-contract representation to another attorney while maintaining financial power (and an incentive to limit costs). Ms. Green's sub-contracted attorney, in service of an attorney with an actual conflict, limited his hours and merely tried to induce her to plead guilty. Ms. Green was sentenced to more than 23 years in prison and served four and a half years before being exonerated. *See* The National Registry of Exonerations, Doris Green (last accessed Nov. 14, 2023);<sup>8</sup> *see also* Jacqueline McMurtie, *Unconscionable Contracting for Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed Fee Contracts*, 39 U. MICH. J. OF L. REFORM, 773, 794-95 (2006).

**Anthony DiPippo**, exonerated in the state of New York in 1997, served nearly 20 years of a 25-to-life sentence for a rape and murder he did not commit. Mr. DiPippo's trial counsel had also represented another possible suspect for the rape, whose car a witness had reported seeing the victim get into at 4pm on the day she was last seen. Counsel neither investigated that possible lead nor presented any evidence that might have implicated his other client as the actual killer. Mr. DiPippo's conflicted counsel's other client later admitted to having killed the victim. *See* The National Registry of Exonerations, Anthony DiPippo (last accessed Nov. 14, 2023).<sup>9</sup>

**Glenn Davis, Jr., Larry Delmore, and Terrence Meyers** were all exonerated in Louisiana in 2010 after prosecutors convicted them of murder in 1993. They were all represented by the same defense attorney, whom Innocence Project investigators later discovered had also advised an alternate suspect—a man who drove a car that matched

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<sup>8</sup> *Available at:*

<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3860>.

<sup>9</sup> *Available at:*

<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5011>.



the description of the car seen driving away from the murder, and, more to the point, later told several people that he was the killer. *See* The National Registry of Exonerations, Glenn Davis, Jr. (last accessed Nov. 14, 2023).<sup>10</sup>

**Randy McEntire**, who won a motion for a new trial in 2018. One week before McEntire's trial, the State disclosed the identity of the confidential informant upon whom much of its case relied. After finally learning the identity of the informant, Mr. McEntire's public defender discovered that his direct supervisor represented the confidential informant in a different criminal case—one where the government had stayed proceedings in contemplation of dismissing charges, possibly because of his cooperation. Mr. McEntire's counsel moved three times to withdraw because of the obvious conflict of interest, but the court denied those motions—which was later held to be an abuse of discretion entitling Mr. McEntire to a new trial with conflict-free counsel. *State v. McEntire*, 551 S.W.3d 481, 483-84 (Mo. Ct. App. 2018).

*Amici* continue to litigate this issue in other cases, too. Artis Whitehead, who is represented by Network member organization the Tennessee Innocence Project, is currently serving a 249-year sentence imposed in 2004. Mr. Whitehead's criminal defense attorney failed to investigate or press the confidential informant who purported to break open a cold case, because his law partner represented the informant in seeking to reduce his own sentence for a different crime in exchange for the tip in Whitehead's case. Incredibly, Mr. Whitehead also had counsel with an actual conflict of interest at the appellate level: an entirely new defense team contracted with an attorney who simultaneously prepared Mr. Whitehead's direct appeal brief and also represented the confidential informant for the purposes of his appeal. *See* Lucas Finton, *Beale Street robbery: After 20 years, attorneys say man*

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<sup>10</sup> *Available at:*  
<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3158>.

*wrongly convicted could be released*, Memphis Commercial Appeal (Sept. 11, 2023);<sup>11</sup> *see also* Lucas Finton, *Shelby County DA will not stand in way of 2002 Beale Street robbery case getting new trial*, Memphis Commercial Appeal (Sept. 28, 2023) (explaining District Attorney’s acquiescence to the post-conviction petition because of the flawed case “and the fact that trial counsel had an actual conflict of interest”).<sup>12</sup> Mr. Whitehead has consistently maintained his innocence since the very outset.

Ultimately, these wrongful convictions demonstrate that even factually innocent criminal defendants often cannot overcome the Constitutional violation imposed by conflicted counsel. Conflicted counsel so fundamentally undermines a defense case that this Court should not countenance it. An actual conflict of interest that prevents a criminal defense attorney from diligently and zealously representing their client—investigating other potential suspects, cross-examining informants about motivation and sentence reductions, aggressively presenting alternate theories, and maintaining their own authority as to representation strategy—fundamentally undermines the Sixth Amendment right to effective assistance of counsel. Holding otherwise would insulate numerous wrongful convictions that result from conflicted counsel. This Court should adopt the standard set out by Mr. Taylor, on the way to reversing and remanding with instructions to issue the writ.

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<sup>11</sup> *Available at:*

<https://www.commercialappeal.com/story/news/crime/2023/09/11/artis-whitehead-memphis-may-be-exonerated-decades-after-b-b-kings-robbery-2002-conviction/70773847007/>.

<sup>12</sup> *Available at:*

<https://www.commercialappeal.com/story/news/local/2023/09/28/shelby-co-district-attorney-man-convicted-of-2002-beale-street-bb-kings-robbery-should-get-new-trial/70899852007/>.

**II. Although he need not demonstrate actual innocence to prevail on this appeal because of the structural error, Mr. Taylor's case is particularly troubling because it bears the hallmarks of a wrongful conviction.**

Because Mr. Taylor has clearly demonstrated an actual conflict of interest that adversely affected his representation, he need not demonstrate prejudice under the *Strickland* standard to prevail in this appeal. Accordingly, Mr. Taylor did not brief his innocence claim in this forum. But as important contextual information for this appeal, *Amici* explain why Mr. Taylor is not only legally innocent but potentially factually innocent as well. In that respect he may well be like many of the people described in Section I.c., whose conflicted counsel so undermined their criminal representation that it led directly to wrongful convictions.

As Mr. Taylor explained in his Opening Brief, the underlying offense at issue here is a murder that happened in September 2005. Antoine Baldwin was shot while standing and talking to two other men, and the two shots that killed him came from a nearby alley. *See* JA 132, 187, 198, 260, 405. No witnesses could identify the shooters, JA 219, 280-81, and if anything, Mr. Taylor himself initially thought that Mr. Baldwin, a friend as close as a brother, JA 335, had been mistakenly killed by someone intending to target him. JA 353. Police repeatedly interviewed Mr. Taylor, and only detained him after one of the witnesses finally picked him out of a photo array on the third, police-influenced, attempt. JA 270. From there, the bulk of the prosecution case stemmed from a confidential informant who met Mr. Taylor at the Dauphin County Prison where each was detained pre-trial. JA 529-30.

Mr. Taylor has well explained the actual conflict on the part of his criminal defense attorney: his attorney had a longstanding, multi-faceted relationship with the confidential informant who became the crux of the Commonwealth's case. *See* JA 495, 497, 542-44, 546, 648, 719, 721, 723, 726, 731-32, 731-32, 754 (establishing prior attorney-client relationship, personal relationship, and business relationship). The confidential informant regularly referred potential clients to the attorney, JA 543, 723, and indeed, he even referred *Mr. Taylor* to this attorney for criminal representation. JA 56, 543, 734. Once Mr. Taylor retained the attorney, the attorney also continued to represent the confidential informant, including in a case in which the informant hoped his work in Mr. Taylor's case would reduce his potential sentence. *See* JA 720-24. At trial, the confidential informant's testimony about Mr. Taylor's purported confession made up the bulk of the prosecution's case. *See* JA 722. And, because of the actual conflict, Mr. Taylor's attorney did not aggressively question the confidential informant, and in fact, explained to the jury that he could not do so. *E.g.* JA 542-43.

In addition to the actual conflict, Mr. Taylor's case bears several hallmarks of a wrongful conviction. As an initial matter, even without the involvement of conflicted counsel, jailhouse informant testimony is notably unreliable and present in many cases of wrongful conviction. *See* National Registry of Exonerations, Search Tool (last accessed Nov. 16, 2023) (documenting 238 exonerations in cases that involved

jailhouse informants).<sup>13</sup> Many wrongful convictions also include a lack of physical evidence. Moreover, Mr. Taylor's trial counsel seemingly failed to investigate other obvious suspects and Mr. Taylor's alibi. *See* JA 682, 686, 802. Some of that evidence that trial counsel failed to adequately investigate or present at trial includes information from one eyewitness who saw two armed men run away from the scene of the crime. *See* JA 690 (describing incorrect assertion police had no other suspects). Defense counsel did not investigate the discrepancy between what eyewitnesses said and the prosecution theory of the case. Trial counsel also failed to investigate and adequately present Mr. Taylor's alibi: on the evening of the shooting, Mr. Taylor had been at a friend's house, and then several different bars, *see* JA 256—including one at which Mr. Taylor had been seen by and engaged in conversations. Mr. Taylor's conflicted counsel neither sought out nor presented any of this evidence—possible alternate suspects, or witnesses or other evidence to substantiate Mr. Taylor's alibi—at trial.

The case also includes another important hallmark of wrongful convictions, faulty eyewitness identification procedures: The detective who interviewed Mr. Taylor repeatedly (and induced him to modify his story), and who induced an eyewitness to change his identification to Mr. Taylor during the third attempt, has coerced witnesses in other criminal cases originating in Harrisburg. *See, e.g., Johnson v. Mechling*, 446 F.App'x 531 (3d Cir. 2011) (reversing with instructions to grant writ of

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<sup>13</sup> *Available at:*

<https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=JI>

habeas corpus in case involving Officer Duffin coercing witness); Matt Miller, *Witness recants testimony in Harrisburg taxi driver's 2000 slaying*, PENN LIVE (Aug. 30, 2013) (describing coercion by Officer Duffin).<sup>14</sup> The potential for a wrongful conviction due to a jailhouse informant, ineffective counsel, and coercive eyewitness ID procedures is elevated in a case like this where there was no physical evidence tying Mr. Taylor to the crime.

Again—Mr. Taylor need not convince this Court of his actual innocence to prevail on this appeal. But *Amici* provide this context for two reasons. First, to underscore how actually conflicted counsel can fatally undermine representation; and second, to highlight the hallmarks of wrongful convictions present in Mr. Taylor's case— lack of physical evidence, witness coercion, and ineffective assistance across both pretrial and trial phases of the case. Mr. Taylor's conflicted counsel's deficient performance contributes to the potential that he has been wrongly convicted, and this Court should not hesitate to reverse on the legal issue in no small part because of the real possibility that his underlying conviction is not merely legally deficient, but factually infirm, as well.

## CONCLUSION

The judgment of the District Court should be reversed, and this Court should remand with instructions for the District Court to issue the writ of habeas corpus.

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<sup>14</sup> *Available at:*  
[https://www.pennlive.com/midstate/2013/08/witness\\_recants\\_testimony\\_in\\_h.html](https://www.pennlive.com/midstate/2013/08/witness_recants_testimony_in_h.html).

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Nov. 22, 2023

### **CERTIFICATE OF COMPLIANCE**

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 4,583 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.66.1, set in Century Schoolbook 12-point type.

/s/ Jim Davy

Jim Davy



**CERTIFICATE OF SERVICE**

I certify that on Nov. 22, 2023, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

I further certify that, within the required time, I will file 7 paper copies of this brief with the Clerk of Court.

/s/ Jim Davy

Jim Davy