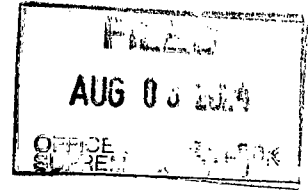


24-5324 ORIGINAL
Case No: _____



IN THE
SUPREME COURT OF THE UNITED STATES

MARNELL JOHNSON - PETITIONER

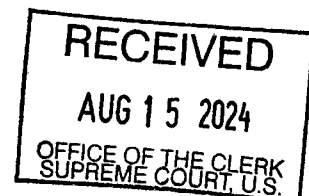
vs.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARNELL JOHNSON
33 ½ PEMBROKE ROAD
DANBURY, CT 06811



QUESTION PRESENTED

Does the 3rd Circuit's interpretation of constructive possession doctrine, especially in joint constructive possession cases, violate the 5th Amendment Due Process of law?

LIST OF PARTIES

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

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
I. THIRD CIRCUIT'S INTERPRETATION OF CONSTRUCTIVE POSSESSION IN ANOTHER'S HOME VIOLATES DUE PROCESS	3
A. THIRD CIRCUIT IS NOT IN LINE WITH THE MAJORITY OF THE OTHER CIRCUITS	3
B. THERE IS A CLEAR CIRCUIT SPLIT ON THE ISSUE OF CONSTRUCTIVE POSSESSION WHEN THERE MIGHT BE JOINT POSSESSORS	6
CONCLUSION	9

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Henderson v. United States</u> , 135 S. Ct.1780 (2015)	6,8,9
<u>Johnson v. United States</u> , 2024 U.S. App. LEXIS 11299 (3d. Cir N.J. 2024)	4
<u>United States v. Blue</u> , 957 F.3d 106, 107-08 (4th Cir. 1992)	5
<u>United States v. Campbell</u> , 549 F.3d 364, 374 (6th Cir. 2008)	7,8
<u>United States v. Cruz</u> , 285 F.3d 692, 699 (8th Cir. 2002)	4,8
<u>United States v. Holland</u> , 114 U.S. App. D.C. 225, 445 F.2d 701, 703 (D.C. Cir. 1971)	4,8
<u>United States v. Kelso</u> , 924 F.2d 680, 681-82 (9th Cir. 1991)	5
<u>United States v. Onick</u> , 889 F.3d 1425, 1429 (5th Cir. 1989)	4,8
<u>United States v. Peoples</u> , 370 F. App'x 276, 277 (3d Cir. 2010)	4,8
<u>United States v. Ramos</u> , 852 F.3d 747, 755 (8th Cir. 2017)	7, 8
<u>United States v. Reece</u> , 86 F.3d 994, 996 (10th Cir. 1996)	5, 6
<u>United States v. Robinson</u> , 473 F.3d 387, 399 (1st Cir. 2007)	7
<u>United States v. Rodriguez</u> , 392 F.3d 539, 547 (2d Cir. 2004)	8
<u>United States v. Rodriguez-Martinez</u> ,778 F.3d 367, 373 (1st Cir. 2015)	6, 8
<u>United States v. Samaria</u> , 239 F.3d 228, 239 (2d Cir. 2001)	7
<u>United States v. Shaffers</u> , 22 F.4tyh 655 (7th Cir. 2022)	8
<u>United States v. Taylor</u> , 113 F.3d 1136, 1145 (10th Cir. 1997)	5, 6
<u>United States v. Whitfield</u> , 203 U.S. App. D.C. 102, 629, F.2d 136, 142-43 (D.C. Cir. 1980)	5
STATUTES AND RULES	
18 U.S.C. §922(g)(1)	2
18 U.S.C. §924(c)	1, 2

21 U.S.C. §841(a)(1)&(b)(1)(C)	2
28 U.S.C. §1254(1)	1
Fed. R. Crim. P. 29(a)	3
Fed. R. Crim. P. 29(c)	3
U.S.S.G. §2D1.1(b)(12)	3
OTHER	
Black's Law Dictionary, 1047	9
Federal Jury Practice and Instruction, Criminal §39.12 p.55	9

**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 judgement below.

OPINIONS BELOW

The opinion of the United States Court of Appeals and is reported at 2024 U.S. App. LEXIS 11299, 2024 WL 2077776 (3d Cir. N.J., May 9, 2024)¹.

The opinion of the United States District Court has been reported at 2023 U.S. Dist. LEXIS 17901, 2023 WL 1475124 (D.N.J., Feb. 2, 2023).

JURISDICTION

The date on which the United States Court of Appeals decided the case was May 9, 2024.

While a request for rehearing was filed in the appellate court for the Third Circuit, there was no actual reharing.

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

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment's Due Process Clause U.S. Const. Amend. V;
18 U.S.C. §924(c).

STATEMENT OF THE CASE

A jury found Marnell Johnson ("Petitioner") guilty of (1) possession with intent to distribute a controlled substance, in violation of 21 U.S.C. §841(a)(1)&(b)(1)(c); (2) possession of a firearm by a felon, in violation 18 U.S.C. §922(g)(1); and (3) possession of a firearm in furtherance of a drug trafficking crime, under 18 U.S.C. §924(c)(1)(A). On July 13, 2022, Petitioner was found guilty of counts I and III. On July 14, 2022, he was found guilty of Count II.

Law enforcement officers observed petitioner going in and out of an apartment in Long Branch, New Jersey approximately six times between mid-February and April 2020. Four of the six times, law enforcement observed Petitioner in the vicinity of the apartment complex selling heroin to a confidential source ("CS").

The DEA agents arrested Petitioner on April 8, 2020 shortly after he left the apartment. Before the agents entered the one-bedroom apartment, they saw, through a screen door, a woman identified as Tia Jones ("Jones"). Jones was sitting on the couch in the living room, packaging heroin on a coffee table.

Upon entering the bedroom of the apartment, they saw a bench in front of a small table with more heroin and other drug packaging paraphernalia. In the drawer of that table, they found a digital scale and a loaded handgun. The officer's also discovered men's clothing and two pairs of men's shoes near the bedroom table.

Petitioner's trial were bifurcated to prevent him from suffering any prejudice for evidence of a prior felony, a required element of Count Two, the felon-in-possession charge. At the close of the Government's case-in-chief in the first phase of trial, Petitioner moved for a judgement of acquittal on Count Three, the §924(c) charge, pursuant to Federal Rule of

Criminal Procedure 29(a). The District Court reserved its decision, and subsequently denied the motion.

After the trial, Petitioner moved for judgement of acquittal on Count Two and renewed his motion for judgement of acquittal on Count Three, both pursuant to Federal Rule of Criminal Procedure 29(c). Petitioner also moved, in the alternative, for a new trial on the firearm counts (Counts Two and Three), pursuant to Federal Rule of Criminal Procedure 33. The District Court denied both motions.

Petitioner was ultimately sentenced to a term of 138 months imprisonment with 3 years supervised release. He was enhanced under section 2D1.1(b)(12) of the United States Sentencing Guidelines (the "Guidelines"), on the basis that he "maintained a premises for the purpose of manufacturing or distributing a controlled substance." U.S.S.G §2D1.1(b)(12). He then timely appealed.

REASONS FOR GRANTING THE PETITION

I. Third Circuit's Interpretation of Constructive Possession In Another's Home Violates Due Process

The Fifth Amendment states that "[n]o person shall ... be deprived of life, liberty, or property without due process of law." U.S. Const. Amend. V. This Due Process clause includes the principle of Fundamental Fairness. The interpretation of the Third Circuit's standard of constructive possession is flawed.

A. Third Circuit Is Not In Line With The Majority Of The Other Circuits

The Third Circuit, is silent on the principle of constructive possession in the context of joint occupancy or joint possession. Most other Circuits recognize that there is a different standard for joint occupancy/possession

as opposed to singular exclusive possession. See United States v. Cruz, 285 F.3d 692, 699 (8th Cir. 2002)("we will not lightly impute constructive possession of drugs or other contraband to one found in another's house."); United States v. Holland, 114 U.S. App. D.C. 225, 445 F.2d 701, 703 (D.C. Cir. 1971)(Court of Appeals emphasized that constructive possession "should not be lightly imputed to one found in another's apartment or home."); United States v. Onick, 889 F.3d 1425, 1429 (5th Cir. 1989)("We will not lightly impute dominion or control (and hence constructive possession) to one found in another person's house.") Conversely, in the Third Circuit, the standard is clear: if a firearm is within "arm's reach" of a defendant at the time of his arrest, a factfinder can infer that the defendant was in constructive possession of that weapon without regard to joint dominion or possession. See United States v. Peoples, 370 F. App'x 276, 277 (3d Cir. 2010).

The facts of the case are simple. Petitioner visited Ms. Jones' apartment a few times, he was observed selling drugs in the area, and there was men's clothing in the apartment. Johnson v. United States, 2024 U.S. App. LEXIS 11299 (3d Cir. N.J. 2024). There was no evidence to link Petitioner specifically to the weapon, only to the house. Under the heightened requirements of the Fourth, Fifth, Eighth, and D.C. Circuits, he likely would have been acquitted of the firearm possession.

It is not reasonably in dispute that he was aware of the drugs in the house as he sold drugs in the vicinity of the apartment. Johnson, supra. However, to "lightly impute" constructive possession of a weapon found inside of a closed drawer in "another's" apartment as was the outcome in the instant case, would not have been resulted in several other Circuits and cannot survive the fundamental fairness doctrine of the Due Process of Law clause. Cruz, supra; Holland, supra; Onick, supra.

Many Circuits have overturned factually similar cases. See United States v. Blue, 957 F.3d 106, 107-08 (4th Cir. 1992)(rejecting the government's contention that the defendant constructively possessed a pistol underneath his seat when the only evidence of a nexus was an officer's testimony that the defendant dipped his shoulder as the officer approached); United States v. Kelso, 924 F.2d 680, 681-82 (9th Cir. 1991)(rejecting Government's argument, offered in support of a sentencing enhancement, that the defendant passenger constructively possessed a gun discovered behind the driver's seat because "although [the defendant] may have had access to the gun, there is no evidence he owned it, or even was aware of its presence."); United States v. Whitfield, 203 U.S. App. D.C. 102, 629 F.2d 136, 142-43 (D.C. Cir. 1980)(finding evidence sufficient that the defendant driver, who owned the car, constructively possessed pistols under the driver's and passenger's seats but holding the evidence was insufficient as to the defendant passenger.)

In fact, in the Tenth Circuit, a defendant's dominion and control over a room doesn't impute constructive possession. See United States v. Taylor, 113 F.3d 1136, 1145 (10th Cir. 1997)(concluding there was no constructive possession was insufficient when the defendant jointly occupied an apartment in which a handgun was discovered and when a government witness's testimony that the defendant had possessed it "on one or two occasions" provided only a vague description of the gun and the date on which she saw him with it); United States v. Reece, 86 F.3d 994, 996 (10th Cir. 1996)(concluding that evidence of constructive possession of narcotics when the narcotics were discovered in the pockets of a passenger in a car that the defendant was driving "because constructive possession requires a nexus between the defendant and the contraband where there is more than one possibility as to

who is in possession of that contraband, mere dominion over the vehicle and proximity to the contraband will not satisfy the possession element.") In the instant case, there was less evidence than in Taylor, supra, because the CS in this case never testified to seeing a gun during his interactions with Petitioner. Similarly, Petitioner was not the owner of the apartment (his name was not on the lease (but another male's was)), and he didn't have a key to the property), yet he was found to be in constructive possession because the owner had a gun, in her personal bedroom, in her personal drawer. cf. Reece, supra.

Fundamental fairness cannot allow holding a person responsible for the acts of another without evidence to the contrary. Ms. Jones was not charged as a co-conspirator (although she was seen packaging heroin while Petitioner was away) so even the Government believes they were not working in conjunction. Therefore, it's more the reason to show that Petitioner wouldn't know about all of the aspects of her operations.

B. There Is A Clear Circuit Split On The Issue Of Constructive Possession When There Might Be Joint Possessors

As stated in subpart A of this section, there is a clear disparity between the standards of constructive possession. Furthermore, the Supreme Court is silent on the issue. See Henderson, infra (SCOTUS relies on Black's Law Dictionary for even a basic definition of constructive possession). There exists an unfairness in the criminal justice proceedings: it is Circuit-dependent on whether a defendant will be found guilty of a crime.

Looking at the First Circuit's holding makes clear just how wide the gap between the Circuits are. In the First Circuit, they impute nearly strict liability for constructive possession. See United States v. Rodriguez-Martinez, 778 F.3d 367, 373 (1st Cir. 2015)("A finding of constructive

possession requires a showing 'that the person knows (**or has reason to know**) that the firearm is within easy reach, so that he can take actual possession of it virtually at will.'"(quoting United States v. Robinson, 473 F. 3d 387, 399 (1st Cir. 2007)))(emphasis added). Essentially, in the First Circuit, a defendant would be guilty for mere association without actual knowledge of the contraband.

In the 6th Circuit, they require evidence such as "proof of motive, a gesture implying control, evasive conduct, or a statement" to find one guilty by way of constructive possession. United States v. Campbell, 549 F.3d 364, 374 (6th Cir. 2008). Here, no evidence existed that would link Petitioner to the firearm. At best, the evidence shows that he frequented the apartment.

Similarly, in the Second Circuit, even when one has control of the premissis, without more, they will not be found of constructive possession. See United States v. Samaria, 239 F.3d 228, 239 (2d. Cir. 2001)(holding that a passenger in their own vehicle was not in constructive possession of contraband because "[T]here is no evidence that [defendant] handled any of the boxes or directed where they were to be taken.") There was no evidence that Petitioner knew of the existence of an object, located in a closed drawer, while he wasn't even on the property. There was no DNA or fingerprints on the gun or the drawer where it was found. The mens clothing was not introduced as evidence and could reasonably have been attributed to the man whose name is on the lease. The evidence presented for the 924(c) portion of the trial ("Phase I") only shows that Petitioner entered the apartment on two occasions: once on 2/14/2020 and then again, over one month later, on April 8, 2020. This is not the kind of evidence that would support a conviction in other Circuits.

In United States v. Ramos, 852 F.3d 747, 755 (8th Cir. 2017), the

evidence included finding a firearm in the bedroom of a woman that the defendant was allegedly living with. The Court concluded:

It is unclear whether [the defendant], though he lived at the apartment, exercised any control over the bedroom where the gun was found. On this evidence, it is more than possible that [the defendant] was convicted because [the woman he lived with] had a weapon that [the defendant] did not know about. A reasonable jury could not conclude beyond a reasonable doubt to the contrary.

Id. In the instant case, the facts are even more disassociated. Petitioner did not live at the apartment, he was only an occasional guest. That is not the "proof of motive ... gesture implying control, evasive conduct ... or statement" that would impute constructive possession. Campbell, supra; United States v. Shaffers, 22 F.4th 655 (7th Cir. 2022). This is the case where constructive possession "will not be lightly imputed." Cruz, supra (Eighth Cir.); Holland, supra (D.C. Cir.); Onick, supra (5th Cir.). There was no evidence to prove that the firearm "was in plain view or could somehow be identified if one were sitting next to it." United States v. Rodriguez, 392 F.3d 539, 547 (2d. Cir. 2004). Instead, in the Third Circuit, there only need be evidence to show that he was within "arm's reach" of the firearm. Peoples, supra.

In this case, there was a near strict liability imposed in that the government didn't even prove knowledge of the existence of a gun, in a closed drawer, in a personal bedroom. This is more consistent with the First Circuit's standard which doesn't require knowledge at all. Rodriguez-Martinez, supra.

The last case on which the Supreme Court weighed in on the issue of constructive possession (highly indirectly) was Henderson v. United States, 135 S. Ct. 1780 (2015) (finding that release of a gun to a third-party for a sale wouldn't necessarily constitute constructive possession.) In that

holding, the Supreme Court had to rely on the Black's Law Dictionary and another secondary source for the definition of constructive possession as there is no good precedent on this issue. Id. The definition used ("Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.")(see Black's Law Dictionary, 1047 & 2A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal §39.12 p. 55 (6th ed. 2009) is too general to touch upon this specific question.

CONCLUSION

Given the lack of precedent and the unfairness of the state of our criminal justice system, that guilt is location dependent, Petitioner respectfully prays that this Honorable Court would exercise its power and bring unity to the issue presented in this case. Petitioner prays that this Court would grant his Petition for a Writ of Certiorari.

Executed on this 7th day of August, 2024.

Respectfully Submitted,

