

No. **25-5321**

FILED

MAR 04 2025

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY RICARDO WIMBERLY - PETITIONER

VS.

MICHIGAN - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

By: Jeffrey Ricardo Wimberly #428466  
Muskegon Correctional Facility  
2400 South Sheridan Drive  
Muskegon, Michigan 49444

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SUPREME COURT, U.S.

## QUESTIONS PRESENTED

While Mr. Wimberly was on appeal he sought and received equitable tolling per Michigan Supreme Court Administrative Order 2020-21. The Court of Appeals effectively retained jurisdiction. As his appeal was pending, the trial court resentenced him. The Michigan Supreme Court, sua sponte, raised the question whether the trial court violated subject-matter jurisdiction. The Michigan Supreme Court then looked the other way "by simply not applying" its own precedent. This petition presents the following questions:

1. Does a lower court lose subject-matter jurisdiction over a petitioner's case when his equitably tolled appeal pends in a higher court?
2. If so, did the Michigan Supreme Court's intervention in raising the jurisdictional issue on its own motion, then looking the other way, a blatant violation of a constitutional magnitude?

#### PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Jeffrey Ricardo Wimberly, an inmate. The Respondent is James Schiebner, a warden of a Michigan correctional facility.

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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 judgement below.

REFERENCE TO OPINIONS BELOW

The November 22, 2022 opinion of the Michigan Court of Appeals appears at Appendix B.

The October 25, 2024 Michigan Supreme Court order vacating in part and denying in part, appears at Appendix D. This is the highest state court to review the merits and the opinion is published.

A timely filed petition for reconsideration was denied on December 26, 2024, and a copy of the motion and order denying reconsideration appears at Appendix E.

# STATEMENT OF JURISDICTION

Petitioner seeks review of the October 25, 2024, opinion of the Michigan Supreme Court decision, People v Jeffrey Ricardo Wimberly, Unpublished Opinion, #165229.

On December 26, 2024, the Michigan Supreme Court issued an order denying Petitioner's motion for reconsideration of that order. People v Jeffrey Ricardo Wimberly, Order, #165229 (87).

This Court has Jurisdiciton pursuant to 28 U.S.C. §1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. ART I §10, cl1: No State shall enter into any Treaty, Alliance, or Confederation, grant Letter of Marque and Reprisal; coin Money, emit bills of Credit; make any Thing bu gold and silver Coin a Tender in Payment of Debts; pass any bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.....7

U.S. CONST. ART, VI §2, cl2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and Treaties made, or which shall be made, under the Authority of United States, shall be the supreme Law of the Land; and judges in every state shall be bound thereby, and any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.....13

U.S.CONST Am. XIV, §1, 1886: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.....12

CONST 1963, ART 1, §10: No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.....7

CONST 1963, ART VI, §5: The supreme Court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinction between law and equity proceedings shall, as far as practicable, be abolished. The office of master of chancery is



prohibited.....9

#### OTHER AUTHORITIES

28 U.S.C. §1447(c): If at any time before final judgement it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded.....10

AO 2020-21, 506 Mich lxxxvi (2022). In light of the inhibitory effects of the COVID-19 pandemic on prison inmates' abilities to complete the necessary proceedings to proceed with a criminal appeal 2021-21 tolled the 56-day filing period for incarcerated defendants acting in propria persona until June 15, if they filed a notice of intent to appeal in the Michigan Supreme Court.....6

MCR 7.305(C)(a): A timely filed application for leave to appeal from a Court of appeals decision remanding for further proceedings stays proceedings on remand unless the Court of Appeals or Supreme Court orders otherwise.....10

## STATEMENT OF THE CASE

### A. The Criminal Sexual Conduct Conviction

Mr. Wimberly was convicted of two counts of criminal sexual conduct in the first degree (CSC-1). Police initially stopped the investigation and chose not to pursue a warrant after being told by the complainants mother, Fern Perkins, that her daughter, Anastassia Perkins, lied to police about the incident with "Jeffrey Wimberly" and his codefendant, "Larry Martin." Although Mr. Wimberly's legal identity and his DNA had been obtained, no charges came untill 2016 - as a "Special Project" - 15 years after the alleged incident took place in 2002 between then 18-year old Mr. Wimberly, 17-year old Anastassia Perkins, and 14-year old Larry Martin. Mr. Wimberly has maintained his innocence throughout these proceedings, testifying that this sexual interaction between him and Ms. Pekins was part of a long standing consensual sexual relationship.

In 2006, MCL 750.520b - the statute criminalizing criminal sexual conduct in the first degree - was amended in part to give trial courts the discretion to "order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." MCL 750.520b(3).

Although this amendment did not pass into law until 2006 - four years after the alleged events in this case took place, the trial court sentenced Mr. Wimberly to two consecutive terms of 468-720 months, each equivalent to 39-60 years in 2018. In total, Mr. Wimberly was sentenced to 78-120 years in prison.

Mr. Wimberly appealed his convictions but was remanded for resentencing based on the trial court's violation of due process - the use of acquitted conduct in scoring his sentencing guidelines. See People v Wimberly,

unpub. per curiam op., Court of Appeals, Nov. 24 (Docket No. 342751).

#### **B. AO 2020-21 (Equitable Tolling)**

On November 27, 2020 the Michigan Supreme Court issued Administrative Order (AO) 2020-21, which established a tolling period for incarcerated individuals acting in pro per during the Covid pandemic. It allowed them to file a letter with the MSC notifying it of their intent to file an application for leave to appeal. This letter would then toll the filing deadline from the date the letter was mailed. the tolling period expired on January 4, 2021. From that date, a pro per individual would have "the same number of days to file the... application that remained when the tolling period began." ADM File No. 2020-08/AO 2020-21.

#### **C. Simultaneous Appellate Proceedings**

Mr. Wimberly acted in pro per following the Court of Appeals' opinion. Mr. Wimberly filed two notices of intent with the Michigan Supreme Court pursuant to AO 2020-21 - one on December 6 and the other on December 17, 2020. (App - F, Tolling requests/acknowledgements).

Mr. Wimberly then filed a motion for reconsideration of the Court of Appeals' November 24, 2020 decision, and a claim of appeal in the Court of Appeals. Accordingly, Mr. Wimberly's filing time pursuant to AO 2020-21 was tolled. As his appeal was pending in the Court of Appeals, the trial court resentenced Mr. Wimberly on December 18, 2020 - 24 days after the Court of Appeals' opinion was issued. The trial court imposed the same sentence, consecutive prison terms of 39-60 years, 78-120 in total.

Mr. Wimberly appealed his convictions to the Michigan Supreme Court which resulted in a standard order of denial (App - G, 4/15/22). He followed up with a Writ of Certiorari to this Court which was also denied by standard order. (App - H, 10/21/2022).

As the aforementioned appeals were proceeding, Mr. Wimberly also appealed by right - a third simultaneous appeal - and appointed counsel filed a motion to correct an invalid sentence with the trial court. The trial court heard and denied the motion. (App - A, Trial Court Order, 6/21/21). Mr. Wimberly then filed a brief on appeal with the Court of Appeals, who affirmed his sentences in an unpublished per curiam opinion. (App - B, Court of Appeals Opinion, 11/22/22).

Mr. Wimberly filed an application for leave with the Michigan Supreme Court. the court ordered the prosecution to respond to the issues in Mr. Wimberly's application for leave to appeal and to address the following questions:

(1) Whether the imposition of consecutive sentences in his case violates the Ex Post Facto Clauses of the United States and Michigan Constitutions, US Const, art 1, § 10 cl 1; Const 1963, art 1, § 10, because the criminal conduct preceded the amendment to MCL 750.520b that authorized consecutive sentences, see People v Porter, 495 Mich 990 (2014); and (2) whether the Calhoun County Court lacked subject-matter jurisdiction to conduct resentencing before the expiration of the defendant's deadline for applying for leave to appeal the November 24, 2020 judgement of the Court of Appeals, see People v Washington, 508 Mich 107 (2021).

The prosecution filed their response. The Michigan Supreme Court then ordered oral argument on the application, directing the parties to file supplemental briefing on the aforementioned two questions as well as "whether the appropriate remedy is to grant [Mr. Wimberly] a new sentencing hearing or to direct the sentencing court to amend the judgement of sentence to reflect concurrent sentences." In addition the Michigan Supreme Court invited amicus briefs from parties interested in the issues. (App - C, 5/30/23, MSC Order).

#### D. Michigan Supreme Court Ruling

The Michigan Supreme Court held oral arguments and issued its opinion.

"We vacate the Novemeber 22, 2022 judgement of the Court of Appeals and the sentence of the Calhoun Circuit Court, and we REMAND this case to the circuit court for an amendment of the judgement of sentence to reflect concurrent sentencing." The Michigan Supreme Court then "DENIED" all other respects to the appeal "because we are not persuaded that the questions presented should be reviewed by this Court." (App - D, 10/25/24).

In a dissenting opinion, the Chief Justice, Elizabeth T. Clement with Justices Megan Cavanaugh and Elizabeth Welch opined while sharing "[t]he majority's concern that the trial court's imposition of consecutive sentences... violated defendant's Wimberly's ex post facto protections... However, the trial court lacked subject-matter jurisdiction to resentence the defendant in December 2020." (See App - D). Mr. Wimberly filed a motion to reconsider which was denied by standard order. (App - E, 12/26/2024.)

## REASONS FOR GRANTING THE PETITION

- I. This Court has affirmed that "equitable tolling, regardless of its basis, always requires the petitioner to demonstrate that he has acted diligently to pursue his rights." Pace v DiGuglielmo, 544 US 408, 418 (2005).

Michigan has the Constitutional authority to "establish, modify, amend..." and otherwise issue the Administrative Order 2020-21, allowing for equitable tolling. Const. 1963, art. VI § 5. As evidenced, Mr. Wimberly complied with the order and submitted two letters of intent. Thus, his appeal was equitably tolled.

The Sixth Circuit held the doctrine of equitable tolling "permits courts to extend the statute of limitations on a case-by-case basis to prevent inequality." Baden-Winterwood v Life Time Fitness, 484 F. Supp. 2d 822, 826 (S.D. Ohio 2007)(citing Truitt v County of Wayne, 148 F.3d 644, 648 (6th Cir. 1988)). "The equitable tolling doctrine is read into every federal statute." *Id.*

Mr. Wimberly exhibited the required diligence in pursuing his rights during the extraordinary circumstance of the Covid pandemic. Typically "equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." Graham-Humphrey's v Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 561-2 (6th Cir. 2000)(citing Baldwin County Welcome Center v Brown, 466 US 147, 151 (1984)). A plaintiff bears the burden of demonstrating why he or she is entitled to equitably toll the statute of limitations in a particular case. Allen v Yukins, 366 F.3d 396, 401 (6th Cir. 2004).

It is undisputed that the Covid pandemic was a rare circumstance where equitable tolling was not only warranted, but indeed "sparingly" granted to

Mr. Wimberly. See Irwin v Dep't of Veterans Affairs, 498 US 89, 90 (1990).

Here, Mr. Wimberly has shown his diligence in pursuing his rights and that an extraordinary circumstance stood in his way of filing his application for leave to appeal. Thus, the Michigan Supreme Court granted Mr. Wimberly equitable tolling in this rare circumstance.

**II. This Court should affirm that a lower court is divested of subject-matter jurisdiction when a petitioner's equitably tolled appeal pends in a higher court.**

Michigan Supreme Court precedent, People v Washington, 508 Mich 107 (2021), holds that a trial court lacks subject-matter jurisdiction to resentence a defendant while the defendant's application for leave to appeal is pending. MCR 7.305(C)(6)(a) "provides that a timely filed application for leave to appeal from a Court of Appeals decision remanding for further proceedings stays proceedings on remand unless the Court of Appeals or Supreme Court orders otherwise."

On the federal level Congress has required that "if at any time before final judgement it appears that the district court lacks subject-matter jurisdiction, the case shall be remanded." 28 USC §1447(c). This Court has read the next section of that statute, 28 U.S.C. §1477(d), as precluding review of a remand order based on a finding that subject-matter is wanting.

Here, as the trial court was attempting to resentence Mr. Wimberly, via remand, adjudicatory authority of his timely filed, equitably tolled application for leave to appeal had been stayed, and was proceeding through higher courts. It included an actual innocence claim and newly discovered evidence which "had the ability to greatly alter the course of the case, including obviating the need for retrial." Washington, 508 Mich at 125. See also Inland Bulk Transfer Co. v Cummins Engine Co., 332 F.3d 1007, 1013 6th Cir. 2003)(Where an appeal include "actions that alter the case on appeal"

the district court has no jurisdiction).

It is well settled that the "[f]iling a notice of appeal transfers adjudicatory authority from the district court of appeals." Manrique v United States, 137 S. Ct. 1266, 1271 (2017). Specifically, a notice of appeal "is an event of jurisdictional significance" that "divests the district court of its control over those aspects of the case involved in the appeal." Griggs v Provident Consumer Discount Co., 459 US 56, 58 (1982).

Likewise, the eleventh circuit has long recognized "a district court generally is without jurisdiction to rule in a case that is on appeal even if the court has rendered a decision - until the mandate has issued." Zaklama v Mt. Sinai Medical Center, 906 F.2d 645, 649 (1990). The seventh circuit said "Until the Court of Appeals issues its mandate, the case remains in the Court of Appeals, and "any action by the district court is a nullity." Kusay v United States, 62 F.3d 192, 194 (7th Cir. 1995 Easterbrook. J.)(16AA C. Wright & Miller, Federal Practice and Procedure §39887, p.612 (3d ed. 2008)).

As reflected in the federal circuits - as above so below - it is the fundamental incompatibility between the trial court's original jurisdiction and the court's appellate jurisdiction that has led many of our sister courts to hold that "[t]he effect of the appeal is to remove the subject matter of the order from the jurisdiction of the lower court..." Washington, supra. "The purpose of the general rule is to avoid the confusion of placing the same matter before two courts at the same time and preserve the integrity of the appeal process." Whispering Pines Estates, Inc., 369 BR 752, 757 (Bankr CA 1, 2007).

In addition, challenges to subject-matter jurisdiction may be raised "at any point in the litigation," and courts must consider them sua sponte.



"at any point in the litigation," and courts must consider them sua sponte. Gonzales v Thaler, 565 US 134, 141 (2012). The Michigan Supreme Court raised the subject matter jurisdiction question on its own motion. After extending an invitation for interested parties to submit amicus briefs and ordering the parties to submit supplemental briefing on the very issue, the court then skirted its own precedent, suggesting "[s]ubject-matter did not remain with the appellate courts until the period for filing an application for leave to appeal... expired." The dissenting Justices opined in fact, "[u]nder Washington, a trial court does not regain subject-matter jurisdiction - and the Court of Appeals judgement does not become effective - until the time for filing an application for leave to appeal in this Court has expired, even if a defendant does not pursue an appeal." The trial court was without jurisdiction and a full resentencing was required. See App - A, CAVANAUGH and WELCH, JJ., join the statement of Clement, CJ).

This Court has concluded, "We cannot look the other way when it comes to subject-matter jurisdiction. It establishes - or fails to establish - our authority to decide a case, triggering an unflagging duty to make sure we have it." Hamer v Neighborhood Hous. Servs. of Chi., 138 S Ct. 13, 17 (2018). See Shannon, Reconciling Subject-Matter Jurisdiction, 46 Hofstra L Rev 913, 933 (2018)(noting that the "primary difference" between subject-matter jurisdiction and other procedural rules such as personal jurisdiction and venue is that the subject-matter jurisdiction defects **cannot be waived**)(emp added).

Mr. Wimberly's equitably tolled appeal divested the trial court of subject-matter jurisdiction. The Michigan Supreme Court acknowledged the divestment, then failed to uphold its duty to correct the error, essentially waiving it. Mr. Wimberly was stripped of his liberty when the trial court,

willfully, and in clear absence of all jurisdiction, imposed an unconstitutional sentence. This injurious act resulted in a deprivation of Mr. Wimberly's right to due process and equal protection of the laws. Coupled with the Michigan Supreme Court's wanton omission, the magnitude of this constitutional violation cannot not be understated. See Const Am XIV. Certiorari is warranted.

**III. The issues presented are of national importance and requires a prompt resolution.**

Regarding the first issue presented, it cannot be lost on this Court that the courts of law and courts of equity has merged, in the pursuit of fairness. The equitable tolling doctrine is settled jurisprudence, there is no conflict or division to that point. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution..." U.S. Const. art, III, §2. Once invoked, Pace, and Michigan Supreme Court (A0) 2020-21, dictates that if a litigant demonstrates that he has acted diligently to pursue his rights and an unforeseen circumstance prevents timely filing, his appeal shall be equitably tolled.

Regarding the second issue presented, subject-matter jurisdiction is not an illusory requirement. It is Constitutional and "[s]hall be the supreme Law of the Land; and judges in every State shall be bound thereby..." Supremacy Clause of article VI, cl2 of the United States Constitution. It is unequivocal that subject-matter must be properly obtained before a court can decide a case. It is on the duty of the court to recognize this before assuming it has authority. In Michigan, Washington is an authoritative interpretation, binding under the doctrine of stare decisis. The Michigan Supreme Court broke with court rule and fundamental policy of our law.

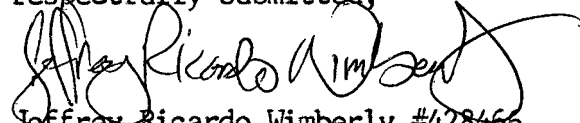
Further delay before resolving this issue has significant seperation-

of-power implications. In failing to uphold its integrity, the judicial branch abrogates, through equity and settled jurisprudence. Mr. Wimberly demonstrated his appeal was effectively stayed from the lower court's jurisdiction when he was granted equitable tolling. He was in precise compliance with the laws of this land. This Courts intervention is required to enforce these laws.

# CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgement and opinion of the Michigan Supreme Court.

respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey Ricardo Wimberly", written over the typed name.

Jeffrey Ricardo Wimberly #428466  
Muskegon Correctional Facility  
2400 South Sheridan Drive  
Muskegon, Michigan 49444