FROM: 22712424 JOHNSTON, ANDREW J 20-6487

[redacted]

SUBJECT: Petition For Rehearing
DATE: 01/31/2021 06:44 PM

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-6487

Andrew J. Johnston,

Petitioner,

v.

United States,

Respondent.

PETITION FOR REHEARING

Executed on: February 1, 2021 x Andrew Johnston

Mr. Andrew J. Johnston
Prisoner ID No. 22712424
United States Penitentiary
P.O. Box 24550
Tucson, Arizona 85734

QUESTION PRESENTED

Will this Court adhere to its precedent interpreting the separation of powers enumerated by the Constitution and apply and enforce that precedent against the lower courts where a member of the Judiciary and a member of the Executive branches reworded a federal criminal statute in the middle of a criminal trial to dilute the reasonable doubt standard of proof and frustrate the overall statutory scheme against legislative intent and history?

JURISDICTION

The jurisdiction of this petition is founded upon the Court's January 19, 2021 order denying petitioner's petition for writ of certiorari without Justice Barrett's consideration, and Rules 44 and 58. "A petition for rehearing of a denial of a petition for writ of certiorari is part of the appellate procedure authorized by the Rules of this Court ... The right to such a consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied ... Accordingly, on an appropriate showing that a substantial matter as required by Rule 58, is to be presented, appropriate opportunity should be given for doing so." Flynn v. United States, 99 LED 1298, 1299 (1955).

TABLE OF AUTHORITIES

ORGANIC

Article I, Section 1; Article III, Section 2; Amendment V's Due Process Clause; Separation of Powers;

STATUTORY

18 U.S.C. Section 2113(a)P1; Section 2113(a)P2; Section 2113(b); Section 2113(c);

OTHER

1 W. Blackstone, Commentaries on the Laws of England, 69 (1765);

3 E. Burke, Reflections on the Revolution in France, 110 (1790);

Black's Law Dictionary, 1696 (11th Ed. 2019);

Jackson, Decisional Law and Stare Decisis, 30 A.B.A.J. 334 (1944);

The Federalist, No. 78, P. 529 (J. Cooke ed. 1961)(A. Hamilton);

CASES

Johnson v. United States, 135 S. Ct. 2551 (2015);

Kolender v. Lawson, 461 U.S. 352, 357 (1983);

M'Culloch v. Maryland, 4 Wheat 316, 404, 405 (1819);

Payne v. Tennessee, 501 U.S. 808, 827 (1991);

Richmond v. Arizona, 434 U.S. 1323, 1325 (1977);

Sessions v. Dimaya, 138 S. Ct. 1204 (2018);

United States v. Davis, 139 S. Ct. 2319 (2019);

United States v. Hudson, 7 Cranch 32 34 (1812);

United States v. Loniello, 610 F.3d 488, 492, 492 (CA7 2010);

United States v. Thornton, 539 F.3d 741, 747, 749 (CA7 2008);

Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

STATEMENT OF FACTS

On January 9, 2019, the jury instruction that were adopted by the district court on August 2, 2018 were in effect as no subsequent jury instruction conferences were requested by the parties before the trial began on January 8, 2019. Specifically, as a result of the August 2, 2018 conference, the district court stated:

"Defendant Johnston has been charged with violating the first paragraph of 18 U.S.C. Section 2113(a), which prohibits the act of taking or attempting to take property or money from a bank 'by force and violence, or by intimidation'" ... and went on to cite "United States v. Loniello, 610 F.3d 488, 491 (7th Cir. 2010)." Case No. 1:17-cr-517, Dkt. No. 201, Page 1, Filed August 7, 2018.

However, after the following testimony came out during cross-examination on January 9, 2019, the judge and prosecutor altered the substantive jury instruction over petitioner's objection:

"Mr. Johnston: What did he say initially?

The Witness: My wife and kids have been kidnapped. They are going to rape and kill them. My brother-in-law has a gambling problem. I need money. And he gave an estimated amount of like -- I want to say it was like 28-$3500"

R. #330, Page 34, Id. at 9-16.

"Mr. Johnston: And did you hear that individual instruct her to come closer?

The Witness: No, I did not.

Mr. Johnston: Did you hear the individual say anything about a robbery? Did you hear the word 'robbery'?

The Witness: No."

R. #330, Page 34, Id. at 23 - Page 35, Id. at 1-4.

"Mr. Johnston: You stated that you were about three to four feet away from the suspect when he approached the counter? Is that true?

The Witness: Yes.

Mr. Johnston: Did you hear the suspect make any threat to you or to Ms. Nevarez?

The Witness: No.

Mr. Johnston: Did he say he was going to harm you or Ms. Nevarez in anyway if he did not get what he was asking for?

The Witness: No.

Mr. Johnston: Did he mention a weapon? Did he mention any form of violence towards you or Ms. Nevarez as you stood on the other side of that countertop that day?

The Witness: No."

R. #330, Page 47, Id. at 6-23.

At the surprise jury instruction conference later that evening:

"The Court: All right. Government Instruction No. 16 is the pattern 4.01, attempted bank robbery. The elements are the attempt, deposits insured, use of intimidation.

Mr. Johnston: We resolved to include 'the defendant acted to take such money by force and violence or by intimidation.' The pattern instruction includes all three elements. The actual intimidation has to be proven beyond a reasonable doubt, even though its an attempted bank robbery. So to dilute that element, to me, would be extremely prejudicial.

Mr. Bond: Judge, the pattern instruction -- the indictment in this case charges the act was by intimidation. There is no evidence that we are presenting of force in this case. To add those elements to the instruction would cause confusion, we believe, with the jurors. I think leaving it strictly as intimidation, as is charged in the indictment and as the evidence has been presented, would be the proper way to instruct the jury.

Mr. Johnston: You already ruled on it -- I believe it was July -- that we would include whoever by -- the defendant acted by force and violence or by intimidation. And as you may be aware, the government also proposed an additional definition of 'attempt' and 'knowingly'. So they are already trying to -- and then the definition of 'intimidation' in Instructions 19, 18, and 17 that follow right behind it. So they are already trying to water down intimidation, what it means, and make it just simply like, boo, and it's intimidation, is [what] I get from this instruction.

The Court: Let me just take a look at the pattern.

Mr. Johnston: The authority for that is United States v. Thornton, if I'm not mistaken.

Mr. Bond: Force, violence, and intimidation are different means. They are not different elements, Judge. The intimidation is what was charged in this case. There was no violence charged. There was no force charged. It was charged as intimidation.

Mr. Johnston: That was the reason why I asked for the lesser included offense, was because it was so close to on the boarder there. So you took that lesser included offense away from me and included the 'whoever by force and violence or by intimidation'. So I felt like that was a fair compromise, by taking away the lesser included offense, and it's in the pattern.

The Court: I didn't take anything away from you.

Mr. Johnston: I mean, it was there, but then we went back over it. Initially you granted it when you read Prince out in the court, and Ms. Ardam brought up [Loniello], if you recall.

Ms. Ardam: Your Honor, if I just may, for a second? Jury Instructions is not a competition. the jury has to be properly instructed by the law. It's also the responsibility of the Court. There is no evidence of those means. The jury should not -- I think it's, quite frankly, even more prejudicial for them to receive that instruction, that it could be violence or it could be force. But --

Mr. Johnston: That's what the pattern reads. I didn't write the pattern.

The Court: It says -- the pattern says, the defendant acted to take such money or property by force and violence or by intimidation. I think the government is conceding, there is no force or violence. They are saying the only thing they are going to try to prove here is intimidation. So you want to include force or violence in order to show that in some other case they would have to prove that; is that right?

Mr. Johnston: No. I want to show force and violence because if, God forbid, I am convicted, intimidation still qualifies as a -- it's been interpreted to mean a crime of violence for career offender provisions for sentencing things and stuff like that.

The Court: We can't change that, though.

Mr. Johnston: Right. So the burden is enumerated in the pattern, and I feel like omitting those two elements, which are already there, is prejudicial to me, because I basically built my defense around showing them that there was insufficient evidence to satisfy these elements.

The Court: Right. I think you are right. I don't think it's contested that there is no evidence of violence in this case.

Mr. Johnston: I mean, the thing is that from -- I'll give you my footing. Thornton. Thornton was outside of a bank. he had a machine gun in a suitcase, or something like that. He walked up to the handle of the door, he touched it, noticed somebody in the drive-up window. Didn't go in the bank, and got nervous and walked away. The guy called the police. They came and arrested him. They found him with the machine gun on him, they charged him with attempted bank robbery by intimidation. So the Seventh Circuit interpreted that, and they said that they don't lose their burden on intimidation. That includes the way that they wrote the pattern instruction, to me. That burden, it goes with it. That's the whole point. Intimidation has been defined as a threat of force, an implied gesture. Like this is intimidation (indicating), putting your hand in your shirt or something like that. So what they are trying to do, ultimately, is water that down to where, 'oh, she had a nervous breakdown. She was shocked by the experience of this. That's intimidation'. That's not intimidation. Intimidation is a threat of force and fear of bodily harm.

The Court: I think you have got a good argument. I think you have got a good argument. You could say, they haven't shown intimidation. Nobody was intimidated here. She had this nervous breakdown, but that has nothing to do with intimidation. I don't know how that relates to this discussion we are having, though, which is whether or not we need to put back in something the government agrees it's not going to prove-up. The instruction says 'or by intimidation'. I think it's reasonable to take out the reference to force and violence, because the government concedes it's not proving that. So I am going to adopt Government Instruction No. 16"

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DATE: 02/01/2021 12:56 PM

R. #331, Page 142, Id at 13 - Page 147, Id. at 1-14.

On January 21, 2019, petitioner filed his motion for a new trial, R. #303, and his renewed motion for acquittal, R. #304. And on January 28, 2019, petitioner filed his supplemental brief/addendum to those motions, R. #305. As the motion for a new trial was the next available procedural vehicle after the above cited surprise jury instruction conference on January 9, 2019, the motion stated:

"after defendant's cross-examination of the bank tellers on January 9, 2019, the Court improperly modified the jury instructions, most importantly: Government Instruction No. 16, Section 3, to omit the statutory elements 'force and violence' from the instruction. The omission removed the vague (and undefined by 18 U.S.C. Section 2113) term and essential element 'intimidation' from its contextual backdrop and common law origin of producing an ordinary person in fear of bodily harm ... the omission of 'force and violence' therefore from the jury instruction dislocated 'intimidation' from its actual meaning. This error evaporated the government's burden of proof, and simultaneously diluted the reasonable doubt standard to be applied by the jury ... By omitting 'force and violence' from the jury instruction above stated, the Court did not give 'intimidation' its plain meaning in the 'robbery' context required by Section 2113's title ... Furthermore, by eliminating the habitat of 'force and violence' to further expand intimidation into a dragnet, the overall statutory scheme was frustrated because acts criminalized by section 2113(a)P2 and section 2113(b) could be ensnared by the ambiguous intimidation element of section 2113(a)P1 out of its robbery context ... This would lead to absurd results because all larceny would be encapsulated by 'intimidation' ... if Congress intended for such absurd results to exist, it wouldn't have passed section 2113(a)P2 or section 2113(b), which contravenes legislative intent." R. #303, Page 3 of 12 - page 5 of 12.

In reply to the United States' response to that motion, petitioner stated:

"As applied to the jury instruction error here, 'or by intimidation' is the proviso whose subject-matter is confined to the scope of the enacting/principal clause 'force and violence' of section 2113(a)P1's elements. This was done to qualify and restrain the generality of 'intimidation' to prevent misinterpretation of removal from the robbery context ... The government concedes this point, and cites no authority nor legislative history/intent to the contrary." R. #334, Page 2 of 5, Section 3 - Page 3 of 5, Section 4.

On November 12, 2019, petitioner raised the exact same challenge to the district court's misconstruction of section 2113 as usurping the legislative branch in his opening brief in the court of appeals. Appeal No. 19-1624, Opening Brief, Page 34 - Page 38. And on March 20, 2020, petitioner filed his reply brief in the court of appeals quadrupling down on that challenge to the district court relegislating section 2113(a)P1 in violation of the separation of powers and the court of appeals' controlling precedents, Thornton and Loniello.

All the court of appeals had to say in its May 11, 2020 order affirming the district court was:

"He argues the district court failed to instruct the jury that to convict it had to find that he used 'force and violence'. But the statute of his offense criminalizes the taking of bank property 'by force and violence, or by intimidation.' 18 U.S.C. section 2113 (a)(emphasis added). The district court therefore correctly stated the law, and because Johnston was charged only with attempted robbery by intimidation, it had no obligation to instruct the jury on the 'force and violence' clause. See United States v. Matthews, 505 F.3d 698, 704 (7th Cir. 2007)." Appeal No. 19-1624, May 11, 2020 Order, Page 5, Paragraph 1.

After petitioner's May 17, 2020 petition for rehearing en banc mysteriously never made it to the docket in the court of appeals, on June 25, 2020 petitioner's motion to recall mandate was granted, and his petition for rehearing en banc was filed. On July 14, 2020, the court of appeals denied that petition. After petitioner's petition for writ of certiorari was docketed on December 1, 2020, it took until January 29, 2021 for petitioner to finally become equipped with unfettered access to his trial transcripts, and enough ink pens to prepare this petition. And, on January 29, 2021, petitioner received this Court's January 19, 2021 order denying certiorari. This petition follows.

GOOD FAITH CERTIFICATION

Under Rule 58, petitioner hereby certifies under the penalty of perjury this petition is brought in good faith as it presents a substantial matter and a "new reason why [the] initial decision to deny certiorari was wrong." Richmond v. Arizona, 434 U.S. 1323, 1325 (1977). This Court's January 19, 2021 order denying certiorari was wrong because petitioner's petition for writ of certiorari was wrong. This is so, because it was written without the transcripts of the January 9, 2019 surprise jury instruction conference. After March 20, 2020, the staff at petitioner's previous place of confinement, USP Lee, did not allow petitioner access to his transcripts. Thus petitioner only had the citations from his reply brief in the court of appeals to rely on.

It was also wrong because it raised way too many issues, which was the natural reaction by petitioner to having the vast majority of his issues inaccurately and incompletely addressed by the court of appeals' May 11, 2020 order and subsequent denial of rehearing en banc. The most substantial matter of petitioner's case rests within this Court's most organic function under the Constitution: to enforce the separation of powers between the co-equal branches of the national government. To not allow relatively unaccountable judges and prosecutors to act as unelected congressmen and senators without respective constituents to answer to.

REASONS FOR GRANTING REHEARING AND CERTIORARI

The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity' ... The government of the Union, then [], is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit ... If any one proposition could command the universal assent of mankind, we might expect it would be this - that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all." M'Culloch v. Maryland, 4 Wheat 316, 404-405 (1819).

As emanating from the people, it is settled that only the people's elected representatives in the legislature are authorized to "make an act a crime." United States v. Hudson, 7 Cranch 32, 34 (1812). Thus, an Assistant U.S. Attorney and a U.S. District Judge in the northern district of Illinois may rewrite a federal criminal statute in the middle of a trial under no constitutional circumstances, regardless of whether that prosecutor concedes he cannot carry his burden of proof beyond a reasonable doubt in the context commanded by the statute and pattern jury instruction. The answer was acquittal or dismissal, not legislating from the bench.

If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws or criminal laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature -unelected, and hijacking the important policy decisions reserved by the Constitution to the people's elected representatives. Those representatives passed 18 U.S.C. section 2113(a)P1 as the most serious charge of the statute in the context of force and violence, to distinguish that section from all of the lesser charges, section 2113(a)P2, section 2113(b), and section 2113(c).

When the district court removed that context, it presented a version of section 2113(a)P1 to the jury, over petitioner's objection, that was not passed by Congress. It then sentenced petitioner under the same judge-drafted charge to 14 years imprisonment with the full liability of the force and violence context incorporated into sentencing provisions, despite the jury not being instructed on that context. Not only was this done in usurpation of Congress, but also against the court of appeals' controlling precedent. "Accordingly, actual force and violence or intimidation is required for a conviction under the first paragraph of section 2113(a), whether the defendant succeeds (takes) or fails (attempts to take) in his robbery attempt." United States v. Thornton, 539 F.3d 741, 747 (CA7 2008).

And the other case speaking directly to the exact structure at issue held "[i]nterpretation depends on context, and the context of 'or' in the phrase 'by force and violence, or by intimidation' is completely different from the context of 'or' as a conjunction between self-contained units." United States v. Loniello, 610 F.3d 488, 493 (CA7 2010). Despite this clear and express precedent, the court of appeals said nothing about the context commanded by the statute nor how removing that context disrupts the whole section 2113 statutory scheme by reading out the lesser asimilar sections as inoperative or redundant as all their provisions could be stuffed into intimidation removed from the atmosphere of force and violence, but still bring about the full sentencing implications of force and violence.

The lone case the court of appeals cited, "United States v. Matthews, 505 F.3d 698, 704 (7th Cir. 2007)", was decided pre-Thornton and Loniello, and sheds a third of the light that Thornton and Loniello do on the issue. Matthews was not expressing the Seventh Circuit's position amongst a national circuit split as did Thornton, and was not deciding a government interlocutory appeal of the dismissal of an indictment as Loniello did. This Court's precedent is that a statute may not invite arbitrary enforcement and that judges cannot legislate from the bench. Kolender v. Lawson, 461 U.S. 352, 357-358 (1983); Johnson v. United States, 135 S. Ct. 2551 (2015); Sessions v. Dimaya, 138 S. Ct. 1204 (2018); United States v. Davis, 139 S. Ct. 2319

(2019).

Adherence to precedent is necessary to "avoid an arbitrary discretion in the courts." The Federalist, No. 78, P. 529 (J. Cooke ed. 1961)(A. Hamilton). The constraint of precedent distinguishes the judicial "method and philosophy from those of the political and legislative process." Jackson, Decisional Law and Stare Decisis, 30 A.B.A.J. 334 (1944). Stare Decisis ("to stand by things decided") is the legal term for fidelity to precedent. Black's Law Dictionary, 1696 (11th Ed. 2019). It has long been "an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 W. Blackstone, Commentaries on the Laws of England, 69 (1765).

This principle is planted in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them. Because the "private stock of reason ... in each man is small, ... individuals would do better to avail themselves of the general bank and capital of nations of ages."
3 E. Burke, Reflections on the Revolution in France, 110 (1790); see also, Payne v. Tennessee, 501 U.S. 808, 827 (1991); Vasquez v. Hillery, 474 U.S. 254, 265 (1986).

We know the district court did not adhere to the applicable precedent, Thornton and Loniello. We know the court of appeals did not enforce that precedent. We know the court of appeals did not apply horizontal stare decisis. And we know the court of appeals did not apply this Court's precedent interpreting the separation of powers. The question is now will this Court enforce its own precedent, M'Culloch, Hudson, Kolender, Johnson, Dimaya, Davis, Payne, Vasquez, and grant this petition as well as certiorari thereafter?

Wherefore petitioner prays this Court reverses and/or vacates the court of appeals' May 11, 2020 judgment for the foregoing reasons.

Respectfully Submitted,

Andrew Johnston 02/01/2021

Mr. Andrew James Johnston