Supreme Court of the United States

No. (Clerk Levitan Can Provide)

In re: Andrew J. Johnston, (Petition for Writ of Prohibition)

Petitioner.

Application For Stay of Proceedings Below

Now Comes the Petitioner Andrew James Johnston, respectfully before this Honorable Court. Petitioner applies for a stay of the proceedings below in light of Appendix A and Appendix B attached hereto, which are respectfully incorporated into this application. Petitioner adds that it is more than curious of the Seventh Circuit to deny the stay requested below, erroneously state in automated fashion what was filed is "repetitious and frivolous" and then require standby counsel to file a response ~~by~~ January 14, 2019 (the date the trial is scheduled to end sought to be stayed and/or prohibited absent the relief requested by the 'Petition for Writ of Prohibition' filed in this Court.

Wherefore petitioner prays the Court grant this application and the relief requested. Petitioner thanks the Court for its time and review.

Respectfully Submitted,

Date: 01/03/2019

x Andrew Johnston

Andrew James Johnston
71 West Van Buren Street
Chicago, Illinois 60605

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Appendix A

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
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ORDER

December 28, 2018

Before

DIANE P. WOOD, *Chief Judge*
DIANE S. SYKES, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*

No. 18-3302	UNITED STATES OF AMERICA, Plaintiff - Appellee v. ANDREW J. JOHNSTON, Defendant - Appellant
Originating Case Information:	
District Court No: 1:17-cr-00517-1 Northern District of Illinois, Eastern Division District Judge Rebecca R. Pallmeyer	

The following are before the Court:

1. **AFFIDAVIT OF PREJUDICE PURSUANT TO 28 U.S.C. SECTION 144**, filed on December 4, 2018, by standby counsel.

2. **APPELLANT'S MOTION FOR STAY OF PROCEEDINGS IN DISTRICT COURT PENDING APPEAL**, filed on December 21, 2018, by standby counsel.

IT IS ORDERED that the motion for stay of the district court proceedings is **DENIED**.

IT IS FURTHER ORDERED that Attorney Matthew McQuaid shall file, on or before January 11, 2019, a brief statement explaining what involvement, if any, he has had with appellant Andrew Johnston's repetitious and frivolous filings with this Court. We remind counsel that an officer of the court, even as standby counsel, has a duty not to submit frivolous papers to the Court.

form name: **c7_Order_3J**(form ID: **177**)

TRULINCS 22712424 - JOHNSTON, ANDREW J - Unit: CCC-I-A

Appendix B
(Page 1 of 12)

FROM: 22712424
TO: Johnston, Samantha C; Mcquaid, Matthew J
SUBJECT: Motion For Stay Pending Appeal
DATE: 12/20/2018 08:59:40 PM

...

Appeal No. 18-3302

APPELLANT'S MOTION FOR STAY OF PROCEEDINGS IN DISTRICT COURT PENDING APPEAL

NOW COMES the Appellant, Andrew James Johnston, respectfully before this Honorable Court. Appellant moves the Court for a stay of the proceedings in the district court pending disposition of this appeal pursuant to Abney v. United States, 431 U.S. 651 (1977); and Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989). In support thereof, appellant offers the following particulars:

1. On December 18, 2018, the district court denied appellant's 'Motion To Revoke Detention Order And For Release From Custody', Dkt. No. [236]. The motion had been pending in the district court since October 12, 2018. Following the completion of an updated pretrial services report on November 26, 2018, appellant appeared in the district court on November 29, 2018 and orally argued in support of his pretrial release, without any opposition whatsoever from the Government at that time. Specifically, on November 29, 2018, the Government did not contend appellant was a "danger to community" nor a "flight risk" following the submission of the updated pretrial services report. On December 18, 2018, appellant once again appeared before the district court primarily on a well-grounded 'Motion To Continue Trial Date' and 'Motion For Daubert/Kumho Tire Hearing', where once again the Government did not assert any opposition whatsoever to appellant's release pending trial. As reflected by Dkt. No. [279], the Court finally denied appellant's pretrial release without any opposition by the Government.

2. In Abney, supra, the Supreme Court held that an interlocutory appeal may be taken to vindicate the "right not to be tried" created by the Double Jeopardy Clause. The Court saw such an appeal as one raising an issue separate from the merits yet presenting a question that could not be resolved on appeal from a final judgment-for by then the trial would be over, the "right not to stand trial" lost. Appellant opened this appeal on three premises:
(1) the denial of pretrial release after 15 months of pretrial detention and the impedance/irresolution of appellant's trial subpoenas critical to establishing his alibi defense;
(2) the oral denial of appellant's 'Motion To Dismiss Pursuant To Double Jeopardy Clause' because the indictment does not plead a sufficient bar to a subsequent prosecution under the 18 U.S.C. section 2113(a)P2 following an acquittal on section 2113 (a)P1;
(3) the district court's refusal to address appellant's Tenth Amendment/separation-of-powers challenge to the federal jurisdiction element as a threshold matter and question of law despite the Supreme Court's holding in Steel Co. v. Citizens For Better Environment, 523 U.S. 83, 94-95 (1998); and contemporaneously,
(4) the district court's omissions of the proper exercise of it's authority/impedance concerning appellant's ability serve subpoenas duces tecum from pretrial detention to acquire highly material evidence for his alibi defense.

3. At this time, Dkt. No. [279] reflects the district court's intent to force appellant to stand trial on January 8, 2018 absent the evidence needed for his defense, and without any defense witnesses served to testify for the defense. Please see Supreme Court Docket No. 17-8840, 'Special Supplemental Brief/Bill of Complaint', Exhibits (Email From Matthew J. McQuaid to appellant). Two un-served witnesses in particular that will show appellant's alibi unavailability coupled with the Cell Site Location Information ("CSLI") from appellant's cell phone; original, unaltered, properly authenticated/certified radio chatter between federal and local law enforcement between 4:30pm-5:30pm on July 25, 2017 in a ten square mile radius of defendant's arrest; and the ATM camera video from the Byline Bank from 4:30pm-5:30pm on July 25, 2017 of the show-up are currently outstanding pieces of material evidence the district court is ignoring. Moreover, the district court seeks to force appellant to stand trial without the assistance of the previously requested (and orally approved in July/August 2018) investigator/expert witness, who was requested pursuant to appellant's pretrial detention and need for neutral investigative feet on the ground in a residential neighborhood to discover the most important defense witness in the case. In United States v. Parker, 716 F.3d 999, 1010-1011 (7th Cir. 2013), the defendant there raised similar concerns before this Court about the proceedings in front of the same district judge concerning the right to call defense witnesses by stating "she was deprived of her right to call witnesses in her defenses based on a confusing set of circumstances relating to who was ultimately responsible for getting those witnesses to court." Parker, Id, at 1010-1011 (emphasis added).

4. More recently, in United States v. Sammy Gordon (Case No. Unknown)(represented by Sam Adam, Jr.)(motion to suppress granted in 2018 prior to service/production of dash cam video) in front of the same district judge below, an identical set of circumstances occurred regarding the non-service of a subpoena duces tecum to acquire a dash cam video from a Hoffman

Estates Police SUV that Gordon sought after both a preliminary and suppression hearing. Appellant is the one who directed Mr. Gordon's attention (while housed together at the MCC-Chicago) to the dash cam that Gordon and defense counsel pushed for around April/May 2018 which caused the subsequent granting of the 'Motion To Suppress' without production of the dash cam. To appellant's knowledge, based on information received from Gordon, eerily Gordon's subpoena was never served. Gordon had also stated to appellant that Gordon's defense counsel stated to Gordon something to the effect that counsel "had to go about getting the subpoena another way" (indicating the judge would be a problem). In the same vein, in United States v. Warner, 498 F.3d 666, 705-715 (7th Cir. 2007), Judge Kanne's dissenting opinion identifies strong parallels to the past 11 months of proceedings before the district court in appellant's case below.

5. Specifically, Judge Kanne observed: "Judge Pallmeyer is a consensus builder. This insightful comment is the key to understanding the non-structural juror errors. Consensus building can help in finding common ground in disputes. It can also expose decision makers to alternative points of view. But consensus building can have negative consequences as this case demonstrates. Consensus building by the district judge allowed a continual round robin of discussions between the attorneys and the court especially during the critical period of March 27th and 28th when the parties and the court were addressing the juror-related issues. Transcripts from this period reveal a very conscientious but irresolute judge who is willing to contribute her views and concerns to the conversation involving contested issues, but is reluctant to provide firm rulings that end the court's consideration of those issues. The record from this period is full of conversations but lacks definitive rulings ... A lack of definitive rulings by the trial court presents great difficulty in a review on appeal, for appellate courts review decisions, not commentary ... Yet, the district judge's post-trial decision did not provide citation to the record on this point. In fact, a review of the record during the March 27th and 28th period shows there was absolutely no consideration of the conflict between Juror Ezell and other jurors ... However, the nonstructural errors--in their totality--were so egregious that again a mistrial was the only permissible result." Warner, supra, 705-715 (internal quotations and citations omitted).

6. As stated above, appellant has been held in pretrial detention without opposition from the Government since November 29, 2018, and arguably since September 25, 2018 when the Government suggested an updated pretrial services report in open court. Furthermore, 18 U.S.C. section 3142(j) emphasizes the importance of the presumption of innocence; 3142(b) mandates release; and 3142(c) mandates release with certain specified conditions. Appellant has made every possible effort to rely solely on the law as expressed by controlling Supreme Court and Seventh and D.C. Circuit precedent and the evidence tendered to, and retained by appellant before the district court. Key evidence and witnesses remain outstanding due to lack of service of subpoenas duces tecum and/or is being withheld by the FBI. On December 18, 2018, appellant expressed these issues in minute detail before the district court, and even asked to place one of the witnesses, James Kelly, on the phone in open court on speaker phone to inquire about the missing 53 minutes of ATM camera video appellant has been requesting since October 2017. The district court has no interest in getting to the bottom of the evidentiary issues, has no interest in appointing the U.S. Marshals to serve highly specific, relevant, and material subpoenas, has no interest in an evidentiary nor suppression hearing nor Daubert hearing, let alone the official appointment of the expert orally approved who visited appellant at the MCC-Chicago and was shown the intricacies of the defense.

7. A defendant's right to compulsory process is violated only when a court denies the defendant an opportunity to secure the appearance at trial of a witness whose testimony would have been relevant and material to the defense. Washington v. Texas, 388 U.S. 14, 23 (1967). The government violates the Constitution's Due Process Clause "if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Smith v. Cain, 565 U.S. 73, 75 (2012). Additionally, "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." Roviaro v. United States, 353 U.S. 53, 60-61 (1957). Accordingly, on December 18, 2018, appellant argued to the district court that it was contradicting it's prior order on November 20, 2017 requiring the government to disclose the communications to the arresting officer's police SUV by refusing to continue the trial date and leaving appellant without a remedy to subpoena the original police radio chatter. Clearly, the original radio chatter is material for a jury to hear versus the unauthenticated "911 audio" tendered to date, which contains static and buzzing sounds to omit certain transmissions. Tendered dash cam with audio coupled with appellant's own personal observations show: there was a presence of federal agents in rush hour traffic accompanying and/or coordinating the local police and arrest of appellant by way of illegal access of appellant's CSLI and knowledge of appellant being on U.S. Probation. That information concerning the presence of other law enforcement, nor the totality of the information received by the arresting local police has not been produced to appellant. Yet, the district court having observed the AUSA's integrity in recent disclosure of some material evidence and un-opposition of pretrial release still seeks to force the trial on January 8, 2019, knowing appellant will not be ready.

WHEREFORE appellant prays, and respectfully seeks, that this Court grant this motion and the relief requested, also reconsider appellant's 'Motion For Release From Custody Pending Trial And Memorandum of Law' for the above stated also foregoing reasons. Appellant thanks the Court for it's time and review.