

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE KENNETH GAYLORD STOKES - PETITIONER

PETITION FOR WRIT OF MANDAMUS

Kenneth Gaylord Stokes - 03661-093

United States Penitentiary - Tucson

PO Box 24550

Tucson, AZ 85734

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APPENDIX

Appendix A - February 28, 2017 Opinion of the United States District Court for the Western District of Missouri, Southern Division.

Appendix B - October 17, 2017 Opinion of the Eighth Circuit Court of Appeals and the December 8, 2017 Mandate after the denial of rehearing by the Eighth Circuit Court of Appeals.

PETITION FOR WRIT OF MANDAMUS

QUESTION PRESENTED FOR REVIEW

IS PETITIONER ENTITLED TO IMMEDIATE RELIEF,
INCLUDING MANDAMUS, FROM THIS COURT FOR A
CLAIM OF ACTUAL INNOCENCE WITH REGARD TO
DOUBLE EX POST FACTO VIOLATIONS?

RELIEF SOUGHT

Petitioner prays for a Writ of Mandamus directed to the Eighth Circuit Court of Appeals directing and commanding the Respondents to grant a Certificate of Appealability with regards to Petitioner's claim of actual innocence based on double ex post facto violations.

UNAVAILABILITY OF RELIEF IN OTHER COURTS

No other court can grant the relief sought by this Petition because the lower courts have ruled that Petitioner's claim of actual innocence (double ex post facto violations) are procedurally barred.

1.) On February 28, 2017 the United States District Court for the Western District of Missouri, Southern Division, denied Petitioner's leave to supplement his §2255 Motion asserting

that he was actually innocent based upon two ex post facto violations. A copy of this Order is attached as Appendix "A".

2.) On October 17, 2017 the Eighth Circuit Court of Appeals issued their mandate denying Petitioner's requested Certificate of Appealability of the District Court's denial of his Motion for Leave to Supplement his §2255 Motion. Appendix "B".

3.) A Motion for Rehearing of the denial of Certificate of Appealability was denied by the Eighth Circuit Court of Appeals on December 8, 2017. Appendix "B".

UNsuitability of ANY OTHER FORM OF RELIEF

No other form of relief will be sufficient to protect the rights of the Petitioner because all forms of Habeas relief in the lower courts have been exhausted and a Writ of Certiorari has been denied.

LIST OF PARTIES IN COURT BELOW

- 1.) Kenneth Gaylord Stokes, Petitioner.
- 2.) United States of America, Respondent.
- 3.) Eighth Circuit Court of Appeals, Respondent.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to issue the requested Writ under 28 U.S.C. §1651(a) and Supreme Court Rule 20.

CITATION OF LOWER COURT DECISIONS

The decision of the United States District Court for the Western District of Missouri, Southern Division, are set out in the written orders attached to this Petition in Appendix "A".

The decision of the United States Court of Appeals for the Eighth Circuit are set out in the written order attached to this petition in Appendix "B".

CONTROLLING PROVISIONS

Article I, Section 9, Clause 3 of the United States Constitution provides:

"No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT OF CASE AND GOVERNING FACTS

On February 28, 2017 the District Court for the Western District of Missouri, Southern Division denied Petitioner's leave to supplement his §2255 Motion (Dist. Ct. DE. 9)

asserting that he was actually innocent based upon two ex post facto violations. This Motion was sent to the district court on January 11, 2017 (Dist. Ct. DE. 9) and the Government filed opposition on February 15, 2017 (Dist. Ct. DE. 11) arguing that the motion was untimely. The district court addressed this filing and subsequently dismissed the claim as "New issues cannot be raised for the first time in a Section 2255 reply brief" and that the claim did not relate back to the original motion. (Dist. Ct. DE. 12, pg 6). Regardless, the district court claimed that the issue was reviewed ex gratia and saw no basis for relief, issuing an order denying Petitioner's §2255 Motion and his motion to file a supplemental motion on February 28, 2017. Because this was an issue of procedural bar and based on actual innocence, Petitioner believed that a COA should have been granted and the issues remanded to the district court for proper consideration. Petitioner believes that the Eighth Circuit Court of Appeals simply overlooked the significance of the actual innocence issue. That Court then denied the Certificate of Appealability.

ARGUMENT

The district court denied Petitioner the ability to raise an actual innocence claim in his Habeas Motion, claiming it to be procedurally barred. On Application for Certificate of Appealability, the Eighth Circuit Court of Appeals denied the Application for COA for review of the district court's

procedural bar. Petitioner raised two ex post facto violations in the lower courts based on provisions of 18 U.S.C. §2423 that were enacted by congress after his arrest and/or commission of any alleged crime. This would surely meet the "actual innocence" and "Fundamental miscarriage of justice" exceptions of *Murray v. Carrier*, 477 US 478 (1986).

Petitioner was indicted for five (5) violations of §2423(c) which reads as follows: "Any United States citizen who resides, either temporarily or permanently, in a foreign country, engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both." 18 U.S.C. §2423(c). The absolute latest date which any alleged offense could have occurred was December 3, 2012 (the date of Petitioner's arrest). However, his conduct alleged in the factual basis of the Plea Agreement (Dist. Ct. Crim. DE. 55) falls under two (2) phrases added to §2423 after that date.

First Ex Post Facto Violation:

The Act of March 7, 2013 inserted "OR RESIDES EITHER TEMPORARILY OR PERMANENTLY IN A FOREIGN COUNTRY" to Subsection (c) of §2423. (emphasis added). Petitioner, at the time of his arrest on December 3, 2012, was within the country of the Philippines on a permanent resident visa (13A Visa) and was married in October 2009 to a Philippino national. This clearly predates Congress' amendment to §2423(c) by more than three (3) months, and thus is a violation of the ex post facto clause. Therefore, there can be no procedural bar as the Petitioner is actually innocent as charged.

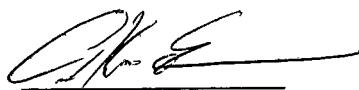
Second Ex Post Facto Violation:

The Act of May 29, 2015 added paragraph (3) "PRODUCTION OF CHILD PORNOGRAPHY as defined in Section 2256(8)" to the definition of "illicit sexual conduct" under Subsection (f) of §2423. (emphasis added). Again, Petitioner, at the time of his arrest on December 3, 2012, was within the country of the Philippines on a permanent resident visa (13A Visa) and was married in October 2009 to a Philippino national. This clearly predates Congress' amendment to §2423(c) by more than twenty-nine (29) months, and thus is a violation of the ex post facto clause. Therefore, there can be no procedural bar as the Petitioner is actually innocent as charged.

CONCLUSION

For the reasons stated, the Petitioner prays that this Court grants the requested Writ of Mandamus and directs the Eighth Circuit Court of Appeals to grant Certificate of Appealability and order the United States District Court for the Western District of Missouri, Southern Division, to dismiss the action filed in that Court against Petitioner, with prejudice, immediately and without condition.

Submitted on this, the 13 day of June, 2018.



Kenneth Stokes

Reg. No. 03661-093

United States Penitentiary - Tucson
PO Box 24550
Tucson, AZ 85734