

IN THE SUPERIOR COURT OF PENNSYLVANIA

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No. 212 EDA 2017

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COMMONWEALTH OF PENNSYLVANIA,

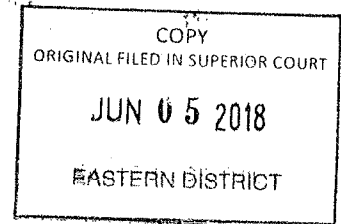
Appellee

v.

RUSTY LEE BRENSINGER,

Appellant

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On Appeal from the December 23, 2016, Order of the Lehigh County Court of  
Common Pleas, Case No. CP-39-CR-3251-1997

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**BRIEF FOR *AMICI CURIAE*,  
LAW PROFESSORS, DIRECTORS OF LEGAL SERVICES  
ORGANIZATIONS, AND PRO BONO DIRECTORS AND PARTNERS AT  
PRIVATE LAW FIRMS IN THE COMMONWEALTH OF  
PENNSYLVANIA, IN SUPPORT OF APPELLANT  
RUSTY LEE BRENSINGER'S PETITION FOR  
PANEL RECONSIDERATION OR REARGUMENT *EN BANC***

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## STATEMENTS OF IDENTITY AND INTEREST OF *AMICI CURIAE*<sup>1</sup>

Individual statements of interest of *amici curiae* are contained in Appendix A to this brief.

### SUMMARY OF ARGUMENT

The panel decision issued by this Court on March 5, 2018 grievously misapplies settled Pennsylvania lawyer professional responsibility law by conflating a lawyer’s *involvement* with a prospective client, to review the prospective client’s case, with the lawyer’s *representation* of the client, after the lawyer has accepted the case. As the dissent explains and the record demonstrates, attorney Mark Freeman was only “involved” with Appellant in 2009 and the Pennsylvania Innocence Project (“PIP”) only “became involved” with Appellant in 2011 to review whether they would represent Appellant. In contrast, it was after PIP completed its extensive, careful, multi-year review that both ultimately agreed to represent Appellant.<sup>2</sup> The crux of the panel’s error was its assumption that a *prospective* client is the same as an *actual* client. But the law is clear that a

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

<sup>2</sup> Howard D. Scher and John J. Powell (attorneys with Buchanan Ingersoll & Rooney PC in Philadelphia) began representing Appellant along with PIP in 2015. *See* R. 29a, 2916a.



prospective client is not an actual client and, if that were the law, it would work serious hardships on lawyers and prospective clients.

When someone consults with a lawyer, that lawyer owes the prospective client the duties to maintain information in confidence and be free from conflicts of interest. The prospective client, for his part, reasonably expects these assurances. During a review period, the lawyer reviews the potential merits of the prospective client's case and assesses whether she is competent to handle it. Most assuredly, however, she has *not* entered into an attorney-client relationship, and has not agreed to devote the time, resources, and dedication to the case that accompany formal legal representation.

Critically, during this review stage, the prospective client cannot reasonably expect that the lawyer is providing him the level of communication or competence that he would receive if the lawyer had accepted his case. That is because the lawyer has not agreed to do anything other than review the client's case and determine whether she wants to accept it. It is here that the panel so mistakenly erred, in conflating Mark Freeman's and PIP's prospective consideration of taking on Appellant's case—in the words of the panel, when the lawyer “became involved” with the client—with those lawyers' representation of Appellant.

Pennsylvania law sets forth a clear, four-part test to determine when a prospective client becomes a client. Under this test, the existence of such a

relationship depends, among other things, on whether “the attorney expressly or impliedly agreed to render [legal] assistance,” and whether “it [was] reasonable for the putative client to believe the attorney was representing him.” *Cost v. Cost*, 677 A.2d 1250, 1254 (Pa. Super. 1996) (quoting *Atkinson v. Haug*, 622 A.2d 983, 986 (Pa. 1993)).

Here, however, the panel departed from this precedent (which it did not even acknowledge in its Opinion) and applied an entirely different inquiry to determine whether Appellant, who is serving a sentence for the murder of a young child, was represented by counsel between 2009 and 2015. The stakes for Appellant are enormous. The panel relied on its erroneous professional responsibility premise in denying as untimely Appellant’s Post Conviction Relief Act (“PCRA”) request. In his PCRA Petition, Appellant sought to prove that the “Shaken Baby Syndrome” theory used to convict him for murder was junk science and that the child’s death was the result of a tragic accident, not a deliberate act.<sup>3</sup>

The evidence presented at Appellant’s PCRA hearing showed that he had approached at least two attorneys over the years preceding his PCRA Petition and that PIP went through a four-year intake process to determine whether it would

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<sup>3</sup> *Amici* take no position on whether “Shaken Baby Syndrome” is junk science or reliable, as that is outside their areas of expertise and interest. Rather, this brief focuses on the professional responsibility issues raised by the panel’s decision, the ways in which it departs from settled Pennsylvania law governing lawyers and clients, and the hardships to which it could lead.

represent him—but there was no evidence that any attorney agreed to represent Appellant before 2015, or that Appellant believed he was represented during that time. The panel nonetheless found that Appellant was represented during this time period, based solely on the fact that PIP and another pro bono attorney had “looked at,” become “involved in,” and “work[ed] on” his case while they were in the process of deciding whether they would represent him. Op. at 10-12. In other words, simply by engaging in a robust vetting process of a prospective engagement, pro bono attorneys were held to be in an attorney-client relationship that neither they nor their supposed client had agreed to enter.

The panel’s holding that an attorney-client relationship can exist where none was intended confuses and complicates an important legal standard that should remain simple and clear. If the holding were allowed to stand, it could potentially (1) expand the ambit of legal malpractice claims and introduce uncertainty into the broader question of what duties lawyers owe to people they have not agreed to represent; (2) provide a disincentive for attorneys to carefully vet cases before accepting them; and (3) discourage pro bono representation while also disadvantaging the prospective clients who seek such representation.

## ARGUMENT

### **I. THE PANEL, IN FINDING THAT ATTORNEYS “REPRESENTED” APPELLANT AT A TIME WHEN BOTH HE AND THEY BELIEVED THEY WERE DECIDING WHETHER TO TAKE ON HIS CASE, DISREGARDED PENNSYLVANIA’S CLEAR STANDARDS FOR DETERMINING WHEN AN ATTORNEY-CLIENT RELATIONSHIP EXISTS**

#### **A. The Existence of an Attorney-Client Relationship Depends on the Intentions of the Lawyer and the Client, Not on Whether the Lawyer Is Involved with Investigating the Client’s Claim**

Pennsylvania law provides that an attorney-client relationship can be formed with an express or implied agreement:

Absent an express contract, an implied attorney-client relationship will be found [if the following are shown]: (1) the purported client sought advice or assistance from the attorney; (2) the advice sought was within the attorney’s professional competence; (3) the attorney expressly or impliedly agreed to render such assistance; and (4) it is reasonable for the putative client to believe the attorney was representing him.

*Cost*, 677 A.2d at 1254 (quoting *Atkinson*, 622 A.2d at 986); *see also* Restatement (Third) of Law Governing Lawyers § 14 (2000) (“A relationship of client and lawyer arises when . . . a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) . . . the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services[.]”). Key to this inquiry is whether the lawyer expressly or impliedly agreed to take on the matter and the putative client’s reasonable belief on whether he is represented

by the lawyer. Notably absent from the inquiry is whether, prior to the agreement, the lawyer was involved with reviewing the client's case to determine, among other things, the merits of the case and whether the lawyer was competent to handle it.

The Pennsylvania Rules of Professional Conduct contemplate three distinct categories: (1) prospective clients; (2) current clients; and (3) former clients. Lawyers owe each category different sets of responsibilities. Reinforcing the boundaries between the three categories, the Pennsylvania Rules allow a lawyer to review a prospective client's matter thoroughly without making the prospective client a current client—*i.e.*, without forming an attorney-client relationship. To illustrate, a lawyer may communicate with a prospective client, learn about the prospective client's legal issues, retain the prospective client's documents, and even give the prospective client legal advice, all without creating an attorney-client relationship. R.P.C. 1.18 (“Duties to Prospective Clients”). “Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice.” *Id.* cmt. 1. Until an attorney-client relationship forms, however, “prospective clients should receive some but not all of the protection afforded [current] clients,” and the lawyer is “free (and sometimes required) to proceed no further.” *Id.*; *accord* Restatement (Third) of the Law Governing Lawyers § 15 (2000), cmt. b (“[P]rospective clients

should receive some but not all of the protection afforded clients[.]”). For example, lawyers have distinct, less stringent conflict-of-interest duties toward *prospective* clients than toward *current* or *former* clients. *Compare* R.P.C. 1.18 (“Duties to Prospective Clients”); *with id.* 1.7, 1.8 (“Conflict of Interest: Current Clients”) and *id.* 1.9 (“Duties to Former Clients”). It is critical for practicing lawyers to be able to rely on the Rules’ clearly-drawn lines between types of clients in order to uphold their ethical obligations, particularly in the often-complex area of conflicts.

The Rules of Professional Conduct also contemplate that a lawyer can represent a client for one purpose but not another, *see* R.P.C. 1.2(c), 6.5, and can represent some members of an organization but not others, *see id.* 1.13. Again, the extent of the representation is a matter to be decided upon by lawyer and client, and does not depend on the extent of the lawyer’s knowledge about the matter in question.

**B. The Panel’s Conclusion That Counsel’s Review of Appellant’s Case Constituted Representation Is Inconsistent With Pennsylvania Law**

**1. The Importance of the Question of Representation**

The Pennsylvania PCRA provides that petitions filed more than one year after the date a judgment of sentence becomes final are untimely, unless the petitioner shows that he falls within one of the exceptions to this time bar. Here,

Appellant maintains that his Petition is timely under 42 Pa. C.S.A. § 9545(b)(1)(ii), which provides for an exception when “the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence,” and the petition is filed within 60 days of the date that the petitioner becomes aware, or should become aware, of those facts. The Commonwealth of Pennsylvania contends Appellant’s Petition was not timely because the scientific information underlying the Petition had been in the public record for many years.

Whether Appellant was represented by counsel more than 60 days before he filed his petition is critical to the timeliness determination. The Pennsylvania Supreme Court has held that the “unknown facts” exception does not apply to facts in the public domain because those facts could be discovered through a petitioner’s due diligence. *See Commonwealth v. Edmiston*, 619 Pa. 549, 570-71 (2013). Significantly, however, in *Commonwealth v. Burton*, 638 Pa. 687 (2017), the Pennsylvania Supreme Court held that this presumption does not apply to incarcerated petitioners who are not represented by counsel. *Pro se* petitioners, it explained, cannot be presumed to have access to public records. *Id.* at 714. In reaching this conclusion, the Court drew a clear line between inmates who are represented by counsel and those who are not. *See, e.g., id.* at 713 n.19 (drawing distinction between represented and unrepresented inmates); *id.* at 719 n.22

("[O]ur holding applies to all *pro se* PCRA petitioners who are incarcerated, as it is this particular group whose access to public records is in question, and so are rationally distinguishable from all counseled, or non-incarcerated, petitioners."); *id.* at 720 (Saylor, C.J., concurring) (noting majority opinion's "developed explication of the unreasonableness in enforcing a strong presumption of access to public records at least as against unrepresented prisoners").

*Burton's* firm distinction between represented and unrepresented inmates makes sense, because a lawyer has a duty to provide her clients with competent and diligent representation and to keep them informed to a reasonable extent. *See* R.P.C. 1.1 (competence), 1.2 (diligence), 1.4 (communication). Even if a petitioner has had contact with lawyers, absent the attorney-client relationship and all the duties that come with it, a lawyer is not charged with the responsibility of monitoring the public record on the petitioner's behalf, and therefore the petitioner cannot be presumed to know what is in that record.

## **2. An Application of Pennsylvania Law Demonstrates That Appellant Was Not Represented Before 2015**

As Judge Panella eloquently explains in his dissent, under the blackletter Pennsylvania law set forth above, Appellant was not represented by counsel at any relevant time. The record shows that Appellant's family first approached a solo practitioner, Mark Freeman, Esquire, in 2009, but Mr. Freeman did not agree to



take the case at that time. Dissent at 3 (citing R. 2615a); *id.* at 5 (citing R. 2897a).<sup>4</sup> In 2011, Appellant contacted PIP, which began to assess whether it would agree to represent him. Dissent at 3-4. In Appellant’s case, as in all PIP cases, the intake process was extremely time consuming.<sup>5</sup> PIP spent years trying to obtain medical records that would help it determine whether or not it could become involved in

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<sup>4</sup> While the panel highlighted the fact that Mr. Freeman possessed Appellant’s records prior to 2015 (*see, e.g.*, Op. at 11), this emphasis sidesteps the key questions of whether (1) Mr. Freeman and Appellant in fact entered into an attorney-client relationship at that time; or (2) Mr. Freeman’s review of Appellant’s records conferred awareness on *Appellant* of the scientific information regarding Shaken Baby Syndrome that the panel presumed Appellant had.

<sup>5</sup> PIP’s “Frequently Asked Questions” website page, attached as **Exhibit A** and available at <http://innocenceprojectpa.org/us/pa-innocence-faq/#qe-faqs-index>, explains each step of PIP’s review process. First, PIP reviews a convicted individual’s letter to determine if the case meets PIP’s threshold criteria. Second, PIP sends the individual a detailed questionnaire and requests court documents, reviews the completed questionnaire and briefs, and decides whether the case “involves a plausible claim of innocence.” The third step, “Full Case Review,” involves a review of “every piece of paper about the case” and discussion of the case in staff meetings. If PIP “feel[s] the case presents a strong innocence claim and there is a likelihood of discovery evidence that could prove the person’s innocence in court,” it may put the case before a Case Review Committee. These committees, made up of experienced outside lawyers, meet three times a year.

If a Case Review Committee approves a cases, a fourth step begins – a full investigation.

Our investigations involve speaking with every available witness from the trial, including those mentioned in pre-trial statements and motions, consulting with particular experts, and searching for physical evidence that could be subjected to modern scientific testing. The staff investigator often travels across the state seeking to speak with witnesses, family members, or others who may have knowledge of the crime.

PIP’s mission is to exonerate the innocent. Therefore, it states, “[a]t any point in the process, if the facts confirm an individual’s guilt, we will determine the case will not be pursued. But if the evidence confirms innocence, then we may be able to take on representation of the individual in court.”

Appellant’s case. Dissent at 3-4 (citing R. 2618a-32a). Eventually, in 2015, PIP and Appellant entered into a formal retainer agreement. *Id.* at 4 (citing R. 2916a).

Judge Panella concluded that, until 2015, Appellant was “only a prospective client, as defined in Pa.R.P.C. 1.18(a), of both Attorney Freeman and PIP.” *Id.* at

5. Applying the four-factor test set forth in *Cost*, 677 A.2d at 1254, and other Pennsylvania cases, Judge Panella reasoned:

There is no evidence of record capable of establishing that Attorney Freeman or PIP expressly agreed to render professional legal advice to Brensinger before 2015. Furthermore, Brensinger’s testimony makes clear that he did not believe Attorney Freeman or PIP represented him until 2015.

Dissent at 5-6.

**3. The Panel’s Conclusion That the Lawyers Who Were Considering Whether to Take Appellant’s Case Were Actually Representing Him Is Inconsistent With Pennsylvania Law**

The panel, however, failed to apply blackletter—or any other—Pennsylvania law to determine whether Appellant was represented by counsel before 2015.

Indeed, it never cited *Cost*, much less applied *Cost*’s four-part test for determining the existence of an attorney-client relationship. Instead, it appears to have applied a new test, unsupported by any legal precedent, which conflates a lawyer’s pre-engagement review with post-engagement legal representation.

The panel quoted with approval the PCRA court’s finding that Appellant “has been represented by counsel since at least 2009, and has had the Pennsylvania Innocence Project working on his case since 2011,” and concluded that Appellant had not been *pro se* before 2015. Op. at 11-12. This conclusion appears to be based on the following:

- Mr. Freeman “looked at [Appellant’s] case in 2009” and “reviewed [Appellant’s] files and records,” *id.* at 10-11;
- Mr. Freeman “was involved in [Appellant’s] case in 2009,” *id.* at 11;
- Mr. Freeman “maintained certain of [Appellant’s] records,” and provided them to PIP when PIP began reviewing the case, *id.*; and
- PIP was “involved” and “working on” Appellant’s case beginning in 2011, *id.* at 11-12.

Critically, the panel did not assess whether Mr. Freeman or PIP had agreed to represent Appellant before 2015, or whether Appellant could reasonably believe that those lawyers had agreed to do so. Instead, the panel pointed to the fact that Mr. Freeman and PIP were reviewing Appellant’s case; that Mr. Freeman had copies of some of Appellant’s records; and that the attorneys were in some way “involved” with Appellant’s case. *Id.* at 10-12.

These facts, however, would show—if anything—only that Appellant was a *prospective* client, entitled to the protections of his confidential information set forth in Pennsylvania Rule of Professional Conduct 1.18. These facts, however, most assuredly do not show that Appellant was a *current* client to whom the

lawyers owed duties of diligence, competence, and communication. Lawyers regularly “look at” cases before they take them on, a task that may include receiving records from a prospective client. In considering whether to accept a case, they conduct due diligence for multiple reasons, including to determine whether the case has merit, whether they are competent to handle it and conflict-free, and whether they and the prospective client share an understanding as to the scope of the representation.

Importantly, Pennsylvania law does not contemplate that this type of pre-engagement review, without more, creates an attorney-client relationship. “Look[ing] at” a potential client’s case, being “involved” in it, or even “work[ing] on” it (Op. at 10-12) does not make the potential client an actual client, unless the lawyer agrees to represent the client and the potential client reasonably believes that the lawyer has agreed to represent him. *See Cost*, 677 A.2d at 1254 (quoting *Atkinson*, 622 A.2d at 986); Restatement (Third) of Law Governing Lawyers § 14 (2000). Yet, the panel decision seriously erred by departing from Pennsylvania law to use such attorney review as the basis for its conclusion that the lawyers represented Appellant as early as 2009 and 2011.

## **II. THE PANEL’S BLURRING OF THE DISTINCTION BETWEEN PROSPECTIVE CLIENTS AND ACTUAL CLIENTS COULD HAVE NEGATIVE CONSEQUENCES THAT EXTEND FAR BEYOND THE PCRA CONTEXT**

Lawyers, clients, and the legal system as a whole benefit from clear rules as to when an attorney-client relationship exists. The panel’s finding that “involvement” constitutes representation, if adopted in other cases, could have far-reaching consequences that affect many different corners of the legal system.

When assessing a lawyer’s professional responsibilities,

A fundamental distinction is involved between clients, to whom lawyers owe many duties, and nonclients, to whom lawyers owe few duties. It therefore may be vital to know when someone is a client and when not. Prospective and former clients receive certain protections, but not all those due to clients.

Restatement (Third) of the Law Governing Lawyers, Chapter 2, Topic 1, Introductory Note. Under the panel’s approach, however, this “vital” question becomes impossible to answer. The panel’s assumption that a lawyer can come to represent a prospective client when neither lawyer nor client has agreed to the representation, simply because the lawyer has spent time becoming educated about the prospective client’s case, could have negative consequences for lawyers, clients, and the entire legal system. Respectfully, such a rule disrupts Pennsylvania professional responsibility jurisprudence and could have untoward effects, including opening the door to malpractice claims against lawyers for pre-

representation conduct; discouraging lawyers from conducting sufficient pre-representation due diligence; undermining public policies promoting pro bono legal service; and disadvantaging potential pro bono clients.

**A. The Panel’s Rule Is Inconsistent with Pennsylvania Legal Malpractice Jurisprudence and Threatens to Erroneously Open the Floodgates to Pre-Representation Legal Malpractice Claims**

The principle that being “involved” with the review of a matter constitutes formal representation would inevitably introduce uncertainty and confusion about the duties that lawyers owe to individuals or entities they have not yet agreed to represent. Indeed, such a principle is inconsistent with legal malpractice law, which conditions malpractice liability on the threshold criterion that an attorney-client relationship existed. *See Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983) (retaining requirement that plaintiff in professional malpractice action show an attorney-client relationship to maintain suit); *see also Capitol Surgical Supplies, Inc. v. Casale*, 86 F. App’x 506, 508 (3d Cir. 2004) (noting that under Pennsylvania law, to prevail on its legal malpractice claims, plaintiff “had the burden of establishing the existence of an attorney-client relationship between the parties,” and applying the test for the existence of an attorney-client relationship articulated in *Cost*, 677 A.2d at 1253-54); *Lefta Assocs. v. Hurley*, 902 F. Supp. 2d 559, 581 (M.D. Pa. 2012) (noting that “[i]n order to maintain a claim for legal malpractice under Pennsylvania law, a plaintiff must first demonstrate that an

attorney-client relationship existed,” and applying *Cost* test); *cf. Cost*, 677 A.2d at 1253-54 (affirming order holding that no legal malpractice claims existed because, despite the plaintiff’s interactions with the attorneys, there was no attorney-client relationship—*i.e.*, “no legal principle under which the lawyers [at issue] would owe plaintiff the full panoply of obligations that a lawyer owes a client”). It follows that, if the panel’s expansion of the formal attorney-client relationship is permitted, it could open the floodgates to malpractice claims against lawyers for conduct that occurred prior to any formal representation.

**B. Attorneys Must Be Able to Review Prospective Cases Without Adverse Consequences**

The panel’s rule, if adopted, would make it more difficult for lawyers to uphold professional standards. Lawyers should be able to review prospective cases without fear of conflicting obligations or pre-representation malpractice claims. Lawyers’ standards of conduct require them to review the merits of each prospective representation to ensure that they take on only non-frivolous cases. *See* R.P.C. 1.16, 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . .”). Additionally, attorneys must be free to investigate potential claims in order to ensure that they have the requisite expertise in the required area(s), *i.e.*, to ensure the best fit between lawyer, client, and subject matter. *See id.* 1.1, 1.16 cmt. 1 (“A lawyer should not accept representation in a matter unless

it can be performed competently, promptly, without improper conflict of interest and to completion.”).

**C. The Panel’s Rule Would Undermine the Key Public Policy Goal of Encouraging Pro Bono Representation and Would Disadvantage Prospective Pro Bono Clients**

The panel’s rule poses a direct threat to Pennsylvania’s public policy goal of encouraging pro bono representation. *See, e.g.*, R.P.C. 6.1 (“A lawyer should render public interest legal service.”). Law firms and public interest legal organizations are regularly flooded with claims from indigent litigants; their intake processes can be complex and time-consuming, often requiring expertise in administrative law, local procedure, and other niche areas that can be arcane and difficult to master. The process of learning about cases and matching them with appropriate lawyers is as difficult as it is important. Blurred lines, unclear expectations, and the specter of misguided legal malpractice claims based solely on a lawyer’s involvement with the review of a prospective client’s case can make pro bono engagements more risky.

What is more, the panel’s rule would disserve prospective pro bono clients if the labored work of law firms and public interest organizations in assessing and onboarding pro bono clients somehow disadvantaged those clients. Indeed, to the extent that courts afford *pro se* pleadings more liberal consideration, the panel’s rule, if adopted, would undermine that policy by voiding a litigant’s *pro se* status.



*See Commonwealth v. Lyons*, 833 A.2d 245, 252 (Pa. Super. 2003) (“[T]his Court is willing to construe liberally materials filed by a pro se litigant, [but] pro se status generally confers no special benefit upon an appellant.”) (emphasis added, citation omitted).

### III. CONCLUSION

For all of the reasons set forth above, amici respectfully request that this Court reverse and remand for the correct application of *Cost v. Cost*, 677 A.2d 1250 (Pa. Super. 1996) and *Commonwealth v. Burton*, 638 Pa. 687 (2017), regarding whether Appellant was represented by counsel at the pertinent times.

HANGLEY ARONCHICK SEGAL PUDLIN  
& SCHILLER

Dated: June 5, 2018

By: /s/ John S. Summers  
John S. Summers (Attorney I.D. No. 41854)  
Cary L. Rice (Attorney I.D. No. 325227)  
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Attorneys for *Amici Curiae*

**CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT**

Pursuant to Pa. R.A.P. 531(b)(3), I, John S. Summers, hereby certify that the foregoing Brief for *Amici Curiae*, Law Professors, Directors of Legal Services Organizations, and Pro Bono Directors and Partners at Private Law Firms in the Commonwealth of Pennsylvania, in Support of Appellant Rusty Lee Brensinger's Petition for Panel Reconsideration of Reargument *En Banc* contains **4,190 words**, excluding those portions exempted by Pa. R.A.P. 2135(b), and thus complies with the 7,000 word limit set forth in Pa. R.A.P. 531(b)(3).

/s/ John S. Summers

John S. Summers

Dated: June 5, 2018

**CERTIFICATION OF COMPLIANCE WITH Pa. R.A.P. 127**

I, John S. Summers, hereby certify that the foregoing Brief for *Amici Curiae*, Law Professors, Directors of Legal Services Organizations, and Pro Bono Directors and Partners at Private Law Firms in the Commonwealth of Pennsylvania, in Support of Appellant Rusty Lee Brensinger's Petition for Panel Reconsideration of Reargument *En Banc* 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.

/s/ John S. Summers  
John S. Summers

Dated: June 5, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that I am on this day serving a true and correct copy of the Brief for *Amici Curiae*, Law Professors, Directors of Legal Services Organizations, and Pro Bono Directors and Partners at Private Law Firms in the Commonwealth of Pennsylvania, in Support of Appellant Rusty Lee Brensinger's Petition for Panel Reconsideration of Reargument *En Banc* upon the persons listed below via first-class mail, which service satisfies the requirements of Pa. R.A.P. 121:

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Brensinger*

/s/ John S. Summers  
John S. Summers

Dated: June 5, 2018

## **APPENDIX A**

### **STATEMENTS OF IDENTITY AND INTEREST OF AMICI CURIAE**

*Amici curiae* are (1) law professors; (2) directors of legal services organizations; and (3) pro bono directors and partners at private law firms in the Commonwealth of Pennsylvania. *Amici* file this amicus brief due to their belief that the panel's rule has serious, negative professional responsibility implications for legal service providers.

Many of the *amici* listed below receive substantially more requests for legal assistance than they can possibly meet, and field numerous calls every week from individuals and organizations seeking assistance. These *amici* carefully evaluate each potential case before taking on a representation. This multistep process typically includes a conflict-of-interest check, factual investigation, legal research, internal discussion and review among their attorneys, and, for certain *amici*, identifying potential pro bono co-counsel to share in the workload and cost of litigation. Following that internal process, many *amici* must engage in an equally-robust vetting process with their management and/or Boards of Directors in order to obtain approval to represent a client in litigation. Depending on the complexity of the case and the capacity of the particular organization, this screening process can take weeks, months, or even years from the time the organization first gets involved with a prospective client until it can agree to take on the representation

and form an attorney-client relationship. A thorough screening process is critical to ensure that each organization is using its limited resources to do the most important work. The panel's blurring of the distinction between prospective clients and actual clients could negatively impact this important practice and have a chilling effect on law firms' and legal services organizations' willingness to take on pro bono representations. Moreover, a premature finding of the attorney-client relationship while an organization is still analyzing a case could harm its prospective client's legal position.

The individual *amici* comprise the following:

#### **I. LAW PROFESSORS**

**Jane Campbell Moriarty** is the Carol Los Mansmann Chair in Faculty Scholarship and Professor of Law at Duquesne University School of Law. Her scholarship focuses on professional responsibility, scientific evidence, and neuroscience and law. During her career, she was named Professor of the Year (Akron Law), and she received the Excellence in Teaching award (Duquesne Law). A contributor to *Black's Law Dictionary*, Moriarty has been included in *Who's Who in America*, and has received awards for her scholarship. She was a visiting professor at both Case Western University School of Law and the University of Pittsburgh School of Law. Ms. Moriarty received a B.A. from Boston College, *summa cum laude*, where she was awarded the Bapst Philosophy Medal and

elected to Phi Beta Kappa. She graduated, *cum laude*, from Boston College Law School. She also served as a law clerk to the Superior Court of Massachusetts and to Ralph J. Cappy, Justice of the Supreme Court of Pennsylvania.

**Eleanor Myers** is an Associate Professor of Law Emerita at Temple University School of Law, where she specializes in Professional Responsibility and also teaches in the Business curriculum. In addition, she assisted in the development of the award-winning Integrated Transactional Program and has primary responsibility for the Professional Responsibility component of that course. Professor Myers publishes in the area of Professional Responsibility and served as the Associate Reporter on the Third Circuit Court of Appeals Task Force on the Selection of Class Counsel. In 1989, she became an associate at the University of Pennsylvania's Center on Professionalism, where she developed professional responsibility videotapes and teaching modules for practicing lawyers and taught Professional Responsibility nationwide. She regularly presents at Continuing Legal Education programs on Legal Ethics and is often consulted by the press on ethics-related issues. Professor Myers graduated from the University of Pennsylvania with a B.A., and from the University of Pennsylvania Law School with a J.D., *magna cum laude*. At Penn Law School, she was a member of the Order of the Coif and an Editor of the Law Review.

**Janet G. Perry** taught professional responsibility as an Adjunct Professor at the University of Pennsylvania Law School for approximately thirty years and at Temple University School of Law before retiring in May of this year. From 1988 to 1996, Ms. Perry served as the program director at the University of Pennsylvania's Center on Professionalism, where she developed, wrote, and taught educational programs on professional responsibility and legal ethics for lawyers, judges, and law students. Prior to her retirement, Ms. Perry also served as the Special Counsel and Director of Professionalism at Pepper Hamilton LLP from 1999 to 2007. In this role, she counseled lawyers and clients on professional responsibility problems; participated in the development of firm professional responsibility policies and procedures; and regularly updated lawyers on ethics and professional responsibility developments. She also designed and taught ethics programs for the firm, clients, and bar and professional organizations, and directed the firm's pro bono program. Ms. Perry is a graduate of Villanova University School of Law. Upon graduation, she clerked for the Honorable Edmund B. Spaeth, Jr., then a judge on the Superior Court of Pennsylvania.

## **II. DIRECTORS OF LEGAL SERVICES ORGANIZATIONS**

**Joanna Visser Adjoian** and **Lauren Fine** are Co-Directors of the **Youth Resentencing & Reentry Project ("YSRP")**. YSRP works to keep children out of adult jails and prisons, and to bring home people who were sentenced as



children to life in prison without the possibility of parole (“juvenile lifers”). YSRP aspires to end the practice of charging youth in adult courts. In the interim, YSRP’s policy advocacy chips away at the harmful impacts of adult incarceration on young people and their families. Specifically, during the court process in individual cases, YSRP presents prosecutors and judges with mitigation reports, or humanizing narratives of a person’s experience. For juvenile lifers eligible for resentencing and Parole Board hearings, YSRP provides workshops inside of prisons on mitigation, reentry, and self-advocacy. As close to a child’s arrest as possible, and prior to juvenile lifer resentencing hearings, YSRP creates individualized reentry plans that connect youth or juvenile lifers with critical supports and services in housing, employment, education and health and mental health care. Before, during and after incarceration, YSRP connects youth, juvenile lifers, and family members with needed supports and services. YSRP created and leads the JLWOP Reentry Working Group, a citywide response to coordinated reentry service provision and planning for juvenile lifers. YSRP also creates tools and provides trainings for defense attorneys to raise the level of representation for youth charged in adult courts and juvenile lifers facing resentencing and Parole Board hearings. Additionally, YSRP trains and supervises graduate law and social work students and other volunteers to work in teams that create impact within and across systems.

**Sophie Bryan** is the Executive Director of **Philadelphia VIP**. Founded in 1981, Philadelphia VIP provides legal services for low-income residents and families facing civil legal problems that threaten their basic human needs: shelter, employment, financial stability, education, and health. Through its volunteers and staff, VIP serves more than 3,500 individuals and families yearly who could not otherwise afford attorneys and whose cases could or would not be handled by other public interest organizations. To qualify for free legal assistance via VIP, clients must be residents of Philadelphia with household income at or below 200% of the federal poverty level, and must be unable to receive legal assistance elsewhere, either because the client's particular need is not addressed by another legal services organization, or because there is a conflict of interest that would prevent another organization from accepting a particular individual as a client. The largest demographic groups represented in 2017 included: 85.8% people of color, 73.5% females, and 30% seniors over age 60. VIP handles any civil matter that is non-fee generating and for which there is no right to counsel. In stark terms, VIP is the agency of last resort for many low-income individuals and families who face critical legal problems that affect their basic needs.

**Karen C. Buck** is the Executive Director of **SeniorLAW Center**. SeniorLAW Center's mission is to improve the lives of older Pennsylvanians and protect their rights through legal representation, education, and advocacy. Its core

values are excellence, compassion, respect, passion, integrity, creativity, and optimism. Each year, SeniorLAW Center provides direct individual legal services and representation to thousands of needy senior citizens, which enables them to keep their homes, terminate family violence, rectify consumer and financial exploitation, and gain custody rights over children in their care to address their medical, educational, and care needs. SeniorLAW Center's model of service combines the efforts of its legal staff of attorneys and legal assistants and a panel of dedicated volunteer attorneys from the private Bar. It focuses on problems in the major areas of housing, consumer protection, family law, elder abuse, financial exploitation, and advance planning. Over the past 40 years, SeniorLAW Center provided individual legal services and representation to approximately 400,000 seniors, and opened well over 3,000 individual cases in the year 2017 alone.

**Jennifer Clarke** is Executive Director and **Mimi McKenzie** is Legal Director of the **Public Interest Law Center (the "Law Center")**. The Law Center is a non-profit public interest law firm with a mission of using high-impact legal strategies to advance the civil, social, and economic rights of communities in the Philadelphia region facing discrimination, inequality, and poverty. The Law Center uses litigation, community education, advocacy, and organizing to secure their access to fundamental resources and services. It is an affiliate of the

Lawyers' Committee for Civil Rights Under Law, founded in 1969 in response to President Kennedy's call for lawyers to engage in the civil rights movement.

**Deborah Freedman** is the Executive Director of **Community Legal Services of Philadelphia ("CLS")**. Founded in 1966 by the Philadelphia Bar Association, CLS has provided free civil legal assistance to more than one million low-income Philadelphians. Approximately 10,000 clients were represented by CLS in the past year. CLS assists clients when they face the threat of losing their homes, incomes, health care, and even their families. CLS attorneys and other staff provide a full range of legal services, from individual representation to administrative advocacy to class action litigation, as well as community education and social work. CLS is nationally recognized as a model legal services program.

**Yolanda French Lollis** is the Managing Attorney at the **AIDS Law Project of Pennsylvania**. Founded in 1988, the AIDS Law Project is a nonprofit public-interest law firm providing free legal assistance to people living with HIV and AIDS and those affected by the epidemic. It is still the nation's only independent public-interest law firm dedicated to HIV and AIDS. The AIDS Law Project serves all of Pennsylvania and Southern New Jersey from its offices in Philadelphia and Camden County, NJ, educating the public about AIDS-related legal issues, training case management professionals to become better advocates

for their HIV-positive clients, and working at local, state, and national levels to achieve fair laws and policies.

**Witold Walczak** is Legal Director and **Molly Tack-Hooper** is a Staff Attorney at the **American Civil Liberties Union of Pennsylvania (“ACLU-PA”)**. The ACLU-PA is a nonprofit, nonpartisan, membership organization dedicated to defending and expanding individual rights and personal freedoms throughout the entire state of Pennsylvania. Through advocacy, public education, and litigation, ACLU-PA’s staff and volunteers work to preserve and enhance liberties grounded in the United States and Pennsylvania constitutions and civil rights laws. Among those liberties are freedoms of speech, religion, and association; the right to petition the government; separation of church and state; the right to privacy; reproductive freedom; due process of law; the rights of the accused; and the right to equal treatment under the law. Through its work, ACLU-PA reviews thousands of requests for assistance each year.

### **III. PRO BONO DIRECTORS AND PARTNERS AT PRIVATE LAW FIRMS**

**Nathan J. Andrisani** is a partner at **Morgan, Lewis & Bockius LLP**. Mr. Andrisani defends organizations and individuals facing government investigations and related litigation. He represents clients in a variety of white collar criminal matters, False Claims Act (FCA) and qui tam litigation, and other complex government investigations. These include alleged health care fraud, violations of

US federal and state anti-kickback, anti-corruption, and commercial bribery statutes, violations of the Sherman Antitrust Act, the Foreign Corrupt Practices Act (FCPA), environmental protection laws, US Drug Enforcement Administration regulations, and import/export regulations, including the International Traffic in Arms Regulations (ITAR). Mr. Andrisani is a trial lawyer who, before joining Morgan Lewis, served as an Assistant District Attorney in the Philadelphia District Attorney's Office, where he prosecuted and tried hundreds of criminal cases involving a wide range of state crimes. Mr. Andrisani graduated from Syracuse University in 1992, and received his law degree from Temple University, Beasley School of Law in 1995.

**Valentine A. Brown** is Pro Bono Partner at **Duane Morris LLP** and a partner in the firm's Employment, Labor, Benefits and Immigration Practice Group. She serves as global immigration law counsel to a diverse group of multinational and domestic corporations and their employees, providing advice, compliance audits and representation to help navigate the intricacies of U.S. and foreign immigration laws. Ms. Brown also represents individuals in all types of immigration proceedings, including persons of extraordinary ability; spouses, fiancées and children of US citizens; naturalization and political asylum applicants; as well as respondents in deportation and immigration appellate proceedings. She is also a member of the firm's Cuba Business Group. Ms. Brown is a former law

clerk to the Honorable John. J. Gossart, Executive Office for Immigration Review, Baltimore, Maryland, a *magna cum laude* graduate of the University of Baltimore School of Law and a graduate of the University of Delaware.

**Melinda Levine deLisle** is the Director of Pro Bono Engagement for **Cozen O'Connor P.C.**, where she works on cases and organizes and expands the firm's public interest practice. Previously, Ms. deLisle practiced commercial litigation, concentrating on complex multidistrict litigation, antitrust litigation on behalf of plaintiffs, and pro bono work, among other things, in defense of abused women and children and the rights of LGBT people. Ms. deLisle received her law degree from Harvard Law School in 1985, and her undergraduate degree from Brown University in 1982.

**Stephen A. Fogdall** is a partner, Chair of the Financial Services Litigation Practice Group, and Chair of the Pro Bono Committee at **Schnader Harrison Segal & Lewis LLP**. Mr. Fogdall participates in numerous areas of the firm's commercial litigation practice, including financial services litigation, product liability litigation, and class action defense. He has litigation experience in state and federal courts at both the trial and appellate levels. He received a B.A., *magna cum laude*, and a Ph.D from the University of Washington in 1990 and 1997, respectively. He received his law degree from the University of Pennsylvania Law School in 2001.

**Ethan D. Fogel** is a partner at **Dechert LLP**. Mr. Fogel represents a variety of creditors, debtors, and purchasers in bankruptcy proceedings. His creditor representations have included extensive work for secured lenders and for bond trustees whose issuers have been the subject of bankruptcy proceedings or other insolvency proceedings. Mr. Fogel also maintains a varied pro bono practice. He chairs the Pro Bono Committee in Dechert's Philadelphia office and, in that capacity, coordinates that office's pro bono activities. Mr. Fogel is a member of the Landlord Tenant Liaison Committee, established by the Court of Common Pleas to improve the administration of landlord/tenant cases, which was recognized with the 2007 First Judicial District of Pennsylvania Pro Bono Publico Award for its work. He is a member of the Philadelphia Bar Association's Civil Gideon Task Force and has co-chaired its Housing Working Group. He is active in addressing systemic issues relating to landlord tenant practice and advising in the management of the Landlord Tenant Legal Help Center. Mr. Fogel graduated from Stony Brook University in 1975. He received his law degree from University of Pennsylvania Law School, *magna cum laude*, in 1983, and was a member of the *University of Pennsylvania Law Review* and Order of the Coif.

**W. John Lee** is a partner at **Morgan, Lewis & Bockius LLP**. Mr. Lee focuses his practice on complex employment litigation, representing employers in class and collective actions across the United States involving allegations of race



and gender discrimination, wage and hour claims, as well as challenges to employer background check practices. He also litigates claims under the Sarbanes-Oxley and Dodd-Frank Acts, as well as state law whistleblower actions, in courts and before the US Department of Labor (DOL). Mr. Lee graduated from the University of Virginia in 2000. He received his law degree, *cum laude*, from Temple University, Beasley School of Law in 2007.

**Katharyn I. Christian McGee** is the Associate Pro Bono Counsel for **Duane Morris LLP**, where she leads the firmwide Pro Bono Program. Ms. McGee supervises and coordinates the firm's delivery of pro bono legal services, including outreach to bar associations, public interest organizations, and business entities. Ms. McGee also works to enhance involvement by firm personnel and provide training for new attorneys and summer associates. In addition to leading the firm's Pro Bono Program, Ms. McGee maintains a substantive practice in public interest/poverty law, focusing much of her work on representation of domestic violence and sexual trafficking survivors, as well as individuals with disabilities or terminal illnesses, veterans, and immigrants. Ms. McGee also serves as a liaison to the firm's Diversity & Inclusion committee. Since joining Duane Morris in 2012, Ms. McGee has implemented several pro bono initiatives to aid human trafficking survivors and provide estate planning and legal assistance for oncology patients and families. She similarly leads the firm's pro bono efforts on

behalf of veterans. She has received numerous honors for her public interest work. Ms. McGee is an honors graduate of the University of Alabama Law School with a Certificate in Public Interest Law, where she was editor-in-chief of The Journal of the Legal Profession. She is also a graduate of Vanderbilt University, where she was elected to Phi Beta Kappa.

**Abraham Reich** is a Partner and Chair Emeritus at **Fox Rothschild LLP**. Named as one of the leading litigation attorneys in Pennsylvania by Chambers USA, Mr. Reich's practice involves all aspects of business litigation, including: antitrust; securities; trade secrets; intellectual property matters; legal ethics and professional responsibility; and alternative dispute resolutions. Mr. Reich also represents lawyers and serves as an expert witness in legal ethics, professional responsibility, and law firm matters. Additionally, for the past 13 years Mr. Reich has taught a course at the University of Pennsylvania School of Law entitled, "Ethics and Advocacy - From the Boardroom to the Courtroom." He frequently lectures and writes on business litigation, legal ethics and professional responsibility. Mr. Reich is a Fellow of the American College of Trial Lawyers, and in 1995, was the Chancellor of the Philadelphia Bar Association. He is a member of the House of Delegates of the American Bar Association. Mr. Reich also served as a member of the Pennsylvania Continuing Legal Education Board, and was Chair of the Board. In 1998, he was Chair of the Lawyers Advisory

Committee of the U.S. Court of Appeals for the Third Circuit. Mr. Reich graduated from the University of Connecticut in 1971, where he was elected to Phi Beta Kappa. He received his law degree in 1974 from Temple University School of Law, where he was a member of the law review.

**Mary Gay Scanlon** is Pro Bono Counsel for **Ballard Spahr LLP** and chairs the firm's Pro Bono Committee. Ms. Scanlon is also a member of the Association of Pro Bono Counsel, and is Co-Chair of the Philadelphia Bar Association's Law Firm Pro Bono Committee. Previously, she served on the boards of Philadelphia VIP and the Support Center for Child Advocates. Ms. Scanlon was also an elected member and past President of the Wallingford-Swarthmore School District's Board of School Directors, and a member of the Constitution High School Advisory Board. Prior to joining Ballard Spahr, Ms. Scanlon was an attorney with the Education Law Center of Pennsylvania, where she represented parents and families in issues involving public schools and educational reform. Ms. Scanlon graduated from Colgate University in 1980, and received her law degree from the University of Pennsylvania Law School in 1984.

**Joseph Sullivan** is the Special Counsel and Director of Pro Bono Programs at **Pepper Hamilton LLP**. Mr. Sullivan manages Pepper's firm-wide pro bono programs. He supervises and coordinates all aspects of the delivery of pro bono legal services, including the internal reach and effectiveness of the programs, as

well as outreach to bar associations, public interest law firms, business entities, and community organizations. Mr. Sullivan also actively participates in pro bono engagements. In addition, Mr. Sullivan is a lecturer of law at the University of Pennsylvania Law School, where he teaches professional responsibility, and for many years has been co-chair of the Delivery of Legal Services Committee of the Philadelphia Bar Association, as well as co-chair of the Association's Task Force on Civil Gideon and Access to Justice. Mr. Sullivan is an active board member of the Pennsylvania Innocence Project and is also a board member of the Association of Pro Bono Counsel (APBCo), a national and international organization of legal professionals working full-time as counsel and directors of pro bono programs at private law firms. Mr. Sullivan graduated from Columbia University in 1980. He received his law degree in 1987 from Columbia Law School, where he was editor-in-chief of the *Columbia Human Rights Law Review*.

**Christopher Walters** is Senior Pro Bono Counsel for **Reed Smith LLP**.

Mr. Walters founded the firm's Philadelphia Litigation Group in 1978, and served as its head until 1988. He was named the Firm's Senior Pro Bono Counsel in 2005, a full-time position overseeing the day-to-day operations of the Firm's Pro Bono Program. Before 2005, Mr. Walters handled the trials and appeals of complex commercial cases, including construction, product liability, fraud, and intellectual property cases. Mr. Walters graduated from Princeton University's

Woodrow Wilson School of Public and International Affairs in 1964. He received his law degree in 1967 from University of Michigan Law School.

# **EXHIBIT A**



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## FAQ

### PA Innocence Project Frequently Asked Questions:

Learn about the process, factual innocence, and how to request our help. Click on the question links or press play on the informative video below of one of our staff attorneys, Nilam Sanghvi, explaining the PA Innocence Project process to find the answers to our FAQs.

1. [What types of cases does the Pennsylvania Innocence Project accept?](#)
2. [What does factual innocence mean?](#)
3. [Does the PA Innocence Project take only cases with DNA evidence?](#)
4. [Can I submit an application for a friend or family member?](#)
5. [How do I ask for help?](#)
6. [How long does it take to determine if you'll look into a case?](#)
7. [What is the process for the PA Innocence Project to review and take on a case?](#)

[? What types of cases does the Pennsylvania Innocence Project accept?](#)

The Pennsylvania Innocence Project only takes on cases from factually innocent individuals who have been wrongfully convicted and exhausted their appeals. This includes the direct appeal and first petition for Post Conviction Relief Act (PCRA).

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## ❓ What does factual innocence mean?

We can only take on cases for people who had no involvement in the crime for which they were convicted. This will generally mean people who had an alibi for the time of the crime, whether it was presented at trial or not.

**Factually innocent** is different from cases where someone may be legally innocent of a crime. So, for example, we cannot review a claim of consent instead of rape, or self-defense rather than murder. As important as all of those issues are, we are unfortunately limited in our resources and in the scope of assistance we can offer.

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## ❓ Does the PA Innocence Project take only cases with DNA evidence?

No. The Pennsylvania Innocence Project will take on cases with or without DNA evidence as long as the case meets all other requirements.

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## ❓ Can I submit an application for a friend or family member?

No. The Pennsylvania Innocence Project only accepts cases directly from the convicted individual involved.

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## ❓ How do I ask for help?

The Pennsylvania Innocence Project provides pro bono investigative and legal assistance to prisoners convicted in Pennsylvania who are actually innocent and whose innocence can be proven by DNA testing or by other newly discovered evidence.

When selecting cases we can only take cases from Pennsylvania state or federal court, where the convicted individual had no role in the incident that led to the conviction, and where the individual does not have an attorney or have the right to appointed counsel.

For more information on cases we do and do not take and for our full reviewing process, visit our page. If the case meets that criteria, we require a short letter from the convicted individual, not a family member or friend, explaining the following:

1. What you were convicted of – what the charges were;
2. Briefly what the witnesses say happened;



3. Whether there was a trial or the you pled guilty/no contest (accepting plea deals is included in this);
4. Why you say you are innocent;
5. Where you are in your appeals process

Please send your letter to:

Pennsylvania Innocence Project  
1515 Market Street, Suite 300  
Philadelphia, PA 19102

Office telephone:

215-204-4255

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## ❓ How long does it take to determine if you'll look into a case?

We review the convicted individual's letter and determine if the case meets our criteria. The initial determination is made in usually in less than two weeks.

If the case meets our criteria, we'll send a detailed questionnaire to the individual to complete. Review of a questionnaire takes more time than reviewing a letter because of the large volume of requests. Therefore, it may take several months before the Project screeners decide whether or not to move a case forward. We really appreciate your patience throughout this process.

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## ❓ What is the process for the PA Innocence Project to review and take on a case?

There is a four stage screening process that can lead to a petition for a new trial. Below are descriptions of each step:

### Stage 1: Screening for Innocence

The first step is reviewing a convicted individual's letter. If the person was convicted in Pennsylvania, says he had no involvement in the crime, and has exhausted all of his appeals, we can move the case to Stage 2.

### Stage 2: Review

Next, we send out a detailed questionnaire for the convicted individual to complete. We also ask for copies of the appellate briefs and court opinions from the direct appeal (the appeal immediately following conviction).

A volunteer lawyer or law student will carefully examine the questionnaire and briefs to get a sense of the case. If the reviewer feels the case involves a plausible claim of innocence, we move the case forward to Stage 3.

### Stage 3: Full Case Review

At Stage 3, the job of our law student interns is to get every piece of paper about the case we can: transcripts, expert reports, crime scene photos, appellate documents, witness statements, toxicology reports, and so on. If there is a possibility for DNA testing, the student will begin trying to locate that and ask it be preserved for possible testing.

The intern or volunteer lawyer will then thoroughly review the case, reading every document, and looking for potentially missing information. We will discuss the case in our staff meetings, and the intern or volunteer lawyer will ask for advice and direction from the legal staff.

If, after reviewing all of the materials we can get, we feel the case presents a strong innocence claim and there is a likelihood of discovering evidence that could prove the person's innocence in court, we may move the case into Stage 4.

To determine which cases we take, we use a Case Review Committee – to provide an outside objective perspective on the cases. The panel is made up of experienced lawyers and always includes at least one former prosecutor. This panel decides if the matter will move forward for investigation and potential litigation. We hold these reviews approximately three times per year, presenting an average of three cases per review.

### Stage 4: Investigation and Possible Litigation

Once the panel accepts a case for investigation, The Project staff investigator reviews the entire case file and creates an investigative plan. Since the Project's interest is in revealing the truth, we start from a presumption of guilt, not innocence, and see where the facts take us. Our investigations involve speaking with every available witness from the trial, including those mentioned in pre-trial statements and motions, consulting with particular experts, and searching for physical evidence that could be subjected to modern scientific testing. The staff investigator often travels across the state seeking to speak with witnesses, family members, or others who may have knowledge of the crime. Whenever possible, our law students take part in the investigations.

At any point in the process, if the facts confirm an individual's guilt, we will determine the case will not be pursued. But if the evidence confirms innocence, then we may be able to take on representation of the individual in court.

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## Pennsylvania Innocence Project

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