

CASE NO

IN THE
Supreme court of the united states

Peter G Noe

VS.

Warden of Victorville

on Petition for a writ of certiorari to

Ninth circuit court of Appeals

Petition for writ of Certiorari

Peter G Noe # 10849-041

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Florence, CO, 81226

Questions Presented

- ① What is the appropriate use of title 28 usc 2255(e) and title 28 u.s.c 2241 for federal inmates?
- ② When is 28 USC 2255 "Inadequate or ineffective To test the legality of a persons confinement"
- ③ Do The arguments presented in Noe v Warden of Victorville No; CV 17-01574-AB meet the requirements?

List of Parties

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

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In the
Supreme court of the united state

Petition for writ of Certitrary

Petitioner respectfully prays that a writ
of certitrary issue to review the
judgement below

OPINIONS BELOW

The opinion of the united states court of
appeals at Appendix A to the petition
and is unpublished

The opinion of the district court appears
at Appendix B and is unpublished.

Jurisdiction

The date on which the United States Court of Appeals denied C.O.A. was April, 20, 2018

No petition for rehearing was timely filed in my case

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

constitutional and statutory Provisions involved

us const XIV amend.

21 USC 851.

us const art 1st 9 cl 2

The u.s. const XIV amend prevents a retroactive increase in a criminal Statute.

The u.s. const prohibits the suspension of the Writ of Great writ.

Statement of the case

Noe filed a Motion under section 28 USC 2241 and invoked the savings clause in 28 USC 2255(e). The Magistrate judge dismissed the motion without reaching the merits of the Petition concluding that "every circuit to have addressed the issue has concluded that the savings clause embodied in §2255(e) requires a claim of actual innocence directed at the underlying conviction, Not merely the Sentence Appendix C, page 13, paragraph 20-25. The district court approved the recommendations and the Ninth circuit denied C.O.A concluding "Appellant has not shown that jurists of reason would find it debatable whether the motions states a constitutional claim." Appendix A. In fact there is a deep and mature split in the circuits on this issue. Noe makes three claims. All of these claims have been addressed by other circuits and inmates in those circuits have received relief. Noe's claims are that the Supreme court's ruling in Peugh v U.S. 133 Sct 2072 (2012) renders Noe's sentence in excess of his statutory maximum and Actual innocence. The district court ruled that Noe can only use Section 28 USC 2241 to

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Argue condition of confinement the district court relied on its ruling in Frank V Banks, 2011 WL 3477096 At 3-5 (C.D. Cal July 15 2011) see (Magistrate Judges Report and recommendation of page 13 paragraph 17-26 and page 14 paragraph 1-4). The courts conclusion that "Agreeing that every circuit to have addressed the issue has concluded that the saving clause embodied in 2255(E) requires a claim of actual innocence directed at the underlying conviction not merely the sentence". See Appenix C, page 13 paragraph 21-25. This ruling directly conflicts with several other circuit courts ruling in fact.

The 7th circuit ruled in Brown V Caraway 719 F.3d 583 (7th cir 2013) "That defendants can use section 28 USC 2241 to argue that there sentence is in excess of the Statutory Maximum Penalty Authorized by congress."

The 6th circuit ruled in Hill V Bart Masters Warden No 15-5188 6th circuit (2016)

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"A prisoner can use 28 USC 2241 to challenge the misapplication of a sentencing enhancement under a then mandatory 2001 Sentencing Guideline manual."

The 11th circuit ruled in Bryant v. Warden (2013 BL 355128, 11th cir No 12-11212, 12/24/13) that they acknowledge "a deep and mature circuit split on the reach of the saving clause" But that "when a Petitioner is serving a sentence above the applicable statutory maximum he is being detained without authorization by any statute" The court said "under these narrow limits of the savings clause there is little undermining of finality interests to grant relief to prisoners who are serving illegal sentences above the authorized statutory maximum penalty". They also ruled "There are serious constitutional separation-of-powers concerns that Attach to sentences above the statutory maximum penalty authorized by congress".

Noe invoked these rulings but the court was bound by its ruling in Frank v

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BANKS.

Noe is serving a sentence in excess of the Statutory Maximum Penalty Authorized by congress and should be allowed to use the savings clause in 2255(e) and title 28 U.S.C 2241 to address this claim.

Noe was sentenced when the Sentencing guidelines were mandatory. Noe was on direct review when the Supreme court ruled in Blakely V Washington 124 Sct 2531 2536 (2004) that "the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

Because Noe was on direct review Blakely V Washington was applied under Griffin V. Kty 479 U.S. 314 (1987)

At that time the Supreme Court gave Noe a Statutory Maximum sentence of 235 months. That was the Maximum sentence a judge could impose

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with no additional facts outside of the jury verdict.

Noe was waiting to be remanded back for resentencing when the Supreme court heard United States v Booker 125 S.Ct 2531 (2005).

The 8th circuit court of appeals held Noe's case pending the ruling in Booker. The Supreme court ruled in Booker that yes Blakely applies to the federal sentencing guidelines and in Booker part two, or what's known as the remedial part two, the Supreme court made the federal sentencing guidelines advisory. The new remedial advisory guidelines were made (or at least applied) retroactively and Noe's case was denied.

The 8th circuit denied Noe to file a supplemental brief on the impact of Blakely on his case. Noe's attorney filed a very important Petition for rehearing en banc. Her argument was that Applying the remedial portion of Booker retroactively violates fair notice under the Due Process clause of U.S. Const. 14th Amend

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as well as the ex pos facto clause. the 8th circuit denied this Petition but never ruled on the merits.

Amazingly in 2012. the Supreme court addressed the issue in Peugh v. United States 133 Sct 2072 (2012) the Supreme court agreed that a retroactive increase does in fact violate the ex pos facto clause.

In light of Peugh v. United States, Noe is entitled to have the statutory Maximum under Blakely v Washington Applied to his case because the court ruled effitively that the remedial portion of Booker does not apply retroactively as it violates ex pos facto.

So simply because of the circuit Noe is housed in he cannot receive relief for his claim. This causes an unwarranted sentenceing disparity for prisoners simply because of the prison they are at.

Actual Innocent of the underlying offense

Almost all the circuits agree that the Savings clause in 2255(e) Applies to a claim of Actual innocence. The tenth circuit however has rejected the possibility of Savings clause relief for both actual innocence and any sentencing claims. See; Prost v. Anderson 636 F.3d 578, 88 crl 686 (10th cir 2011) on the other hand eight circuits have held definitively that the Savings clause allows a Petitioner to bring an actual-innocence claim See e.g. Reyes-Reguena v. United States, 243 F.3d 893, 68 crl 502 (5th cir 2001)

The ninth circuit Court of Appeals ruled in Alaimalo v. U.S. 636 F.3d 1092; (2011 9th cir) That "A Petition meets the escape hatch criteria where a Petitioner (1) Makes a claim of actual Innocence and (2) has not had an unobstructed procedural shot at presenting that claim." The court explains That "A Petitioner is actually innocent when he

was convicted for conduct Not prohibited by law". Several circuits agree see; Brown v Caraway 719 F.3d 583 (7th cir 2013,) Okereke v United States 307 F.3d 117, 120 (3d cir 2002), In re Dorsainvil 119 F.3d 245, 251-252 (3d cir 1997); In re Jones, 226 F.3d 328, 333-34 (4th cir 2000).

In Prost v Anderson, 636 F.3d 578, 584 (10th cir 2011). The court went the other way and ruled that "The court rejects the possibility of Savings clause relief for both actual innocence claims and all sentencing claims."

The court in In re Dorsainvil 119 F.3d 245, 248 (3rd cir 1997) got it right in Ruling 2255 inadequate or ineffective where "A party claims that he is factually or legally innocent as a result of a previously unavailable statutory interpretation."

Noe was convicted of conspiracy to distribute Methamphetamine in violation of 21 U.S.C 841(b)(1)(A), 846 and 851. The Supreme court ruled in

Descamps v. United States, 133 S.Ct. 2276 (2013) that "the modified categorical approach can be applied only when dealing with a divisible statute:" "A statute that sets out one or more element of the offense in the alternative" Id at 2281.

The ninth circuit in a sound application of Descamps recently held that Minnesota Statute § 152.021 Sub 1(1) is not a drug trafficking offense because it "sweeps more broadly" than the guidelines definition of a "drug trafficking offense" see United States v Gonzalez-Rayes, 535 Fed Appx 592 (2013)⁷⁴³ Quoting Descamps 133 S.Ct. at 2283; U.S.S.C. § 2L1.2(b)(1)

Minnesota Statute 152.021 Sub 1(1) WAS the predicate used to enhance NOES indictment to a charge of 21 USC 851. 21 USC § 851(A)(1) Provides in Pertinent Part that: "No person who stands convicted of an offense under this Part be Sentence to increased punishment by reason of one or more convictions, unless before trial

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or before entry of a ple of guilty, the united states attorney files an information with the court stating in writing the "Previous convictions to be relied upon"

What

The courts have not addressed is the effect "filing 21 USC 851 before the trial begins" has on the trial itself.

Noe

believes that the charging of the 21 USC 851 becomes a superseding indictment it adds the prior drug offense as an element of a greater charge. AS NOE pointed out in his motions under 28 USC 2241 and 2255(e) The district court in the case ruled that the government could not use any evidence at trial from NOES 1999 Minnesota drug conviction under which the title 21 U.S.C 851 was used. The court ruled this in NOES pretrial motions (before the 21 USC 851 was filed) because NOES indictment WAS from 2000-2002 (So the 1999 drug offense WAS pre-conspiracy) During the trial the government introduced all

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The evidence that the court had ruled was suppressed. When Noe asked his attorney to object Noe was informed that the government was allowed to bring that otherwise suppressed evidence into court and present it to prove the 21 U.S.C. 851. Petitioner is aware of this court's ruling is

Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Petitioner reminds the court that

Almendarez-Torres, WAS a 5-4 vote. The Honorable Justice C. Thomas ruled with the majority in that case. In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2001) The Honorable Justice C. Thomas was also on the Majority.

In Apprendi, Blakely, Booker, Taylor, Shepard, and Alleyne v. United States, 133 S.Ct. 2151, 186 L.Ed.314, 2013 NO 11-9335

The Honorable Justice C. Thomas repeatedly urged this court to rehear Almendarez-Torres, concluding that the Majority of the court now feels it was wrongly decided. Noe's argument goes

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even further. While Almendarez-Torres deals with sentencing enhancements Noe's argument is that title 21 U.S.C 851 becomes a whole new charge.

A Sentencing Enhancement is done after the trial during the pre-sentence investigation. This has no effect on the trial itself.

on the other hand the 21 U.S.C 851 is a horse of a different color. It is presented (by rule must be presented) to the court and the defendant before the trial begins. The 21 U.S.C 851 at that point changes the whole complexity of the trial itself. Not only did it change the evidence during the trial but the only reason there was a trial was due to the 21 U.S.C 851.

Noe was offered a ple. The deal was Noe would ple guilty to the charge and the government would not ask for more than twenty years. Noe's lawyer under the terms could not ask for less than fifteen years.

Noe accepted the ple and it was presented to the court. the court accepted the ple and began the rule 11 hearing during the rule 11 hearing the district court judge mentions the fact that the 21 u.s.c 851 had been "charged out". At that point Noe began asking his attorney what that ment. The court stoped the hearing to allow MR Albert Garcia (Noes attorney) to explain to Noe the impact of 21 u.s.c 851 the court ordered we be placed in a conference room. Noes attorney explained to Noe that because the 21 u.s.c 851 had been charged out that the court would have to give Noe the twenty year mandatory minimum. Noe asked what the maximum was and Noe was told "Not more then twenty five years." Noe at that point refused the ple and went to trial. He was convicted and sentenced to forty years in prison.

The 28 u.s.c 851 can and in this case did cause a structural error. When the court ruled the

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Minnesota statute used to file the 21 USC 851 was invalid the court must reconceder the case from where the error occured which effectively invalidates Noe's conviction or at a minimum Noe should be allowed to accept his plea bargain.

This very argument is what caused the split in the circuits:

A similarly argument came before the fourth circuit; see United States v. Surratt, 797 F.3d 246 (Dec 2^{4th Cir} 2015) the honorable Gregory J dissenting. See id at 269-76.

After concedering the ruling in U.S. v. Surratt and what the Sixth circuit reasoned was a "well-reasoned dissent" they agreed with the dissent and ruled in Hill v. Masters, Warden No 15-5188 which is the case Noe has invoked throughout his motions. The honorable Judge Gregory's dissent anchors his reasoning on the history and text of the "Great Writ", tracks the legislation on it, and then applies those principles and forth

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circuit precedent to determine that the majority's holding violates them all. The core of his argument resides in the constitutional prohibition on suspension of the writ Id at 270 (citing U.S. Const. art Ist § 9, cl. 2)

Noe is left to serve a sentence in excess of his statutory maximum under an at best questionable conviction. That most circuits agree he is entitled to relief on simply because of the circuit split and the prison he's at.

Reasons for granting the Petition

This honorable court should grant the petition to unify the circuits and to prevent injustice. To make the decision of what impact charging 21 usc 851 before trial has on the trial and what relief there is for a defendant serving a sentence above the maximum authorize by congress but most of all to assure that inmates in the same situation are treated the same. As it stands now Noe is only still in prison because of the prison hes being housed in which for lack of a proper legal term is just not right.

conclusion

The petition for a writ of Cestiorari
should be granted

Respectfully submitted

pete nol

date 5/7/18 may 7, 2018