STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

ARTHUR RONALD HAILEY, III,

Defendant-Appellant.

Supreme Court No. 140518 4-5

Court of Appeals No. 276904

Lower Court Nos. 06-8939-01/8941-01

BRIEF OF *AMICUS CURIAE* CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND THE INNOCENCE NETWORK IN SUPPORT OF APPELLANT

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I. INTRODUCTION AND STATEMENT OF INTEREST

Bad lawyering and, in particular, the failure by defense counsel to adequately investigate the facts and witnesses crucial to a case, plays a major role in the wrongful conviction of innocent defendants: "Poor lawyering was a major cause in almost a quarter of the cases in which innocent people were exonerated by DNA." Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, Wis L Rev 35, 75 (2005). In a study of fifty-three wrongful convictions in New York State, ineffective assistance of defense counsel, "usually a failure to fully investigate or to offer alternative theories and/or suspects," is cited as one of the "primary factors" contributing to wrongful convictions. Preliminary Report of the New York State Bar Association's Task Force on Wrongful Convictions (2009), *available at* http://www.reentry.net/ny/library/attachment.147932

Another review of 200 wrongly convicted persons exonerated by DNA evidence found that twenty-nine percent raised claims of ineffective assistance of counsel in their appeal or postconviction petition, and that "[t]he majority of the thirty-eight exonerees in the innocence group who raised ineffective assistance of counsel claims did not raise procedural errors by counsel[, but instead] presented claims based on ineffectiveness of counsel relating to important evidence introduced at trial, including failures to use blood evidence, to present alibi witnesses, and to challenge eyewitness identification or informant testimony." Brandon L. Garrett, *Judging Innocence*, 108 Colum L Rev 55, 114 (2008). The failure of defense counsel to discover and present crucial evidence is of course a direct consequence of a basic failure to investigate the facts of a case. Moreover, many "procedural errors," such as failure to object to improper argument or irrelevant testimony, may also stem from defense counsel's ignorance of the basic facts of a case—again, often a direct result of failure to adequately investigate.

The precedent set by the Court of Appeals here would aggravate the neglect by ineffective defense counsel of their constitutional duty to perform a thorough investigation in each case. The holding of the Court of Appeals would permit defense counsel to justify a failure to investigate almost any exculpatory information, based solely on counsel's uninformed opinion that it would be "highly unlikely" that the investigation would produce useful information, or that a witness "[i]n all likelihood would not come forward and exculpate [the] defendant." *People v. Hailey*, No. 276423 (Mich App Dec 17, 2009). This holding would render the constitutional duty to investigate a nullity and would all but eliminate any objective standard of review for a decision to limit investigation, by focusing solely on the subjective opinion of the lawyer that a given inquiry would "probably" be a waste of time. Moreover, this rule would apply even where the lawyer's client has provided specific information and factual details supporting a claim that a third party, known to the client and available to the attorney, actually committed the crime.

The Criminal Defense Attorneys of Michigan ("CDAM") is a professional organization open to all lawyers providing criminal defense in the state of Michigan. CDAM organizes and educates its member attorneys in order to promote expertise in the area of criminal law, constitutional law, and procedure; to improve trial and appellate advocacy; and to improve the quality of legal representation for persons in the criminal justice system. CDAM seeks status as *amicus curiae* on invitation of the Michigan Supreme Court.

The National Legal Aid & Defender Association ("NLADA"), founded in 1911, is this country's oldest and largest nonprofit association of individual legal professionals and legal organizations devoted to ensuring the delivery of legal services to the poor. For nearly 100 years, NLADA has secured access to justice for people who cannot afford counsel through the creation

and improvement of legal institutions, advocacy, training and the development of nationally applicable standards. NLADA serves as the collective voice for both civil legal services and public defense services throughout the nation. The organization's full history appears on its website at http://www.nlada.org. The NLADA has regularly appeared in the United States Supreme Court as *amicus curiae* in cases ranging from *In re Application of Gault*, 387 US 1 (1967) (right to counsel and due process in juvenile cases) to *Furman v Georgia*, 408 US 238 (1972) (whether a mandatory death penalty is cruel or unusual punishment). See also *Murray v Giarratano*, 492 US 1 (1989) (NLADA appeared as amicus on scope of right to counsel). NLADA seeks status as *amicus curiae* because it believes that the precedent set by the Court of Appeals in this case would harm the interests of many indigent defendants in the state of Michigan and would deprive them of the full measure of their constitutionally guaranteed right to the effective assistance of counsel for their defense.

The Innocence Network ("the Network") is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The 54 current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Australia and New Zealand.[1] The

[1] The Member Organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defence of the Wrongly Convicted (Canada), California & Hawai'i Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Idaho Innocence Project (Idaho, Montana, Eastern Washington), The Griffith University Innocence Project (Australia), Indiana University School of Law Wrongful Convictions Component, Innocence Institute of Point Park University, Innocence Network UK, The Innocence Project, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas,

Innocence Network and its 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 promotes study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented. The Network seeks status as *amicus curiae* because it believes that the precedent set by the Court of Appeals in this case would substantially harm the interests of many innocent defendants and would lead to more wrongful convictions in the state of Michigan.

II. ARGUMENT

A. The "Decision" Not to Contact a Witness Essential to a Chosen Line of Defense Cannot be a Reasonable Exercise of Professional Judgment Under the Rule of *Strickland v. Washington*.

Effective defense counsel must conduct a thorough investigation not only to ensure that the right evidence comes in at trial, but also to inform sound strategic choices about how to defend the client or argue the case. Sound strategy depends inherently on sound investigation: "Common sense suggests that lawyers cannot reasonably decide to pursue certain lines of defense to the exclusion of others unless they have first investigated the pertinent options." Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 Marq L Rev 515, 522 (2009). Indeed,

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Innocence Project at UVA School of Law, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post Conviction Project (New York), Palmetto Innocence Project, Pennsylvania Innocence Project, The Reinvestigation Project of the NY Office of the Appellate Defender, Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University - Justice Brandeis Innocence Project (Massachusetts), The Sellenger Centre (Australia), Texas Center for Actual Innocence, Texas Innocence Network, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wesleyan Innocence Project, and the Wisconsin Innocence Project.

Webster's defines "judgment" as meaning: "to determine or pronounce after inquiry and deliberation," and "to form an opinion[;] to estimate especially on the basis of a comparison of facts or ideas." Webster's Third New International Dictionary, Unabridged (2002) (emphasis added). As the Supreme Court held in *Strickland v Washington*, 466 US 668, 691 (1984):

> [C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Sound investigation, once performed, may support strategic decisions on where to limit investigation or deploy scarce resources in developing a case. And some strategic decisions can reasonably lead counsel to decide not to pursue an entire line of investigation at all. "To be sure, in some cases counsel may have sound reason to think it would have been pointless to spend time and money on additional investigation .... But such decisions are reasonable only because counsel made them after an investigation adequate enough to make an informed choice." *Pinholster v Ayers*, 590 F3d 651, 673 (CA9, 2009). (emphasis in original; citations and internal quotations omitted).

Where counsel has chosen a particular strategy of argument or defense, the scope of "reasonable decisions" to limit investigation, based on "reasonable professional judgments," simply cannot shelter a decision not to investigate at all, when it concerns a witness central to the chosen line of defense.[2] For example, where a client admits to shooting the complainant, but tells

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[2] "An attorney's informed decision not to call a particular witness is, no doubt, ordinarily a question of strategy which cannot be revisited in a habeas corpus proceeding. When, however, the failure to call a witness is the result of an insufficient or non-existent investigation, it cannot be considered reasonable trial strategy." *Moore v New York*, No. 04 Civ 2965 2008 WL 361105, at *9 (SDNY, Feb 05, 2008) (emphasis added); see also *Keith v Mitchell*, 466 F3d 540, 544 (CA6, 2006) ("Counsel's complete and utter failure to investigate before deciding not to present mitigating evidence at sentencing is deficient performance as a matter of law under Supreme Court case law..."); *Brown v Sternes*, 304 F3d 677, 693–96 (CA7, 2002) ("Despite these

counsel that the complainant shot at him first, then the decision to argue self-defense, based on the client's admissions, could make it reasonable not to seek out or interview alibi witnesses. But that same choice would make it unreasonable to decide not to at least attempt to interview the complainant, even though it may be "highly unlikely" that he or she would admit to the client's version of events. The complainant's testimony would be essential to the defense of self-defense, regardless of what the complainant said. Even an unsuccessful attempt to interview the complainant could confirm for counsel whether the complainant is hostile to the client. And a successful interview would allow counsel to explore the details of the complainant's testimony, or to commit the witness to any inconsistencies in his or her statements, for later impeachment.

Likewise, where trial counsel decides, as in this case, to present a defense of third-party guilt, that decision does not make investigation of an alternative suspect as a potential witness "unnecessary;" it makes that investigation indispensable.[3] The majority in the Court of Appeals erred because it conflated two crucially distinct decisions: (1) the decision to present the defense of third-party guilt, based on information from the client; and (2) the "decision" not to interview the identified alternative suspects, based on nothing more than counsel's own speculation that these witnesses would not provide favorable testimony. *Strickland* held that the first sort of

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concerns [about defendant's mental competency and sanity, based on interactions of counsel with her client and information from prior counsel], [trial] counsel inexplicably abandoned their investigation and failed to articulate any strategic reason for the abandonment of the investigation into Brown's mental history.").

[3] "[F]ailure to locate and interview the potential witnesses whom petitioner had identified concerning a viable defense cannot be deemed strategic; it was only by contacting the witnesses that counsel could determine whether they could help petitioner's case or lead counsel to additional defense witnesses or evidence." *Rosario v Ercole*, 582 F Supp 2d 541, 577 (SDNY, 2008); see also *Barnes v Elo*, 339 F3d 496 (CA6, 2003) ("Without [an opinion from a medical expert on whether defendant could have performed the physical acts alleged given his disease], counsel could not make a competent strategic decision on whether the information would have been helpful.").

decision—the strategic choice of which way to argue the case—could make certain avenues of investigation obviously unproductive to pursue. But the *Strickland* court nowhere allowed that the "decision" of a lawyer not to even contact a witness, where that witness is central to a line of defense already strategically selected, could have the same effect.

The prosecution erroneously relies on *Strickland* to support its contention that trial counsel here made a reasonable decision not to investigate alternative suspects. In *Strickland*, as the prosecution points out, trial counsel had decided not to present mitigating evidence at all. *Strickland*, *supra* at 699–700. It was this decision which the Court found reasonable, not the "decision" to forego contact with any witnesses who might have offered mitigating testimony. *Strickland* in fact contradicts the prosecution's argument on this point, because the decision not to contact witnesses was reasonable only because trial counsel had already made a larger strategic decision which rendered the testimony of those witnesses irrelevant. To put it the other way, if counsel in *Strickland* had decided to present a mitigation case but had failed to even attempt to contact the witnesses who could provide mitigation testimony, there is no doubt that the Court would have found counsel's performance to be unreasonable.

Moreover, contact by defense counsel may itself stimulate a witness to come forward or to admit crucial information. As in this case, a witness who committed a crime may not even know that another person has been charged with or is facing trial for the same offense. (See SA 88a–92a.) Counsel who fails to even contact possible exculpatory witnesses cannot point to the failure of those witnesses to come forward as support for that decision, because those witnesses may have no idea there is any reason for them to come forward. Further, the concrete knowledge that an innocent person could be convicted for the witness's own crime could make that witness more willing to come forward and tell the truth. If nothing else, counsel must at least contact a

witness whom the client identifies as an alternative suspect to discover any testimony or information that witness may have that contradicts the client's story, and to determine whether the witness will cooperate with the prosecution or appear at trial.

Finally, the feelings, situation, and testimony of a witness may also change over time, and counsel will have no way to know of these changes, if counsel never even bothered to speak with the witness. In *State v Smith*, CR-06-0898, slip op at 27–30 (Ala Crim App Oct 1, 2010), the defendant, Larry Smith, told his trial counsel that another man, Carl Cooper, had murdered the victim. Cooper's former wife (who was still married to Cooper at the time of the murder) testified at a postconviction hearing that, soon after the killing occurred, Cooper called the police to come to his home to discuss the crime. Before police arrived, Cooper threatened to kill his wife and her parents if she did not go along with Cooper's story identifying Smith as the killer. In fear for her life, Cooper's wife told police that she heard Smith talk about robbing and killing the victim and saw Smith with a gun. The wife admitted that, although the basic events described in her statement were true, she merely substituted Smith's name for Cooper's when she spoke to police. She further testified that by the time of trial, she had left Cooper and divorced him, no longer feared for her life, was available to talk to defense counsel, and would have testified truthfully if called as a witness at trial.

Defense counsel received a copy of the wife's statement to police in discovery, but he never bothered to interview or even to contact her. So he never knew about Cooper's threat or the change in the wife's story, and he did not call her as a witness at trial. Here, even though a documented statement strongly suggested that the wife would not be a helpful defense witness, the court found defense counsel ineffective for failing to make any effort to talk with her, and as a result failing to present her testimony in support of the third-party guilt defense at trial.

B. Contrary to Trial Counsel's Speculation, Documented Cases Show That Many Innocent Defendants Have Been Exonerated by Compelling Evidence of Third-Party Guilt, Particularly the Confession of the True Guilty Party.

Out of the millions of cases prosecuted each year in this country, it is impossible to know how many true perpetrators would have been willing to come forward and admit guilt, if only defense counsel had picked up a telephone. It is almost as difficult to track those who were acquitted at trial because of effective defense counsel who successfully presented a defense of third-party guilt because they did investigate and locate the real perpetrator who was willing to confess. Despite these difficulties, there are a number of documented cases where the guilty party came forward to aid in the exoneration of the wrongfully convicted.

In all of the cases presented below, the perpetrator had no personal connection to the innocent party, making the situation even more unlikely than the instant case, where the perpetrators were family. The perpetrators in these cases knew that they would never be caught if they remained silent, as someone else had already been convicted for their crimes. And yet they risked their freedom and, in some cases, their lives, to do what was right. They were all subsequently convicted.

1) Marvin Anderson

Marvin Anderson was convicted of robbery, forcible sodomy, two counts of rape, and abduction on December 14, 1982, in Virginia. *Marvin Anderson*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Marvin_Anderson.php. The victim was approached by a stranger on a bicycle and was beaten, threatened, and raped. *Id.* Anderson became a suspect because the perpetrator said that he "had a white girl" and Anderson had a white girlfriend. *Id.*

From the beginning, people in the community knew that the most likely suspect was a man named John Otis Lincoln. Lincoln had a white girlfriend, and he was identified as having stolen the bicycle that was identified as the bicycle used in the rape. *Id.* Anderson requested his lawyer to call both Lincoln and the owner of the bicycle as witnesses, but counsel refused. *Id.*

In 1988, Lincoln decided to admit that he committed the crime in an effort to exonerate Anderson. Elisabeth Salemme, *Gallery of the Exonerated: Marvin Anderson*, TIME, http://www.time.com/time/specials/2007/article/0,28804,1627368_1627366_1627363,00.html. He gave detailed testimony under oath at a state post-conviction hearing. The judge did not believe him and refused to grant Anderson a new trial. *Marvin Anderson*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Marvin_Anderson.php. In 2001, the judge's ruling was proved wrong when swabs from the victim were finally tested for DNA. The samples excluded Anderson and implicated Lincoln. Lincoln was tried and convicted in 2003. Salemme, *supra.*

By the time of his exoneration, Anderson had spent fifteen years in prison. *Id.* By every appearance, this wrongful conviction would have been avoided but for the fact that Anderson's trial attorney refused to contact the alternative suspect whom his client had named, an alternative suspect who, it turns out, was willing to admit his guilt. *Id.*

2) Jeffrey Scott Hornoff

Jeffrey Scott Hornoff was convicted in 1996 for the 1989 murder of his mistress, Victoria Cushman, in Rhode Island. Cushman had been found bludgeoned to death in her home. Jeffrey Scott Hornoff, http://www.newenglandinnocence.org/profiles.html. In 1999, his motion for a new trial was denied, so he requested the release of his evidence for DNA testing. Douglas

Hadden, *Man to be Freed on Murder Rap*, PAWTUCKET TIMES, November 5, 2002, *available at* http://truthinjustice.org/Hornoff_Exonerated.htm. However, what freed him was the 2002 confession of the actual perpetrator, Todd Barry. *Id.*

Todd Barry had never been a suspect or even a witness in the Cushman murder. *Id.* He did not know Hornoff. *Id.* Although he seemingly had no reason to confess his crime, he did just that, walking into the Attorney General's office on November 1, 2002. *Id.* The Attorney General's office immediately investigated to check whether Barry's confession was corroborated by evidence. *Id.* Five days later, Hornoff was released. Barry pleaded guilty to Cushman's murder on January 6, 2003. *Hornoff v City of Warwick Police Dep't*, No CA PC 2003-4264, 2004 WL 144115, at *2 (RI Super Jan 6, 2004).

3) Richard Danziger & Christopher Ochoa

In 1988, Nancy De Priest's body was found at the Pizza Hut where she worked in Austin, Texas. She had been raped and murdered. *Richard Danziger*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Richard_Danziger.php. The police suspected Richard Danziger and his co-defendant, Chris Ochoa, both of whom worked at the Pizza Hut with De Priest. The two men were interrogated separately.

Chris Ochoa was interrogated for more than twenty hours over two days. Henry Weinstein, *Freed Man Gives Lessons on False Confessions*, LOS ANGELES TIMES, June 21, 2006, *available at* http://articles.latimes.com/print/2006/jun/21/local/me-confess21. He requested an attorney, but his request was denied because he had not yet been charged. Diane Jennings, *Two Men's DNA Exoneration in '88 Austin Murder Reveal Triumph, Tragedy*, THE DALLAS MORNING

NEWS, Feb 24, 2008. Finally, Ochoa falsely confessed to the murder. *Id.* After police threatened him with the death penalty, Ochoa falsely implicated Richard Danziger. *Id.*

A few years later, the real perpetrator, Achim Merino, heard about the convictions. *Id.* In 1996, he wrote letters to Austin police and the *Austin American-Statesman* in which he confessed his guilt. *Id.* His letter to police told them where to find the bank bag and handcuffs used in the crime. *Id.* He also wrote to then-Governor Bush's office and the district attorney's office and revealed detailed knowledge of the crimes. *Christopher Ochoa*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Christopher_Ochoa.php. .

Finally, in 2002, Mr. Danziger and Mr. Ochoa were exonerated by DNA evidence obtained and tested by the Wisconsin Innocence Project. *Id.* Those tests also implicated Achim Merino. *Id.*

Although Achim Merino was already in prison, he risked a death sentence in order to free two innocent men. *Id.* He was convicted of murder and sentenced to life in prison. Richard Danziger and Christopher Ochoa each served twelve years in prison before exoneration.

These cases are far from unique; there have been other cases where a third party confessed to defense counsel, prosecutors, or to police.[4] None of these confessions was influenced by police or by the discovery of incriminating evidence. The DNA evidence which eventually aided in the exonerations of so many of these cases was not tested until after the perpetrators confessed.

While some true perpetrators do come forward on their own, this does not relieve defense counsel of the responsibility to make a reasonable investigation, especially when told by his

[4] Other DNA exonerees with similar stories include: Kenneth Foley, Frederick Daye, Ron Reno, Richard Alexander, Antron McCray, Yusef Salaam, Kevin Richardson, Raymond Santana, and Korey Wise.

client who the true perpetrators are. The likelihood that a true perpetrator would admit guilt and exonerate an erroneously-accused defendant is, of course, greater when, as here, the true perpetrators have a family tie to the defendant. Trial counsel's claim that he had never heard of a third party confessing his guilt in open court, *People v. Hailey*, No. 276423, slip op. at 3 (Mich. App. Dec. 17, 2009), can only bolster the claim of ineffective assistance of counsel, considering the number of highly publicized cases in which true perpetrators did exactly that.

III. CONCLUSION

Because the Michigan Court of Appeals was in error when it held that Mr. Hailey's trial counsel reasonably decided to not even attempt to contact the men his client told him were the true perpetrators, the Criminal Defense Attorneys of Michigan, the National Legal Aid and Defender Association, and the Innocence Network support Mr. Hailey's request that this Court reverse that decision.

Dated: 12/1/2010

Respectfully Submitted,

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