

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN R. VANDEMERVE — 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

Martin R. VanDeMerve
(Your Name)
Federal Register Number: 14358-081

Federal Prison Camp - North
(Address)
4000 Victory Road

Lompoc, California 93436-2737
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Is the Circuit Split between the Seventh Circuit Court of Appeals and other¹ listed Circuits(see below) sufficient given it denies defendant's in all the other Circuit's access to the Great Writ(and in effect suspends the Writ of Habeas Corpus available only through the Seventh Circuit via 28 U.S.C. § 2241) of sufficient deprivation to require this United States Supreme Court to resolve this Circuit split⁴ which allowed to stand will deny all others except the Seventh Circuit to have access to argue² a misapplication of the sentencing guidelines, which otherwise represents a fundamental defect that constitutes a miscarriage of justice corrigible in a § 2241 proceeding?³

¹ In re Davenport, 147 F.3d 605 (7th Cir. 1998) & Narvaez v US, 674 F.3d 621 (7th Cir. 2001). The latter decision has been rejected explicitly by Sun Bear v US, 644 F.3d 700, 705 n.8 (8th Cir. 2011)(en banc), and implicitly by McKay v US, 657 F.3d 1190 (11th Cir. 2011). The former conflicts with Trenkler v US, 536 F.3d 85, 99 (1st Cir. 2008); San-Miguel v Dove, 291 F.3d 257, 261 n. 2 (4th Cir. 2002)⁴; Poindexter v Nash, 333 F.3d 372, 382 (2nd Cir. 2002); Okereke v US, 307 F.3d 117 (3rd Cir. 2002); Wooten v Cauley, 677 F.3d 303, 307-08 (6th Cir. 2012); Marrero v Ives, 682 F.3d 1190, 1193 (9th Cir. 2012); Prost v Anderson, 636 F.3d 578, 584-93 (10th Cir. 2011). When Davenport is combined with Narvaez there is a clear conflict with Gilbert v US, 604 F.3d 1293 (11th Cir. 2011)(en banc) and In re Bradford, 660 F.3d 226 (5th Cir. 2011). And Court of Appeals for the District of Columbia. However, please note that as of 2013 the only Seventh Circuit Judge to dissent from the result when combining Davenport and Narvaez is Judge Easterbrook.

² A federal prisoner may petition under §2241 "if his section 2255 remedy 'is inadequate or ineffective to test the legality of his detention.'" Id. (citing § 2255(3), the "Savings Clause"). In re Davenport, 147 F.3d 605 (7th Cir. 1998) established in the Seventh Circuit three conditions for this exception to apply: (1) he relies on a statutory-interpretation case; (2) relies on a retroactive decision that he could not have invoked in his first §2255; & (3) the sentence enhancement has been grave enough error to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding(showing a fundamental defect in his conviction or sentence).

³ A finding on the merits not on jurisdiction, procedure or otherwise.

⁴ US v Wheeler, 4th Cir., No. 16-06073, petition for rehearing en banc denied 6/11/18. The U.S. Supreme Court should take up a criminal case "of significant national importance," Judge G. Steven Agee of the U.S. Court of Appeals for the Fourth Circuit wrote June 11, 2018.

At stake is whether prisoners can take advantage of retroactive changes in the law when traditional habeas corpus review(as here)can't provide relief.

A three judge panel of the court stated his claim could go forward but had to apply the "most expansive view" of the savings clause among the circuits. The Supreme Court justices were urged to step in and resolve the conflict "so that the federal courts, Congress, the Bar, and the public will have the benefit of clear guidance and consistent results of this important area of law." Wheeler's en banc was denied so the Supreme Court justices could take Wheeler(and VanDeMerve) "at the earliest possible date in order to resolve [this]existing circuit split that the panel decision broadens even further."

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:

The following Circuit Court judgments are the subject of this Writ:

First

Second

Third

Fourth

Fifth

Sixth

Eighth

Ninth

Tenth

Eleventh

District of Columbia

ALL above stand in opposition to the Seventh Circuit.

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* No case # yest assigned and filed by same Inmate Providing Assistance	
Barry R. Schotz, 06088-097.	<u>END</u>

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 _____ 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 May 31, 2018 [Appx/Exh. A]

☒ 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: _____, 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. § 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).

STATEMENT OF THE CASE

The recent statutory-interpretation in Mathis v US, 136 S.Ct. 2243 (2016) found that when a statute is indivisible, the court must apply the categorical approach in determining whether a prior conviction can be utilized to enhance a defendant as a career offender, the sentencing court not having applied the approach, did improperly enhance the petitioner as a career offender.

The Categorical Approach was known to VanDeMerwe's sentencing court years before petitioner's Utah State Convictions. The Modified Categorical approach was known to the sentencing court before the Government's information was filed pursuant § 851 application with the court in 2008. Taylor & Shepard.

The Ninth Circuit has made clear that Mathis was a clarification of the statute and hence, the Utah State Statute under which Petitioner's sentence was enhanced had always been "indivisible" and not appropriate as a predicate drug offense as defined in the Controlled Substance Act utilized by the United States Sentencing Guidelines["USSG"]..

Knowing the above, the United States District Court Central District of California and Ninth Circuit Court of Appeals refused to utilize the Seventh Circuit's combination of Davenport and Narvaez, choosing instead to ORDER Summary Dismissal for lack of jurisdiction thereby denying a review and finding on the merits.

The Ninth Circuit made clear that petitioner challenges the legality of his sentence and must therefore do so by motion raised in his sentencing court pursuant 28 U.S.C. § 2255. However, § 2255 does contain an exception - known as the "escape hatch" or "savings clause" - which permits petitioners to file a habeas corpus petition pursuant § 2241 to contest a federal where the remedy under § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e); Hernandez v Campbell,

204 F.3d 861, 864 (9th Cir. 2000). "A petition meets the savings clause criteria where a petitioner (1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." Alaimalo v US, 645 F.3d 1042, 1047 (9th Cir. 2011) The Ninth's determination of whether a petitioner had an unobstructed procedural shot to pursue his claim considers: "(1) whether the legal basis for petitioner's claim 'did not arise until after he had exhausted his direct appeal and his § 2255 motion'; and (2) whether the law changed 'in any way relevant' to petitioner's claim after the first : 2255 motion." Harrison v Ollison, 519 F.3d 952, 960 (9th Cir. 2008)(quoting Ivy v Pontesso, 328 F.3d 1057, 1060-61 (9th Cir. 2003))

The Seventh is different and the 2018 Fourth Circuit's Wheeler is different as in "most expansive view of the "savings clause" among the circuits.

The Seventh and Fourth conclude that collateral relief must be available for errors that affect the length of sentence for PRE & POST Booker sentences, given that sentence enhancements are grave enough errors to be deemed a miscarriage of justice, therefore, corrigible in a habeas corpus proceeding. Indeed, there is no distinction between a conviction and punishment under an unconstitutional law and an unconstitutional conviction and punishment under a valid law.

REASONS FOR GRANTING THE PETITION

In Wheeler the Fourth Circuit sounds the alarm by taking the extraordinary step of disagreeing with not rehearing en banc this circuit split specifically so this Supreme Court could take and resolve this Circuit split at the earliest possible date. This recognized that the Fourth took the "most expansive view" of the "savings clause" among the circuits. (refer footnote 4 Question(s) Presented)

This important area of law requires this Supreme Court to step

in and resolve the conflict for a fair and functional federal postconviction remedy one must insist that this circuit split left alone shades easily into a sort of federal common law that violates Article III constraints on judicial power when used to settle the legal questions which the habeas corpus statute is neither silent nor ambiguous. And so the federal courts, Congress, the Bar, and the public will have the benefit of clear guidance and the vital role in protecting constitutional rights on postconviction remedies, certainly an important area of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment - The constitutional amendment, ratified with the Bill of Rights in 1791, guaranteeing the freedom of[]petition, otherwise denied by the current circuit split.

Fifth Amendment - The constitutional amendment, ratified with the Bill of Rights in 1791, providing that a person cannot be [](4) deprived of life, liberty, or property without due process of law[]. Under the Fifth Amendment known as Due Process Clause and under the Fourteenth Amendment known as Equal Protection Clause.

Eighth Amendment - The constitutional amendment, ratified as part of the Bill of Rights in 1791, prohibiting []cruel and unusual punishment.

28 U.S.C. § 2241(c)(3) Writ of Habeas Corpus by a person in federal Custody.

21 U.S.C. § 851 Career Offender Information Process

28 U.S.C. § 2255 - Motion to Vacate, Set Aside or Correct Sentence.

28 U.S.C. § 2255(c)(2) - Petitioner required to make a substantial showing of a denial of a constitutional right.

28 U.S.C. § 2255(h)(2) - A second or successive § 2255 petition.

28 U.S.C. § 2255(e) - Savings Clause entitling court to proceed on merits.

United States Sentencing Guidelines(USSG) § 4B1.1 - Career Offender guidelines.

USSG § 4B1.2(b) Defines controlled substance offense.

Utah Criminal Code Unannotated 1999 Titles 72-78 Constitutions Rules
Tables Section 76-3-208. Imprisonment -- Custodial authorities. & 77-
18-4. Sentence -- Term -- Construction.⁵

Utah Statute Code 58-37-8(1AIII)(June 16, 1998) - Statute is indivisible.

Utah Statute Code 58-37-8(2AI)(December 1, 2000) - Statute is indivisible.

28 U.S.C. § 1631 - Transfer of matter to a court with jurisdiction.

28 U.S.C. § 2255(f) - One-year statute of limitations.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

June 29, 2018

A handwritten signature in black ink, appearing to read 'Martin R. VanDeMerwe', with a long, sweeping horizontal line extending to the right.

Martin R. VanDeMerwe, Pro Se Petitioner

⁵ § 851 determination was incorrect as both Utah cases were misdemeanors by definition.

EXHIBIT A