

No. _____

**In the
Supreme Court of the United States**

Jerry White,

Petitioner,

v.

Tim Garrett,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the constitution prohibits the continued incarceration of a person who proves, with new evidence in the form of a confession by the true perpetrator, that he is innocent.

LIST OF PARTIES

The only parties to this proceeding are those listed in the caption.

LIST OF PRIOR PROCEEDINGS

Jerry White was convicted of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and conspiracy to commit robbery with the use of a deadly weapon in *Nevada v. White*, No. CR-FP-007658, in the Fourth Judicial District of Nevada. The judgment of conviction was entered on January 16, 2001.

White appealed to the Nevada Supreme Court in *White v. Nevada*, No. 37422. The Nevada Supreme Court issued an Order of Affirmance on March 8, 2002.

On July 26, 2002, White filed a pro se post-conviction petition in the Fourth Judicial District in *White v. Warden*, No. CV-HC-02-961. The court denied the petition, and the Nevada Supreme Court affirmed in *White v. Warden*, No. 42243 on July 8, 2004.

White then filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada in *White v. McDaniel*, No. CV-N-0412-LRH(RAM). The district court denied the petition on September 27, 2007.

The Ninth Circuit denied White's request for a certificate of appealability on April 25, 2008, in *White v. McDaniel*, No. 07-17064.

White then applied to the Ninth Circuit for leave to file a second or successive habeas petition raising a freestanding actual innocence claim based on the previously

unavailable confession from the real perpetrator of the crimes. On January 21, 2010, the Court granted the request in *White v. McDaniel*, No. 09-73248.

On February 22, 2010, White filed a successor petition in the district court in *White v. McDaniel*, No. 3:04-cv-0412-RCJ-RAM, raising the actual innocence claim.

On September 28, 2009, White returned to state court and filed a second post-conviction petition in the Fourth Judicial District, in which he argued that he is actually innocent based on the previously unavailable confession. On December 6, 2013, the state court denied White's petition in *White v. McDaniel*, No. CV-HC-09-856.

On November 24, 2015, the Nevada Supreme Court affirmed the denial of the petition in *White v. McDaniel*, No. 64756. (Appendix D.)

On February 3, 2016, White moved to reopen his federal habeas case and filed an amended successor petition on February 3, 2017. On May 18, 2020, the district court denied White's petition in *White v. Wickham*, No. 3:04-cv-00412-GMN-CLB. The court granted White a certificate of appealability on his freestanding actual innocence claim. (Appendix C.)

Without the benefit of argument, the Ninth Circuit denied White relief in *White v. Russell*, No. 20-16171 on August 12, 2021. (Appendix A.) It further denied a petition for either panel rehearing or en banc on September 20, 2021. (Appendix B.)

TABLE OF CONTENTS

Petition For Writ Of Certiorari	1
Opinions Below	1
Jurisdiction.....	1
Constitutional Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition.....	7
I. The Court should decide whether the United States Constitution permits a state to continue the imprisonment of a person who proves, with new evidence in the form of a confession by the true perpetrator, that he is innocent.....	7
Conclusion	13

TABLE OF AUTHORITIES

Cases

<i>Carriger v. Stewart</i> , 132 F.3d 463 (9th Cir. 1997)	9
<i>Cornell v. Nix</i> , 119 F.3d 1329 (8th Cir. 1997)	9
<i>District Attorney’s Office for Third Judicial District v. Osborne</i> , 557 U.S. 52 (2009)	8
<i>Graves v. Cockrell</i> , 351 F.3d 143 (5th Cir. 2003)	9
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993)	7, 11, 12
<i>House v. Bell</i> , 547 U.S. 518 (2006)	7
<i>In re Davis</i> , 557 U.S. 952 (2009)	8
<i>In re Lawley</i> , 179 P.3d 891 (Cal. 2008)	9
<i>Jones v. Taylor</i> , 763 F.3d 1242 (9th Cir. 2014)	8
<i>McQuiggin v. Perkins</i> , 569 U.S. 383 (2013)	8
<i>Miller v. Commissioner of Corrections</i> , 700 A.2d 1108 (Conn. 1997)	9
<i>People v. Washington</i> , 665 N.E.2d 1330 (Ill. 1996)	9
<i>Robinson v. California</i> , 370 U.S. 660 (1962)	11
<i>Schlup v. Delo</i> , 513 U.S. 298 (1995)	8
<i>State ex rel. Amrine v. Roper</i> , 102 S.W.3d 541 (Mo. 2003)	9
<i>State v. Beach</i> , 302 P.3d 47 (Mont. 2013)	9

Statutes

28 U.S.C. § 1254	1
28 U.S.C. § 2254	2, 6
28 U.S.C. § 1291	3
28 U.S.C. § 2253	3

Other Authorities

Supreme Court Rule 13.1	1
U.S. Constitution Eighth Amendment.....	1
U.S. Constitution Fourteenth Amendment	2

Secondary Sources

<i>Adam Heder & Michael Goldsmith, Recantations Reconsidered: A New Framework for Righting Wrongful Convictions</i> , 2012 Utah L. Rev. 99 (2012) ..	13
<i>Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases</i> , 40 Stan. L. Rev. 21 (1987) ..	12
<i>Paige Kaneb, Innocence Presumed: A New Analysis of Innocence As A Constitutional Claim</i> , 50 Cal. W. L. Rev. 171 (Spring 2014) ..	10
<i>Stephanie Roberts Hartung, Habeas Corpus for the Innocent</i> , 19 U. Pa. J. L. & Soc. Change 1 (2016) ..	10

PETITION FOR WRIT OF CERTIORARI

Petitioner Jerry White respectfully prays that a writ of certiorari issue to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit. (Appendix A.)

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit filed an unpublished memorandum on August 12, 2021, affirming the denial of White's habeas petition. It is attached as Appendix A. The Ninth Circuit's September 20, 2021, order denying White's petition for rehearing is attached as Appendix B. The United States District Court order denying White's petition for a writ of habeas corpus is attached as Appendix C. The opinion of the Nevada Supreme Court affirming the denial of White's post-conviction petition wherein he raised a claim of innocence is attached as Appendix. D.

JURISDICTION

The court of appeals issued its decision in this case on August 12, 2021. (Appendix A.) White filed a timely petition for panel rehearing and rehearing en banc, which was denied on September 20, 2021. (Appendix B.) This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States constitution provides, in part, “nor shall any state deprive any person of life, liberty, or property, without due process of law.”

STATEMENT OF THE CASE

Jerry White is actually innocent and is wrongfully imprisoned. In November 2000, he was convicted of murder, robbery, and conspiracy following the killing of Ramon Navarro. (*See* VI-ER-1110–12.¹) White was sentenced, in the aggregate, to serve two consecutive terms of life without the possibility of parole. (VI-ER-1111.) White always has insisted that he is innocent and that his co-defendant, Michael Woomer, acted alone in carrying out these crimes. Nearly a decade after trial, Woomer confessed to being solely responsible and admitted he falsely accused White, against whom he agreed to testify in exchange for a plea deal with the State. As the Nevada Supreme Court recognized, “Woomer’s recitation of events in his declaration and postconviction testimony, if believed, would have absolved appellant of any of the crimes with which he was charged.” (VIII-ER-1736.)

The Ninth Circuit Court of Appeals authorized White to file a successive habeas petition under 28 U.S.C. § 2254 raising a single claim: that he is actually innocent of the robbery and murder of Ramon Navarro. (ECF No. 38.) The Ninth Circuit later, without the benefit of oral argument, affirmed the district court’s denial

¹ White cites to the Excerpts of Record filed in the Ninth Circuit. (*See* Ninth Circuit ECF No. 5.)

of habeas relief. (Appendix A.) That court had jurisdiction under 28 U.S.C. §§ 1291, 2253.

Woomer explained in a declaration and at two² state-court evidentiary hearings that in October 1999, White, Woomer, and Navarro went to Navarro's house after Woomer and White—who were traveling together—met Navarro in a bar. (VI-ER-1317; VII-ER-1422, 1424; VIII-ER-1624.) Woomer confirmed what White said to police from the start: “At some point, Jerry [White] took off his shoes in the living room. He went to the bathroom where he threw up. He then went to lie down in the other bedroom and passed out.” (VI-ER-1317; *see also* VII-ER-1426–27; VIII-ER-1625.)

Woomer admitted that robbing Navarro was his idea, which he formulated after White was already passed out in another room. (VI-ER-1317; VII-ER-1428; VIII-ER-1627.) Woomer explained, “Ramon [Navarro] went to the bathroom and that's when I left the apartment and got Jerry's baseball bat out of the car. When I came back in, Ramon came out of the bathroom. That's when I hit him on the head with the baseball bat.” (VI-ER-1318; *see also* VII-ER-1429–30; VIII-ER-1627–29.)

Woomer searched around the house and found money under Navarro's bed. (VI-ER-1318; VII-ER-1433; VIII-ER-1631.) Then he went to wake up White, who was

² On February 4, 2011, the state court held an evidentiary hearing on White's state-court petition that raised his innocence claim. (*See* VII-ER-1403–1562.) However, while the petition was pending, the judge presiding over the hearing died. After the case was reassigned, the new judge ordered a second hearing on White's freestanding claim of actual innocence. (VII-ER-1600.) The second hearing was held on August 9, 2013. (*See* VIII-ER-1606–1722.) Woomer testified at both hearings.

“passed out on the floor in the other bedroom.” He woke White up and told him “we had to get out of there.” (VI-ER-1318; *see also* VII-ER-1435; VIII-ER-1633–34.) Woomer went outside to smoke while White put his shoes on: “While I was on the porch I noticed a neighbor watching me. I told Jerry to hurry up.” (VI-ER-1318; *see also* VII-ER-1435–36.) Woomer watched White gather his things and look around him, shocked at the scene in the house. (VII-ER-1438–39.) According to Woomer, White picked up his bat from the floor in the living room. (VII-ER-1439.) Woomer told White again that they needed to leave. (VII-ER-1440.) White panicked, and Woomer took the bat from him and threw it over a fence. (*Id.*)

Woomer confirmed that White got upset with him and “told [Woomer] to shut up” when Woomer tried to tell White about the murder. (VI-ER-1318; *see also* VII-ER-1441.) White then left Woomer behind in Battle Mountain, where Woomer was later arrested. (II-ER-293–94; VI-ER-1318; VII-ER-1445.) White took Woomer’s money before leaving. (VI-ER-1318; VII-ER-1497.) Woomer’s confession confirmed White’s claim of innocence and the account he gave to police. (*See* I-ER-49–107.)

In addition to being consistent with White’s repeated insistence of his innocence, Woomer’s confession and exoneration of White is consistent with the other evidence in the record. First, the victim had Woomer’s DNA under his fingernails—not White’s. (III-ER-551; *see* III-ER-558.) Second, an inmate who knew Woomer testified that Woomer got a tattoo on his chest of a cracked skull and a baseball bat, which reflects the crime here. (V-ER-974–75, 981–82.) Third, only hours after the

killing, Woomer exclaimed that he literally had blood on his hands. (IV-ER-645–46.) Fourth, Woomer’s jacket had the victim’s blood on it. (I-ER-71–73, 94; III-ER-525–26.) Fifth, law enforcement found a sizable bloodstain on the right side of Woomer’s right shoe. (III-ER-520–21.) Finally, Woomer testified that he hit the bedroom door with the baseball bat, damaging it. (VII-ER-1431.) This is corroborated by a photograph introduced at trial showing the damaged door. (*See* IV-ER-716.) Even the state court judge who presided over White and Woomer’s cases—who did not have the benefit of Woomer’s confession—believed Woomer killed Navarro. (*See* VI-ER-1108.)

Woomer’s confession is further bolstered by looking at the context in which it was given, as opposed to the context of when he implicated White. Woomer had everything to gain by lying to law enforcement and the State prior to White’s trial; he received a favorable deal to testify against White. (*See* I-ER-108–14.) As the state court found, Woomer has now expressly admitted that “he lied to the detectives to protect himself. He didn’t want to spend a long time in prison or receive a death sentence.” (VIII-ER-1726.) And as the federal district court noted, he was also able to avoid additional convictions by cooperating with the prosecution of White. (IX-ER-1977.) In contrast, Woomer had everything to lose by coming forward and confessing because it constituted a confession to perjury and to violating the terms of his plea agreement (*see* I-ER-109), and it could have damaged his chances for parole.

Additionally, Woomer’s initial story to the police effectively stole White’s experience and switched the roles of the two men. (*Compare* I-ER-1–47, *with* I-ER-

49–107.) The fact that the men have always explained the same sequence of events makes it more believable that this is what occurred, specifically that one of them was passed out while the other committed the crimes. Now, Woomer has admitted that it was White who was unconscious. As the federal district court recognized (IX-ER-1977), the circumstances surrounding Woomer’s blaming White and then coming clean suggest that his later statements are truthful. As the district court further explained:

Woomer and White, who were traveling together from Ohio to California with insufficient funds, were the only two individuals in the house with Navarro when Navarro was robbed and murdered, and Woomer and White each originally pointed the finger at the other person. At one point, each individual claimed to be ill or passed out in a different room while the other committed the heinous acts against Navarro.

(IX-ER-1978.) Woomer and White now both agree that Woomer committed the crimes while White was passed out, not knowing what was occurring.

White unsuccessfully sought relief on the basis of his innocence from the Nevada state courts. (*See* VII-ER-1734–39.) The federal district court then denied White’s successive habeas petition under 28 U.S.C. § 2254 in which he asserted a freestanding claim of actual innocence. The court found that the record as a whole was consistent with White’s innocence and Woomer’s guilt. Nevertheless, despite the consistency of all of the evidence, the court concluded it was not sufficient to meet an actual innocence standard. (Appendix C.) Without the benefit of oral argument, the

Ninth Circuit affirmed the denial of White’s petition. (Appendix A.) It further denied his request for rehearing by either the panel or the en banc court. (Appendix B.)

REASONS FOR GRANTING THE PETITION

I. The Court should decide whether the United States Constitution permits a state to continue the imprisonment of a person who proves, with new evidence in the form of a confession by the true perpetrator, that he is innocent.

This Court has not yet resolved whether the constitution prohibits the continued incarceration of the innocent. The Court has, however strongly signaled that it would do so in the proper case. In *Herrera v. Collins*, the Court assumed without deciding that “a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief.” 506 U.S. 390, 417 (1993); *see also House v. Bell*, 547 U.S. 518, 554–55 (2006). A majority of the justices were prepared, however, to recognize the “fundamental legal principle that executing the innocent is inconsistent with the Constitution.” *Herrera*, 506 U.S. at 419 (O’Connor, J., concurring); *see also id.* at 430–31 (Blackmun, J., dissenting) (“We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence. . . . I do not see how the answer can be anything but ‘yes.’”).

Although *Herrera* was a death penalty case, the Court’s majority opinion rejected the idea that the appropriate relief for an innocent death-sentenced petitioner would be vacating the death sentence only. 506 U.S. at 405 (“It would be a rather strange jurisprudence, in these circumstances, which held that under our

Constitution he could not be executed, but that he could spend the rest of his life in prison.”). Further, in non-capital cases the Court has acknowledged that whether a freestanding claim of innocence is cognizable in habeas remains an open question. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (citing *Herrera*, 506 U.S. at 404–05); *District Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71–72 (2009); *see also Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) (“We have not resolved whether a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding in the non-capital context, although we have assumed that such a claim is viable.”).

The Court seemed to acknowledge in *Schlup v. Delo*, 513 U.S. 298, 316 (1995), that a substantive innocence claim could be asserted if the evidence of innocence was sufficiently strong. And the strongest evidence showing that the Court intends to acknowledge such a claim can be found in *In re Davis*, 557 U.S. 952 (2009). In that case, the Court considered the original writ of habeas corpus of Troy Davis. In the very brief opinion, the Court ordered that “[t]he District Court should receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.” *Id.* at *1. Clearly, the Court would not have granted the relief it did if it believed that a free-standing innocence claim was not cognizable.

Without clear guidance from this Court, however, lower federal courts and state jurisdictions are split both regarding the scope of constitutional protections for the actually innocent and what standard should apply to a claim of innocence.

See Graves v. Cockrell, 351 F.3d 143, 151 (5th Cir. 2003) (ruling claims of actual innocence are not cognizable on federal habeas review); *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (determining petitioner “must affirmatively prove that he is probably innocent”); *Cornell v. Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997) (explaining standard “is at least as exacting as the clear and convincing evidence standard, and possibly more so”); *State v. Beach*, 302 P.3d 47, 54 (Mont. 2013) (requiring clear and convincing evidence that no reasonable juror would convict); *People v. Washington*, 665 N.E.2d 1330, 1337 (Ill. 1996) (requiring evidence “of such conclusive character as would probably change the result on retrial” (internal quotation marks omitted)); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003) (requiring “a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment”); *In re Lawley*, 179 P.3d 891, 897 (Cal. 2008) (explaining evidence of innocence must, if credited, “undermine the entire prosecution case and point unerringly to innocence or reduced culpability”); *Miller v. Comm’r of Corr.*, 700 A.2d 1108, 1130 (Conn. 1997) (requiring showing of actual innocence by clear and convincing evidence, plus insufficiency of evidence in combined record to support finding of guilt).

The Court should now decide whether the United States Constitution permits a state to continue the imprisonment of a person who proves, with new evidence, that he is innocent. The answer must be that this imprisonment is not permitted. Society’s understanding of the scope of the issue of wrongful convictions has changed since the Court declined to resolve the issue in *Herrera*. As one scholar explained in 2014, “In

1993, when the Supreme Court discussed whether innocence is a freestanding constitutional claim in *Herrera v. Collins*, very few people had been exonerated by DNA evidence. Today, however, at least 316 people have been exonerated by DNA evidence; nearly one thousand have been exonerated without DNA evidence.” Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence As A Constitutional Claim*, 50 Cal. W. L. Rev. 171, 202 (Spring 2014); *see also* Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. Pa. J. L. & Soc. Change 1, 24 (2016) (“At the time Congress debated the provisions of AEDPA, the American criminal justice system was still widely regarded as an error-free model for the world. Indeed, as of 1996, fewer than 30 known DNA exonerations had occurred. Today, that number has expanded 50-fold, and it is widely understood that the current exonerations represent the mere ‘tip of the iceberg’ with thousands, if not tens of thousands, of factually innocent prisoners remaining incarcerated.”). According to the National Registry of Exonerations, as of this writing there have been 2,908 exonerations since 1989, resulting in the wrongfully convicted spending more than 25,600 years in prison for crimes they did not commit. *National Registry of Exonerations*, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited December 14, 2021). Importantly, dozens of exonerations across the country have rested, in whole or in part, on the discovery of false accusations against the wrongfully convicted or post-trial confessions by the actual perpetrator. *See National Registry of Exonerations*, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (filter by “False Accusation”). It is not uncommon for people to implicate others in

order to protect themselves, as Woomer did here. That wrongful convictions result from such false accusations is an unavoidable reality.

There is broad justification for a constitutional claim of innocence, as it is rooted in several different concepts including the constitutional right not to be subjected to cruel and unusual punishment and constitutional rights to substantive and procedural due process. First, any length of imprisonment would be a grossly disproportionate punishment of someone who is innocent, and thus violative of the Eighth Amendment's prohibition on cruel and unusual punishments. *See Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"); *cf. Herrera*, 506 U.S. at 431 (Blackmun, J., dissenting) ("I think it is crystal clear that the execution of an innocent person is 'at odds with contemporary standards of fairness and decency.' Indeed, it is at odds with any standard of decency that I can imagine." (internal citation omitted)). As a judge in the Southern District of Georgia recognized following transfer by this Court of the actual innocence claim in *Davis*:

If there is a principle more firmly embedded in the fabric of the American legal system than that which proscribes punishment of the innocent it is unknown to this Court. It is well established that the punishment of the innocent or those otherwise without culpability is at odds with the constitution, including the Eighth Amendment.

In re Davis, 2010 WL 3385081, at *41.

Second, continued imprisonment of the innocent would be such a deprivation of the innocent's liberty interest that it would shock the conscience. The protections

of substantive due process would therefore be violated. *Cf. Herrera*, 506 U.S. at 435–37 (Blackmun, J., dissenting) (discussing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Rochin v. California*, 342 U.S. 165, 172 (1952)).

Wrongful convictions are now documented and widely understood as a grim reality of our criminal justice system. As is clear from the Statement of the Case, White has been wrongfully convicted. The true perpetrator, and the man who implicated White, has now confessed as much. In light of Woomer’s confession, either White has been lying since the beginning of the case and Woomer is lying now without any benefit to himself, or White has been telling the truth the whole time and Woomer lied when arrested in order to protect himself and is now telling the truth. Based on all of the evidence in the record, it is clearly the latter. Indeed, neither of the two people with knowledge of what occurred in Navarro’s house now claims that White had anything to do with the crimes; their recitation of events now align.

There is nothing more White could have presented to prove his innocence in this case. In a case such as this one, a real-perpetrator confession to the crime and exoneration of the petitioner is the most compelling factual predicate a petitioner could ever hope for. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 139–40 (1987) (“Next to establishing that no crime occurred, perhaps the most convincing disclosure of error occurs in cases where the actual perpetrator intervenes. . . . In a few cases, the true offender was the innocent man’s co-defendant, and exoneration came when the co-defendant confessed.”). According to one study, “nearly eighty-four percent of all

wrongful convictions result from mistaken witness identification, false statements, and witness confusion.” Adam Heder & Michael Goldsmith, *Recantations Reconsidered: A New Framework for Righting Wrongful Convictions*, 2012 Utah L. Rev. 99, 100 (2012) (citing Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* 42–44, 73 (2000)). White’s case represents one such wrongful conviction. White instead should be among the exonerated, but he will not be unless the Court declares that the continued incarceration of the innocent, as proven with a confession by the true perpetrator, violates the constitution.

CONCLUSION

Michael Woomer has confessed to the crimes for which Jerry White is serving life in prison. Woomer admitted he acted alone and that he blamed White in order to protect himself. Woomer is out on parole. White continues to languish behind bars. Our constitution cannot tolerate White’s continued imprisonment. This Court should finally decide the long-outstanding question of whether the constitution is violated by the continued incarceration of the innocent.

Dated December 14, 2021

Respectfully submitted,

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