No. _____

In The Supreme Court of the United States

William Demont White, Jr., Petitioner

v.

Lisa Stenseth, Warden Rush City Correctional Facility, Minnesota, Respondent.

On Petition For Writ of Certiorari To The Eighth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In deciding whether to issue a certificate of appealability under 28 U.S.C. § 2253, may a federal court find that "reasonable jurists would not disagree" about the denial of relief on procedural grounds where other courts have resolved the issue, on similar facts, in a manner favorable to habeas petitioner's position?

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The Eighth Circuit Judgment in *White v. Stenseth*, No. 24-3424, denying the request for a certificate of appealability (Appendix A) is unreported. The Order of the United States District Court, *White v. Stenseth*, 24-0261 (PAM/JFD) (Oct. 10, 2024), appears at Appendix B. The Report and Recommendation of the Magistrate Judge appears at Appendix C. Mr. White had an appeal to the Minnesota Court of Appeals, *State v. White*, A22-1848 (Minn.App. Sept. 5, 2023). This opinion appears at Appendix D. Mr. White petitioned the Minnesota Supreme Court for review. This was denied by an Order, which appears at Appendix E. Judgment was entered on December 29, 2023. See Appendix F.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered on January 17, 2025. (Appendix A). Petitioner invokes this Court's jurisdiction on the basis of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The questions presented implicate the following provisions of the United States Constitution:

AMEND. XIV, No state shall … deprive any person of life, liberty, or property without due process of law.

AMEND. V, No person shall be … deprived of life, liberty, or property without the due process of law.

AMEND. VI, In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

The questions further implicate the following statutory provisions:

28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from— (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254, which is reproduced verbatim in the appendix to this section. (Appendix G).

STATEMENT OF THE CASE

Petitioner William White, Jr. seeks a writ of certiorari to the Eighth Circuit from the denial of a certificate of appealability in federal habeas corpus review. Federal court jurisdiction derives from 28 U.S.C. § 2254. The Minnesota Court of Appeals affirmed Mr. White's conviction on appeal. See Appendix D. Mr. White's

habeas petition was denied by the United States District Court for the District of Minnesota. Appendix B. The District Court's Order adopted the Magistrate Judge's Report and Recommendation (Appendix C) and denied a Certificate of Appealability under 28 U.S.C. § 2253 as to all claims. Mr. White's timely filed Application for Certificate of Appealability was denied by the Eighth Circuit Court of Appeals on January 17, 2025. (Appendix A).

William White, Jr., was indicted in the Benton County District Court with aiding 15 counts of murder, assault, arson, and crimes committed for gang benefit. The charges were based on allegations White, Nokomis Jefferson, and Vance Laster shot and killed JD and shot and wounded NP. White pled not guilty and, over his objection, he was tried jointly with Nokomis Jefferson. Laster, who was the only witness to identify White as the shooter during trial testimony, testified at the joint trial in exchange for a favorable plea bargain. Neither White nor Jefferson testified.

The jury acquitted White of Count 1, first-degree murder; Count 2, first–degree murder and Count 4, second-degree drive-by shooting murder. The jury convicted White of Count 3, second-degree intentional murder; Count 5, second-degree felony murder; Count 7, first-degree assault and Count 8, second-degree arson. The jury did not return a verdict for Count 6, attempted second-degree murder. The court declared a mistrial for that charge. The jury acquitted Jefferson of Counts 1-7, but convicted him of Count 8.

White appealed his conviction to the Minnesota Court of Appeals. In his counseled brief, White argued: the district court erred in joining his trial with co-

defendant Nokomis Jefferson, the district court erred in admitting NP's out of court identification of White as the shooter, and there was insufficient evidence to prove first-degree assault based on NP's injuries. In his pro-se brief, White argued: he was denied a jury made up of a fair cross section of the community, the district court failed to instruct the jury on partial verdicts, and the district court erred in failing to sequester the jury. The Minnesota Court of Appeals affirmed White's conviction in a nonprecedential opinion dated August 26, 2020. *State v. White*, A19-1398 (Minn.App. Aug. 26, 2020). Mr. White's petition for further review to the Minnesota Supreme Court was denied on October 20, 2020. Judgment was entered on October 22, 2020.

White discovers Laster was on parole

After completing his direct appeal, Mr. White obtained a Certified Disposition showing that Laster was convicted of Felon in Possession / Use of A Firearm, in violation of Statute 702-5/24-1/1(A), and sentenced to sentenced to three (3) years in prison, with credit for 1 day served, on March 24, 2016. (See Exhibit 1 – Laster Certified Disposition). Under Illinois law, for all sentences that include prison, a person will only serve 50% of the sentence if the Department of Corrections has determined that they have behaved well in custody and deserve good time. 730 Ilcs 5/3-6-3. The remainder of the sentence will then be served on parole, also called mandatory supervised release. Id.

Based on a sentencing date of March 24, 2016, with credit for a single day in custody, Laster would have been on mandatory supervised release both on the date

of the offense (2/16/2018) and during trial (verdict on 3/8/2019). Despite this, while it appears Laster's conviction was disclosed, there is nothing about Laster's questioning that suggests that it was disclosed that Laster was actually on parole both at the time of the offense and during his trial testimony.

Mr. White is now aware of Laster's parole status, not because his attorneys provided that information to him, or because the prosecution made the necessary disclosures, but because of investigation and research that he conducted on his own, after trial.

Postconviction and appeal

On August 9, 2022, White filed a petition for postconviction relief arguing: he was denied his Sixth Amendment right to a trial before an impartial jury; his Fourth Amendment rights were violated when his phone was searched on a warrant lacking probable cause; his right to a fair trial was violated when he was improperly joined for trial with co-defendant Jefferson; he received the ineffective assistance of trial and appellate counsel; that he obtained newly discovered evidence, including discovery that prosecution witness Vance Laster was on parole, which evidenced a *Brady* violation; and that he should be granted a new trial in the interests of justice.

By an Order dated 10/31/2022, the district court denied White's petition for postconviction relief, concluding his impartial jury, warrant, joinder, and ineffective assistance of trial counsel claims were *Knaffla* barred and his ineffective assistance of appellate counsel, *Brady* claims, and interest of justice claims lacked merit. White filed a timely notice of appeal on 12/30/2022. The Minnesota Court of

Appeals affirmed the denial of Mr. White's petition for postconviction relief in an opinion dated September 5, 2023. *White v. State*, A22-1848 (Minn.App. Sept. 5, 2023). Mr. White's petition for further review was denied by the Minnesota Supreme Court on December 19, 2023. Judgment was entered on December 29, 2023.

White then filed a federal habeas petition under 28 USC 2254, on February 1, 2024. On August 30, 2024, the Honorable John F. Docherty recommended the habeas petition of Petitioner William White, Jr. be denied as untimely and that no certificate of appealability be issued. Mr. White filed timely objections to the Report and Recommendation. Those objections were overruled by the district court, which dismissed Mr. White's petition with prejudice by an Order dated October 10, 2024.

Mr. White then sought a Certificate of Appealability from the Eighth Circuit Court of Appeals. Mr. White's application for a certificate of appealability was denied and his appeal was dismissed by a Judgment issued on January 17, 2025.

REASONS FOR GRANTING THIS PETITION

I. The Eighth Circuit applied a heightened standard in denying a COA on Mr. White's claims.

Mr. White was required to secure a certificate of appealability as a prerequisite to his appeal of the District Court's dismissal of his habeas petition. See 28 U.S.C. § 2253(c)(1)(B). Under AEDPA, an application for a COA must demonstrate "a substantial showing of the denial of a constitutional right." Id. at (b)(2). A COA must issue if either: (1) "jurists of reason could disagree with the district court's resolution of his constitutional claims" or (2) "that jurists could

conclude the issues presented are adequate to deserve encouragement to proceed further." Id. Where the petition has been denied for some procedural issue and the district court did not reach the merits in the petition, the COA should issue if the petitioner shows a valid claim of denial of constitutional rights and that jurists of reason would find it debatable whether the district court was correct in its procedural decision. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). A petitioner need not show "that the appeal will succeed." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). This Court has stated that "a claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

After review of Mr. White's claims, the Eighth Circuit concluded that no reasonable jurists would disagree with the district court's denial of Mr. White's petition, despite the existence of similar cases in which a petitioner was able to overcome the potential time bar to have his claims addressed on their merits.

A. Reasonable jurists can and do conclude habeas petitions are timely under circumstances similar to Mr. White's.

a. Cases with facts similar to Mr. White's show that 28 USC 2244(d)(1)(D) is the proper statutory measure for timeliness of his *Brady* claim.

In recommending that Mr. White's petition be denied, the Report and Recommendation concluded that 28 USC 2244(d)(1)(A), and not 2244(d)(1)(D) was the proper statutory subsection to use to determine whether Mr. White's *Brady* claim was timely. (Report and Recommendation P. 11-12). This conclusion is based on a determination that the factual predicate, Laster being on parole at the time of

the offense and trial, was available for discovery at the time of trial if Mr. White exercised due diligence. (Report and Recommendation P. 11).

Despite this conclusion, Mr. White has identified cases that he believes show the appropriate manner of determining when the factual predicate of a claim arises.

For example, in *Starns v. Andrews*, 524 F.3d 612 (5th. Cir. 2008), that court held that due diligence did not require that the defendant learn of exculpatory grand jury testimony where the state downplayed the exculpatory nature of the grand jury testimony and where defendant's counsel in a wrongful death suit learned of the exculpatory evidence in a deposition years after the conviction became final, even though criminal defense counsel had been given the witness' address prior to trial.

In *Moore v. Knight*, 368 F.3d 936 (7th Cir. 2004), that Court held that the habeas petition was timely as filed within one year of when the petitioner obtained the investigative report and affidavits showing improper judicial contact with the jury. *Id.*at 938-40. This was the case, even though the judge had reported the contact with the jury, off the record, prior to sentencing, because the judge presented the contact as benign. *Id.* at 439. Moore's conviction became final on March 28, 1997. *Id.* at 938.

In early 1997 Moore first learned through a friend, who had overheard conversations, that the judge's contact with the jury was more than the judge had reported. *Id.* At that same time, Moore asked his friend to investigate this further. *Id.* On May 18, 1998, the friend provided an investigative report and two (2)

affidavits from jurors which indicated that they felt the judge's communications contained commentary on the credibility of witnesses. *Id.* Petitioner filed for postconviction relief in state court on January 5, 1998, and then "after following proper procedural routes appeared before United States District Court for Northern District of Indiana" seeking habeas relief. *Id.* at 939. That Court held that the lag of time between initially learning of possible improper conduct in early 1997 and receiving affidavits in May 1998 did not show a lack of due diligence because the petitioner was in prison. *Id.* at 940. It also held that May 18, 1998, was the proper date for the factual predicate since that was the date that the petitioner obtained actionable information to make his claim. *Id.* at 940.

In *Wilson v. Beard*, 426 F.3d 653 (3rd Cir. 2005), the defendant's conviction became final in 1985. *Id.* at 655. On March 31, 1997, after the prosecutor from Wilson's trial decided to run for district attorney, a video tape of the prosecutor explaining that it was his preference to strike black jurors, and explaining how he did it in a way to get past *Batson* analysis, was released. *Id.* at 657. Wilson learned of the existence of the tape on or around April 6, 1997 from his prior attorney. *Id.* at 660. Wilson then filed a petition for relief in state court based on the video on June 2, 1997. *Id.* at 659. That petition was pending until March 22, 2001. *Id.* Wilson then filed for habeas relief on January 23, 2002. *Id.* If Wilson knew or should have known of the video between April 1 and April 5, 1997, his habeas petition would be untimely. The Third Circuit Court of Appeals held that Wilson did not fail to exercise due diligence in failing to learn of the tape until April 6, 1997, when he was

told about it by counsel because due diligence did not require him to continuously monitor the news on the remote possibility of learning facts helpful to his case. *Id.* at 661-62.

These cases demonstrate that a defendant is not expected to be omnipotent in obtaining new evidence, but must act with an appropriate level of diligence in pursuing the evidence when it becomes known to them. Mr. White contends that he has done so in this matter based on the evidence presented such that his petition is timely under 28 U.S.C. § 2244(d)(1)(d).

Further, concluding that Mr. White should have known of Laster's parole status ignores that it was the prosecution's obligation to discover and turn over *Brady* evidence when that witness's credibility may be determinative of guilt or innocence. See *State v. Miller*, 754 N.W.2d 686, 705-06 (Minn. 2008); Minn. R. Crim. P. 9.02; *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). In this case, it was the prosecution that presented Laster's testimony and relied on him as the primary witness against Mr. White. It was the prosecution's obligation to learn of and disclose the details of Laster's parole status, not Mr. White's obligation to discover it on his own. *Brady* requires disclosure of *all exculpatory material*, not just some exculpatory materials.

Mr. White must have some right to rely on compliance with *Brady* and that reliance needs to be considered in determining whether he exercised the level of diligence required to ascertain whether he was the victim of a nondisclosure. Any other rule rewards the state for a violation of what is a fundamental obligation. It

places an untenable burden on defendants: to be hampered in the first instance by the state's malfeasance under *Brady* and then risk waiving the rectification of the wrong, by not compulsively scouring the universe for something of which they might not have had even an intuition to begin searching.

Where there was non-disclosure and Mr. White should have at least some minimal right to rely on the idea that the opposing party will satisfy its longstanding and constitutionally mandated disclosure requirements, that should work in White's favor to establish that 28 USC 2244(d)(1)(D) is the correct provision for measuring timeliness. And, if that is the case the claim is timely. (See Report and Recommendation P. 9-10).

b. Courts presented with similar facts have concluded equitable tolling is appropriate under the circumstances.

The Report and Recommendation and District Court concluded that Mr. White was unable to avail himself of equitable tolling due to the Covid-19 pandemic. (Report and Recommendation P. 12-15). Mr. White contends equitable tolling is appropriate due to limitations placed on him during the Covid-19 pandemic. *See e.g. United States v. Maddox*, No. 18-cr-0014 (WMW/BRT), 2021 WL 1550492, at *1 (D. Minn. Apr. 19, 2021) (motion for tolling granted where petitioner "asserts that he has lacked access to, among other things, the prison law library, a typewriter, a computer, a copy machine, and his personal property.") The record in this matter shows that White has been pursuing his rights diligently and that extraordinary circumstances have stood in the way of White seeking timely relief in the state courts.

Many courts have recognized that the Covid-19 pandemic and corresponding shutdowns constituted an extraordinary circumstance that can serve as a basis for equitable tolling. The nature of the disruption in life due to Covid-19 during the time relevant to Mr. White is that it impacted everyone in nearly every way. If ever there was a time to use the equitable powers of the courts to ensure that a defendant is able to have the merits of his claims addressed, is it when the request is based on a global pandemic that grounds life for the entire world, and even more so for those in prison, to a halt.

White has been able to identify a number of cases in which federal courts have granted equitable tolling of AEDPA's statute of limitations to habeas petitioners based on the COVID- 19 pandemic. Those cases are:

Mata v. Wasmer, No. 8:20-cv-487-RFR-SMB (D. Neb. Feb. 22, 2021). After a death-sentenced petitioner filed a "protective" habeas corpus petition, the Court granted his motion for a stay and equitable tolling based on the pandemic to assess whether he had additional claims that could be asserted through an amended habeas petition, stating: "The pandemic has prompted other courts to grant this relief in habeas proceedings and the Court finds it particularly appropriate here given this is a death penalty case.".

Contreras v. Davis, No 1:19-cv-01523-AWI-SAB, 2020 WL 5588589 (E.D. Cal. Sept. 18, 2020). In *Contreras*, another death penalty habeas case, the action was commenced by the petitioner filing pro se requests to proceed *in forma pauperis* and for appointment of counsel. *Id.*, 2020 WL 5588589, at *1. The district court found

that equitable tolling of the AEDPA limitations deadline was available prospectively and granted equitable tolling of the filing deadline of the petition, based on impediments arising from the COVID-19 pandemic, stating: "Petitioner has made a sufficient showing that notwithstanding available COVID- 19 vaccines and safety guidelines and protocols, exceptional circumstances raised by the ongoing COVID-19 pandemic have presented varying and somewhat cyclical impediments to a constitutionally adequate mitigation investigation and development and presentation of new claims." *Id.*, 2020 WL at *3.

Maury v. Davis, No. 2:12-cv-1043 (E.D. Cal. Jan. 5, 2021). After a death-sentenced petitioner filed a petition, the district court stayed the habeas proceeding and equitably tolled the statute of limitations for filing an amended petition. The ruling was based on the increase in COVID-19 cases in the county where most witnesses to be interviewed resided, and because judges in the Eastern District of California had held in a number of cases that anticipatory equitable tolling is appropriate. *Id.*, slip op. at 2. In granting relief, the court stated: "This court will not recommend a result that would force petitioner's counsel to choose between risking the safety of themselves, their staff, potential witnesses, and all of their families to conduct interviews or risking the loss of the right to assert habeas claims on behalf of their condemned client. The court has ample grounds to grant petitioner's motion for equitable tolling." *Id.*

Biela v. Gittere, No. 3:20-cv-26 (D. Nev. Dec. 1, 2020). The district court granted the death-sentenced petitioner's unopposed motion for equitable tolling to

file a second amended petition on account of restrictions arising from the COVID-19 pandemic.

Cowan v. Davis, No. 1:19-cv-745 (E.D. Cal. Nov. 6, 2020). The district court granted equitable tolling to a death-sentenced petitioner for filing an amended habeas petition, based on "the exceptional and extraordinary circumstances of the COVID-19 pandemic." *Id.* at 6.

Brown v. Davis, No. 1:19-cv-1796 (E.D. Cal. Aug. 27, 2020). The district court granted a death-sentenced petitioner's motion for equitable tolling to file a habeas corpus petition, because of delay in the appointment of federal habeas counsel and impediments arising from the COVID-19 pandemic where Cowan cited various stay-at-home orders, canceled prison visits, and his counsel's restricted ability to assemble a record. In granting relief, the Court explained that it would consider the "complexity of the legal proceedings and whether the state would suffer prejudice from the delay," as well as how courthouses in California had been closed for months and would likely remain closed for the foreseeable future.

Hutto v. Cain, No. 3:20-cv-98 (S.D. Miss. June 26, 2020). The district court granted Petitioner's unopposed motion for equitable tolling or modification of the current scheduling order to file a habeas petition in light of the current COVID-19 pandemic.

O'Malley v. Davis, No. 5:19-cv-3872 (N.D. Cal. June 19, 2020). The district court granted the petitioner's unopposed motion for equitable tolling to file a habeas corpus petition, based on the global pandemic.

Rivera v. Harry, No. 20-3990-KSM, 2022 WL 93612, at *5 (E.D. Pa. Jan. 10, 2022). "Rivera had to file the Petition within 65 days of April 9, 2020 . . . . However, due to the COVID-19 pandemic, Rivera was quarantined in his cell for 23 hours and 45 minutes per day from March 2020 through July 2020 and the prison's law library was closed, so he was not able to timely file the Petition. The prison's safeguards against the COVID-19 pandemic prevented Rivera from timely filing the Petition, and Rivera diligently pursued his rights by filing the Petition on July 11, 2020, almost immediately after the prison lifted the quarantine and reopened the law library."

Dunn v. Baca, No. 3:19-cv-00702, 2020 WL 2525772, at *2 (D. Nev. May 18, 2020). "The problem is the COVID-19 pandemic. Visits to prison are restricted to keep the disease from spreading into the prisons. Travel to other areas for investigation is difficult. Trying to interview people on potentially sensitive issues while maintaining distance also is unwise. Courthouses are closed, and so obtaining records is difficult to impossible. Counsel for Dunn and for Respondents are working from home, as are their colleagues. The Court has received many requests for extension of time from both due to technical difficulties of setting up secure remote connections to their work computers, and their home computers might not be as efficient as their work computers. Some people have children whose schools or day-cares have closed. The parents have suddenly and unexpectedly become teachers, in addition to their normal work duties. In short, the COVID-19 pandemic is an

extraordinary circumstance that is preventing parties from meeting deadlines established both by rules and by statutes"

Monroe v. United States, No. 4:17-cr-11, 2020 WL 6547646, at *3 (E.D.V.A. Nov. 6, 2020). "The Court recognizes that Petitioner may have experienced issues in attempting to timely file the present motion while facing the impact of a global pandemic. Accordingly, the Court will toll the filing deadline . . . as the circumstances surrounding the pandemic were both extraordinary and beyond Petitioner's control.".

Crawford v. Morrison, No. 1:20-cv-691, 2020 WL 6144433, at *2–4 (W.D. Mich. Oct. 20, 2020). Equitable tolling allowed because the pandemic has "interfered" with a petitioner's plans to obtain statutory tolling by pursuing unexhausted claims in state court.

Zuniga v. Bean, No. 2:20-cv-00619-GMN-BNW, 2021 WL 1565783, at *1– 2 (D. Nev. Apr. 21, 2021). Finding that COVID-19 is an extraordinary circumstance that prevented Zuniga from meeting the statutory deadline when counsel could not obtain juvenile-court records, meet with Zuniga in person or by videoconference "to determine which claims to raise and to determine whether a neuropsychological evaluation of Zuniga is necessary," or "to interview people in-person on potentially sensitive issues.".

Even in cases where courts concluded granting prospective relief was not appropriate, they have signaled that equitable tolling will be available:

Fitzgerald v. Shinn, No. CV-19-5219-PHX-MTL, 2020 WL 3414700, at *1 (D. Ariz. June 22, 2020). "There is little doubt that ultimately, the COVID-19 pandemic will be considered an extraordinary circumstance meriting tolling for some period of time."

Pickens v. Shoop, No. 1:19-cv-558, 2020 WL 3128536, at *1–3 (S.D. Ohio June 12, 2020). Declining to grant prospective equitable tolling, despite acknowledging the state of emergency, travel restrictions, and stay at home orders imposed in Ohio making it "obvious that 'extraordinary circumstances' likely stand in the way of [petitioner's] timely filing a complete petition. In fact, that is probably an understatement"

Like the petitioners cited above, White has been pursuing his rights diligently, and the extraordinary circumstances of the global pandemic have impeded his ability to file a timely habeas corpus petition. In concluding that no reasonable jurists can agree that Mr. White is entitled to equitable tolling, the Eighth Circuit Court of Appeals applied a heightened standard to the certificate of appealability analysis. This Court should grant review to ensure that the proper statutorily required analysis is applied in cases such as this.

CONCLUSION

For the reasons stated above, Mr. White respectfully requests that this Court grant this petition for certiorari and allow him to have the merits of his claims addressed.

Respectfully submitted.

Dated: April 16, 2025

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