Appendix-A 1 of 3

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF NextGen 1.6.3
Eastern Division

UNITED STATES OF AMERICA

Plaintiff,

v.

Case No.: 1:08–cr–01065
Honorable Matthew F. Kennelly

, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, June 13, 2022:

MINUTE entry before the Honorable Matthew F. Kennelly as to Andrew Johnston: Defendant Andrew Johnson has filed a motion asking to "clarify" his sentences in Case Nos. 08 CR 1065 and 13 CR 881 to eliminate the restitution obligation. Mr. Johnson served a term of incarceration in each case followed by a term of supervised release. The Court terminated his supervised release unsatisfactorily after he committed another crime during his supervised release term. Mr. Johnson contends that because his supervised release term has concluded he no longer owes restitution. This is incorrect. Under 18 USC 3613(b) Mr. Johnson's liability to pay restitution does not end until the later of two dates: 20 years after the entry of judgment; or 20 years after his release from imprisonment. In other words the end of Mr. Johnson's supervised release does not terminate his restitution obligation. For these reasons the Court denies Mr. Johnson's motion [107]. The Clerk is directed to mail a copy of this order to: Andrew Johnson; No. 22712–424; US Penitentiary; P.O. Box 24550; Tucson AZ 85734. Mailed notice. (mma,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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 Appendix-A 2 of 3

UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA

Plaintiff,

v.

Case No.: 1:08–cr–01065
Honorable Matthew F. Kennelly

, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, June 13, 2022:

MINUTE entry before the Honorable Matthew F. Kennelly as to Andrew Johnston: Defendant Andrew Johnson has moved to vacate his bank robbery conviction in this case. Mr. Johnson pled guilty and was sentenced to a prison term. His motion cites the following grounds: he made inculpatory statements after being beaten and kicked by police officers; he was intoxicated on narcotics and alcohol at the time of the offense; he was not put on notice that the government had to prove beyond a reasonable doubt that he acted knowingly; knowing conduct was not alleged in the indictment; and (apparently) he says that the element of FDIC insurance coverage was not met. He also appears to attribute ineffective assistance to his counsel. Mr. Johnson's sentence has been completed but he contends the conviction in this case was later used to enhance his sentence in another case. None of what Mr. Johnson cites provides a basis to vacate his conviction in this case. First of all – Mr. Johnson admitted in his plea agreement that the deposits of the banks he robbed were insured by the FDIC. Second – the document that Mr. Johnson attaches to his motion establishes that the bank in question (Byline Bank) was in fact insured by the FDIC at the relevant time. Third – the factual basis in Mr. Johnson's plea agreement quite clearly established his knowing conduct with respect to the bank robberies. Fourth – the claimed defect in the indictment is immaterial and cannot be raised at this late date (over 13 years after Mr. Johnson's guilty plea) in any event. Fifth – the time limit for any challenge to Mr. Johnson's conviction and sentence under 28 USC 2255 ran out over a decade ago. See 28 USC 2255(f). Mr. Johnson says that he is seeking a writ of coram nobis. Coram nobis is "a rare form of collateral attack on a criminal judgment" that is available to defendants who are out of custody and therefore may no longer petition for relief under section 2255. See United States v. Delhorno; 915 F.3d 449 at 450 (7th Cir. 2019). It is available only when the defendant: (1) alleges an error "of the most fundamental character" enough to "render the criminal conviction invalid"; (2) provides "sound reasons" for his "failure to seek earlier relief"; and (3) demonstrates that he "continues to suffer from his conviction even though he is out of custody." Id. at 450–51. Mr. Johnson has not identified any "fundamental error." This is defined as an error "that undermines our confidence that the defendant is actually guilty." United States v. Wilkozek; 822 F.3d 364 at 368 (7th Cir. 2016); see also United States v. Keane; 852 F.2d 199, 205–06 (7th Cir. 1988) (denying defendant's petition for writ of coram nobis in part due to his failure to demonstrate that a "fundamental defect that produce[d] a complete

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miscarriage of justice" occurred in his case). None of the errors that Mr. Johnson cites suggests that he is not guilty of the crimes to which he pled guilty. Furthermore he has offered no reason – let alone a "sound reason" – explaining why he did not raise his grounds for relief earlier. For these reasons the Court denies Mr. Johnson's motion for vacatur [112]. The Clerk is directed to mail a copy of this order to: Andrew Johnson; No. 22712–424; US Penitentiary; P.O. Box 24550; Tucson AZ 85734. Mailed notice. (mma,)

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NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 23, 2023*
Decided June 26, 2023

Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-2202

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDREW J. JOHNSTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:08-cr-01065

Matthew F. Kennelly,
Judge.

ORDER

Andrew Johnston, a federal prisoner serving a sentence imposed in 2019, filed two motions contesting his earlier convictions from 2009 and their accompanying order of restitution. The district court denied both motions. Because he is both procedurally and substantively ineligible for collateral relief from the 2009 convictions, we affirm.

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* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

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Johnston has been in a cycle of prison and supervised release since 2009, when he pleaded guilty to three counts of bank robbery, 18 U.S.C. § 2113(a). For the 2009 convictions, he was sentenced to 63 months' imprisonment, with three years' supervised release, and was ordered to pay $32,480 in restitution (payment was also a condition of release). Johnston first entered supervised release from prison in 2013, but the district court ended his supervised release early when he was arrested for another bank robbery that same year. That arrest resulted in a 2015 conviction. Two years later, Johnston was again released on supervision and again arrested for bank robbery, resulting in a 2019 conviction, for which he is currently serving a prison sentence.

In 2022, Johnston filed two motions related to his 2009 convictions. First, he asked the district court to order the Bureau of Prisons to stop collecting the restitution. He argued that because the district court had terminated his supervised release, he no longer was responsible for the restitution. Second, seeking a writ of coram nobis, he moved to vacate his 2009 convictions based on what he asserted were two fundamental errors: The banks were not insured by the Federal Deposit Insurance Corporation (FDIC) against robberies and the indictment did not specify the mens rea, which he asserted had to be more than reckless conduct.

The district court denied both motions. First, it explained that the obligation to pay restitution does not end until either 20 years after the entry of judgment or 20 years after release from prison, 18 U.S.C. § 3613(b), and that neither of those dates had passed. Turning to the petition for a writ of coram nobis, it explained that Johnston's plea agreement had established that the deposits were FDIC-insured and that he had acted knowingly; therefore, no fundamental error undermined the court's confidence of Johnston's guilt. Johnston appeals both decisions.

We start with his restitution order. Johnston first argues that, because his conditions of supervised release included enforcement of restitution, the end of his supervised release ended any restitution debt. But his restitution obligation is "in addition to" any other part of his sentence, and it thus reflects an independent, extant portion of that sentence. 18 U.S.C. § 3551(b). Johnston replies that the restitution order is invalid for a different reason: The order delegated, improperly in his view, collection authority to the Bureau of Prisons. In *United States v. Sawyer*, 521 F.3d 792, 796 (7th Cir. 2008), we rejected a variation on that theory; as a result, Johnston asks us to overrule *Sawyer*. But his argument is undeveloped, and he raised it for the first time in his reply brief; thus, he has waived it. *See White v. United States*, 8 F.4th 547, 552 (7th Cir. 2021).

We next turn to Johnston's request for a writ of coram nobis to challenge his 2009 convictions. Coram nobis is a "rare form of collateral attack," available to defendants who are out of custody, allege a fundamental error that would render the conviction invalid, provide a sound reason for failure to seek relief earlier, and show continued harm from the conviction. *United States v. Delhorno*, 915 F.3d 449, 450–51 (7th Cir. 2019).

Johnston contends that his convictions are invalid because two elements of his § 2113 offenses—FDIC insurance and intent—were not established. His argument about FDIC insurance fails for several reasons. First, Johnston argues that the banks were not insured against bank robbery, but § 2113 requires only that FDIC insurance cover the institution's deposits, not that the insurance cover robberies. *See* 18 U.S.C. § 2113(f). Second, Johnston admitted in his plea agreement that the bank's deposits were FDIC-insured. Third, Johnston offers no reason why he could not have raised this issue earlier. Thus, he could not obtain coram nobis relief even if his claim of a fundamental error had any merit. *See Delhorno*, 915 F.3d at 450–51.

Johnston's contention that the indictment's failure to allege intent renders his conviction invalid is likewise unavailing. He relies on *Borden v. United States*, 141 S. Ct. 1817, 1834 (2021). *Borden* holds that reckless conduct is not a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Johnston maintains that § 2113(a) should similarly exclude reckless conduct and now argues that he only recklessly robbed the banks. But among other problems with seeking coram nobis relief under this theory, *Borden* is irrelevant to § 2113(a). The phrase "violent felony" is not in the bank-robbery statute, let alone defined the same as in § 924(e). In any event, the required state of mind is reflected in the indictment through its citation to § 2113(a), which the Supreme Court said, long before Johnston pleaded guilty, requires only knowledge that he robbed a bank. *See Carter v. United States*, 530 U.S. 255, 267–68 (2000). And Johnston, through his plea agreement, stipulated that he violated § 2113(a). Thus, the absence of additional wording in the indictment was not a fundamental error.

We have considered Johnston's other arguments, and none has merit.

AFFIRMED

Appendix - F

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 1, 2023

Before

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-2202

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDREW J. JOHNSTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:08-cr-01065

Matthew F. Kennelly,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed by Defendant-Appellant on July 17, 2023, no judge in active service has requested a vote on the petition for rehearing en banc, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing and rehearing en banc is DENIED.

Additional material from this filing is available in the Clerk's Office.