

24-6480

No. \_\_\_\_\_

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

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Andrew James Johnston PETITIONER  
(Your Name)

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals Seventh Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mr. Andrew James Johnston  
(Your Name)

Prisoner ID No. 2271474, P.O. Box 23811  
(Address)

Tucson, AZ 85735  
(City, State, Zip Code)

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QUESTIONS PRESENTED

1. Does 28 U.S.C. Section 2244(b)(1) apply to claims brought in second or successive motions for post-conviction relief under 28 U.S.C. Section 2255?
2. If not, does a motion to reopen under Federal Rule of Civil Procedure 60(b)(6) seeking only to reopen a previous motion for a new trial under Federal Rule of Criminal Procedure 33(b)(1) and/or 28 U.S.C. Section 2255 that was denied on the merits (without advancing a different constitutional claim) constitute a second or successive motion subject to the jurisdictional bar in 28 U.S.C. Section 2244(b)(1)?

## TABLE OF CONTENTS

OPINIONS BELOW .....
JURISDICTION.....
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....
STATEMENT OF THE CASE .....
REASONS FOR GRANTING THE WRIT .....
CONCLUSION.....

## INDEX TO APPENDICES

APPENDIX A	U.S. District Court 02/28/24 Order
APPENDIX B	U.S.C.A. 7 06/27/24 Order
APPENDIX C	U.S.C.A. 7 08/01/24 Order
APPENDIX D	U.S.C.A. 9 2022 Order (Circuit Split)
APPENDIX E	
APPENDIX F	

## TABLE OF AUTHORITIES

### U.S. Constitution, Amendment V, Due Process Clause

#### CASES

Avery v. United States, 140 S. Ct. 1080 (2020)(mem.)(J. Kavanaugh statement respecting denial of certiorari)  
Blitch v. United States, 2022 U.S. App. LEXIS 19085, Id. at \*9-10 (7th Cir. 2022)  
Brady v. Maryland, 373 U.S. 83, 87 (1963)  
Gallagher v. United States, 711 F.3d 315 (2d Cir. 2013)  
Gonzalez v. Crosby, 545 U.S. 524, 532, n. 4-5 (2005)  
In re: Baptiste, 828 F.3d 1337, 1339 (11th Cir. 2016)  
In re: Bourgeois, 902 F.3d 446, 447 (5th Cir. 2018)  
Jones v. Hendrix, 143 S. Ct. 1857, 1865-1876 (2023)  
Jones v. United States, 2022 U.S. App. LEXIS 15895, Id. at \*14-19 (9th Cir. 2022)  
Kemp v. United States, 142 S. Ct. 1856, 1865 (2022)  
Kuhlmann v. Wilson, 477 U.S. 436, 454, n. 17 (1986)  
Moore v. United States, 871 F.3d 72, 78 (1st Cir. 2017)  
Taylor v. Gilkey, 314 F.3d 832, 836 (7th Cir. 2002)  
United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003)  
United States v. Winkelman, 746 F.3d 134, 135 (3d Cir. 2014)  
United States v. O'Malley, 833 F.3d 810, 814 (7th Cir. 2016)  
Williams v. United States, 927 F.3d 427, 434-435 (6th Cir. 2019)  
Winarske v. United States, 913 F.3d 765, 768-769 (8th Cir. 2019)

#### STATUTES

5 U.S.C. Section 552  
18 U.S.C. Section 2113(a)  
18 U.S.C. Section 3231  
28 U.S.C. Section 1291  
28 U.S.C. Section 1254(1)  
28 U.S.C. Section 2244(b)(1)  
28 U.S.C. Section 2254  
28 U.S.C. Section 2255

#### OTHER

Federal Rule of Civil Procedure 60(b)(6)  
Federal Rule of Criminal Procedure 33(b)(1)

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

reported at 24-1515; or,  
[ ] has been designated for publication but is not yet reported; or,  
[ ] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

reported at 1:17-cr-517, Doc. 517; 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.

### JURISDICTIONAL STATEMENT

The district court's jurisdiction was founded upon 18 U.S.C. Section 3231 because the motion to reopen was brought under Federal Rule of Civil Procedure 60(b)(6). The jurisdiction of the court of appeals was founded upon 28 U.S.C. Section 1291 as petitioner prosecuted an error of law concerning the failure to address the defect in the initial filing of the proceeding. This Court's jurisdiction is founded upon 28 U.S.C. Section 1254(1) and the following particulars:

Date of USCAT Judgment: June 27, 2024;

Date of Denial of Rehearing En Banc: August 1, 2024.

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### CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment IV, Unreasonable Searches And Seizures Clause

U.S. Constitution, Amendment V, Due Process Clause

U.S. Constitution, Separation of Powers

## STATEMENT OF THE FACTS

On August 25, 2017, petitioner was charged by indictment with a single count of bank robbery in violation of 18 U.S.C. Section 2113(a). Between the indictment and trial, petitioner argued pretrial motions that claimed an unreasonable search and seizure occurred in the moments leading up to the arrest (either lack of reasonable suspicion to stop/arrest or illegal search of physical movements/location), and the government was violating *Brady v. Maryland*, 373 U.S. 83, 87 (1963) by withholding the evidence to support those claims. See, Case No. 1:17-cr-517, Dkt. 92 - 304, respectively; and Dkt. 218.

On January 10, 2019, a jury found petitioner guilty, and on April 4, 2019 petitioner was sentenced to 168 months imprisonment, and sufficiency of the evidence. Appeal No. 19-1624, Appellant's Opening Brief, Reply Brief. On May 11, 2020, the court of appeals affirmed the conviction and sentence. This Court subsequently denied certiorari.

On June 22, 2021, the district court dismissed/denied petitioner's motion to vacate under 28 U.S.C. Section 2255 primarily because Fourth Amendment claims were not cognizable in a 28 U.S.C. Section 2255 - even those Fourth Amendment claims based on newly discovered evidence under the Freedom of Information Act, 5 U.S.C. Section 552 (FOIA), that was withheld by the government prior to trial. Case No. 1:21-cv-2720; June 22, 2021 Order.

On November 18, 2021, the court of appeals denied a certificate of appealability. Appeal No. 21-2257. This Court subsequently denied certiorari. In early March 2022, petitioner filed a motion for a new trial under Fed. R. Crim. P. 33(b)(1) arguing that based on newly discovered FOIA evidence showing the Fourth Amendment violation occurred, a new trial should be granted. Case No. 17-CR-517, Dkt. 424. On March 29, 2022, the district court denied the motion as a disguised second or successive motion under Section 2255, or alternatively (and without explanation) insufficient on the merits. Dkt. 425.

On November 10, 2022, the court of appeals did not consider the Rule 33(b)(1) motion as a disguised second or successive motion under Section 2255, and addressed (albeit incorrectly from petitioner's perspective) the merits of the Fourth Amendment claim. Appeal No. 22-1558, November 10, 2022 Order. This Court subsequently denied certiorari. In light of the court of appeals silent determination that the Rule 33(b)(1) motion was not one under Section 2255, as new information became available, petitioner filed a first and second amended motion under Rule 33(b)(1). Dkt. 469, respectively.

On February 2, 2023, the district court denied the motion again as a disguised motion under Section 2255 or insufficient on the merits. Dkt. 470. On April 28, 2023, the court of appeals summarily affirmed the district court's order, Appeal No. 23-1348, and this Court subsequently denied certiorari. On January 29, 2024, the Federal Bureau of Investigation (FBI) sent petitioner a letter in response to a December 2023 FOIA request for records of Hemisphere Program and/or Data Analysis Services Program (DAS) requests from the FBI to AT&T on the day of the arrest, and the FBI stated they had such records.

Hemisphere and/or DAS are non-public programs AT&T uses to provide the FBI with real-time location information without a search warrant or showing of probable cause or customer's knowledge/consent. Although the FBI letter admitted the existence of the Hemisphere/DAS records for the date in question, it withheld those records under FOIA exemptions for law enforcement purposes/methods. The Office of Information Policy affirmed that decision to withhold the records.

In February 2024, petitioner filed a motion for relief from 03/29/22 order under Fed. R. Civ. P. 60(b)(6) seeking to reopen/reinstate the Rule 33(b)(1) motion based on the FBI's January 29, 2024 letter, and also sought an order directing the FBI to produce the FOIA records of Hemisphere/DAS usage on July 25, 2017. Dkt. 516. The motion alleged a defect in the integrity of the Rule 33(b)(1) occurred and sought no relief from the conviction/judgment.

On February 28, 2024, the district court denied the motion as though it sought relief from the conviction/judgment, and did not address whether there was a defect in the integrity of the Rule 33(b)(1) proceeding per the withholding of the Hemisphere/DAS records for some 7 years to date by the government. Dkt. 517. On June 27, 2024, the court of appeals issued an order imposing a sanction and filing restriction while simultaneously dismissing the appeal under 28 U.S.C. Section 2244(b)(1). Appeal No. 24-1515. On August 1, 2024, rehearing en banc was denied, and this Petition follows.

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## REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The Second, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have concluded the bar against second or successive motions in 28 U.S.C. Section 2244(b)(1) applies to motions brought under 28 U.S.C. Section 2255. See, Gallagher, 711 F.3d 315; Winkelman, 746 F.3d 134, 135; Winestock, 340 F.3d 200, 205; Bourgeois, 902 F.3d 446, 447; Taylor, 314 F.3d 832, 836; Winarske, 913 F.3d 765, 768-769; and Baptiste, 828 F.3d 1337, 1339.

The First Circuit has reserved ruling on the issue in light of the circuit split on the issue. See, Moore, 871 F.3d 72, 78. The Sixth and Ninth Circuits conclude the opposite: the bar on second or successive motions under Section 2244(b)(1) does not apply to motions under Section 2255, and only applies to motions under Section 2244. See, Williams, 927 F.3d 427, 434-435; and Jones, 2022 U.S. App. LEXIS 15895, *Id.* at \*14-19. This Court has also flagged the issue. See, Avery, 140 S. Ct. 1080.

The court of appeals below, concluded that "[w]e do not address the merits of this motion. It is a disguised collateral attack on the judgment, which goes nowhere because Johnston has not received (or for that matter sought) this court's permission. See, 28 U.S.C. Section 2255(h), incorporating 28 U.S.C. Section 2244. Criminal Rule 33 provides an alternative to Section 2255 in some situations, but that rule is no longer available to Johnston." USCA7, 06/27/24 Order, Page 2, *Id.*

Here, the court of appeals explicitly reiterated its holding in Taylor, 314 F.3d 832, 836, which petitioner contends is an incorrect holding in light of Williams, 927 F.3d 427, 434-435; and Jones, 2022 U.S. App. LEXIS 15895, *id.* at \*14-19. Although petitioner sought to reopen/reinstate a Rule 33(b)(1) Motion in the district court, the court of appeals holds that Rule 33(b)(1) motions are interchangeable with motions under Section 2255 when based upon newly discovered evidence. See, O'Malley, 833 F.3d 810, 814. As such, the court of appeals holding in Taylor, *id.* at 836, was applied to the Rule 33(b)(1) motion.

Petitioner posits that the Sixth and Ninth Circuits got it right in Jones, and Williams. In this situation, petitioner obtained a letter from the FBI on January 29, 2024 in response to petitioner's Freedom of Information Act request stating it had records of the FBI's use of a program used by AT&T called Hemisphere and/or Data Analysis/Analytics Services that provides real-time location information on targeted cell service subscribers without a search warrant on the day that petitioner was arrested.

Prior to trial, petitioner sought dismissal and/or suppression of the fruits of the arrest based upon an illegal search of his physical movements in violation of the Fourth Amendment. See, Case No. 1:17-cr-517, Doc. 218, 223, respectively. Before trial, through trial, petitioner attempted to subpoena such information and/or obtain disclosure of it from the government. Not until the 01/29/24 FBI letter, has the government admitted the existence of Hemisphere and/or DAS records with respect to the day of petitioner's arrest at issue.

As such, petitioner sought to reopen his Rule 33(b)(1) motion, because the integrity of that proceeding was defected by the government's withholding of the existence of the Hemisphere/DAS records in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and sought to compel the FBI to produce the records requested under FOIA so petitioner could properly prepare an amended Rule 33(b)(1) motion based upon the illegal search of his physical movements. This Court should overrule the circuits that oppose the position taken by the Sixth and Ninth Circuits accordingly.

With respect to a motion to reopen under Rule 60(b)(6) in the context of reopening a motion under Rule 33(b)(1) pursuant to a defect in the integrity of that Rule 33(b)(1) proceeding comprised of withheld material evidence showing a Fourth Amendment violation occurred/was concealed, this Court's precedent supports the availability of such a procedural vehicle. See, Kuhlmann v. Wilson, 477 U.S. 436, 454, n. 17 (1986); Gonzalez v. Crosby, 545 U.S. 524, 532, n. 4-5 (2005); McQuiggin v. Perkins, 133 S. Ct. 1924, 1931-1932 (2013); and Kemp v. United States, 142 S. Ct. 1856, 1865 (2022)(citing intervening change in law and/or development of fact as valid Rule 60(b)(6) basis).

Last year, in Jones v. Hendrix, 143 S. Ct. 1857, 1865-1876 (2023) this court foreclosed the availability of the "savings clause" primarily because of the administrative problems with fragmenting prospective post-conviction relief in district courts outside of the trial/sentencing district where the case began. Maintaining the availability of reopening a pre-existing constitutional claim brought in a previously denied Rule 33(b)(1) motion by way of Rule 60(b)(6) aligns with the administrative concerns addressed in Jones because any such Rule 60(b)(6) motion gets filed in the trial/sentencing court.

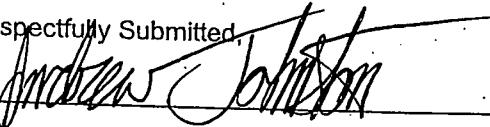
This is not a case where petitioner forfeited, waived, or was otherwise undiligent in exercising his rights. Petitioner has had his foot on the gas since he was arrested. Petitioner has done nothing but pursue the withheld evidence surrounding the basis for his arrest, and present that evidence as it has become available under FOIA. There is no reason petitioner should not be able to reopen his Fourth Amendment claim brought in his original Rule 33(b)(1) upon receipt of a letter from the FBI stating it has records of using real-time location information programs with AT&T on the day of the arrest. This is especially true where these records have been requested, demanded, and concealed by the government for some 7 years.

To conclude otherwise, would permit the government to flout Brady during pretrial motions, trial, post-trial motions, and abuse the post-conviction process by using procedural technicalities to argue against the very presentation/inspection of evidence the government itself is responsible for withholding in the first place. That is precisely what has taken place here, and due process of law should not allow it to stand. In routine cases involving guilty pleas, Rule 33(b)(1) would obviously not be available because there was not trial in the first place. But in cases where innocence has been maintained, due diligence extensive exercised - despite government stonewalling - reopening an existing claim should be an option.

#### CONCLUSION

Wherefore the petition and issuance of a writ of certiorari should be granted, and the judgment of the court of appeals reversed for the foregoing reasons.

Respectfully Submitted,

  
x

Mr. Andrew James Johnston

Date: 12/17/24