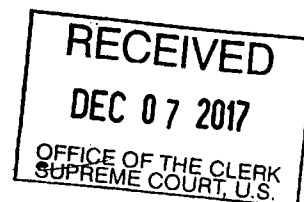


No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

Darryl Dwayne Burton — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Ninth Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Darryl Dwayne Burton

(Your Name)

P.O. Box 3900

(Address)

Adelanto, CA 92301

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

1). Whether a panel of the Ninth Circuit erred in failing to grant Petitioner request for Certificate of Appealability pursuant to Buck Davis, 137 S.Ct. 759, 773 (2017) ? (2). Is a Petitioner who years later after conviction through counsel discovers pursuant to the Freedom of Information Act, newly undisclosed materials , which would have affected and/or altered the outcome of the conviction and sentence, is Burton entitled to equitable tolling? (3) . Was the district court denial of the 59(e)/60(b)/230(j), a Fifth Amendment violation and "manifest unjust" in this case?

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:

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Fed.R.Crim.P. Rules -- 32(a)(1)(A), 32(i)(1)(A), 32(e)(1) & (2)
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United States Sentencing Guidelines -- Amendments -- 6A1.2

Constitutional Amendments - Fifth, Sixth, and Fourteenth

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☒ is unpublished.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 2016 U.S. Dist. LEXIS 152893; 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☐ is unpublished.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 May 24, 2017;

☐ 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: September 25th, 2017, 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).

REASONS FOR GRANTING THE PETITION

District Court's factual findings are not entitled to a presumption of correctness. There was legal error and district court's decision was "arbitrary, capricious, whimsical, and manifestly unreasonable. A district court's factual finding is clearly erroneous if it lacks evidentiary support or "if it was induced by an erroneous view of the law."

Ritter v. Morton, 513 F.2d 942, 949 (9th Cir. 1975)(per curiam). District Court selectively and intentionally failed to address the merits of Burton's newly discovered evidence, procedural errors along with the accompanying constitutional due process violation claims.

The Appellate Court failed to conclude its findings based on the merits of the application for certificate of appealability, not the debatability question as stated in Buck v. Davis , 137 S.Ct. 759 (2017). This panel of the Ninth Circuit Court of Appeals put the merits first, instead of the proper analysis of the debatability question. Thus it did not have the subject-matter jurisdiction for denial of the requested certificate of appealability. This Court should review the factual conclusions drawn by the lower courts.

I.

JURISDICTION:

Jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States Supreme Court may review a case from a court of appeals by writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

II.

PROCEDURAL HISTORY:

1). The Petitioner was indicted in a superseding indictment charged with Seven Counts in 1985. Subsequently, Burton entered into an 'open plea' to Count IV (manufacturing and Aiding and Abetting the Manufacturing of approximately 80 pounds of piperidinocyclohexanecarbonitrile ("PCC") which is a non-narcotic crime). (Refer to DK # 90) The court imposed the maximum allowable sentence of 15 years imprisonment with an accompanying term of Special Parole, which was an additional 25 years.

2). Petitioner filed a timely 28 U.S.C. § 2255 petition on 09/29/2001. (Refer to DK # 140). District court denied the petition on 01/26/2001. (Refer to DK # 145)

Special Attention:

This cause then layed dormant until 10/26/2013, Petitioner timely filed pursuant to Fed.R.Civ.P., Rule 35(a), subsequently, the court denied the Rule 35 motion.

- 3). Petitioner then timely filed the required "Notice of Appeal" to the Ninth Circuit Court of Appeals. (Refer to DK # 148-9)
- 4). The Ninth Circuit Court of Appeals declined Petitioner's invitation on 05/13th/2015. (Refer to 2013 U.S. Dist. LEXIS 157099).
- 5). Petitioner extrapolates that, a panel from the Ninth Circuit Court of Appeals issued its Order which denied the requested Application for Certificate of Appealability (pursuant to 60(b) newly discovered evidence) on or about July 17th, 2017. (See Ninth Circuit Court of Appeals Order of July 17th 2017.)
- 6). Petitioner timely filed for an extension of time to file a motion for rehearing/rehearing en banc. The motion was granted on August 21st, 2017.
- 7). Petitioner extrapolates that the appellate panel decision rendered on September 25th, 2017, conflicts with authoritative Supreme Court decisions, Circuit authority and other Circuit's persuasive law decisions.

CLAIM ONE:

1). Whether a panel of the Ninth Circuit erred in failing to grant Petitioner request for Certificate of Appealability pursuant to *Buck v. Davis*, 137 S.Ct 759, 773 (2017).

To effectively appeal the district court's order and judgment denying relief pursuant to Fed.R.Civ.P., Rule 60(b), Mr. Burton would have to first obtain a certificate of appealability (shall be referenced as COA). The standards for obtaining a COA are that a petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Burton attacks the Court's certificate of appealability decision on the basis Supreme Court's decision in *Buck v. Davis*, 137 S.Ct. 759 (2017). In *Buck v. Davis*, the Supreme Court held circuit court should not decide the merits on an application for a certificate of appealability, but just the debatability question. To put the merits question first, the Court said, is to decide the merits of an appeal without jurisdiction to do so because appellate jurisdiction depends on there being an issued certificate of appealability. (Refer to Ninth Circuit Court of Appeals Order May 24, 2017) It must be clearly pointed out that this Court has emphasized that the COA inquiry "is not coextensive with a merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the

claims.'" Buck, 137 S.Ct. at 773 (quoting Miller-El, 537 U.S. at 336.

Extraordinary circumstances may also exist where, without Rule 60(b)(6) relief, "an extreme and unexpected hardship would occur." Cox v. Horn, 757 F.3d 113, 115 (3rd Cir. 2014) (quoted case omitted). A change in the law may itself, or in combination with other factors, constitute extraordinary circumstances justifying relief under Rule 60(b)(6). Id. at 124.

In the case-at-bar district court denied habeas corpus (60(b) petition) on procedural default-without reaching the merits of the underlying constitutional claims, the Supreme Court has held that a petitioner must satisfy a two-part standard to obtain a COA. This standard required Mr. Burton to show, with respect to the claim[s] dismissed on procedural grounds, "that jurist of reason would find it debatable whether [his] petition states a valid claim of the denial of constitutional rights and that fair-minded jurists of reason would find it debatable whether district court was correct in its procedural ruling[s]." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (emphasis added); see also Coppage v. McKune, 534 F.3d 1279, 1281 (10th Cir. 2008). A procedural default may be excused if Petitioner established (1) "cause" and "prejudice," or (2) that a fundamental miscarriage of justice has occurred. Sawyer v. Whitley, 505 U.S. 333, 339 (1992). "Cause" is a legitimate excuse for the default and "prejudice" is actual harm resulting from the alleged

constitutional violations. *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1991). (Citations omitted).

With respect to Mr. Burtons claim[s], District Court and the Ninth Circuit Appellate Court failed to review and rule on the merits, Mr. Burton had to satisfy the first factor of the previously identified standard in order for the COA to issue as to those claims. That is, he must show that reasonable jurists "would find it debatable whether [any of these claims] state [] a valid claim of the denial of a constitutional right." *Slack*, 529 U.S. at 484. The Courts should have determined if Mr. Burton had satisfied this standard, although the appellate court was limited to an overview of the claims in the habeas corpus (59(e)/60(b)/local rule 230j) and the general assessment of their merits," rather than full consideration of the factual or legal bases adduced in support of the claims." *Miller-El v. Cockeral*, 537 U.S. 322, 336 (2003); see also *Buck v. Davis*, 137 S.Ct. 759, 773 (2017) ("When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." (alteration in original) (quoting *Miller-El*, 537 U.S. at 336-37)).

Petitioner would need not show his appeal would be successful to be entitled to a COA, rather, Burton must show "something more than the absence of frivolity or the existence of mere good faith." *Miller-El*, 537 U.S. at 338 (internal quotation

marks omitted). "Indeed, a claim can be considered debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, the petitioner will not prevail." *id.*

Petitioner extrapolates that the law has evolved since he was originally sentenced in 1986. The United States Sentencing Guideline's were enacted, these guidelines at one point formed the very basis for all federal sentences, also, they were mandatory. Since the Sentencing Guidelines were enacted, they have now been ruled to be only used in a advisory manner (Refer to United States v. Booker, 543 U.S. 220 (2011)). There has also been numerous material changes enacted by the Supreme Court authoritative law in Booker, Kimbrough, Gall, and Alleyne. All these cited cases would have made Burton's § 2255 motion successful. Had the above decisions been available at the time of Burton's original filing. Second, the 59(e)/60(b)/local rule 230(j) motion was made in a reasonable time after discovery of the newly released materials, as even a delay of several years is not enough to defeat it, given Burton's pro-se status. Considering that Burton was unaware of Booker, Kimbrough, Gall, and Alleyne Supreme Court decisions. Third, there is no impact if the judgment is reopened as "[no] party has relied on the judgment in this case. Mr. Burton is in federal prison. The Government has not taken any subsequent action in reliance of the judgment. "Thus, if reopened, 'the parties would simply pick up where they left off," (citing *Phelps v. Alameida*, 569 F.3d 1120, 1138 (9th Cir. 2009));

Harvest v. Castro, 531 F.3d 749 (9th Cir. 2008) ("[Rule 60(b)(6) is to be used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.]" (internal quotations omitted)).

The case-at-bar represent an manifest unjustly committed error in district courts decision. District court has attempted to circumvent ever properly having to address the merits of Burton's newly discovered claims and the constitutional/procedural violations.

CLAIM TWO:

2. Is a Petitioner who years later after conviction through counsel discovers pursuant to the Freedom of Information Act, newly undisclosed materials, which would have affected and/or altered the outcome of the conviction and sentence, is Burton entitled to equitable tolling?

A. Petitioner extrapolates that in the originally filed petition it was alleged district court committed plain error by not complying with Fed.R.Crim.P., Rule 32(i)(1)(A). The record is devoid of district courts verification that petitioner and his respective attorney had read or acknowledged discussing the presentence report and any attached addendum to the report. Counsel never confirmed to

the district court that he and Burton had read and discussed the presentence or that they had need for a continuance. Petitioner further asserted that he was never provided with a complete, certain, and true copy of the presentence report. Petitioner attached an 'Affidavit of Truth' in support of this claim. (Refer to DK # 161: November 15, 2016) During the course of Burton's attorney filing pursuant to the Freedom of Information Act in 2016, the above and below stated facts were unknown. Only through the released newly discovered FOIA materials did these numerous procedural and major constitutional errors become known.

Congressional intent reflects that it was plain error for district court not to ensure Burton guaranteed rights were not observed during the sentencing proceedings. See Fed.R.Crim.P., Rule 32(i)(1)(A); *United States v. Sustaita*, 1 F.3d 950, 953-54 (9th Cir. 1993) Moreover, the term of incarceration imposed violated the so-called parsimony principle that a criminal sentence be "sufficient, but not greater than necessary" to serve the purposes codified in 18 U.S.C. § 3553(a)(2). *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc) (quoting § 3553(a)).

B. Petitioner extrapolates as previously set out, that the United States probation/parole office violated the United States Sentencing Guidelines § 6A1.2 and Fed.R.Crim.P., Rule 34(e)(2), by failing to ensure the Petitioner received a valid complete copy of the presentence report prior to imposition of sentence.

In addition Petitioner avers that the quantitative amounts of the precursor chemicals utilized during sentencing was specifically and factually inaccurately calculated weight amounts in the adopted presentence report. The record developed during sentencing indicates that district court was fully aware of there being drug calculation problems referenced back to the amounts of precursor materials and/or dosages allegedly stated in the presentence report. (Refer to November 15th, 2016, Originally filed 59(e)/60(b)/ local rule 230(j) etc.Pleading)

EQUITABLE TOLLING:

Claimant extrapolates that he is entitled to relief under equitable tolling principles. The district court's error in failing to conduct the mandated inquiry and fully inform Burton about his options with respect to the erroneous presentence report and the possible ramifications, violated Burton's Fifth, Sixth, Eighth and Fourteenth Amendment rights. Moreover, district court's violation of established Supreme Court precedent authority and statutory procedures warranted equitable tolling consideration and judicial review based on the merits of Burton's claim[s]. "A motion on Rule 60(b)(6) is not subject to a one-year limitations period, and need only "be made within a reasonable time[.]" 1

Equitable exceptions arise from the "tradition power of the courts to apply the principles...of equity jurisprudence. The classic example is the doctrine of equitable tolling, which permits a court to pause a statutory time limit when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." Cal. Pub. Emps. Ret. Sys. v ANZ Sec., Inc., 137 S.Ct. 2042, 2051 (2017) (citations and internal quotation marks omitted).

1 Local Rule 230(j) requires a party to show the "new or different facts or circumstances claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion." Motions to reconsider are committed to the discretion of the trial court. Combs v. Nick Garin Trucking, 825 F.2d 437, 441 (D.C. 1987); Rodgers v. Watt, 722 F.2d 456, 460 (9th Cir. 1983) (en banc). To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. See, e.g., Kern-Tulare Water Dist. v City of Bakerfield, 634 F. Supp. 656, 665 (E.D. Cal. 1986), aff'd in part and rev'd in part on other grounds, 828 F.2d 514, (9th Cir. 1987)

"At bottom, the purpose of equitable tolling is to soften the harsh impact of technical rules which might otherwise prevent

a good faith litigant from having [her] day in court'" Rudin v. Myles, 781 F.3d 1043, 1055 (9th Cir. 2015) (alteration in original) (quoting United States v. Buckles, 647 F.3d 883, 891 (9th Cir. 2011)).

Burton's petition indicates it was timely filed within the one-year limitation period of the newly discovered evidence revealed through counsel. Reasonableness turns on the "particular facts and circumstances of the case. However, there still exist the possibilities that equitable tolling should be considered, if, the court determines another denial for a procedural reason. And the district court judge did not afford Burton an opportunity to present grounds for equitable tolling. Refer to Holland v. Florida, 560 U.S. 645, 649 (2010)

Timeliness is supposed to be measured as of the point of time when the moving party (Burton) has grounds to make [a Rule 60(b)] motion, regardless of the time that has elapsed since the entry of judgment. Refer First Republic Bank, 958 F.2d at 120.

CLAIM THREE:

(3). Was the district court denial of the 59(e)/60(b)/230(j), in violation of the Eighth Amendment and "manifestly unjust" in this case?

Noted Factors To Consider: In 1986 the district court imposed sentence of 15 years incarceration and 25 years special parole for a non-narcotic offense, which was disproportionality overly excessive, creating the "manifestly unjust" situation. Mr. Burton had NO prior convictions in 1986, the imposed sentence was extremely cruel and highly unusual outside of a normal sentence for a non-narcotic offense. In *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003), this Court held that, notwithstanding the "lack of clarity regarding what factors may indicate gross disproportionality," "[t]hrough [the Court's] thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established;.... A gross disproportionality principle is applicable to sentences for terms of years." *Id.* at 72-73; see also *Ewing v. California*, 538 U.S. 1179 (2003). See also *The Punishment No Longer Fits The Criminal*, 10 Notre Dame J.L Ethics & Pub. Pol'y 389, 389 (1996) ("If [the proportional] link between culpability and the punishment imposed is severed, then the foundations upon which the criminal justice system are based are rendered morally suspect."). The above stated principles all valid Burton's constitutional and procedural claims presented before these court's.

Claimant's sentence was beyond being a rare sentence of gross disproportionality prohibited by the Eighth Amendment, for, if the sentence were not grossly disproportionate, then the principle that prohibited a sentence grossly disproportionate to the offense for which it was imposed had no meaning.

District Court failed to conduct the proper merits analysis for the numerous procedural and constitutional violations alleged in the released newly discovered materials claims. The final clause of the Eighth Amendment, which prohibits cruel and unusual punishment, prohibits not only barbaric punishment, but also sentences that are disproportionate to the crime committed. After discovery of the new evidence district court sought to utilize a procedural bar instead of examining the petition for equitable tolling and on the merits of the claims.

The principle of proportionality is deeply rooted in common-law jurisprudence. It was expressed in the Magna Carta, applied by the English courts for centuries, and repeated in the English Bill of Rights in language that was adopted in the Eighth Amendment. When the Framers of the Eighth Amendment adopted this language, they adopted the principle of proportionality that was implicit in it. Refer to *Weems v. United States*, 217 U.S. 349 (1910).

A court's proportionality analysis under the Eighth Amendment should be guided by objective criteria. The main criteria for this analysis are (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

In light of the relevant objective criteria, claimant's sentence of 15 years incarceration, (which was the maximum term) 25 years special parole is significantly disproportionality to his crime, and is therefore prohibited by the Eighth Amendment. The numerous constitutional and procedural errors discovered years later would have allowed the district court to factual reexamine the prior committed errors in this case. The Supreme Court has continued to recognize that prison sentences must be proportional under the Eighth Amendment in every case that has dealt with that question since *Solem*, See *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring) ("[t]he Eighth Amendment proportionality principle also applies to noncapital sentences"); *Ewing v. California*, 538 U.S. 11, 20 (2003) ("The Eighth Amendment...contains a 'narrow proportionality principle' that applies to noncapital sentences.") (internal citation omitted)

CONCLUSION

"The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (CA DC 1983) (opinion of Scalia)

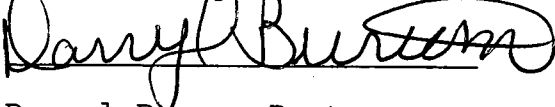
The Petition seeks relief on three grounds. Petitioner claims denial of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights based on

1). Whether a panel of the Ninth Circuit erred in failing to grant Petitioner request for Certificate of Appealability pursuant to Buck v. Davis, 137 S.Ct 759, 773 (2017)? (2) Is a Petitioner who years later after conviction through counsel discovers pursuant to the Freedom of Information Act, newly undisclosed materials, which would have affected and/or altered the outcome of the conviction and sentence, is Burton entitled to equitable tolling? (3). Was the district court denial of the 59(e)/60(b)/230(j), a Fifth Amendment due process violation and "manifestly unjust" in this case?

However, if reasonable jurist could have debated that the district court's determination that Mr. Burton's petition was time-barred, then the alternative must then consider whether Mr. Burton had stated a valid constitutional claims. The petition for a writ of certiorari should be granted.

DONE this the 22nd day of November, 2017 A.D.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Darryl Dwayne Burton". The signature is stylized with a large, looping initial "D" and a cursive script for the rest of the name.

Darryl Dwayne Burton,

In Propria Persona