No. 18-8549



IN THE

SUPREME COURT OF THE UNITED STATES

Keith D. Goodman – PETITIONER
(Your Name)

vs.

I. D. Hamilton, Warden, Haynesville Corr. Center – 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

Keith D. Goodman, #1070066
(Your Name)

P.O. Box 129, Haynesville Correctional Center
(Address)

Haynesville, VA 22472
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

## QUESTION(S) PRESENTED

In 2013, The Fourth Circuit Court of Appeals declared Va. Code § 18.2-361(A), a state criminal statute under which Petitioner remains convicted, sentenced, and imprisoned, to be facially unconstitutional. The question presented is:

1.) whether a § 2254 (habeas) claim of a conviction under that facially unconstitutional statute is, by itself, able and sufficient to overcome a statutory 'second or successive' determination by the district court?

## LIST OF PARTIES

[ x ] 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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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

[ x ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix **C** to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ x] is unpublished.

The opinion of the United States district court appears at Appendix **A** to the petition and is
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ x] is unpublished.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[ ] is unpublished.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[ ] is unpublished.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

[ x ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was 4-23-18.

[ ] No petition for rehearing was timely filed in my case.

[ x ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 5-22-18, and a copy of the order denying rehearing appears at Appendix **D**.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____.

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. _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory and rule provisions involved include:

- 28 U.S.C. § 2244
- 28 U.S.C. § 2254

## INTRODUCTION

Petitioner in this case is being held under a facially unconstitutional statute. This is no speculative claim; the statute in question – Va. Code 18.2-361(A) – was declared facially unconstitutional (under the Due Process Clause of the Fourteenth Amendment) by the Fourth Circuit in *MacDonald v. Moose*, 710 F.3d 154 (C.A.4 (Va.) 2013). Yet, Petitioner remains convicted, sentenced, and imprisoned under it.

The sole means of address Petitioner has is through a § 2254 (habeas). However, due to a 'second or successive' determination by the district court, the merits of Petitioner's claim are not being reached. Thus, the question arises: is a 'second or successive' determination enough to prevent a person from seeking relief from being held under a facially unconstitutional statute?

Certiorari should be granted in this case.

## STATEMENT OF THE CASE

1. On 9-30-14, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia under 28 U.S.C. § 2254 ("first habeas"),[1] challenging the execution of his sentence[2] (specifically, how the Virginia Department of Corrections was calculating his sentence). On 12-8-15, the

[1] The case in the U.S. District Court for the Eastern District of Virginia was assigned Case # 1:14cv1335 (GBL/TRJ).

[2] The Fourth Circuit defines the "execution of a sentence" in the habeas context as "administrative rules, decisions, and procedures applied to [a] sentence." *In re Wright*, 826 F.3d 774, 777 (C.A.4 2016).

District Court denied this first-in-time petition. The Court of Appeals denied a Certificate of Appealability ("COA") on 8-2-16 and rehearing was denied on 9-13-16.

2. In the summer of 2015, well after having filed his first § 2254, Petitioner learned that the Fourth Circuit had declared Va. Code § 18.2-361(A) facially unconstitutional in *MacDonald v. Moose*, 710 F.3d 154 (C.A.4 (Va.) 2013). Petitioner filed a second-in-time § 2254 petition in the United States District Court for the Eastern District of Virginia ("second habeas"), this time challenging his conviction under this disavowed statute. On 10-20-17, the District Court denied this second-in-time petition without reaching the merits, because it found the petition to be 'second or successive' under 28 U.S.C. § 2244. The Court of Appeals denied a COA on 4-23-18 and rehearing was denied on 5-22-18.

## REASONS FOR GRANTING THE PETITION

### QUESTION 1

### Considerations Governing Review on Certiorari – QUESTION 1

Pursuant to the Rules of the Supreme Court of the United States, Rule 10(c), Petitioner seeks review of this question on a writ of certiorari, as "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court."

This case arises in this Court from the denial of a COA. However, this Court has "jurisdiction... to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals," *Hohn v. United States*, 524 U.S. 236, 253, 118 S.Ct. 1969, 1978, 141 L.Ed.2d 242 (1998).

Moreover, Petitioner's claim here is that he is being held under a state statute already declared as facially unconstitutional, and such a claim should eliminate procedural barriers to relief. Thus, because this 'miscarriage of justice' claim would overcome any denial of a COA, the underlying merits should be considered by this Court, not just a consideration as to whether a COA should have been issued by the lower court. See *Buck v. Davis*, 137 S.Ct. 759, 774-775 (2017) ("With respect to this [U.S. Supreme] Court's review, § 2253 [COA statute] does not limit the scope of our consideration of the underlying merits").

### Reasons why the petition should be granted – QUESTION 1

As previously stated, the criminal statute under which Petitioner is being held, Va. Code § 18.2-361(A), has been found to be facially unconstitutional by the

Fourth Circuit Court of Appeals in *MacDonald v. Moose*, 710 F.3d 154 (C.A.4 (Va.) 2013). Petitioner's second-in-time § 2254 application challenging his convictions under this statute was dismissed by the district court for being 'second or successive' under 28 U.S.C. § 2244(b)(3)(A).

Statute provides that "[b]efore a second or successive application... is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider its application," 28 U.S.C. § 2244(b)(3)(A). However, peculiar to the instant case, it is also true that "a court has no authority to leave in place a conviction or sentence that violates a substantive rule," *Montgomery v. Louisiana*, 136 S.Ct. 718, 731, 193 L.Ed.2d 599 (2016).[3]

Unfortunately, the district court in this case did not heed *Montgomery*'s teachings; rather, it declared *Montgomery* (and *Siebold*, *infra*) as "inapposite," and therefore presented no "error of law or manifest injustice." District Court Order, dated 12-13-17, p.2 (**Appendix B**).

It is axiomatic that a person remaining convicted under a facially unconstitutional statute *automatically* violates a substantive rule.[4] This very

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[3] Also see *Ex Parte Medley*, 33 L.Ed. 835, 841 134 U.S. 160, 173 (1890) ("[U]nder the writ of habeas corpus we **cannot do anything else** than discharge the prisoner from the wrongful confinement in the penitentiary under the Statute of [the state] invalid as to this case") (emphasis added).

[4] See *e.g.*, *Chambers v. United States*, 22 F.3d 939, 942-945 (9th Cir. 1994), *vacd on other grounds*, 47 F.3d 1015 (9th Cir. 1995) (previous circuit decision declaring federal child pornography statute to be facially unconstitutional, even if deemed "new rule," is automatically retroactive "substantive decision" and, in any event, falls within *Teague*'s first exception) (emphasis added), *accord* Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure, Sixth Edition § 25.7 (Matthew Bender) (2011).

situation – where Petitioner remains convicted, sentenced, and imprisoned under a facially unconstitutional statute (§ 18.2-361(A)) – exists in this case. Therefore, the district court simply "ha[d] no authority to leave in place" Petitioner's conviction which violates a substantive rule, even at the expense of § 2244(b)(3).

There is thus an inherent conflict between the statute applied by the district court in this case (§ 2244(b)(3)(A)) and fundamental constitutional edicts concerning void convictions (*Montgomery*, *supra*, and *Siebold, infra*). The question that should have been considered and adjudicated by the district court[5] is how to resolve this discord in such a way that Petitioner does not remain convicted and imprisoned under an unconstitutional statute. Petitioner submits that this apparent jurisdictional conflict should have been (and should still be) resolved in Petitioner's favor because the retention of jurisdiction for an error of extreme constitutional magnitude (such as someone remaining convicted and incarcerated under a facially unconstitutional statute) overcomes the limiting of jurisdiction by mere procedural statute.

This is adequately stated in *Ex Parte Siebold*, 100 U.S. 371, 375, 25 L.Ed. 717 (1880):

> The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

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[5] "In a habeas action, federal courts stand willing to review issues of jurisdiction, allegations of substantial constitutional violations, and claims that exceptional circumstances resulted in a fundamental miscarriage of justice," *Lawrence v. McCarthy*, 344 F.3d 467, 474 (C.A.5 (La.) 2003).

Thus, even if § 2244(b) does not jurisdictionally "authorize" relief on a 'second or successive' habeas petition in this case, *Siebold* dictates that the district court should grant relief *anyway* (i.e., even without statutory authorization) if there is a want of jurisdiction from another court or if that other court's proceedings are rendered void. There is no dispute that Petitioner's conviction under a facially unconstitutional statute is void.[6] Thus, there exists a striking "want of jurisdiction" over the state's void proceedings keeping Petitioner convicted under the statute in question. Pursuant to *Siebold*, the district court accordingly had jurisdiction over Petitioner's claims, notwithstanding § 2244(b). Emphasizing its point, *Siebold* states:

> It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is **authorized to take such jurisdiction**. We think so, because, if the laws are **unconstitutional** and void, the Circuit Court acquired no jurisdiction of the causes.

*Siebold,* U.S. at 377 (emphasis added). Put simply, the district court should **take jurisdiction** in the rare scenario where a person is being held under a facially **unconstitutional** statute.

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[6] See *Siebold*, U.S. at 376-377 ("An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment"); *Journigan v. Duffy*, 552 F.2d 283, 289 (C.A.9 (Cal.) 1977) ("The statute, if unconstitutional, would be void and the conviction a nullity ab initio").

There is no question that a constitutional mandate overcomes a statutory one. This was made clear in *U.S. v. Butler*, 297 U.S. 1, 62, 56 S.Ct. 312, 318, 80 L.Ed. 477, 486-487 (1936):

> The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, -to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.

Thus, Congressional statutes must yield to Constitutional imperatives[7] (such as conviction and incarceration under a facially unconstitutional statute).

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[7] Also see, e.g., *Don't Tear It Down, Inc. v. Pennsylvania Ave. Development Corp.*, 642 F.2d 527, 533 (C.A.D.C. 1980) ("Our Constitution declares federal legislation, when compatible therewith, to be the supreme law of the land"); *Loza v. Mitchell*, 766 F.3d 466, 497 (C.A.6 (Ohio) 2014) ("rights under a federal statute are not the equivalent of constitutional rights"); *Montgomery v. Louisiana*, 136 S.Ct. 718, 749 (2016) (Justice Thomas, dissenting) ("the Court's reinvention of *Siebold* as a constitutional imperative eliminates any room for legislative adjustment"); *U.S. v. Robel*, 88 S.Ct. 419, 426 n.20, 389 U.S. 258, 268 n.20, 19 L.Ed.2d 508 (1967) ("the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict"). And see, e.g., *United States v. Levy Auto Parts*, 787 F.2d 946, 950 (C.A.4 (Va.) 1986) ("in construing the [federal] statute, the higher authority of... the Constitution must be respected and observed"); *United States v. Smith*, 62 F.Supp. 594, 596 (W.D.Mich. 1945) ("a trial court should not annul an Act of Congress, unless it is in conflict with some plain mandate of the Constitution"), citing *Mather v. MacLaughlin*, 57 F.2d 223, 225 (C.A.3 (Penn.) 1932); *Zoltek Corp. v. U.S.*, 442 F.3d 1345, 1378 (C.A.Fed 2006) (Plager, dissenting) ("To argue that Congress in enacting [28 U.S.C.] § 1498 successfully cabined the Constitution is the reverse of the understanding that the Constitution trumps legislation; it hardly seems appropriate for this court to be the first to announce such a contrary view of constitutional doctrine").

In this instance, by dismissing Petitioner's habeas, the district court has left in place a conviction that violates a substantive rule.[8] This is verbatim disallowed under *Montgomery*, and such a ruling does not adhere to fundamental constitutional mandates. Because the district court "ha[d] no authority to leave in place" the conviction, it follows that it had no jurisdiction to dismiss the habeas petition without resolving that issue. In other words, while the district court may have felt that it had no jurisdiction to adjudicate the habeas petition, it was also required to recognize that it had no jurisdiction *not* to adjudicate this particular habeas petition[9] (due to the fundamental constitutional nature of the claims) – or, rather, it was required by *Siebold* to 'take jurisdiction' to adjudicate the petition.[10]

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[8] *MacDonald*'s rule is virtually identical to the rule put forth in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). See *Muth v. Frank*, 412 F.3d 808, 817 (C.A.7 (Wis.) 2005) ("*Lawrence* is a new substantive rule and is thus retroactive").

[9] Put another way, the court has an affirmative duty to nullify a conviction that violates a substantive rule. See, e.g., *White v. U.S.*, 399 F.2d 813, 823 (C.A.8 (Mo.) 1968) ("If [a] statute is unconstitutional, **affirmance of a prison sentence** against a defendant for its violation would be a clear miscarriage of justice") (emphasis added). Also see *Geier v. University of Tennessee*, 597 F.2d 1056, 1067 (C.A.6 (Tenn.) 1979) ("The Constitution can be violated by inaction as well as by deeds"); "[I]naction in the face of an affirmative duty to act violates the Fourteenth Amendment," *accord Stanley v. Darlington County Sch. Dist.*, 879 F.Supp. 1341, 1412 (D.S.C. 1995), citing *Milliken v. Bradley*, 433 U.S. 267, 53 L. Ed. 2d 745, 97 S. Ct. 2749 (1977).

[10] Petitioner should not be made to pursue a § 2244 grant with the Court of Appeals; the argument here is that § 2244 is inapplicable when the claim is of an already-decided facially unconstitutional statute.

## Conclusion

Pursuant to the Rules of the Supreme Court of the United States, Rule 10(c), this Court should grant certiorari review on the denial of a COA, because a mere statute preventing the filing of 'second or successive' petitions should not be of sufficient power, under any circumstances, to prevent a person from being heard on a claim of being held under an indisputably already-decreed facially unconstitutional criminal statute, and at minimum, a COA should have been granted. "The instrument [U.S. Constitution] is a dead letter, unless its effect be to invalidate every act done by the states in violation of the constitution of the United States." *Craig v. State of Missouri*, 29 U.S. 410, 441, 7 L.Ed. 903 (1830) (Johnson, dissenting).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Keith Goodman

Keith D. Goodman, *pro se*

Date: 6-7-18