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No. 12-126

In The
Supreme Court of the United States

GREG MCQUIGGIN,

Petitioner,

vs.

FLOYD PERKINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* FOR FORMER AND CURRENT LAW ENFORCEMENT OFFICIALS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are former and current police detectives and federal law enforcement officers, each of whom have expertise with resolving especially difficult to investigate crimes. We are all dedicated to the imperatives of: (1) safeguarding society by punishing culprits; and (2) bringing closure to victims by proving beyond reasonable doubt that the true perpetrator has been brought to justice. Each of us has decades of experience in crime solving, as well as in the work of finding and preserving evidence sufficient to withstand the test of adversarial process and court adjudication, to ensure true perpetrators are held accountable. Given our vocation and experiences, we feel particularly well-suited to comment on the competing views arising from the lower court decision here, that a credible showing of actual innocence may be a basis for excusing compliance with the AEDPA statute of limitations, even in the absence of a showing of diligence.

We have direct understanding of two questions at the core of this dispute: what does it actually take to find and present a credible showing of factual innocence; and what does it mean to put a one-year

[1] Pursuant to Rule 37.6, *amici curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed their written consent to the filing of *amici* briefs pursuant to Rule 37.3.

statute of limitations or a diligence requirement on the process of doing so? We know first-hand that successful investigation in such circumstances may depend heavily on the passage of time. It would be impractical and inequitable to impose a one-year time limit on a petitioner's ability to present evidence of actual innocence, or to require proof of diligence.

AMICI CURIAE

Robert K. Cromwell: After serving nearly four years as a police officer in Montgomery Township, New Jersey, and two and one half years with the Naval Criminal Investigative Service, Mr. Cromwell served 22 years as a special agent with the Federal Bureau of Investigation (hereinafter "FBI" or "the Bureau"), and was involved in many types of complex criminal and corruption investigations, including the Oklahoma City bombing case. His final position was as Special Agent in Charge of the Jacksonville, Florida office. During the past four years, Mr. Cromwell has served as a board member of the Florida Innocence Project, and has reviewed the investigation of several cases that have led to exoneration.

Joseph P. Dwyer: Mr. Dwyer served five years as a police officer with the New York City Police Department. When he retired from law enforcement in 1995, he worked with the Street Narcotics Enforcement Unit in Manhattan North. He then founded his own private investigation firm, Investigative

Resource Group, Inc., which is staffed with former law enforcement officers. Among other wrongful conviction cases, Mr. Dwyer worked on the innocence investigation of William Lopez, discussed herein, who was recently granted habeas relief on an out-of-time petition in the Eastern District of New York because of strong evidence of innocence.

Henry O. Handy served as a Special Agent in the FBI from 1971 to 1992. He examined new evidence in the Norfolk Four case of Virginia, and advocated for the pardon of the Norfolk Four.

William "Lou" Hennessy was a member of the Metropolitan Police Department from 1973 until 1998. Hennessy was Commander of Homicide Investigations for the Metropolitan Police Department of the District of Columbia from 1993 until 1995. Presently, he is a Judge for the District Court for Charles County (Maryland).

Stanley Lapekas: Mr. Lapekas currently serves as the Regional Director of the private investigation firm Turnstone Investigative Group, Hunton & Williams, LLC, where he has worked since 2003. Prior to joining the firm, Mr. Lapekas was the Executive Secretary of the Virginia Charitable Gaming Commission, from 1998 to 2003. He served as a Special Agent with the FBI from 1974 until 1998, and served in the United States Army from 1966 to 1969. Mr. Lapekas was instrumental in building the innocence case of Michael Hash, discussed herein.

Gregg O. McCrary: Mr. McCrary served as a Special Agent at the FBI from 1969 through 1994. During his career at the Bureau, he took part in many complex investigations of violent crime. Since his retirement, he has continued to assist law enforcement agencies in the United States and around the world. He has participated in the investigation of the wrongly convicted.

Joe Newman served on the Battle Creek (Michigan) Police Department from 1976 to 2000. He served as Chief of Detectives for eight years and retired as a Commander in 2000.

Dana Orent: Mr. Orent is currently a private investigator and consultant specializing in gang investigations. He worked for 11 years as a gang detective with the Pasadena police department, working on violent gang crimes and cold-case gang homicides before retiring. He has done investigative work for the San Diego Innocence Project. Mr. Orent also worked an innocence investigation on behalf of Mario Rocha, whom prosecutors declined to retry after his homicide conviction was overturned in 2006.

James M. Petro: After serving as a prosecuting attorney in three Ohio jurisdictions, Mr. Petro served as Ohio Attorney General from 2003-2007. During his administration, he launched an effort that added more than 200,000 DNA profiles from Ohio to the national CODIS database. Also while Attorney General, he intervened in the case of Clarence Elkins, who had been wrongly convicted of murder. Mr. Petro and his

wife, Nancy Petro, co-authored the book, "False Justice: Eight Myths that Convict the Innocent."

John W. Raley: Mr. Raley was an assistant United States Attorney in the Western District of Oklahoma from 1961 through 1969, and served as United States Attorney for the Eastern District of Oklahoma from 1990 through 1997.

John Smietanka: Mr. Smietanka was the Berrien County (Michigan) Prosecuting Attorney from 1974 to 1981. He was the United States Attorney for Western Michigan from 1981 until 1994. After entering into private practice in Grand Rapids, Michigan, Mr. Smietanka worked on the innocence investigation and defense of Larry Pat Souter, discussed herein, who was released in 2005, after serving 13 years in jail for a crime he did not commit.

Larry B. Smith: Mr. Smith is a retired FBI Special Agent. His service with the Bureau began in 1983 and ended with his retirement in 2006. While at the Bureau, he participated in investigating many complex violent and major offender cases. Since his retirement, he has reviewed cases of prisoners claiming innocence. Michael Hash, one of these cases, is discussed herein.

Peter S. Smith: Mr. Smith served for ten years as a police officer on the Nassau County, New York Police Department, before retiring due to a line of duty injury. Mr. Smith then worked as a prosecutor for Suffolk County, New York District Attorney's office for seven years. He left in 2004 as the Deputy Chief of

the Insurance Crimes Bureau. Mr. Smith currently works as a defense attorney-investigator and is engaged in cases involving innocence claims in New York.

B. Frank Stokes, Jr.: Mr. Stokes served as a special agent of the FBI for 30 years, from January, 1971 until November 30, 2001, During his career, he led complex organized crime, white collar, personal and property crime, domestic and international terrorism and wrongful conviction investigations. Since his retirement, he has worked as a private investigator and worked on a number of cases involving claims of wrongful conviction. One former client, Jeffrey David Cox, was exonerated in 2001 by the Commonwealth of Virginia after Cox served eleven years in prison.

James Trainum: Mr. Trainum is a private consultant, reviewing cold and wrongful conviction cases. He has held this position since 2009. Previously he served as a D.C. Metropolitan Police Department homicide detective from 1983 to 2010.

Ken Winter: Mr. Winter served as Director of the Mississippi Crime Lab from May, 2000 through May, 2004. Since January, 2005, he has served as Director of Mississippi Police Chiefs. During the course of his service in each position, he has worked closely on cases that have led to exoneration of the wrongly convicted.

SUMMARY OF ARGUMENT

What it really takes to find and present persuasive evidence of actual innocence is at the heart of this case. Based on all of our experience with hard-to-investigate cases (including missing persons cases, "cold case" homicides, and other especially difficult, serious crimes),[2] we know that, often, the passage of time is precisely what allows new, and/or more probative and reliable evidence to emerge. In our view, it is accordingly not pragmatic, or fair, to limit a credible claim of actual innocence to a one year window, or to impose a diligence requirement – at least not in cases involving serious felony convictions – when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

We believe in the integrity of our criminal justice system. The chief aims of the criminal justice system are to convict the guilty and, equally, to insure that innocent citizens are not wrongly convicted. Yet, we know that, however rarely, mistakes are made. On those occasions the perpetrator goes free and unpunished, sometimes able to continue causing harm,

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[2] There is no standard definition for a "cold case." Common among the varied criteria used to designate such cases is that they are usually at least a year old, and could not be resolved "because of workload, time constraints, or the lack of viable leads." Robert C. Davis, Carl Jensen and Karen E. Kitchens, *Cold Case Investigations: An Analysis of Current Practices and Factors Associated with Successful Outcomes*, at iii, n.1 (Rand Center of Quality Policing, 2011).

while an innocent person ends up serving time for something he did not do.

We do not discuss the specific record in this case. Nor do we speak to whether the evidence of actual innocence proffered below is strong enough to warrant an equitable exception. We file this brief only to bring to the Court's attention the very real difficulties of finding and presenting evidence of actual innocence after a wrongful conviction, and to advise the Court as to the time-consuming process that will often be involved in rectifying any such fundamental miscarriage of justice. In doing so, we point the Court to four examples of innocence cases where the investigations of innocence relied on the passage of time to develop. Three of these cases, including Larry Souter of Michigan; Michael Hash of Virginia; and William Lopez of New York, are cases which some among us worked on directly, using our years of experience and training as former detectives and law enforcement officers. The fourth is the well-known New York case of the "Central Park Five," involving five teenagers who falsely confessed to a brutal crime. We believe our perspective on these issues is directly relevant to the dispute now under this Court's review and we thank the Court for considering our input.

ARGUMENT

I. Law Enforcement Officers Working Difficult-to-Investigate Crimes Often Rely on the Passage of Time.

As detectives and law enforcement officers, we have found that, in cases where the crime at issue was difficult to solve at the outset, the passage of time is often crucial to the development of a prosecutable case. In the words of one seminal text on solving cold case homicides, "[t]ime, once an enemy in homicide investigation, slowly becomes a friend."[3] The passage of time becomes a crucial element of strategy in the context of difficult-to-investigate cases because changes in relationships between people, as well as advances in technology, may lead to information which ultimately permits law enforcement officers to "crack" the case.

Relationships between people change in two dimensions. First, people generally change as time passes, and their relationship(s) to potential suspect(s), the victim(s), or witness(es) will shift. Loyalties or fears which previously dampened a person's willingness to help law enforcement, or otherwise come forward, will alter over time. This is especially true in gang and/or drug-related crimes. In a subdivision titled *Time as an Ally*, another text on

[3] Richard H. Walton, *Cold Case Homicides: Practical Investigative Techniques*, at Introduction, iv (Taylor & Francis Group, LLC, 2006).

resources for unidentified, missing and cold homicide case investigations instructs that, "[t]ime – sometimes decades – can give people an opportunity to mature, to overcome former fears, and to develop a different sense of right and wrong."[4]

Secondly, as time passes, law enforcement officers are replaced, and/or investigators collaborate with new people. The relationships investigators have with potential witnesses and informants adjust accordingly. In such instances, investigators must patiently and persistently work to establish trust between themselves and others. Close working relationships with other investigative agencies, federal and state prosecutors, forensic scientists, witnesses and the victim's family members are critical factors to success with hard-to-solve cases.

Empirical research echoes these observations. One August 2009 study surveyed Colorado law enforcement officers as to their last resolved homicide over three years old. It found the most prevalent factors which "broke the case" included, at number one, "'previously unavailable witness,'" followed by "receiving help from an outside agency" and "the

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[4] Silvia Pettem, *Cold Case Research: Resources for Unidentified, Missing, and Cold Homicide Cases* 9 (CRC Press, 2012). Walton, *supra* note 3; *and see id.* at i (further noting that the two major elements which open opportunities to solve cold case homicides "are changes in technology and changes in relationships that came about through the passage of time").

assignment of different investigators to the case."[5] In a different survey of law enforcement agencies nationwide, the number one and number three reasons attributed for the clearance of cold cases were "new information from witnesses" and "information from new witnesses."[6]

There is simply no way to know when such shifts in relationships will lead to a break in a case. Among the various definitions for a cold case investigation is one "wherein enough time has passed that the perpetrators begin to feel confident enough to speak freely about their involvement [in the crime], *suggestively 5 years or more*."[7]

When changes in relationships do yield new or potentially more probative information, investigators must spend additional time corroborating and testing the reliability of that information. If a witness recants, for example, his or her new stance needs to be fully explored and explained before any further action can be taken. Convincing grounds for the recantation must be verified. Witnesses and suspects must be

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[5] Alexandra Naday, et al., *Analysis of the Cold Case Survey of Law Enforcement for the Colorado Bureau of Investigation* 3 (Colorado State University, Center for Study of Crime and Justice, August 2009).

[6] Davis, et al., *supra* note 2, at 33.

[7] Walton, *supra* note 3, at 19; *and see id.* at iv. (Emphasis added).

re-interviewed.[8] Even when a lead has opened a promising new avenue for investigation, there may remain hundreds or thousands of hours of work before information as to that lead can be made public. Generally, the more time that has passed, the more time that is needed to process the new information and build a case.

It would cripple the ability of a detective to build the relationships needed to develop a narrative strong enough to support a successful prosecution if the State was required to file in court, or otherwise publicly disclose promising leads, within one year after newly developed information initially came forward. It is in part for this reason that this Court has been clear that "prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." *United States v. Lovasco*, 431 U.S. 783, 791 (1977). In *Lovasco*, the Court reversed the Eighth Circuit Court of Appeals after it affirmed a district court's dismissal of an indictment based on an 17-month delay in bringing the indictment. As the Court recognized, "a requirement of immediate prosecution upon probable cause is equally unacceptable because it could make obtaining proof of guilt beyond a reasonable doubt impossible by causing potentially fruitful sources of

[8] Thomas A. DiBiase, *How to Successfully Investigate and Prosecute a No-body Homicide Case* 8 (March 19, 2010), http://www.nobodycases.com/tips.pdf.

information to evaporate before they are fully exploited." *Id.* at 791-92.

Crime solving can also rely on advances in technology over time. Most obviously, breakthroughs in DNA testing and analysis have changed the landscape of forensic science.[9] But other advancements, for example, in ballistics analysis and fingerprint databases, likewise can create opportunities for hard-to-investigate cases to progress, sometimes to resolution. Even something as relatively minor as the conversion of old files to digital formats, including audio and video files, can create new avenues for detectives.

It is not possible to predict how long it might take to apply new technology to available evidence. The first U.S. conviction based on DNA – of serial killer Terry Spencer – took about a year, from suspicion to conviction.[10] But the person who had been wrongly convicted after falsely confessing to Terry Spencer's crime spent four years incarcerated before he was ultimately pardoned, nearly 6 months after Spencer's conviction.[11] Gaining access to evidence for testing can take years. Backlogs of convicted offender samples and untested evidence, including rape kit

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[9] National Institute of Justice, *Using DNA to Solve Cold Cases* (July 2002), https://www.ncjrs.gov/pdffiles1/nij/194197.pdf.

[10] Rob Warden and Steven A. Drizin, *True Stories of False Confessions* at 277.

[11] *Id.*

samples, have persisted for decades now.[12] Just this year, in Colorado, DNA was used to finally link a suspect to a 1976 murder.[13]

Even if and when developments in technology allow for new analysis of available evidence, that new information must be corroborated and assessed for reliability before it can be used to build a case. It is in part because of how long it can take to crack a hard-to-investigate case that statutes of limitations for the most serious of crimes do not exist. Indeed, because of the increasing potential that technological advances will ultimately help detectives solve difficult to unravel cases, many jurisdictions have extended statutes of limitations for crimes like rape.[14] In some states, law enforcement officers file "John Doe" arrest warrants, which identify only the unique DNA profile

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[12] *See, e.g.*, Brandi Grissom, *Testing State's Huge Backlog of Rape Evidence Kits Comes with Hefty Price Tag*, N.Y. Times (January 3, 2013), http://www.nytimes.com/2013/01/04/us/hefty-cost-to-testing-texas-huge-backlog-of-rape-evidence-kits.html (citing a backlog of over 20,000 untested rape kits in the state of Texas); *see also* National Institute of Justice, *supra* note 9, at 11-12 (discussing convicted offender backlogs and forensic casework backlogs, generally).

[13] Garrison Wells, *Cold Case: Springs Police Link Inmate to 1976 Murder*, The Gazette (January 2, 2013), http://www.gazette.com/articles/springs-149221-colorado-dna.html.

[14] *See* Robert Tanner, *DNA Evidence Fuels Changes on Statutes of Limitations*, The Seattle Times (March 19, 2000), http://community.seattletimes.nwsource.com/archives/?date=20000319&slug=4010782. *See also* National Institute of Justice, *supra* note 9 at 15, discussing extensions and exceptions to statutes of limitations.

obtained from unsolved crime scene evidence, and thereby "commence" a prosecution in order to toll any existing statute of limitations.[15]

Finally, we cannot stress enough the role serendipity plays in the resolution of difficult-to-investigate cases. Retired investigator Carl Craig "*just happened to be*" in the office in September 1999 when a police captain, who had recently encountered the family member of a 1961 homicide victim, casually asked if he knew anything about the 1961 murder.[16] As it happened, Craig was familiar with the case. Craig was able to solve it, almost four decades later, by examining and re-examining the murder weapon, a gun, and bullet fragments, and by interviewing and re-interviewing the suspect, Edward Frieburger, who was convicted in 2002.[17] As one report – which looked at nation-wide survey data and on-site research in four jurisdictions with high volume cold case homicide investigations – explains, "The first observation, and one that surprised us, is that cold case work is usually opportunistic."[18]

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[15] Micah Sucharman, *People v. Robinson: Developments and Problems in the Use of "John Doe" DNA Arrest Warrants*, 99 Calif. L. Rev. 885, 914 (2011).

[16] Walton, *supra* note 3, at 90-94. (Emphasis in original).

[17] *Id.*

[18] Davis, et al., *supra* note 2, at 39.

II. Evidence of Factual Innocence After a Wrongful Conviction is Highly Analogous to More Common Hard-to-Investigate Cases, with the Important Distinction that Detectives and Wrongfully Convicted Inmates have Dramatically Disproportionate Access to Resources.

The law enforcement officer investigating a hard-to-solve case and a wrongfully convicted prisoner trying to demonstrate his actual innocence often share the same goals, starting with the goal of finding evidence which eliminates the wrong suspects – although, obviously, for the wrongfully convicted that means him or herself. Both are often searching for evidence which convincingly identifies the true perpetrator.

The parallels between investigative strategies in the wrongful conviction context are accordingly unsurprising. Indeed, the author of the seminal text on cold-case investigation strategy, Richard H. Walton, writes about how his own introduction to cold case homicide investigation was in connection with his investigation of the wrongful conviction of Jack Ryan, a Native American who served over 40 years in prison and on parole for crimes he did not commit, until then-Govenor Ronald Reagan commuted his sentence to time served in 1969.[19] In 1996, when Ryan was posthumously pardoned, then-Governor

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[19] Walton, *supra* note 3, at Introduction, i.

Pete Wilson, acknowledged that "'Jack Ryan was a young man in the wrong place at the wrong time. He was unjustly railroaded into pleading guilty for crimes he did not commit.'"[20] Walton began his investigation in 1983 and didn't present any evidence to a court until 1989, six years later.[21] In the course of looking for evidence to clear Ryan's name, Walton spent 13 years, poring through newspaper archives files, and records; looking for witnesses or their descendants, and conducting over 400 interviews.[22] "Slowly," he writes of the experience, "the truth – and the coverup – began to emerge."[23]

The wrongfully convicted innocent prisoner shares many of the same obstacles in his or her pursuit of justice as the law enforcement officer trying to untangle a difficult-to-solve case. As the law enforcement officer must often review reams of records and files she did not originally put together to look for clues and missed opportunities, the wrongfully convicted must carefully go through boxes and boxes of the State's files and records, including transcripts of the proceedings against him. In both scenarios the available evidence has to be analyzed;

[20] *Posthumous Pardon for Unjust Conviction: Man Imprisoned 25 years for Two Murders*, S.F. CHRON. (April 17, 1996), http://www.sfgate.com/news/article/Posthumous-Pardon-For-Unjust-Conviction-Man-2986296.php#ixzz2HFa2NdaP.

[21] *Id.*

[22] Walton, *supra* note 3, at Introduction, i.

[23] *Id.*, at Introduction, ii.

discrepancies in the evidence and variations in statements have to be examined side by side, broken down and tracked. The law enforcement officer and the wrongfully convicted prisoner must then investigate the variations and discrepancies. Often that means going out – or, in the case of the prisoner, getting someone trustworthy and reliable to go out – into the field. In the field, a law enforcement officer, or the prisoner's agent must seek, whenever possible, to bring technological resources to bear on existing evidence; look for new evidence or more evidence; and painstakingly cultivate relationships with information sources. Just as often, it means waiting on people to change, relationships to shift, advances in technology, and on pure serendipity, in order for a new lead to appear, or for a pathway to showing actual innocence to open up.[24] Below we review four examples of cases – several of which undersigned *amici* were directly involved in – that demonstrate how slowly innocence cases unfurl.

The case of Larry Pat Souter is paradigmatic. Souter was wrongly convicted in 1992 for the 1979 murder of Kristy Ringler. In 1997, after years of working from behind bars with family members to try

[24] *See*, *e.g.*, *Wyzykowski v. Dep't of Corr.,* 226 F.3d 1213, 1218 (11th Cir. 2000) (noting that barring a habeas petitioner who can demonstrate actual innocence "raises concerns because of the inherent injustice that results from the conviction of an innocent person, and the technological advances that can provide compelling evidence of a person's innocence."

to build his own case of actual innocence, one of the undersigned *amici*, John Smietanka, a former United States Attorney for the Western District of Michigan started working on the case. It took Smietanka and his legal team another 8 years, until 2005, before sufficient evidence of innocence could be amassed to build a case strong enough to result in Souter's release from prison. Ironically, in Souter's case a newly-elected sheriff – who had publicly committed his office to getting to the bottom of unsolved crimes – had rushed a cold case investigation of a 1979 murder to prosecution in 1992. *Souter v. Jones*, 395 F.3d 577, 582 (6th Cir. 2005). In the process, an innocent man was wrongfully convicted.

Souter was the last person seen with Ringler alive, while the two were drinking at a party. *Id.* at 596. Ringler was found in the middle of a road, with her arms to her side, suffering from two head wounds. *Id.* at 581. Souter was convicted largely based on expert testimony that a head wound was caused by a blow from a whiskey bottle that had been used by Souter, and that it was virtually impossible for her head injury to have come from being hit by a vehicle, which was the defense theory of the case. *Id.* at 581-83.

Immediately after his conviction Souter tried to access police files by having his family submit requests under the Freedom of Information Act ("FOIA"). It took five years of FOIA requests before some of the documents in police files which had *not* been turned over before trial were finally released to

Souter. It took several additional years, between his 1992 conviction and 1999, for Souter to collect several affidavits from new witnesses, and former witnesses with different testimony – including from the experts who had testified against him. As the team working on Souter's case found, each time a helpful lead appeared, it took time to corroborate and check out.

Both the district court and the court of appeals agreed that the most recent of the affidavits collected by Souter was not "new evidence," but merely cumulative evidence of innocence, consistent with his defense theory at trial. *Id.* at 587. Both courts decided that Souter was time-barred from raising his constitutional claims. *Id.* at 587-88. However, the appellate panel concluded that, given the "concern about the injustice that results from the conviction of an innocent person [which] has long been at the core of our criminal justice system," Souter's case presented the rare circumstance where evidence of innocence creates an exception to the AEDPA time bar. *Id.* at 601-02 (6th Cir. 2005).

Today, Souter's innocence is beyond cavil. The daughter of the man now believed to have killed Ringler in a vehicular homicide just happened to see a newspaper headline about the Sixth Circuit decision, and noticed the link to the death of Ringler. Although she had also reached out to police back in 1979 – they disregarded her and failed to disclose information about her to Souter's defense team – she immediately reached out to Smietanka's law firm. She reported, again, that she believed her father

had killed Ringler with the side view mirror of his recreational vehicle. This time, however, the facts of her story were all corroborated. As the state Attorney General told the press thereafter, Mr. Souter, "'was done wrong. Thank God it is being corrected.'"[25] Larry Pat Souter has now been fully exonerated, and lives a quiet life in Grand Rapids, Michigan, with his wife Melody. He has worked with the University of Michigan Law School's Innocence Clinic, giving presentations about his case.

Several of the undersigned *amici* – Stanley Lapekas, Gregg McCrary, Larry Smith and James Trainum – also worked on the innocence investigation of Michael Hash, in Culpepper, Virginia. Hash spent 12 years in jail after his conviction, in 2000, of the 1996 murder of Thelma Scroggins. *Hash v. Johnson,* 845 F. Supp. 2d 711 (E.D. Va. 2012). Similar to the Souter case, the sheriff who helped prosecute Hash had been elected on a platform of closing open murder cases.

As the federal district court judge who granted habeas relief found, the prosecution of Hash included "a cavalcade" of misconduct, by prosecutors and police. *Id.* at 749; *see also id.* at 748-53. The new sheriff assigned two detectives to the case; they in turn came across a witness who implicated Hash and two others. *Id.* at 730, 750-51. This witness had lied

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[25] John Agar, *Murder suspect 'was done wrong'; Attorney general says Larry Souter never should have been brought to trial*, The Grand Rapids Press, July 6, 2005, at A1.

several times to investigators, and in fact she failed a polygraph test, but one of the three people she implicated confessed; he also failed a polygraph test, but the State failed to disclose either failed polygraph to the defense. *Id.* at 723. The man who confessed was further coached into testifying against Hash and his remaining co-defendant. *Id.* at 718, 730, 750-51. While Hash's co-defendant was acquitted at trial, a jail-house snitch also testified against Hash, claiming Hash had confessed to him. *Id.* at 718-719. The State falsely denied at trial that they had purposefully housed Hash with the known snitch, and falsely denied at trial that any deal had been negotiated with him. *Id.* at 722, 748.

The investigation of Hash's innocence case took 10 years. Relying on their decades of experience and crime scene analysis abilities, the involved undersigned *amici* were able to show how far off the witnesses against Hash were from the actual facts of the crime. They were also able to build relationships of trust which led to testimony as to Hash's innocence. The co-defendant who confessed fully recanted, admitting that all of the details he had shared about the murder he had gotten from the law enforcement officers interrogating him; the federal district court judge found several markers of reliability in that recantation, including that one police investigator admitted in the federal proceeding that he may have given the co-defendant information. *Id.* at 723, 730-31. Indeed, even after the federal habeas petition was filed, more evidence of innocence was uncovered by discovery ordered by the district court, including

evidence of the deals offered to the witnesses against Hash. *Id.* at 722-23, 747. Finally, investigators were also able to develop compelling evidence that another perpetrator had actually committed the crime. *Id.* at 731-32.

In light of Hash's strong showing of innocence, the federal district court rejected the state's challenges to certain of Hash's federal habeas claims based on exhaustion and timeliness. *Id.* at 728-35. As the district court judge concluded: "Having reviewed the voluminous record in this case, the Court is disturbed by the miscarriage of justice that occurred in this case and finds that Hash's trial is an example of an 'extreme malfunction[ ] in the state criminal justice system[ ].'" *Id.* at 752. After this grant of relief, Fairfax County appointed a special prosecutor who went over the record in the case and spent five months interviewing 40 witnesses in connection with the murder.[26] As he stated to the press, "'[i]n fairness to Hash, it is time to release him. He is now presumed innocent and a totally free individual.'"[27] Today, Michael Hash, at 33 years old, is looking for

[26] Donnie Johnston, *Charges against Michael Hash Nolle Prossed*, The Free Lance-Star (August 20, 2012), http://news.fredericksburg.com/newsdesk/2012/08/20/charges-against-michael-hash-nolle-prossed/; *see also* Susan Svrluga, *Va. Man Michael Wayne Hash has Murder Charges Dismissed After 12 Years in Prison*, The Washington Post (August 20, 2012), http://articles.washingtonpost.com/2012-08-20/lifestyle/35491921_1_murder-charges-capital-murder-key-witness.

[27] *Id.*

employment and trying to catch up on all that happened in the world while he was behind bars.

The very recently decided Eastern District of New York case of William Lopez is instructive. Lopez's federal habeas petition was initially dismissed in 2002 as out of time. However the merits of his claim were ultimately heard because of the strong innocence case which took Lopez well over 15 years to build. *Lopez v. Miller*, No. 02-CV-3988, 2013 U.S. Dist. LEXIS 7262, *34-35 (E.D.N.Y. Jan. 16, 2013). Among the undersigned, Joseph Dwyer is a former New York police detective who helped investigate Lopez's innocence case.

Lopez was convicted in 1990 of the 1989 shooting of an alleged drug dealer. The state's incriminating evidence consisted only of an eyewitness who failed to recognize Lopez in the courtroom – she in fact described the shooter as a "dark black" man when Lopez was obviously light-skinned – and a witness who was on a two-day crack binge at the time of the crime, whose testimony changed during trial from saying she had not seen the shooting, but saw Lopez with a gun, to saying she had seen Lopez shoot the victim. *Id.* at *2-3. In 1993, the intermediate state appellate court affirmed the lower court's denial of Mr. Lopez's appeal. *Id.* at *34-35. In 1999, Lopez filed a *pro se* motion in the state's highest appellate court for review, but the motion was denied in 2000 as out of time. *Id.* In 2005, recognizing that the Second Circuit had instructed district courts only to consider the question of whether "the Constitution requires an

actual innocence exception to AEDPA's limitation period" if a colorable case of innocence was presented, the district court granted reconsideration of the dismissal of Lopez's habeas petition, and appointed counsel. *Id.* at *36-37.

At the time, Lopez's evidence consisted of three affidavits he had secured from the witness who claimed to have seen him shoot the victim, in the months after his sentencing in 1991, and two alibi affidavits from the mother and sister of his former common law wife, which he had acquired in 2005. *Id.* at *32, *59. In each of the three recantation affidavits, the witness against Lopez maintained she had falsely testified at trial and that Lopez was not at the crime scene. *Id.* at *66-83. Both of the 2005 affiants stated that Lopez was with them around the time of the commission of the crime, and therefore could not be the perpetrator. *Id.* at *99-103.

The district court directed appointed counsel to hire an investigator to locate the recanting witness, who had disappeared. *Id.* at *36-37. It took the investigator four years to learn the witness had died. *Lopez v. Miller*, 02-CV-3988 (E.D.N.Y.), Doc. No. 359-5, p. 21 of 354. After that investigation was complete, Lopez sought and got a stay to exhaust his state court remedies; his state court motion for a vacatur was denied, and his claims were exhausted in 2011. *Lopez*, U.S. Dist. LEXIS 7262 at *37-38. Back in federal court, Lopez asked for a federal evidentiary hearing on his innocence claim. He got not one but two; the first was reopened because, among other helpful

discoveries, investigators had finally found another eyewitness to the crime who was a close friend of the victim, and who testified he was certain Lopez was not the shooter, and that the shooter was black and dark-skinned. *Id.* at *46-48.

Given this evidence, and the affidavits Lopez had collected on his own back in 1991 and 2005, the district court considered the merits of Lopez's claim for ineffective assistance and granted relief. The district court found that the result of trial counsel's failure to investigate alibi witnesses was that: "a likely innocent man has been in prison for over twenty-three years. He should be released with the State's apology." *Id.* at 152. The State of New York has been ordered to take substantial steps to retry within 60 days of the date of the district court order, January 16, 2013, or to release Lopez. *Id.*

Finally, the well-documented case of the so-called "Central Park Five" is also instructive. In that case, five teenaged boys were wrongfully convicted after each had falsely confessed to participating in the rape and near-murder of Tricia Meilli, a jogger in Central Park. Kharey Wise, Kevin Richardson, Antron McCray, Yusef Salaam and Raymond Santana were convicted after trials in 1990. Although each had asserted innocence at trial, after several years of trying to find evidence which could prove innocence, the possibility of exoneration seemed hopeless. By sheer happenstance, however, the actual perpetrator of the crimes, Matias Reyes, had a brief encounter with one of the five in prison. Coming face to face

with one of the men he knew had been wrongfully convicted compelled Reyes to confess in January 2002 that he alone committed the crimes against Meilli. All but one of the wrongfully convicted men had by this time already finished serving their sentences.

In light of Reyes' confession, law enforcement officers spent several months working on finding corroborating evidence that Reyes acted alone in attacking Meilli. Ultimately, the state of New York did not oppose the motions to set aside the convictions of McCray, Wise, Salaam, Richardson and Santana after investigators concluded that "Reyes' account of the attack and rape is corroborated by, consistent with, or explanatory of objective, independent evidence," including DNA evidence that was retested and found to inculpate Reyes and exculpate the five wrongly convicted. *New York v. Wise, et al.*, 194 Misc.2d 481, 489 (New York County 2002). The five were freed in December of 2002. It is important to note that, after Reyes' confession much of what ultimately amounted to the evidence of innocence for McCray, Wise, Salaam, Richardson and Santana was found and dug up in an exhaustive reinvestigation of the crime by prosecutors and law enforcement officers. What took several months for these well-trained, experienced officers – who had access to databases, and subpoena power that even criminal defense investigators cannot access, much less a layperson – to corroborate could have easily taken an inmate several years to do alone.

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While both the law enforcement officer and the wrongfully convicted person seeking to demonstrate innocence may share the goals of eliminating the wrong suspects, and identifying the true perpetrator, there are two major differences in their circumstances.

Most importantly, law enforcement has much greater access to resources than the wrongfully convicted prisoner, who almost always remains incarcerated, even as he or she investigates innocence. Detectives have freedom of movement; access to powerful but confidential local and national databases; access to legal consultations and the power of the grand jury and the subpoena. While law enforcement agencies everywhere are cash strapped, there is at least limited funding allocated to especially hard to solve cases. And detectives can draw on institutional knowledge, and their professional training and experiences. These resources enable detectives to chase down leads, and allow them to make informed judgments about when waiting is the most diligent strategy they can pursue.

None of these resources are readily available to an incarcerated person trying to uncover persuasive evidence of his or her innocence. The wrongfully convicted prisoner has limited, if any, access to legal advice and no institutional support for his quest. He has no training or experience to draw on, and the scenario he faces – needing to prove innocence in the face of a record that had been strong enough to result in his conviction – is so rare that there is no road map

to follow. Although he faces many of the same challenges law enforcement officers working hard-to-investigate crimes face, it would be a pure legal fiction to pretend those obstacles are as surmountable for the wrongfully convicted innocent person.

Apart from the considerable work of finding and developing evidence of actual innocence, the wrongfully convicted person inevitably faces the additional burden of needing to first isolate and identify where the original investigation, prosecution and/or judicial review of his case failed, so as to explain how it was he came to be wrongfully accused, prosecuted and convicted. Again, his or her access to resources, including funds and legal counsel, is limited. Moreover, as to the prisoner seeking to build a case of wrongful conviction, and the law enforcement officer seeking to build a prosecutable case for conviction, the issues with respect to timing are often the same.

As discussed, a detective trying to crack a hard to solve homicide uses time as an ally: he or she waits for the right relationships to change or develop; for technology to become more available or more useful; or for serendipity to strike to his or her advantage. As this Court recognized in *Lovasco,* if deadlines forced law enforcement officers to prematurely push a case toward prosecution, years, even decades, of hard, painstaking work could be entirely undermined. Premature disclosure of evidence and information could shut down important avenues of corroboration. If not properly interpreted and assessed for reliability, new evidence, or newly analyzed evidence, could

prove misleading, or inaccurate, wasting resources and discrediting aspects of an otherwise robust investigation. The law enforcement officer working up a case for prosecution accordingly relies heavily on his or her judgment with respect to the issue of timing – there are simply no textbook answers for the prisoner to look up on the questions of when it is advisable to wait for more evidence, and for how long; when an investigator should continue knocking on a door for an interview, or work instead on building a relationship of trust; or when to make the call that a case is strong enough to bring to the grand jury, or to trial, or to wait.

However, with respect to constitutional claims asserted without gateway evidence of innocence, AEDPA's "new evidence" provision clearly limits the time for filing a habeas petition to one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). The Court now considers whether there is an exception to this provision of AEDPA when a petitioner can demonstrate a credible claim of actual innocence and, if so, whether an inmate with a credible claim of innocence must show that he has diligently pursued his rights.

Our experience with hard-to-investigate crimes compels our conclusion that it would be impractical and inequitable to impose a time limit on coming forward with evidence of actual innocence, or to require a legal showing of diligence. With little to no

resources, and given the need to connect a showing of actual innocence to a cognizable constitutional claim for habeas relief, a factually innocent prisoner already has the odds stacked against him. Finding and substantiating leads on his innocence, and building that information up to the point where the evidence can stand up in court, will most likely take the wrongfully convicted person even more time and luck than it takes law enforcement to crack especially difficult-to-solve cases. Moreover, an innocent prisoner looking for the true perpetrator of the crime for which he is incarcerated is unlikely to have the same judgment regarding questions of timing as trained law enforcement professionals.

As discussed, many jurisdictions have no statute of limitations on major crimes, or have extended the statute of limitations to accommodate advances in investigative strategies and technologies that may make new information available. The rationale for doing so is to bring closure to the victims by proving beyond doubt that the true perpetrator has been brought to justice, and to safeguard society by restraining the true perpetrator from striking again. Imposing what amounts to a statute of limitations on evidence of innocence contravenes these objectives, and would perpetuate the injustice that cold case units are dedicated to preventing. For these reasons, we believe "[w]e need to work just as hard to exonerate the innocent as we do to convict the guilty," and we now urge the Court to consider that there is no

practical or fair way to put time and diligence constraints on such efforts.[28]

CONCLUSION

We believe that the Sixth Circuit decision below should be affirmed by this Court.

Respectfully submitted,

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[28] Walton, *supra* note 3, at Introduction, iv.