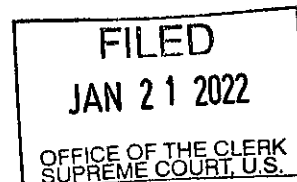


No. 21-7012

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

Jessica Ewing — PETITIONER
(Your Name)

vs.

Harold Clarke — RESPONDENT(S)

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

Jessica Ewing #1598062
(Your Name)

Fluvanna Correctional, P.O. Box 1000
(Address)

Troy, Virginia, 22974
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1) Ms. Ewing asserts that the previous court erred when it did not grant a C.O.A. despite the debatability of the District Court's opinion by a reasonable jurist.
- 2) Ms. Ewing asserts that the previous court was in error when it denied her motion based on its own merits determination of her ineffective assistance of counsel claim.
- 3) Ms. Ewing asserts that the Alford plea is misleading in the 'maintaining of innocence' as defendant is treated as though they are guilty beyond a shadow of a doubt without prosecutors having to prove such. In post-conviction proceeding, the Alford plea is taken as evidence of guilt to such an extent that subsequent courts and judges feel that they need not look beyond such plea to verify one's guilt, innocence or effectiveness of counsel.

LIST OF PARTIES

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

RELATED CASES

- ° Jessica Ewing v. Harold Clarke No. 20-7534 United States Court of Appeals for the Fourth Circuit August 18, 2021
- ° Jessica Ewing v. Harold Clarke No. 20-7534 United States Court of Appeals for the Fourth Circuit October 25, 2021
- ° Jessica Ewing v. Harold Clarke No. 20-7534 United States Court of Appeals for the Fourth Circuit October 29, 2020
- ° Jessica Ewing v. Harold Clarke United States District Court for the Western District of Virginia, Roanoke Division September 30, 2020

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- APPENDIX E Case for North Carolina v. Alford 400 U.S. 25
- APPENDIX F Case for Buck v. Davis 137 S. Ct. 759
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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☒ For cases from **federal courts**:

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

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

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

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ 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 August 18, 2021.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 25, 2021, and a copy of the order denying rehearing appears at Appendix C.

☐ 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

North Carolina v. Atford - See Appendix

Buck v. Davis - See Appendix

United States v. Brodie - See Appendix

STATEMENT OF THE CASE

- 1) On October 14, 2019, Ms. Ewing filed a petition of Habeas Corpus, in pro se, in necessity, with the United States District Court for the Western District of Virginia, Roanoke Division
- a) On September 30, 2020, her petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 was dismissed and a Certificate of Appealability was denied.
- 3) On October 19, 2020, Ms. Ewing's petition was filed in this Court of Appeals, seeking issuance of a Certificate of Appealability.
- 4) On August 18, 2021, the United States Court of Appeals For the Fourth Circuit issued its order to deny Ms. Ewing's petition seeking a Certificate of Appealability
- 5) On September 23, 2021, Ms. Ewing's petition seeking a panel rehearing and/or rehearing en banc was entered.
- 6) On October 25, 2021, her petition seeking a panel rehearing was denied by the United States Court of Appeals for the Fourth Circuit.
- 7) Here now, Ms. Ewing files her petition seeking a Writ of Certiorari.

Reasons For Granting this Petition

North Carolina v. Alford

Under Ms. Ewing's § 2254 motion, she asserts that Counsel Tyson Daniel failed to represent her to the fullest of his abilities as is her Constitutional right. North Carolina v. Alford 400 U.S. 25 states that the standard for determining the validity of guilty pleas is whether a plea represents a voluntary and intelligent choice among the alternative courses of action open to a defendant. As Counsel failed to deliver evidence to either the defendant or court concerning Ms. Ewing's mental health conditions (evidence currently allowed as viable in the state of Virginia under Va. Code Ann. § 19.2-271.6) Ms. Ewing was not well-informed therefore her decision could not be considered intelligent. Counsel failed to inform the defendant of pertinent information. In fact, Mr. Daniel did whatever he could to convince Ms. Ewing that not going through through a trial was her best option by

manipulating her emotions with notions that she would not want to drag the family through a trial that would be embarrassing due to the homosexual conduct that occurred.

The Court states that Ms Ewing was well-informed by her own statements in court. To say that she knowingly and intelligently answered the questions concerning the effectiveness of Counsel is further debatable once considering the human rights violating and psychologically damaging 30+ days Ms Ewing spent in segregation. Without therapy, she could not have properly recovered from such damage. One could debate that such time would make one easily suggestable.

The average person has difficulty differentiating willful, premeditated Murder and something less serious when it is put into legal jargon. To hear that one "maintains innocence" is miscommunicative

and confusing. To expect the average person to understand the differences is discriminatory. To make a frank comparison, it is akin to asking the average person how a black hole is formed. To say: "it is the result of a collapse of a star of a certain size and mass" sounds much like understanding and intelligence when it is nothing more than parroting. To understand something of that nature, one would need to have attended specific college-level schooling. It is the same with law and legal jargon.

With the forward movement of criminal justice reform and the sickening number of people being found innocent of crimes they spent decades behind bars for, the Alford plea leads to the ease of a miscarriage of justice. The Alford plea all but guarantees the systematic denial of justice and liberty to the innocent. If the justice system were not so capable of sentencing to inequitable amounts of time for the wrong criminal code for the offense given

(exacerbated by the DA's freedom to unfoundly slander defendants)
the Alford plea would be outdated. The disparity between the
maintenance of innocence and Commonwealth's guilty assertion
leaves justice unobtainable.

United States v. Brodie

Ms. Ewing asserts that her due process rights, as protected
under her Fifth Amendment right, were infringed upon.

She was not afforded "an opportunity to be heard in a
meaningful manner." As seen in *United States v. Brodie*,
686 F. Supp. 941, "it is proper — indeed even necessary for
the rational exercise of discretion — to consider the defendant's
whole person and personality. The sentencing court must
be permitted to consider any and all information that reasonably
might bear on the proper sentence for the particular defendant."

Ms. Ewing was not afforded the "meaningful manner" that is
her right when the sentencing judge stated:

"I've had some other cases very similar to this in the

past and I think the sentence I gave in this case is somewhat consistent with the other sentences I have given in the past' Hearing on Motion to Modify Sentence, page 347 of transcripts, lines 12-14.

This statement is rife with mechanical application of the law and a lack of a 'meaningful manner' when considering Ms. Ewing's guidelines ranged from 23 years 2 months to 38 years 7 months. This is the applicable guideline created by her presentencing report which is a tried and true method of ensuring a lesser opportunity of handing out aggrandized punishments. The imposed sentence of 45 years is excessive as Ms. Ewing has no previous criminal record, poses no threat to society as reflected by her community service record, Girl Scout Gold Award and her current and consistent recidivism score of low. As Ms. Ewing also attempted to turn herself in before the authorities were aware of the seriousness of the event, one would consider the judge to take these facts into

account. It can be debated that by not considering Ms. Ewing as an individual and his previously quoted statement that the judge had a standing bias against persons charged with violent crimes. The judge readily accepting the plea under Alford further proves this as "pleas coupled with claims of innocence should not be accepted... until the judge taking the plea has inquired into and sought to resolve the conflict between waiver of trial and the claim of innocence" North Carolina v. Alford 400 U.S. 25. If Judge Turk had done so, he would not have found premeditation beyond a shadow of doubt.

At Ms. Ewing's reconsideration, she asked that Judge Turk take into consideration her age, 22, he refused to consider again. Washington D.C. recently passed the Second Look Act (2020) that allows those who committed crimes as emerging adults - under 25 - to petition for resentencing.

This is because of the clear basis that the human brain is not fully developed until the ages of 25-27.

Ms. Ewing knew of this fact at her sentencing yet the judge continued to refuse to consider this notion.

In short, Ms. Ewing never received her 'meaningful manner' that is her right; instead being treated as though she were one of the many others sentenced under Judge Turk.

Buck v. Davis

Ms. Ewing claimed in her 2254 motion that counsel was ineffective. After denying her requested 2254 relief, Ms. Ewing filed a Motion for a C.O.A. in this court. A three judge panel denied Ms. Ewing's Motion because the panel found her ineffectiveness claims to be meritless.

Ms. Ewing declares that the panel's decision is in error because it is contrary to United States Supreme Court precedent.

In the recent Supreme Court case *Buck v Davis* (No. 15-8049) (5th Cir. Feb. 22, 2017), the Supreme Court held that the Fifth Circuit exceeded the limited scope of the C.O.A. analysis. The C.O.A. statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then if it is, an appeal in the normal course.

Chief Justice Roberts, writing for the court, held that the Certificate of Appealability "inquiry", we have emphasized, is not coextensive with a merits analysis."

According to the Chief Justice, "the question for the Fifth Circuit was not whether Buck had shown extraordinary circumstances. These are ultimate merits determinations the panel should not have reached. We reiterate what we have said before: a court of appeals should limit its examination at the C.O.A. stage to a threshold inquiry into the underlying merit of [the] claims, and ask only if the District Court's decision was debatable."

In *Henny v. Cockrell*, 327 F.3d 429, 431 (5th Cir. 2003), the court explained that: under the Antiterrorism and Effective Death Penalty Act (A.E.D.P.A.), a petitioner must obtain a Certificate of Appealability (C.O.A.) before he can appeal the court's decision. See 28 U.S.C. Section 2253(c)(1).

A C.O.A. will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right."

See 28 U.S.C. Section 2253(c)(2)

In order to make a substantial showing, a petitioner must demonstrate that a "reasonable jurist would find the district court's assessment of the constitutional claim debatable or wrong." *Slack v. McDaniel* 529 U.S. 473, 484, 120 S. Ct.

1595, 146 L. Ed. 542 (2000). When a district court has denied a claim on procedural grounds, then the petitioner must demonstrate that a "reasonable jurist would find it debatable whether the district court was correct in its procedural ruling." As the Supreme Court made clear in its decision on the case of *Miller-El v.*

Cockrell, 537 U.S. 322, 123 S. Ct. 1039, 1039, 154 L. Ed. 2d 931 (2003), a C.O.A. is a "jurisdictional prerequisite" and "until a C.O.A. has been issued, the federal courts of appeals lacks jurisdiction to rule on the merits of appeals from habeas petitioners." When considering a request for a C.O.A., "the question is the debatability of the underlying constitutional claim, not the resolution of that debate," id. at 1042.

On further debatability, the Honorable James P. Jones, U.S. District Judge on September 30, 2020 states in his opinion:

"Admittedly, if the jury completely believed Ewing's version of the events, a conviction for second-degree murder or even voluntary manslaughter might be possible"

The Honorable Judge Turk even tells Ms. Ewing during her request for consideration:

"I think what you told me happened that night is basically what happened. All the evidence I heard

tended to make more sense with what you described the activities were that evening." (page 346 of transcripts lines 6-9)

These statements, coupled with the court's psychological evaluator stating that this was a clear case of involuntary manslaughter brings to mind that Counsel Tyson Daniel's representation was wanting and therefore critically failed Ms. Ewing.

This court would be ensuring the rights of all American citizens by granting this petition. The Alford plea as it stands, allows for innocent people to sit in prison for exorbitant amounts of time, stripped away of their right to fight for themselves. As the average person cannot fully understand the severity of particular charges, nor their definitions, prosecutors and counsel for defendants are in a position to manipulate. Without the right to appeal, defendants are left to serve out the sentence the court argues they accepted in a moment of a lapse of judgement, because a trained attorney told them it was their only hope. The number of felonious

cases that do not go to trial due to a plea agreement in Virginia is questionable. If the courts are sure that the defendant would be found guilty because the defendant's lawyer said they would, then, in the interest of limiting the number of innocent people in prison (especially those that maintain innocence under Atford), they should maintain the right of full post-conviction relief as they are ultimately treated as guilty. This includes the right to appeal through issuance of a C.O.A.

REASONS FOR GRANTING THE PETITION

This court would be ensuring the rights of all American citizens by granting this petition. The Alford Plea as it stands, allows for innocent people to sit in prison for exorbitant amounts of time, stripped away of their right to fight for themselves. As the average person cannot fully understand the severity of particular charges, nor their definitions, prosecutors and counsel for defendants are in a position to manipulate. Without the right to appeal, defendants are left to serve out the sentence the court argues they accepted in a moment of a lapse of judgement, because a trained attorney told them it was their only hope. The number of felonious cases that do not go to trial due to a plea agreement in Virginia is questionable. If the courts are sure that the defendant would be found guilty because the defendant's lawyer said they would then, in the interest of limiting the number of innocent people in prison (especially those that maintain innocence), they should maintain the right of full post-conviction relief as they are ultimately treated as guilty. This includes the right to appeal through issuance of a C.O.A.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James Ewing

Date: January 20, 2022