No. 20-7962

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Wesley Brian Earnest — PETITIONER, Pro se
(Your Name)

vs.

Keith W. Davis, et al. — RESPONDENT(S)
Warden Keith W. Davis represented by Virginia Attorney General

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Wesley Brian Earnest
(Your Name)

Sussex One State Prison, 24414 Musselwhite Dr.
(Address)

Waverly, VA 23891
(City, State, Zip Code)

N/A
(Phone Number)

Questions Presented

(1) a. Should courts procedurally time-bar a prose inmate's habeas corpus when a prison official with a serious health illness, such as COVID-19, is responsible for the untimely filing? Or, should "Extraordinary Circumstances" be recognized and Equitable Tolling granted? (This is of national importance with the COVID-19 pandemic).

b. Should courts recognize "Actual Innocence" and constitutional rights violations as grounds to remove procedural time-bars in a habeas corpus? (Lower courts are divided on this issue).

(2) a. Should trial courts prevent defendants the use of exonerating DNA (blood and hair) simply because the DNA is not yet registered in a criminal database and the third-party donor is unknown?

b. Should trial courts supplant scientific DNA evidence with mere circumstantial evidence, or would this lead to a surge in wrongful convictions nationwide, significantly diminishing the public confidence in the judicial system?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Keith W. Davis, Warden

Harold W. Clarke, Director Virginia Department of Corrections

Respondent's Counsel, Mark Herring, Virginia Attorney General

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[✓] reported at WWW.ca4.uscourts.gov Case 20-7531; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished. Procedural Time Bar. February 23, 2021
Petition For Rehearing Denied April 6, 2021

The opinion of the United States district court appears at Appendix B to the petition and is

[✓] reported at https://www.pacer.gov Case 7:18-cv-595; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished. Procedural Time Bar September 30, 2020

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Virginia Supreme Court (Habeas Corpus) appears at Appendix C and is reported at record No. 171028, CL14009211 May 22, 2018

The opinion of the Circuit Court of Amherst County, Virginia (Habeas Corpus) appears at Appendix D and is reported at CL14009211-00 May 5, 2017

The opinion of the Virginia Supreme Court (Direct Appeal) appears at Appendix E Record No. 130018 July, 2013

The opinion of the Virginia Court of Appeals (Direct Appeal) appears at Appendix F and is reported at 61 Va. App. 223, 734 S.E. 2d 680 (2012)

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 23, 2021

[ ] No petition for rehearing was timely filed in my case.

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 6, 2021, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Argument One addresses the "Due Process" clause of the 5th and 14th Amendments as well as the "Equal Protection" clause of the 14th Amendment. In addition, since "Actual Innocence" is demonstrated, the issue of a "fundamental miscarriage of justice" is foremost as courts procedurally bar claims which should be heard on their merits. "Extraordinary Circumstances" and Equitable Tolling Considerations;

Argument Two addresses the "Due Process" clause of the 5th and 14th Amendments as well as the "Compulsory Process" and "confrontation" clauses of the 6th Amendment. The right to cross-examine government witnesses and to call witnesses is fundamental to a person's right to a fair trial. Defendants have the right to put on a "complete defense" which includes pointing to third-party guilt and creating an alternative theory to a crime. Scientific DNA analysis is key technology for accomplishing that task.

AEDPA Statute of Limitations
28 U.S.C.S. 2244 (d)

Statement of the Case

On May 6, 2008, Wesley Earnest was indicted for first degree murder of his estranged wife, Jocelyn Earnest, and use of a firearm in Bedford County Circuit Court in Bedford, Virginia. He was tried and found guilty of both offenses on April 5, 2010. The verdict was set aside on July 14, 2010 and a mistrial order entered July 26, 2010 due to the jury receiving impermissable materials during deliberations. A new trial was scheduled for November 8, 2010 in neighboring Amherst County as a change of venue was granted. The same Judge James W. Updike, Jr. again presided and on November 19, 2010, a guilty verdict was returned by the jury (T. 2864). The jury recommended life in prison plus three years. (T. 2888). On January 25, 2011, the court sentenced Petitioner in accordance with the jury recommendations (S.25). Petitioner appealed his convictions to the Virginia Court of Appeals, and the judgment of the trial court was affirmed. Petitioner appealed to the Virginia Supreme Court but it was refused July 29, 2013 and the petition for rehearing refused September 23, 2013. A petition for Writ of Certiorari to the U.S. Supreme Court was filed but denied February 24, 2014. Petitioner filed for a writ of habeas corpus in Amherst County Circuit Court, Amherst, Virginia. Judge James W. Updike, Jr., the same as the trial judge, denied petitioner's request for relief without an evidentiary hearing on May 5, 2017. The Virginia Supreme

Court denied the petition on May 22, 2018. The U.S. Supreme Court denied Certiorari on October 15, 2018. The U.S. District Court for the Western District of Virginia - Roanoke Division dismissed petitioner's Federal Habeas Corpus September 30, 2020 with a procedural Time-Bar. An appeal was filed with the U.S. Court of Appeals for the Fourth Circuit and they also procedurally time-barred petitioner February 23, 2021 by two days. A petition for re-hearing En Banc was timely filed and a Temporary Stay of Mandate issued March 9, 2021. The petitition for re-hearing was denied April 6, 2021.

Court Opinions / Orders

① Wesley Brian Earnest v. Commonwealth
61 Va. App. 223, 734 S.E. 2d 680 (Ct. App. 2012)

② Wesley Brian Earnest v. Commonwealth, Record No. 130018,
Order of the Clerk of Supreme Ct. of Virginia

③ Wesley Brian Earnest v. Virginia, Record No. 13-779
Order of the U.S. Supreme Court, February 24, 2014

④ Wesley Brian Earnest v. Keith W. Davis, et al.
Habeas Corpus in Amherst County Circuit Court
Case No. CL14009211-00, May 5, 2017

⑤ Wesley Brian Earnest v. Keith W. Davis, et. al.
Habeas Corpus Case No. CL14009211-00, Record No. 171028
Virginia Supreme Court, Refusal May 22, 2018

⑥ Wesley Brian Earnest v. Keith W. Davis, et. al.
Habeas Corpus Case No. CL14009211-00, Docket No. 18-5728
U.S. Supreme Court, Certiorari Denied October 15, 2018.

⑦ Wesley Brian Earnest v. Keith W. Davis, et. al.
Federal Habeas Corpus No. 7:18-00595
U.S. District Court For The Western District of Virginia-
Roanoke Division, Dismissed September 30, 2020, Time-Bar

⑧ Wesley Brian Earnest v. Keith W. Davis, et. al.
Federal Habeas Corpus No. 20-7531
U.S. Court of Appeals for The Fourth Circuit
Dismissed February 23, 2021; Stay of Mandate Granted on
March 9, 2021; Petition For Re-hearing En Banc denied
April 6, 2021. Time-Bar

The trial transcript with page number is designated by [T. Page #] and the sentencing transcript with (S. Page #).
The federal District Court Website and Appendices are at https://www.pacer.gov case 7:18-cv-00595 and the 4th Circuit website is www.ca4.uscourts.gov case 20-7531.

Statement of Facts

Wesley Brian Earnest married Jocelyn Earnest in 1995 and moved into the marital residence in Bedford County, Virginia. They separated in 2004 when Mr. Earnest built a lake house about an hour's drive away from the marital residence. Earnest was a public school educator by profession and his wife was an executive supervisor for the large insurance company, Genworth Financial. Both Earnest and his wife moved on to other relationships and official divorce proceedings began in early 2006. Earnest began dating a black female and faced numerous racist incidents in the area. He took a job in Chesapeake, Virginia and moved over 200 miles away in 2005. He had almost no contact with his estranged wife, knew nothing of her relationships, her change in job location, nor did he even have her phone number. Divorce attorneys were handling marital bills for assets jointly owned as money was in escrow from the sale of a rental house they owned. A meeting was held with Earnest, Mrs. Earnest and their attorneys in early 2007 to discuss asset distribution and this was the last meeting. Earnest lived and worked over 200 miles away in Tidewater, Virginia while separated for years from his wife. He was a high school assistant principal in Chesapeake, Virginia (T. 2512) where the only eye witnesses in this case testified Earnest was on the day and night in question, December 19, 2007. Teacher Cindy King [T. 2284 - 2295], Computer technology

Specialist Dr. Al Ragas [T. 2296-2312] and Chesapeake Taco Bell employee Wayne Stewart [T. 2333-2369] all testified Earnest was in Chesapeake, Virginia at times when it is impossible to be 200 miles away in Bedford County, Virginia. [T. 2514]

Earnest voluntarily met with detectives 12/21/07 and answered all of their questions including his whereabouts during the entire week in question, 12/16/07 to 12/21/07. (See Respondent's Exhibit P, 4th Circuit and District Court Websites) The transcript reveals Earnest provided alibi names, a DNA sample, phone numbers of alibi witnesses and agreed to give everything in writing. Detectives did <u>not</u> contact the hundreds of staff members at his high school. At trial, prosecutors accused alibi witnesses of lying or being mistaken. In May, 2019, it was revealed that prosecutors hid the exculpatory video evidence of Earnest at work in Chesapeake, Virginia. Sealed search warrants had been used and Earnest was unaware of being the target of their investigation, and he was arrested months later.

This case is a completely circumstantial case with mere speculation and wild theories. Earnest's arrest was justified by a thumbprint on the piece of paper of the typed, suicide note found at the old marital residence where Earnest lived for a decade [T. 475]. In addition, in December, 2006, Jennifer Kerns and Mrs. Earnest rented a moving truck and removed all items from Earnest's lake house including furniture, office supplies, computer paper, computer printer, etc. [T. 864-866, 2372-2375,

2524, 2417-2419] The next day, a pendente lite hearing for the divorce was held in Bedford Circuit Court during which the court gave exclusive use of the lake house to Earnest and the marital residence to his wife. [T. 860, 1373, 2640]

Kenneth Riding and Andrew Johnson were called by the state as fingerprint analysts and they both agreed fingerprints can last for decades. Even Hitler's fingerprints are still analyzable today, some 70 years later. [T. 2023-2031, 2053, 2146-2147, 2162] For this reason, a motion to strike was promoted by defense counsel and all charges asked to be dismissed.

Riding also testified the alarm system keypad was <u>not</u> submitted for fingerprint analysis nor was the thermostat, any windows, doorknobs, computers, printers, phones, etc. submitted even though hard and plastic surfaces are good for finding fingerprints. [T. 2057-2058] The condom wrapper, unopened condom and box of condoms found at the scene were also <u>not</u> submitted for fingerprint analysis. [T. 653-656, 671] The only item submitted for fingerprint analysis was the suicide note, of which five witnesses did not see prior to detectives arriving at the scene. Two EMTs, a deputy sheriff, Mrs. Earnest's two girlfriends, Muncey and Shepherd, were all at the scene before detectives. Detective Mayhew testified there was no forced entry to the house and all doors and windows were locked and secured [T. 818-819]. There was a security alarm system on the house as well as new locks [T. 2678-79].

Mrs. Earnest's divorce attorney testified that Mr. Earnest had no access to the house security alarm system code nor any key to the new locks on the house [T. 806, 831, 1441-42]. Mrs. Earnest began an intimate, romantic relationship with Marcy Shepherd in 2005. When the suicide note was read in court, Shepherd identified herself as the "new love" referenced in the note. Shepherd was married with children and she lived with her husband in a nearby subdivision [T. 1052-1055, 1096].

The state's medical examiner, Dr. Tharp, performed an autopsy verifying Mrs. Earnest died of a gunshot wound to the head, and she testified there was gunshot residue on her right hand. For months, Dr. Tharp wrote "undetermined" on the death certificate as to suicide or homicide. She changed it to "homicide" upon Earnest's arrest. She testified that people do not shoot themselves in the side of the head [T. 1162-1171, 1185, 1195-1209].

A small frame .357 revolver pistol was recovered at the scene. The state's firearm expert testified it was similar in size to the "Lady Smith" revolver marketed to women. [T. 1125] Earnest stated he bought the gun for his wife years earlier in 1999 and selected it for its small frame and ease of operation. [T. 2269-2270].

Earnest's father, who owns a farm in West Virginia, testified Mrs. Earnest practiced shooting her .357 pistol at his farm and her skilled shooting. [T. 2257-2259] Divorce documents for asset distribution revealed she was still in possession of her .357 revolver, but the court

ruled it was "heresay" and not allowed by the defense. The medical examiner stated she could not determine a time of death on the night in question, 12/19/07. However, an electronic time of death can be established at approximately 7:30 p.m. Mrs. Earnest sent an email, likely from her Blackberry, at 7:28 p.m. and this is the last known communication from her. [T. 816, 894-896, 2487] At 7:35 p.m., her home security alarm system was disarmed using the Keypad and security code [T. 940-942]. She apparently just returned home from a counseling session with her mental health therapist. The security system had motion, door and window sensors.

Marcy Shepherd stated she had a date with Mrs. Earnest and they had texted earlier [T. 1011-1014]. However, after 7:28 p.m., dozens of text messages and phone calls go unanswered the evening of 12/19/07. Shepherd stated she went over to the house that evening thinking Mrs. Earnest was with her other girlfriend, Maysa Muncey. Shepherd stated that Mrs. Earnest's car was in the driveway, but nobody came to the door [T. 1030-1044]. All of the text messages and phone data on Mrs. Earnest's Blackberry were deleted while in the custody of detectives and irretrievable. Shepherd told the police about her texts and calls to Mrs. Earnest from the evening of 12/19/07, however her phone was not examined or seized until weeks later because Shepherd refused to cooperate [T. 789-790, 1082]. When Shepherd finally did relinquish her phone, selective

text messages from 12/19/07 had been deleted and could not be retrieved [T. 795-797, 1088]. Shepherd also failed to initially report her intimate relationship with Mrs. Earnest to detectives.

Shepherd stated she went back to the house the next morning, 12/20/07, got the house key, and entered the house to find the body. She called a mutual girlfriend, Maysa Munsey, who arrived at the scene prior to any others. Shepherd called 911 and two Emergency Medical Technicians arrived with a deputy sheriff. Neither Munsey or Shepherd were processed for gunshot residue nor were their cars searched. [T. 562, 759-760, 818].

Earlier in the day of 12/19/07, the day in question, Maysa Munsey was arrested and appeared in court in Amherst County for identity theft and fraud. Mrs. Earnest accompanied her to court, and it appears the identity theft occurred from the human resources department where Munsey, Shepherd and Mrs. Earnest all worked [T. 2434-2440]. They all worked for Genworth Financial, and they all took the week off of work. Under cross-examination, Munsey testified she could not "remember" how she stole the identity of the person for whom she was charged.

On 12/20/07, detectives recovered blood and hair at the scene, the DNA which does not belong to petitioner Earnest or his wife. All scientific evidence excludes petitioner Earnest, yet mere speculation is used against him.

DNA analyst, Rodney Woolforth, testified the blood and hair recovered do not belong to any known person nor was it in a criminal database. [T. 640-646, 812, 2193-2194, 2236-2237].

A bed sheet, condom wrapper, unopened condom and box of condoms was not processed for DNA. [T. 653-656, 671]

In December, 2007, Earnest borrowed David Hall's truck for hunting and outdoor activities as well as moving residences in Chesapeake, Virginia. Earnest and Hall were friends who spent time together outdoors. In the following month, after the day in question, Earnest bought new tires for the truck in January, 2008 and surprised Hall with the gift. [T. 1849-1850, 1865, 1886, 1889, 1855, 1866-1869].

Hall testified that for "eleven months" he and his wife told detectives that Earnest did <u>not</u> have his truck on the night in question, 12/19/07. However, Hall changed his story and mere speculation was used to cast suspicion on Earnest. A wild theory was formed of Earnest trying to hide tire evidence that never even existed! The judge even said, "We have rules against allowing this," yet allowed it anyway. The police processed Hall's truck and no evidence relevant to the case was found, however the entire prosecution's case used this wild theory as their key evidence. [T. 1982] Petitioner Earnest submitted Hall's hidden change of story as a <u>Brady</u> violation as claim 3 in his Habeas Corpus.

Bedford County Deputy Neal stated Google Maps says the drive from Earnest's employment to Mrs. Earnest's house takes 4 hours, 18 minutes of drive time alone. Neal admitted this time does not take into consideration traffic patterns, rush hour traffic, weather conditions, varying routes, holiday traffic for Christmas, etc. Deputy Neal made the drive at night time and claimed he could speed across the state in 3 hours, 40 minutes which would require averaging 92 miles per hour on the highway. Neal admitted he failed to simulate the drive at the rush hour traffic time when Earnest would get off work, [T. 1746-1750, 1765-1773] after 4:00 P.M. Nonetheless, unimpeached eye witness testimony by educator Dr. Al Ragas proves Earnest was at work at the high school after 4:01 p.m. 12/19/07 still dressed in a suit and tie carrying out normal principal duties. Ragas testified Earnest was back at work 12/20/07 between 7:30 A.m. and 7:45 A.m. drinking coffee at the staff coffee pot and chatting with co-workers. [T. 2296-2312] Unimpeached witness, Wayne Stewart of Taco Bell, testified Earnest was his customer around 6:30 p.m. 12/19/07 and even described his order of a "grande meal" from the Chesapeake, Virginia store. Stewart and his assistant manager, Stephanie Gregory, signed a written statement indicating Earnest was at their Taco Bell over 200 miles away from the scene. [T. 2333-2369] Cell phone towers prove Earnest in Chesapeake, VA. [T. 2328]

Argument One

Petitioner, a pro se inmate, was procedurally time-barred by two days by the United States District Court for the Western District of Virginia, Roanoke Division, and the United States Court of Appeals for the Fourth Circuit, despite the seriously ill prison official taking full responsibility for the untimely filing.

Petitioner maintains "actual innocence" through five claims in his habeas corpus, but none have been heard on the merits due to the procedural time-bar. The trial court judge is the only reviewer of record as he was also the Virginia State Habeas judge.

The AEDPA statute of limitations allows one year to file the federal habeas corpus plus statuatory tolling, and petitioner submitted his legal documents to the prison official to make the court-required legal copies with nearly a month to spare. The prison official was seriously ill at the time and took 23 days to return the legal copies to the petitioner, who filed the petition that very day.

The Court's refusal to grant equitable tolling for two days is a "Due Process" violation grounded in the 5th and 14th Amendments and also an "Equal Protection of the laws" violation of the 14th Amendment.

The U.S. District Court requires petitioners to submit the original habeas corpus, plus two copies. The normal prison procedure for making legal copies is for inmates to go to the law library. However, due to the violent incident of a staff member being stabbed by an inmate, the prison went on lockdown. The officer getting stabbed caused a particularly hard lockdown with "no movement" and the law library was closed. Extensive documentation was provided for the court via signed statement of correctional officer Sergeant Norris, Counselor Stephens' letter, affidavits and Cognitive Counselor Dennis Stephens' notarized affidavit.
https://www.pacer.gov federal district court case 7:18-cv-595
Appendix I pages 6A, 6B, 7, 8
www.ca4.uscourts.gov 4th circuit case 20-7531
see "Statute of Limitations" page 3-19, Appendix N, Affidavit p. 8,9

The documentation proves "obtaining legal copies for the court was not possible" and "No photo copies were available to inmates" with the lockdown and the law library closed. Upon such lockdowns, the prison procedure is for inmates to give legal materials to their counselor for making the court-required photocopies. Normally, using this procedure, copies are made within "just hours, or at most a day."

On October 24, 2018, petitioner gave his federal habeas corpus to his counselor, Dennis Stephens, to make the legal copies. Counselor Stephens disappeared for 23 days before returning with petitioner's paperwork! (See Next Page)

Counselor Stephens, the prison official responsible for the delay, was sick with "cancer" and receiving "chemotherapy treatments" as outlined in his affidavit. Petitioner was prejudiced by the prison procedure for making the court-required legal copies and the delay was wholly beyond petitioner's control. Counselor Stephens takes full responsibility for the delay in his affidavit, yet the courts are taking an overly stringent stance against petitioner.

This inflexible approach is against the U.S. Supreme Court precedent and even the 4th circuit's case law. Certainly a prison official's sickness causing tardiness will be an issue with the past year's COVID-19 pandemic. Prisons across the country have been locked down, law libraries closed and inmates stuck behind closed doors yelling out for assistance in meeting court deadlines. Inmates are at the complete mercy of prison officials, their health, quarantine regulations for staff, quarantine regulations for inmates, hospitalizations, etc.

While the AEDPA time restrictions seeks to eliminate backlogs in the federal habeas review process, it does not aim to be so rigid as to deny Constitutional rights. Houston v. Lack, 487 US 266, 275-76 (1988) long ago recognized "obstacles" which are unique to pro se defendants who are in prison and even the 4th circuit recognizes the prison mailbox rule U.S. v. Moore, 24 F.3d 624, 626 (4th Cir. 1994). More recently, they ruled

that Equitable Tolling is appropriate when there is an impediment to filing a timely petition. Pro se petitioners face numerous "impediments" not experienced by attorneys, and courts have been more flexible in recognizing impediments wholly beyond the control of inmates in prison. Green v. Johnson, 515 F. 3d 290, 304-305 (4th Cir. 2008).

In order to apply the time limitations under AEDPA "Equitably," then Equitable Tolling should be granted. Petitioner had until November 13, 2018 to filed his federal habeas corpus, however due to "Extraordinary Circumstances," the prison official picked up his paperwork to be copied on October 24, 2018 and failed to return it until November 15, 2018, upon which it was filed.

Petitioner demonstrated reasonable due diligence in filing his habeas corpus and attempted to locate the counselor during his "disappearance" for 23 days. Petitioner had other correctional officers and housing unit personnel calling for and trying to locate Counselor Stephens. Petitioner avidly requested the whereabouts of the counselor as he had the only copy of petitioner's paperwork. Stephens' affidavit even says, "Earnest diligently had other correctional officers calling me on the radio and in the office to track me down."

Petitioner has shown a track record of filing court papers in a timely fashion as page 14 of his federal habeas corpus itemizes the dates. Each filing was within

just days of the court's ruling. On this occasion, petitioner received the court's ruling from October 15, 2018 and he submitted the entire federal habeas to his counselor for photocopies on October 24, 2018. An argument can be made that this is the date which should be used to calculate the one-year time limitation to file. The prison official had the final copy to be photocopied for the U.S. District Court, which it requires three full copies. His failing to return the habeas copies until November 15, 2018 is irrefutably an "Extraordinary Circumstance" beyond petitioner's control. It should have only taken a few hours.

In Holland v. Florida, 560 U.S. 631 (2010) the Supreme Court ruled that 28 U.S.C.S. 2244(d) is subject to equitable tolling in appropriate cases when petitioner "shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.
Petitioner meets both standards for equitable tolling of the two days the federal habeas corpus was late.
The court also said, "the flexibility inherent in equitable procedure enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices."
Serious health illness by prison staff (i.e. COVID-19) is a new situation.
Petitioner has argued "actual innocence" where DNA of blood and hair excludes petitioner but was not allowed by

the trial court judge to point at third-party guilt. Prosecutors provided, in Discovery, witness reports of police misconduct where a drunk detective bragged of planting evidence, but defense counsel refused to investigate. Two key witnesses testified on trial transcript that they changed their stories "eleven months" later, but this was hidden by prosecutors, a Brady violation. Multiple witnesses were denied the opportunity to testify for the defense, including an expert. Newly discovered evidence revealed prosecutors hid exonerating video evidence of petitioner over 200 miles away and proving "actual innocence," another Brady violation. Brady v. Maryland, 373 us 83 (1963)

All of these claims are listed in petitioner's federal habeas corpus, but they have not been heard on the merits due to the procedural timebar. Many courts have recognized the need to grant equitable tolling under a variety of reasons. In U.S. v. Gabaldon, 522 F.3d 1121, 1126 (10th Cir. 2008), the court ruled that when prison officials confiscated an inmate's legal paperwork, he should be granted equitable tolling. In petitioner Earnest's case, the prison official, or counselor, did not actually confiscate his legal materials, but the effect was the same as he disappeared with it for 23 days. The second circuit made a similar ruling in Valverde v. Stinson, 224 F.3d 129, 133-136 (2d Cir. 2000). They also ruled that equitable tolling is permitted when the petitioner is subjected to medical procedures during

the filing period. Harper v. Ercole, 648 F.3d 132, 142 (2d Cir. 2011). In petitioner Earnest's case, the prison official, Counselor Stephens, was undergoing a medical condition and procedures which caused the petition to be two days late. The principle is the same, an "Extraordinary Circumstance" beyond petitioner control.

As long as the respondent is not prejudiced by the delay, equitable tolling should be allowed according to the Sixth circuit. Soloman v. U.S. F.3d 928, 933-35 (6th Cir. 2006). In petitioner Earnest's case, a two-day delay certainly did not prejudice respondent. The sixth circuit also recognizes "actual innocence" as grounds for equitable tolling as ruled in Souter v. Jones, 395 F.3d 577, 588-602 (6th Cir. 2005)

Petitioner Earnest argues "actual innocence" as mentioned before and all eye witnesses in the case testified he was over 200 miles away at times proving innocence. However, prosecutors accused them of lying or being mistaken. Nonetheless, the scientific DNA evidence excludes petitioner and points to a third party as the guilty party. Criminal complaints have been filed against the prosecutor for felony perjury in his affidavit when responding to the newly discovered hidden video. (Appendix O) An official transcript proves the two counts of perjury, and the hidden video was absolutely exculpatory evidence. This case should be heard on the merits. (Appendix L)

In Slack v. McDaniel, 529 US 473 (2000), the court ruled that a Certificate of Appealability (COA) should be granted when the District Court denied prisoner's habeas corpus petition on procedural grounds without reaching the prisoner's underlying federal constitutional claims, when the claims are valid and when the District Court erred on the procedural ruling.

In Earnest's case, he has solid constitutional claims and he has shown the District Court's error in failing to grant equitable tolling. In addition, petitioner's "actual innocence" claims should remove the procedural bar as highlighted by Schlup v. Delo 513 US 298 (1995). The DNA alone as proof of "actual innocence" and evidence of a third-party's guilt should remove the procedural timebar, letting the case be heard on the merits. House v. Bell, 547 US. 538 (2005) and Schlup, 513 US 327, 28.

Petitioner also claims ineffective assistance of trial counsel for failing to investigate police misconduct reports, spotlighting two key witnesses who changed their testimony and the video hidden by prosecutors. In Martinez v. Ryan, 566 U.S. 1 132 S.Ct. 1309, 182 L Ed 2d 272 (2012) and Trevino v. Thaler, 569 US. 413, 133 S.Ct. 1911, 185 L Ed. 2d 1044 (2013), the court ruled a "particular concern" in the application of procedural default, especially when ineffective assistance of counsel is claimed. A procedural bar should not prevent the claims to be heard on the merits. Details of the ineffective assistance of counsel is in claim 2, claim 3 and claim 5

of petitioner's federal habeas corpus prepared for the district court.

The Fourth circuit's failing to grant equitable tolling is a "Due Process" violation and "Equal Protection" violation as the court recognizes extraordinary circumstances beyond petitioner's control, but has not yet done so in this case. McQuiggin v. Perkins, 569 U.S. 383 (2013) recognizes a "Fundamental Miscarriage of Justice" standard for removing a timer bar and the public perception of the judicial system is important.

The case against petitioner was a circumstantial case with mere speculation at times. Sir Arthur Conan Doyle wrote the Sherlock Holmes novels in the 1880's, and Doyle was actually a private detective of sorts. Doyle wrote, "Circumstantial evidence is a very tricky thing. It may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different." (Sherlock Holmes, p. 309)

Doyle finished by saying, "Many an innocent man has been hung from the gallows due to circumstantial evidence." He wrote that nearly 140 years ago, and they did not have DNA scientific analysis back then, which exonerates petitioner if his case is heard on the merits. It would be a "fundamental miscarriage of justice" for this case to not be heard on the merits. Petitioner's "actual innocence" should be given thorough consideration, especially

when reviewing the police misconduct outlined in claim 2 of petitioner's habeas corpus. A witness came forward indicating the lead detective got drunk and bragged of planting the "fingerprint" and "other evidence." This witness came forward prior to trial and wanted to 'get it off his chest' how the detective said he planted enough evidence to give petitioner a "lethal injection" using the judicial system. The witness also named three additional witnesses who were present during the drunken brags. (Names and addresses were provided in Appendix I, Response #2, Habeas Corpus, District Court Website) Even though this police misconduct was provided by prosecutors in Discovery, defense counsel refused to investigate. The state police was also ready to investigate as Superintendent Colonel Steve Flaherty said in his letter. (Also Appendix I, along with multiple affidavits) Thus, an "ineffective assistance of counsel" claim was filed as Claim 2 in petitioner's habeas corpus.

There is a great deal of circumstantial evidence showing police misconduct along with the detective's confession of corruption. Crucial cell phone records were "lost" or destroyed while in custody of the detectives, as Mrs. Earnest's Blackberry was completely erased. The state's fingerprint analyst, Andrew Johnson, testified he could not read the date on the evidence tag of the fingerprint, the very one the detective bragged of planting! Did the detective change the date after planting it? There is the old saying, "Drunken lips tell the sober truth." The detective

planted the only evidence in the case. The witness even described the detective being in a wheelchair with two broken heels, which was true and unknown to the public. He said the detective bragged of fraudulently collecting worker's compensation because he was actually injured while drunk and jumping off a bridge. This detective had only been an investigator for one year according to warrants, but he said the sheriff heard about his planting evidence and was going to reassign him after the trial, which is what happened.

There was only an individual thumbprint on the suicide note; no other prints as if the paper were held — no reciprocating fingerprints! Kenneth Riding, the state's fingerprint analyst, testified the only way that there were no other prints is if the defendant used "thumbless gloves." Obviously, this idea that a person would use such gloves in a crime is silly, and it further supports the detective bragging of planting it. [T. 2023 - 2162] As mentioned earlier, no other items were submitted by detectives for fingerprint analysis, only the suicide note he bragged of planting the fingerprint upon.

The unprofessionalism of the detectives is further highlighted in their use of a "fake doctor" in collusion with the jail nurse, Mrs. Rosser. After petitioner's arrest, he was pulled out of his cell for an unrequested doctor visit. Nurse Rosser performed a series of diagnostic tests and

consulted with the fake doctor, complete with the white lab coat and stethoscope. They informed petitioner he was dying and tried to get petitioner to confess in some sort of death-bed confession. The fake doctor was a Bedford County Detective as defense counsel recognized him after petitioner notified him of the circumventing of the attorney. Later, they used a fake counselor in another attempt to force a confession while circumventing petitioner's attorney. Afterwards, petitioner received bond for nearly two years, but detectives formed a plot to have bond revoked. They called to have petitioner pick up his impounded car, but gave him only a 30-minute window to do so. Petitioner sent a tow truck instead of trying to drive the car and two tow-truck operators verified the gas line had been cut on the car. When the car was put on an angle, gasoline poured out of the back of the car. The car would have broken down after a mile of driving it, and detectives would be right there to violate petitioner's bond due to driving on an expired registration. They impounded the car about 10 months earlier, and the tags expired. (All of these issues are detailed with affidavits in petitioner's habeas corpus on the district court and circuit court websites listed earlier).
Racism is also apparent as prosecutors solicited testimony from multiple witnesses about petitioner's inter-racial relationship. State witness, Jennifer Kerns, repeatedly testified of petitioner's "black" girlfriend. [T. 806, 831-866]

Outside of the presence of the jury and also in their presence, Kerns testified at length of an occasion she stalked petitioner and watched his intimacy with a "black" woman. Kerns even goes back to verify, "She was black."

Another state witness, police officer Wade Satterfield, testified petitioner was "attracted to black women," and that was essentially his sole testimony. This Satterfield neglected to mention how he mocked petitioner saying he had "Jungle Fever" because his girlfriend was black. He was relating petitioner's girlfriend to an ape in the jungle.

Numerous pictures of petitioner's black girlfriend were submitted as evidence, and it is clearly done to prejudice him in the Confederate south and a nearly all white jury. Official police interviews repeatedly refer to the "black" girlfriend. In a transcript of Maysa Munsey, she tells police, "You know she's black." None of this racism should be surprising since Loving v. Virginia (1967) was only one generation ago, putting an end to imprisonment for inter-racial marriages, all within Virginia.

When the "48 Hours" film crew came down for the trial, they inquired of petitioner about the racism in Bedford County, Virginia. They had been warned by co-workers about the racism, and they were afraid. They were from New York, yet they had been warned by co-workers hundreds of miles away!

The lead detective and the prosecutor were caught on official police interview transcript tampering with a witness and her free will to testify. Stephanie Gregory, a black female and Taco Bell Assistant Manager, was threatened to be charged as an "accessory to first degree murder" if she did not give the video of the Taco Bell drive-thru to them. Gregory had written and signed with a co-worker a letter of alibi that petitioner was at their Taco Bell in Chesapeake, Virginia at 6:30 p.m. on the night in question, 12/19/07. (Appendix M, pages 20-23)

Because she was too afraid to testify, the letter she wrote was not allowed as a defense exhibit.
In claim 5 of petitioner's habeas corpus, newly discovered evidence was presented of a hidden video of petitioner at work in Chesapeake, Virginia at times proving "actual innocence." Attorney Eboni Hamilton of the Hamilton Firm, PLC, interviewed numerous people and determined prosecutors committed a Brady violation in hiding exculpatory video evidence. In the process of filing court documents for the federal district court, prosecutor Wes Nance filed an affidavit in which he lied saying he "never attempted to obtain" the video because he thought it was not significant. An official police interview transcript proves Nance committed two counts of felony perjury in federal court and criminal complaints have been filed with the U.S. Attorney in Roanoke, Virginia. (Appendices L, O, P, Q)

A recent Dateline television show hosted by NBC news anchor, Lester Holt, adds further insight to the detective bragging about planting the fingerprint. It showed two key elements. Number one: A planted fingerprint gets reversed because it must first be transferred to a medium. Thus it makes a left thumbprint to, at first glance, appear to be a right thumbprint. Upon petitioner's arrest, accusation was made that his right thumbprint was found. However, petitioner had a catastrophic injury to his right thumb as a child, so the finding was challenged. After a review, it was then submitted as petitioner's left thumbprint, just as the Dateline forensics experts testified! Number Two: The experts said it forces a very awkward, reversing of the hand in order to copy a planted fingerprint. This is also exactly how the state's fingerprint expert, Kenneth Riding, demonstrated! He stood up and awkwardly held the piece of paper back and behind himself - totally unnatural for handling the paper. [T. 2023-2160]

When all of the irregularities and unprofessional acts of corruption were filed in petitioner's habeas corpus, an assassination attempt was carried out against his attorney! A professional-style assassination attempt against attorney Joseph Sanzone in Spring, 2015 landed him in the hospital with a head wound from a gunshot. A press conference was even called to highlight his fortune, and no suspect was ever identified. All of these corrupt acts support petitioner's "actual innocence" claim, along with DNA evidence.

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in a criminal database and is unknown, therefore the court ruled petitioner could not prove a case against an unknown person. This ruling changed the presumption of innocence, put the burden of proof on

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petitioner and it permeated the entire trial. Petitioner was not allowed to form an alternative theory to the crime and was denied the right to put on a complete defense. The trial judge is the only one to hear this claim, and it has never been heard on the merits.

In today's crime investigation, DNA evidence is the scientific standard to clearly point at a guilty party. A bond hearing was held for petitioner due to the lack of evidence at the preliminary trial, and petitioner was granted bond for nearly two years awaiting trial. At the bond hearing, prosecutor Nance used the blood found at the scene to prevent petitioner from receiving bond. Nance dramatically and theatrically pronounced, "We have blood!" He was assuming the DNA belonged to petitioner in an attempt to bolster his case, however the blood did not belong to Earnest. Unlike the CSI movies, all DNA results by the FBI analysts took up to two years, and some results were provided just days prior to the trial.

Due to politics and public perception, prosecutors refused to dismiss the case. Instead, they created a plan to prevent petitioner from using DNA in his defense even though they attempted to use it as evidence of guilt. The judge denying the use of DNA to point at third-party guilt is so unheard of, it is "shocking to the senses!" Petitioner's "actual innocence" claim is completely supported by all scientific DNA evidence.

With DNA evidence exonerating wrongly convicted people across the country, it is even more of an egregious error on the court. The U.S. Supreme Court has held that a defendant's right to the fair opportunity to present a defense "Whether rooted directly in the Due Process clause of the Fourteenth Amendment... Or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment," is violated by trial court's exclusion of competent, reliable evidence central to defendant's claim of innocence.

Holmes v. South Carolina, 547 US 319, 324 (2006) quoting Crane v. Kentucky, 476 US 683, 690-91 (1986)

The trial court's exclusion of DNA to point at third-party guilt in petitioner's case violated his constitutional rights central to his claim of innocence.

Respondent's own words on page 8 of his Motion to Dismiss said, "The petitioner claims the trial court erred in excluding what he calls "third party" evidence. This included DNA evidence from hair found in the bathroom and blood found on the rug near the body and various other items... condoms found at the scene..."

The bathroom trashcan was empty as if someone was bleeding and cleaned up [T. 809-813]. There were missing lead fragments from the bullet supporting the idea of an assailant injuring oneself in the shooting. Petitioner attempted to demonstrate a blood trail across the rug from the body to the bathroom but the court refused this evidence to prove "actual innocence."

Petitioner was not allowed to ask questions on cross-examination regarding blood at the scene alluding to a third-party assailant. When trying to cross-examine the state's blood analysis expert, all questions were stopped, and the defense was not allowed to confront the witness! Any attempt to point at third-party guilt on cross-examination was denied by the court! This is a constitutional right rooted deep in the constitution and upheld consistently by cases such as Davis v. Alaska, 415 US 308, 316-17 (1974) Olden v. Kentucky, 488 US 227, 231 (1988), and more recently Crawford v. Washington, 541 US 36 (2004).

Even the Fourth Circuit, where this case originates, recognizes the right to confront witnesses and rigorously cross-examine them such as in Barbe v. McBride, 521 F.3d 443 (4th Cir. 2008)

The court's third-party guilt ruling also prevented the defense from calling several witnesses on his behalf. A defendant has the right to "cross-examine adverse witnesses and to present witnesses in his own behalf." Chambers v. Mississippi, 410 US 284 (1973).

The Fourth Circuit has also ruled a violation of the Confrontation clause when the court limited cross-examination of a witness in U.S. v. Smith, 451 F. 3d 209, 221 (4th Cir. 2006) and in Chavis v. North Carolina, 637 F. 2d 213 (4th Cir. 1980).

For many decades, the fundamental right to show a third party committed the crime is grounded in landmark case Washington v. Texas, 388 US 14 (1967).

The defendant being allowed to call a witness proved the third-party guilt of someone other than the defendant.
When evidence is material to the case, the triar of fact must have the opportunity to consider it in deliberations. In Abdul-Kabir v. Quarterman, 550 US 233 (2007) it was ruled that jurors cannot be "prevented from giving meaningful consideration to constitutionally relevant mitigating evidence."
The courts denying the use of DNA to form an alternative theory of the crime, pointing at a third party, is the most fundamental violation of petitioner's constitutional rights. In this completely circumstantial case, to deny scientific evidence to put on a complete defense violates "due process" in the 5th and 14th Amendments. The court's refusal to allow petitioner to call several witnesses under the third-party guilt ruling violated "Compulsory process" rights in the 6th Amendment. The unknown donors of the DNA would have also acted as "witnesses" of third-party guilt. The court's stopping all adversarial questions of state witnesses using the third-party guilt ruling violated petitioner's 6th Amendment right to "confront" witnesses. The court's third-party guilt ruling permeated the entire trial, prevented some witnesses for the defense, stopped adversarial questions and prevented petitioner from creating or alluding to any alternative theory of the crime.

DNA scientific evidence has been widely recognized for over three decades in identifying guilty parties. It is commonly known, and experts agree, that an assailant oftentimes injures oneself in the commission of a crime. This fact was highlighted in the famous O.J. Simpson trial when prosecutors brought forth blood at the scene with DNA belonging to O.J. himself.

Clearly detectives and prosecutors felt DNA was absolutely crucial to the case, because on 12/21/07, when petitioner voluntarily met with detectives, they immediately requested a DNA sample to "rule him out as a suspect."

(See Respondent's Exhibit P, page 85, police interview transcript)

All across the country, wrongful convictions are being overturned due to DNA testing results. Even DNA companies like Ancestry.com have helped solve cold cases where DNA technology was not used yet. If the jury was allowed to hear cross-examination of the blood pattern expert and a professional opinion of third-party guilt, the verdict would have been different. If the jury was allowed to hear testimony from witnesses related to Maysa Mursey's arrest on the very day in question, the verdict would have been an acquittal. The jury would have heard of the identity theft and fraud from Mrs. Earnest's workplace, their involvement and other potential third-party suspects to match the DNA scientific evidence. In the legal field, there is a

common quote to the effect of, "It is better for 100 guilty persons to go free than for one innocent person to be wrongfully convicted." It would be a "fundamental miscarriage of justice" to ignore this claim. Coleman v. Thompson, 501 US 722 (1991)

Conclusion

If courts around the country are allowed to deny the scientific evidence of DNA to point at third-party guilt, wrongful convictions will surge. If courts are allowed to supplant technological advances with speculations and circumstantial evidence, then the judicial system will step backwards more than a century and the public confidence shattered. Petitioner's Constitutional rights to "confront" witnesses, "Compulsory" process in calling witnesses and "due process" were violated, otherwise the verdict would have been different. Petitioner was prejudiced by the trial court. For these reasons, along with petitioners "actual innocence" claim, a writ of certiorari should be granted. Courts across the country are divided as to whether or not "actual innocence" should remove a procedural bar such as the time-bar in this case. Petitioner showed the serious health issue by the prison official causing the delay in filing which warrants a ruling of "Extraordinary Circumstances" and Equitable Tolling. This will certainly be an issue with the COVID-19

pandemic, quarantine issues, lockdowns across the country, prison staff missing work, contact tracing quarantines, etc. Equitable Tolling was designed for the reasonable application of the time limitations under the law, to prevent a "travesty of justice." U.S. Supreme Court case law and even Fourth Circuit precedent demonstrate the recognition of "Extraordinary Circumstances" beyond petitioner control, yet the court failed to recognize it here. This is an "Equal Protection" violation in the 14th Amendment as well as a "Due Process" violation in the 5th and 14th Amendments. Petitioner's substantial showing of "Actual Innocence" should add to courts' more lenient approach as even the prosecutors told defense counsel that petitioner could not have even been at the scene of the crime. For these reasons, Equitable Tolling should be granted and a Certificate of Appealability (COA) issued in petitioner Earnest's case, and the case heard on its merits. Since the trial court judge is the only judge to hear the merits, this is an opportunity for the court to offer an appeal by an unbiased panel. Petitioner prays this court recognize the constitutional violations, the "Extraordinary Circumstances" deserving Equitable Tolling and petitioner's "Actual Innocence," while seeing the resulting prejudice from previous court rulings.

Respectfully Submitted,

Wesley Earnest

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petitioner pro se

submitted
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