
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH MEDENBACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
DECLARATION OF COUNSEL

The petitioner, Kenneth Medenbach, requests leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.1 of this Court and 18 U.S.C. § 3006A(d)(6).

//

This motion is based on the attached Declaration of Counsel

RESPECTFULLY SUBMITTED June 27, 2019.

s/Matthew Schindler
Matthew A. Schindler
Attorney for Petitioner

DECLARATION OF MATTHEW A. SCHINDLER

1. I am an attorney admitted to practice before this Court and am appointed counsel to Appellant Kenneth Medenbach. I was appointed by the District Court pursuant to the CJA to represent Mr. Medenbach on August 17, 2016. I make this declaration based on personal knowledge.

2. Mr. Medenbach was appointed counsel under the CJA based on his lack of funds. I know that he is subject to a restitution order in this case and that he pays $5.00 per month based on his ability to pay. I am aware of nothing indicating he can pay the fee required.

Respectfully submitted under penalty of perjury on June 27, 2019,

s/Matthew Schindler
Matthew Schindler
Attorney for Petitioner

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH MEDENBACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Matthew A. Schindler
Attorney at Law
501 4th Street #324
Lake Oswego, OR 97034
(503) 699-7333

Attorney for Petitioner Kenneth Medenbach

QUESTIONS PRESENTED

Did the District Court err in finding that it has authority under 18 USC §3561(a)(3) to impose a sentence of six months imprisonment and a 5 year term of probation?

Are Mr. Medenbach's substantial rights affected because he remains on probation long after the statutorily authorized term of supervised release required by statute for a sentence of imprisonment would have expired?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH MEDENBACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

The petitioner, Kenneth Medenbach, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 5, 2018.

I. OPINIONS BELOW:

On August 1, 2016 the District Court sentenced Mr. Medenbach to five years of probation and six months in custody with credit for time served. *See Appendix A.* On July 5, 2018 petitioner Kenneth Medenbach had his conviction and sentence affirmed in a memorandum opinion filed by the Ninth Circuit Court of Appeals. *See Appendix B.* On August 22, 2018 petitioner sought rehearing from the panel or rehearing en banc. On August 29, 2018, the government was ordered to file a response to the petition for rehearing/rehearing *en banc*. *See Appendix C.* On October 5, 2018 petitioner's motion for rehearing/rehearing *en banc* was denied. *See Appendix D.*

II. JURISIDICTIONAL STATEMENT:

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS:

18 USC § 3561(a)(3) states:

(a) In general.--A defendant who has been found guilty of an offense may be sentenced to a term of probation unless--

> (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

18 USC § 3563(b)(10) states:

(b) Discretionary conditions.--The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant--

> (10) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release;…

18 USC § 3585 states as follows:

(a)Commencement of Sentence.—

A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b)Credit for Prior Custody.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

IV. STATEMENT OF THE CASE:

On August 1, 2016 Kenneth Medenbach received an illegal sentence of six months imprisonment and five years of probation that plainly violated 18 USC § 3561(a)(3). Under that statute, the District Court was required to place him on supervised release if a term of imprisonment was imposed.

He has now been illegally forced to remain on probation for 18 months after the term of supervised release the District Court was statutorily required to impose would have expired. Nevertheless, the Ninth Circuit concluded that Mr. Medenbach's "substantial rights" were

not violated because he had already served the six months. The Ninth Circuit's conclusion is inconsistent with the plain language of the statute and basic common sense. Under any standard, the federal government subjugating this man for years under a sentence imposed in violation of the law must be violating his substantial rights.

V. REASONS FOR GRANTING WRIT:

A. The Panel should have reviewed de novo the District's Court's decision that it had authority to impose six months in custody and five years of probation.

1. Relevant Facts – District Court:

On August 1, 2016, the District Court held a sentencing hearing. Appendix A; ECF 69.[1] At that time, the government advocated for a sentence of six months in custody as a condition of a five-year term of probation. ECF 64; ER 52-57. Mr. Medenbach argued that if the Court intended to impose a six month sentence under 18 USC § 3561(a)(3) the District Court could only sentence him to one year of supervised release. ER 19; ER 28-29. He argued that a five year term of probation was "grossly excessive." ER 28. He further argued that the appropriate

---

[1] "ECF" refers to the electronic filing document number in the District Court docket. "ER" refers to the excerpt of record.

sentence was 30 days in jail not six months in custody. ER 23. The District Court imposed a five year term of probation and a sentence of six months in custody with credit for time served over Mr. Medenbach's objections. ER 6.

2. The Court of Appeals Memorandum:

The Panel held that Mr. Medenbach's six month sentence would be reviewed for plain error because he failed to object. "When a defendant does not object in the district court, we review the imposition of probation conditions for plain error." *United States v. Forbes*, 172 F.3d 675, 676 (9th Cir. 1999). Appendix at 2.

3. Argument:

Mr. Medenbach made it clear to the District Court that he opposed a six month term of incarceration and a five year term of probation. ER 19; ER 23; ER 28-29. The District Court's statement to the government indicated that it was aware that this was an issue:

> "Can I do both six months and five years probation? What I am hearing from the probation department is if I impose jail, I can only give one year probation."
>
> ER 19.

The PSR contains the recommendation from probation of 6 months in custody and 1 year supervised release. CSD 1[2]. Given the fact that the issue of the appropriateness of this sentence was abundantly clear to the District Court and the defendant did object, it is baffling that the panel would apply plain error review.

Citing *United States v. Forbes* the Panel further erred by construing Mr. Medenbach's objection as going to the district court's discretion as opposed to its authority to impose certain conditions of probation. *Appendix* at 2. While the objection in *Forbes* may have been unclear, everyone here understood the problem. *United States v. Forbes*, 172 F.3d 675, 676 (9th Cir. 1999)("Forbes's objection to the sentence was unclear…") The issue throughout this case was whether the District Court had the statutory *authority* to impose a continuous term of custody and a term of probation 18 U.S.C. §3561(a)(3). ER 23. That is precisely why the District Court invoked 18 U.S.C. §3561(b)(10) in the statement of reasons. Somehow it was obvious to everyone except

---

[2] "CSD" refers to Confidential Sentencing Documents filed with the excerpt of record.

the appellate panel that the parties were dealing with a question of statutory interpretation.

Since interpretation of §3561 is a legal question that does not involve the District Court's discretion but instead deals the district court's authority in the first instance it should have been reviewed de novo. *United States v. Parrott*, 992 F.2d 914, 920 (9th Cir.1993). "Because Defendant argues that the district court exceeded its legal authority, no discretion is involved; our review is de novo." *United States v. Baker*, 658 F.3d 1050, 1053 (9th Cir. 2011), overruled on other grounds by *United States v. King*, 687 F.3d 1189 (9th Cir. 2012).

The Supreme Court should reverse Court of Appeal and direct it to apply the appropriate standard of review to the actual question of law presented by Mr. Medenbach.

B. The Ninth Circuit's decision finding no fault with a six month term of continuous imprisonment as a component of a sentence of probation directly contradicts the plain language of 18 U.S.C. §3561(a)(3) and United States v. Forbes.

1. Relevant facts – District Court:

In imposing a sentence of five years of probation and six months in custody, the District Court relied upon 18 U.S.C. § 3563 (b)(10). ER 2. It rejected both Mr. Medenbach's arguments and probations position

that the District Court could only impose one year of supervised release if it sentenced Mr. Medenbach to six months in prison.

2. The Court of Appeals Opinion:

The Ninth Circuit acknowledges that it is plain error to impose of continuous custody and a term of probation citing *United States v. Forbes*. See Appendix at 2. It nevertheless concludes that the six months in continuous custody that Mr. Medenbach received is different than the six months Forbes received because the District Court gave him credit for time served.

3. Argument:

The panel's decision flies in the face of Forbes, directly contradicts the plain language of the statutes at issue, and represents semantic wordplay at its worst. It is abundantly clear from the record that Mr. Medenbach served six months in jail in custody on this case. It is also apparent from the record that he received five years of probation. Both Ninth Circuit case law and the statutes make it clear that he cannot receive such a sentence and the pronouncement of the words "credit for time served" have absolutely no effect on the analysis.

18 USC § 3561(a)(3) states:

"(a) In general.--A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense."

The panel acknowledges that both the statute and *United States v. Forbes* expressly prohibit the District Court's sentence which required both six months in custody and five years of probation. *Appendix at 2*. It is therefore stupefying that it could then find under any standard of review that this sentence is consistent with Congress's statutory directive because the District Court said "time served."

The District Court relied on 18 USC § 3563 (b)(10) which is expressly restricted to situations where the custody is served intermittently. Because as of July 15, 2016, Mr. Medenbach had already served six months continuously in custody, this statute cannot be used to justify his sentence. The District Court necessarily relied on an incorrect legal ground to sentence him and the appellate panel simply ignored that fact.

Applying a plain error standard of review the Ninth Circuit in *Forbes* previously rejected the exact same sentence endorsed by the Court in this case:

> "18 U.S.C. § 3561 is headed "Sentence of probation" and provides for such a sentence "unless ... the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense." Id. at (a)(3)….

The government points to 18 U.S.C. § 3563 (b), which does permit as a condition of probation a sentence to the custody of the Bureau of Prisons "during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense...." No doubt Forbes could have been imprisoned nights or weekends but a straight sentence of six months is not the intermittent incarceration that this statute permits. *United States v. Forbes*, 172 F.3d 675, 676 (9th Cir. 1999)

It was procedural error for a District Court to improperly apply mandatory sentencing statutes in arriving at a sentence. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008). The error committed here

was compounded by a Panel that ignored both the exact holding of Forbes and unambiguous language of 18 U.S.C. §3561(a)(3). The case should be reheard to correct this injustice.

C. Mr. Medenbach's illegal sentence continues to violate his substantial rights because he remains on probation for a period of years beyond August 9, 2017 when the term of supervised release required by his sentence would have expired.

1. The Court of Appeals Ruling:

Since "[t]he judge limited the custodial sentence to time served, Medenbach has therefore failed to bear his burden of proving how this affected his 'substantial rights' when it resulted in no prison time." *United States v. Jimenez*, 258 F.3d 1120, 1126 (9th Cir. 2001).

2. Argument:

The Ninth Circuit's holding makes absolutely no sense. Mr. Medenbach served weeks of prison time in the Jackson County Jail. He served prison time at the Federal Detention Center in Sheridan, Oregon. He served prison time in the Lane County Jail. He served prison time in the Multnomah County Detention Center in Portland, Oregon.

How can the Court of Appeals possibly then conclude that he served no time as a result of the Judge's sentence? See 18 USC § 3585.

The Judge could have ordered no imprisonment and then the sentence of probation would have been legal but as soon as he credited Mr. Medenbach with that sentence, he was foreclosed from imposing probation.

The Ninth Circuit misunderstood Mr. Medenbach's objection to this sentence and the impact it has on him today. Even if you can somehow accept the absurd conclusion that he was not prejudiced because he had already served the prison time, he is prejudiced now by the fact that he remains on probation that should never have been imposed under Federal law.

Once the District Court chose to sentence him to six months in continuous custody, it forfeited the right to sentence him to probation. 18 U.S.C. §3561(a)(3); *United States v. Forbes*, 172 F.3d 675, 676 (9th Cir. 1999); *United States v. William*, 491 F. App'x 821, 823 (9th Cir. 2012); *United States v. Schukay*, 106 F.3d 411 (9th Cir. 1997). Once it added any sentence of imprisonment, the sentence is illegal. *Id.*

The Ninth Circuit completely ignored the extraordinary continuing impact that this multi-year probation involves. Its assessment of "substantial rights" reeks of the jibber jabber that makes

lawyers so despised. In the end, Ninth Circuit completely ignored Mr. Medenbach's obvious right to be free from a sentence that is patently illegal under all of the applicable statutes and case law.

Had he been sentenced consistent with the law, his supervised release term would have expired August 9, 2017, nearly a year and a half ago. See 18 USC § 3583(b)(3)(Maximum term of supervised release for a misdemeanor is one year.). It is absolutely absurd to hold that his continued subjugation pursuant to an illegal sentence does not affect his "substantial rights." *Appendix* at 2; *United States v. Castro-Verdugo*, 750 F.3d 1065, 1072–73 (9th Cir. 2014)(Breyer, J. dissenting).

The Ninth Circuit ignored the fact that every day he remains under the threat of additional prison time based on this illegal sentence. The Court ignored the fact that every day his fundamental liberties including his First Amendment rights and his Fourth Amendment rights are seriously curtailed because of this illegal sentence. How exactly did he fail to prove that his substantial rights are not impacted? If government oppression pursuant to an illegal sentence this Court has repeatedly held was plain error does not implicate his substantial rights then perhaps the time has come for the Court to simply acknowledge

that these rights aren't substantial, and, in fact, they are not rights at all. See e.g. *United States v. Castro-Verdugo*, 750 F.3d 1065, 1072–73 (9th Cir. 2014).

This case should be heard to address this Ninth Circuit's misreading of unambiguous federal statutes and Ninth Circuit's prior holdings in *Forbes, William, and Schukay*.

D. The Ninth Circuit ignored Mr. Medenbach's arguments about the meaning of the word "territory" for the purposes of Article IV, § 3, cl. 2 of the United States Constitution and misconstrued them as repetitive of arguments rejected before.

1. The scope of other property as that term is used in Article IV, Section 3 has been consistently misinterpreted by the federal courts to include public lands.

In Article IV, Section 3, Clause 2 of the United States Constitution it states:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States;…"

The "needful rules and regulations respecting the Territory or other property belonging to the United States" as it relates to territory ceded by individual states to the United States and for purposes of Article IV, Section 3, cl. 2, were established by Congress through the Land

Ordinance of 1784, the Land Ordinance of 1785, the Northwest Ordinance of 1787, almost all Acts to Establish Territorial Governments in the States, the 19 Organic Acts established by Congress to manage federal lands and even haphazardly in the Oregon Admission Act.

As it relates to territories at the time of the ratification of the United States Constitution, the Northwest Ordinance of 1787, in Section 14, Article 4, states; "no tax shall be imposed on lands [or] the property of the United States;…."[3]

The Ordinance of 1784 Resolution was put into operation by the Ordinance of 1785 by providing a mechanism for selling and settling the land. The Northwest Ordinance of 1787 addressed political needs.

---

[3] Mr. Medenbach believes that the text of the Northwest Ordinance of 1787 is missing the word "or." Without that word added the "lands," referred to in the Ordinance are not in the proper relation to "property" as non-taxable lands or the property of the United States. Neither the online printed version of the Northwest Ordinance nor the handwritten version contains this necessary language. [The Northwest Ordinance handwritten version lacks an Article 14, Section 4 entirely.] The proper relation between "lands or the property" is to clarify that the lands or the property of the United States cannot be taxed. When homesteaded, lands can be taxed and improvements to the lands, which would be property, can be taxed, as in houses, barns, fences and other like structures. Other property in Article 4, Section 3, Cl. 2, of the United States Constitution would be property, in proper relation to lands in the Northwest Ordinance of 1787, not public lands.

Following the Ordinance of 1785 Congress eased conditions for sales on credit. Widespread defaults and forfeitures followed. As these defaults and forfeitures were being re-vested in and reverted to the United States, these lands or the property of the United States became territory or other property of the United States, in Article 4, Section 3, Clause 2, that couldn't be taxed when available for disposal, but could be taxed, once homesteaded.

The needful rules and regulations respecting the Territory or other property" as it relates to Oregon and for the purposes of Article 4 Section 3, cl. 2, were also established by Congress through the Oregon Territorial Act of 1848:

> "AN ACT, To Establish The Territorial Government Of Oregon, . . .Section 6. And be it further enacted, that the legislative power of the territory, shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents, be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly, shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect…And all such laws, or any law or laws, inconsistent with the provisions of this act, shall be utterly null and void; and all taxes shall be equal and uniform, and

> no distinction shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences, which may result from intermixing in one and the same act such things have no proper relation to each other, "every law shall embrace but one object, and that shall be expressed in the title."

For the purposes of the Oregon Territory Act and Article IV, Section 3, Clause 2 of the United States Constitution other property means houses, barns, fences and other like structures. In the American West, 57% of the homesteaders made good on their claims allowing them to retain possession of their homestead. Nevertheless a large proportion of homesteaders, 43%, had their lands or other property re-vested in or reverted back to the United States under the Donation Land Claim Act of 1850. It is only these lands or other property that became "Territory" or other property belonging to the United States.

In the Constitution the only place the phrase "other property" appears is in Article 4, Section 3, cl. 2: lands which used to be territory, until homesteaded became lands in relation to other property for taxation purposes. The only thing lands could have been a proper relation to involving taxes would be houses, barns, fences and other like structures that are taxable. Therefor "other property" in Article 4

Section 3 Clause 2 can only be houses, barns, fences and other like structures.

The present state of the law is that the Supreme Court decided in 1840 that the phrase "other property" is public land. *United States v. Gratiot*, 39 US 526, 537 (1840). In *Gratiot*, the Court said:

> "The term territory as here used is merely descriptive of one kind of property: and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation;"

The Supreme Court was wrong. The Constitution does not expressly define the phrase "other property. Public lands are not a proper "relation to lands or territory" as those terms were used in the Oregon Territorial Act of 1848." The Oregon Territorial Act of 1848 suggests limitations on what "other property is." At the time of ratification there were no public lands in the States. The only land controlled by the federal government was "Territory" at the time the Constitution was ratified. Houses, barns, fences and other like structures that re-vested in or reverted to the federal government under the Donation Land Claim Act of 1850 are the only other property that is

in proper relation to lands or Territory as understood in the Oregon Territorial Act of 1848.

2. The Supreme Court's definition of "other property" is inconsistent with intent of the framers to preserve the sovereignty of the States.

"FREE AND INDEPENDENT STATES" were paramount to the founding of our Nation according to the Declaration of Independence. Similarly, the Articles of the Confederation states: "Each said State retains its sovereignty, freedom, and independence." The United States Constitution supports the same ideals in establishing a federal government of limited and enumerated powers. If the Constitution does not delegate that power, the federal government does not have that power.

Our founding fathers would never have imagined that legislation inconsistent to the Constitution over taxing lands and or other property would morph into the federal government owning public lands in the states.

Nothing in the Constitution delegates to the federal government the power to own lands in the States, nor is the power to own lands in the States prohibited by the Constitution to the States, thus the power

to own lands in the States is reserved to the States, pursuant to the 10th Amendment. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

E. The District Court judge's oath of office, as set out at 28 USC § 453, is unlawful and therefore the judge could not lawfully preside over this matter.

1. Congress has required an official oath that is inconsistent with the Constitution.

In 1997, in an appeal from a conviction in U.S. District Court for the Western District of Washington, defendant challenged the constitutionality of federal ownership of public lands in Washington State. *United States v. Medenbach*, 116 F.3d 487 (9th Cir. 1997). Defendant also argued that since the Constitution does not confer upon federal courts the power of judicial review *Marbury v. Madison*, 5 U.S. 137 (1803), was wrongly decided. *United States v. Medenbach*, 116 F.3d 487 (9th Cir. 1997).

The Ninth Circuit Court of Appeals rejected the argument because defendant failed to offer reasoning or case law to support the argument that *Marbury v. Madison* should be overruled. *Id.* What follows is reasoning and proof that *Marbury v Madison* must be overruled.

Article VI, Sec. 2 of the United States Constitution states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

The Constitution is the "Supreme Law" of the land. In order to support a true union by the people and for the people and to assure that the Constitution remained the Supreme Law of the land, the drafters included in that very document the requirement of an oath before serving the country in an official capacity:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to 'support this Constitution' but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."
>
> Article VI, Sec. 3 of the United States Constitution

These critical words were inserted when the entire organization of government was being adopted by the Constitutional Convention. It was in that form, and with these powers, that the Constitution was submitted to the People of the several States for their consideration and decision. The emphatic language of the oath explicitly required is to "support" this Constitution. There is no power more clearly enumerated

by the plain language of the Constitution of the United States than this requirement for officials to "support" the Constitution.

The first law of the United States of America, enacted in the first session of the First Congress on 1 June 1789, was Statute 1, Chapter 1: an act to regulate the time and manner of administering certain oaths, which established the oath required by civil and military officials to, "support the Constitution." The first oath prescribed by Congress (June 1, 1789) was simply, "I do solemnly swear (or affirm) that I will "support the Constitution of the United States."

It took just one week short of four months for Congress to pervert the Constitution's command. In the Judiciary Act adopted September 24, 1789, Congress prescribed an unconstitutional second oath of office to United States judicial officers:

> "I, , do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me according to the best of my abilities understanding, agreeably to the Constitution and the laws of the United States. So help me God."

See Judiciary Act of 1789, 1 Stat. 73, Sec.8.

This unconstitutional oath of "understanding, agreeably", was central to the Supreme Court's holding reserving to it the power to interpret the constitution in *Marbury v Madison*, 5 U.S.137 (1803).

The Supreme Court said:

> "Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime".
>
> *Id.*

If the unconstitutional second oath of office of "understanding, agreeably to the Constitution," had not been established by the Judiciary Act of 1789, 1 Stat. 73, Sec.8, it would never have been available to the Supreme Court in 1803 and *Marbury v Madison* would have never come into existence. According to *Marbury v. Madison*, the oath by its very nature requires the power of Constitutional interpretation. Because that oath was inconsistent with the Constitution in the first place, *Marbury* was wrongly decided.

2. Congress's attempts to establish an oath have been inconsistent with the Constitution.

In the 1990 Judicial Improvements Act, at 28 USC § 453, Congress replaced the phrase, "according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God," to "under the Constitution." This begs the question of why the oath was changed after nearly 200 years and replaced with another oath no more consistent with the Constitution than the one it replaced.

The legislative history on this statute and its intent is opaque. The Congressional Research Service of the Library of Congress, which works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate, prepares upon enactment into law, a final public law summary. It stated concerning this provision:

> Upon the enactment of replacing "according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God," with "under the Constitution," the Congressional Research Service stated, "This language proved reasonably more effective in tying the decisions of the judiciary to the authority of the United States Constitution."

It appears that Congress intended to force the judiciary to tie its decisions to the Constitution with a revised oath that eliminated the language allowing the courts to extend their authority in an unconstitutional manner. It also suggests that because actions were taken by the courts in an extra-constitutional manner pursuant to an invalid oath, decisions made by the federal courts prior to 1990 are presumptively unconstitutional.

At the same time, since the 1990 Judicial Improvements Act did not cure the unconstitutional flaws in the oath which remains inconsistent with the plain language of the Constitution:

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to "support" this Constitution..."
>
> Art. VI, Sec. 3 United States Constitution

The plain language of the Constitution dictates that an oath with the language "under the Constitution," is no closer to the correct Constitutional oath to "support the Constitution," than "understanding, agreeably" to the Constitution.

3. The federal court's flawed understanding of the unconstitutionality of the oath and its impact are apparent from the course of defendant's history in the federal courts.

In *United States of America v Medenbach*, the Ninth Circuit stated:

> "Medenbach argues that the district court judge's oath of office was constitutionally deficient because the statutorily prescribed oath of office set out at 28 U.S.C. § 453 does not mirror the wording of the Constitution itself. The Constitution requires that, "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath of Affirmation, to support this Constitution." (U.S. Const. art.VI, cl. 3). The oath prescribed by statute requires that each federal justice or judge swear to "faithfully and impartially discharge and perform all the duties incumbent upon me ... under the Constitution and laws of the United States." 28 U.S.C. § 453. Medenbach argues that the district court judge who presided over

> Medenbach's bench trial lacked judicial authority because he did not swear to "support" the Constitution, only to perform his duties "under" the Constitution. The Constitution does not require that a judge swear verbatim to "support" the Constitution. Thus, we reject Medenbach' s claim that the district court judge's oath of office was deficient."

United States v. Medenbach, 116 F.3d 487 (9th Cir. 1997)

The Ninth Circuit's holding that a judge need not swear verbatim to "support the Constitution" is plainly inconsistent with the language of the Constitution.

4. Petitioner's literal reading of the oath is supported by Marbury.

In *Marbury v Madison*, the Supreme Court considered the limited grant of judicial power expressly found in the language of the document as key to understanding its provisions:

> It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.
>
> If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded

> further than to have defined the judicial power, and the tribunals in which it should be vested The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.
>
> Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.
>
> It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

Marbury v. Madison, 5 U.S. 137, 174, 2 L. Ed. 60 (1803)

If it cannot be presumed that any clause in the Constitution is intended to be without effect, neither the Congress nor the federal courts have the power to ignore the language of the Constitution requiring a specific oath.

For the same reason, the Court was wrong in *Medenbach v United States of America* Case No. 1:14-cv-641-PA when Judge

Panner stated, "Plaintiff s claim is wholly insubstantial because the slight difference in wording between the Constitution and the statute providing the oath of office has no legal significance." Nowhere does the Constitution vest in Judge Panner the right to decide that the plain words of the Constitution have no effect. Furthermore, the implication from his holding is that everyone in government has the right to interpret or in this case, disregard, the Constitution.

5. Marbury is inconsistent with the language of the Constitution and the right to interpret the Constitution belongs to the people.

The plain language of the Constitution allows and requires only one oath of office to "support the Constitution." Any other oath of office for United States justices and judges, that does not have "support the Constitution" in it, prescribed by Congress and taken by federal judicial officers does not meet the requirements of Article VI, Sec. 3 and the 10th Amendment.

The 10th Amendment, which is never mentioned in *Marbury v Madison*, states; "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *Marbury v Madison* the Supreme Court unconstitutionally claimed for itself the power to interpret the Constitution when it stated: "It is emphatically the province and duty of the judicial department to say what the law is,…"

Judicial interpretation of the Constitution is not a power delegated to the judicial department by the Constitution. It was a power unlawfully taken from the people by this Court without Constitutional authority in violation of the 10th Amendment. *Marbury v Madison*, as well as *United States v. Medenbach* were wrongly decided. The United States District Court lacks jurisdiction to decide this case because the Constitution's plain language does not confer upon federal courts the power of judicial review. *See* United States Constitution, Article VI, Sec. 3.

Since all state officers also take an oath to support the Constitution, they are prohibited by the Constitution from interpreting the Constitution. Thus the powers quoted in Marbury v Madison, are reserved to "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, who ordained and established this Constitution for the United States of America."

VI. CONCLUSION:

Mr. Medenbach is subject to an illegal and unconstitutional sentence affirmed by the Ninth Circuit. His sentence should be summarily reversed and he should be discharged from probation.

Respectfully submitted June 27, 2019,

s/Matthew Schindler
Matthew Schindler
Attorney for Kenneth Medenbach