

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Andrew R. Spengler — PETITIONER
(Your Name)

vs.

Rodney W. Chandler — RESPONDENT(S)

On petition for an Extraordinary Writ from the
United States Court of Appeals for the Fifth Circuit

In re Andrew R. Spengler

Request for remand as permitted by the habeas corpus statute
28 U.S.C. § 2241(b); or a writ of habeas corpus under § 2241(a).

Andrew R. Spengler

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SUMMARY

Petitioner, Andrew R. Spengler, pro se, filed a motion in the district court under 28 U.S.C. § 2241 challenging the execution of his federal sentence (and other claims). The district court denied the motion and articulated no reasoning at all in reference to Spengler's sentence execution claim. Spengler has presented a proper claim to a court with jurisdiction to hear it and is entitled to a reasoned ruling.

Spengler filed a timely appeal regarding, and the Fifth Circuit dismissed the action for a lack of subject matter jurisdiction. Subject matter jurisdiction is a court's power to hear a case. There is statutory authority for the Fifth Circuit to hear the case. The court's dismissal makes no sense, and denies Spengler an appeal to which he is entitled.

Spengler requested Supreme Court intervention through Rule 22. The Clerk of Court refused to file the presented action that was authorized by rule and statute. The Clerk of Court cited no authority or precedent preventing the docketing of the original action and instructed Spengler to file under Rule 20.

Spengler seeks a remand back to the district court so that a reasoned adjudication of his properly presented sentence execution claim can be conducted. Supreme Court intervention is required because Spengler has already served the statutory maximum penalty and continues to be confined in prison. Spengler has been denied his right to court access and habeas corpus by the lower courts (they simply will not process his valid claim).

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR AN EXTRAORDINARY WRIT
In re Andrew R. Spengler

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B, C, H to the petition and are

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ unpublished.

The opinion of the United States district court appears at Appendix D 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 8, 2017

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 28, 2017, and a copy of the order denying rehearing appears at Appendix C.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Jurisdiction is also established by 28 U.S.C. § 2241; 28 U.S.C. § 1651; and authorized by Supreme Court Rule 20.

☐ 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained is had.

(b) The Supreme Court, and justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

STATEMENT OF THE CASE

PETITIONER SPENGLER'S CASE REPRESENTS EXCEPTIONAL CIRCUMSTANCES WHICH WARRANT A REMAND ORDER FROM THIS COURT

Spengler's issue manifests because of a failure to adjudicate by the United States District Court for the Northern District of Texas. Spengler presented a challenge to the execution of his federal prison sentence, which is a proper ground brought under 28 U.S.C. § 2241. The current sentence exposes Spengler to a prison sentence greater than the statutory maximum penalty. (Spengler has already served the maximum penalty and continues to be imprisoned.) The district court improperly denied the motion for a lack of jurisdiction. The district court did not articulate any reasoning for the dismissal of Spengler's sentence execution claim in its denial.

Based upon the above, Spengler has satisfied Supreme Court Rule 20 by making an application to the district court where he is held. Spengler's case is exceptional because he is being denied the proper use of 28 U.S.C. § 2241. The district court has acted against all precedent by not hearing this sentence execution claim.

Spengler filed a timely appeal to the Fifth Circuit Court of Appeals. The Fifth Circuit collected a full filing fee from Spengler and then dismissed the appeal for a "lack of subject matter jurisdiction". Subject matter jurisdiction is a court's power to hear a case. There is statutory and precedential authority that allow for Spengler's appeal (see 28 U.S.C. § 1291). In fact, it is well established that appellate courts are to give Spengler's presented issue(s) *de novo* review. The

dismissal is exceptional because it is far removed from legal, ethical, and common practice.

Spengler sought reconsideration and informed the appellate court of the specific statutes that provided jurisdiction for his appeal. Spengler also showed the appellate court that the Appellee never moved the court for dismissal based upon a lack of jurisdiction. Spengler presented jurisdictional **FACTS** to the court and they were ignored in exceptional form. The appellate process guaranteed by law eludes Spengler.

Spengler's case is exceptional because the lower courts have made themselves unavailable to him. These actions represent a constitutional infringement upon Spengler's right to access the courts. There is no other remedy at this point that can restore Spengler's rights other than appellate action by the Supreme Court.

Spengler simply requests that his case be remanded back to the district court (consistent with 28 U.S.C. § 2241(b)) so that he can receive the judicial process that the Constitution entitles him to.

Title 28 U.S.C. § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

CASE HISTORY AND FACTS

Petitioner Spengler filed a motion under 28 U.S.C. § 2241. The district court noted Spengler's asserted grounds: federal subject matter jurisdiction was lacking for his prosecution; Spengler is actually innocent of count one as a matter of law; and the execution of Spengler's sentence creates a sentence in excess of the maximum penalty prescribed by law. The petition was denied. The district court stated that Bond v United States, 564 US 211 (2011), had not been declared retroactive on collateral review and the court believed that Spengler primarily relied upon this case.¹ The district court did not articulate in its order any reasoning for the denial of Spengler's sentence execution claim.

Spengler appealed raising three issues: 1.) is the Supreme Court decision in Bond v United States, 189 L. Ed. 2d 1 (2014) retroactive; 2). can a free-standing claim of actual innocence be raised in a § 2241 petition; and 3.) the failure of the district court to address Spengler's sentence execution claim required remand. Spengler's brief was filed on February 21, 2017, and accepted by the appellate court.

The Government asserted that the appeal lacked merit in a motion to the appellate court requesting dismissal (Appendix E). The Government also requested an extension of time in which to file a brief if its motion to dismiss was denied. The Fifth

1.) The district court incorrectly cited an earlier Bond case in its order (Bond v United States, 564 US 211 (2011)). Spengler had in fact relied upon the second Bond opinion to be issued (Bond v United States, 189 L. Ed. 2d 1 (2014)).

Circuit later issued an order dismissing the appeal for a "lack of jurisdiction" (Appendix B). No party to the action requested or articulated any claim that the appeal lacked jurisdiction. It is unclear as to how this impossible contention was reached. (The PACER docket notes that the jurisdictional dismissal was a clerk order, see docket at date 6/22/2017.)

Spengler motioned for reconsideration because jurisdiction for the appeal is firmly established (Appendix F). Reconsideration was denied (Appendix C).

Spengler motioned the Fifth Circuit again seeking clarification as to how appellate jurisdiction was absent (Appendix G). The court had not previously explained their finding and no legal or logical basis existed in which to conclude that jurisdiction was lacking.

On November 6, 2017, Spengler received a *per curiam* order. The order (located at Appendix H) states: "Warden Chandler moved to dismiss for lack of subject matter jurisdiction. On May 9, 2017 we granted the motion." This is not true. The only motion of Warden Chandler's in this case is located at Appendix E, and nowhere in its text does Chandler request a dismissal for a lack of jurisdiction.

The remainder of the order is also divergent, stating: "Spengler failed to show that Section 2255 was inadequate or ineffective to test the legality of his convictions or sentence." This "finding" is not consistent with the substance of the reconsideration request. The order does not establish any authority for a jurisdictional bar as issued. Nor does it

reference the appellate questions presented by Spengler (see questions listed above and appellate brief docketed 2/27/2017, case no. 16-11793). There is no rhyme or reason to the appellate dismissal.

Spengler's appeal has been processed by an errant staff attorney at the Fifth Circuit and "rubber stamped" before issuance. (See Richard A. Posner, *Reforming the Federal Judiciary*, CreateSpace 2017, pp.176-185; which studies and outlines the Fifth Circuit staff attorney program. Spengler's appeal was handled by a clerk/staff attorney, not a judge as the U.S. Constitution requires.) An underqualified person processed and decided Spengler's case and this has resulted in an absurd dismissal for a lack of jurisdiction.

Spengler has been denied the use of the law 28 U.S.C. § 1291 which provides for his appeal. Spengler has been denied the appellate process that is due to him. Spengler requests a remand to the district court consistent with 28 U.S.C. § 2241(b) for a decision upon his sentence execution claim or an order that re-instates his appeal in the Fifth Circuit.

REASONS WHY THIS WRIT SHOULD BE GRANTED

SPENGLER'S SITUATION IS EXTRAORDINARY, HE HAS BEEN DENIED JUDICIAL PROCESS AND THE USE OF 28 U.S.C. § 1291, THE ETHICAL DUTIES OF LOWER COURT OFFICERS ARE BEING IGNORED

The interests of justice beg for action because Spengler is being exposed to an excessive prison sentence that the law does not allow. The judicial system has turned a blind eye to Spengler's illegal confinement. The merits of the claim have

been avoided by court officers. Spengler has proven his claim as a matter of law. Ethical duties of the court process and its officers are being ignored which harm Spengler. Court officers have a duty to review the **substance** of Spengler's claim.

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v United States, 295 US 78, 88 (1935); also cited in Young v U.S. ex rel. Vuitton et FILS S.A., 481 US 787, 803 (1987).

Spengler has presented serious issues directly related to the unlawful constraint of his personal liberty. Court officers have refused to take the required objective view of these issues which has resulted in a failed judicial system. The failure to confront the facts of this case perpetuate Spengler's illegal imprisonment. (See "Ethical Consideration (EC) 7-13 Canon 7 of the American Bar association (ABA) Model Code of Professional Responsibility (1982): 'The responsibility of a public prosecutor differs from that of the usual advocate; **his duty is to seek justice, not merely to convict.**'" Young at 803, emphasis added.) Justice, in this instance, means acknowledgement of the alleged facts that create the illegal sentence.

Spengler seeks a reasoned decision upon the issue of his unlawful imprisonment and remand by this Court is required in order to manifest such a ruling. Due process requires an

adjudication of the merits and this eludes Spengler.

Spengler filed a timely appeal, authorized by statute, and it was improperly dismissed. The Fifth Circuit ruled that the appeal lacked jurisdiction after accepting Spengler's brief. Furthermore, no party to the action asserted that jurisdiction was lacking (see Appendix E). This ruling was in error.

Title 28 U.S.C. § 1291 grants the appellate courts power to review "all final decisions of the district courts". The appellate courts do have jurisdiction to determine retroactivity issues as presented by Spengler on appeal (see Garland v Roy, 615 F.3d 391, 397 (5th Cir. 2010)). Additionally, Spengler has posed two jurisdictional questions in reference to 28 U.S.C. § 2241 which are to be given *de novo* review by the appellate courts (see Pack v Yusuff, 218 F.3d 448, 451 (5th Cir. 2000)).

Spengler has been unjustly denied appellate process and now seeks remedy. An "individual who considers himself injured has a right to resort to the laws of his country for a remedy." Marbury v Madison, 5 US 137, 166 (1803). The Fifth Circuit will not allow Spengler to exercise his right to appellate process despite the fact that jurisdiction for the appeal is firmly established by precedent and statute.

**THE EXECUTION OF SPENGLER'S SENTENCE CREATES A PRISON TERM THAT
IS LONGER THAN THE STATUTORY MAXIMUM PENALTY AND
SPENGLER HAS SERVED THE MAXIMUM SENTENCE**

The Fifth Circuit has held that the execution of a federal sentence is a proper ground brought under 28 U.S.C. § 2241. The Government has conceded this fact and cited specific case law in

its brief at page 8 (Appendix E) holding the same (see Toliver v Dobre, 211 F.3d 876, 877 (5th Cir. 2000); "section 2241 is a means of attacking the manner in which a sentence is executed").

Spengler was convicted at trial of two counts. Both of these counts contain the same criminal elements and stem from the same occurrence (see indictment and jury verdict forms at Appendix A). The sentencing court improperly executed these sentences consecutively. Spengler received 120 months as to count one and 68 months as to count two for a total term of 188 months.

The Supreme Court held in Rutledge v United States, 517 US 292, 307 (1996) and Ball v United States, 470 US 856, 861-864 (1985) that if two criminal charges, which manifest from the same instance, contain the same elements (or a lesser included of one another) one of the convictions must be vacated. Ball cites Blockburger v United States, 284 US 299 (1932) which relates that if the criminal elements of two separate counts are the same, sustaining both convictions is a violation of the Double Jeopardy Clause (absent expressed congressional intent to compound punishment in the subject statutes).

The elements of Spengler's counts are recounted below:

- | COUNT ONE | COUNT TWO |
|--|--|
| 18 U.S.C. § 241 | 18 U.S.C. § 242 |
| - a conspiracy | - aiding and abetting |
| (overt act required) | (overt act required) |
| (overt acts listed) | (NO OVERT ACTS LISTED) |
| - under color of law | - under color of law |
| - to willfully | - and willfully |
| - perform an unreasonable seizure in the form of excessive force | - perform an unreasonable seizure in the form of excessive force |

Overt acts are required to be charged and proven in a civil rights conspiracy. The aiding and abetting modifier as charged

against Spengler also requires an overt act. In Spengler's indictment only count one has overt acts listed. Both charges rely upon the same overt act(s), contain the same criminal elements, and stem from the same occurrence.

Aiding and abetting is duplicative of conspiracy in the civil rights context. (See United States v Branch, 91 F.3d 699, 730 and 732 (5th Cir. 1996) where the elemental sub-parts of conspiracy and aiding and abetting are cited and identical.) One of Spengler's counts must be vacated because they are the same crime and the execution of his sentence is improper.

Both of the counts charged against Spengler carry a maximum penalty of 10 years imprisonment. The 188 month sentence that Spengler is serving is in excess of the statutory maximum penalty. A count against Spengler is required to be vacated as the sentence execution is unlawful. The error in the execution of Spengler's sentence effects his substantive rights.

THE SOLICITOR GENERAL HAS DECLARED THAT THE CHALLENGE SPENGLER HAS MADE IN REFERENCE TO HIS SENTENCE IS PROPERLY RAISED UNDER 28 U.S.C. § 2241

An en banc Seventh Circuit Court of Appeals had examined a similar claim of sentence execution raised in a § 2241 motion. In Webster v Daniels, 784 F.3d 1123 (7th Cir. 2015)(en banc), the Seventh Circuit placed heavy reliance upon the views of the Solicitor General. Webster quotes a significant portion of a brief composed by the Solicitor General at 1137-1138.

The Solicitor General stated: "The question presented here is whether petitioner is entitled to challenge the sentencing error

by way of a petition for writ of habeas corpus under 28 U.S.C. § 2241. The lower courts held that Section 2241 was not available because petitioner was challenging his sentence rather than his conviction. That holding is incorrect." Id. The Solicitor General went on to explain that the savings clause (i.e. § 2241) is available even though the challenge is to the sentence, not the underlying conviction. Id. The Supreme Court then remanded the case back to the lower courts for processing of the sentencing error claim.

Spengler's situation is no different but the lower courts will not review the merits. The Solicitor General has concluded that unlawful sentences manifest a miscarriage of justice, and are proper subjects of § 2241. The lower courts simply refuse to allow Spengler to use the law and ignore the facts which establish his illegal sentence. Spengler has presented and cited the Solicitor General's views at the lower levels, yet the Respondent still asserts procedural blocks to adjudication.

CONCLUSION AND RELIEF SOUGHT

The interests of justice beg for this Court to take action. Spengler has already served the maximum penalty prescribed by law and continues to be confined (Spengler has served over ten years in prison).

Spengler has attempted to use the law 28 U.S.C. § 2241 for the purpose outlined by the courts that have interpreted it (i.e. challenge the execution of his illegal sentence). The district court has improperly refused to articulate any basis

for denying his claim. Spengler filed a proper appeal under the law 28 U.S.C. § 1291. Again, Spengler's right to use the laws of his country were withheld through the improper appellate dismissal for a "lack of jurisdiction". The lower courts have refused to allow Spengler to use the laws as he is entitled.

Intervention is needed as Spengler's situation is extraordinary. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Marbury at 163.

WHEREFORE, Andrew R. Spengler, pro se, respectfully requests an order remanding this case back to the district court (as the expressed language of § 2241(b) allows) while instructing the district court to issue a reasoned and supported opinion upon the subject of Spengler's sentence execution claim. Spengler also requests court appointed counsel upon any remand. Alternatively, Spengler requests that the Court issue an order consistent with § 2241(a) granting his claim and correcting his sentence or remanding his case back the the Fifth Circuit so that his appeal may be properly processed. Spengler further requests any other relief that the Court deems appropriate and just.

Dated: April 18, 2018



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