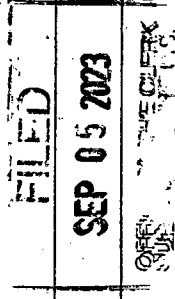


IN THE SUPREME COURT OF THE UNITED STATES

23-5878 ORIGINAL

Andrew James Johnston

Petitioner



United States

Respondent

Originating Case Information: CCA7 16-22-2202

PETITION FOR WRIT OF HABEAS

Executed on: September 1, 2023

Andrew Johnston

Mr. Andrew James Johnston

Prisoner ID 16 2272424

Federal Correctional Institution

PO Box 23811

Tucson, AZ 85734

RECEIVED

SEP 15 2023

OFFICE OF THE CLERK
SUPREME COURT U.S.

QUESTIONS PRESENTED

1 Does the plain language of 18 U.S.C. § 3604 (F)(2) command that district courts set restitution schedules of payment in the judgment instead of impermissibly delegating that duty to U.S. Probation and/or the Bureau of Prisons? If so, should the Fourth, Fifth, and Seventh Circuits' contrary precedent be overruled?

2 Does this Court's holdings interpreting the mens rea of the elements "use of force, attempted use of force, and threatened use of force" in

Borden v. United States, ~~137 S.Ct. 1817 (2017)~~ apply to the synonymously-worked elements of "force and violence, or intimidation" in 18 U.S.C.

§ 2113(a) and undermine Carter v. United States, 530 U.S. 255, 269 (2000)? If so,

should Carter be revisited and/or overruled to the extent it holds § 2113(a) cannot be violated by reckless mens rea?

JURISDICTIONAL STATEMENT

The district court's jurisdiction was founded on 18 U.S.C. § 3231 because the motion sought

issuance of a writ of *coram nobis*. The court of appeals' jurisdiction was founded upon

28 U.S.C. § 1291. This Court's jurisdiction is founded on 28 U.S.C. § 1254(1) and the

following: (a) 18CA7 judgment on June 26, 2023;

(b) Hearing En Banc Denied on August 1, 2023.

TABLE OF AUTHORITIES

Organic

U.S. Constitution Article I, Section 1

U.S. Constitution, Separation of Powers

Cases

Borden v. United States, [REDACTED] S.Ct. 1817 (20[REDACTED])

Carter v. United States, 530 U.S. 255, 269 (2000)

United States v. Corley, 500 F.3d 210, 225-227 (3d Cir. 2007)

United States v. Davis, 306 F.3d 398, 406 (6th Cir. 2002)

United States v. Watkins, 202 F.3d 711, 716 (4th Cir. 2000)

United States v. Kinlock, 174 F.3d 297, 301 (2d Cir. 1999)

United States v. McElathlin, 249 F.3d 783, 785 (8th Cir. 2001)

United States v. Morris, 116 F.3d 406, 409 (1st Cir. 1999)

United States v. Miller, 436 F.3d 323 (5th Cir. 2005)

United States v. Overholt, 307 F.3d 1231, 1256 (10th Cir. 2002)

Ward v. Chavez, 678 F.3d 1042, 1049-1050 (7th Cir. 2012)

5 of 11

United States v. Priddy, 333 F.3d 1249, 1254-1255 (11th Cir. 2002)

United States v. Sawyer, 521 F.3d 792, 794 (7th Cir. 2008)

Statutes

18 U.S.C. § 2113(a)

18 U.S.C. § 3664(f)(2)

Other

Writ of Coram Nobis

STATEMENT OF THE FACTS/CASE

On June 13, 2022, the district court denied Petitioner's Motion for Clarification, R. 107.113, which sought invalidation of restitution collection per the lack of an enforcement mechanism in the judgment. At the same time, the district court also unilaterally denied petitioner's Motion for Vacatur, R. 112, 114, which sought a writ of coram nobis predicated on Borden.

11/6/22

In appeal, petitioner asked the court of appeals five questions - only three of which were answered - regarding the district courts'

June 13, 2022 orders. Relevantly here:

"Did the district court commit reversible error on the merits of the motion for vacation seeking issuance of coram nobis relief?" and

"Where a district court revokes a term of supervised release, terminates it unsatisfactorily, and imposes a new sentence without carrying over the original restitution order to the new criminal judgment, is the original restitution order still enforceable with the conditions of supervised release it was incorporated into terminated?" *Appeal No. 22-2202, Appellants' Opening Brief, Page 1, Id.*

On October 13, 2022, the government responded by conceding two out of the three coram nobis prongs by distinguishing *Baraden* as an ACPA case - purportedly inapplicable to § 2253(a)'s elements, and by citing the court of appeals' decision in *United States v. Sawyer*, 521 F.3d 792, 796 (7th Cir. 2008) which authorizes (admittedly erroneously) district courts to delegate its duty under § 3261(f)(2) to the BOP and Probation -

In reply, petitioner reiterated why Border shows the judgment should be vacated and convictions expunged for the lack of a mens rea element in the indictment. That is, recklessly would be the best of the mens rea criminalized since no mens rea was charged and renders the convictions invalid. Petitioner also replied that Sawyer should be overruled in light of Corley, Davis, Kimlock, McGlothlin, Overholt, and Proerty. Despite the government raising Sawyer for the first time on appeal, the court of appeals' June 26, 2023 order claims petitioner waived challenging Sawyer in his reply and distinguished Border as an ACA case instead of interpreting § 213(a)'s elements against the legal holdings of Border, regardless of Carter.

80711

Rather than recognizing the intervening effect

of Borden, the court of appeals parroted Carter

On rehearing en banc, petitioner again sought

the full court to overrule Sawyer explained how

the ~~three~~ judge panel failed to account for the

opening-the-door principle. where petitioners

reply was the first chance to address Sawyer

per the government's first citation to it on appeal, and

on August 1, 2023 the court of appeals denied

rehearing en banc. This petition follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

There is tension between Carter and Borden

with the synonymously-worded elements being

interpreted oppositely. Specifically, Borden held offenses

that can be committed recklessly are not uses, attempts, or threats of force.

Yet, in *Carter* the Court read into the statute, § 2113(a), the mens rea element "knowingly" because § 2113(a) has no mens rea. *Id.* at 269. However, the presumption in favor of scienter requires only to read into a statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct. That would be "recklessly," not a leap to "knowingly" as *Carter* bounds, which *Borden* highlights. It's a stretch to find "knowingly" is the minimum mens rea between wrongful and innocent conduct as though "recklessly" is a more culpable mens rea than "knowingly." For these reasons, the Court should grant certiorari and revisit and/or overrule *Carter* in light of *Borden's* interpretation of "recklessly."

Additionally, the First, Second, Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have held district courts cannot delegate ultra vires (the duty under § 3664(F)(2)) to the BOP and/or U.S. Probation. See, *Merric*, *Kinlock*, *Corkey*, *Davis*, *McGlothlin*, *Ward*, *Overholt*, and *Prosty*, *supra*. Only the Fourth, Fifth, and Seventh Circuits allow district courts to impermissibly delegate the duty to set payment schedules for restitution per § 3664(F)(2) to the BOP and/or Probation. See, *Dawkins*, *Miller*, and *Sawyer*, *supra*. For the reasons stated by the majority of the court of appeals, and § 3664(F)(2)'s plain language - this Court should grant certiorari, and hold accordingly.

Conclusion

Wherefore petitioner prays the Court grants
this petition.

Respectfully Submitted,

Date: 09/01/23 Andrew Johnston

Mr Andrew James Johnston