No. 18-7048

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JIMMY LAWRENCE NANCE — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
ON PETITION FOR A WRIT OF CERTIORARI TO THE 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

Jimmy Lawrence Nance
(Your Name)

F.C.I. Edgefield POB 725
(Address)

Edgefield S.C. 29824
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN DENYING A CERTIFICATE OF APPEALABILITY BY FAILING TO ASSES THE EXTRAORDINARY CIRCUMSTANCES PRESENTED IN THIS CASE THAT DEMONSTRATE NANCE HAS MADE A THRESHOLD SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND THAT JURISTS OF REASON COULD DISAGREE WITH THE COURT'S RESOLUTION OF HIS CONSTITUTIONAL CLAIMS AS ARTICULATED IN THIS COURT'S SLACK V. MCDANIEL, 529 U.S. 473, 484-485 (2000) AND BUCK V. DAVIS 137 S.Ct. 759 (2017) DECISIONS?

LIST OF PARTIES

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

[x] 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:

Office of Solicitor General
Department of Justice Room 5614
950 Pennsylvania Ave. N.W.
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Office of U.S. Attorney
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Roanoke Va. 24011

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STATUTES AND RULES

OTHER AUTHORITY

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-B to the petition and is

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[X] is unpublished.

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

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[X] is unpublished.

[ ] 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.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was July 30, 2018.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 9, 2018, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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

Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner was convicted by a Virginia jury of first degree murder of a Postal Employee and sentenced to Life in prison in 1993. On july 28, 2016, petitioner filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(6) (ECF 293) to the district court with a request for judicial notice of the newly discovered evidence with verified affidavit. The district court ordered government to file a response within (7) days (ECF 294), government complied, the district court ordered petitioner to respond within (10) days, (ECF 307). An oppositional response was submitted with a motion to amend (ECF 302) with request for counsel, (ECF 303).

The district court denied the motions on July 12, 2017, (ECF 304) petitioner sought reconsideration on July 24, 2017, (ECF 307), the district court instructed petitioner to dismiss one of his claims in the parent pleading, (ECF 308), petitioner complied submitting his amended motion with new authority (ECF 309), again, the district court denied the filing and entered the exact same order of denial of July 12, 2017, on March 02, 2018 (ECF 312).

Petitioner filed a timely notice of appeal on March 12, 2018, (ECF 313) and the Fourth Circuit ordered petitioner to submit his appeal on "informal brief" form supplied by the Clerk. This brief was filed on April 3, 2018, the Fourth Circuit denied same on July 30, 2018, petitioner sought en banc review September 10, 2018, the Court of Appeals for the Fourth Circuit denied same October 9, 2018.

fn 1

This case history spans more than 25 years [a]nd is extensive and need not be repeated herein except in relevant portions. The full text of the case is found in Pacer: United States v. Nance 92-0135-R (W.D. Va. 1992).

QUESTION PRESENTED

WHETHER THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN DENYING A CERTIFICATE OF APPEALABILITY BY FAILING TO ASSESS THE EXTRAORDINARY CIRCUMSTANCES PRESENTED IN THIS CASE THAT DEMONSTRATE NANCE HAS MADE A THRESHOLD SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND THAT JURISTS OF REASON COULD DISAGREE WITH THE COURT'S RESOLUTION OF HIS CONSTITUTIONAL CLAIMS AS ARTICULATED IN THIS COURT'S SLACK V. MCDANIEL, 529 U.S. 473, 484-85 (2000) AND BUCK V. DAVIS, 137 S.Ct. 759 (2017) DECISIONS.

REASONS FOR GRANTING THE WRIT

Granting a Writ of Certiorari in this case is extremely important to provide the lower courts uniform guidance in applying evolving standards of Federal Rule of Civil Procedure Rule 60(b) in post conviction review of seasoned cases where a petitioner's opportunity to seek and obtain collateral relief has been limited by specific extraordinary circumstances external to the petitioner that was not discovered until after direct appeal and first Section 2255 proceedings were complete.

This Court's most recent precedential decision in Buck v. Davis, 137 S.Ct. 759 (2017) outlined a flexible framework for what may constitute extraordinary circumstances sufficient to reopen collateral proceedings at the Certificate of Appealability ("COA") stage of a Motion to reopen pursuant to Rule 60(b) by strongly reiterating Slack v. McDaniel's principle holding that at the COA stage, the only question the lower court must ponder is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further. Id. at 774. This Court cautioned however, that

"a COA determination is not coextensive with a merits analysis" 137 S.Ct. at 773. This flexible approach to Rule 60(b) conforms to the overriding principle that "the Constitution guarantees criminal defendants the opportunity to present a complete defense" Crane v. Kentucky, 476 U.S. 683 (1986) and that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law"). Here, as in Buck, Nance has been denied a meaningful opportunity to present a complete defense and to test material exculpatory evidence withheld from Nance's defense at trial and his first Section § 2255.

In this context, an audit of recent cases seeking to enforce an extraordinary circumstances analysis indicates there is a wide-spread inconsistency of results amongst the circuit and district courts that makes clear this Court's intervention is necessary to establish uniform and consistent instruction to the lower courts in applying Rule 60(b) in the post conviction context. Thus, granting a Writ of Certiorari in this case is would resolve an extremely important question that would have potentially wide-ranging implications on the application of Fed.R.Civ.P. 60(b).

ARGUMENT

On July 30, 2018, the Fourth Circuit Court of Appeals denied Mr. Nance a COA reasoning that because the district court construed Nance's post conviction motions as successive and unauthorized § 2255 motions, Nance must demonstrate both that the

dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. Citing Slack v. McDaniel, 529 U.S. 473, 484-85 (2000). In conducting their analysis however, the Fourth Circuit did not actually address whether the factual circumstances Nance presented were sufficient to make a prima facie showing of extraordinary circumstances under the framework explained in Buck v. Davis to reopen Nance's Section 2255 proceedings pursuant to Rule 60(b).

Importantly in this context, both the Fourth Circuit and this Court have held that a true Rule 60(b) motion is not subject to the preauthorization requirement of 28 U.S.C. § 2244(b)(3)(A). See United States v. McRae, 793 F.3d 392, 397 (4th Cir. (2015); Gonzalez v. Crosby, 545 U.S. 524, 531-32 (2005).

In any event, to the extent a COA is required for Nance to proceed on appeal, he submits that this Court is justified in granting Certiorari, issuing a COA or granting a GVR Order on two grounds: First, both the district court and Fourth Circuit Panel's dispositive rulings are inconsistent with the Buck v. Davis extraordinary circumstances test. Second, in light of Slack v. McDaniel and a factually similar case arising out of the Fourth Circuit in United v. MacDonald, 641 F.3d 596 (4th Cir. 2010), Nance submits the lower courts have erred in overlooking his allegation that reasonable jurists could debate whether the petition should have been resolved in a different manner and that the issues presented were adequate to deserve encouragement to proceed further. Slack, 529 U.S. at 483-84.

Accordingly, Nance submits the Fourth Circuit Panel erred in its COA analysis of whether the district court was mistaken to deny Nance the opportunity to reopen his § 2255 proceedings and pursue Discovery of material exculpatory evidence (Negative Control Tests performed on DNA specimins collected at the crime scene) -- that were never disclosed to the defense -- the results of which would establish whether the DNA evidence used to secure Nance's conviction was contaminated and resulted in inaccurate DNA profiling of blood and other evidence, which if true, would undermine the jury's guilty verdict. See Schlup v. Delo, 513 U.S. 298 (1995) (holding that prisoners asserting innocence as a gateway to defaulted claims must establish that in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt").

Indeed, the importance of this Court's intervention in this context cannot be gainsaid given that Nance has never been afforded an unobstructed opportunity to fully and fairly present this claim. Moreover, and equally important, the government has, under auspicious circumstances, destroyed the forensic evidence before Nance's case was made final by virtue of this Court denying a Petition for a Writ of Certiorari in 1996. See Tharpe v. Selers, 583 U.S. ___, ___ (Jan. 8, 2018) (No. 17-6075) ("review of the denial of a COA is certainly not limited to grounds expressly addressed by the court whose decision is under review"); Buck, 137 S.Ct. at 777 (although Rule 60(b)(6) is available only in extraordinary circumstances, ... "courts may consider a wide range of factors to determine if extraordinary

circumstances are present."); LeBlanc v. Cleveland, 248 F.3d 95,101 (2d Cir. 2001) ("The movant has demonstrated extraordinary circumstances under Rule 60(b)(6) because she would be left without a remedy of the motion were not granted").

Turning to the extraordinary circumstances overlooked by the lower courts that compels this Court's intervention includes, but is not limited to the prosecution's destruction of material forensic DNA evidence prior to the case becoming final that was never disclosed to the defense at trial -- but instead discovered by Nance through FOIA processes years later that included the following: (1) finger nail clippings from the victim with embedded skin and blood cells; and (2) Negative Control Tests performed on the forensic DNA evidence.

Given the materiality of forensic evidence containing DNA in this largely circumstantial evidence case, it begs the Court to ponder just why the government withheld this evidence from the defense and then hastily destroyed it before Mr. Nance had the opportunity to perform independent testing of it. This, even to the lay mind, rings loudly of due process concerns and warrants another look into the murkey waters of the prosecution's motives in this context. Accord 18 U.S.C. § 3600A(a)-(c) (Preservation of biological evidence). Moreover, given that after several FOIA lawsuits, Nance discovered that Negative Control Tests were indeed performed on the DNA evidence of this case that was submitted in the prosecution's case-in-chief, but were never disclosed to the defense and are mysteriously "missing" from the FBI laboratory file -- must also give the Court pause to ponder

just why this is, particularly where, as here, Nance submits the results of the Negative Control Tests bare directly on the integrity of the only material forensic evidence in this case.

Critically, stoking the furnace of this claim is the government's repeated insistence that the Negative Control Test results are "inconsequential" -- yet they continue to deny access to those results to both Nance and the courts. Thus, unless and until the government is compelled to release the Negative Control Tests results -- their reason for withholding this potential material exculpatory evidence may never be revealed. See Kyles v. Whitley, 514 U.S. 419 (1995) (suppression by government of evidence materially exculpatory toward the defendant under Brady v. Maryland, and its progeny found to violate the Fifth Amendment); United States v. Bagley, 473 U.S. 667 (1985) (holding that favorable but undisclosed evidence is material and constitutional error results from its suppression "if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different."). Id., at 682.

In Arizona v. Youngblood, 488 U.S. 51 (1988), this Court held that, unless a criminal defendant can show bad faith on the part of the police, the failure by the police to preserve evidence that was potentially useful to the defendant does not constitute a denial of a defendant's due process right under the Federal Constitution. However, this Court made clear that under the constitutional materiality standard, the duty of the [prosecution] to preserve evidence that has the potential to

exculpate a criminal defendant applies to only evidence possessing an exculpatory value that was apparent before the evidence was destroyed. So, in this context, the relevant question is whether the victims fingernail clippings containing a flesh and blood DNA profile other than Mr. Nance and the victim herself had an apparent exculpatory value before they were destroyed (and withheld from the defense)? Mr. Nance submits this question must be answered in the affirmative -- that this evidence should have had an obvious exculpatory value to Nance's defense -- and been produced for his defense to assess and present to the jury. Yet, the prosecution withheld this evidence, did not inform the defense of its existence and destroyed it before the case became final -- and that rings loudly of bad faith by any measuring stick.

Unfortunately, in Judge Jones's March 2, 2018 opinion, the Court said that Nance "fail[ed] to establish that he presents claims substantially different from the prior collateral attack dismissed by this court and the court of appeals [in 2012] or that he has received authorization to file a successive § 2255 motion." Opinion at 3. Although it cannot be denied that Nance has previously raised the matter of the Negative Control Tests and destruction of forensic evidence in his 2006 motion, it is critical to note that the Honorable James C. Turk (now deceased) never addressed the merits of Nance's claim in this regard, but instead denied his motion on procedural grounds based on the fact that the government destroyed the evidence in question prior to Nance case becoming final in 1995. But, that decision however,

does nothing to address the Negative Control Test results -- which have not been destroyed -- but rather, is being deliberately witheld from Nance and the Court within the prosecution's casefiles. Equally concerning of Turk's Judgment is that it does not address Youngblood's badfaith framework. In any event, Mr. Nance's current round of litigation in the form of a motion to reopen § 2255 proceedings is directed precisely at Judge Turk's, and then Judge Jones's prior "failure" to address the merits of Nance's DNA claim.

Moreover, given today's technology, mitochondrial DNA testing of the 25-hair strands that the government destroyed would now produce a more clear DNA profile to establish the hair plug did not belong to Mr. Nance. And, as relevant to tipping the scales towards granting a Writ of Certiorari, this decision was made without the benefit of the Buck extraordinary circumstances framework -- which, when viewed in totality -- should compel this Court to take a look at this case; at the very minimum, issue a GVR Order to permit Nance Discovery of the Negative Control Tests -- if nothing more.

Turning to whether Nance made a prima facie showing that jurists of reason could decide Nance's issues differently, thereby meeting the Slack v. McDaniel COA standard, the Fourth Circuit addressed a factually similar case with an equally long and storied history as Nance's case with exception to the expensive team of lawyers and media attention drawn to it in United States v. MacDonald, No. 75-CR-26. In summarizing the relevant history of the MacDonald case, Nance would respectfully

draw the Court's attention to MacDonald's second motion for post conviction relief, where he asserted, similar to Nance, claims under § 2255 that the government had unconstitutionally withheld and suppressed exculpatory evidence from the defense including synthetic hairs. The alleged suppressed evidence also included unmatched human hairs and woolen and cotton fibers collected from the victim's bedding, from places on and near the victim's body, and from the wooden club used as a murder weapon. On the merits of MacDonald's claims, the district court observed that "the ultimate question [was] whether the jury's verdict would have been different had the defense been aware of the allegedly suppressed evidence at the time of trial." See United States v. MacDonald, 778 F.Supp. 1342, 1349 (E.D.N.C. 1991). The motion was ultimately denied.

In 1997, MacDonald filed a motion to reopen the proceedings on his second post conviction motion pursuant to Rule 60(b) on the ground that the government and one of its witnesses (an FBI forensic examiner) had perpetrated a fraud on the court. Bypassing the extensive details, suffice it to say that MacDonald sought access to all items of physical evidence analyzed by the FBI forensic examiner so that he could conduct independent laboratory testing including newly available DNA tests. The district court denied MacDonald's Rule 60(b) motion and discovery requests. However, the Fourth Circuit considered and disposed of two separate appeals from the district court's 1997 decision. In so doing, the Court denied authorization to file a successive § 2255 motion, but, by that same order ruled "that the motion with

respect to DNA testing is granted and this issue is remanded to the district court." In re MacDonald, No. 97-713 (4th Cir. Oct. 17, 1997). Subsequently, the Fourth Circuit affirmed the district court's denial of MacDonald's Rule 60(b) motion to reopen proceedings premised on the government's alleged fraud on the court.

Importantly however, the Fourth Circuit granted MacDonald authorization to file a second and successive § 2255 motion in light of subsequent independent DNA testing that resulted from the earlier grant of discovery to MacDonald. The Fourth Circuit granted such authorization based on their determination that the § 2255 motion made a prima facie showing of the requirements for a successive motion, citing 28 U.S.C. § 2244(b)(3)(C).

Precedents of this Court appear to support Nance's claim that he continues to be denied due process of law because the government knowingly destroyed exculpatory evidence (finger nail clippings with skin and blood DNA -- that was never disclosed to the defense), 25-strands of hair that was found in the victims grasp (that did not belong to Nance) which could have been subjected to modern testing modalities unavailable at the time of trial and direct appeal. The government's conduct in this context offends evidentiary preservation principles dating back to Brady v. Maryland, 373 U.S. 83 (1963); California v. Trombetta, 467 U.S. 479 (1984), and Arizona v. Youngblood, 488 U.S. 51 (1988). Moreover, this Court has instructed that when lower courts are faced with credible allegations of evidence suppression and destruction courts are obligated to at least evaluate the

withheld evidence in the context of the entire record. See United States v. Agurs, 427 U.S. 97 (1976) and United States v. Bagley, 473 U.S. 667 (1985).

Accordingly, given this Court's standing authority on this matter and the factual similarity, yet disparate treatment between the Fourth Circuit's MacDonald decision and the Nance case, including but not limited to the questionable DNA testing in both cases, the withholding of material exculpatory evidence, and the similar procedural posture of the two cases -- it is entirely reasonable for Nance to be granted a Petition for a Writ of Certiorari and thereafter allowed the Discovery of Negative Control Tests to help prove his innocence on what remains of the flimsy record evidence in this case. For 26-years Nance has unwavered in his profession of innocence -- and if the Negative Control Test results support his innocence -- then Nance is entitled to his day in court. For nothing in this great democracy is more distateful and offensive to life, liberty, and the pursuit of happiness -- than a death sentence viz "Life" in prison -- of an innocent man.

CONCLUSION

Given the severity of the sentence involved and the dramatic disparity of the courts application of Rule 60(b), this Honorable Court should not hesitate to exercise its certiorari jurisdiction to resolve this long standing circuit split. Mr. Nance's rights to due process were violated. The government withheld material exculpatory evidence from the defense throught trial, direct appeal and first § 2255, and then destroyed it -- and continue

to conceal Negative Control Test results conducted on DNA specimens which rings loudly of bad faith -- should compel this Honorable Court's intervention to rectify this fundamental miscarriage of justice. Therefore, Nance's Petition for a Writ of Certiorari should be granted.

Dated on this 6th of December, 2018.

Respectfully submitted,