

IN THE SUPREME COURT OF THE UNITED STATES

21-6979

No. (Clerk to Supply)

ORIGINAL

ANDREW JAMES JOHNSTON,

Petitioner,

FILED
DEC 29 2021
OFFICE OF THE CLERK SUPREME COURT, U.S.

v.

UNITED STATES,

Respondent.

Originating Case Information: Johnston v. USA,
Appeal No. 21-2257, U.S.C.A. 7

PETITION FOR WRIT OF HABEAS CORPUS

Executed: 12/27/21 Andrew Johnston

Mr. Andrew James Johnston
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P.O. Box 24550
Tucson, AZ 85734

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QUESTIONS PRESENTED

1. Is the Second and Eighth circuits' position - in opposition to the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and DC circuits - that *Stone v. Powell*, 428 U.S. 465 (1976) does not procedurally preclude a district court from reaching the merits of a free standing Fourth Amendment claim brought in a petition under 28 U.S.C. § 2255 the correct position in light of *Kaufman v. United States*, 394 U.S. 217 (1968)?

2. Did the court of appeals correctly conclude that there was no substantial showing of the deprivation of a constitutional right?

JURISDICTION

The jurisdiction of the district court was founded upon 28 U.S.C. § 2255(a). The jurisdiction of the court of appeals was founded 28 U.S.C. § 1291 and § 2253(c)(1). The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1) and the following particulars:

Decision Sought To Be Reviewed: November 18, 2021 judgment;
Date Decision Denying Rehearing En Banc: December 15, 2021.

TABLE OF AUTHORITIES

Organic

Amendment IV, Probable Cause Requirement
 Amendment V, Due Process Clause

Statutes

28 U.S.C. § 2253(c)(1)
 28 U.S.C. § 2255(a)

Cases

Arayo v. United States, 195 F.3d 54, 55 (CA1 1999)
 Baranski v. United States, 515 F.3d 857, 860 (CA8 2008)
 Brock v. United States, 573 F.3d 497, 500 (CA7 2009)
 Laaman v. United States, 973 F.2d 107, 114-115 (CA2 1992)
 Ray v. United States, 721 F.3d 758, 761-762 (CA6 2013)
 Tishnack v. United States, 547 F.2d 452, 455 (CA9 1976)
 United States v. Britton, 2017 U.S. App. LEXIS 16577 (CA3 2017)
 United States v. Byers, 740 F.2d 1104, 1137 n. 90 (CA DC 1984)
 United States v. Cook, 997 F.2d 1312, 1317 (CA10 1993)
 United States v. Ishmael, 343 F.3d 741, 742 (CA5 2003)
 United States v. Schulte, 2000 U.S. App. LEXIS 23804, at *2 (CA4 2000)

STATEMENT OF THE FACTS

On June 22, 2021, the district court denied my petition for writ of habeas corpus to vacate under 28 U.S.C. § 2255 unilaterally without briefing or a hearing. The rationale was that under Brock *supra*, my Fourth Amendment claim was procedurally barred because I was supposedly provided a "full and fair opportunity" to litigate my claim despite the claim being premised on newly discovered evidence.

In July 2021, I appealed that judgment as wrong or debatable, and filed my brief on August 5, 2021.

I also filed a petition for hearing en banc with my brief identifying the circuit split and asked the full court of appeals to overrule Brock in light of Baranski, *supra*, Laaman, *supra*, Arroyo, *supra*, and Kautman, *supra*. On September 7, 2021, the court of appeals denied initial hearing en banc. Appendix-A. On November 18, 2021, the court of appeals denied a certificate of appealability. On November 30, 2021, I filed a petition for rehearing en banc, and the court of appeals denied it December 15, 2021. This petition follows.

REASONS WHY RESCUE OF THE WRIT SHOULD BE GRANTED

Of the eleven circuits to discuss the issue, two have expressly stated *Stone v. Powell* does not effect petitions under § 2255 bringing free standing Fourth Amendment claims, *Baranski*; and *Laaman*, while eight circuits have concluded *Stone v. Powell* bars reaching the merits if a full and fair opportunity to litigate the claim was provided, *Brifton*, *Brock*, *Byers*, *Cox*, *Ishmael*, *Kay*, *Schutte*, and *Tishado*, and one circuit observed the issue has not been squarely decided by this Court while reserving ruling on the issue, *Alroya*.

The eight circuits against *Kaufman* have implied that *Stone v. Powell* overruled *Kaufman* while the *Baranski* court held "*Stone* left open the question of whether Fourth Amendment claims may be raised by federal prisoners under § 2255, ... and it did not overrule *Kaufman* [7]. In *Kaufman*, the Court had unequivocally held that a claim of unconstitutional search and seizure is cognizable in a § 2255 proceeding, 394 U.S. at 231... We conclude *Stone* does not bar our consideration of the issue... whether *Groh v. Ramirez* would entitle *Baranski* to prevail on his § 2255." *Baranski*, *Id.* at 860.

Had the district court been required to follow Kautman, instead of Stone v. Powell via Brack, it would have been required to consider the merits of the new dash cam with audio and find its prior decisions denying my motions to quash arrest and suppress evidence incorrect, and based on false evidence.

Conclusion

Wherefore petitioner prays this petition is granted.

Respectfully Submitted,

Executed: 12/27/21 Andrew Johnston

Mr. Andrew James Johnston

Certificate of Service

I, Mr. Andrew James Johnston, declare under the penalty of perjury that I mailed the attached Petition to the Clerk, SCOTUS, on 12/27/21, and do not have the ability to serve respondent. See, Appendix-C.

Respectfully Submitted,

Executed: 12/27/21 Andrew Johnston