

No. _____

In the
Supreme Court of the United States

JI CHAOQUN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 951 provides that “[w]hoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Attorney General . . . shall be fined . . . or imprisoned not more than ten years, or both.” 18 U.S.C. § 951(a).

This Court has long recognized that juries should be formally and explicitly instructed on unanimity as it relates to an essential element of an offense.

The question presented is:

Must a jury unanimously decide which act a defendant committed subject to the direction or control of a foreign government to convict under 18 U.S.C. § 951?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are those listed in the caption.

The proceedings in federal trial and appellate courts identified below are directly related to the above-captioned case in this court:

United States v. Ji Chaoqun, No. 18 CR 611, United States District Court for the Northern District of Illinois, Judgment entered February 2, 2023, Amended Judgment entered February 3, 2023.

United States v. Ji Chaoqun, No. 23-1262, United States Court of Appeals for the Seventh Circuit, Judgment entered July 10, 2024.

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PETITION FOR WRIT OF CERTIORARI

Ji Chaoqun respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 107 F.4th 715 and reproduced at App. 1a.

JURISDICTION

The Seventh Circuit entered judgment on July 10, 2024. 23-1262 ECF 52. It subsequently issued its mandate on August 1, 2024. ECF 53. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

“No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

“In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI.

Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Attorney General if required in subsection (b), shall be fined under this title or imprisoned not more than ten years, or both. 18 U.S.C. § 951(a).

STATEMENT OF THE CASE

On May 19, 2022, a grand jury returned a five count superseding indictment charging Ji Chaoqun with one count of conspiring to commit an offense against or defraud the United States in violation of 18 U.S.C. § 371, one count of acting in the United States as a foreign agent without providing prior notification to the Attorney General in violation of 18 U.S.C. § 951(a), two counts of wire fraud in violation of 18 U.S.C. § 1343, and one count of making a materially false statement in violation of 18 U.S.C. § 1001(a)(2).

Ji Chaoqun is a Chinese national who came to the United States in 2013 to study electrical engineering at the Illinois Institute of Technology in Chicago, Illinois. At Ji's trial in September 2022, the government presented evidence that Ji had been recruited by the Ministry of State Security ("MSS"), the intelligence and security agency for the People's Republic of China.

In January 2013, Ji attended a career fair at his college in China. Ji met Zha Rong, an agent of the

MSS. At the time, Zha held himself out as a professor from another university, and Ji was not initially informed that Zha was recruiting for the MSS.

A series of text messages obtained by the government showed that by August 2013, Ji came into contact with Geng Zhengjun, another MSS agent. At trial, the government's expert James Olson, former CIA Chief of Counterintelligence, opined that Ji was in the recruitment and assessment stage at this point. The text messages demonstrated that Ji initially believed that he was going to be asked to work for the MSS in China, and that he was given three years to think about it. However, Ji was informed that the MSS "would train [him] to do things on their behalf because they are not able to travel out of the country."

Ji was admitted to the Illinois Institute of Technology in May 2013. He arrived in the United States in August 2013 to begin his studies. Ji's first semester was largely uneventful, with few text messages between Ji and any MSS officials. Ji took his first trip back to China in November 2013. Geng, believing Ji was still in the United States, messaged Ji in the middle of the trip to check on him, demonstrating his lack of awareness that Ji was back in China.

Ji returned to China in December 2013, during his winter break. On this trip, Ji had several meetings with MSS officers including his first meeting with Xu Yanjun. The government introduced photos from this

trip found on Ji's phone, including photos of an MSS registration form, an unsigned "pledge of allegiance" to Chinese intelligence, a training document depicting how a Chinese student should handle questioning if approached by an FBI agent, and cash Ji allegedly received from the MSS.

Ji returned to the United States on January 20, 2014. At trial, the government introduced a text message conversation between Ji and his friend Yu Wenzhi. Ji sent Wenzhi photos of the MSS registration form and cash with the caption "operational fund." During this conversation, Ji asked Wenzhi, who was enrolled in an aviation-related program at George Washington University, to help him by "acquaint[ing] [himself] with more people in this field," and offering Wenzhi some money if he did. However, Ji and Wehzhi never followed up on this conversation.

Ji returned to China in May 2014, and again in December 2014. In July 2015, while Ji was in the United States, Xu Yanjun contacted Ji and asked how he was doing. Ji told him he was performing an internship at Motorola. However, Ji was lying to Xu. Ji did obtain a job offer from Motorola but turned it down a month prior to being contacted by Xu.

In August 2015, Xu sent Ji a list of eight names with associated companies and other identifying information. Xu asked Ji to purchase background check reports on these individuals. Ji later sent Xu an

email with a subject line titled “Midterm test questions.” The body of the email read “eight sets of the midterm questions for the last three years.” Attached to the email were background check reports on the eight individuals Xu listed. Several weeks later, Xu sent Ji a ninth name and Ji emailed Xu one more background check report. Xu paid Ji \$1,000 for the purchase of the nine background check reports. The background check reports were purchased from commercial websites and contained publicly available information.

On October 29, 2015, Ji submitted an application to the FBI’s Honors Talent Internship Program, which is an application bank that notifies individuals when jobs open up. Ji took no additional steps to gain employment with the FBI. There was no evidence presented that Ji was tasked by the MSS to do this. On May 20, 2016, Ji enlisted in the United States Army’s Military Accessions Vital to the National Interest (MANVI) program. He did so to expedite his application for U.S. citizenship. The MSS did not direct Ji to join the Army nor did he first notify the MSS of his intention to do so.

Nothing significant happened until April 2018, when Xu Yanjun was arrested in Belgium by Interpol and United States authorities. Shortly thereafter, the government initiated an undercover operation and sent an undercover agent to engage Ji. The agent posed as an overseas asset of the MSS named “Chen.” Chen approached Ji pretending that he was sent by

Zha Rong. Chen explained that Xu Yangjun had been arrested and the MSS was concerned that Ji might have been exposed by his communications with Xu. The government recorded three conversations between Ji and Chen, all of which were introduced at trial.

During these meetings, Ji repeatedly denied joining the Army at the direction of the MSS or obtaining any information from the Army for China. When asked what he would be willing to do for China in the future, Ji explained that he planned to obtain his citizenship quickly, obtain a top-secret security clearance, and then look for jobs with secret clearance such as the CIA, FBI, or NASA. Ji further implied that he could recruit other Chinese nationals in the MANVI program and that he could use his military identification to access military bases and take photos of aircraft carriers. The defense's theory at trial was that Ji, as a Chinese citizen confronted by a powerful MSS agent, could not refuse to answer questions and his statements did not evince any true intent on his part, but were rather statements meant to appease the People's Republic of China.

The government's theory at trial was that any one of the January 2014 Wenzhi conversation, August 2015 purchase and transfer of the background check reports, October 2015 FBI application, or May 2016 enlistment in the army constituted Ji "acting" in his alleged capacity as an unregistered foreign agent. The district court denied the defense's request that the

jury be provided a unanimity instruction as to the act provision of 18 U.S.C. § 951.

The jury found Ji guilty of the § 371 conspiracy, substantive § 951 count, and the false statement count and acquitted Ji of the two wire fraud charges. On January 25, 2023, Ji was sentenced to 96 months' imprisonment.

Ji timely filed his notice of appeal on February 10, 2023. In his appeal, Ji argued, *inter alia*, that the district court erred in determining that the act provision of 18 U.S.C. § 951 is a means rather than an element and compounded that error in declining to give a unanimity instruction as to the "act" element of 18 U.S.C. § 951.

On July 10, 2024, the Seventh Circuit filed its opinion and order rejecting each of Ji's arguments and affirming his conviction. In that opinion, the Seventh Circuit held that the act provision of 18 U.S.C. § 951 is a means, not an element, and therefore a jury need not be unanimous on which act a defendant performed to find him guilty of violating 18 U.S.C. § 951.

REASONS FOR GRANTING THE PETITION

1. THIS COURT'S INTERVENTION IS NECESSARY TO CLARIFY FEDERAL LAW CONCERNING JURY UNANIMITY REGARDING THE ACT PROVISION OF 18 U.S.C. § 951.

The Seventh Circuit's opinion below allows for the following scenario:

A defendant is charged with acting as an unregistered foreign agent without first notifying the Attorney General, in violation of 18 U.S.C. § 951. The indictment spans years, fails to list any specific acts, and merely tracks the language of the statute. At trial, the government presents evidence of twelve discrete acts that it argues are each individually sufficient for a conviction. Each juror finds that only one of those twelve acts satisfies the elements of the offense, and no two jurors agree on which act that is. The defendant is convicted, even though for each alleged act, eleven jurors believed no crime was committed. This is a dangerous precedent unsupported by current federal jurisprudence. *See, e.g., United States v. Gonzalez*, 786 F.3d 714, 717 (9th Cir. 2015) ("a general unanimity instruction alone is insufficient if it appears that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts") (cleaned up).

The Fifth and Sixth Amendments to the United States Constitution “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *United States v. Gaudin*, 515 U.S. 506, 510 (1995). While a jury must unanimously agree as to each element of an offense to convict, the jury members need not agree as to “which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.” *Richardson v. United States*, 526 U.S. 813, 817 (1999); accord *United States v. Daniel*, 749 F.3d 608, 613 (7th Cir. 2014). To distinguish the “elements” from the “means” of a particular statute, courts consider “statutory language, legal tradition, [and any] unusual risk to defendants.” *See, e.g., United States v. Turner*, 836 F.3d 849, 863 (7th Cir. 2016).

To violate 18 U.S.C. § 951, (1) a person must act; (2) the action must be taken at the direction of or under the control of a foreign government; and (3) the person must fail to notify the Attorney General before taking such action. *See* 18 U.S.C. § 951(a) (criminalizing “acts” of “an agent of a foreign government without prior notification to the Attorney General”). *United States v. Duran*, 596 F.3d 1283, 1291 (11th Cir. 2010).

A plain reading of the text reveals that the need to register is based on acts, not on the existence of an agency relationship. *Id.* at 1291-92. A foreign agent’s

mere presence in the United States is not enough to violate the statute. *Id.* See also *United States v. Latchin*, 554, F.3d 709, 715 (7th Cir. 2009). An individual may agree to act as an unregistered foreign agent but come to the United States and do absolutely nothing at the behest of that foreign government. If that were the case no registration requirement would be necessary because there would be no triggering act. If the very basis for registering in the first instance is the commission of an act, then it tends to make sense that the act itself is an element of the offense rather than a means.

The Seventh Circuit’s opinion below runs counter to the Eleventh Circuit’s decision in *United States v. Duran*, which held that “whether a defendant must register under § 951 depends on the defendant’s *action* and *conduct* as an agent of a foreign government. *Duran*, 596 F.3d at 1292. “[I]t is not sufficient for the defendant to hold the status of an agent of a foreign government – he must also act. *Id.*

In *Richardson v. United States*, the Supreme Court analyzed whether a jury must unanimously decide which “violations” a defendant committed to find that he violated the continuing criminal enterprise (“CCE”) statute. *Richardson*, 526 U.S. at 815. A defendant violates the CCE statute if he “violates any provision” of the federal drug laws and “such violation is a part of a continuing series of violations.” *Id.* (quoting 21 U.S.C. § 848(a)). The Court determined that “continuing series of violations” is an

element of the CCE statute and that accordingly, a jury must unanimously agree as to which underlying violations a defendant committed to find he violated the statute. *Id.* At 819–20.

In reaching that determination, the Court focused on fairness and explained that where a statute proscribes a broad range of conduct, treating the conduct as a means – rather than an element – increases the risk of “cover[ing] up wide disagreement among the jurors about just what the defendant did, or did not, do.” *Id.* at 819. If not forced to focus on specific factual detail, jurors may erroneously convict having concluded that “where there is smoke there must be fire.” *Id.* See also *United States v. Mannava*, 565 F.3d 412, 415 (7th Cir. 2009) (“This reasoning leads to the absurd conclusion . . . that the government could charge a defendant with violating the federal statute by violating 12 state statutes and that he could be properly convicted even though with respect to each of the 12 state offenses 11 jurors thought him innocent and only one thought him guilty”).

The same consideration applies here, where the language of 18 U.S.C. § 951 is exceedingly broad and invites confusion as to what conduct a jury deems criminal. A unanimity instruction as to the act element of 18 U.S.C. § 951 eliminates the risk that a defendant is convicted in a situation where twelve jurors disagree as to how the defendant violated the law. Otherwise, the government may bring charges on

a pile of smoke, without having to answer the question of what exactly a defendant did.

In *United States v. Latchin*, the indictment listed what acts violated 18 U.S.C. § 951 and the jury was instructed it that must be unanimous on that point. 04 CR 661 Dkt. # 216, p. 12, Dkt. # 287, p. 74 (N.D. Ill. 2007). Resisting a sufficiency challenge, the Seventh Circuit held that the jury did not have to conclude that Latchin was spying, only that he took acts of some kind on behalf of Iraq without registering as a foreign agent. *Latchin*, 554 F.3d at 715. This passage does no violence to the statute and is an accurate statement of the law. However, it does not stand for the proposition that the “acts of some kind” need not be agreed upon unanimously – only that “spying” is not an essential element of the offense.

In the decision below, relying on *Mathis v. United States*, 579 U.S. 500, 506 (2016), the Seventh Circuit drew parallels to a hypothetical statute that includes the use of a deadly weapon as an element and explained that “the use of a knife, gun, bat, or similar weapon would all qualify.” Because the type of weapon is not an element, jurors need not unanimously decide which weapon the defendant used. *Id.*

The example does not at all account for the much more intricate and nuanced issues presented in 18 U.S.C. § 951 prosecutions. The use of a deadly weapon, no matter the kind, is illegal. In the context

of 18 U.S.C. § 951, the act is qualified and forms the actus reus of the crime, without which no criminal liability attaches. It is akin to the “taking” in a robbery, not the deadly weapon.

The Seventh Circuit also compared 18 U.S.C. § 922(g), which prohibits a particular class of persons from possessing any firearm. In *United States v. Villegas*, 494 F.3d 513, 514-15 (5th Cir. 2007), the Fifth Circuit held that the particular type of firearm is not an element of the crime because the statute’s focus is on the type of person prohibited. In other words, a violation of the statute does not turn on the type of firearm possessed.

Contrary to the Seventh Circuit’s holding, a violation of 18 U.S.C. § 951 does turn on the nature of the act. Ji’s case is a perfect illustration. Not everything that Ji did in the United States could serve as the basis of an 18 U.S.C. § 951 prosecution – only acts taken “subject to the direction or control of a foreign government.” *See United States v. Rafiekian*, 68 F.4th 177, 184 (4th Cir. 2023) (“the government had to prove that Rafiekian acted subject to the ‘direction or control’ of the Turkish government . . . not simply that his actions aligned with Turkey’s interests”). Moreover, there was evidence that Ji joined the army and submitted his application to the FBI talent pool with no direction from the Chinese government. This is unlike gun cases cited by the Seventh Circuit or hypothetical deadly weapons statutes. In a gun case, any felon possessing a gun is

guilty. In the 18 U.S.C. § 951 scenario, any act is not a crime unless it is at the behest of a foreign government. These waters can prove murky and that is why unanimity is required.

An alternative reading would render the “acts” element meaningless, as mere presence in the United States would be a sufficient basis for prosecution. Courts have repeatedly rejected this reading. *See, e.g., Latchin*, 554 F.3d at 715; *Duran*, 596 F.3d at 1291.

The Seventh Circuit’s holding below departs from established precedent, undermines the principle of jury unanimity, and contradicts the protections of the Fifth and Sixth Amendments to the United States Constitution. This case serves as an opportunity to safeguard the requirement that no defendant may be convicted unless twelve jurors are unanimous as to each element of the crime, beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Ji Chaoqun respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals.

Respectfully Submitted,

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