

18-7581
No. 18A551

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
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OFFICE OF THE CLERK
SUPREME COURT U.S.

Brandon Erwin,

Petitioner,

vs.

Warden, FCI Coleman Low,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1

The majority of the federal appellate circuits conclude that § 2255 is inadequate or ineffective to adjudicate a claim of actual innocence, which results from a retroactive change in the circuit's controlling law. Thus, a prisoner may use § 2241 to present the actual innocence claim. The Eleventh and Tenth Circuit, however, conclude that § 2255 is at least theoretically adequate or effective to remedy a claim foreclosed by circuit precedent, thus in the Eleventh and Tenth a prisoner cannot access § 2241.

Does the Eleventh Circuit too narrowly restrict a district court's § 2241 corpus jurisdiction?

Question 2

Section 2255 prohibits a district court from taking jurisdiction over a § 2241 habeas corpus petition unless a § 2255 motion to vacate is inadequate or ineffective to test the legality of the detention.

An actual innocence claim untethered to constitutional or jurisdiction error is not cognizable under 28 U.S.C. § 2255; incognizability is the paradigmic example of inadequate and ineffective. Thus, § 2255 is inadequate or ineffective to test the legality of a detention based on a claim of factual innocence.

Does the Eleventh Circuit construction of § 2255(e) improperly restrict a district court's habeas corpus jurisdiction over actual-innocence claims that are incognizable under 28 U.S.C. § 2255(a) and (h)?

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The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix "A" to the petition and is not yet published for review.

The opinion of the United States District Court appears at Appendix "B" to the petition and is reported at: 2017 U.S. Dist. LEXIS 215542 (M.D. Fla. July 31, 2017).

The opinion of the United States District Court denial of the motion for reconsideration appears at Appendix "C".

The Application to the Eleventh Circuit Court of Appeals to file a second or successive 28 U.S.C. § 2255 motion appears at Appendix "D", and the grant of an extension of time to file a petition for a writ of certiorari up to and including January 19, 2019, appears at Appendix "E".

JURISDICTION

The date on which the United States Court of Appeals decided Mr. Erwin's case was August 22, 2018. (App. "A"). On November 28, 2018, an extension of time to file the petition for a writ of certiorari was granted to and including January 19, 2019 in Application No. 18A551 (App. "C"). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE
(Course of Proceedings)

On January 26, 2006, the United States indicted Mr. Erwin for three violations of 21 U.S.C. §§ 841(a)(1), (b)(1)(C). Count One and Three were for possession with intent to distribute MDMA, and Count Two was possession with intent to distribute methadone. (Crim. Doc. 14). On October 5, 2006, the government filed a superseding indictment. (Crim. Doc. 54). Count One was

conspiring to possess cocaine, methadone, and MDMA with intent to distribute. Count Two was distributing methadone and cocaine, the use of which resulted in the death of Mr. Erwin's longtime friend, Andrew Culver. Counts Three and Five were for distributing MDMA. Count Four was distributing methadone.

In 2007 at trial, defense counsel argued that the drugs Mr. Erwin provided did not cause Mr. Culver's death. (Crim. Doc. 146). Mr. Culver had spent several days in a hotel room binging on numerous drugs and consuming alcohol. Mr. Erwin's drugs were among those consumed by his friend, Mr. Culver. (Crim. Doc. 143). The government, contended that as long as the drugs sold by Mr. Erwin contributed to Mr. Culver's death, then Mr. Erwin violated the more severe crime contained in § 841(b)(1)(C). The jury found Mr. Erwin guilty on all charges. (Crim. Doc. 147). Mr. Erwin was sentenced to 20 years imprisonment for each of the 5 counts.

On February 17, 2009, Mr. Erwin appealed the criminal judgment. (Crim. Doc. 114). On September 21, 2009, the Eleventh Circuit affirmed Mr. Erwin's conviction and sentence. **United States v. Erwin**, 345 Fed.Appx. 482 (11th Cir. 2009) 07-15173-HH.

On December 13, 2010, Mr. Erwin timely filed a 28 U.S.C. § 2255 motion. (8:10-cv-2781-T30EAJ)(M.D. Fla. 2010)(Doc. 1). On September 16, 2011, with the benefit of an evidentiary hearing, the district court denied Mr. Erwin's 28 U.S.C. § 2255 motion. (Doc. 18).

On November 15, 2011, Mr. Erwin timely filed a notice of appeal and request for Certificate of Appealability, which the Eleventh Circuit denied. **Erwin v. United States**, Appeals No. 11-15538-D (11th Cir. 2012).

On October 26, 2012, Mr. Erwin filed a petition for writ of certiorari. **Erwin v. United States**, No. 12-7646 (2012). Mr. Erwin claimed that:

"[t]he enhanced penalty in § 841(b) should also be found unconstitutional or excised under the void-for-vagueness doctrine because persons of common intelligence must necessarily guess as to what is prohibited under § 841(a) and make a guess as to which words in Section § 841(b) are sentencing factors and which are elements of the prohibited acts of § 841(a). § 841 'death resulting' provision is also unconstitutional because it is open to arbitrary application and is so broad as to include innocent acts."

On January 14, 2012, the petition for certiorari was denied. *Id.*

In December 2014, after this Court's decision in **Burrage v. United States**, 134 S.Ct. 881 (2014), Mr. Erwin filed a petition under 28 U.S.C. § 2241 claiming that he was actually innocent of the "death results from" variant of § 841(b)(1)(C) and that his current detention resulted from that wrongful conviction (§ 2241 Doc. 1, grounds 2 & 3), and a sentencing error that only ripened into a claim after his § 2255 concluded. *Id.* at Grounds 1 and 2. Neither the factual-innocence error, nor the late-ripening sentencing error, could ever have been raised under § 2255, thus either § 2241 must be available to test the detention, or an unconstitutional peacetime suspension of habeas corpus has occurred.^{/1}

In October, 2017, the district court dismissed Mr. Erwin's § 2241 for lack of subject-matter jurisdiction citing Eleventh Circuit's en banc decision in **McCarthan v. Director of Goodwill Industries-Suncoast, Inc.**, 851 F.3d 1051 (11th Cir. 2017)(en banc)(cementing that, in the habeas context, § 2255(e) is synonymous with incognizability)(§ 2241 Doc. 23, 26).

Mr. Erwin sought reconsideration of the dismissal, in part because, during the pendency of the § 2241, Mr. Erwin applied for authorization to file a second or successive § 2255 petition grounded on the substantive rule identified in

^{1.} See generally **Triestman v. United States**, 124 F.3d 361 (2d Cir. 1997). **Felker v. Turpin**, 518 U.S. 651 (1996).

Burrage. The Eleventh Circuit denied Mr. Erwin's petition stating "...the [Supreme] Court did not announced a new rule of constitutional law, but instead used rules of statutory construction to interpret a substantive criminal statute." **In re Brandon Erwin**, No. 17-11552-C (11th Cir. Apr. 2017).

The Eleventh Circuit's holding (that the **Burrage** rule did not create a constitutional claim) did not persuade the district court that it had § 2241 jurisdiction. The district court refused to reconsider its October 17, 2011 dismissal of the § 2241 motion.

On May 7, 2018, Mr. Erwin appealed the denial by the district court to the Eleventh Circuit. (Appeals No. 17-15080-HH). Mr. Erwin raised whether the district court has jurisdiction to hear an actual innocence claim under to § 2241. And whether the circuit-precedent-changing retroactivity applicable rule from of this Court identified a scenario § 2255 was in inadequate or ineffective to test the legality of a petitioner's detention.

On August 22, 2018, citing **McCarthan** the Eleventh Circuit summarily denied Mr. Erwin's appeal. Stating "Erwin's challenge to his conviction under **Burrage** is a challenge to his underlying conviction and sentence, rather than the execution of his sentence. And that, "... the district court lacked jurisdiction to consider Erwin's § 2241 petition." (Appendix "A").

Mr. Erwin proceeds with a petition for writ of certiorari with this Court.

REASONS FOR GRANTING THE WRIT

A deep and mature disagreement exists among the federal circuit court of appeals on whether 28 U.S.C. § 2255(e) permits a prisoner to submit a traditional writ of habeas corpus when a retroactive Supreme Court rule shows the prisoner is actually innocent of a particular crime.

In 2018, that divide in circuit-court opinion became more pronounced. The Fourth Circuit reaffirmed its traditional position that certain actual innocence

claims are cognizable under § 2241. Furthermore, the Fourth Circuit expressly rejected the Eleventh Circuit's minority view that § 2241 did not permit actual innocence claims based on a retroactive change in the law. **United States v. Wheeler**, 886 F.3d 415 (4th Cir. 2018) (rejecting the Eleventh Circuit's holding in **McCarthan v. Director of Goodwill Industries-Suncoast, Inc.**, 851 F.3d 1076 (11th Cir. 2017) (en banc)).

In denying the government's petition for rehearing, the Fourth Circuit expressly stated that it would be best for this Court to address the issues concerning the construction of 28 U.S.C. § 2255(e) including the availability of habeas corpus to adjudicate claims based on retroactively-applicable changes in the law which implicate either actual innocence or a fundamentally flawed sentence. See **United States v. Wheeler**, 2018 U.S. App. LEXIS 15753 (4th Cir., June 11, 2018) ("The issues [concerning § 2241] are of significant national importance and are best considered by the Supreme Court at the earliest possible date in order to resolve an ("existing and broadening circuit split").")

Mr. Erwin presents this Court with a factual scenario to resolve these questions. In **Burrage**, this Court announced a rule that makes Mr. Erwin actually innocent of the crime for which he is imprisoned. The actual innocence, as opposed to a flawed sentence, scenario is illustrated by the Sixth Circuit's analysis of this Court's reasoning, "[i]n **Burrage**, the Court referred to the death-results enhancement as 'an element that must be submitted to the jury and found beyond a reasonable doubt.'" **Harrington v. Ormond**, 900 F.3d 246 (6th Cir. 2018) (attached as Appendix "F") (quoting **Burrage**, 571 U.S. at 218-19).

Accordingly, if the "death results" element is not proven, then Mr. Erwin is actually innocent of the "death results" variant of § 841(a)(1), (b)(1)(C). See generally **Jackson v. Virginia**, 443 U.S. 307 (1970) (innocence occurs when all the elements of a particular crime are not proven beyond a reasonable doubt).

That brings us to a question that haunts the nation's judiciary: does the Constitution permit the government to imprison a person based on conduct that the law does not prohibit; conduct that the law does not define as criminal?

Mr. Erwin briefly sets the intellectual stage by showing that this Court's **Burrage**-rule is retroactively applicable and that it applies to Mr. Erwin. Thereafter, Mr. Erwin shows why this Court should resolve this substantial issue that divides the Court of Appeals.

1. In **Burrage v. United States**, this Court announced a retroactively applicable rule of statutory interpretation that narrowed the scope of conduct prohibited by 21 U.S.C. § 841(a)(1), (b)(1)(C).

In 2014, this Court interpreted 21 U.S.C. § 841(a)(1), (b)(1)(C)'s term "death results". **Burrage v. United States**, 571 U.S. 204, 134 S.Ct. 881 (2014). This Court more precisely defined "death results" as requiring that the particular drugs distributed were "a but-for cause of [the] death." *Id.* at 218-219. In other words, "where use of the drugs distributed by the defendant is not an independent cause of the victim's death or serious bodily injury, a defendant cannot be liable under § 841(b)(1)(C)." *Id.* In essence, this Court's statutory interpretation narrowed the range of prohibited conduct, therefore the rule applies retroactively to cases on collateral review. **Schriro v. Summerlin**, 542 U.S. 348, 351 (2004) (citing **Bousley v. United States**, 523 U.S. 614, 620-21 (1998)).

Mr. Erwin's conviction involved his introducing two people to each other for the purpose of one acquiring pain medication. The jury found that the brokered drugs contributed to the death of the purchaser. As a result of an overbroad construction of § 841(b)(1)(C)'s term "death results" the district court imposed a mandatory 20 year sentence.

Mr. Erwin and his victim, Mr. Culver, were friends. Prior to Mr. Culver's death, Mr. Culver was at Mr. Erwin's place of residence complaining about a tooth ache and the delay in being able to set up a dental visit. Mr. Culver asked if Mr. Erwin had any pain killers, and Mr. Erwin replied that he could

make a phone call. Mr. Erwin called James Gore who met with Mr. Culver and provided Mr. Culver with what turns out to have been Methadone pills. Mr. Erwin had instructed the two men to deal with each other as he was just introducing the two men, thus Mr. Erwin did not (does not) know the quantity of Methadone provided. Mr. Erwin further instructed for them to exchange phone numbers, that way "I am not in the middle of it." Unfortunately, for all involved, Mr. Culver died, and Mr. Erwin's "moment in the middle" turned into a generation of his life.

After a jury trial in which neither Mr. Erwin nor Mr. Gore testified, the district court found Mr. Erwin guilty of distributing drugs that contributed to Mr. Culver's death, in violation of 21 U.S.C. § 841(b)(1)(C)'s "death results" enhancement. And as a result of that jury finding, the district court imposed a mandatory minimum statutory sentence, rather than the 5-year Guidelines sentence, which otherwise would have applied.

2. The continued imprisonment of an actually innocent person tears asunder the fabric of American tradition and shatters a foundational principle of the Constitution.

This Court and all circuit courts have recognized—albeit in obiter dicta—that a serious constitutional issue would arise if an actually innocent person were forced to remain in prison and derived of any judicial process to remedy the wrongful detention. See, e.g., **Murray v. Carrier**, 477 U.S. 478, 496 (1986) (A fundamental miscarriage of justice results from conviction of one who is actually innocent); accord **House v. Bell**, 547 U.S. 518 (2006).

Mr. Erwin's petition presents a claim that he is actually innocent of the "death results" variant of 841(b)(1)(C). Under the Eleventh Circuit and the Tenth Circuit's reading of 28 U.S.C. § 2255(e), Mr. Erwin has no procedural recourse. See **McCarthan v. Director of Goodwill Industries-Suncoast Inc.**, 851 F.3d 1076, 1080 (11th Cir. 2017); **Prost v. Anderson**, 636 F.3d 578 (10th Cir.

2011) (Gorsuch, J.). On the other hand every other federal circuit provides, through one test or another, that a prisoner may use § 2241 to prove that the prisoner's imprisonment unlawful; either that the prisoner is either factually innocent or convicted for a non-existent offense. See, e.g., **Hill v. Masters**, 836 F.3d 591, 594-95 (6th Cir. 2016); **Alaimalo v. United States**, 645 F.3d 1042, 1047-49 (9th Cir. 2011); **Abdullah v. Hedrick**, 392 F.3d 957, 963-64 (8th Cir. 2004); **In re Smith**, 285 F.3d 6, 8 (D.C. Cir. 2002); **Reyes-Requena v. United States**, 243 F.3d 893, 904 (5th Cir. 2001), **United States v. Barrett**, 178 F.3d 34, 52 (1st Cir. 1999); **In re Davenport**, 147 F.3d 605, 611-12 (7th Cir. 1998); **Triestman v. United States**, 124 F.3d 361, 363 (2d Cir. 1997); **In re Dorsainvil**, 119 F.3d 245, 248, 251 (3d Cir. 1997).

A particularly disturbing feature of the Court of Appeals jurisprudence is that where the United States imprisons a person determines if the person's actual innocence is relevant. If the United States had imprisoned Mr. Erwin in Pennsylvania, Michigan, Louisiana, California, or 40 states other than the Florida (or its Tenth and Eleventh Circuit siblings), then he likely would have been released to supervised release several years ago.

3. The current circuit divide produces absurd and fundamentally unjust results. In one circuit a prisoner may be heard in § 2241, while his brother and codefendant—which is housed in a different prison for the same crime—cannot be heard. An unjust and ludicrous result of the circuit divide.

The integrity eroding scenario played itself out in the cases of **Bruce v. Warden**, 2016 U.S. App. LEXIS 14410 (11th Cir. 2016) (unpublished) and **Bruce v. Warden**, 868 F.3d 170 (3d Cir. 2017). Among the crimes, the jury convicted the two Bruces of violating 18 U.S.C. § 1512(a)(1), that is, the killing or attempting to kill with intent to prevent communications with federal law enforcement.

In **Fowler v. United States**, 563 U.S. 668 (2011), this Court clarified the mens rea element of § 1512. In doing so, this Court narrowed the range of conduct prohibited by § 1512(a)(1). Consequently, both Bruces believed they were innocent of that particular count of conviction. Both sought relief under § 2241 asserting that § 2255 was inadequate and ineffective to remedy a now illegal detention. Stated otherwise, the two Bruces claimed that the new retroactively applicable **Fowler** rule overturned circuit precedent and showed they were innocent.

And here is where real life gets stranger than fiction. The Third Circuit allowed Charles Bruce to petition for relief under § 2241. While the Eleventh Circuit held "the district court lacked jurisdiction to consider the merits of (his brother Robert) Bruce's petition ... "

In sum, as the circuit conflict stands, some prisoners are eligible to file §2241 petitions and other similarly-situated prisoners are not. Also some federal district courts have greater subject-matter jurisdiction than others. A jurisdictional anomaly that constitutionally cannot be allowed to persist since legally, in the absence of express direction from Congress, one district court cannot have greater authority and power than another.

Effectively the split in circuit has judicially redefined the district court's subject-matter jurisdiction. An usurpation of Congress's authority strictly forbidden by the Constitution's separation-of-powers doctrine.

This Court should grant the writ to resolve the circuit split and correct the anomaly on the substantial issue of whether a circuit court may through decisional authority alter a district court's jurisdiction.

4. **Although policy concerns should not alter a plain textual meaning in this context alternative results help point to the text's meaning.**

Although policy consideration should not dictate textual interpretation, a valid use of policy is to determine if any particular statutory interpretation generates results that necessarily contradict the textual purpose or are otherwise absurd.

One of § 2255's primary purposes was to ease the burden's on federal district courts caused by of hearing habeas actions involving criminal judgment from other districts. The existing circuit split cuts against that principle. Now, federal prisoners have an incentive to prison shop. By example, a prisoner with a 26 U.S.C. 7212 conviction who has exhausted his orthodox remedies has every incentive to transfer from the Tenth Circuit to the Second Circuit in order to take advantage of the Second Circuit's more generous definition of 2255(e).

This Court should grant certiorari in order to resolve the circuit split and extinguish the need for prisoners to forum shop.

5. **The Eleventh and Tenth Circuit definition of § 2255(e) alters the district court's subject-matter jurisdiction, effectively violating the separation of powers doctrine.**

Congress created a single United States District Court with 97 districts. Congress granted each district courts the same subject matter jurisdiction. The existing circuit split on § 2255(e) narrows the jurisdiction of the district courts in the Tenth and Eleventh Circuits.

Three constitutional problems arise from the sustained circuit conflict:

- A. An equal protection problem exists; some citizens have access to a more expansive writ of habeas corpus a others.
- B. The circuit courts effectively usurped Congress's authority to determine a district court's subject-matter jurisdiction.
- C. When the state deprives a person of his liberty for conduct that has not been identified as a crime the government violates substantive due process.

All of which are only a reflection of a more fundamental problem—that as a practical matter, the Antiterrorism Effective Death Penalty Act suspended habeas corpus for citizens who are actually innocent of a conviction, especially when actual innocence is established by an retroactively-applicable, statutory-interpretation rule announced by the Supreme Court.

CONCLUSION

For twenty-five years, the Circuits in the Court of Appeals have disagreed on when a § 2255 motion is inadequate or ineffective to remedy a detention made illegal by a retroactively applicable rule of statutory interpretation. For a longer time, this Court has left unsettled when a freestanding claim of actual innocence (e.g. factual innocence) may be heard on habeas corpus. This Court should grant a writ of certiorari, bring Mr. Erwin's case before it, and resolve both the substantial questions of law, and should close the circuit split.

Respectfully submitted on this 17th day of January, 2019 by:


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VERIFICATION

Under the penalty of perjury pursuant to 28 U.S.C. § 1746, I declare that the factual allegations contained in this filing are true and correct to the best of my knowledge.


Brandon Erwin