The Burger Court Opinion Writing Database

Davis v. United States

417 U.S. 333 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 25, 1973

Re: No. 72-1454 - Davis v. United States
No. 72-6509 - Meador v. United States

Dear Potter:

I have your memorandum of October 24.

I return to the view I expressed at Conference, i. e., that we remand to the Court of Appeals with directions that the Circuit resolve its own "conflict". This was the Court's procedure on one case in the C. A. D. C. just before my advent there -- I believe in 1954 or 1955. If Circuit Judges come to believe we will resolve intra-circuit disagreements, we may be plagued.

Regards,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 9, 1974

Re: No. 72-1454 - Davis v. United States

Dear Potter:

Please join me.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

October 20, 1973

MEMORANDUM TO THE CONFERENCE:

Re: No. 72-1454 - David v. United States
No. 72-6509 - Meador v. United States

At Friday's Conference I was asked to prepare a per curiam suggesting the possible remand of these cases to the Court of Appeals of the Ninth Circuit.

My understanding of the issues in these cases is pretty thoroughly covered in Byron's memorandum of October 17, 1973. I would be inclined on the basis of his analysis, which I think was accurate, to grant and reverse in this case saying that the Court of Appeals was not correct in applying the "law of the case" to permit review.

For myself I would not hear argument. If others are more doubtful I think in the light of the analysis in Byron's memo we should grant the petitions and put them down for argument

WOD

William O. Douglas

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

October 26, 1973

72-1454 - David v. U.S.
72-6509 - Meador v. U.S.

MEMO TO CONFERENCE:

I agree with Byron's memo of October 25th and vote to grant these petitions or at least be relieved of writing the per curiam proposed by the Conference.

WILLIAM O. DOUGLAS

The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 11, 1974

Dear Potter:

Please join me in your opinion in 72-1454, Davis v. United States.

WOD
William O. Douglas

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 26, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 72-1454 David v. United States
No. 72-6509 Meador v. United States

I too would prefer to grant and hear the petitions in the above.

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 8, 1974

RE: No. 72-1454 Davis v. United States

Dear Potter:

I agree.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 24, 1973

72-1454 - David v. U. S.
72-6509 - Meador v. U. S.

Dear Bill,

Although we might ultimately need to grant certiorari in a case involving the issues present here, I would for the moment be in favor of remanding these cases to the Court of Appeals for the Ninth Circuit, in the hope that the apparent intra-circuit conflict could be resolved by that Court.

Sincerely yours,

P.S.

Mr. Justice Douglas

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Stewart, J.

Circulated: _____

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-1454

Joseph Anthony Davis, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law. While the question presented is a relatively narrow one, it arises as the result of a rather complicated chain of events.

I

In February of 1965, the petitioner, Joseph Anthony Davis, was classified I–A by his draft board and ordered to report for a pre-induction physical examination. Davis failed to appear on the appointed date. He later informed his local board that his failure to report was due to illness. Although the board attempted to arrange a second date for the pre-induction physical, its attempts to communicate with the petitioner were frustrated by his failure to keep the board apprised of his correct mailing addresses. As a result, the local board's communications to the petitioner were returned to the board stamped "addressee unknown," and Davis again failed to report for the physical. In December of 1965, the board sent the petitioner a warning that it was considering

9-11

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: _____

Recirculated: MAY 22

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1454

Joseph Anthony Davis, Petitioner, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

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7-11

cc: The Chief Justice
Mr. Justice Douglas

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1454

MAY 3 1 '74

Joseph Anthony Davis, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law. While the question presented is a relatively narrow one, it arises as the result of a rather complicated chain of events.

I

In February of 1965, the petitioner, Joseph Anthony Davis, was classified I-A by his draft board and ordered to report for a pre-induction physical examination. Davis failed to appear on the appointed date. He later informed his local board that his failure to report was due to illness. Although the board attempted to arrange a second date for the pre-induction physical, its attempts to communicate with the petitioner were frustrated by his failure to keep the board apprised of his correct mailing addresses. As a result, the local board's communications to the petitioner were returned to the board stamped "addressee unknown," and Davis again failed to report for the physical. In December of 1965, the board sent the petitioner a warning that it was considering

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 11, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-5642, Thomas v. United States

This case, which is listed on page 10 of the June 14 Conference list, was previously held for No. 72-1454, Davis v. United States. The petitioner was convicted in the United States District Court for the Southern District of New York of conspiring to import narcotics into the United States, 21 USC §173, and was sentenced to 15 years' imprisonment. The Second Circuit affirmed, 409 F. 2d 888, rehearing denied, 415 F.2d 1113. We denied certiorari, 402 U.S. 984.

Petitioner then filed this §2255 motion in the District Court, contending that he was arrested without probable cause and that the evidence seized incident to his arrest therefore should have been excluded at trial. The District Court denied relief, citing to the original discussion of the Court of Appeals on the legality of the arrest, and noting, "more importantly," that petitioner's counsel on direct appeal had conceded the legality of the arrest. Following the denial of the §2255 motion,

the petitioner filed a notice of appeal, together with a motion to proceed in forma pauperis. The District Court denied the motion, characterizing the appeal as frivolous. That denial was affirmed by the Second Circuit without opinion, and the appeal was dismissed. A subsequent petition for rehearing was denied.

In his pro se brief, petitioner asserts that the District Court was in error in finding that he had waived any arguments about the legality of his arrest on direct appeal. He claims that the issue was raised in a rehearing petition. The opinion of the Second Circuit denying rehearing, which is reported at 415 F.2d 1113, does not discuss this alleged claim; it simply states that the only issue meriting discussion was the applicability of Chimel v. California, 395 U.S. 752, to petitioner's pre-Chimel search. The court of appeals resolved that issue against petitioner.

In my view, this case is in no way controlled by Davis, where we held that a "change of law" requires consideration anew in a §2255 proceeding of claims rejected on direct appeal. This case should therefore be considered on its own merits; I expect to vote to deny certiorari.

P.S.

P. S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 18, 1974

file

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 72-1454, Davis v. United States

No. 73-5860, Arias v. United States

Insofar as this case raises issues relevant to Davis, the pertinent facts are these: The petitioner pleaded guilty, in May, 1971, to a charge of conspiracy to sell narcotics. In August, 1972, he commenced this suit under §2255, claiming (aside from the point discussed in Bill Brennan's memos on cases held for Warden v. Marrero, No. 73-831) that he had not understood the nature of the charge against him, and that the District Court accepting his plea had failed to indicate satisfaction "that there [was] a factual basis for the plea," in violation of F. R. Crim. P. 11. The District Court dismissed the petition, and the Court of Appeals affirmed.

As to the question of compliance with Rule 11, the appellate court condeded that "the district judge did not make as complete

and unambiguous a record of 'the factual basis for the plea' as is contemplated by Rule 11: and that "if this case were here on direct appeal from the defendant's conviction, we might well conclude that these shortcomings constitute reversible error." The Court declined to reach the issue, however, because under its reading of §2255 "petitioner must show that the error is constitutional or jurisdictional in character before he may obtain relief. Hill v. United States, 368 U. S. 424, 428."

In Davis the Court rejected the assertion that claims other than of unconstitutionality or lack of jurisdiction are not cognizable under §2255. "This is not to say, however, that every asserted error of law can be raised on a §2255 motion." The appropriate inquiry, we said, was whether the claimed error was "a fundamental defect which inherently results in a complete miscarriage of justice," and "presents exceptional circumstances where the need for the remedy ... is apparent."

As Bill Brennan's supplemental memo indicates, the petitioner appears to have been released upon the expiration of his sentence less good time. In Carafas v. LaVallee, 391 U. S. 234, the Court held that a federal habeas suit commenced while a prisoner is in custody does not lapse for

mootness or want of jurisdiction upon the prisoner's unconditional release. Since the Solicitor General suggests that the petitioner may be "subject to return to prison if he violated the conditions of his release," it would appear to follow a fortiorari that the federal courts still have jurisdiction of this case.

I expect to vote to deny certiorari.

P.S.

P. S.

Cf for 10/18

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 17, 1973

MEMORANDUM FOR THE CONFERENCE

Re: No. 72-1454 - Davis v. United States
No. 72-6509 - Meador v. United States

1. At the first October conference, there was some confusion over whether Davis v. United States (No. 72-1454) was jurisdictionally out of time by one day. Bill Douglas had extended the time for filing the petition to and including April 25, 1973. According to the docket sheet, the petition was filed on April 25, 1973 (copy attached). The confusion over the timeliness of filing arose from the April 26, 1973, date stamped on the petition itself. I am informed by the Clerk's Office that the wrong date was stamped on the petition and that the petition was filed at 8:23 p.m. on April 25, 1973, with a police officer at the northwest entrance. It would therefore appear that the petition is timely.

2. My interest in Davis lies in the CA 9 rule that a federal prisoner may not raise claims on collateral attack which were raised and decided against him on direct appeal

because that earlier decision is "the law of the case." See, e.g., Odom v. United States, 455 F. 2d 159, 160 (CA 9 1972); Stein v. United States, 390 F. 2d 625, 626 (CA 9 1968) (and cases cited therein). Other circuits seem to have adopted a similar rule. E.g., Palmer v. United States, 249 F. 2d 8 (CA 10 1957); Davis v. United States, 311 F. 2d 495 (CA 7 1963); cf. Lampe v. United States, 288 F. 2d 881 (CA D.C. en banc 1961); but cf. United States v. Thompson, 261 F. 2d 809 (CA 2 1958); Kapotos v. United States, 432 F. 2d 110 (CA 2 1970). See, generally Note, Developments in the Law--Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1064-1066 (1970). This rule of practice strikes me as perhaps inconsistent with what the Court said in Kaufman v. United States, 394 U.S. 217, 227, n. 8, in the context of under what circumstances a District Court must grant a § 2255 hearing, or at least consider the claim on its merits in light of the record previously made, where a trial or appellate court has previously determined the federal prisoner's claim.[1/] There we noted that, by a parity of reasoning, the same rule

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1/ One group of commentators has suggested that Kaufman "hints" at the appropriate resolution of this question. Hart & Wechsler, The Federal Courts and the Federal System 1528 (2d ed. 1973).

that governed successive § 2255 motions under Sanders v. United States, 373 U.S. 1 (1963), applied with equal force where the "trial or appellate court has had a 'say' on a federal prisoner's claim . . . ." In both instances, we concluded that the District Court could dispense with a hearing if "on the basis of the motion, files, and records, 'the prisoner is entitled to no relief.' See Thornton v. United States, 215 U.S. App. D.C. 114, 125, 368 F. 2d 822, 833 (1966) (dissenting opinion of Wright, J.)." 394 U.S., at 227, n. 8. To reach this conclusion, one would naturally assume that the District Court, and the Court of Appeals on appeal, must, at the very minimum, scrutinize the record of the prior proceedings and make an evaluative determination that the claim is so devoid of merit that a hearing would not serve the ends of justice.

The CA 9's resort to "law of the case"[2/] analysis to justify its rule would appear to be at loggerheads with the rationale of this Court's decision in Sanders:

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable

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2/ Law of the case commonly refers to legal principles decided by a trial or appellate court in a given case and considered binding in further proceedings of that case. Although the term has acquired several meanings, it is most frequently used to describe the rule that an appellate (continued)

to the judiciary for a man's imprisonment,' Fay v. Noia, supra, at 402, access to the courts on habeas must not be thus impeded. The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ." 373 U.S., at 8.

Under the CA 9 rule, a federal prisoner in a § 2255 proceeding, unlike his state counterpart in a § 2254 action (see e.g., Cupp v. Naughten, No. 72-1148, which we heard on Tuesday), is stripped of all habeas corpus rights to challenge a prior judicial determination. This does not appear to square with previous pronouncements concerning the availability of collateral relief:

"'Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.' [United States v. Hayman, 342 U.S. 205, 219 (1952) (citations omitted).] . . .

"Plainly, were the prisoner invoking § 2255 faced with the bar of res judicata, he would not enjoy the 'same rights' as the habeas corpus applicant, or 'a remedy exactly commensurate with' habeas. [Hill v.

2/ continued.
court will not reevaluate its own prior rulings of law on a later appeal in the case. Note, Developments in the Law -- Res Judicata, 65 Harv. L. Rev. 818, 822 (1952); see also Messenger v. Anderson, 225 U.S. 436, 444 (1912). Law of the case focuses upon questions of law in the framework of a single case and reflects our system's concern that there be an end to litigation. In this important respect, law of the case is closely related to, if not subsumed under, res judicata -- the broad, generic concept embracing all the binding effects of former litigation. Note, supra, at 820, n. 1; see also Restatement, Judgments 157-161 (1942).

> United States, 368 U.S. 424, 427 (1962).] Indeed, if he were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered, as the Court in Hayman implicitly recognized." Sanders v. United States, supra, 373 U.S., at 13-14.

I raise these questions only to point out the difficulties inherent in the CA 9 rule and to suggest the necessity of plenary review. Of course, it may very well turn out that the current practice in the lower federal courts is a faithful application of prior authority. But I am doubtful, at least where the Court of Appeals has itself changed the substantive ground rules following its decision on direct review, as is the case here.

3. I placed Meador v. United States (No. 72-6509) on the discuss list because it involves a variation of the CA 9 rule relied upon in Davis, supra. Here petitioner's § 2255 application was denied without an evidentiary hearing and the CA 9 affirmed in a one sentence per curiam on the basis of the District Court opinion. The CA 9 had affirmed petitioner's kidnapping conviction on direct appeal. Meador v. United States, 341 F. 2d 381 (CA 9 1965). His collateral attack set forth ten grounds for relief. Noting that petitioner had raised the first four issues on direct appeal, the District Court ruled that "§ 2255 may not be invoked to relitigate questions which were or should have

been raised on direct appeal from the judgment of conviction. Battaglio v. United States, 428 F. 2d 957 (9th Cir. 1970), cert. denied 400 U.S. 919; Hammond v. United States, 408 F. 2d 481 (9th Cir. 1969); United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965); cert. denied 382 U.S. 817; Medrano v. United States, 315 F. 2d 361 (9th Cir. 1963); see Mugia v. United States, 448 F. 2d 1275 (9th Cir. 1971); Stein v. United States, 390 F. 2d 625 (9th Cir. 1968)." Pet. App. B, at 2 (emphasis added).[3/] Despite the apparent bar to any inquiry under CA 9 authority, the District Court "reexamined petitioner's arguments made on direct appeal in light of his petition and [found] that petitioner allege[d] no new facts nor [did] he show development in the law subsequent to his direct appeal that would accrue to his benefit." Id., at 2-3 (footnote omitted). In the interests of justice, the District Court reviewed the allegations made for the first time in the § 2255 application and not raised on direct appeal.

B.R.W.

3/ The Ninth Circuit apparently also invokes this res judicata rule in situations where no appeal is taken. See Grimes v. United States, 396 F. 2d 331, 333-334 (CA 9 1968). This permutation of the general rule is grounded in the deliberate by-pass doctrine of Fay v. Noia, 372 U.S. 391, 438-440 (1963).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 25, 1973

MEMORANDUM FOR THE CONFERENCE

Re: No. 72-1454 - Davis v. United States

In response to Potter's letter of October 24, 1973, I have reexamined the problem posed by this case in light of the papers presently before us. Davis appealed his conviction; the CA 9 vacated and remanded in light of Gutnecht v. United States, 396 U.S. 295 (1970). 432 F. 2d, at 1010. On appeal after the remand, the Court of Appeals applied a rule of law which Davis now claims was subsequently repudiated by another CA 9 panel in Fox v. United, 454 F. 2d 593 (CA 9 1972). (Davis I.) In his appeal from denial of § 2255 relief, Davis was refused the benefit of this change in the circuit law because of the CA 9's "law of the case" rule detailed in my previous memorandum of October 17. (Davis II.) It further appears, however, that in Zack v. Benson, 454 F. 2d 596 (CA 9 1971), a case decided on the same day as Fox, a defendant also convicted before Fox was given in a § 2255 proceeding the benefit of that decision that was denied Davis.

This situation, it is suggested, presents an intra-circuit conflict with respect to the willingness of the Court of Appeals to reconsider in collateral proceedings a matter litigated on direct appeal. I suggest, however, that the existence of a conflict is unclear at the very least because Zack, the Davis II papers reveal in a footnote,[1/] never appealed, and therefore never litigated the issue on direct appeal.[2/] In terms of the CA 9's own "law of the case" collateral attack rule, this would appear to distinguish Zack and Davis.

1/ Petition for Certiorari (72-1454), at 13, n. 9.

2/ It may also be that the defense at issue was never presented in the District Court, and even if it was, that may be insufficient to invoke the CA 9 rule.

I agree with Bill Douglas that the Court of Appeals was not correct in applying the "law of the case" to foreclose review, and I therefore prefer to grant the petition and put the case down for argument.

B.R.W.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 10, 1974

Re: No. 72-1454 - Davis v. United States

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 29, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 72-1454 -- Davis v. United States

I would grant this petition.

T. M.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 9, 1974

Re: No. 72-1454 -- Davis v. United States

Dear Potter:

Please join me.

Sincerely,

T. M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 26, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 72-1454 - Davis v. United States
No. 72-6509 - Meador v. United States

I have read with interest the correspondence circulated with respect to these cases.

My note indicates that in No. 72-6509, Meador v. United States, certiorari was denied on October 23. This leaves only No. 72-1454. As to it, I, too, am inclined to remand to let the CA9 resolve what might be an intracircuit conflict. This would be along the lines of what was done in Johnson v. Bennett, 393 U.S. 253 (1968).

H.A.B.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 8, 1974

Re: No. 72-1454 - Davis v. U. S.

Dear Potter:

I am glad to join your opinion proposed for this case.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 25, 1973

No. 72-1454 David v. U. S.
No. 72-6509 Meador v. U. S.

Dear Bill:

I rather agree with Potter that we should give CA9 an opportunity to resolve the apparent intra-circuit conflict.

Sincerely,

Lewis

Mr. Justice Douglas

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 5, 1974

No. 72-1454 Davis v. United States

Dear Potter:

As one of the questions presented in the petition for certiorari was whether Gutknecht controls this case, and as I thought that it does not, I voted at the Conference to affirm the judgment of the Court of Appeals.

A hurried reading of your opinion for the Court indicates that you have written it narrowly and very well indeed, if one accepts your premise. I will reexamine my position in light of your opinion, and then decide whether to circulate a dissent.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stew
Mr. Justice Whit
Mr. Justice Marsh
Mr. Justice Blac
Mr. Justice Rehn

1st DRAFT

From: Powell, J.

Circulated: APR 24 1974

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-1454

Joseph Anthony Davis, Petitioner, *v.* United States. } On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1974]

MR. JUSTICE POWELL, concurring and dissenting.

I agree with the Court's holding that review under 28 U. S. C. § 2255 is available to petitioner, due to the intervening change in the law of the circuit. But I would dispose of the case finally, not remand it.

Petitioner's case turns on whether his conviction for refusing induction has been invalidated by *Gutknecht* v. *United States*, 396 U. S. 295 (1970). Both parties have raised, briefed and argued this issue, and it is properly before us. We should, in the interest of judicial economy if for no other reason, decide the *Gutknecht* issue and bring to an end this lengthy litigation, rather than remand it to the Court of Appeals for that court's fourth round of consideration.

In my view, petitioner's reliance upon *Gutknecht* is misplaced. Petitioner reads *Gutknecht* as invalidating the former delinquency regulations of the Selective Service System in every possible application.[1] He espouses a *per se* rule under which any induction order that derived from an application of those delinquency regulations is illegal. *Gutknecht* does not have such a broad sweep.

[1] *Gutknecht* concerned primarily 32 CFR § 1642.13 (1969), now superseded, which assigned first priority in the order of induction to delinquents. That regulation is not at issue here.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 24, 1973

Re: No. 72-1454 - David v. United States
No. 72-6509 - Meador v. United States

Dear Bill:

I agree with the position expressed by Potter in these cases in his letter of October 24th.

Sincerely,

WHR

Mr. Justice Douglas

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72–1454

Joseph Anthony Davis, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1974]

MR. JUSTICE REHNQUIST, dissenting.

The Court today holds, with a minimum of discussion, that petitioner, in a proceeding under 28 U. S. C. § 2255, may raise his claim that his induction into the Armed Forces was accelerated contrary to the principles of *Gutknecht* v. *United States*, 396 U. S. 295 (1970). The Court reaches this result despite the fact that a United States District Court and the Court of Appeals for the Ninth Circuit previously considered this contention in light of *Gutknecht* and concluded that petitioner's induction had not in fact been accelerated. As a justification for the decision this Court suggests that a § 2255 motion is both permissible and appropriate because a panel of the Court of Appeals for the Ninth Circuit has rendered a subsequent decision which adopts a new legal test for determining whether acceleration has occurred and which, if applied to petitioner, would probably change the outcome of his case. Since I believe the Court's decision is justified neither by the language of § 2255 itself nor by any prior case decided by this Court, and since I believe the potential consequences of the decision are harmful to the administration of justice, I dissent.

I

The facts of this case are set out in detail in the Court's opinion. I review them here briefly only to emphasize

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1454

Joseph Anthony Davis, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1974]

MR. JUSTICE REHNQUIST, dissenting.

The Court today holds, with a minimum of discussion, that petitioner, in a proceeding under 28 U. S. C. § 2255, may raise his claim that his induction into the Armed Forces was accelerated contrary to the principles of *Gutknecht* v. *United States*, 396 U. S. 295 (1970). The Court reaches this result despite the fact that a United States District Court and the Court of Appeals for the Ninth Circuit previously considered this contention in light of *Gutknecht* and concluded that petitioner's induction had not in fact been accelerated. As a justification for the decision this Court suggests that a § 2255 motion is both permissible and appropriate because a panel of the Court of Appeals for the Ninth Circuit has rendered a subsequent decision which adopts a new legal test for determining whether acceleration has occurred and which, if applied to petitioner, would probably change the outcome of his case. Since I believe the Court's decision is justified neither by the language of § 2255 itself nor by any prior case decided by this Court, and since I believe the potential consequences of the decision are harmful to the administration of justice, I dissent.

I

The Court's conclusion, discussed *infra*, that claims such as petitioner's can be raised on a § 2255 motion, is

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1454

Joseph Anthony Davis, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1974]

MR. JUSTICE REHNQUIST, dissenting.

The Court today holds, with a minimum of discussion, that petitioner, in a proceeding under 28 U. S. C. § 2255, may raise his claim that his induction into the Armed Forces was accelerated contrary to the principles of *Gutknecht* v. *United States*, 396 U. S. 295 (1970). The Court reaches this result despite the fact that a United States District Court and the Court of Appeals for the Ninth Circuit previously considered this contention in light of *Gutknecht* and concluded that petitioner's induction had not in fact been accelerated. As a justification for the decision this Court suggests that a § 2255 motion is both permissible and appropriate because a panel of the Court of Appeals for the Ninth Circuit has rendered a subsequent decision which adopts a new legal test for determining whether acceleration has occurred and which, if applied to petitioner, would probably change the outcome of his case. Since I believe the Court's decision is justified neither by the language of § 2255 itself nor by any prior case decided by this Court, and since I believe the potential consequences of the decision are harmful to the administration of justice, I dissent.

I

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