No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2021

JOHN GREGORY ALEXANDER HERRIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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SUBMITTED: October 22, 2021

QUESTION PRESENTED

WHETHER THE GOVERNMENT WAS ENTITLED TO ESTABLISH PETITIONER'S GUILT AT TRIAL FOR FEDERAL OFFENSES IT DID INDICT (INTERSTATE TRANSPORTATION OF STOLEN MONEY AND MONEY LAUNDERING) BY TRIAL PROOF ON A FEDERAL OFFENSE IT FAILED TO INDICT (BANK THEFT) AND ON WHICH THE STATUTE OF LIMITATIONS HAD RUN.

RELATED PROCEEDINGS

United States v. Herrin, Ninth Circuit Cause No. 19-30002
Decision Date June 26, 2019 (interlocutory appeal).

Herrin v. United States, United States Supreme Court No. 19-6188
Petition for Certiorari denied November 12, 2019.

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Petitioner John Gregory Alexander Herrin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The June 23, 2021 decision of the court of appeals is not reported. A copy of it is set forth in the Appendix to this petition at pages 1-4. Relevant decisions of the district court are likewise unreported and included in the Appendix at pages 5-21.

JURISDICTION

The order of the court of appeals denying petitioner's petitions for rehearing and rehearing en banc in the Appendix at page 22 was entered on July 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. This case involves the Grand Jury Clause contained in the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

2. This case also involves 18 U.S.C. §3282(a), 18 U.S.C. §2314, 18 U.S.C. §1957 and 18 U.S.C. §2113(b), which respectively provide in pertinent part:

> §3582(a)
> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

> §2314
> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.

> §1957
> Whoever . . . knowingly engages in or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

§2113(b)
Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both.

STATEMENT

1. Acting under the express language of 18 U.S.C. §3231 that "district courts of the United States shall have original jurisdiction, exclusive of the courts of the States of all offenses against the laws of the United States" the government filed an indictment on October 26, 2016, against petitioner alleging that he physically transported stolen United States currency from Montana to Nevada (Las Vegas) in January 2014. (Count I, Appx. 199). And likewise that the same stolen money was the result of a specified unlawful activity, which petitioner laundered through his various accounts. (Counts II-XIII, Appx. 199-206). The former charge was brought under 18 U.S.C. §2314. The latter charges were brought under 18 U.S.C. §1957. Noticeable by its absence was any allegation in the indictment suggesting how the money generally described as "stolen" became "stolen" in the first place.

2. Initial work on the case revealed that the money in question ($390,000.00) was supposedly the object of a theft on November 20, 2013 from an armored car owned by GardaWorld, a company engaged in the business of transporting large amounts of currency and coin between FDIC banks throughout

Montana. However, although petitioner was employed by GardaWorld and indeed had previously staffed the very truck from which the money was taken, petitioner did not work the day the $390,000.00 was discovered missing. Furthermore, despite an internal investigation by GardaWorld security staff, and a parallel investigation by the local (Missoula, Montana) police department, petitioner was not identified as a suspect in the theft of the money in either of those investigations. Not until later when Currency Transaction Reports surfaced did authorities suspect that petitioner was likely the one who actually took the money.

3. Once the CTRs surfaced federal law enforcement vetted petitioner's bank and stock market accounts, which led investigators to conclude that petitioner was likely the one who took the money from the armored car in November of 2013. Not only had petitioner processed large cash deposits through his local Montana bank, the federal investigation also showed that petitioner had traveled to Las Vegas in January of 2014 to engage in high stakes gambling.

4. Knowing that theft of bank money from an armored car is a federal crime under 18 U.S.C. §2113(b), *see United States v. Mafnas*, 701 F.2d 83 (9th Cir. 1983), the defense queried government counsel whether the United States intended to contend at trial that petitioner had stolen the $390,000 to prove the charges in the indictment. When the government confirmed that was the case defense counsel centered petitioner's defense on the claim that the government ought not be allowed

to proceed to prove that petitioner had physically moved "stolen" money interstate, or that he laundered same through his personal accounts, premised on the idea that petitioner had actually been the one who had taken the $390,000 in violation of 18 U.S.C. §2113(b).

5. Consequently, before, during and after trial (and on both interlocutory and direct appeal) petitioner argued without success that his right to grand jury indictment had been violated because the trial proof was broadened to include a federal crime (armored car bank theft) not alleged in the indictment and on which the statute of limitations had expired.

REASONS FOR GRANTING THE WRIT

Throughout the entire course of this proceeding it has been the government's theory that it was petitioner who took the money from the armored truck on November 20, 2013. However petitioner was never indicted for that crime. And by the time of petitioner's jury trial in January of 2020 the statute of limitations of five years applicable to that theft offense had been expired for over thirteen (13) months.[1]

Yet over consistent defense objection the government offered and secured admission of trial evidence which supported the view that it was petitioner who had

[1] The money went missing on November 20, 2013. The five year limitation period expired on November 20, 2018. Petitioner was indicted on October 26, 2016, but was not tried until January, 2020. Moreover, the government acknowledged that it was not oversight but its design not to indict petitioner as the thief. Appx. 196-197.

taken the money, which again, in this context was an unindicted violation of 18 U.S.C. § 2113(b). Furthermore all of the government's trial proof casting petitioner as the thief resulted in this closing argument assertion by the government:

> So what might have happened to the money? Maybe Mr. Herrin followed the truck to Missoula that day. We know Curt McAlpin and Clay Olson were working. But maybe he followed it over there. Maybe he wore his uniform in order to blend in. Waited for McAlpin and Olson to leave the truck, used a broom handle to open the truck, opened locker 13, took the bags, and drove back to Helena several hours before anyone at Garda realized the money was even missing.
>
> And then the fingers were pointed to all the employees who were working that day, and Mr. Herrin wasn't. You can infer that based on the evidence here. There's enough evidence to draw that conclusion. But you don't need to answer that question.

Appx. 71, lines 8-20.

In *Stirone v. United States*, 361 U.S. 212 (1960), this Court ruled that the Fifth Amendment's grand jury clause was violated because the offense proved at trial was not fully contained in the indictment, just like here. Stated a little differently in *Stirone*, just like here, the trial evidence in effect amended the indictment by broadening the possible bases for conviction from those which appeared in the indictment. As this Court said in *Stirone* the issue was "whether [Stirone] was convicted of the offense *not charged in the indictment*." 361 U.S. at 213 (emphasis added). Here the government could not convict Petitioner on the § 2314 charge or the § 1957 money laundering charges without also convicting him of the § 2113(b) violation, which was not charged in the indictment, but was nevertheless put before

the jury in the government's trial proof. *See Dowling v. United States*, 473 U.S. 207, 216 (1985) (common-sense meaning of 18 U.S.C. § 2314 contemplates the physical identity between the items unlawfully obtained and those eventually transported in interstate commerce). Hence there needs to be proof of some prior physical taking of the money or property in a § 2314 case. Unfortunately in this case the government wrongly chose to prove at trial that petitioner was the actual thief, a crime for which petitioner clearly was not indicted, and on which the statute of limitations had expired.

Considering that the Court cannot permit a defendant to be tried on charges that are not made in the indictment brought against him; or because the statute of limitations on that unindicted crime has expired, petitioner's convictions on Counts I-V, VIII, XI, XII, XIII, of the indictment ought to be reversed, with no right of retrial in the government. This follows because absent the government's unindicted contention that petitioner was the thief the trial proof is insufficient as a matter of law to show beyond a reasonable doubt that the money supposedly transported by petitioner to Nevada from Montana and/or processed through petitioner's personal accounts was the same money taken from the armored car. *Cf. Jackson v. Virginia*, 443 U.S. 307, 318 n. 11 (1979), *citing and quoting Curley v. United States*, 160 F.2d 229, 232-233 (D.C. Cir. 1947) (If "reasonable" jurors "must necessarily have . . . . a [reasonable] doubt as to guilt, the judge must require acquittal, because no other

result is permissible within the fixed bounds of jury consideration."). This is the result required here because except for the unindicted, out-of-time contention that petitioner stole the $390,000.00 from the armored truck there is no proof that the money allegedly transported (Count I) or the money allegedly laundered (Counts II-XIII) was the same money taken from the armored truck.

CONCLUSION

WHEREFORE, the Court should grant this petition, vacate the judgment and reverse all of the counts of which petitioner was convicted, with no right of retrial in the government.[2]

Respectfully submitted this October 22, 2021.

/s/ Michael Donahoe
MICHAEL DONAHOE
Deputy Federal Defender
Counsel of Record

[2] Petitioner was acquitted of Counts VI, VII, IX, and XIV. Appx. 12-16.