

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK JAMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether a defect in an indictment -- of whatever kind -- is categorically a non-jurisdictional error, even if the indictment alleges conduct that is beyond the scope of the charging statute.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner Frank James respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinion Below

The summary order of the United States Court of Appeals for the Second Circuit appears at Pet. App. 1a-12a, and is available at 2024 WL 4456205. The order of the district court denying the motion to dismiss the indictment is unreported and appears at Pet. App. 13a (Entry of Dec. 21, 2022, on district court docket sheet).

Jurisdictional Statement

The summary order of the court of appeals was issued on October 10, 2024. Pet. App. 1a. The District Court had jurisdiction under 18 U.S.C. § 3231. The Second Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

1. U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury ... nor be deprived of life, liberty, or property, without due process of law.

2. **18 U.S.C. § 1992**

(a) General prohibitions.--Whoever, in a circumstance described in subsection (c), knowingly and without lawful authority or permission-

* * *

(4) sets fire to, undermines, makes unworkable, unusable, or hazardous to work on or use, or places any biological agent or toxin, destructive substance, or destructive device in, upon, or near any--

(A) tunnel, bridge, viaduct, trestle, track, electromagnetic guideway, signal, station, depot, warehouse, terminal, or any other way, structure, property, or appurtenance used in the operation of, or in support of the operation of, a railroad carrier, and with intent to, or knowing or having reason to know, 1 such activity would likely, derail, disable, or wreck railroad on-track equipment; or

(B) garage, terminal, structure, track, electromagnetic guideway, supply, or facility used in the operation of, or in support of the operation of, a mass transportation vehicle, and with intent to, or knowing or having reason to know, 1 such activity would likely, derail, disable, or wreck a mass transportation vehicle used, operated, or employed by a mass transportation provider;

* * *

(7) commits an act, including the use of a dangerous weapon, with the intent to cause

death or serious bodily injury to any person who is on property described in subparagraph (A) or (B) of paragraph (4);

* * *

(b) Aggravated offense.--Whoever commits an offense under subsection (a) of this section in a circumstance in which--

(1) the railroad on-track equipment or mass transportation vehicle was carrying a passenger or employee at the time of the offense;

3. **18 U.S.C. § 924(c) (3):**

For purposes of this subsection the term "crime of violence" means an offense that is a felony and-

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT OF THE CASE

This petition for a writ of certiorari presents an issue that is pending before the Court in Azibo Aquart v. United States, No. 24-5754 (U.S.), which is scheduled for conference on January 10, 2025.¹

¹ The United States filed its response to Aquart's certiorari petition (which was filed on October 11, 2024) on December 11, 2024. Petitioner Aquart filed a reply on December 23, 2024. Id.

Petitioner Frank James committed a crime in a subway car on the New York transit system, and was indicted on charges of committing a terrorist attack or other violence against a mass transportation system, in violation of 18 U.S.C. § 1992(a)(7) and (b)(1), and using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). He discharged a firearm in a subway car wounding ten people, although no one was killed.

James moved to dismiss the indictment on the grounds that the conduct that the indictment alleged could not, as a matter of law, constitute an offense "against the laws of the United States"; hence, the district court lacked subject-matter jurisdiction over the case. See 18 U.S.C. § 3231 (jurisdiction of district courts, in criminal matters, is limited to the prosecution of "offenses against the laws of the United States").

In his motion to dismiss, James contended that: (i) 18 U.S.C. § 1992(a)(7) does not extend to a shooting in a subway train car, which is a quintessential state offense; (ii) the aggravating-penalty provision of § 1992(b) — which increased the maximum penalty from 20 years' to life imprisonment — does not apply to § 1992(a)(7); and (iii) a violation of § 1992(a)(7) is not a categorical crime of violence within the meaning of 18 U.S.C. § 924(c). The issues raised in James's motion to dismiss, concerning the particular statutes he was charged with violating, are currently pending before the Second Circuit. See United States v.

Ullah, No. 21-1058-cr (2d Cir.) (argued on April 27, 2022).²

The district court summarily denied James's motion to dismiss the indictment. Pet. App. 13a (docket entry, dated Dec. 21, 2022: order denying mot. to dismiss). James then pleaded guilty to violating § 1992(a)(7) and § 924(c), of Title 18, unconditionally and without a plea agreement.³

On appeal, James argued that the district court had erred by denying his motion to dismiss the indictment. The Second Circuit, however, rejected his argument on the ground that claims alleging defects in an indictment are non-jurisdictional, so James, therefore, waived any non-jurisdictional claims with his unconditional guilty plea. Pet. App 3a-4a. The Second Circuit relied on its own precedent in United States v. Rubin, which interpreted this Court's opinion in United States v. Cotton, 535 U.S. 625 (2002) as holding that a district court has jurisdiction over a criminal prosecution "even where an indictment alleges conduct that does not state an offense under the statute purportedly violated." 743 F.3d 731, 37 (2d Cir. 2014).

² The oral argument before the Second Circuit in Ullah occurred more than two and one-half years ago, on April 27, 2022. The case has not yet been decided. See No. 21-1058-cr (2d Cir.)

³ Under Fed. R. Crim. Proc. 11(a)(2), a defendant, "[w]ith the consent of the court and the government," "may enter a conditional plea of guilty or nolo contendere, reserving ... the right to have an appellate court review an adverse determination of a specified pretrial motion."

The Second Circuit thus held that any alleged defects in Frank James's indictment did not deprive the district court of jurisdiction. It held that, "[s]ince 'challenges to indictments on the basis that the alleged conduct does not constitute an offense under the charged statute are . . . non-jurisdictional challenges,' we conclude that James waived his arguments when he entered his unconditional guilty plea." Pet. App. 3a-4a (ellipsis in original) (quoting Rubin, 743 F.3d at 37).⁴

It thus concluded: "We therefore need not address James's argument that the charged statutes do not cover the conduct at issue here." Pet. App. 4a.

Reasons for Granting the Writ

Article III of the Constitution confers on federal courts subject-matter jurisdiction over all cases arising under the laws of the United States. See U.S. Const. art. III, § 2, cl.1. In federal criminal prosecutions, subject-matter jurisdiction is conferred by 18 U.S.C. § 3231. Through this statute, Congress limited federal judicial jurisdiction, providing that the "district courts of the United States shall have original jurisdiction . . .

⁴ In United States v. Aquart, 92 F.4th 77 (2d Cir. 2024), the Second Circuit reaffirmed Rubin's interpretation of this Court's opinion in Cotton, stating: Rubin "interpreted Cotton to mean that 'challenges to indictments on the basis that the alleged conduct does not constitute an offense under the charged statute are . . . non-jurisdictional challenges.'" Id. (ellipsis in original) (quoting Rubin, id. at 37 (2d Cir. 2014)). As noted, Azibo Aquart's petition for a writ of certiorari is pending before the Court, scheduled for conference on January 10, 2025.

of all offenses against the laws of the United States.” 18 U.S.C. § 3231 (emphasis added). Federal courts, thus, by the plain language of the governing statute, lack jurisdiction over a criminal proceeding absent an allegation of an offense against the laws of the United States.

The courts of appeals are split, however, about whether an indictment defect can ever render a federal court without jurisdiction. See United States v. Muresanu, 951 F.3d 833, 838 (7th Cir. 2020) (recognizing split).

The conflict arises from this Court’s decision in Cotton. In Cotton, the Fourth Circuit vacated the sentences of seven people convicted of drug offenses because their indictments omitted the drug quantities. Cotton, 535 U.S. at 628-29. This Court then granted certiorari to decide “whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals’ vacating the enhanced sentence, even though the defendant did not object in the trial court.” Id. at 627. The Court concluded that failing to allege drug quantities is not a jurisdictional error because such “defects in an indictment do not deprive a court of its power to adjudicate a case.” Id. at 630-34.

I. Courts of appeals are divided on the issue presented.

A. Six circuits read Cotton to require that indictment defects of any kind are non-jurisdictional.

The Second, Fifth, Sixth, Seventh, Tenth, and D.C.

Circuits interpret Cotton as holding that indictment defects are never jurisdictional.

1. The Second Circuit in Rubin confronted a challenge to a conviction under the Unlawful Internet Gambling Enforcement Act, see 31 U.S.C. §§ 5361-5367. 743 F.3d at 34. The defendant, who pleaded guilty unconditionally, argued on appeal that his conduct did not come within the statute because he only handled gambling funds. Id. at 35. Although a guilty plea would normally preclude his raising this argument on appeal, he asserted that his challenge to the indictment was jurisdictional. Id. at 35-36. Because the indictment failed to allege a federal offense against him, he argued, the district court lacked subject-matter jurisdiction to enter his guilty plea. Id. at 36.

The Second Circuit rejected the argument, interpreting Cotton to require a categorical approach to indictment defects: “[A] district court has ‘jurisdiction’ even where an indictment alleges conduct that does not state an offense under the statute purportedly violated.” Id. Thus, in the Second Circuit, “[e]ven a defendant’s persuasive argument that the conduct set out in the indictment does not make out a violation of the charged statute

does not implicate subject-matter jurisdiction." United States v. Yousef, 750 F.3d 254, 260 (2d Cir. 2014), abrogated on other grounds as recognized in United States v. Van Der End, 943 F.3d 98, 104-05 (2d Cir. 2019); see also Pet. App. 3a ("`challenges to indictments on the basis that the alleged conduct does not constitute an offense under the charged statute are ...non-jurisdictional challenges'"') (ellipsis in original) (quoting Rubin, 743 F.3d at 37).

2. The Fifth Circuit in United States v. Scruggs reviewed a collateral challenge to a conviction for aiding and abetting honest-services mail fraud. 714 F.3d 258, 261 (5th Cir. 2013). After the petitioner's guilty plea, this Court held that the statute for honest-services fraud requires proof of a bribe. Id. at 262 (citing Skilling v. United States, 561 U.S. 358 (2010)). The petitioner moved to vacate his sentence, under Skilling, but the district court ruled that he had procedurally defaulted by pleading guilty. Id. at 261. On appeal, he argued that his challenge was jurisdictional because the charging document stated a "non-offense." Id. at 262.

The Fifth Circuit rejected the jurisdictional argument, citing language in Cotton that "'defects in an indictment do not deprive a court of its power to adjudicate a case,'" Scruggs, 714 F.3d at 263 (quoting Cotton, id. at 630). The court explained that although the failure to allege a bribe might have rendered the indictment

"factually insufficient, it did not divest the district court of subject matter jurisdiction over the case." Id.

3. The Sixth Circuit in Vanwinkle v. United States reviewed a collateral challenge to a conviction for unauthorized use of an access device under 18 U.S.C. § 1029. 645 F.3d 365, 367-68 (6th Cir. 2011). The petitioner, who had pleaded guilty, argued that he had not procedurally defaulted his challenge because his indictment did not allege a violation of federal law and, therefore, the district court lacked jurisdiction. Id. at 368-69. The Sixth Circuit rejected this argument, citing Cotton and holding that the petitioner's claim was "more properly considered as a legal sufficiency challenge." Id. at 369.

4. The Seventh Circuit in United States v. Perez reviewed a direct challenge to a conviction for a racketeering conspiracy under 18 U.S.C. § 1962(d). 673 F.3d 667, 668 (7th Cir. 2012). The defendant argued on appeal that the renumbering of the paragraphs in his indictment and the redaction of the allegations against his former co-defendants was a constructive amendment and, thus, a violation of the Grand Jury Clause of the Fifth Amendment. Id. at 669. Because the defendant had not objected in the district court, his challenge was subject to plain error review. Id. The defendant countered that the error was jurisdictional and thus subject to de novo review. Id. at 670. But the Seventh Circuit concluded that, under Cotton, a defective indictment does not deprive a court of

jurisdiction. Id.

Later, the Seventh Circuit acknowledged the “existence of a circuit split about the reach of Cotton,” contrasting its own decision in Perez with the Eleventh Circuit’s rule adopted in United States v. Peter, 310 F.3d 709, 715 (11th Cir. 2002) (per curiam), discussed below. See United States v. Lowe, 512 F. App’x 628, 630 (7th Cir. 2013).

5. The Tenth Circuit in United States v. De Vaughn reviewed a challenge to a conviction for mailing threatening communications. 694 F.3d 1141, 1142-43 (10th Cir. 2012). The defendant pleaded guilty in the district court. Id. at 1143. On appeal, however, he argued that his statements did not constitute true “threats;” therefore, his charging document did not allege offenses against the United States, depriving the district court of jurisdiction. Id. at 1143, 1146. The Tenth Circuit disagreed, reading Cotton to adopt a categorical rule that all “indictment defects are not jurisdictional,” including “both omissions from the indictment and arguments that the indictment does not charge a crime against the United States.” Id. at 1149 (cleaned up). Accordingly, it held that “the objection that the indictment does not charge a crime against the United States goes only to the merits of the case.” Id. (cleaned up).

6. The D.C. Circuit in United States v. Delgado-Garcia reviewed a direct appeal to three convictions for conspiring and

attempting to induce illegal aliens to enter the country under 8 U.S.C. § 1324(a). 374 F.3d 1337, 1339 (D.C. Cir. 2004). The defendants argued that their indictments failed to state an offense against the laws of the United States because the charging statute does not apply extraterritorially, and this defect was jurisdictional. Id. at 1340-41. The court rejected this argument, concluding that "the substantive sufficiency of the indictment is a question that goes to the merits of the case, rather than the district court's subject-matter jurisdiction." Id. at 1342.

B. Two circuits have rejected a categorical view that indictment defects are always non-jurisdictional.

The First and Eleventh Circuits have held that whether an indictment defect is jurisdictional depends on the type of defect.

1. The First Circuit in United States v. Rosa-Ortiz reviewed a direct appeal from a conviction for conspiracy to violate the Federal Escape Act, see 18 U.S.C. § 751(a). 348 F.3d 33, 34 (1st Cir. 2003). The defendants argued that the conduct charged in their indictments was outside the sweep of the charging statute. Id. at 36. Although the defendants had pleaded guilty, they argued that their challenges were reviewable because the indictment defect was jurisdictional. Id. The First Circuit agreed, holding that a federal court "lacks jurisdiction to enter a judgment of conviction when the indictment charges no offense under federal law whatsoever." Id.

2. The Eleventh Circuit in Peter reviewed a petition for a writ of error coram nobis to a conviction for racketeering conspiracy based on predicate acts of mail fraud. 310 F.3d at 710-11. The petitioner argued that, because of an intervening Supreme Court decision interpreting the mail fraud statute, his indictment failed to allege a federal offense. Id. at 711.

The court agreed, holding that coram nobis relief was warranted because the district court never had jurisdiction to enter the judgment of conviction. Id. at 716. The Eleventh Circuit relied primarily on United States v. Meacham, where the former Fifth Circuit held that “[t]he entry of a guilty plea does not act as a waiver of jurisdictional defects such as an indictment’s failure to charge an offense.” 626 F.2d 503, 510 (5th Cir. 1980). In other words, “a district court is without jurisdiction to accept a guilty plea to a ‘non-offense.’” Peter, 310 F.3d at 713.

The Eleventh Circuit rejected the government’s argument that Cotton had abrogated Meacham. See id. at 713-14. Cotton, the court explained, does not require a “categorical approach that treats all indictment problems the same way.” Id. at 714 (quoting McCoy v. United States, 266 F.3d 1245, 1252-53 (11th Cir. 2001)). Under Cotton, some indictment defects, like “the failure to allege a fact requisite to the imposition of defendants’ sentences” — as in Cotton itself — are non-jurisdictional. Id. But other defects, like alleging only “specific conduct that, as a matter of law, [is]

outside the sweep of the charging statute," are jurisdictional. Id.

The Eleventh Circuit has since reaffirmed Peter, holding that a defendant who pleaded guilty to Hobbs Act robbery and attempted robbery while carrying a firearm did not waive his argument that his crimes were not "crimes of violence" for the purpose of firearms convictions under 18 U.S.C. 924(c). United States v. St. Hubert, 909 F.3d 335, 344 (11th Cir. 2018), *abrogated on other grounds* as recognized in United States v. Taylor, 596 U.S. 845 (2022). The Eleventh Circuit reiterated that, if the indictment did not allege offenses against the laws of the United States, then the district lacked jurisdiction. Id.

II. This case is a suitable vehicle for resolving the conflict.

This case is a suitable to address the question presented. There are no jurisdictional obstacles. The question was presented below. And the Second Circuit addressed the issue in deciding James's appeal. It held that "'challenges to indictments on the basis that the alleged conduct does not constitute an offense under the charged statute are ... non-jurisdictional challenges[.]" Pet. App. 3a-4a. The Second Circuit thus concluded: "We therefore need not address James's argument that the charged statutes do not cover the conduct at issue here." Pet. App. 4a.

Moreover, the merits of James's challenge to the indictment raise substantial questions that the Second Circuit would have to address if it had jurisdiction to do so. James's particular

challenges to his indictment are unresolved in the Second Circuit, but currently pending in a case before that court. See United States v. Ullah, No. 21-1058-cr (2d Cir.). Although the oral argument in Ullah occurred more two and one-half years ago, in April 2022, no decision has been rendered. Therefore, if James were permitted to raise his legal challenges to his indictment on a remand to the court of appeals, he would have an opportunity to vindicate his claims.

III. The Second Circuit's decision is wrong.

Treating all indictment defects as categorically non-jurisdictional violates the jurisdictional statute's plain language. Federal courts have a limited jurisdictional grant under 18 U.S.C. § 3231, which gives district courts, in criminal cases, "original jurisdiction ...of all offenses against the laws of the United States." Under the statute's plain language, therefore, for a district court to obtain jurisdiction over a federal criminal prosecution, the indictment must allege an "offense[] against the laws of the United States." Id. Therefore, if an indictment does not allege a violation of a federal offense, then the district court does not have jurisdiction to allow the federal prosecution to proceed. Under the categorical approach, however, "a district court has 'jurisdiction' even where an indictment alleges conduct that does not state an offense under" the laws of the United States. Rubin, 743 F.3d at 37.

The categorical approach would thus require federal courts to exercise jurisdiction in situations where it is clear that no federal offense has occurred. A prosecutor could simply slap the label of a federal criminal statute on an indictment, and the district court would be required to exercise exclusive jurisdiction over the case, even if it were evident on the face of the indictment that the conduct alleged did not -- and never could -- constitute a federal offense as a matter of law. The jurisdictional statute for federal crimes would, thus, provide no meaningful check on the power of federal courts. That cannot be right.

Nothing in Cotton compels this categorical approach. The indictment there clearly alleged conduct that fell within the charging statute: i.e., an offense against the laws of the United States. The only question was whether omitting a fact necessary to a sentencing enhancement presented a jurisdictional issue. 535 U.S. at 627. This Court held that the answer is no because not every defect in an indictment implicates the court's subject- matter jurisdiction. See id. at 630-31. But that holding does not mean that no indictment defect is jurisdictional.

The First and Eleventh Circuits have correctly held that whether an indictment defect is jurisdictional depends on the type of indictment problem at issue. An indictment that is missing a fact necessary for a sentencing enhancement does not implicate the district court's jurisdiction: such a defect does not cast any

doubt on whether the government is alleging the commission of a federal offense. But an indictment that charges no federal offense at all -- as James alleges here -- gives rise to a jurisdictional error because a district court can exercise jurisdiction only over "offenses against the laws of the United States." 18 U.S.C. § 3231.

Conclusion

For the foregoing reasons, therefore, the petition for a writ of certiorari should be granted.

Dated: New York, New York
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Respectfully submitted,

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