18-6604

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Joseph Jenkins — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals for the Second Circuit (Federal Court)
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Joseph Jenkins
(Your Name)

- Federal Correctional Institution Allenwood - Low Security
(Address)
- P.O. Box 1000
- White Deer, PA 17887
(City, State, Zip Code)

(315) 789-7578 (Family)
(Phone Number)

QUESTION(S) PRESENTED

I Can "catchall phrases" form a basis for a 'perjury by exclusion' indictment and conviction in the absence of precise questioning, open court transcripts under duress and extenuating circumstances; Is 'perjury by exclusion' an actual offense?(When the information sought remains 'unknown' to date?)

II Is due process violated when a district court fails to comply with the Court Reporters Act (losing exact portion of transcript in open court); Allows the presiding magistrate judge and other government employees to provide alternate facts and supplemental evidence to a jury in it's place; Thus concocting a "perjury" charge and obtaining a conviction, by 'perjury trap'?

III Would an unexplained, non-mandatory consecutive sentence added to a sentence determined to be (substantively unreasonable) "shockingly high," "excessive," "far overboard" where the appellate court judges actually stated "it was not possible to understand why the sentence was imposed;" Automatically render the sentence substantively unreasonable and needlessly harsh?

IV Does a district courts consideration of qualified retirment savings for immediate use in paying attorneys, fines, restitution, among other things place unfair hardship(s) on a defendant; When the defendant is not eligible to withdraw the funds (under 65) subject to fines, penalties, taxes and fees ranging from 30% to 50% or more under certain conditions; Can it be mandated?

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INDEX TO APPENDICES

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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

[XX] For cases from **federal courts**:

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

[X] reported at U.S. App. LEXIS 7454 (March 22, 2018); 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 B to the petition and is

[XX] reported at 130 F.Supp. 3d 700 (LEXIS 124491); 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.

TABLE OF AUTHORITIES CITED

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* * *

STATUTES AND RULES

OTHER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V

(In relevant parts) No person shall be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be sompelled in any criminal case to be a witness against himself. Nor be deprived of life, liberty or property, without due process of law...

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

JURISDICTION

[XX] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 03/22/2018.

[ ] No petition for rehearing was timely filed in my case.

[XX] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 3, 2018, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

TABLE OF AUTHORITIES CITED - CONTINUED

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STATEMENT OF THE CASE

This case is a manifestation of United States v Jenkins, 687 Fed.Appx. 71 (2d Cir 2017) which is the initial arrest. The arrest directly interfered with and usurped, preventing the resolution of case 6V7N3 instituted in Ontario Provincial Court on May 25, 2009; As explained in Jenkins v United States, 138 S.Ct. 530; 199 L.Ed.2d 406; 2017 Lexis 7231; as well as in extensive lower court proceedings.

The instant case follows a vague indictment in the Northern District of New York, where I was charged with "perjury" years after an arrest and arreignment. The government alleges "On or about October 4, 2011...under section 1746 of Title 28, United States Code...completed a Criminal Justice Act Form 23-Financial Affidavit and signed such form under penalty of perjury knowing that it was false because, as Jenkins then well knew, he had substantially more assets than Jenkins declared on the form...in order to obtain court-appointed counsel, in violation of Title 18, United States Code, Section 1621(2)."

At my initial appearance the government and the district court contend that "magistrate court proceedings were audio recorded after the judge took the bench," and that the "courtroom deputy was responsible for initiating the recording." The beginning of the proceeding in open court is missing from the recording.

A transcript provided from the district reads:

> (Beginning of proceeding not captured on recording.)
>
> THE COURT: -- counsel. Mr. Jenkins, what we're going to do is we're gonna appoint an attorney from our CJA list.

This was when the recording was allegedly activated. The remainder of the proceeding appears to be captured on recording. The problem herein is that a conversation relevant to my appointment of council is missing. The exact portion.

The majority of the alleged "perjury" revolved around the "cash" and "property" sections on the one page "CJA-23" form, which I did NOT fill out personally. The government claims I perjured myself for not disclosing (i) Retirement accounts (ii) business accounts (iii) some recreation vehicles and trailers. It is undisputed I was not asked specifically for any of these items. I was briefly questioned by a court clerk (I was handcuffed) as I could not personally fill out the form. The answers to the questions were "literally true" and relevant - nothing else.

Pretrial motions sought dismissal of the vague indictment, for among other things, extenuating circumstances surrounding: (a) an improper (usurped) arrest and complications with the pending case and two lawyers retained previously one in the US and one in Canada (b) complications surrounding the vague questions on the CJA form, business accounts and transactions, liabilities, pending jobs and retirement accounts and unknown balances at the time of arreignment (c) pending appeal in the first case and so called 'garnishment proceeding' instituted by the government and court (d) missing exact portion of relevant court transcript that was relevant to my defense.

In the pretrial conference in addition to the above, objections were made to (a) magistrate judge testifing on behalf of the government (b) cutting and editing "jailhouse recordings" the government sought to use at trial (c) subpoenaing my 80 year old father located in Florida as it served no purpose with all of the other 'evidence' the judge was allowing the government to use. They were also all denied or ignored without sufficient explanation, with the exception of the judge* stating that there was a 'rule of completeness' in reguards to the audio recordings. The recordings were made a few days after the arrest, right after I was denied any pretrial release - and were very prejudicial in nature. The case proceeded to trial.

* - The judge allowed them into evidence at trial - without explanation (cut and edited)

The magistrate judge was the governments primary witness and testified he had held many jobs in the US attorneys office previously. His testimony was overall very odd and scripted to say the least. Many years and 500 court appearances later he claimed he "refreshed [his] recollection" because "most of the proceeding was recorded...[I] also looked at docket entries...courtroom deputy notes...All of that helped refresh [his] recollection." He stated the "recording equipment apparently wasn't working properly...so I have to rely on my own memory" and "Now we tend to use court reporters" also "I don't specifically remember Mr.Jenkins." After identifing the "CJA Form" and it's contents, he claims he did ask me if the information on the form was "true" as "a usual practice" which allegedly occured off of the recording or before they claim it was activated. (In the 5-10 minutes missing)

The government than began (over my repeated objections) a ridiculous series of questioning with the magistrate. "If(s); where(s); I would say(s); catchall phrase(s); and the most suitable place(s) for;" etc. clearly trying to find places for things that the form didn't ask for. This was extensive.

On cross examination he oddly stated "I have a specific recollection of the proceedings. I refreshed my recollection with the tape and the transcript, but there are aspects of the proceeding that I don't have a specific recollection of." He admitted if we had a discussion (before appointing an attorney) it should have been on the [missing] audio and that it was his "job to conduct an adequate financial inquiry."

He futher testified, he is not an expert on IRA accounts and that the form does not ask for disclosure of them. But, he said there was a "catchall" for "valuable property" and further that the form does not "distinguish between business and checking accounts."court audio - he stated that it was the clerks office who maintains the recordings (integrity) and that of the documents. It was unclear where the recordings (which are digital) are stored, who has access to them - and what if anything would prevent tampering by the government. This building is shared and

mixed use with the government. The government has unfettered access to all court personnel and records. He further blames the courtroom deputy for not turning on the microphones, but it was never clarified how this was done or even if it was true. He did not order any inquiry into the corrupted digital recording. I also objected to the corrupted/incomplete audio being played for the jury - this was overruled as well.

The court clerk was allowed to testify next. She explained that appearances were recorded with an "FTR recorder." ODDLY, when asked if the entire proceeding was recorded in "audible format" she said "YES". She could not say why she neglected to inform the party's why she had not started the recording until well into the proceeding. She was not sure who had access to it or what security measures were in place, but it was saved onto a computer. When asked why there was no court reporter in the courtroom or if there could have been. she stated "it wasn't the proceedure."

Q. So there is a lot that happened that is not on the recording?
A. Correct.
Q. There is no official record of it and you had no specific recollection of it?
A. Correct.

When asked for an explanation (possibly another) why there was no audio, she stated "we've had problems in that courtroom before." She further had no recollection of any other proceedings that day or if she turned on the audio for them either.

There was various testimony over objections reguarding "jail calls" allegedly made by myself during incarceration. The judge admitted them into evidence (3 calls that were singled out by the government) without verification for authenticity and without all of the calls being disclosed (there were probably 100's) or turned over. The selected calls were cut and edited to sound incriminating - against pretrial discussions this would not be allowed to happen.

On top of this - another 'actor' was inserted who gave blatantly false testimony

combining with the magistrates orchestrated testimony with "catchall phrases," etc. totally misleading the jury finding places for things that the form clearly did not ask for. After the fact. Obtaining the conviction.

Another complete fraud was a so called agent who claimed to have escorted me to the courtroom after the arrest. This is to contradict my direct testimony that there was an explanation missing in the audio as to my uncertainty to the arrest and the lawyers I had retained. The "agent" claimed I said nothing at the proceeding. The "agent" was not there. The building has a marshalls service. I was escorted to the courtroom hours after the arrest. An 'outside' agent would not be allowed to do this. HE was an inserted actor, who was completely impeched on the witness stand as some voice recognition expert.

I basically testified in my own defense saying that I was both surprised and confused by the arrest, uncertain if it was over extradition. I had told the clerk I didnot know information off hand (which included over $200,000 in business intrests and liabilites) just stating I would probably have $10,000.00 after bills were paid off in a checking account - trying to do some quick math.

The magistrate was informed at the arreignment about the pending proceeding and that I had lawyers retained and needed to consult. He did find me eligible for appointed the attorney to assist - never following up on the circumstances. (This is whats missing on the recording).

The second circuit claimed on direct appeal, "an indictment need do little more than track the language of the statute charged" this was erroneous. The Rules of Federal Criminal Proceedure clearly state: Rule 7(c) "The indictment or information must be a plain concise and definite written statement of the essential facts constituting the offense charged." This supports this courts requirement that "Precise questioning is imparative as a predicate for the offense of perjury." The government failed by not precisely stating what "assets" were not "declared," "substantially more assets" lowered the governments burden of proof considerably.

The remainder of the 'summary order' issued by the court was negligent in ignoring the direct challanges to the perjury trap set by the testimony at trial, and the harsh, unexplained sentence following the questionable conviction - which under no circumstances warranted a consecutive sentence.

The Circuit judges claim on direct appeal (a)that the magistrate was merely a 'fact witness' (b) the vague questions on the form would not allow omission of (ie.) retirement funds or recreational vehicles (completely ignoring business accounts issue(s)) (c) 'corroboration' (ie. testimony from government employees) was not needed to sustain the conviction at trial - as the form itself was enough (d) completely ignored the fact the phone calls were cut and edited (e) claimed my assets were not frozen by the government/district when a letter was provided from my financial company stating they were (f) failed to remand the case for resentencing for the judge to explain the harsh sentence (g) failed to properly review the lack of evidence presented for the (rule 29) motion (actually disect) what was appropriate for consideration and what the magistrate said after the fact he wanted, which was ultimately irrelevant.

This led to a sham trial and the resulting conviction was a perjury trap. The circuits misguided take on the entire case is reflected in it's statement, "rather, he was out of funds because he hid his assets by trying to move them to his father." (S.O.p6) The statement is illogical in its composition, in addition to the fact testimony made perfectly clear - no money was ever transfered, and it had nothing to do with obtaining a "free" attorney. The circuits entire analysis was flawed and inadequate.

REASONS FOR GRANTING THE PETITION

The Foundation of this case is an arrest of a highly questionable origin that remains completely unexplained to date. This court declined to review the original arrest (Jenkins v. United States, 138 S.Ct. 530; 199 L.Ed. 2d 406; 2017 U.S. Lexis 7231, 86 U.S.L.W. 3281; decided December 4, 2017; 17-6632) denying the writ of certiorari without explanation. However, this consecutive conviction and sentence escalates the 'manifest injustice' and prosecutorial/judicial overreach ingored by the Second Circuit in United States v Jenkins, 687 Fed.Appx. 71 (2d Cir 2017) Cert Denied; Which ultimately turned a usurped Canadian offense of (12-15) months of incarceration into 20.25 years in federal prison following what are now two very dubious convictions.

The lower courts decision directly conflicts with and disreguards this courts ruling Bronston v United States (1973) 409 U.S. 352, 34 L.Ed.2d 568, 93 S.CT. 595 by affirming the indictment and conviction, as well as decisions by other circuit courts and it's own sentencing decisions and conclusions in Jenkins. This case and the erroneous, unexplained rulings within would literally allow anyone to be convicted of perjury, whether or not they have actually committed an offense.

I/II The indictment and conviction are erroneous.

In Bronston this court set fourth many standards and requirements needed to sustain a perjury accusation. The second circuit completely ignored all of them in affirming this "perjury" conviction, also contradicting rulings of other appellate courts. This allowed the government and the district court to effectively change the questions after they were asked and answered years earlier, under extenuating circumstances, to say the least.

The governments accusations against me revolve around a "CJA-23"* form application for court appointed council, which is one page long, from arreignment.(initial)

* - Also see arguement IV (district court decision)

What happened at trial to obtain the conviction was as unprecedented and as unorthodox as the preceeding case. In violation of Rule 605 (Federal Rules of evidence) and 28 U.S.C. § 455 the Magistrate judge was placed on the witness stand to testify as to events many years earlier, occuring in his courtroom, in place of, the (very conveniently) missing portion of (exact) open court transcript.

The presiding judge was called in from another district (Western District of New York) because of this controversy - so the magistrate could testify, on the governments behalf. The judge completely and inexplicably ignored this conundrum and decided to travel (bring) a court reporter from her district in Rochester to Syracuse, NY.

Under Fed.R.Crim.P. Rule 80 - The open court transcripts could have been used in my defense, thus concluding "the defendant never established that he wanted [or needed] assigned council," United States v Barton, 712 F.3d 111 (CA2, 2013) An entire conversation went missing. The entire situation I was placed into in this district violated the due process clause.

(A) Basic courtroom proceedures were not properly executed or adheared to on October 4, 2011.

(i) The form was not worded properly. It does not state or request that the information be "true and complete" or alternately "all of the requested information has been provided." It was not notorized or sworn under an oath administered by an authorized individual. (see United States v Duranseau, 19 F.3d 1117(6th Cir. 1994)

(ii) The district was out of compliance with the "Court Reporters Act" or 28 U.S.C § 753. "Congress specifically intended that sound recording not be the exclusive method of recording criminal proceedings," United States v Thompson 598 F.2d 879 (CA4, NC 1979). The court clerk clearly stated a court reporter "wasn't the proceedure" during open court arreignments. "[The] requirement that court reporter shall record all proceedings in open court cannot be overidden by local practice," see

Fowler v United States, (1962 CA5 Fla) 310 F.2d 481. "The requirements of the Act are mandatory and it is the duty of the court...to see that it's provisions are complied with." United States v Garner (1978 CA5) 581 F.2d 481. This is also why cases such as Thompson have held that, "Fearful that problems with electronic tape recording could prejudice the rights of defendants, Congress specifically intended that such sound recording not be the exclusive method of recording criminal proceedings," see (S.Rep.No618, 89th Cong., 1st Sess.(1965), Reprinted in (1965) U.S. Code Cong. & Adim.News, p.2905.

The magistrate judge nor the court clerk had any specific recollection of what actually transpired at the proceeding. This creates a circumstance where the (missing exculpatory) exact portion of transcript with an explanation could have exonerated me was a denial of due process. There could be no rational determination of guilt beyond a reasonable doubt.

(B) The magistrate judges testimony and several serious errors at trial created a 'perjury trap' changing questions that were asked.

(i) The magistrate (over objections) at trial was allowed to give testimony to proceedures he was not involved in, not an expert on, as a supplement to insufficient evidence and in place of missing open court transcript/audio that he should have been held accountable for. This was unprecedented, unsupported in total by any case law and any measure of common sense. "Judges hold a position or influence over a jury and it is improper for a judge to add to the evidence by assuming the role of a witness." United States v Blanchard (CA7, 2008) 542 F.3d 1133.

The testimony was orchestrated to give the illusion of 'perjury by exclusion'[1] for what seemingly was a 'substantial' amount of money I failed to disclose, but was completely irrelevant (business checking account) and was not plainly asked for (Retirement Accounts) trying to make them material years later.

1. No case law exists for "perjury by exclusion" allegations

It remains undisputed that I didnot fill out the form personally, because I was handcuffed, and clerk (who did not remember anything) questioned me and wrote the answers down. It is also undisputed that I ran a contracting business and was being proceeded against for the exact 'same' conduct in another case - for which counsel was retained, and the case remains pending.

Under 'duress' and 'confusion' of the arrest, I was asked about "cash" and "property" by the clerk. In Bronston this court held "It is the questioners burden to frame the interrogation acutely to elicit the information he seeks,"(@356). In a common dictionary (i.e. Oxford University Press (2010)) Cash is defined as (money available for use) and Property (a building and the land belonging to it) the answers to the questions were of course answered under this pretext. It was also undisputed that I was not asked for any Individual Retirement Accounts (IRAs) or anything of similar nature.(HN)9

Briefly the breakdown is quite simple:

My Net worth, according to the government	$230,886.00
(less the irrelevant) Retirement Accounts	(168,380.00)
Business Accounts	(58,481.00)
Total Available for consideration (Personal Accounts)	$ 4,025.00
"Checking Account Balance" declared on the 'form' was	$ 10,000.00
On Cross Examination the Magistrate stated an attorney costs	$ 8,000.00

Basic Math and Common Sense makes the entire prosecution unnecessary on top of all the other due process violations and attorneys previously retained. The amount of $10,000 declared on the form was relevant and the only funds available for use.

The was no property to declare in the form of 'real estate' relevant to the questioning. The government contends (along with the magistrate) after the fact I committed "perjury" by not disclosing balances of the IRA accounts and the business accounts under the "property" section of the "CJA" form (CJA-23) years later -

(HN) # HEADNOTES _ Classified to U.S.Supreme Court Digest (see page 26)

I claim they were irrelevant then, and still are now. Which is why they were not specifically asked for on the form. (Other courts and forms differ) As do opinions.

First, as explained in the trial, the "Ameriprise Accounts" were complicated (IRA'S) investments not managed by myself.[1] The documentation submitted by the government at trial was nearly a hundred pages long. Thoughout all of this, the balance on the day I was arreigned remains unknown. It was never proven. The used evidence showing the account balances on January 1, 2011 - I was arreigned on/about October 4, 2010.

Second, the "business accounts" (Checking and Money Market) contain funds for pending obligations. (i.e. customer deposits, sales tax monies) The business was fully operational with liabilities and contracts pending amounting to over $200,000 in total. It would have unlawful to spend these funds as personal.

Third, there was pending legal expenses from the pending Canadian Trial that this case directly interfered with. Uncertainty at the time of arreignment was made known at the arreignment. Which would have been on the 'missing' court transcript. This fact in itself would have been more than enough to qualify for court appointed counsel.

For example: The magistrate was allowed to testify on the stand that the "property" section of the form was actually a "catchall phrase," and that I should have listed "IRA accounts," "business checking accounts," among a few other things (boat, all terrain vehicle and a boat trailer, (which had no proven value)) which would have been material to his determination. Even though they were not specifically asked for, on the vague one page form. Claiming they would render me ineligible.

I submit, that he was misused (as a judge) to present misleading, false and confusing evidence to the jury. Irrelevant items, that were clearly not asked for, were lumped together for the jury - explained to them in a way that they were not explained to me when the form was being filled out - under duress.

This courts rulings in Bronston were to guard against such faulty indictments.[HN]

1. I was not aware of daily or monthly balances.

This court held in United States v Freeman, (1975, AppDC) 169 US App DC 73, 514 F.2d 1314, vacated on other grounds (1979, AppDC) 387, 598 F.2d 306, "In determining whether there is plain error, reviewing courts must weigh, where there are numberous trial errors, [the] cumulative impact." This was not done by the second circuit, because they failed to identify these two major reversible errors or even acknowledge them on the direct appeal. They are grounds for a re-trial even in the face of a faulty indictment.(they were irrelevant issues)

(C) This courts rulings in BRONSTON invalidate the Indictment and the conviction.

Most all of the Circuit courts have upheld this standard set in Bronston the Second circuit has perilously dreguarded it(lowering the standard) in new case law; This in addition to allowing biased magistrates to testify and add to 'evidence' after the fact - in lieu of open court transcripts and cutting and editing selected phone calls to concoct perjury charges.

The third circuit in United States v Crocker, stated an indictment may not stand where "[it] fails to set fourth the precise falsehood and the factual basis of it's falsity with sufficient clarity...to permit a jury to determine it's verity and to allow meaningful judicial review of the materiality of those falsehoods." United States v Slawik, 584 F.2d @ 83 (3d Cir 1977); This is reinforced by the 5th/11th Circuits in United States v Chaker, 820 F.3d 204 (2016) and in United States v Sarwari, 669 F.3d 401 (2011) by the 4th Circuit.

The government could not establish a precise "falsehood" because I was not specifically asked the question(s). This was done at Trial when the magistrates testimony was 'tailored' to establish the 'materiallity' after the fact - by finding places for things that the form clearly did not ask for. This violated all of my rights to due process. "Literal truth and ambiguity are both defenses to false statement claims,"(see) Bronston and Sarwari.

Therefore in this instance the vague questions to "property" and "cash" on the simplistic form (which differs greatly from the appellate and Supreme Courts financial affidavits which are 6 pages long)-combined-with the vague indictment to lower the governments burden of proof when all of the items (irrelevant or not)were lumped together by the improper testimony at trial.

(D) There was no "perjury."

Contrary to the appellate courts biased findings that "ordinary intelligence" should be the standard applied to the questions. A college educated and responsible business owner would not consider "business account(s)" expendable "cash" - Nor would he consider qualified "retirement accounts" expendable "cash" or valuable "property,"(as the common use dictonary terms them.)

It also would have been negligent (subject to prosecution) to misuse business funds which are designated to other individuals; Or to guess at or 'underestimate' any balances of IRA accounts, assuming I did understand the relevance, or was specifically asked for them - as they fluctuate with the market. The government could not even provide a balance on the day I was arreigned. How can someone be guilty of not providing an 'unknown' balance of an account?

The Rule 29 motion should have been granted by the judge and the court of appeals should have noticed and corrected the errors on appeal - by dismissing the case or ordering a re-trial suppressing the magistrates testimony and the cut and edited phone calls. The trial judge allowed the government to do whatever they wanted without explanation; Also allowing other government 'actors' to testify in the vaccume created by the too conveniently missing court audio. Their testimony was also very scripted to contradict my testimony and the events that actually took place in open court, which I remember, in detail. The trial errors were too numberous and created an unfair trial and improper conviction violating fundamental due processes of law.

(ii) Phone calls were erroneously cut and edited before being played to the jury to bolster the governments case even further. Among 'trolling' outgoing telephone conversations when I was incarcerated in county jail. The government was allowed to edit at least three phone conversations (over objections, pre-trial discussions) to sound incriminating and present them out of their original context. This was in direct violation of Federal Rules of Evidence 403, among other things. The judges decisions were unexplained in total in reguards to the admission of these calls - as was allowing the testimony of the magistrate.

Admission of these calls was overly prejudicial error. (a) the government had no reason to possess or electronically eaves drop on these calls. They were recorded at county jail and the government was simply 'trolling'. Under Illinois v Gates 462 US 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) 'probable cause' must exist and can only be supported by "totallity of the circumstances" indicating a probability of criminal activity. There was no underlying criminal investigation here. These calls were used to subpoena my financial records and concoct the so called "perjury" allegation. They were minipulated to misconstrue a conversation where I requested a transfer of business funds (to reduce liability exposure) under duress of the arrest - to wrongly imply I was trying to obtain "free" counsel under the guise of the disappearing court transcripts.

(b) Absolutely nothing about the calls was authenticated, in any way, by any prosecution witness. Hundreds of calls were missing, no expert witness was presented, no 'CD' of original calls was presented and no chain of custody was presented. An 'agent' presented by the government was completely impeached and uncredible.

(c) The calls were made when I was distressed about the unexpected initial arrest two days after arreignment after just being denied pre-trial release, which was quite devistating under the circumstances and to my business. I had not consulted any competent local attorney, or any previously retained attorneys at this time.

(E) The 'EXACT' portion of the proceeding missing warrants dismissal under due process.

The missing audio in this case, as elicited at trial was not inquired into by the sitting (replacement) judge who brought a stenographer from another district, which in itself says volumes. This case is preceeded by controversial conviction and conduct or ongoing vendetta between the petitioner and this district. The court clerk when asked did state the proceeding was entirely recorded in audible format. Other courts have dismissed cases for missing transcripts.

A murder conviction was recently overturned by the Georgia Supreme Court when "key portions" of his trial transcript went missing and were unavailable for appeal, Shepard v State, 2016 BL 370419, Ga., No S16A1291, 11/7/16.

In a very similar case involving tampered audio in Califoria, Kern County, a prosecutor was facing disbarrment over the creation of false evidence. The defendant Velasco - Palacios was released by the Supreme (state) Court. (Criminal Law Reporter (12-14-16) ISSN 11-1341)

In Velasco, between the prosecutor and police, the end of audio recording was deleted and a 'doctored transcript' was produced with a false confession. The courts found the prosecutor engaged in "egregious misconduct" that violated the "basic notion of ethics, integrity and fairness upon which the legal profession is built" which "erodes confidence in law enforcement and the criminal justice system."

In my case the beginning was erased creating the opportunity or 'vacuume' for the introduction (after deleting relevant conversation) of false testimony at trial and the previous indictment. As testimony presented at trial the government had opportunity. The building is shared mixed use with the prosecutors office and the court. The government has unfettered access to court personnel and records, including the digital audio recordings. Notorious for succeptibility to tampering. Following conduct in the first case by the government - This was relevant. The magistrate failed to follow up on the situation, this was erased.

III The 'consecutive' sentence imposed by the court is proceedurally and substantively 'unreasonable'.

This court pronouced in Gall v United States, 552 US 38 (2007) that the sentencing court "must adequately explain the chosen sentence to allow for meaning appellate review and promote the perception of fair sentencing." The judge under the circumstances erred by giving no reason at all for imposing a "consecutive sentence [where it] indisputedly affected the length of [] incarceration," Goodwin v Officer Billings Lexis 116471 (2018).

The court also in it's review of Booker that abuse of discretion standard applies to appellate review of sentencing decisions stating, "It is also clear that a district judge must...adequately explain his conclusion that an...unusually harsh sentence is appropriate with sufficient justifications." The appellate court ignored the harshness, it's prior ruling in Jenkins simply stating: "But the perjury conviction is a distinct conviction, and the sentence is below the guidelines range for perjury. The perjury sentence is substantively reasonable."

In it's decision in Jenkins, which was publicized and now highly cited was critical of the judge for the exact same mistakes. The sentence was ruled "excessive," "shockingly high," "far overboard," stating "where a sentence is unusually harsh, meaningful appellate review is frustrated where it is not possible to understand why the sentence was imposed." Yet the court said nothing, not properly reviewing a sentence added to this 225 month sentence making it 243 months in federal prison, when absolutely no explanation was offered. (see Jenkins, 854 F.3d 181, (2nd Cir 2017)

The decision in Jenkins further went on "Additional months in prison are not simply numbers. Those months have exceptionally severe consequences for the incarcerated individual. They also have severe consequences for both society which bears the direct and indirect costs of incarceration and for the administration of justice which must be at it's best when as here, the stakes are at their highest." The case

was remanded for resentencing after the court suggested the sentence was ten to thirteen years too high.

I argue that the sentencing judge in the second case abused her discretion by not reviewing the first (or acknowleging) sentence for substantive reasonableness, which it obviously was not.(Commiting a proceedural error) The appellate court also substantively erred by not instisting that the judge explain the non-mandatory and incredibly harsh consecutive sentence; That was based on two very dubious and controverisal convictions. This makes (renders) the sentence automatically unreasonable under any measure of common sense. It makes the sentence more vindictive than the first.

The only tennative explanation the judge suggested, was that I "have complete disreguard for the law and the courts lawful authority." This was also contradictive to the second circuits decision in Jenkins wnere citing United States v Gerezano Rosales, 692 F.3d 393, 401 (5th Cir 2012) a district courts decision to increase a defendants sentence based on "defendants disrespect for the law" consituted clear error in judgement. Actually stating in Jenkins "we are unwilling to sanction dramatically increasing a sentence because...[defendant]...fails to manifest sufficient respect for the system that is about to incarcerate him." Therefore both lower courts commited proceedural and substantive error by imposing and affirming the incredibly harsh consecutive sentence. Between the two convictions and the grounds of the original arrest the 'overreach' created is (and defines) "Manifest Injustice." 243 months in prison is unreasonable for a first time offender - when the original (usurped) case called for (12 to 15 months) if I was even convicted, which was unlikely citing the lack of evidence.

They further stated in Genao, 869 F.3d at 142, "The defendant, the public and appellate courts should not be required to engage in guesswork about rationale for a particular sentence." Under the "totallity of the circumstances" standard the consecutive sentence is not rational.

IV Consideration of qualified retirement funds places unfair hardships on defendants.

In United States v Lexin, 434 F.Supp.2d 836 (CA9 2006) the courts decision favors protection of any 'retirement accounts' in a similar controversy over a CJA-23 form:

> Further, federal law exempts, with certain exceptions not applicable here, retirement accounts from alienation or attachment. See 29 U.S.C. § 1056(d) The Court notes that 29 U.S.C. § 1056(d) allows a participant in a retirement plan to borrow funds from his or her retirement account if the loan is secured by the participant's accrued non-forfeitable benefit and is exempt from the tax imposed by 26 U.S.C. § 4975. Similarly, the funds contained in retirement accounts are exempt from a bankruptcy estate for distribution to creditors. Rousey v. Jacoway 544 U.S. 320, 125 S. Ct. 1561, 161 L. Ed. 2d 563 (2005). Courts have acknowledged "that strong public policy favors protection of retirement plans . . ." Seltzer v. Cochrane 104 F.3d 234, 236 (9th Cir. 1996)
>
> The government argues that the Court should consider Defendants' retirement accounts because the CJA 23 financial affidavit form requests that defendants list "stocks, bonds, or notes, not what type of investment vehicle the property is held in." However, the government does not explain how the CJA 23 financial affidavit form's request for "stocks, bonds, or notes, not what type of investment vehicle the property is held in," implicates a defendant's retirement account. If the CJA form envisioned a Defendant providing what type of investments and assets were in a defendant's retirement account, the Court presumes the form would so state.

This entirely supports my position in this case that since the form did not specifically ask for them, they should not be included as a basis for the so called perjury conviction. The government hevily relied on them at trial and the magistrate judge insisted to the jury they should have been included on the "form." The court went on to state that it did "not decide at this time whether Defendants may be capable of borrowing funds from their retirement accounts to pay for, or contribute to their legal expenses in this case." Further Stating:

> As a result, the issue of Defendants' eligibility for appointed counsel is less about whether defendants qualify for appointment of counsel and more about which assets may be considered by the Court assessing whether Defendants can provide partial contribution as an offset toward the attorney fees and related expenses likely to be incurred as part of the defense to the charges pending against them. Thus, despite the conclusion that each Defendant is eligible for appointed counsel, the Court proceeds with an examination each of issue since the outcome of that analysis dictates what, if any, contribution Defendants can make toward attorney **{434 F. Supp. 2d 841}** fees and expenses under 18 U.S.C. § 3006A(f).

This would be difficult to do at an initial arreignment after someone was arrested. There should have been a follow up proceeding.

The Criminal Justice Act ("CJA") requires each district court to establish" . . . a plan for furnishing representation for any person financially unable to obtain adequate representation . . ." 18 U.S.C. § 3006A(a) 3. The Guide To Judiciary Policies and Procedures, approved by the Judicial Council of the United States (hereinafter "Guide"), provides direction and elaboration to the court with respect to application of the statute.

Volume VII, Chapter II, § 2.04 of the Guide indicates that an individual is "'. . . financially unable to obtain counsel' . . . if . . . financial resources and income are insufficient to enable him to obtain qualified counsel." The Guide also states that "Any doubts as to a person's eligibility should be resolved in his favor."

Nothing in this district has been resolved in 'defendants favor' - where termination of council, (was appropriate?) - perjury prosecution, conviction and consecutive sentence were not.

Mandatory penalties of even 10% are unacceptable.

At the beginning of the case, the judge acknowledged that assets were restricted by a civil forfeiture proceeding against my(only remaining funds) "ameriprise accounts" which were annuities, SEP/IRA investments. The civil forfeiture proceeding instituted by this district seized $52,200 of non-tainted IRA funds to satisfy the judgement previously discussed as "overboard"and"excessive".

This proceeding (Case NO. 15-cv-0018) which costed me $25,000 or more on top of the seized money in fees/penalties/taxes, etc. was apparently not enough. The judge ordered an immediate fine to be paid, based solely on my remaining (after seizure) IRA Annuity of approximately $94,383.26 (balance fluctuates) using out dated information that I could "cash out" the entire account for $88,184 which she thought "was relatively minimal". This of course does not take into account the extra 30 to 50% of taxes on top of the withdrawl to be paid.

I argue that for an incarcerated individual, under the extenuating circumstances of the initial arrest, usurped arrest, pending case, outrageous sentences that this district has gone too far. Enough is Enough. "There must be a finding funds are available for that purpose... in ordering reimbursement in specified amount, the defendant will not suffer extreme hardship as a consequence of being deprived his funds." United States v Bracewell, 569 F.2d 1199 (2d Cir 1978).

There was further paperwork filed in the case (on docket) that funds where frozen by the government - this was ignored by the courts. "Assets are available when a defendant has discretionary use over them," United States v Konrad, 2013 LEXIS 18460 (2013 CA3). Further stating "We consider the liquidity of the assets," nothing was condidered properly in this - all rulings were simply made against the defendant and for the government, and were an abuse of discretion. An 'immediate' fine should not have been ordered to be paid out of a retirement annuity, by an incarcerated and under (retirement) aged defendant - on top of previously imposed fines that were ruled 'excessive' along with the term of imprisonment.

The improper testimony of the magistrate, insisting "catchall phrases" should have prompted me to disclose, among other things, business and IRA accounts, which were irrelevant and not specifically asked for; Combined with the cut and edited to sound incriminating "jail calls" - gave an 'illusion' of perjury where there clearly was not

V Summary

The second circuit has been neglegent, allowing too many 'mistakes' to be made by the district court, outrageous precedents are being written into case law as a direct result. Though this court does not "correct errors in lower court decisions" as a primary function; There should come a time when 'enough is enough' in criminal prosecutions. The piling on convictions and sentences (after ignoring major issues and due process violations on direct appeal) without proper justification and in violation of basic court proceedures-in the absence(s) of proper review have created a second consecutive 'manifest injustice' requiring this courts attention. Direct Appeals should specifically and properly address the issues presented for review.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Perjury § 1 - convictions - literally true but unresponsive answers - misleading testimony

1. Under the federal perjury statute (18 USCS § 1621), a witness may not be convicted of perjury for giving an answer, under oath, that is literally true, but unresponsive to the question asked and arguably misleading by negative implication.

Perjury § 1 - truth of answer

2. With regard to the federal perjury statute (18 USCS § 1621), whether an answer is true must be determined with reference to the question it purports to answer, not in isolation.

Perjury § 1 - unresponsive answers - test of truthfulness

3. With regard to the federal perjury statute (18 USCS § 1621), an unresponsive answer is unique because its unresponsiveness by definition prevents its truthfulness from being tested in the context of the question it purports to answer.

Perjury § 1 - bankruptcy proceedings - applicability of perjury statute

4. The federal perjury statute (18 USCS § 1621) is applicable to federal bankruptcy proceedings, where the need for truthful testimony is great, since the proceedings constitute searching inquiries into the condition of the estates of bankrupts, assist in discovering and collecting assets, and develop facts and circumstances which bear upon the question of a bankrupt's discharge.

Perjury § 1 - unresponsive answer - purpose - conjecture of jury

5. In a prosecution under the federal perjury statute (18 USCS § 1621), a jury should not be permitted to engage in conjecture as to whether an unresponsive answer, true and complete on its face, was intended to mislead or <*pg. 570> divert the examiner, for the state of mind of a witness is relevant only to the extent that it bears on whether he does not believe his answer to be true.

Perjury § 1 - errant testimony - primary safeguard

6. The federal perjury statute (18 USCS § 1621) must be read in the light that a prosecution for perjury is not the sole, or even the primary, safeguard against errant testimony.

Perjury § 1 - federal perjury statute - construction - literally true but unresponsive answers

7. The federal perjury statute (18 USCS § 1621) is not to be loosely construed, nor invoked simply because a wily witness succeeds in derailing the questioner, so long as the witness speaks the literal truth, for the burden is on the questioner to pin a witness down to the specific object of the questioner's inquiry.

Perjury § 1 - precise questioning - predicate for perjury

8. Precise questioning is imperative as a predicate for the offense of perjury.

Perjury § 1 - literally true but unresponsive answers - remedy - questioner's acuity

9. In federal trials and proceedings, any special problems arising from the literally true but unresponsive answer are to be remedied through the questioner's acuity, and not by a federal perjury prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph V Jenkins, Pro Se

Date: 9-24-18