FROM: 22712424
TO [redacted]
SUBJECT: Petition For Writ of Habeas Corpus
DATE: 06/12/2021 05:48:45 PM

21-5611

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES



No. (Clerk To Supply)

In re: Mr. Andrew James Johnston,

Petitioner.

[redacted]

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

To: Mrs. Amy Coney-Barrett, Associate Justice
Supreme Court of the United States
Washington, DC 20543-0001

Executed on: 06/14/2021 x Andrew Johnston

Mr. Andrew James Johnston
Prisoner ID No. 22712424
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QUESTION PRESENTED

Will this Court issue a writ of habeas corpus that vacates the conviction and sentence imposed in Case No. 1:17-cr-517, under a version of a federal criminal statute that was not passed by Congress in violation of Article I, Section I?

JURISDICTION

The jurisdiction of this Court is founded upon the Judiciary Acts of 1789 and 1867, as interpreted by Felker v. Turpin, 518 U.S. 651, 660-661 (1996), which authorizes this Court to hear original habeas petitions directed at individual justices, or the entire Court as a whole, independent of the Anti-Effective Death Penalty Act or any proceedings thereunder.

TABLE OF AUTHORITIES

ORGANIC

U.S. Constitution, Article I, Section I

U.S. Constitution, Article III, Section 2



CASES

Felker v. Turpin, 518 U.S. 651, 660-661 (1996)

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

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

United States v. Jones, 713 F.3d 336, 339-340 (CA7 2013)

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

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

STATUTES

18 U.S.C. Section 2113(a)P1

18 U.S.C. Section 2113(a)P2

OTHER

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STATEMENT OF FACTS

On July 25, 2017, petitioner was arrested. On August 23, 2017 petitioner filed a false arrest suit, Case No. 1:17-cv-6183, and on August 24, 2017 a grand jury returned an indictment against ANDREW JOHNSTON charging a single count of attempted bank robbery in violation of 18 U.S.C. Section 2113(a)P1. After extensive unsuccessful pretrial motion and extraordinary writ practice, including a motion to dismiss for failure to state a charge, R. #216, petitioner was forced to stand trial "or plead guilty" on January 8, 2019.

Special Note: an appeal is currently pending in the court of appeals, No. 21-1746, that seeks the production of the January 8, 2019 for the first time; and a petition for writ of prohibition about the same pending as well, No. 21-2073.

On January 9, 2019, the jury instructions that were in place were adopted by the district court on August 2, 2018 as no subsequent jury instructions conferences were held following August 2, 2018. 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.

On January 9, 2019, petitioner, representing himself, cross-examined bank teller supervisor, Sharon Byrne, about her interaction with the suspect on July 25, 2017 as follows:

"Mr. Johnston: What did he say initially?

Ms. Byrne: 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?

Ms. Byrne: No, I did not.

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

Ms. Byrne: 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?

Ms. Byrne: Yes.

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

Ms. Byrne: 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?

Ms. Byrne: No.

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

Ms. Byrne: No."

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

Later that evening after the jury had been sent home, the trial court held a surprise jury instruction conference after hearing the above stated testimony:

"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 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 border 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 -- I think its, 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 its 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 its not going to prove-up. The instruction says 'or by intimidation'. I think its reasonable to take out the reference to force and violence, because the government concedes its not proving that. So I am going to adopt Government Instruction No. 16."

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

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On January 21, 2019, petitioner filed his renewed motion for judgment of acquittal and motion for a new trial, R. #303, #304, which argued the district court's adoption of Government Instruction No. 16 over petitioner's objection removed intimidation from its original context of force and violence and frustrated the entire Section 2113 statutory scheme against legislative intent in violation of Article I, Section I, of the Constitution. R. #303, Pages 3 - 5. And in reply to the United States' opposition to that motion reiterated that the principal clause was "force and violence" and "intimidation" is the proviso which should have its generality restricted by the principal clause. R. #334, Pages 2 - 3.

On November 12, 2019, petitioner raised the exact same issue on direct appeal in the opening brief. Appeal No. 19-1624, Opening Brief, Pages 34 - 38. And once again, fortified that position in his reply brief on March 20, 2020. On May 11, 2020, the court of appeals devoted three sentences to explain its justification of the district court's violation of Article I, Section I. Appeal No. 19-1624, May 11, 2020 Order, Page 5, Paragraph 1.

Petitioner raised the same issue in his petition for rehearing en banc, which was denied on July 14, 2020, and in his petition for writ of certiorari, which was denied January 19, 2021. On rehearing from the denial of certiorari, this was the sole issue petitioner presented for review, however the petition for rehearing was denied on April 19, 2021. S. Ct. No. 20-6487. On April 23, 2021, petitioner filed a petition for writ of certiorari to the April 19, 2021 decision by this court denying rehearing with the International Court of Justice, P.O. Box 19519, 2500 CM, The Netherlands, Certified Mail Tracking No. 664303972US.

Special Note: there is an appeal pending regarding the dismissal of a civil complaint for the mistranscription of trial transcripts in the above stated portion during cross-examination of Byrne, appeal no. 21-1221.

REASONS FOR GRANTING THE WRIT

The government proceeds directly from the people. U.S. Const. Article I, Section I. The people passed Section 2113(a) through their elected representatives to be the most serious section of the Section 2113 overall scheme. This was done with a view that "intimidation" would be in the context of "force and violence", not freewheeling in generality. The applicable precedent, Jones, Thornton, Loniello, Kolender, and Davis, supra, reinforce this position. Petitioner is being held in violation of Article I, Section I, because he is convicted under a version of Section 2113(a)P1 that Congress did not pass as the trial court reconstructed the statute through its surprise jury instruction conference on January 9, 2019. As a result, petitioner stands sentenced as though the suspect in the bank brandished a pistol because of the gap in the law created by the trial court's omission of "force and violence" from the instruction. This is a classic violation of separation of powers between the Judiciary and the Legislative branches of the National government. For these reasons, this Court should issue a writ of habeas corpus that vacates the above stated conviction and sentence, order a new trial with the proper instructions to the jury, and any relief the court may deem fair and just at the earliest opportunity available.

CONCLUSION

Wherefore petitioner prays the Court grants this petition and the relief requested for the foregoing reasons.

Respectfully Submitted,

x Andrew Johnston Executed on: 06/14/2021

Mr. Andrew James Johnston

# Statement Under Rule 20.1 & 20.4(a) Explaining Aid of the Court's Appellate Jurisdiction, Exceptional Circumstances Warranting Exercise of Discretionary Powers, And Why Adequate Relief Cannot Be Obtained In Any Other Form or Court

The attached petition contains one ground for relief, a single "claim." The claim is a violation of the Constitution's separation of powers. The claim was raised before trial in the district court on a motion to dismiss, R. 216 respectively, and fully argued on the merits after trial in petitioner's motion for a new trial, R. 303, 305, 334, as the violation was fresh. On direct appeal, no. 19-1624, the claim was also fully briefed in the Opening Brief and Reply Brief, but the court of appeals failed to address the separation of powers aspect of the claim in violation of the party presentation principle.

The claim was fully argued in petitioner's petition for writ of certiorari, No. 20-6487, which was denied January 19, 2021, and it was the sole claim brought in the petition for rehearing, No. 20-6487, which was denied April 19, 2021. Because the claim is directly predicated on the January 9, 2019 transcript, which has been discovered to contain highly material omissions of evidence from it, see Johnston v. Ward & Pallmeyer, Case No. 20 CV 7247, on appeal at no. 21-1221, petitioner

attempted to provisionally file his petition under 28 U.S.C. § 2255 with a motion to suspend briefing and motion to compel production of evidence in the same envelope as the petition so the district court would order the original audio recording of January 9, 2019 from the courtroom microphones to be filed on the docket with other newly discovered evidence/recordings. See, 21 CV 2720.

Once that January 9, 2019 recording was filed, petitioner was going to file a Second Amended petition under § 2255 to bring the claim in this petition. However, on June 22, 2021 the district court received the next-day-air sent $505.00 for the filing fee for the appeal no. 21-1221 about the transcript, and unilaterally denied the petition under § 2255 without briefing, discovery, or a hearing, in retaliation for the above stated fee being paid on time. Compare: 20 CV 7247 on June 22, 2021 With: 21 CV 2720 on June 22, 2021. In the Ninth Circuit, the binding precedent upon the district petitioner is held in requires that § 2241 petitioners show § 2255 is inadequate or ineffective by (1) claiming actual innocence; and (2) that the petitioner did not have an unobstructed procedural shot at presenting the claim - which means it was not available at the time of petitioner's direct appeal and first § 2255 petition.

Where petitioner could not anticipate the June 22, 2021 retaliatory order unilaterally denying the §2255 petition, the claim herein was not resubmitted in the §2255 petition so the district court would not revisit its prior ignorance of the claim, or the court of appeals' ignorance of the claim, or this Court's denial of certiorari, until the January 9, 2019 audio recording of the trial was filed as evidence on the §2255 docket. As such, in the Ninth Circuit, an obviously procedural bar presumably exists that bars reaching the merits. Put differently, futility is the cause for petitioner not presenting this claim in Arizona given that it was not presented in the first §2255 petition before it could be amended upon the January 9, 2019 audio.

The writ will be in aid of the Court's appellate jurisdiction because it will allow a ruling on the merits, given that the primary evidence supporting the claim is prima facie in the petition, without the need of granting certiorari or the process thereof, and it will confine the lower courts to a proper exercise of their jurisdiction by showing them that failing to address a fully argued/briefed separation of powers claim in a motion for a new trial, direct appeal, and the intentional mishandling of a §2255 petition will not go uncorrected by this Court. No other relief or court can grant the relief requested because of the §2255(e) precedent in the Ninth Circuit, and a petition for a writ of certiorari cannot

be taken on the denial of a certificate of appealability under 28 U.S.C § 2244, which is how the claim would be processed in the Ninth Circuit.

Respectfully Submitted,

Date: 07/16/21 Andrew Johnston

Mr. Andrew James Johnston