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No. 23-663

ORIGINAL

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

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GARY LYNN MCDUFF,  
*Petitioner,*

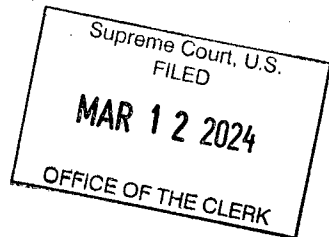
v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court of Appeals  
For The Fifth Circuit**

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**PETITION FOR REHEARING**

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**REHEARING IS WARRANTED**

This petition for rehearing is timely filed within 25 days from the denial of petition for writ of certiorari on January 20, 2024, Case No. 23-662.

While it is rare, the Supreme Court does consider re-hearing petitions under specific circumstances. This is a specific circumstance that equals or exceeds the National significance of due process protections the Court required in *Napue*, *Brady*, *Jencks*, *Giglio*, *Kyles*, *Bagley*, *Agurs*, and *Berger*.

First, the due process (*Napue*) stakes, and corresponding need for reliability, could not be greater. Mr. McDuff was unjustly convicted and sentenced to 25 years of lost liberty for a crime he did not commit based on testimony his prosecutors knew to be false.

Second, there currently is a split between federal circuits regarding this Court's *Napue* requirements which has been illuminated via amicus briefs and brought to this Court's attention by *Glossip v. Oklahoma* (No. 22-7466). On January 22, 2024 this Court granted Glossip certiorari briefing and set April 8, 2024 as the due date for "Briefs on the Merits" to be filed for Glossip's *Napue* materiality arguments. The decision to grant Certiorari was made 12 days after this Court denied McDuff's petition for certiorari. Because Glossip's issues substantially apply equally to McDuff, it creates an intervening circumstance sufficient to meet the Rehearing requirements of Supreme Court Rule 44. The DC Circuit and Ninth Circuit have found that the prosecution always has an obligation to correct materially false testimony immediately on its discovery, while the Second and Seventh Circuits have held that prosecutor's do not always have that obligation. That circuit split is clear in the decisions made in

*United States v. Butler*, 955 F.3d 1052, 1058 (D.C. Cir. 2020) and *Dow v. Virga*, 729 F.3d 1041, 1048 (9th Cir. 2013) when contrasted with *Jenkins v. Artuz*, 294 F.3d 284, 295 (2d Cir. 2002) and *Long v. Pfister*, 874 F.3d 544, 548–49 (7th Cir. 2017). Such a qualified obligation to correct false testimony defies *Napue* and is wrong. *Napue*’s standard of review asks only whether the error could have affected the verdict. If so, the conviction is unconstitutionally tainted by the false testimony. On December 22, 2023, after denial of McDuff’s case, the Fifth Circuit made a *Napue* materiality decision in *United States v. Brumfield* (22-39238) in which the court laid out the specific type of fact requirements necessary to meet the *Napue* standard. The evidence provided to the clerk by Petitioner McDuff for filing and destroyed by the district court clerk met each standard specified by the court in *Brumfield*. Unfortunately, due to the clerk’s inappropriate conduct, the court never knew exculpatory evidence had been presented for filing and was not properly entered into the record by the clerk.

This matter is now ripe for the Court to settle the ongoing circuit split on the *Napue* duty. The issue has been teed-up by *Glossip* for the Court to fully consider and issue a clear directive to every lower court as to when and how *Napue* materiality events must be remedied upon their discovery, both pre and post-conviction.

### **MATERIALITY**

The Constitutional due process right to file exculpatory actual innocence evidence in support of a habeas petition into the court record, for judicial consideration, should remain sacrosanct and this

Court should ensure the public that it is. Allowing any district or appellate court to deny a habeas petitioner from the only legal venue available to him to use newly discovered (withheld) evidence to vindicate himself does violence to one of the most fundamental protections of the Constitution. Only this Highest Court has the power to command that every lower court must require prosecutors and court clerks to protect this most precious due process right.

The most egregious due process violation occurred when the trial court and the Fifth Circuit did not consider whether McDuff's trial outcome could have been different if the prosecution had made the requisite disclosures, or whether the jury could have been inappropriately influenced by the fact that SEC attorney Magee and Receiver Quilling lied to the jury about Lancaster "*not having*" any of the required SEC licenses to sell securities and that his 2003 Lancorp Fund had "*not ever been filed*" with the SEC as required by SEC rules.

The accurate truth of this is of monumental significance because the government knew and withheld verified *Brady* materials it had sequestered away in its undisclosed investigative file showing that, at all times relevant, Mr. Lancaster did in fact hold every NASD/FINRA securities license required, and that Mr. Lancaster had in fact timely filed the required paperwork with the SEC central office for the 2003 Lancorp Fund to ensure he could lawfully begin selling shares in that Fund (App.145-155). This verified evidence (together with several thousand pages of additional exculpatory *Brady/Jencks/Giglio* evidence) was not discovered or discoverable by the defense because the government denied its existence during pretrial discovery, throughout trial, and

throughout direct appeal (App.8-11). Because it is newly discovered, and timely used to support McDuff's petition, and then subsequently (and inappropriately) destroyed by the district court clerk (making it heretofore unavailable to the lower courts for consideration when reaching their habeas petition decisions), the protective force of the Supreme Court should be used to require the lower court(s) to consider, for the first time, the exculpatory evidence that has recently been recovered and filed into the appellate record by Petitioner McDuff to make the record complete for this Court to review and consider in contemplating granting certiorari (App.5-7).

The right to a fair and impartial hearing of any habeas corpus petition is integral to the constitutional guarantee of due process under the Fifth and Fourteenth Amendments. In *Harris v. Nelson*, 394 U.S. 286, 292 (1969), and *Chessman v. Teets*, 354 U.S. 156 (1957), the Court noted the significance of the petitioner's right to "apply to a federal court for relief from a federal sentence...in a meaningful federal forum for claims of constitutional right violations." Now on home confinement, McDuff can travel and attend any court hearing or related proceeding.

See also:

<https://supreme.justia.com/cases/federal/us/394/286/#>

In this context, the action of the district court clerk in the present case clearly violates the principles of due process. The clerk's arbitrary decision to destroy the appendices containing crucial, newly-discovered, exculpatory evidence is an egregious violation of procedural protections guaranteed by the

due process clause. The resultant deleterious impact on McDuff's case is evident from the district court's denial of the habeas corpus petition for 'want of supporting evidence' and the denial of the Rule 10(e) motion to restore the record back to its original submitted form so both the district court and appellate court could consider the clerk-destroyed exculpatory evidence.

This Court has continually recognized the importance of the integrity and completeness of the record in the context of appeals. In *Interstate Circuit, Inc. v. City of Dallas*, 366 U.S. 645, 654 (1961), the Court stated, "It is the duty of a reviewing court to consider the trial court's action based upon the conditions existing at the time when it acted."

The very ability for an appellate court to adhere to this solemn duty is predicated on the thoroughness and completeness of the case record. Based on the foregoing legal precedents, it is unmistakable that the destructive conduct of the district court clerk resulted in a flagrant violation of McDuff's right to meaningful due process. The arbitrary and capricious destruction of three appendices supporting the habeas corpus petition under-mines the foundational principles of justice and unduly discriminates the petitioner's right to appeal. In any other context, such destruction would be viewed by any reasonable court as tampering with or destruction of evidence, which is a punishable offense.

In light of the overwhelming national significance of this issue, as it affects every habeas petitioners guaranteed rights in United States courts, it is incumbent upon this Honorable Court to grant a rehearing of the certiorari petition and mandate an appropriate due process remedy.

**CONCLUSION**

The Court should grant this Petition for Rehearing and consider McDuff's petition for certiorari together with or after Glossip's petition, and grant certiorari in this case (or both cases) by finding it to be unconstitutional for lower courts to ignore this Court's mandatory compliance with its materiality holding in *Napue*.

DATED: March 11, 2024

Respectfully submitted,

s/

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**CERTIFICATION**

This request for a rehearing is presented in good faith, not for purposes of delay, and is limited to the intervening and substantial grounds governing Rule 44 petitions.

Dated: 03/11/2024      s/  
Gary Lynn McDuff, pro se