RECEIVED by MSC 1/15/2016 9:02:04 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

Supreme Court No. 150994
Court of Appeals No. 314564
Lower Court No. 2001-004547-FC

Lorinda Irene Swain,
Defendant-Appellant.

AMICUS CURIAE BRIEF

OF CURRENT AND FORMER MICHIGAN PROSECUTORS JOHN SMIETANKA, THOMAS CRANMER, JAMES SAMUELS, THOMAS ROMBACH, GERALD GLEESON II, SAUL GREEN, FRED MESTER, ANTHONY BADOVINAC, AND BRANDON HULTINK

JENNER & BLOCK LLP
Sara Tonnies Horton (admitted *pro hac vice*)
Chad J. Ray (admitted *pro hac vice*)
Paul D. Margolis (admitted *pro hac vice*)
ATTORNEYS FOR AMICUS CURIAE
CURRENT AND FORMER MICHIGAN PROSECUTORS
353 N. Clark Street
Chicago, Illinois 60654

PRICE HENEVELD LLP
Gregory A. Lewis (P75796)
OF COUNSEL
695 Kenmoor Ave SE
PO Box 2567
Grand Rapids, Michigan 49501-2567

Dated: January 15, 2015

RECEIVED by MSC 1/15/2016 9:02:04 PM

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATUTES AT ISSUE IN *PEOPLE V. SWAIN* 2

III. ARGUMENT 4

A. Relevant Case History and the Competing Interpretations of MCL 770.1 and MCR 6.500, et seq. 5

B. The Court of Appeals Misinterpreted MCL 770.1 and MCR 6.500, et seq. 5

C. Notions of Federalism Support Expansively Interpreting the Statutes to Maintain Power at the State Level 9

D. The Ethical Mandates of the State of Michigan Require that Prosecutors and Judges Seek Justice, Rather than Expeditiousness 13

1. Ethical Duties of Prosecutors in the State of Michigan 13

2. Ethical Duties of Judges in the State of Michigan 15

E. The Costs of Wrongful Conviction Favor Facilitating Early Relief 17

IV. CONCLUSION 19

RECEIVED by MSC 1/15/2016 9:02:04 PM

TABLE OF AUTHORITIES

Page(s)

CASES

Barefoot v. Estelle,
463 U.S. 880 (1983) 11

Herrera v Collins,
506 US 390 (1993) 4, 11

McDougall v. Schanz,
461 Mich. 15, 579 NW2d 148 (Mich. 1999) 6

Murray v. Carrier,
477 U.S. 478 (1986) (Brennan, J., dissenting) 12

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) (Brandeis, J., dissenting) 9

People ex rel Coon v Plymouth Plank Rd Co.,
32 Mich 248 (1875) 6

People of the State of Michigan v. Lorinda Irene Swain,
Supreme Court Case No. 150994, Court of Appeals Case No. 314564,
Calhoun County Court Case No. 2001-004547-FC 1

People v. Cress,
468 Mich 678; 644 NW2d 174 (2003) 7

People v Kincade
206 Mich App 477; 522 NW2d 880 (1994) 6

STATUTES

28 U.S.C. § 2254 ..... 12, 13

MCL 770.1 ..... passim

MCL 770.2 5

MCL 770.3 3

MCL 770.16 3

RECEIVED by MSC 1/15/2016 9:02:04 PM

OTHER AUTHORITIES

3 J. Elliott, The Debates In The Several State Conventions On The Adoption Of The Federal Constitution 563 (2d ed. 1836) 10

4 William Blackstone, Commentaries 16

Michigan Const 1963, Article 6, § 5 ..... 3, 6

The Federalist No. 46 (J. Madison) (J. Cooke ed. 1961) 10

Freedman, *Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 Brooklyn L. Rev. 835 (1983) 10

J. Rawls, A THEORY OF JUSTICE (1971) 1

Jonathan M. Kirshbaum, *Actual Innocence after Friedman v. Rehal: The Second Circuit Pursues a New Mechanism for Seeking Justice in Actual Innocence Cases*, 31 Pace L. Rev. 627 (2011) 11

MCR 6.002 3

MCR 6.500 ..... passim

Michigan Code of Judicial Conduct, Canon 1 16

Michigan Code of Judicial Conduct, Canon 4 16

Michigan Rules of Professional Conduct, Rule: 3.8 ..... 13, 14, 15

Michigan Rules of Professional Conduct, Rule: 8.4 14

Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. Miami L. Rev. 1279 (2010) 9

RECEIVED by MSC 1/15/2016 9:02:04 PM

I. INTRODUCTION

If it is not contrary to the law for an actually innocent person to be locked up for a crime she never committed, what value is the law? The word-play of lawyers is mere pettifogging when aimed at keeping innocent people in prison. It is important to maintain perspective in deciding legal issues that strike to the core of justice. As Michigan knows well, even governors may become prisoners, and prisoners governors, and any of the citizens in whose name a sentence is carried out today may be wrongfully accused of a crime tomorrow. J. Rawls, A THEORY OF JUSTICE, 136-42 (1971) (A just society is created by parties behind "the veil of ignorance" so that principles are generated independent of personal station). Nobody truly believes that punishing an innocent person for a crime is justified by finality or to avoid reopening the wounds of victims or their families, because nobody would accept such an excuse if they found themself wrongfully convicted and seeking justice.

Former Michigan prosecutors understand the need to balance the power entrusted to them by the people of the State of Michigan with the pursuit of justice, and an unwavering ethical commitment to the overall public good. This brief presents their combined conscience.

On September 30, 2015, the Michigan Supreme Court granted leave to appeal *People of the State of Michigan v. Lorinda Irene Swain*, Supreme Court Case No. 150994, Court of Appeals Case No. 314564, Calhoun County Court Case No. 2001-004547-FC, and requested briefing on the interpretation of the law, including certain Michigan statutes. This brief discusses Michigan laws and court rules providing access to a new trial or the collateral review of a conviction for defendants who allege that they have been wrongfully convicted, but who have exhausted their rights to appeal. Michigan Court Rules ("MCR") subsection 6.500, et seq., and Michigan Compiled Laws ("MCL") section 770.1, are the procedural and substantive mechanisms used to move to set aside verdicts.

RECEIVED by MSC 1/15/2016 9:02:04 PM

This brief analyzes MCL 770.1 and its interplay with MCR 6.500, *et seq*., and we argue that MCL 770.1 provides a separate, and independent, mechanism for relief aside from MCR 6.500, *et seq*. This brief also analyzes whether "newly discovered evidence" must simply be evidence not discovered before a first motion under MCR 6.502, or whether the rule requires that "newly discovered evidence" also be evidence that could not have been previously discovered through the exercise of diligence. We argue that the statutes and court rules should be construed as written. This means that under 6.502(G)(2) evidence must merely be newly discovered, not that a litigant would be required to also prove diligence in seeking the evidence.

Our interpretations of the statutes and court rules are further supported by (1) notions of federalism, which favor power being exercised at the most local level possible, (2) the ethical mandate of prosecutors and the courts in administering justice, and (3) cost.

II. STATUTES AT ISSUE IN *PEOPLE V. SWAIN*

Defendants alleging wrongful conviction in the State of Michigan, but who failed to secure release on appeal, must resort to MCL 770.1 and MCR 6.500, *et seq*.

MCL 770.1 allows, as a matter of criminal procedure, the trial court to grant a new trial to a defendant:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

MCL 770.1 reflects a legislative policy determination by the State of Michigan because it allows the trial court to grant relief "when it appears to the court that justice has not been done." This language establishes that the legislature intended MCL 770.1 to empower trial courts to prevent miscarriages of justice. The subsequent rules in the statute provide additional substantive rights,

such as the right to testing of biological material where the identity of the perpetrator was an issue at trial, and the right to appeal adverse decisions by the trial court. MCL 770.3, 770.16.

Separate from the substantive grounds of relief found in Michigan's statutes, the Michigan Supreme Court has promulgated rules for practice and procedure under the rulemaking power granted by the Michigan Constitution. *See* Michigan Court Rules of 1985; Const 1963, art 6, § 5. Michigan Court Rules are "intended to promote a just determination of every criminal proceeding. . . " and "to be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." MCR 6.002. Subsection 6.500 authorizes review of a judgment of conviction and sentence that is no longer subject to appellate review. MCR 6.501. More specifically, MCR 6.502 allows for a motion to the trial court to set aside or modify a judgment. Relevant here, successive motions for relief under MCR 6.502 are to be denied pursuant to MCR 6.502(G)(1), except as provided by MCR 6.502(G)(2), which states in relevant part that a "defendant may file a second or subsequent motion based on . . . a claim of new evidence that was not discovered before the first such motion."

Once a motion passes the procedural hurdle of MCR 6.502(G), the substantive standard for entitlement to relief under 6.508(D) must also be met. MCR 6.508(D)(3) only allows relief to be granted for motions alleging grounds for relief "which could have been raised . . . in a prior motion under this subchapter" if the defendant demonstrates:

> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> > (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
> >
> > (ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an

RECEIVED by MSC 1/15/2016 9:02:04 PM

RECEIVED by MSC 1/15/2016 9:02:04 PM

> involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
>
> (iv) in the case of a challenge to the sentence, the sentence is invalid.
>
> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

MCR 6.508(D)(3)'s waiver of the "good cause" requirement under MCR 6.508(D)(3)(a) reduces the substantive barrier to relief. However, waiver only applies for the exceptional cases where a trial court finds that "there is a significant possibility" that the defendant is innocent of the crime for which they were convicted and sentenced.

This brief focuses on the interpretation of MCL 770.1 and MCR 6.500, *et seq*.[1] However, the analysis applies equally to the interpretation of any right to relief related to criminal matters within the State of Michigan, whether based on case law such as *Herrera v Collins*, 506 US 390 (1993), the United States' Constitution, Michigan's Constitution, or the criminal statutes within the State of Michigan.

III. ARGUMENT

In its decision in *People of the State of Michigan v. Lorinda Irene Swain*, the Michigan Court of Appeals narrowed the relief possible under MCL 770.1 and MCR 6.500, *et seq*., as discussed in Section III.a-b below. The narrowing of these substantive and procedural mechanisms for relief from judgment implicates important policies underlying the Michigan Court Rules and Michigan law in general, including (1) the relationship between the State of Michigan and the federal government, (2) the ethical obligations of prosecutors and the courts in

[1] This brief focuses solely on the interpretation of Michigan law, and does not review or analyze the underlying factual findings by Judge Sindt or the determination that Ms. Swain was entitled to a new trial.

RECEIVED by MSC 1/15/2016 9:02:04 PM

interpreting and applying the law, as well as (3) considerations of costs borne by the State of Michigan and its citizens. These policies are discussed below in Sections III.c-e.

A. Relevant Case History and the Competing Interpretations of MCL 770.1 and MCR 6.500, et seq.

The trial court applied MCL 770.1 and MCR 6.502 as written and granted Lorinda Swain's motion for a new trial. Judge Conrad Sindt, the trial court judge who presided over every day of trial and every witness presented in the case, found that the evidence presented in Ms. Swain's motion was "new evidence that was not discovered before the first such motion." Trial Court Opinion at 2-6. On this basis, Judge Sindt reviewed the newly discovered evidence, rejected some grounds, and granted those grounds that he found met the standard for relief from judgment. *Id*. at 2-11. Judge Sindt then granted relief under MCL 770.1, finding that "justice has not been done" in the case, as well as under *Herrera v. Collins* based on a finding of actual innocence. *Id*. at 11-12.

On appeal by the prosecution, the Michigan Court of Appeals found that Judge Sindt abused his discretion in granting Ms. Swain relief because her motion was barred as a matter of law under MCR 6.502(G), and, even if it was not, that Judge Sindt abused his discretion in granting relief based on MCL 770.1, a *Brady* violation, and Ms. Swain's freestanding innocence claim. Court of Appeals Opinion at 2, 5, 6, 7, 9-10.

B. The Court of Appeals Misinterpreted MCL 770.1 and MCR 6.500, et seq.

The Court of Appeals denied relief under MCL 770.1 on a finding that the relief sought was time barred pursuant to MCL 770.2(1). *Id*. at 7. However, the Court of Appeals did not consider MCL 770.2(4). MCL 770.2(4) states that a court of record may always "grant a motion for a new trial for good cause shown." MCL 770.2(4) applies here because the trial court found

RECEIVED by MSC 1/15/2016 9:02:04 PM

"good cause" and supported its finding at length in its written opinion. Trial Court Opinion at 2-8, 11.

Unfortunately, the Court of Appeals did not consider whether the facts found by Judge Sindt constituted "good cause." Instead it denied relief under MCL 770.1 by finding that only MCR 6.502 may apply. Court of Appeals Opinion at 7. In support of its reversal of the trial court, the Court of Appeals cited *People v Kincade* and *People ex rel Coon v Plymouth Plank Rd Co*. Both are in inapposite because neither case considered or decided the scope of MCL 770.1 or 770.2. *People v Kincade* relates to a defendant's right to appeal decisions made by a trial court hearing a case on a limited remand from an appeals court. 206 Mich App 477, 481-82; 522 NW2d 880 (1994). And, *People ex rel Coon v Plymouth Plank Rd Co* relates to a motion to set aside the verdict in a civil dispute where the parties continued to trial despite a party's attorney withdrawing from the matter for health reasons. 32 Mich 248, 249-50 (1875).

Contrary to the Court of Appeal's decision, MCL 770.1 stands as a substantive ground for relief independent of any provided by the Michigan Court Rules. The State of Michigan passed MCL 770.1 into law to correct wrongful convictions within the State of Michigan, by providing for substantive relief from judgment from trial courts "when it appears to the court that justice has not been done." MCL 770.1. Statutes passed into law in the State of Michigan may not be overridden by court rules. *McDougall v. Schanz*, 461 Mich. 15, 27, 579 NW2d 148 (Mich. 1999) ("it cannot be gainsaid that this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law. Rather, as is evident from the plain language of art 6, § 5, this Court's constitutional rule-making authority extends only to matters of practice and procedure.") (citing *Shannon v Ottawa Circuit Judge*, 245 Mich. 220, 222-223; 222 N.W. 168 (1928).) Therefore, by providing trial courts with a substantive ground for relief "when it appears

RECEIVED by MSC 1/15/2016 9:02:04 PM

to the court that justice has not been done," MCL 770.1 stands as a substantive law independent of the Michigan Court Rules.

The Court of Appeals further denied relief under MCR 6.500, *et seq*., by incorporating the substantive requirements for relief under MCR 6.508(D) into the procedural requirements stated in MCR6.502(G), and finding that this Court's decision in *Cress* applied. Court of Appeals Opinion at 2-6. In *Cress*, the Court limited newly discovered evidence to the evidence "the party could not, using reasonable diligence, have discovered and produced . . . at trial." *See People v. Cress*, 468 Mich 678; 664 NW2d 174 (2003). However, the Court in *Cress* did not consider or decide the standard for review of successive motions for relief under 6.502(G). Rather, *Cress* considered the substantive requirement for claims for relief from judgment where newly discovered evidence arguably could have been discovered before trial under MCR 6.508(D), and not based on evidence only discovered after a motion under MCR 6.502 had already been filed, and presented for the first time in a successive motion for relief from judgment under MCR 6.502(G).

MCR 6.502(G) and 6.508(D) provide separate hurdles for defendants. MCR 6.502(G) procedurally limits successive motions for relief from judgment, while 6.508(D) substantively defines the showing a defendant must make for relief. By reading the substantive requirements of MCR 6.508(D) into the procedural bar of MCR 6.502(G), the Michigan Court of Appeals significantly narrows the prospects for relief from judgment for those wrongfully convicted in the State of Michigan.

This distinction matters. Judge Sindt found that there is a significant possibility that the defendant, Ms. Swain, is innocent of the crime. Trial Court Opinion at 7 ("That 'significant possibility' [of innocence] continues to exist in this case, even more so than the first time this

Court made that determination . . . . This Court has no doubt about it.”). That finding removes the “good cause for failure to raise such grounds on appeal or in the prior motion” requirement under MCR 6.508(D). Thus, if the Trial Court’s plain reading of the statute is correct, then Ms. Swain’s motion was properly granted. However, if the Michigan Court of Appeal’s interpretation of 6.502(G) is correct a defendant must also meet the *Cress* standard showing “good cause” for not presenting the evidence at trial, rather than just presenting evidence that “was not discovered before the first” motion under MCR 6.502. This requirement raises the procedural barrier for relief because MCR 6.502(G) does not contain a similar provision to MCR 6.508(D)(3)’s waiver clause which eliminates the “good cause” requirement in cases of innocence. Thus, by combining the standards of review for these provisions, the Court of Appeals renders MCR 6.508(D)(3)’s waiver clause superfluous in the statute by making the “good cause” requirement both a procedural and substantive bar to relief.

In considering the present case, the Michigan Supreme Court is being called upon to decide between the interpretations of (1) the trial court, which interpreted MCL 770.1 as written, or (2) the Court of Appeals, which significantly narrowed the statute, by limiting MCL 770.1 to the scope of relief possible under MCR 6.500, *et seq*. Similarly, the Michigan Supreme Court is called upon to decide between (1) the trial court’s interpretation of the plain language of MCR 6.502, in granting relief based on evidence that “was not discovered before the first” motion under MCR 6.502, or (2) the Court of Appeals narrower interpretation of the statute. As outlined above, the Court of Appeals interpretation narrowed MCR 6.502(G) by reading-in the additional requirement that newly discovered evidence under the statute must be limited to evidence “the party could not, using reasonable diligence, have discovered and produced . . . at trial.” The

RECEIVED by MSC 1/15/2016 9:02:04 PM

Court of Appeals' narrowing of the statutes and court rules is improper as a matter of interpretation, because, in both cases, requirements outside the plain language are read-in.

C. Notions of Federalism Support Expansively Interpreting the Statutes to Maintain Power at the State Level

The Court of Appeals' narrow interpretation of the statute and court rules violates notions of federalism. The individual states are to be the chief arbiters of state criminal adjudications, and when such decisions are reviewed by federal courts, federalism issues may arise as to the propriety of such review. Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. Miami L. Rev. 1279, 1282 (2010). There are two types of federalism at issue here: horizontal and vertical. Horizontal federalism considers the possibility of social progress in the states' capability to experiment with and compete in devising varying solutions to social problems. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try social and economic experiments without risk to the rest of the country.").

By enacting statutes and court rules providing for post-conviction relief where newly discovered evidence suggests wrongful conviction, *e.g.* MCL 770.1 and MCR 6.500, *et seq*., the State of Michigan attempted to address the social problem of wrongful convictions. However, the prosecution's proposed interpretation of these statutes, subsequently adopted by the Court of Appeals, would undo this progress and circumscribe the impact that the statutes may have in providing relief for those wrongfully convicted in the State of Michigan. Through judicial reduction of the scope of claims, injustices that the statutes and court rules were designed to ameliorate will remain.

RECEIVED by MSC 1/15/2016 9:02:04 PM

RECEIVED by MSC 1/15/2016 9:02:04 PM

The prosecution's proposed interpretation of the statutes also runs afoul of vertical federalism concerns. Vertical federalism, regardless of differences between states, concerns protecting the liberties of citizens by delegating power downwards to the most local, and therefore most politically accountable, level. The Federalist No. 46, at 316 (J. Madison) (J. Cooke ed. 1961) (noting a closer connection between the people and their state government than between the people and the federal government). The founders of the United States sought to protect the people from abuses of power by the centralized national government, based on the premise "that officeholders were not to be trusted and that the corrupting effect of power would inevitably cause them to seek their own aggrandizement at the expense of citizens' liberty." Freedman, *Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 Brooklyn L. Rev. 835, 836 (1983) (citing contemporary sources); *see* 3 J. Elliott, *The Debates In The Several State Conventions On The Adoption Of The Federal Constitution*, 563 (2d ed. 1836) (remarks of William Grayson to the Virginia ratifying convention, June 21, 1788: "[P]ower ought to have such checks and limitations as to prevent bad men from abusing it. It ought to be granted on a supposition that men will be bad; for it may eventually be so."). Notions of vertical federalism provide a fundamental balance to overreaching centralized power in the federal government by decentralizing power to the states wherever possible, including the police power.

Consistent with notions of vertical federalism, to avoid repeated federal court intervention in state criminal proceedings, many states have recognized actual innocence as a freestanding claim for relief from judgment, including the State of Michigan. The State of Michigan has authorized this use of power through MCR 6.500, *et seq*., and MCL 770.1, and the courts have an obligation to apply the law rather than circumscribe it.

RECEIVED by MSC 1/15/2016 9:02:04 PM

Here, if the State of Michigan fails to correct the injustice of wrongful conviction, then the prospect of actual innocence claims becoming cognizable as a stand-alone ground for federal habeas corpus relief increases significantly. This pushes the State of Michigan's police power "up" to the federal government, which then becomes responsible for the accuracy of criminal convictions. This result would inappropriately displace one of the core powers reserved to the states: the police power.

If the Court chooses to adopt the narrowed interpretations of the law advanced by the Court of Appeals, federal courts will increasingly need to exercise their broad equitable powers in habeas cases to ensure that innocent persons do not suffer unjust punishment. *See* Jonathan M. Kirshbaum, *Actual Innocence after Friedman v. Rehal: The Second Circuit Pursues a New Mechanism for Seeking Justice in Actual Innocence Cases*, 31 Pace L. Rev. 627, 645 (2011). Such an incursion may be the most egregious affront to vertical federalism possible. The separation of power between state and the federal governments, particularly clear in the criminal context, makes expansive review of state criminal proceedings by federal courts inappropriate. *Herrera*, 506 U.S. at 401 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). The "if they don't do it we will do it for them" conclusion implicit in *Herrera* that the federal courts may only hear innocence claims if state process is unavailable either forces the states to act, or threatens that the federal courts will decide guilt or innocence for local violations in the state's stead. *See Herrera*, 506 U.S. at 440-44 (Blackmon, J., dissenting). This is because unjust punishment runs afoul of an actually innocent person's constitutional rights; the government in a civilized society must always be accountable for an individual's imprisonment, and, if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to immediate release. *Murray v. Carrier*, 477 U.S. 478, 516 (1986) (Brennan, J., dissenting).

RECEIVED by MSC 1/15/2016 9:02:04 PM

In this case, even assuming that the statutes could be fairly read in at least the two ways described above in Sections II and III.a-b, the interpretations clearly differ in objective. The trial court interpreted the statute as written, favoring the interest of justice based on evidence that convinced him that Ms. Swain was wrongfully convicted. Trial Court Opinion at 7 ("That 'significant possibility' [of innocence] continues to exist in this case, even more so than the first time this Court made that determination . . . . This Court has no doubt about it."). The prosecution's argument, adopted by the Court of Appeals, relies on a narrow interpretation of these statutes at the expense of justice for the wrongfully convicted. *See* Plaintiff-Appellee's Brief on Appeal at 44-47. This interpretation invites federal intervention into state criminal proceedings, and thereby weakens the State of Michigan in our federalist system.

While the prosecution's central argument against reopening criminal proceedings appears to be "finality," *id*., justice remains the ultimate goal of the criminal justice system. Finality serves as an excuse for inaction, and is an inappropriate excuse when applied to innocence claims. *Murray v. Carrier*, 477 U.S. 478, 516 (1986) (Brennan, J., dissenting) ("[T]he root principle underlying 28 U.S.C. §2254 is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release.").

To be sure, the State of Michigan also has an interest in avoiding frivolous delays. But, reviewing newly discovered evidence in evidentiary hearings generates correspondingly narrow and focused proceedings, which are further streamlined by being heard by the original trial judge, where possible. *See* MCR 6.501, 6.502, 6.504. In any event, the prospects of frivolous delay are minimized by addressing the evidence appropriately from its discovery. Restrictive state proceedings necessitating federal review of meritorious claims redouble any frivolous

RECEIVED by MSC 1/15/2016 9:02:04 PM

delay. On the other hand, if petitioners are granted a continuing opportunity the make claims in state court, then, on federal habeas corpus, any non-meritorious claims will be easily dispatched. Such well-supported state findings will maintain the presumption of correctness under 28 U.S.C. § 2254(d) and the normal rules of exhaustion and procedural default will eliminate these claims without further involvement by the federal courts.[2]

D. The Ethical Mandates of the State of Michigan Require that Prosecutors and Judges Seek Justice, Rather than Expeditiousness

The courts (including judges and prosecutors) have an obligation to see that justice is done for all citizens. Courts are empowered to grant such relief under at least MCR 6.500, *et seq*., and MCL 770.1, and ethically they must use this power to see that justice is done.

1. Ethical Duties of Prosecutors in the State of Michigan

The Michigan Rules of Professional Conduct state that "[t]he prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . ." Rule: 3.8, Special Responsibilities of a Prosecutor. The comments expand upon this rule, stating that "[a] prosecutor has the responsibility of *a minister of justice and not simply that of an advocate*. This responsibility carries with it *specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence*." *Id*. (emphasis added.) Moreover, "[i]t is professional misconduct for a lawyer to: . . . (c) engage in conduct that is prejudicial to the administration of justice." Rule: 8.4 Misconduct.

---

[2] Beyond the benefits to federalism, there are numerous additional benefits to the State of Michigan in focusing federal habeas corpus challenges. For instance, claims in federal habeas corpus petitions commonly allege ineffective assistance of counsel, based on a failure to uncover exculpatory evidence. However, the federal judge typically cannot distinguish whether the real attack is on counsel or on the verdict. To prevent injustice, federal judges may be tempted to give more weight to the former attack if the latter appears meritorious, even though counsel could not reasonably have prevented the outcome on the facts that were then available. If proceedings at the state level were litigated on the merits, this problem would not exist, rendering attacks on the performance of counsel fewer and better focused, where applicable. These advantages should not be lost on the State of Michigan, despite not being raised by the prosecution or Court of Appeals.

RECEIVED by MSC 1/15/2016 9:02:04 PM

Lawyers, and prosecutors in particular, have an affirmative obligation to act in furtherance of *justice*. No evidence should be sufficient to decide the guilt of a person who is actually innocent. Further, the duty to see that a defendant is accorded procedural justice requires that prosecutors interpret and apply procedural rules to see that justice is done *for the defendant*. This forecloses arguing to limit the applicability of procedural rules that provide for post-conviction review of cases. Prosecutors must seek justice and not merely to dispose of cases where additional review is sought.

Here, the prosecutors have argued that MCR 6.500, *et seq*., and MCL 770.1 should be interpreted narrowly. The prosecution's arguments go against the interest of justice, attempting to erect additional procedural barriers through 6.502(G)(2). This appears to fly in the face of Rule: 3.8, defining the Special Responsibilities of a Prosecutor "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Michigan Rules of Professional Conduct, Rule 3.8. By interpreting these statutes narrowly, the prosecution seeks finality over justice, at the expense of the accused who may be innocent, and victims. Justice cannot be done if punishment is applied to the innocent rather the guilty. The Michigan Supreme Court should reject the prosecutor's interpretation of MCR 6.500, *et seq*., and MCL 770.1. In so doing, the Michigan Supreme Court reiterates that the Michigan Rules of Professional Conduct mean what they say; namely, that the State of Michigan expects lawyers, and prosecutors in particular, to only make arguments that promote justice, rather than expeditious case handling.

The Quentin Lavell Carter case provides an example of these rules in action. When presented with evidence of Mr. Carter's innocence, Kent County Prosecutor William A. Forsyth confronted the alleged wrongful conviction of Mr. Carter, who had served almost 17 years for

criminal sexual conduct, and ordered that the case be reinvestigated. In doing so, Mr. Forsyth sought justice, both for the original victim and for Mr. Carter. *See* Ex. A, Forsyth Press Release. Mr. Forsyth found that Aurlieas Marshall, who had previously pleaded guilty to child abuse involving the same victim, intimidated the victim into implicating Mr. Carter. These were not Mr. Marshall's only offenses. Mr. Marshall was also convicted of a murder, which occurred approximately two years before the abuse charges.

When faced with evidence that Mr. Carter was wrongfully convicted, Mr. Forsyth recognized that it was his office that sought and obtained the wrongful conviction. In the interest of justice, Mr. Forsyth drafted and assisted Mr. Carter in filing a motion to set aside his 1992 conviction. Mr. Forsyth then personally met with and apologized to Mr. Carter. Mr. Forsyth noted that neither the apology nor setting aside the conviction could adequately compensate Mr. Carter for what he had lost. These actions display that a prosecutor's role in the system is not to win convictions, but to secure justice. Such behavior, consistent with Rule 3.8, should be reinforced by the Michigan Supreme Court. In this case, that means the Court should reject the prosecution's narrow interpretation of the procedures available under 6.502(G) to those wrongfully convicted within the State of Michigan.

2. Ethical Duties of Judges in the State of Michigan

The Michigan Code of Judicial Conduct takes the ethical mandate of judges even further. The Michigan Code of Judicial Conduct states that:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.

RECEIVED by MSC 1/15/2016 9:02:04 PM

RECEIVED by MSC 1/15/2016 9:02:04 PM

Canon 1, A Judge Should Uphold the Integrity and Independence of the Judiciary. In the criminal context, the "litigant" is the accused or convicted, and judges are specifically directed to see that justice be done in our society, for the public good. However, the public's benefit is only achieved if courts operate to ensure justice for all, including those individuals who are wrongfully convicted. To this end, and to the extent multiple interpretations are possible, Michigan courts should interpret the law expansively to provide opportunities for individuals to prove their innocence. It is commonly recognized that it is "[b]etter that ten guilty persons escape than that one innocent suffer." 4 William Blackstone, Commentaries at *358.

By narrowly construing the statute and court rules, at issue here, the courts ensure the opposite. The law should be developed to promote justice, and judges in Michigan, have a special responsibility to improve the cause of justice:

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice.

Canon 4, A Judge May Engage in Extrajudicial Activities. This responsibility extends to interpretation of the law in this case.

Here, Judge Sindt, having presided over the entire trial and having viewed each and every witness presented in the Lorinda Swain case, concluded that Ms. Swain was wrongfully convicted. Trial Court Opinion at 7 ("That 'significant possibility' [of innocence] continues to exist in this case, even more so than the first time this Court made that determination . . . This Court has no doubt about it."). In so ruling, Judge Sindt considered the weight of the evidence, and observed the standards of conduct demanded to protect the integrity and independence of the judiciary. Instead of being attacked as abusing his discretion, judges in Judge Sindt's position, who are aware that the judicial system is for the benefit of the litigant and the public, should be

RECEIVED by MSC 1/15/2016 9:02:04 PM

encouraged to see that justice is done. Judges, and courts in general, must interpret the laws of Michigan for the improvement of criminal justice. That means rejecting the prosecution's narrow interpretation of the procedures available under 6.502(G) to those wrongfully convicted within the State of Michigan.

E. The Costs of Wrongful Conviction Favor Facilitating Early Relief

The Court of Appeals' interpretation of the statute and court rules exacerbates the costs of wrongful conviction. First, many years often pass between wrongful conviction and relief from judgment, in part because of a general tendency for evidence of innocence to be uncovered at a relatively late stage of criminal proceedings. The myriad reasons for this include the intense community pressure to convict someone – anyone – of atrocious crimes. This can lead to law enforcement officials cutting constitutional corners, such as failing to provide relevant exculpatory evidence to the defense. It is often only after the passage of time that witnesses, including law enforcement officers, prosecutors no longer in office, prisoners released from custody, estranged family, friends, or lovers are willing to come forward.

These same pressures also impact defense attorneys. For a lawyer, defending a case involving grievous charges means making a commitment to the full legal and factual evaluation where the client is likely to be the subject of intense public hostility and the state has devoted maximum resources to the prosecution. It also enduring the draining emotional effects of personal responsibility for the outcome.

Finally, although not a criticism of the many outstanding attorneys providing criminal defense at the trial level, the quality of legal representation and amount of resources available for a given case tends to improve somewhat as individuals move through the system. The insufficiency of legal resources for criminal defense results in a system of triage that tends to concentrate resources on those defendants at the highest levels of the appeals courts.

RECEIVED by MSC 1/15/2016 9:02:04 PM

Because of these typical delays, wrongful conviction costs the State of Michigan and its citizens greatly. Wrongful conviction costs the victims of criminal conduct by delaying true justice. Incarcerating the wrong individual for an offense does not see justice done, and leads to reopening of a victim's wounds when the State's error is uncovered. Wrongful conviction may also deny the victim real justice. Delays in prosecuting the real perpetrators may allow statutes of limitation to run, or the evidence to be lost. Moreover, wrongful conviction may create additional victims, if the real perpetrators remain at large committing new offenses.

Wrongful conviction also affects the wrongfully convicted. These individuals lose freedom for years. They are robbed of their earning power, often during their most productive years. The wrongfully convicted also experience unimaginable emotional trauma from the loss of freedom and removal of support by and for friends and family. *See* Forsyth Press Release.

Similarly, families lose individuals who would, if not wrongfully convicted, provide a social, emotional, and productive support to the family. Losses to families include the obvious opportunity costs of salary and savings, as well as direct costs of incarceration, such as telephone bills between loved ones. Those calls for Larry and Melody Souter totaled $83,290.94 during his 13 years in prison for a crime he did not commit. *See* Ex. B, Souter Valuation of Claims at 2. There are also intangible costs, such as loss of consortium, which includes such as loss of companionship, society, and love. *Id*. Even more fundamentally, wrongful conviction can deny families of a next generation, where the lost time robs them of the opportunity to start a family. *See Id*.

Communities also pay a cost for wrongful conviction. They lose individuals who would otherwise be social and productive members. Communities lose a work force participant and an economic demand generator for local businesses. Communities lose social connections, as the

wrongfully convicted is no longer an active participant in churches and other organizations working in the community.

Finally, the State of Michigan pays a high cost when it wrongfully convicts individuals. Of course, the state bears the direct costs of incarceration. However, the state often also must provide significant benefits to families who lose a provider to wrongful conviction. Such support may be in the form of food, shelter, and other public welfare programs. More broadly, the state also loses a work force participant who could otherwise provide support for businesses in the state, both as a source of labor for businesses and in generating demand for businesses by spending money. Moreover, because the wrongfully convicted individual is no longer earning money and paying into the state's coffers, the state loses a tax engine. Importantly, if the innocent are convicted, the state's criminal justice system, and the professionalism of those who work within the system, may lose the public's trust and respect.

Victims, the wrongfully convicted, families, local communities, and the State of Michigan benefit when wrongful convictions are handled as early and quickly as possible, without unnecessary delays and barriers compounding the costs.

IV. CONCLUSION

Despite disproportionately affecting the poorest among us, the principles discussed in this brief affect everyone in our society. Laws must be interpreted as written for each citizen of the State of Michigan. Neither a wronged litigant nor society can afford to be without means to remedy a palpable miscarriage of justice. Therefore, the Court should interpret Michigan's laws to administer justice and protect the remedies necessary to enable the wrongfully convicted to prove their innocence.

//

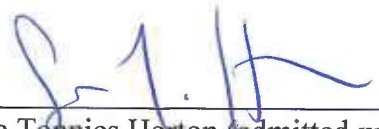
//

RECEIVED by MSC 1/15/2016 9:02:04 PM

Dated: January 15, 2016

Respectfully Submitted,

JENNER & BLOCK LLP



Sara Tonnies Horton (admitted *pro hac vice*)
Chad J. Ray (admitted *pro hac vice*)
Paul D. Margolis (admitted *pro hac vice*)
ATTORNEYS FOR AMICUS CURIAE
CURRENT AND FORMER MICHIGAN PROSECUTORS
353 N. Clark Street
Chicago, Illinois 60654

PRICE HENEVELD LLP
Gregory A. Lewis (P75796)
OF COUNSEL
695 Kenmoor Ave SE
PO Box 2567
Grand Rapids, Michigan 49501-2567

RECEIVED by MSC 1/15/2016 9:02:04 PM

Exhibit A

RECEIVED by MSC 1/15/2016 9:02:04 PM

PROSECUTING ATTORNEY

CRIMINAL DIVISION
82 Ionia Ave N.W.
Suite 450
Grand Rapids, MI 49503-3022
Telephone: (616) 632-6710
Fax: (616) 632-6714

WILLIAM A. FORSYTH
Prosecutor

CHRIS BECKER
Chief Assistant Prosecutor

RECEIVED by MSC 1/15/2016 9:02:04 PM

NEWS RELEASE

After more than two decades, a Kent County jury has at long last held Aurlieas (A.J.) Marshall accountable for the senseless and tragic murder of Joel Battaglia. His actions were horrific, the pain and suffering he inflicted on the family and friends of Mr. Battaglia was unspeakable and his efforts to avoid detection by the use of intimidation and threats were reprehensible.

The evil perpetrated by Marshall, however, did not end with the 1990 murder of Joel Battaglia. During the Battaglia investigation, detectives from the Grand Rapids Police Department and the assistant prosecuting attorney assigned to the investigation learned of evidence that suggested Marshall may have been, in large part, responsible for the wrongful conviction of Quentin Lavell Carter.

In 1992, shortly before his 17th birthday, Mr. Carter was convicted by a jury of criminal sexual conduct in the first degree for an alleged sexual assault of a ten year old girl; he was initially sentenced to 6-20 years in prison. At trial, the victim, a former neighbor of Mr. Carter, identified him as the perpetrator; although inadmissible in court, the results of Mr. Carter's polygraph examination, an exam that he had requested to take prior to trial, lent credence to her identification. In addition, her testimony was supported by the fact that she suffered from injuries consistent with having been sexually penetrated.

Unfortunately, the victim's mother did not report the assault to the police and waited 10 days to take her to the hospital for a physical examination; i.e., the offense was alleged to have occurred on September 3rd and the examination took place on September 13th[1]. Although the examination revealed numerous physical injuries to the victim, no DNA evidence was recovered.

After becoming aware of the evidence that potentially exonerated Mr. Carter, both the detectives and the assigned prosecutor spent countless hours reinvestigating the case against him. After doing so, it is their collective opinion that the child was not assaulted by Mr. Carter but rather by her mother's live-in boyfriend, A. J. Marshall. It is their further belief that in an effort to avoid detection for having sexually assaulted the victim, Marshall forced the girl to incriminate Mr. Carter by physically and psychologically abusing her. Aside from providing cover for his own criminal wrongdoing, it is believed that Marshall may have targeted Mr. Carter in particular because he owed him money for a drug debt. It should be noted that Marshall pled guilty in January of 1992 to child abuse; his victim was the same ten year old girl who he had beaten, coerced and forced to implicate Mr. Carter.

---

[1] **Personnel from Blodgett Hospital immediately contacted the Grand Rapids Police Department after conducting the exam on September 13th.**

At great personal sacrifice, Mr. Carter has maintained his innocence for over 23 years. While in prison, he was encouraged to admit guilt and participate in a counseling program for convicted sex offenders; he refused. His perceived lack of remorse and cooperation may explain, in part, why he was repeatedly denied parole; i.e., instead of being released after he had served his 6 year minimum sentence, he remained incarcerated for almost 17 years.

While Marshall's actions were abhorrent and nearly impossible to comprehend, he is not the only person responsible for what happened to Mr. Carter. In the last analysis, it was my office that charged Mr. Carter and it was my office that sought and obtained the conviction that led to his imprisonment.

Regrettably, the information disclosed during the Battaglia investigation and the reinvestigation of the Carter case leads to the inescapable conclusion that Mr. Carter should not have been convicted of criminal sexual conduct. As a result, my office drafted and has assisted Mr. Carter in filing the attached motion to set aside his 1992 conviction

I have personally met with and apologized to Mr. Carter. During our meeting, I also told him that we are attempting to vacate his conviction and explained to him the steps involved in that process. I fully recognize, however, that neither my apology nor the setting aside of his conviction can begin to adequately compensate Mr. Carter for what he has lost. Tragically, there is nothing that can be done to restore his youth or return to him the years he spent in prison.

William A. Forsyth
Kent County Prosecuting Attorney
6/10/15

RECEIVED by MSC 1/15/2016 9:02:04 PM

RECEIVED by MSC 1/15/2016 9:02:04 PM

Approved, SCAO

Original - Court
1st copy - Prosecutor

2nd copy - Defendant
3rd copy - Defendant attorney

STATE OF MICHIGAN 17th JUDICIAL CIRCUIT KENT COUNTY	MOTION FOR RELIEF FROM JUDGMENT	CASE NO. 91-56163-FC

ORI
MI-

Court address
180 OTTAWA AVENUE NW, GRAND RAPIDS, MI 49503

Court telephone no.
(616) 632-5220

THE PEOPLE OF THE STATE OF MICHIGAN

v

Defendant name, address, and inmate no.
QUENTIN LAVELL CARTER
1908 Union SE
Grand Rapids, MI 49507

To be completed by the court.

CTN/TCN	SID	DOB
41 91 140647 01	1611548L	05/28/1975

INSTRUCTIONS: Answer each question as completely as you can. If you need more space to answer any question, you may attach extra pages. You may also attach documents, affidavits, or a brief, if you wish. Only one motion for relief may be filed, except as indicated in MCR 6.502(G)(2). Information for items 1 and 2 is on both your judgment of sentence and basic information sheet, which are available at the prison record office.

1. I was found guilty on 02/26/1992 (Date) of the crime(s) stated below.

Count	CONVICTED BY Plea*	Court	Jury	DISMISSED BY*	CRIME	CHARGE CODE(S) MCL citation/PACC Code
			X		CSC 1ST	750.520B1A

*For plea: insert "G" for guilty plea, "NC" for nolo contendere, or "MI" for guilty but mentally ill. For dismissal: insert "D" for dismissed by court or "NP" for dismissed by prosecutor/plaintiff.

2. I was sentenced as stated below by Hon. Robert A. Benson (Name of judge).

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
	5/5/1992	6			20		9/20/1991			

3. Fill in the charts below with the information requested about the court proceedings in your case and the names of the attorneys who represented you.

a. **Trial Level - All Proceedings.** From arrest to sentencing, including lineups and other proceedings.

NAME OF PROCEEDING	NAME OF ATTORNEY
Preliminary hearing	Deno Fotieo
Trial	Deno Fotieo
Sentencing	Deno Fotieo
Motion for New Trial	Lawrence Katz

NAME OF PROCEEDING	NAME OF ATTORNEY

b. **Postconviction - All Proceedings.** State and federal, including appeals, posttrial motions, and habeas petitions.

COURT	DOCKET NO.	NAME OF PROCEEDING	NAME OF ATTORNEY	RESULT	DATE OF RESULT
Court of Appeals	155599	Appeal of Right	Lawrence Katz	Conv/Sent Affirmed	8/10/1994

(Continued on the other side.)

4. **Appointment of Counsel.** Do you want an attorney appointed? ☑ Yes ☐ No If yes, complete and attach a financial schedule.

5. **Grounds and Relief.**

a. What action do you want the court to take? Set aside conviction

b. What are the legal grounds for the relief you want? **You <u>must</u> raise <u>all</u> the issues you know about.** You may not be allowed to raise additional issues in the future. Use extra sheets of paper, if necessary.

ISSUE ONE: Based on the victim's recent acknowledgment under oath that she lied at the trial, the conviction should be set aside based on this newly discovered exculpatory evidence.

Supporting facts: See attached memorandum.

ISSUE TWO:

Supporting facts:

ISSUE THREE:

Supporting facts:

ISSUE FOUR:

Supporting facts:

I declare that the statements above are true to the best of my information, knowledge, and belief.

06/10/2015
Date

Signature

PROOF OF SERVICE

I certify that on this date I served a copy of this motion upon the prosecutor by ☑ personal service. ☐ first-class mail.

06/10/2015
Date

Signature

RECEIVED by MSC 1/15/2016 9:02:04 PM

RECEIVED by MSC 1/15/2016 9:02:04 PM

STATE OF MICHIGAN
IN THE 17TH CIRCUIT COURT FOR THE COUNTY OF KENT
* * * * * * * * *

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v QUENTIN LAVELL CARTER, Defendant.	Hon. George S. Buth Case No. 91-56163-FC
William A. Forsyth (P23770) Kent County Prosecutor's Office 82 Ionia Avenue NW – Suite 450 Grand Rapids, MI 49503 (616) 632-6710	Quentin Lavell Carter *In Pro Per* 1908 Union SE Grand Rapids, MI 49507 (616) 350-6740

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT

NOW COMES Quentin Lavell Carter, *in pro per*, and, in support of his Motion for Relief from Judgment, Defendant argues the following:

Pursuant to MCR 6.502, Defendant seeks to have this Honorable Court set aside his conviction for CSC 1st.

As an initial procedural matter, while a motion to set aside the conviction was previously filed in 2002, the motion was never heard and this Court has never ruled on its procedural or substantive merits; therefore, this is the first motion for relief from judgment to be presented to this Court for actual resolution.

LEGAL STANDARD

Pursuant to MCR 6.508(D), it is the defendant's burden to establish entitlement to relief. Because the initial appeal was decided in August 1994, the case is no longer subject to direct review and therefore the bar of §508(D)(1) does not apply. While the issue of the sufficiency of the evidence was previously raised in Defendant's direct appeal, Defendant submits that the newly discovered evidence of the victim's acknowledgement under oath that she lied at the initial trial constitutes a basis for relief from judgment. Because that

evidence did not and could not come to light until it occurred recently, Defendant submits that this Court should analyze this motion under §508(D)(3), which states that this Court cannot grant relief if the motion:

> alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failing to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal; . . .
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case; . . .
>
> The court may waive the "good cause" requirement of subrule (D)(3) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

As the Supreme Court noted in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), "[f]or a new trial to be granted on the basis of newly discovered evidence, a defendant must show that (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." (internal quotations and citation omitted). In *Cress*, the Supreme Court found that the trial court's determination that a third-party's confession to having committed the murder lacked credibility based on how it deviated from the known facts of the case, and therefore the trial court did not abuse its discretion in denying the motion for a new trial. Implicit in the holding of the Supreme

RECEIVED by MSC 1/15/2016 9:02:04 PM

Court is that, if the trial court had found the third party confession credible, it would not have been an abuse of discretion to grant the defendant relief.

FACTUAL SUMMARY

The testimony at the trial was summarized by Judge Benson in his opinion ordering that Defendant be sentenced as an adult: "We had a young girl who was sodomized by Mr. Carter while she was held down, and just prior to that she had been vaginally raped by Mr. Carter's friend while Mr. Carter held her down. So we have a ten-year-old girl who is accosted at a place of safety, in her home, dragged to the porch, brutalized by these two people, then threatened with her life, and threatened to the point where she took a severe beating before she would tell anybody" (4/27/92 Tr, 7). As Judge Benson noted at the time, "Mr. Carter denies any involvement or any wrongdoing whatsoever" (*Id.*, 10).

The investigation into the CSC began when the victim's mother brought a urine sample into a clinic asking that it be tested for pregnancy. When asked, the mother eventually stated it was from her 10-year-old child. The mother was told that the child needed to be examined, and that the clinic was going to follow up on this. When the mother brought the child to a doctor for evaluation, not only was there evidence of a sexual assault, the victim had been severely beaten. The mother's boyfriend, Aurelias Marshall, admitted beating the victim, supposedly to get her to disclose with whom she had sex. Mr. Marshall went to prison for Child Abuse 1st Degree. At trial, the only identification of Defendant as one of the perpetrators of the crime came from the victim. Unfortunately, the victim's mother did not report the assault to the police and waited ten days to take her to the hospital for a physical examination. Although the exam revealed numerous physical injuries to the

RECEIVED by MSC 1/15/2016 9:02:04 PM

victim, including injuries consistent with having been sexually penetrated, no DNA was recovered.

Recently, the Kent County Prosecutor's Office reopened an investigation into the 1990 murder of Christopher Battaglia. In the course of questioning under an investigative subpoena, the CSC victim, who is now an adult, admitted that she lied at Defendant's trial. She testified that the beatings she received from Mr. Marshall were not to get her to reluctantly identify her assailant, but to make sure that she identified someone as an assailant in a gang rape rather than Mr. Marshall, who had been molesting her. The victim also disclosed that, while being taken for medical treatment approximately 10 days after the sexual assault, she was warned by her mother to not say anything bad about Mr. Marshall or she would be beaten more. Because of her fear of what Mr. Marshall could do to her and her family, even after he was incarcerated for child abuse, the victim persisted in identifying Defendant at trial as one of her assailants in a supposed gang rape, and for some time afterwards.

The Kent County Prosecutor's Office reinterviewed several people regarding the CSC, including Defendant. It was learned that Defendant served approximately 17 years of his 20 year maximum term, in part because he refused to admit involvement in the crime, despite knowing that he could have been considered for parole after 6 years if he had admitted involvement. Defendant continued to insist that he was not involved in the sexual assault of the victim. Defendant also stated that Mr. Marshall, who was in jail on his child abuse charge while Defendant was awaiting trial on the CSC charge, told Defendant that he would testify on Defendant's behalf at trial. When Mr. Marshall was called to the courtroom at Defendant's trial, Mr. Marshall invoked his Fifth Amendment right against

RECEIVED by MSC 1/15/2016 9:02:04 PM

self-incrimination despite having pled guilty to Child Abuse 1st Degree.[1] Defendant had relied on Mr. Marshall's communication that he would testify for Defendant at the trial in preparing and presenting a defense; just as Mr. Marshall's beating of the victim was done to manipulate the identification of the true assailant, his efforts sabotaged Defendant's trial.

In the course of the re-investigation into the CSC, the victim's mother has now acknowledged that she was aware that the victim had indicated Mr. Marshall had molested her while he was in the home, and that Mr. Marshall, while beating the victim in the incident that led to his child abuse charges, was not asking the victim about who she had sex with or who had raped her, but instead was telling her to identify Defendant as an assailant. Other statements of the mother at the time of the initial report have also been undermined by subsequent information: she had stated that Mr. Marshall beat the victim to disclose who she had been sleeping around with as a 10-year-old, but interviews and records have demonstrated that the victim and her siblings were essentially trapped in their rooms during the time Mr. Marshall was at the house (including urinating in their rooms for fear of going out into the hallway to use the bathroom), so there was no reasonable possibility that the victim could have been "sleeping around" at the time.

[1] The issue of Mr. Marshall's unexpected invocation of his Fifth Amendment rights, and whether it was a valid exercise of that right, was raised on direct appeal, and the Court of Appeals found that Mr. Marshall's status of post-plea but pre-sentencing on his child abuse charge entitled him to the protection against self-incrimination. This information is presented not to re-litigate the validity of whether Mr. Marshall could invoke his rights, but to give context to what occurred and to help this Court assess the credibility of the victim's subsequent recantation.

RECEIVED by MSC 1/15/2016 9:02:04 PM

RECEIVED by MSC 1/15/2016 9:02:04 PM

Unfortunately, in her young life, the victim was sexually assaulted at least three times: when she was 7 years old,[2] this incident, and when she was 13 years old.[3] The victim has not recanted any of the information about the other assaults, and so her statement that Defendant was misidentified should be viewed as having even more credibility.

Ultimately, what makes this request unique among the motions for relief from judgment reviewed by this Court in which there is a claim that a victim or witness has recanted their earlier testimony, is that, after the investigative subpoenas were completed in the murder case, it was the Kent County Prosecutor's Office that has requested and encouraged Defendant to file this motion. The Prosecutor's Office felt compelled to disclose this recently obtained information to Defendant pursuant to *Brady v Maryland*, 373 US 83 (1963). In fact, this motion was largely drafted by members of the Prosecutor's Office to assist Defendant in having this Court grant him his motion for relief from judgment. As a result, Defendant requests that this Court, pursuant to MCR 6.504(B)(4), order a response from the Prosecutor's Office to verify this information.

Specifically noting the requirements for relief under MCR 6.508(D)(3)(b)(i), Defendant argues that, had the victim stated at the trial that she had been beaten by Mr. Marshall in order to compel her to falsely implicate Defendant, there would, without question, have been "a reasonably likely chance of acquittal." Because of the manipulative actions of Mr. Marshall, the victim lied under oath at Defendant's trial, an irregularity "so offensive to the maintenance of a sound judicial process that the conviction should not be

---

[2] The assailant was her step-father, and he confessed, pled guilty, and served prison time for the offense.

[3] The assailant was an older juvenile cousin who was taken out of the home and put into juvenile custody and programming.

allowed to stand." MCR 6.508(D)(3)(b)(iii). In terms of the good cause analysis, Defendant submits that he, as a private citizen, did not have the ability to examine the victim under an investigative subpoena, and therefore the presentation of this information to the Court at this time should be found to be good cause for failure to raise this information before. To the extent that there has been a delay in filing this motion since the disclosures in the investigative subpoena process (December 4, 2014), Defendant notes that the Prosecutor's Office requested a delay in filing this until Mr. Marshall's trial for the murder of Christopher Battaglia was completed so that Mr. Marshall's jury would not be tainted by the disclosure of this information, and Defendant, who is no longer incarcerated or on parole, agreed to the request.

THEREFORE, Defendant respectfully requests that this Court enter an order pursuant to MCR 6.504(B)(4) directing the Prosecutor's Office to respond to this motion for relief from judgment, and, upon receiving that response, grant Defendant relief from the judgment imposed on him in 1992.

Date: June _____, 2015

Respectfully submitted,

_____

Quentin Carter

RECEIVED by MSC 1/15/2016 9:02:04 PM

Exhibit B

RECEIVED by MSC 1/15/2016 9:02:04 PM

RECEIVED by MSC 1/15/2016 9:02:04 PM

Larry and Melody Souter / Newaygo County, et al:

Valuation of Claims

Larry and Melody Souter seek redress for damages suffered as a result of the actions of Newaygo County, its agents and employees: they seek damages for Larry's loss of liberty, for his unimaginable pain and suffering, and for Melody's emotional pain and suffering.

Larry and Melody persistently protested Larry's innocence and fought for judicial redress from his 1992 conviction through the 2005 vacation of that conviction. Newaygo County just as vigorously opposed the Souters' efforts to regain Larry's liberty. When the United States Sixth Circuit Court of Appeals remanded Larry's petition for Habeas Corpus for reconsideration to the U.S. District Court, Newaygo County was appalled. When the U.S. District Court for the Western District of Michigan learned of Newaygo's failure to produce additional exculpatory information and ordered Larry's immediate and unconditional release, Newaygo County was alarmed. Newaygo County could and should have responded to these clear indicators of Larry's innocence by revealing the truth. Instead, however, as more and more evidence surfaced casting more and more doubt on Larry's conviction, Newaygo County fixed upon the notion of proving his guilt, and resorted to an "Administrative Review" in a desperate and futile effort to send Larry back to prison.

During Larry's 1992 trial, photographs and witnesses that would have contradicted the Prosecution's theory of how Larry might be guilty were known to at least one Newaygo county detective, and likely to more. They knew as they listened to the government's arguments that the prosecution was premised on false information and that critical exculpatory information had been withheld. But they did not flinch. There is nothing that could justify Newaygo County's actions and those of its agents and employees. To Newaygo County, Larry Souter's life and liberty, as well as that of his family, just did not matter.

While Larry Souter languished in prison, assuming that he would die there, those who knew of evidence that would exculpate him had full lives, relationships with family and friends, and long careers.

Conditions in prison were difficult. At one point a contract was put on Larry's life for opposing the anarchy and lawlessness of prison life. He watched his best friend in prison suffer and die of a heart attack, and then watched in horror as his friend's corpse was shackled and chained before it was removed from the prison. Larry lived each day of his incarceration under the anguish of believing that he could die without ever knowing freedom again. If he died in prison, he knew his corpse would be handled like his friend's.

RECEIVED by MSC 1/15/2016 9:02:04 PM

While Larry struggled to maintain his sanity within prison, Melody worked just as hard to exonerate her gentle and soft-spoken husband. She took upon herself the responsibility of establishing his innocence and freeing him from prison. This quest consumed her life, and the burden of proving his innocence wore on her.

Melody's claims are styled as a loss of consortium, which under the law includes intangible factors, such as the loss of a lifetime of companionship, society, and love. Before Larry's arrest, Larry and Melody were an inseparable, loving, and supportive couple; their relationship was of an invaluable nature. Throughout his incarceration she fought to maintain their close relationship.

The loss of consortium also refers to measurable losses, such as financial and household support. Melody had losses falling into each of those categories. In addition, Larry and Melody were hoping to conceive a child when Larry was arrested. Because of his arrest she lost the opportunity to bear Larry's children and to raise those children with him. During Larry's incarceration Melody had a hysterectomy necessitated by her health, effectively ending her hopes for motherhood.

Melody tried to stay in close contact with Larry through regular visits and telephone calls. Melody always thought that Larry would one day be exonerated, and toward that end she saved each telephone bill for their calls to one another, hoping that one day she could repay her parents who paid her telephone bills. Those telephone bills, totaling $83,290.94, reflect both Melody's commitment to Larry as well as the quality of their lost years and what might have been.

There is no sum of money that can "make the Souter's whole." Likewise, there is no sum of money for which the Souters would have volunteered to experience what they have, effectively sacrificing their lives. Their lost liberty and opportunities are truly priceless. As noted by the *Limone* court, "no man's liberty is dispensable…Our system cherishes each individual. We have fought wars over this principle. We are still fighting those wars." (p. 23)

Newaygo County's actions are especially enraging because they breach the public trust. While the cost of Newaygo County's misconduct has been profound for Larry and Melody Souter, the cost to the Newaygo County system of justice has also been extreme. The *Limone* court observed that when law enforcement perverts its mission, the criminal justice system does not easily self correct, and that this is why we have an appellate process. (p. 23) What Newaygo County did to Larry Souter goes far beyond the norms of law enforcement mistake and beyond the unavoidable errors of a fallible system, as has frequently been seen in the instances of eyewitnesses whose mistaken testimony has been corrected through DNA exonerations. Newaygo County's actions toward Larry Souter demonstrate a pattern of intentional misconduct, conspiracy, and the framing of an innocent man. It is difficult to correct law enforcement actions of this sort that are more easily buried. The public relies on the integrity and

professionalism of law enforcement officials to confront errors with courage, encouraging public confidence in an inherently fragile process of truth finding.

It took extraordinary efforts to uncover the injustice done to Larry Souter and his family. It took the unflagging efforts of Larry Souter's wife, his sisters, numerous lawyers, persistent demands under the Freedom of Information Act, and media coverage. In the end, the whole assemblage of evidence turned upon the coincidence that Carla Keller happened to see a newspaper article about Larry's case before the Sixth Circuit Court of Appeals and called to a lawyer's attention that yet more exculpatory evidence was in Newaygo County's possession. As noted by the *Limone* court, proof of innocence in any court in the United States, including the smallest of county courts, should not depend upon coincidence and efforts as gargantuan as those put into Larry's exoneration.

Ultimately and regrettably the Souters' pain cannot be undone, and those parties who are financially responsible for Newaygo County's misconduct can offer Larry and Melody Souter only financial recompense. But how much is enough? It is appropriate to look for guidance in valuing the Souter matter to preceding cases, just as a court would. A synopsis and copies of relevant cases are attached.

The attached case law supports the general rule that judgments typically value wrongful conviction and incarceration at $1 million/year. Some of the attached cases place that value higher, and some lower. The judgment value seems to turn on several factors: the extent to which there was wrongdoing by the criminal justice system; whether the life lost through wrongful conviction was a "good one" (taking into consideration past criminal conduct, homelessness, mental illness, etc.); whether incarceration was shocking and difficult for the plaintiff; whether the plaintiff is a likable person. Larry registers high marks on this loss continuum. In addition, few published cases include have also included a loss of consortium claim, as is the case here.

In the case of the Souters and Newaygo County, as suggested through the DVD presentation, the plaintiffs will establish a sustained pattern and practice of wrongdoing and cover-up by the Newaygo County Sheriff's Department, its agents and employees. Larry Souter, in turn, is a likeable, gentle, soft-spoken, articulate, and polite person. Jurors and jurists will recognize him as wanting no more than any man, to be allowed to work to create a joyful and constructive life. When he was arrested, Larry was a stranger to the criminal justice system, having no prior criminal record. For Larry, his 13 years in prison was a sustained experience that was mind-numbing and chronically humiliating. It permanently altered his emotional and intellectual life. Larry and Melody had a good and loving relationship when he was arrested and convicted, which suffered through his incarceration. Jurors will admire Melody's dedication, fidelity, and perseverance, and respect her sacrifice.

RECEIVED by MSC 1/15/2016 9:02:04 PM

Not included in the attached materials is the reported settlement, *Godschalk v. Montgomery County,* 2003 WL 22998364, which the defense raised for discussion through the mediator. Plaintiff Godshalk settled his claim against the district attorney's office for $740,000 after 18 years of wrongful incarceration following a coerced confession in which the police officers "planted" details that enhanced Godschalk's appearance of culpability. The district attorney denied Godschalk's request for a DNA test, and Godschalk spent four more years in prison before a court ordered the DNA test that ultimately exonerated him. Godschalk's reported settlement is a disposition with the district attorney's office only. The disposition of his remaining claims against the culpable police officers is unknown.

Considering the *Godschalk* claim in the context of all these facts, and considering particularly the strength of immunity assigned to prosecutors, the Godschalk settlement is actually consistent with the Souters' assertion that wrongful imprisonment is properly valued at approximately $1 million/year. The partial settlement of $740,000 was for wrongdoing that covered only four years against an official with a very high immunity threshold. Over four years, the $740,000 would be annualized to $185,000/year, or considered another way, 18.5% of one million. While the prosecutor may have delayed the DNA test that led to Godschalk's exoneration, the prosecutor had nothing to do with the wrongdoing that put Godschalk in prison in the first place. In light of that factor, as well as the immunity issue, an assignment of an 18.5% contribution by the prosecutor's office is consistent with the Souters' valuation of $1 million/year for wrongful incarceration among all defendants.

RECEIVED by MSC 1/15/2016 9:02:04 PM

RECEIVED by MSC 1/15/2016 9:02:04 PM

Larry and Melody Souter seek redress for their damages suffered as a result of the actions of Newaygo County, its agents and employees: they seek damages for Larry's loss of liberty, for his pain, and for Melody's pain.

Larry and Melody persistently protested Larry's innocence and fought for judicial redress. Newaygo County just as vigorously opposed the Souters' efforts to regain liberty. When the United States Sixth Circuit Court of Appeals remanded Larry's petition for Habeas Corpus for reconsideration to the U.S. District Court based upon Newaygo's failure to disclose bloody clothing and Dr. Cohle's and Dr. Bauserman's modifications of their testimony, Newaygo County was appalled. When, soon after, the U.S. District Court for the Western District of Michigan learned of Newaygo's failure to produce the Keller information and ordered Larry's immediate and unconditional release, Newaygo County was alarmed. Newaygo County could and should have responded to these clear indicators of Larry's innocence by revealing the truth. Instead, however, as more and more evidence surfaced casting more and more doubt on Larry's conviction, Newaygo County fixed upon the notion of an "Administrative Review" in a desperate, sloppy, and futile effort to prove his guilt.

Photographs and witnesses that would have contradicted the Prosecution's theory of how Larry might be guilty were known to at least one Newaygo county detective, and likely to more, as they observed Larry's trial. They knew that the prosecutor's argument was premised on false information and that critical exculpatory information had been withheld – but they did not flinch. There is nothing that could justify Newaygo County's actions and those of its agents and employees. To Newaygo County, Larry Souter's life, and those of his family, just did not matter. While Larry Souter languished in prison, assuming that he might die in prison, those who knew of evidence that would exculpate him had the careers and personal lives they chose for themselves.

Conditions in prison were difficult. At one point a contract was put on his life.

As noted by the Limone court, "no man's liberty is dispensible...Our system cherishes each individual. We have fought wars over this principle. We are still fighting those wars."

Cost to Law Enforcement and to public trust. The cost to Larry and to his family has been profound. But the cost to our system of justice has also been extreme. The Limone court observed that when law enforcement perverts its mission, the criminal justice system does not easily self correct, and that this is why we have an appellate process. But what Newaygo County did to Larry Souter goes well beyond mistake and beyond the unavoidable errors or a fallible system as has frequently been seen in the instances of eyewitnesses whose mistaken testimony has been corrected through DNA exonerations. Newaygo County's actions toward Larry Souter demonstrate a pattern of intentional misconduct, conspiracy, and the framing of an innocent man. It is difficult to correct law enforcement actions of this sort that are more easily buried. The public relies on the integrity and professionalism of law enforcement officials.

It took extraordinary efforts to uncover the unjustice done to Larry Souter and his family. It took the unflagging efforts of Larry Souter's wife, his sisters, many many lawyers, persistent demands under the

Freedom of Information Act, and media coverage. In the end, the whole assemblage of evidence turned upon the coincidence that Carla Keller happened to see a newspaper article about Larry's case before the Sixth Circuit Court of Appeals and was brave enough to call to the lawyer's attention yet more exculpatory evidence was in Newaygo county's possession. As noted by the Limone court, proof of innocence in the United States should not depend upon coincidence and efforts as gargantuan as these.

RECEIVED by MSC 1/15/2016 9:02:04 PM