NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

JAMES JOHNMAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "additional special assessment" in the Justice for Victims of Trafficking Act, 18 U.S.C. § 3014, imposes a per-offender or per-count assessment of $5,000.

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other sources

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Petitioner James Johnman, Jr. respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The Third Circuit's opinion is reported at 948 F.3d 612 (3d Cir. 2020). Pet. App. 1a-7a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on May 8, 2018. The Third Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291 and entered judgment on January 28, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 3014 of Title 18 of the United States Code provides, in relevant part:

> (a) In general.--Beginning on the date of enactment of the Justice for Victims of Trafficking Act of 2015 and ending on September 30, 2021, in addition to the assessment imposed under section 3013, the court shall assess an amount of $5,000 on any non-indigent person or entity convicted of an offense under--
>
> (1) chapter 77 (relating to peonage, slavery, and trafficking in persons);
>
> (2) chapter 109A (relating to sexual abuse);
>
> (3) chapter 110 (relating to sexual exploitation and other abuse of children);
>
> (4) chapter 117 (relating to transportation for illegal sexual activity and related crimes); or
>
> (5) section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) . . .

STATEMENT OF THE CASE

This case asks the Court to correct an illegal sentence and a fundamental error of statutory interpretation: whether the "additional special assessment" in 18 U.S.C. § 3014 imposes a per-offender or per-count additional amount of $5,000. The Third Circuit Court of Appeals, based on a textual analysis of the grammatical articles used in the statute, concluded the statute required $5,000 per count of conviction. The Second Circuit Court of Appeals held the statute straightforwardly imposed an additional $5,000 per offender. The Third Circuit erred, and this Court should grant certiorari to prevent a widening Circuit split.

1. Proceedings below

Petitioner James Johnman, Jr. pleaded guilty to three counts: use of an interstate facility to attempt to entice a minor to engage in sexual conduct, 18 U.S.C. § 2422(b); distribution of child pornography, 18 U.S.C. § 2252(a)(2); and possession of child pornography, 18 U.S.C. § 2252(a)(4)(b). The District Court sentenced him to 368 months imprisonment on Count One, concurrent terms of 240 months on Counts Two and Three, a life term of supervised release, a $15,000 special assessment under the Justice for Victims of Trafficking Act ("JVTA"), 18 U.S.C. § 3014, a $300 special assessment, 18 U.S.C. § 3013, and $1,000 in restitution.

After the government moved to enforce the appellate waiver, the singular issue on appeal was whether the District Court erred in imposing a $15,000 (per-count) special assessments under the JVTA.

2. The Opinion of the Third Circuit Court of Appeals

The Third Circuit (Krause, Rendell, and Matey, JJ.), in a precedential opinion authored by Judge Matey, affirmed the sentence below, determining that the plain text of the JVTA called for a per-count assessment for each qualifying offense, $15,000 in this case. *United States v. Johnman*, 948 F.3d 612 (3d Cir. 2020. The relevant text is:

> [I]n addition to the assessment imposed under section 3013, *the court shall assess an amount of $5,000 on any non-indigent person or entity convicted of an offense* under--
>
> (1) chapter 77 (relating to peonage, slavery, and trafficking in persons);
> (2) chapter 109A (relating to sexual abuse);
> (3) chapter 110 (relating to sexual exploitation and other abuse of children);
> (4) chapter 117 (relating to transportation for illegal sexual activity and related crimes); or
> (5) section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) (relating to human smuggling) . . . .

18 U.S.C. § 3014(a) (emphasis added).

The Third Circuit focused on the phrase "convicted of an offense" and found that the singular construction "an offense" is best read to mean "each offense." It reasoned that the use of the indefinite article "an" before "offense" referred to a discrete criminal act. (3a (resorting to definition from Black's Law Dictionary and New Oxford American Dictionary)). Thus, a defendant who pleads guilty to three counts has been "convicted" of three separate offenses.

The Third Circuit used this same grammatical analysis to conclude that the JVTA's other references to the special assessment, in subsections (b), (f), and (g), confirmed this "ordinary reading." 18 U.S.C. § 3014(b) reads:

> (b) Satisfaction of other court-ordered obligations.—*An assessment* under subsection (a) shall not be payable until the person subject to *the assessment* has satisfied all outstanding [monetary obligations] related to victim-compensation arising from the criminal convictions on which *the special assessment* is based.

18 U.S.C. § 3014(g) reads: "the obligation to pay an assessment . . . shall not cease until *the assessment* is paid in full." In subsections (b) and (g), the Third Circuit explained that the first use of the indefinite article "an" establishes an indefinite amount and then the pivot to the definite article "the" when looking back to the initial reference in the subsection naturally means the total amount assessed under subsection (a). (3a). The Third Circuit explained that the definite article "the" used in subsection (f), discussing "[t]he amount assessed under subsection (a)," this time signified an unrestricted sum "open to more than one monetary value." (3a-4a) (resorting to definition from the New Oxford American Dictionary)). Finally, the Third Circuit found that § 3014 mirrored the neighboring assessment in 18 U.S.C. § 3013, showing Congress's intent to incorporate that previous judicial construction. (4a).[1]

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1 The special assessment in Section 3013 has some similar and some different language, but different legislative purpose is evident. The amounts assessed in § 3013 range from $5 to $25 assessments for various classes of misdemeanor offenses up to $400 for a felony conviction if the defendant is "a person other than an individual." All courts of appeals have ruled that § 3013 subjects a defendant to a "per count," not a "per defendant" assessment. *See, e.g., United States v. Donaldson*, 797 F.2d 125, 128-29 (3d Cir. 1986) (emphasizing that the 3013 assessment is a nominal amount). The legislative history confirms that Congress believed the fee schedule in Section 3013 was "nominal." *See* S.Rep. No. 497, 98th Cong., 2d Sess. 13, *reprinted in* 1984 U.S.C.C.A.N. 3607, 3619.

REASONS FOR GRANTING THE PETITION

I. There is a circuit split between the two Circuits that have decided this issue and this Court should step in before the split widens.

Two Court of Appeals have now focused on whether the JVTA requires a per-offense or per-defendant assessment of $5,000 and issued authoritative and precedential opinions reaching opposite conclusions. In *United States v. Johnman*, the Third Circuit found that the plain, natural, and best reading of the additional special assessment in § 3014 showed that Congress intended to assess a defendant $5,000 per-qualifying count.

The Second Circuit disagreed. In *United States v. Haverkamp*, the Second Circuit, in a precedential opinion written by Judge Parker, found that 18 U.S.C. § 3014 is straightforwardly meant to be applied on a per-offender basis. 958 F.3d 145 (2d Cir. 2020) (8a). The Second Circuit focused on the language "an amount of $5,000," and held that meant "as a matter of grammar and common understanding" that the amount is assessed one time. (8a). The Second Circuit found that comparison to § 3013, where Congress demonstrated it knew how to call for multiple assessments, reinforced its decision. In a footnote, the Second Circuit disagreed with *United States v. Johnman* as follows:

> The Third Circuit has recently held that the special assessment established by § 3014 is to be applied on a per-count, rather than per-offender basis. *United States v. Johnman*, 948 F.3d 612, 620 (3d Cir. 2020). That Court reasoned that "an offense" meant "a discrete criminal act" and "convicted" was an "offense-specific term." *Id.* at 617. Its main authority for this proposition was a case from the First Circuit, *United States v. Luongo*, 11 F.3d 7 (1st Cir. 1993), which interpreted a different provision—§ 3013—and held that "convicted of an offense" should be read to mean an assessment imposed for each qualifying conviction. *Id. Luongo* contained no discussion of

> § 3014, which had not been enacted when the case was decided. *Johnman* concluded that § 3014 should be read "lockstep" with § 3013 and interpreted in the same way. *Johnman*, 948 F.3d at 619. We respectfully disagree. Although §§ 3013 and 3014 both deal with post-conviction assessments, the two provisions differ in important respects. Section 3013 is a reticulated provision that calibrates assessments according to the severity of the offense(s)—from infractions to felonies and then sub-classifies them according to the class of misdemeanors. The assessment of § 3014 is far larger (one hundred to one thousand times greater) than the assessments provided for in § 3013. Section 3013 does not contain an indigency exception, whereas § 3014 does. Most importantly, the provision, "an amount," that underpins § 3014 differs sharply from § 3013, which specifies "the amount" for each discrete category of offense. We believe that these differences are too pronounced to justify *Johnman's* "lockstep" approach.

958 F.3d at 150 n.3 (9a).

Like the split between the Second and Third Circuits but without the analysis, District Courts and Courts of Appeals have decided and affirmed judgments that split on whether Section 3014 requires a per-offender or per-count special assessment. *Compare United States v. Kelley,* 861 F.3d 790, 796 (8th Cir. 2017) (affirming conviction and sentence of one $5,000 JVTA special assessment for defendant convicted by jury of one count of possession of child pornography and four counts of receipt of child pornography); *United States v. Hughes*, 2017 WL 2462725 (S.D. Tex. June 6, 2017) (not reported) (imposing a $5,300 special assessment for three counts of conviction related to child pornography); *United States v. Stefanyuk*, Crim. No. 17-40042 (D.S. Dak.) (imposing a $5,400 special assessment for three counts of distribution of child pornography and one count of failure to register as a

sex offender),[2] *with United States v. McMiller*, 954 F.3d 670 (4th Cir. 2020) (affirming $10,200 special assessment for two eligible counts); *United States v. Childers*, 740 Fed.Appx. 417 (5th Cir. 2018) (affirming $10,200 special assessment for two counts of production of child pornography); *see also United States v. Pye*, 781 Fed. Appx. 808 (11th Cir. 2019) (vacating $15,000 portion of $15,300 special assessment on ex post facto grounds). Of course, the universe of cases that add to either side of this split is not easily captured through searches of Westlaw and PACER.

II. The question presented is important

Mr. Johnman was sentenced to an illegal sentence: the additional special assessment that exceeded the statutory maximum of $5,000 violated his right to be free from duplicative prosecutions and punishment. This concept is a hallmark of American jurisprudence and dates back to the common law of England. *United States v. Wilson*, 420 U.S. 332, 339-43 (1975) (citing 4 W. Blackstone, Commentaries 335-36; 3 E. Coke, Institutes 212-13 (6th ed. 1680)). Moreover, a court cannot impose a sentence if it is not authorized by law, *cf. Brady v. United States*, 397 U.S. 742, 755 (1970), and parties cannot bargain for an illegal sentence, *see Baker v. Barbo*, 177 F.3d 149, 155 (3d Cir. 1999). This Court can easily correct the continuing entry of illegal sentences.

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2 Failure to register as a sex offender is found in Chapter 109B of Title 18 and, thus, is not an includable offense under the JVTA. *See* 18 U.S.C. § 3014.

III. This case presents an ideal vehicle to resolve it.

The issue was squarely pressed and passed upon below, and this was the only issue. This petition presents a simple case for this Court's evaluation and review.

CONCLUSION

On this important issue, the petition for writ of certiorari should be granted.

Respectfully submitted,

ALISON BRILL
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Dated: June 16, 2020