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23-5879

FILED
SEP 11 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Richard Wayne Johnson — Petitioner

VS.

United States of America — Respondent

On Petition for A Writ of Certiorari To
The United States Court of Appeals For the Sixth Circuit

Petition for Writ of Certiorari

Richard Wayne Johnson #18463-033
Petitioner Pro Se
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Questions Presented

1. In a Federal criminal case, whether a motion pursuant to 18 U.S.C. § 3582(c) is a point in the litigation a defendant can challenge the subject-matter jurisdiction over the matter?

2. Is the failure of the District Court and Court of Appeals to examine the jurisdiction of the District Court, whether Supreme Court case law that demonstrates lack of subject-matter jurisdiction in the case requires this Court to notice such error and correct the error?

3. Whether affirmative answers to questions one and two, under the totality of the circumstances, demonstrates that equitable estoppel against the Government should be imposed, and reversal of the convictions?

List of Parties

All parties appear in the caption of the case on the cover page.

Related Cases

United States v. Johnson, 2023 U.S. App. LEXIS 14548 (6th Cir. June 9, 2023)

United States v. Johnson, 2022 U.S. Dist. LEXIS 148919 (W.D. Ky. August 19, 2022)

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In The

Supreme Court of the United States

Petition for Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at United States v. Richard Wayne Johnson, 2023 U.S. App. LEXIS 14548 (6th Cir. June 9, 2023).

The opinion of the United States District Court appears at Appendix B to the petition and is reported at United States v. Richard Wayne Johnson, 2022 U.S. Dist. LEXIS 148919 (W.D. Ky. August 19, 2022).

Jurisdiction

The date on which the United States Court of Appeals decided my case was June 9, 2023.

No petition for rehearing was pursued.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

Relevant to this case:

United States Constitution, Article I, §8, cl. 3, provides:

"The Congress shall have Power ... To regulate Commerce with foreign

Nations, and among the several States, ..."

United States Constitution, Article III, §2, in relevant part provides:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public Ministers and Consul;—to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;— to Controversies between two or more States;—between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

United States Constitution, Amendment V, provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just comensation."

United States Constitution, Amendment VI, provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

United States Constitution, Amendment VIII, provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution, Amendment X, provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Statutory Provisions

Title 18, United States Code, section 2252A, relevant to this case, provides:

"(a) Any person who—

(1) Knowingly mails, or transports or ships using any means or facility of interstate or foreign commerce or in or affecting inter-

state or foreign commerce by any means, including by computer, any child pornography; ...

(5) either—

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; ... shall be punished ...."

<u>Title 18, United States Code, Section 2251</u>, relevant to this case provides:

"(d)(1) Any person who, in a circumstance described in paragraph (2), knowingly makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering—

"(A) to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction, if the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct; or

"(B) participation in any act of sexually explicit conduct by or with any minor for the purpose of producing a visual depiction of such conduct:

shall be punished ...

"(2) The circumstance referred to in paragraph (1) is that—

"(A) such person knows or has reason to know that such notice or advertisement will be transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed; or

"(B) such notice or advertisement is transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mailed."

Title 18, United States Code, Section 3582, in relevant part, provides:

"(c) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that—

"(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) [18 U.S.C.S. 3553(a)] to the extent that the applicable, if it finds that—

"(i) extraordinary and compelling reasons warrant such a reduction; or ... (emphasis added)."

Statement of the Case

Between January, 2012, and September, 2013, petitioner committed child pornography offenses defined by federal criminal law, all alleged to have been perpetrated within Oldham County, Kentucky, and not within any property or area within the exclusive legislative jurisdiction of the Federal Government. Investigation of those federal offenses began via a Cybertip from America Online (a nongovernmental service) showing a user, petitioner, was transferring child pornography be e-mail.

State law enforcement officials executed a state search warrant at petitioner's home on or about September 17, 2013, and a forensic examination of petitioner's computers and other digital devices revealed still and video images of child pornography.

A federal grand jury in the Western District of Kentucky returned a three-count Indictment charging petitioner with advertising, distributing, and possessing child pornography, in violation of offenses defined in Title 18 of the United States Code stated, supra.

A plea agreement was agreed to by petitioner, whereas he waived direct appeal and collateral motion under 28 U.S.C. § 2255.

Petitioner was federally sentenced to a term of 360 months imprisonment, to be followed by a life term of supervised release. His projected release date is September 10, 2046.

On June 13, 2022, petitioner filed a "Motion for Modification of an Imposed Term of Imprisonment and Other Appropriate Relief under 18 U.S.C. § 3582(c)(1)(A)(i)."

In a nutshell, petitioner, relying on this Court's standing and applicable constitutional and jurisdictional case law, argued that constitutional Article III courts, such as the sentencing court below, lacks the capacity to be conferred with "criminal" case jurisdiction, when sitting in a State, over conduct that is not a "precise subject-matter" for federal "police power" enforcement when committed within a State, in the absence of properly passed constitutional amendments increasing the Federal Government's powers over sex-related and child sex-exploitation federal offenses, merely because such Article III "inferior" courts within the States cannot be conferred with "judicial Power" (which is jurisdiction) over crimes under the totality of the circumstances of this case.

As the opinions of the courts below, such meritorious arguments were left unresolved, thus subjecting petitioner to what amounts to no less than unconstitutional deprivation of his liberty, by a government that lacks the constitutional power to so subject him to, and this Court, being the Court of final review, is asked to fulfill its province and duty to protect petitioner's rights embedded in the Federal Constitution, and grant the relief refused by the courts below.

Reasons For Granting The Petition

This Court has continued to admonish, in one way or another, to "start with first principles."

> "The Constitution creates a Federal Government of enumerated powers. See Art. I, §8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-239 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." ... "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.""

United States v. Lopez, 514 U.S. 549, 552 (1995).

18 U.S.C. §3582 Is a Step in the Original Federal Criminal Case

This Court has made clear: "Unlike most arguments, challenges to subject-matter jurisdiction may be raised by the defendant "at any point in the litigation," and courts must consider them sua sponte." Ft. Bend County v. Davis, 139 S.Ct. 1843, 1849 (2019) (citation omitted).

"[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." United States v. Cotton, 535 U.S. 625, 630 (2002).

Compare, e.g., Boechler, P.C. v. Comm'r, 142 S.Ct. 1493, 1497 (2022) ("Jurisdictional requirements cannot be waived or forfeited, must be raised by courts sua sponte, and, as relevant to this case, do not allow for equitable exceptions."). Afterall, "A motion brought under [18 U.S.C.] § 3582(c) is part of the criminal proceedings," United States v. Lathan, 2022 U.S. App. 25632, *1 (6th Cir. 2022), thus, this petition is timely, under Sup. Ct. Rule 13(1). Cf., e.g., Houston v. Lack, 487 U.S. 266 (1988).

The Courts Below Failed To Examine Their Jurisdiction In This Case

Relying on many cases from this Court, a district court, in the Sixth Circuit, has observed, "the issue of standing—a matter of subject-matter jurisdiction—can be raised at any time, including sua sponte by the court, as the federal courts have "an independent obligation to examine [our] own jurisdiction."" Stewart v. Healthcare Revenue Recovery Group, LLC, 2022 U.S. Dist. LEXIS 11288, *36 (W.D. Tenn. Jan. 21, 2022)(citations omitted).

With the United States being the "plaintiff" in the underlying case, relevant to the "standing" requirements to establish that the court below had "subject-matter jurisdiction" in the instant purported federal criminal case, the district court continued, and apropos in this petition:

> "Standing has three components: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."... The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the elements of standing.... To meet the burden, the plaintiff must "clearly ... allege facts demonstrating" each element."

Ibid. (Citations omitted).

Compare, e.g., Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-104 (1998)(same).

This Court, in Steel Co, announced an additional caveat relevent to this petition's argument of the district court's lack on constitutional authority to even have sat in judgment in the underlying federal "criminal" case, observing:

> "Article III, §2, of the Constitution extends the "judicial Power" of the United States only to "Cases" and "Controversies." We have always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.... Such a meaning is fairly implied by the text, since otherwise the purported restriction upon the judicial power would scarcely be a restriction at all. Every criminal investigation conducted by the Executive is a "case," and every policy issue resolved by congressional legislation involves a "controversy." These are not, however, the sort of cases and controversies that Article III, §2, refers to, since "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."... Standing to sue is part of the common understanding of what it takes to make a justiciable case."

Id., 523 U.S., at 102 (citations omitted).

The Fourth Circuit hit the nail on the head, when it observed:

> ""Every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it."... "And if the record discloses that the lower court was without jurisdiction [a reviewing] court will notice the defect, although the parties make no contention concerning it.""

Burke v. City of Charleston, 139 F.3d 401, 404 (4th Cir. 1998) (citations omitted).

As this case began with a State investigation, but then was taken over by the Federal Government, the admonition is clear: "Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted" in the Constitution. Ashton v. Cameron County

W.I. Dist. No. One, 298 U.S. 513, 531 (1936)(citation omitted).

The instruction by this Court is clear:

"The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

"... If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it."

Lake County v. Rollins, 130 U.S. 662, 670 (1889)(citations omitted).

Several Terms later, this Court pointed out, in relevant parts:

"Two propositions in our constitutional jurisprudence are no longer debatable. One is that the national government is one of enumerated powers; and the other, that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself.

"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. ... Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded."

South Carolina v. United States, 199 U.S. 437, 448-449 (1905)(in relevant parts).

"The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principle it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the

the statute which is challenged and to decide whether the latter squares with the former." United States v. Butler, 297 U.S. 1, 62 (1936).

"The question is not what power the federal Government ought to have but what powers in fact have been given by the people." Id., 297 U.S., at 63.

The controlling word, in this, and any, case involving the powers of Congress, thus of the Federal Government, is "enumerated," and its derivative "enumerates," and this Court's admonition, in Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012), is instructive:

> "In our federal system, the National Government possesses only limited powers; the States and the People retain the remainder.... In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.
>
> "The Federal Government "is acknowledged by all to be one of enumerated powers." ... That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, §8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." ... The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it.""

Id., 567 U.S., at 533-535 (citations omitted).

This Court has made clear, in many prior cases, that the Federal Government lacks what is termed a "police power" within the States, the latest pronouncement being:

> "Because the police power is controlled by 50 different states instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives,

> liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. madison). The independent power of the States also serve as a check on the power of the federal Government: "By denying any one government complete jurisdiction over all concerns of public life, federalism protects the liberty of the individual from arbitrary power."...
>
> "This case concern two powers that the Constitution does [not] grant the Federal Government, [and] which must be read carefully to avoid creating a general federal authority akin to the police power."

Id., 567 U.S., at 536 (citation omitted).

Because "[C]onstitutional analysis must begin with "the language of the instrument,"..., which offers a "fixed standard" for ascertaining what our founding document means," Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2244-2245 (2022), in cases, such as this instant case establishing that such "police power" over the conduct charged below is non-existent, Mr. Justice Alito's admonition becomes more than clear, when he spoke for the Court: "It is time to heed the Constitution and return the issue of [crimes] to the people's elected representatives," Id., 142 S. Ct., at 2243 (emphasis added), within the States where it has always belonged, and Article III, §2, does not reach. Cf., e.g., Cohens v. Virginia, 6 Wheat. 264 (1821): "Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed by the enumeration of those cases the jurisdiction of the federal courts is extended in consequence of the character of the parties." Id., 6 Wheat., at 383 (emphasis added).

Mr. Justice Thomas, in his dissent, in Taylor v. United States, 136 S. Ct. 2074 (2016), relying on the enumeration of powers in the Constitution, and this Court's prior decisions that are relevant in this case, made perfectly clear:

> "As with its powers generally, Congress has only limited authority over crime. The Government possesses broad general authority in territories and federal enclaves.... But its power over crimes committed in the States is very different. The Constitution expressly delegates to Congress authority over only four specific crimes:... Given these limited grants of federal power, it is "clea[r] that Congress cannot punish felonies generally,"... Congress has "no general right to punish murder committed within any of the States," for example, and no general right to punish the many crimes that fall outside of Congress' express grants of criminal authority.... "The Constitution," in short, "withhold[s] from Congress a plenary police power.""

Id., 136 S.Ct., at 2082-2083 (citations omitted).

Mr. Justice Thomas's correct viewpoints on crimes cognizable under the Constitution can be said to be in accord with a 1879 decision, that also addressed the power of Congress to create criminal courts and the jurisdiction of such courts over crimes, this Court writing:

> "Circuit courts [now district courts] have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where the Acts of Congress otherwise provide, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable in those courts.
>
> "Such courts possess no jurisdiction over crimes and offenses committed against the authority of the United States, except what is given to them by the power that created them; nor can they be invested, with any such jurisdiction beyond what the power ceded to the United States by the Constitution authorizes Congress to confer, from which it follows that before an offense can become cognizable in the circuit court, the Congress must first define and recognize it as such, and affix a punishment to it, and confer jurisdiction upon some court to try the offender....
>
> "Courts of the kind were not created by the Constitution, nor does the Constitution invest them with any criminal jurisdiction. Even the powers of an express character given to Congress upon the subject, embrace only a limited class of well known offenses. Congress may provide for the punishment of counterfeiting the securities and current coin of the United States, and pass laws to define and punish piracies and felonies committed on the high seas, and offenses

against the law of nations, Treason is defined by the Constitution, but it has never been decided that the offender could be tried and punished for the offense until some court is vested with the power by an Act of Congress.

"Implied power in Congress to pass laws to define and punish offenses is also derived from the constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces, and to provide for organizing, arming and disciplining the militia and for governing such parts of them as may be employed in the public service. Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings, and from the clause empowering Congress to pass all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or any department or officer thereof."

•

United States v. Hall, 98 U.S. 343, 345-346 (1879).

As this Court has "made clear, "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."" Nixon v. United States, 506 U.S. 224, 238 ( )(citation omitted). See, also, e.g., Miller v. Johnson, 515 U.S. 900, 922-923 (1995)(same).

The Sixth Circuit, in affirming the District Court's denial of relief, found that "A §3582(c)(1)(A) motion "is not the proper vehicle for arguments 'that were or could have been raised on direct appeal or in a §2255 motion.'""
Opinion, p. 2. The Sixth Circuit's opinion also relied on a prior Circuit case that there was "finding no indication that "Congress intended to allow prisoners to allow prisoners to avoid the specific habeas restrictions by resorting to compassionate release."" ibid. (citations omitted).

With the Sixth Circuit, itself, in Lathan, supra, finding that "A motion under §3582(c) is part of the criminal proceedings," and this Court finding that "challenges to subject-matter jurisdiction may be raised by the defendant "at any point in the litigation," and courts must consider them sua sponte," Ft. Bend, supra, 139 S.Ct., at 1849 (citation omitted), both courts below failed to follow this Court's admonition, which can be interpreted even to apply to jurisdictional challenges brought under §3582(c) motions, as being "a part of the criminal proceedings":

> "The question of standing is not subject to waiver, however: "[W]e are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'"...
>
> "...In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal government conduct as sufficient for standing to invoke the federal judicial power.... We have also made clear that "it is the burden of the 'party who seeks the exercise of jurisdiction in his favor,' ..., 'clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'"

United States v. Hays, 515 U.S. 737, 742-743 (1995) (in relevant parts, citations omitted).

Consistent with the above, this Court, in Henderson v. Shinseki, 562 U.S. 428 (2011), wrote:

> "For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times. ... Objections to subject-matter jurisdiction, however, may be raised at any time. Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction. ... Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction.... And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.

"Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of the term. We have urged that a rule should not be referred to as jurisdictional unles it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction."

Id., 562 U.S. at (citations omitted).

Because this case questions the Government's enforcement of the statutory provisions charged in the case below, and with the application of the jurisdictional federal statute, 18 U.S.C. §3231, under the totality of the circumstances of the constitutional Article III district court sitting within the State of Kentucky, this Court's opinion, in United States v. Munoz-Flores, 495 U.S. 385 (1990), is relevant here, where it is found:

"Because Congress is bound by the Constitution, its enactments of any law is predicated at least implicitly on a judgment that the law is constitutional... yet such congressional consideration of conquestions does not foreclose subsequent judicial scrutiny of the law's constitutionality. On the contrary, this Court has a duty to review the constitutionality of congressional enactments. As we have said in rejecting a claim identical to the one the Government makes here: "Our sytem of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." ...

...

"Nevertheless, the principle that the courts will strike down a law when Congress has passed it in violation of such command has been well settled for [over] two centuries. ... That principle applies whether or not the constitutional provision expressly describes the effects that follow from its violation."

Id., 495 U.S., at 391, 396-397 (citations omitted).

Thus, "the issue of subject-matter jurisdiction may be raised "at any time, with or without the issue being raised by a party to the action."" Blanchard v. City of Memphis, 2018 U.S. App. LEXIS 5565 (6th Cir. 2018)(citation omitted). Accord, Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006); and see, e.g., Kontrick v. Ryan, 540 U.S. 443, 455 (2004)("A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance.")(cited in TC Power Ltd. v. Guardian Indus. Corp., 568 Fed. Appx. 376, 378 (6th Cir. 2014).

As this Court has continuously reiterated:

> "We fully appreciate that judging the constitutionality of a Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." ... "The Congress is a coequal branch of government whose members take the same oath we do to uphold the Constitution of the United States." ...
>
> "We will not shrink from our duty "as the bulwar[k] of a limited constitution against legislative encroachemts," The Federalist No. 78, p. 526 (J. Cooke ed. 1961) (A. Hamilton), but "[i]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case," ...."

Northwest Austin Mun. Util. Dist. v. Holder, 557 U.S. 193, 204 (2009)(citations omitted).

Thus, just as Mr. Justice Alito, speaking for the Court, in Dobbs, supra, has found, as to the subject-matter of abortions, "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision," 142 S.Ct. 2242, as far back as when Mr. Samuel Chase sat in this Court, it was recognized:

> "Upon the whole it may be a defect in our political institutions, it may be an inconvenience in the administration of justice, that the common law authority, relating to crimes and punishments, has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction; but judges cannot remedy political imperfections, nor supply any legislative omission."

United States v. Worrall, 2 U.S. 384, ___, 1798 U.S. App. LEXIS 39, **16-17 (1798).

The reasoning, as Chief Justice Marshall, in Cohens, supra, relying on The Federalist No. 49 (J. Madison), declared so succinctly:

"The people made the constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

Cohens, Id., 6 Wheat, at 389.

As to the district court below exercising "criminal" jurisdiction over the instant criminal matter, borrowing from this Court's reference to its prior decisions, quoted in Keller v. United States, 213 U.S. 138 (1909), it wrote:

"Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution."

Id., 213 U.S., at 145 (internal quotation marks and citation omitted).

To ensure there would be no mistake as to the objects within the legislative powers of Congress are limited by the language incorporated in drafting the Constitution, the Keller Court admonished:

"Generally it may be said, in respect to laws of this character, that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' ... 'Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' ... 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail."

Id., 213 U.S., at 146-147 (citations omitted).

And this where this Court's ruling, in United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989), where a statute's meaning is "mandated" by its "grammatical structure" comes into play with Article III, §2's limits, that declares "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,...—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;" but not to "Criminal" Cases to which the United States shall be a Party. U.S. Const, Art. III, § 2 (in relevant parts).

As the Court wrote in 1819;

"So, with respect to the whole penal code of the United States: whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress. The right to enforce the observance of law, by punishing its infraction, might be denied with more plausibility because it is given in some cases. ... The several powers of Congress may exist, in a very imperfect state, to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

"... But courts may exist, and may decide the causes brought before them, though such crimes escape punishment."

McCulloch v. Maryland, 4 Wheat. 316, 416-417 (1819) (in relevant parts).

The lesson of construing provisions of the Constitution, and especially Article III, § 2, could not be clearer, as this Court admonished, in Utah v. Evans, 536 U.S. 452 (2002), writing:

> "Chief Justice Marshall instructed that '[a]s men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.'..."

Id., 536 U.S., at 491 (citation omitted).

And this is where the "grammatical structure" of the phrase "Cases, in Law and Equity" demonstrate, conclusively, that constitutional Article III "inferior" federal courts cannot be conferred with criminal cases at all, especially when sitting in a State, as this Court has determined, and will be explained, infra.

As to the descriptive phrase "in Law and Equity" in the provision, even the Sixth Circuit, applicable here, can be said that when the words "Law" and "Equity" are "coupled with the use of the conjunctive 'and,' indicates that each of the" two elements is required. Cyrus v. Univ. of Toledo, 2022 U.S. App. LEXIS 8784, *16 (6th Cir. 2022). Cf., also, e.g., Ranger, Inc. v. Equitable Life Assurance Soc., 196 F.2d 968, 972 (6th Cir. 1952) (the provision "uses the conjunctive 'and,' rather than the disjunctive 'or,' and clearly implies that both conditions must exist"); King v. Morgan, 2013 U.S. Dist. LEXIS 139322, *35 (N.D. Oh. 2013) (same); and Canadian Silica Indus., Inc. v. Sand Prods. Corp., 2022 U.S. Dist. LEXIS 213145, *25 (W.D. Mich. 2022) (same).

As the District Court in Canadian Silica, supra, citing a Michigan supreme court case, found: "'And' is a conjunctive, used to denote a joinder, a union. 'Or' is the opposite, a disjunctive, used to indicate a disunion, a separation, an alternative;" (citation omitted).

In short, as this Court, being the "ultimate interpreter of the Constitution," Baker v. Carr, 369 U.S. 186, 211 (1962), and announcing that "criminal" cases "are not, however, the sort of cases ... that Article III, §2, refers to," Steel Co., 523 U.S., at 102, a federal prosecutor, being a public official, the Sixth Circuit has found: "A reasonably competent public official is presumed to know the law governing his or her conduct." Hussein v. City of Perrysburg, 674 F.Supp. 838, 857 (N.D. Ohio, 2009)(citing Silberstein v. City of Dayton, 440 F.3d 306, 318 (6th Cir. 2006)).

Thus, "[a] right is "clearly established" if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates the right."" Anderson v. Creighton, 483 U.S. 635, 640 (1987) (quoted in Hussein, supra, at 856).

The words of this Court, in Harlow v. Fitzgerald, 457 U.S. 800 (1982), can be said to be apropos as applied to the U.S. Attorney and Assistants in this part, where "if an official "knew or reasonably should have known that the action he took within the sphere of official responsibility," prosecuting a defendant in a court known to lack criminal jurisdiction, "would violate the constitutional rights of the" defendant, "or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury,""" id., at 815 (citation omitted), by being deprived of liberty unconstitutionally, as with petitioner.

In spite of the principle, e.g., stated in Hutto v. Davis, 454 U.S. 370, 375 (1982), that "a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be," cf., also, First Am. Title Co. v. Devaugh, 480 F.3d 438, 457 (6th Cir. 2007)("to the extent that a Sixth Circuit decision allegedly conflicts with a Supreme Court decision, the district court is obligated to follow the Supreme Court decision"), it is clear the courts below are no longer obiding the admonition.

By adhering to its own prior decisions, and applying the limits the Constitution places on the "police power" of the federal Government, the conviction cannot stand, if this Court, as Mr. Justice Stevens pointed out, should exercise its "primary obligation to protect the rights of the individual that are embodied in the federal Constitution." Harris v. Reed, 489 U.S. 255, 267 (1989)(citation omitted)(Stevens, J., concurring).

This Case Presents What This Court Requires To Equitably Estop the Government

In United States v. Walker, 450 Fed. Appx. 464 (6th Cir. 2011), it is written:

> "This Circuit recognizes three "traditional elements of equitable estoppel...: (1) misrepresentation by the party against whom estoppel is asserted; (2) reasonable reliance on the misrepresentation by the party asserting estoppel; and (3) detriment to the party asserting estoppel." . . . A party asserting estoppel against the government "must demonstrate some 'affirmative misconduct' by the government in addition to the other estoppel elements."..."

Id., 450 Fed. Appx. at 468 (citation omitted).

The term "affirmative misconduct" is defined as: "An affirmative act of misrepresentation or concealment of a material fact; intentional wrongful behavior ... with respect to a claim of estoppel against the federal government, a misrepresentation or conceelment of a material fact by a government employee—beyond a merely innocent or negligent misrepresentation." Black's Law Dictionary, Fourth Pocket ed. 488 (West Publ. 2011).

As one district court, in the Sixth Circuit put it:

> "'It is well established that estoppel cannot be used against the government on the same terms as against private parties,"... "The party attempting to estop the government bears a very heavy burden."...
> "The elements to invoke the protections of equitable estoppel are: (i) a definite misrepresentation by one party, (ii) intended to induce some action in reliance, and (iii) which does reasonably induce action in reliance by another party to his detriment. ... In addition to these traditional estoppel elements a party asserting estoppel against the government must also "demonstrate some 'affirmative misconduct' by the government."..."

Kerger v. United States, 609 F.Supp.3d 562, 574-575 (N.D. Ohio, 2022)(citations omitted).

In this case, Assistant United States Attorney, Jo E. Lawless, and all other federal agents and officers involved in the underlying federal criminal case, in procurring the indictment in this case misrepresented to the Grand Jury that appellant committed a federal criminal offense cognizable in the district court below this Court's case law demonstrates said district court is constitutionally incapable of being conferred with criminal jurisdiction. See, e.g., Ex parte Bakelite, 279 U.S. 438, 449 (1929).

When the Government attorney presented said indictment to appellant, AUSA Lawless misrepresented to appellant that the indictment was constitutionally valid, intending to induce appellant to plead guilty, instead of going to trial and facing even more time than that upon his plea of guilty, and did reasonably induce him to plead guilty, and to his detriment of still being deprived of his liberty, by imprisonment, unconstitutionally.

Such action by the officers and agents of the Government, without doubt, constitutes "affirmative misconduct" by the Government's agents, in addition to the three traditional estoppel elements.

This brings to the surface that even the Federal Rule of Criminal Procedure 11 proceeding was invalid, and constituted a "plain error" that affected the "substantial rights" of appellant, in addition to "seriously affect the fairness, integrity or public reputation of judicial proceedings." See, e.g., United States v. Vonn, 535 U.S. 55, 62-64 (2002)(citations omitted).

Conclusion

For the foregoing reasons and matters of law, the petition should be granted.

Dated: September 11th, 2023.

Respectfully submitted,

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