NO.

IN THE SUPREME COURT OF

THE UNITED STATES

KENNETH A. WHITE

PETITIONER,

- VS -

UNITED STATES OF AMERICA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI FROM

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENNETH A. WHITE

F.C.I. RAY BROOK

P.O. BOX 900

RAY BROOK, NY 12977

QUESTIONS PRESENTED

Did the District Court err in failing to grant Mr. White a Certificate of Appealability on his Fifth Amendment argument?

JURISDICTION

The Sixth Circuit denied petitioner's request for a Certificate of Appealability. (Appendix A). This petition is timely filed. The Court's jurisdiction is invoked pursuant to 28 USC § 1291 and the Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCES OF LAW**; nor shall private property be taken for public use, without just compensation.

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STATEMENT OF THE CASE

In January of 2009, Petitioner Kenneth White was charged by a grand jury sitting in the Northern District of Ohio on charges of making false loan applications. At the same time, federal agents had investigated White relating to the filing of fraudulent tax returns. The prosecutor originally offered a "global" plea agreement, whereby White would resolve all of the charges. Eventually, however, White rejected that agreement, resulting in the above named indictment. White pled not guilty in that case, and proceeded to trial. He was eventually found guilty and sentenced to 103 months incarceration. White appealed his sentence and conviction, but was unsuccessful.

Over five years after his indictment, prosecutors decided it was time to prosecute White for IRS violations that he had refused to resolve in the global plea. On May 28, 2014, White was named in an eleven count indictment charging: One count of conspiracy to make false claims, in violation of 18 USC § 286; and 10 counts of aiding and abetting in the making of false claims, in violation of 18 USC § 287. After a four day trial held from October 28, thru 31, 2014, White was convicted on the conspiracy count, as well as 6 of the substantive counts. White this time was sentenced to 155 months, to be served consecutively to the 2009 sentence.

IN THE UNITED STATES SUPREME COURT

KENNETH A. WHITE

PETITIONER,

VS.

UNITED STATES OF AMERICA

RESPONDENT.

PETITIONER'S REQUEST FOR A WRIT OF CERT AND MOTION TO VACATE JUDGEMENT OF SENTENCE PURSUANT TO FEDERAL RULES AND CIVIL PROCEDURE RULE 60(b)(6)

Petitioner, Kenneth A. White, hereby moves this court pro-se for an order granting him a writ of cert in regards to the Appellate Court denying him a Certificate of Appealability. As will be shown below, the Court erred in denying a Certificate of Appealability regarding Petitioner's Rule 60(b)(6) Motion. (Appendix A).

OPENING STATEMENT

The adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. This Court once stated, "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skill, neither is it a sacrifice of unarmed prisoners to gladiators." **UNITED STATES V. CRONIC**, 466 U.S. 648 (1984).

Mr. White became an unarmed prisoner when his attorney failed to know the facts, law, and circumstances of the case. As a result of counsel's failures, one of the most fundamental constitutional rights that the Framers intended be protected was circumvented, leaving Mr. White to suffer an injustice that stripped him of life, liberty and the pursuit of happiness.

The late, great, Justice Scalia, once said, "The rule of law, is law of rules." Today, Mr. White asks this court to allow his cry of distress to be his call to rescue. In order for this to be accomplished, he asks that this Court separate fact from fiction.

I. APPLICABLE LEGAL PRINCIPLES

Rule 60(b)(6) allows a party to seek relief "from a final judgment, order, or proceeding" and requests the reopening of a case for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). This rule "vests power in courts ... to enable them to vacate judgments whenever such action is appropriate to accomplish justice." **KLAPPROTT V. UNITED STATES**, 335 U.S. 601, 615 (1949).

Indeed, Rule 60(b)(6) "reflects and confirms the courts own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic, to set aside a judgment whose enforcement would work inequity." **PLAUT V. SPENDTHRIFT FARM Inc.**, 514 U.S. 211, 233-34 (1995) (quoting **HAZEL-ATLAS GLASS Co. V. HARTFORD-EMPIRE Co.**, 322 U.S. 238, 244 (1944).

"A petitioner seeking relief pursuant to Rule 60(b)(6) 'must show extrordinary circumstances' justifying the re-opening of a final judgment." **GONZALEZ V. CROSBY**, 545 U.S. 524 (2005) (quoting **ACKERMAN V. UNITED STATES**, 340 U.S. 193, 199 [1950]). In evaluating extraordinariness, "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." **LILJEBERG V. HEALTH SERVICES ACQUISITION CORP.**, 486 U.S. 847, 866 (1988). This fact intensive inquiry also involves an assessment of the applicants diligence, the probable merits of the underlying claims, the interest in finality, and other equitable considerations. See **11 C. WRIGHT, A. MILLER,** & **M. KANE**, Federal Practice and Procedure § 2857 (2nd Ed. 1995 and Supp. 2004); **GONZALEZ**, 545 U.S. @ 540 (Stevens, J. dissenting) (collecting relevant factors). See also **UNITED COIN METER Co. V. SEABOARD COASTLINE RR.**, 705 F.2d 839 (6th Cir. 1983); **DASSAULT SYSTEMS, SA. V. CHILDRESS**, 663 F.3d 832 (6th Cir. 2011).

ANALYSIS

To understand the constitutional deprivations that Mr. White

has suffered, the procedural history in this case must be specifically outlined. In January of 2009, Mr. White was charged by a grand jury sitting in the Northern District of Ohio on charges of making false loan applications. At the time that those charges were lodged, federal law enforcement officers were investigating Mr. White and he eventually appeared before the Honorable Judge Oliver, and entered a plea of guilt based on a "global plea" which included the fraudulent tax returns case. Mr. White later sought to withdraw his plea. That motion was granted, and Mr. White proceeded to trial and was eventually found guilty. The court later imposed a term of 103 months imprisonment as to the false loan application case.

The question became, what happened to the fraudulent tax returns case? (1:09-cr-0001-50-1, 1:10-cr-00442-50-1). The government never dropped the charges or sought to resolve them once Mr. White withdrew from the plea agreement on August 23, 2011. **THE CHARGES WERE LEFT OPEN AND IN LIMBO FOR FIVE YEARS**. On May 28, 2014 the government brought an eleven count indictment that charged Mr. White with one count of conspiracy to make false claims, in violation of 18 USC § 286; and ten counts of aiding and abetting in the making of false claims all in violation of 18 USC § 287.

A trial on those charges commenced on October 28, 2014, and ending as well as six of the substantive counts. The court subsequently sentenced Mr. White to an additional 155 months to be served consecutively to the 2009 and 2010 sentence.

Mr. White later appealed to the Sixth Circuit Court of

Appeals. His conviction and sentence were affirmed on March 22, 2016. Mr. White later brought a motion pursuant to 28 USC § 2255 to this Court on November 14, 2016. On April 13, 2017 his request for relief was denied with a request for a Certificate of Appealability. In Mr. White's petition for relief he argued his right to a speedy trial was violated, that pre-indictment delay deprived him of due process and equal protection, and that he was deprived of his Sixth Amendment Right to effective assistance of counsel.

Mr. White's current motion pursuant to Fed. R. Civ. P. 60(b)(6) seeks relief from that final judgment, order, and proceeding as there has clearly been an injustice in this case violating both of Mr. White's constitutional rights under the Fifth and Sixth Amendment of the United States Constitution.

In deciding whether Mr. White's rights to due process were violated we must first turn to the constitution. The Vicinage Clause of the Sixth Amendment provides that in criminal prosecutions, "the accused shall enjoy the right to a speedy trial and public trial by an impartial jury of the state and district shall have previously been ascertained by law..." U.S. Const. Amend. VI. Congress later enacted the Speedy Trial Act 18 USC § 3161 to clarify exactly what the Sixth Amendment entails.

18 USC § 3161's time limit and exclusions provides in pertinent part:

(A) in any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, and after consultation with the counsel for the

defendant and the attorney for the government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calandar at a place within the judicial district, so as to assure a speedy trial.

(B) and **INFORMATION** or **INDICTMENT CHARGES** an individual with the commission of an offense **SHALL BE FILED WITHIN THIRTY DAYS FROM THE DATE ON WHICH SUCH INDIVIDUAL WAS ARRESTED OR SERVED WITH A SUMMONS IN CONNECTION WITH SUCH CHARGES**. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information of indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a **JUDICIAL OFFICER OF THE COURT IN WHICH SUCH CHARGE IS PENDING. WHICHEVER DATE LAST OCCURS**. If a defendant consents in writing to be tried before a magistrate (United States magistrate Judge) on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro-se.

(d)(1) If any indictment or information is dismissed upon

motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, and the case may be.

Herein lies the crux of the problem in Mr. White's case. This is where the facts must be separated from fiction. We know that in May of 2011 the government made an offer of a "global plea agreement." We also know that, that particular agreement included the charges to which Mr. White was found guilty of on October 31, 2014, and later sentenced to a term of 155 months of imprisonment. Was Mr. White entitled to be charged by information or indictment within thirty days from the date in which he withdrew his plea of guilt to the global plea for the charges at issue here? Should he also have been taken to trial within seventy days of that withdrawal from the agreement?

That answer resides in 18 USC 3161(b) and (b)(c)(1). The government could not circumvent that they were aware of the evidence, circumstances, or charges that they later tried Mr. White on in October of 2014. The government clearly had their case in early 2011. So why would they not bring Mr. White to trial on those charges with the original charges?

That answer falls in line with the perameters related to consequences. The pre-indictment delay made sure that Mr. White would serve consecutive sentences of 103 and 155 months imprisonment. Is that the justice the Framers intended when sculpting this great Country? There is an inscription on the walls of the Department of Justice that says, **"THE UNITED STATES WINS ITS POINT WHEN JUSTICE IS DONE ITS CITIZENS IN THE COURTS."** It is foundational to our legal tradition that society wins not only when the guilty are convicted, but when criminal trials and the process is fair; our system of the administration of justice suffers when any accused is treated unfairly. The Department of Justice is an institution that has a solemn obligation to always seek justice, and stand for what is right. Regrettably, that promise was not fulfilled in Mr. White's case.

Mr. White was penalized for withdrawing his plea of guilt and exercising his constitutional right to trial. Simply put, the government, in their anger, wanted revenge against Mr. White -- and that revenge would only come by putting him in a position where he would be stripped of the three the Framers found most important -- life, liberty, and the pursuit of happiness for an additional 155 months.

However, the government in their haste scraped the Fifth and Sixth Amendments of the constitution clearly violating those Amendments, and the dictates of the Speedy Trial Act. Mr. White's case is a textbook violation of due process principles. Here, the government circumvented the (30) thirty-day limitation for a speedy trial as described in § 3161(b)(c)(1).

While all of these facts were present, and could have been discovered with a diligent investigation into the facts, laws, and circumstances of Mr. White's case, counsel did nothing. This is a clear case of ineffective assistance of counsel by Mr. White's attorney. This was addressed in Mr. White's original § 2255 petition -- counsel's ineffective assistance.

What would effective assistance of counsel done under professional norms? Clearly, counsel would have done a thorough investigation into the law and facts, and brought a motion to dismiss pre-trial. The Supreme Court made clear that the legal standard governing claims involving the deprivation of the Sixth Amendment Right to the effective assistance of counsel are governed by **STRICKLAND V. WASHINGTON**, 466 U.S. 668 (1984), where the Supreme Court held that to prove such a claim, a defendant must show that: (1) "counsel's representation fell below a reasonable probability that but for counsel's unprofessional errors the result of the proceedings would have been different. **ID**. @ 694. **POUGH V. UNITED STATES**, 442 F.3d 959, 964 (6th Cir. 2004); **MITCHELL V. MASON**, 325 F.3d 732 (6th Cir. 2003); **HADDAD V. UNITED STATES**, 486 F. App'x. 517 (6th Cir. 2012).

The Sixth Amendment guarantee of counsel is to ensure that defendants have "effective assistance" of counsel, that is "the assistance necessary to justify the reliance on the outcome of the proceeding, **STRICKLAND**, 466 U.S. @ 691-92. Counsel's function as assistant to the defendant derive the "overarching duty to advocate the defendant's cause," and the more particular duties to consult with the defendant on important decisions, and to keep the

defendant informed of important developments in the course of the prosecution. **POWELL V. ALABAMA**, 287 U.S. 45, @ 68-69. The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." **ANDERS V. CALIFORNIA**, 386 U.S. 738, 743, 87 S.Ct. 1396 (1967). The Supreme Court has further held that a defendant, "requires the guiding hand of counsel at **EVERY STEP** in the proceedings against him." **POWELL V. ALABAMA**, supra @ 69.

In **BURT V. TITLOW**, ____ U.S. ____, 134 S.Ct. 10 (2013) Justice Sotomayor in her concurring opinion stated, "regardless of whether a defendant asserts [her] innocence or admits her guilt counsel must make an independent examination of the facts, circumstances, pleadings and laws involved" in a clients case. The take away here is that counsel has a constitutional duty to do a proper investigation. It is crystal clear that Mr. White's counsel failed to conduct that investigation regarding the prior "global plea" that encompassed thecharges in the case at bar, and the issues related to the Speedy Trial Act, and quite frankly the prosecutorial misconduct that occurred in this case.

The Sixth Amendment guarantees a defendant the right to have counsel present at all "critical stages" of the criminal proceedings." **MONTEJO V. LOUISIANA**, 566 U.S. 778, 786, 129 S.Ct. 2017 (2009). And in **POWELL V. ALABAMA**, 287 U.S. 45, 57 (1932) the Supreme Court described the pre-trial period as "perhaps the most critical period of the proceedings ... that is to say from the time of their arraignment until the beginning of their trial, when

consultation, **THOROUGH-GOING INVESTIGATION**, and preparation were vitally important."

The pre-trial period constitutes a "critical period" as it encompasses counsel's constitutionally imposed duty to investigate the case. In **STRICKLAND** supra, the Supreme Court explicitly found that trial counsel has a "duty to investigate," and that to discharge that duty, "counsel has a duty to make a reasonable investigation, or to make a reasonable decision that makes particular investigations unnecessary." **STRICKLAND** @ 691.

In the case at bar, the most important aspect on the defense's side was whether or not the indictment was proper. Counsel did no investigation into the prior plea agreement, the pre-indictment failure, and The Speedy Trial Act requirements. That failure to investigate resulted in counsel's failure to file the appropriate pre-trial motions to dismiss, that subsequently resulted in prejudice to Mr. White, in that he was sentenced to an additional 155 months imprisonment.

The Supreme Court in **KIMMELMAN V. MORRISON**, 477 U.S. 365, 375 (1986) held, "failure to move for suppression of bed sheet evidence recovered during an illegal seizure was deficient performance; counsel did not conduct any meaningful pre-trial discovery and there was no strategic reason, other than incompetence, for his actions; remanding for a determination of prejudice." In similar fashion, the Sixth Circuit held, "Failure to move suppression of evidence found during an illegal stop of defendant is ineffective assistance," see **NORTHROP V. TRIPPETT**, 265 F.3d 327 (6th Cir. 2001); see also **JOSHUA V. DEWITT**, 341 F.3d

430 (6th Cir. 2003) (failure of pre-trial counsel to challenge arresting Officer's reliance on Police Flyer containing information that the defendant was a drug courier was ineffective assistance where the officer who provided the information in the flyer lacked reasonable suspicion the defendant was involved in criminal activity).

Counsel's failure to investigate directly effected his ability in the case at bar to file the correct pre-trial motions. Specifically, a motion to dismiss the indictment as a result of a voilation of both due process and the Speedy Trial Act. The Sixth Circuit has consistently made clear that counsel has a constitutional obligation to investigate. See **COLEMAN V. MITCHELL**, 268 F.3d 417 (6th Cir. 2001) (counsel's failure to investigate defendant's background and psychological problems, if presented to the jury, might have allowed defendant to avoid the death penalty). There was no reasonable or strategic reason not to investigate, or file a motion to dismiss in Mr. White's case. Thus, counsel was clearly deficient in his performance in the instant matter, therefore meeting Strickland's first prong requirement.

Counsel's deficient performance resulted in prejudice to Mr. White in that he was sentenced to 155 months of imprisonment that he should not have been prosecuted on, let alone sentenced for. Had counsel moved the court to dismiss the case there is more than a "reasonable probability" that the outcome of the case would have been different. The Supreme Court in **GLOVER V. UNITED STATES**, 531 U.S. 198, 203 (2001) found that, "any amount of actual jail time

has Sixth Amendment significance.").

The standard of proof to establish prejudice that Mr. White must meet to make out his claim is a "reasonable probability," which the Supreme Court has defined as follows:

[A] reasonable probability sufficient to undermine the confidence in the outcome. **STRICKLAND** @ 694; see also **NIX V. WHITESIDE**, 475 U.S. 157, 175 (1986) "reasonable probability standard is less demanding than the preponderance standard." **PORTER V. McCOLLUM**, 558 U.S. 30, 175 L. Ed. 2d 398, 409 (2009).

Here, the truth stands alone to represent itself. Was Mr. White prjudiced by counsel's deficient performance? The facts make it crystal clear that he was.

Mr. White's Rule 60(b)(6) motion was jurisdictionally proper, and therefore the real question is whether he has shown "extraordinary circumstances" justifying the re-opening of a final judgment. **GONZALEZ**, 545 U.S. @ 535. In evaluating that extraordinariness, "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the publics confidence in the judicial process." **LILJEBERG V. HEALTH SERVICES ACQUISITION CORP.**, 486 U.S. 847, 866 (1988).

Leaving the prior judgment against Mr. White intact, risks a profound injustice in his case and undermines public confidence in the rule of law. Here, the District Court denied Mr. White's § 2255 petition on April 13, 2017 in an eight page decision (Dkt. # 191). However, that decision was based on a strained

misinterpretation of the argument, and applicable facts presented by Mr. White's petition makes his Rule 60(b)(6) motion the appropriate vehicle to bring his argument seeking relief.

In that decision, the court delves into the issues concerning the current charges, and the fact that the government brought the charges in 2014 and prosecuted the case in 2014. (Dkt. # 191, @ pg 4-5). However, what the court failed to acknowledge was that the charges at issue were part of the "global plea" in 2011, in relation to the indictment that was filed in January 2009 and the indictment in 2010. Also, that Mr. White's argument was that his rights under the Fifth and Sixth Amendments were violated. What is the question here? That is simply because as previously argued 18 USC § 3161(b) provides that the Speedy Trial Act requires that "[a]ny information or indictment that charges an individual with the commission of an offense shall be filed within the thirty days from the date on which such individual was arrested or served with a summons in connection with such charges."

White was taken into federal custody on July 8, 2010, but not indicted until May 28, 2014. The District Court did not rule on the merits of that argument, and for that reason, his Rule 60(b)(6) motion was appropriate, could not, and should not be construed as a second or successive § 2255 motion. Clearly, the indictment in this case did not come within (30) thirty days from the date in which Mr. White was arrested, nor did it come within thirty days from the time in which he withdrew his plea agreement in May 2011, that included the current charges. These facts turn the constitutional due process rights to a speedy trial on its

face. Especially given the fact that the Court has never ruled on the merits.

A. MR. WHITE'S CASE IS EXTRAORDINARY WITHIN THE MEANING OF RULE 60(b)(6)

1. THE RISK OF INJUSTICE TO MR. WHITE

Mr. White faces the risk of being deprived of life, liberty, and the pursuit of happiness for an additional nine more years whose legitimacy is undermined by the facts of this case. That is the current sentence and conviction were imposed despite the fact that the constitutional rights of Mr. White to a speedy trial were violated. The risk of injustice was compounded by the failures of Mr. White's trial counsel. His counsel turned the role of defense counsel on its head when he failed to do an investigation into the facts, and laws that were all part of Mr. White's case. That included the facts related to the global plea, the fact the current charges were part of that plea, that those charges were never dropped, that the same prosecutor, five years later, brought those same charges and that the same prosecutor had in fact indicted Mr. White on four separate occasions, and that 18 USC § 3161(b) prevented the government from bringing the case in the first place. Had counsel done so, he would have filed the correct pre-trial motions to dismiss. In turn, there is a reasonable probability the indictment would have been dismissed.

2. THE RISK OF UNDERMINING PUBLIC

CONFIDENCE IN THE JUSTICE SYSTEM AND

THE RISK OF INJUSTICE IN OTHER CASES.

Here, the same Assistant United States Attorney indicted Mr. White four times. The current charges were known to the government in 2009 and 2010 when Mr. White was exercising his right to trial, and withdrawing from the global plea the government wanted to punish him. There was no continuing investigation, no new witnesses, so then, why did the government wait (5) five years to prosecute him? The government's pre-indictment delay was for one reason and one reason only; that was so the end result would be a consecutive, and separate sentence. Does something like this promote the public's confidence in the justice system? These actions tell the accused that if you exercise your constitutional right to trial, there is a price to pay. And if the government is permitted to do such in Mr. White's case, there is a risk of injustice in other cases.

Would the government have taken this track if Mr. White was not African American? Here, the AUSA made clear he was not happy that the Honorable Judge Oliver, who was African American himself, sentenced Mr. White to 103 months on the first case. And the AUSA did so by bringing this indictment (5) five years later, so that he could secure the consecutive sentence.

This is a pretty clear case of prosecutorial misconduct. And that misconduct is rooted in race.

"Claims of prosecutorial misconduct are reviewed deferentially" in a habeas case, **MILLENDER V. ADAMS**, 376 F.3d 520, 528 (6th Cir. 2004), and the "touchstone of the due process

analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." **SMITH V. PHILLIPS**, 445 U.S. 209, 219, 102 S.Ct. 940, 71 L. Ed. 2d 78 (1982).

To state a claim for prosecutorial misconduct in bringing particular charges, a movant must show that "the government had undertaken obviously groundless positions in a prosecution of positions intended solely to harass defendants rather than to vindicate the rule of law." **UNITED STATES V. SKEDDLE**, 45 F. App'x 443, 446 (6th Cir. 2002).

It is pretty obvious in this case why the prosecutor brought the charges (5) five years later. He could have prosecuted the case (5) years earlier, and had every bit of evidence to do so, but the prosecution kept the charges at issue here in the bank so to speak, just in case the African American Judge handed down a sentence of the African American defendant, Kenneth A. White, that the caucasian prosecutor did not like.

For over a century, the Supreme Court had condemned the consideration of race in the criminal justice process. See e.g., **EX PARTE VIRGINIA**, 100 U.S. 339, 345 (1880) (prohibiting the race-based exclusion of grand and petit jurors and emphasizing that the Thirteenth and Fourteenth Amendments "were intended to take away all possibility of oppression by law because of race or color."); **STRAUDER V. WEST VIRGINIA**, 100 U.S. 303, 309-10 (1880) ("[H]ow can it be maintained that compelling a colored man to submit to a trial for his life drawn from a panel from which the state has expressly excluded every man of his race, because of color alone

... is not a denial to him or equal legal protection?"); **MARTIN V. TEXAS**, 200 U.S. 316, 319 (1960) ("[I]t is the settled doctrine of this court that whenever, by any action of a state, whether through its legislature, through its courts, or through its executive of administrative officers, all persons of the African race are excluded solely because of thier race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States").; **CASSEL V. TEXAS**, 339 U.S. 282, 287 (1950) (An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race.); **OYLER V. BOLES**, 368 U.S. 448, 456 (1962) ("Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.") (emphasis added); **BORDENKIRCHER V. HAYES**, 434 U.S. 357, 364 (1978) ("Within the limits set by the legislature's constitutionally valid definition of chargable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.") (emphasis added); **WAYTE V. UNITED STATES**, 470 U.S. 598, 608 (1985) ("The decision to prosecute may not be deliberately based upon an unjustifiable standard such as race.") (internal quotation marks and alterations

omitted); **BATSON V. KENTUCKY**, 476 U.S. 79, 85 (1986) ("More than a century ago, the court decided that the state denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded."); **POWERS V. OHIO**, 499 U.S. 400, 411 (1991) ("The jury acts as a vital check against the wrongful exercise of power by the state and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the facts and the perceptions of this guarantee.") (internal citations omitted).

Indeed, this court recognizes that "discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing black citizens that equal justice which the law aims to secure to all others.'" **BATSON**, 476 U.S. @ 87-88 (1986) (quoting **STRAUDER V. WEST VIRGINIA**, 100 U.S. @ 308) (alterations omitted). The perniciousness of race is such that it damages our system of criminal justice when it plays any role:

> **For we cannot deny that, years after the close of the war between the State and over 100 years after STRAUDER, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.**

ROSE V. MITCHELL, 443 U.S. 545, 558-59 (1979). Not only has

the Supreme Court consistently emphasized that there is no place for race in criminal trials, Congress likewise has legislated that there is no place for race in federal sentencing. See 28 USC § 994(d) ("The [United States Sentencing] Commission shall assure that the [sentencing] guidelines and policy statements are entirely neutral as to the races... of offenders.").

Public confidence in the justice system is undermined not only by racial bias in juror selection, but also by perceptions of racial bias in the criminal justice system writ large. "The claim that the court has descriminated on the basis of race in a given case brings the integrity of the judicial system into direct question." **ROSE**, 443 U.S. @ 563.

It is increasingly well established that public confidence in the judiciary is weakened by the perceptions that minorities, particularly African Americans, are treated differently - worse -in our justice system. An August 2013 Pew Research Center Survey found that 68% of black people believe that blacks are treated less fairly than whites in the courts, and that a little more than a quarter of whites (27%) hold the same belief. Eileen Patten, Pew Research Center, The Black-White and Urban-Racial Dividends in Perception of Racial Fairness (August 28, 2013). A Gallup Poll similarly found that 68% of non-hispanic blacks perceive that the American Justice System is biased against black people, and that a quarter (25%) of non-hispanic whites hold the same view. Frank Newport, Gallup:; Gulf Grows in Black-White Views of U.S. Justice System Bias (July 22, 2013).

Again, why did the government wait (5) five years to bring the

indictment? They had all their witnesses, all their evidence, and there was no ongoing investigation. Was it simply to make sure they could incapacitate another African American man? Was it done to strip him of life, liberty, and the pursuit of happiness? There is no other explanation for the (5) five year delay; at least no legitimate one.

Mr. White's case reinforces this perception of unequal justice and threatens to validate concerns about racial bias in the court system. The proper administration of justice relies on the public confidence of all Americans, regardless of race. If Mr. White is made to serve his current sentence, without full and fair review of his claim that he was denied his constitutional rights under the Fifth and Sixth Amendments, (Speedy Trial Act and his right to effective assistance of counsel) his case can, and will, further undermine public confidence in our justice systems ability to treat all defendants fairly. This court should not permit this unnecessary, harmful, and unacceptable damage to our criminal justice system.

3. THE PROBABLE MERIT OF MR. WHITE'S INEFFECTIVE CLAIM.

As detailed above, Mr. White has presented a meritorious claim of ineffective assistance of counsel. Mr. White was prejudiced by counsel's failure to investigate the laws, facts, and circumstances surrounding the motion to dismiss, because there is a reasonable probability of a different outcome had counsel done so.

4. THE GOVERNMENT'S INTEREST IN FINALITY

Under the unique circumstances of this case, the government does not have a strong interest in the finality of the judgment denying federal habeas review of Mr. White's I.A.C. claim. First, judicial review of ineffective assistance of trial counsel claims is essential to the integrity of the criminal justice system because "the right to effective assistance of counsel [at trial] is... the foundation for our adversary system." **MARTINEZ. V. RYAN**, 132 S.Ct. 1309, @ 1317 (2012). The government has no legitimate interest in a sentence that should have never been imposed because the prosecution should have never gone forward on an invalid indictment based on a clear due process violation. **WELCH V. UNITED STATES**, 136 S.Ct. 1257, 1266 (2016) ("[T]here is a little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."). (quoting **MACKEY V. UNITED STATES**, 401 U.S. 667, 693 (1971) (Harlan, J.)

5. MR. WHITE'S DILIGENCE

Mr. White has diligently pursued relief on his ineffective assistance of counsel claim as connected to his Speedy Trial issue. He even made it clear at sentencing when he stated, "On this past from my last conviction, all of it was in a plea, and that was taken [sic] out when I went to trial before. He could have just brought that back then, and I could have went to trial at one time. He called himself waiting to the statute of limitations was over, where it was a day less that the statute of limitations."

Is this the justice spoke of in the inscription on thw walls of the Department of Justice? Is this the justice that the Framers intended be afforded to its citizens? Justice demands more than what Mr. White was afforded here. Dr. Martin Luther King Jr. once said, "An injustice anywhere, is a threat to justice everywhere." Mr. White's case is a textbook example of what an injustice is.

Despite all of these facts, the Circuit Court failed to issue a COA. Mr. White made a "'substantial showing' that reasonable jurists could debate whether the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further." **MILLER-EL V. COCKRELL**, 537 U.S. 322, 336, 123 S.Ct. 1029, 154 L. Ed. 2d 931 (2003).

CONCLUSION

This court should grant Mr. White a Writ of Cert finding that the Circuit Court erred in denying a Certificate of Appealability.

Respectfully Submitted

X _____

Kenneth A. White