

No. 11-833

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**In the Supreme Court of the United States**

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BILLY JOHNSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the district court erred in instructing the jury on the interstate commerce element of 18 U.S.C. 1958(a).

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-29) is not published in the Federal Reporter but is available at 443 Fed. Appx. 85. The opinion of the district court denying petitioner's motion for a judgment of acquittal and new trial (Pet. App. 30-34) is not published in the Federal Supplement but is available at 2009 WL 2447978.

**JURISDICTION**

The judgment of the court of appeals was entered on October 5, 2011. The petition for a writ of certiorari was filed on December 30, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiring to use interstate commerce facilities with intent that murder be committed in exchange for something of pecuniary value, in violation of 18 U.S.C. 1958(a); traveling in interstate commerce with the intent that murder be committed in exchange for something of pecuniary value, in violation of 18 U.S.C. 1958(a) and 2; using the mail with intent that murder be committed in exchange for something of pecuniary value, in violation of 18 U.S.C. 1958(a) and 2; and eight counts of making false declarations before the grand jury, in violation of 18 U.S.C. 1623. Pet. App. 30-31. He was sentenced to life imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1-29.

1. a. Petitioner's mother, Martha Johnson, lived alone in a trailer in Tipton County, Tennessee. Ms. Johnson owned approximately 520 acres of land, including land in Tipton County that she primarily used as a cattle farm. She also owned and operated a local bar named "JJ's." In July 1999, the value of her total assets was \$1,162,850, and she had a net worth of \$727,918. Pet. App. 3-4.

Petitioner worked on his mother's farm and at her bar. Ms. Johnson and petitioner disagreed over the use and possible development of her land. Petitioner wanted to develop portions of his mother's acreage into a subdivision, but Ms. Johnson insisted on continuing to farm the land while postponing any development. Two farm workers had witnessed Ms. Johnson and petitioner engage in heated arguments over the issue, and a personal friend of Ms. Johnson who was the fire chief of

Covington, Tennessee, heard Ms. Johnson make comments about disinheriting her sons. Pet. App. 4; Gov't C.A. Br. 6-7.

In the fall of 1998, petitioner offered Lee Thomas, a worker on Ms. Johnson's land, \$10,000 to murder his mother, with a portion up front and the remainder to be paid after completion of the job. Thomas refused. Petitioner reiterated his offer a month later, but Thomas again refused. Petitioner also unsuccessfully asked his friend Jeremy Lawrence, who also worked on Ms. Johnson's farm, to murder his mother. Pet. App. 4-5; Gov't C.A. Br. 7-9.

b. Having been spurned by Thomas and Lawrence, in July 1999 petitioner solicited Danny Winberry at JJ's bar to murder Ms. Johnson. They agreed that Winberry would murder her for \$50,000. They spoke by phone over the following two weeks and later met at a Walmart parking lot in Covington, Tennessee. During that meeting, petitioner gave Winberry \$5000 and a key to his mother's trailer. Winberry understood that he would receive the remaining \$45,000 after petitioner collected on his mother's life insurance policy. Pet. App. 5; Gov't C.A. Br. 9-10.

On July 19, 1999, petitioner called Winberry from a payphone and instructed him to murder his mother while petitioner was away on a trip to Hot Springs, Arkansas. Petitioner explained that his mother would be in neighboring Lauderdale County, Tennessee on both Wednesday and Thursday, and would return to her residence around 5p.m. or 6p.m. Petitioner said that the murder could be committed on either day. On July 20, 1999, petitioner left for Hot Springs with his family and friends. By traveling to Arkansas, petitioner hoped both to establish an alibi for the time of the murder and to

ensure that his daughter would not be at Ms. Johnson's trailer at the time of the murder. Pet. App. 5-6; Gov't C.A. Br. 10-11.

The evening before the murder, Winberry asked his then-girlfriend, Rebecca Haynes Johnson, to serve as an alibi for a robbery. She agreed, but told Winberry that it would be "different" if he were to kill someone. Winberry then told Haynes Johnson that he did not have to rob an individual because he had keys to the residence. Winberry also showed Haynes Johnson a wad of cash which he told her amounted to \$5000. Pet. App. 6; Gov't C.A. Br. 12.

The next day, July 22, 1999, Ms. Johnson arrived at her residence at approximately 5:15 p.m., where she dropped off Archer and another farm worker, both of whom left in their own trucks. Winberry was already inside the trailer. Winberry surprised Ms. Johnson at gunpoint, but, instead of shooting her, he bludgeoned her to death with an antique iron he found in the house. He then placed a kerosene lamp on a lit stove to set the trailer on fire. Winberry went home to change his clothes and told Haynes Johnson that he needed to go out "to be seen." Pet. App. 6-7; Gov't C.A. Br. 12-14.

Early the next morning, Winberry returned to the trailer and found it still intact. Using a lighter and a rag he had obtained from Haynes Johnson, Winberry applied an accelerant to set a fire in the bedroom. By the time the fire department responded, the trailer was completely engulfed in flames. Upon extinguishing the fire, the fire personnel discovered Ms. Johnson's body in the bedroom. An autopsy revealed that Ms. Johnson died from blunt force trauma to the head. Pet. App. 7; Gov't C.A. Br. 13-15.

When Haynes Johnson learned of the murder several days later, she immediately suspected Winberry and confronted him. Winberry later told her that he was involved, and approximately three weeks later explained that petitioner would have no problem killing him because petitioner had hired him to “kill [petitioner’s] own mother.” During the later investigation of the murder, Haynes Johnson implicated Winberry and petitioner. Pet. App. 7-8; Gov’t C.A. Br. 15-16.

c. While the investigation was still proceeding and before he was arrested, petitioner told Lisa Barnes, a witness who had reported a suspicious truck parked near Ms. Johnson’s trailer the night of the murder, not to further assist the Tipton County Sheriff’s Department in their investigation. As a result, when investigators returned to Barnes with photos of trucks, including Winberry’s, Barnes did not identify the truck. Pet. App. 8; Gov’t C.A. Br. 17.

d. After his mother’s death, petitioner was unable to locate an executed will. Accordingly, he filed the estate intestate, which led to his brother, Jerry Edwards, and his 17-year-old nephew, Hunter Edwards, each being entitled to one-third of the estate. Petitioner administered the estate and persuaded the others that the estate had no value. They therefore formally waived any claims to the estate. Hunter Edwards, still a minor, signed the waiver without the presence of a guardian. Pet. App. 8; Gov’t C.A. Br. 17-19.

As a result, petitioner inherited his mother’s full estate. He sold several tracts of land to a neighbor. He also received \$102,000 in life insurance proceeds, which were mailed to petitioner from a life insurance company in Florida. In total, petitioner obtained a profit of

\$611,893.56 from the sale of his mother's estate. Pet. App. 8-9; Gov't C.A. Br. 19.

e. Petitioner appeared before a federal grand jury in 2004. He testified that he was in Hot Springs at the time of the murder, denied that he had attempted to recruit Thomas and Lawrence to murder his mother, and denied that he told Barnes not to cooperate with the sheriff's department or to talk to anybody about the red truck. Gov't C.A. Br. 19-20.

2. On August 14, 2008, a federal grand jury in the Western District of Tennessee charged petitioner in a superseding indictment with conspiring to use interstate commerce facilities with the intent that murder be committed in exchange for something of pecuniary value, in violation of 18 U.S.C. 1958(a) (Count 1); traveling in interstate commerce with the intent that murder be committed in exchange for something of pecuniary value, in violation of 18 U.S.C. 1958(a) and 2 (Count 2); using the mail with the intent that murder be committed in exchange for something of pecuniary value, in violation of 18 U.S.C. 1958(a) and 2 (Count 3); and eight counts of making false declarations before the grand jury, in violation of 18 U.S.C. 1623 (Counts 4 through 11). Indictment 1-14. The Section 1958(a) charge in Count 2 was predicated on petitioner's travel from Arkansas to Tennessee with the intent that Winberry murder Ms. Johnson. *Id.* at 2. The Section 1958(a) charge in Count 3 was predicated on the mailing of Ms. Johnson's life insurance proceeds from Florida. *Id.* at 3.<sup>1</sup>

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<sup>1</sup> Section 1958(a) provides, in relevant part, that

[w]hoever travels in \* \* \* interstate or foreign commerce, or uses \* \* \* the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of

3. During petitioner's trial, the district court declined to give the following instruction offered by petitioner on count three:

[I]f the mailing in this case by American Bankers Insurance Company, as alleged in Count Three, to pay the proceeds of an insurance policy to the defendant occurred *after* the murder of Martha Johnson, then the government has not proven that the mails were used to facilitate or further her murder.

Pet. App. 25. (alterations original) Instead, the district court instructed the jury on Section 1958(a) as follows:

The first element the government must prove beyond a reasonable doubt before you can convict is that the defendant traveled in interstate commerce, or used or caused another to use the mail or any facility of interstate commerce.

The use of the United States mail or interstate travel are essential elements of the offense of Interstate Travel or Use of the Mail Related to Murder for Hire as charged in Counts 2 and 3 of the indictment.

There is no requirement that mailing or the interstate travel be essential to the scheme. It is enough that the mailing or interstate travel promotes, advances, manages, carries on or facilitates the murder for hire.

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any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so shall be punished. 18 U.S.C. 1958(a).

The government is not required to prove that the defendant actually mailed anything or that the defendant even intended that the mail would be used to further, or to advance, or to carry out the plan to murder Martha Johnson.

The government must prove beyond a reasonable doubt, however, that the mails were, in fact, used in some manner to promote, advance, manage, carry on or facilitate murder for hire. The government must also prove that the use of the mail would follow in the ordinary course of business or events or that the use of the mail by someone was reasonably foreseeable.

It is not necessary for the government to prove that the item itself mailed or contained any request for money or thing of value.

If the government proves beyond a reasonable doubt that the defendant's actions in the plan to murder Martha Johnson caused American Bankers Insurance Company to use the mail in a manner that would promote, advance, manage, carry on or facilitate murder for hire, such as by collecting insurance proceeds, then you may find this satisfies this element.

\* \* \*

With respect to the second element, the government must prove that the defendant caused the interstate travel or use of the mail with the intent to further or facilitate the commission of the murder of Martha Johnson. The government does not have to prove that the murder was committed or even that it was attempted.

Jury Instructions 24-26.

At the conclusion of the three-week trial, the jury found petitioner guilty of all of the counts in the indictment. Gov't C.A. Br. 3.

Petitioner moved for a judgment of acquittal notwithstanding the verdict or, alternatively, a new trial. Among other things, petitioner argued that the district court erred in instructing the jury on the interstate activity element of the murder-for-hire offenses charged in Counts 2 and 3. The district court rejected the claim, stating that its instructions were correct and that petitioner's proposed instructions misstated the law. Pet. App. 30, 34.

The district court subsequently sentenced petitioner to life imprisonment, to be followed by a three-year term of supervised release. Judgment at 3-4.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-29. As relevant here, the court rejected petitioner's argument that the district court abused its discretion in declining to adopt petitioner's proffered jury instructions regarding Counts 2 and 3. *Id.* at 22-26.<sup>2</sup>

As to Count 2, petitioner argued that his trip to Arkansas could not have satisfied the travel element of Section 1958(a) on the asserted ground that it did not facilitate the murder itself. The court of appeals disagreed, noting that Section 1958(a) is not a murder statute; instead, it "specifically addresses murder for hire involving travel in interstate commerce." Pet. App. 24.

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<sup>2</sup> The court also rejected petitioner's claims that the evidence was insufficient to support his conviction; that the district court erred in denying his motion for a new trial; that the district court abused its discretion in making various evidentiary rulings; and that the district court erred in ordering and calculating the amount of restitution. Pet. App. 9-22, 26-28.

Observing that it had previously held that the use of interstate commerce “need not be an essential element of the scheme but need only facilitate or further the unlawful activity,” *United States v. Weathers*, 169 F.3d 336, 343 (6th Cir.), cert. denied, 528 U.S. 838 (1999), the court stated that petitioner’s travel from Tennessee to Arkansas involved the use of interstate commerce and that the jury reasonably found a sufficient nexus between the travel and the facilitation of the murder-for-hire conspiracy, as the travel provided petitioner with an alibi. Pet. App. 24. Accordingly, petitioner’s “travel to Arkansas served to facilitate and further his planning of the murder for hire scheme.” *Ibid.*

As to Count 3, petitioner argued that the mailing of insurance proceeds to him from Florida could not have satisfied the use-of-the-mail aspect of Section 1958(a) because the mailing occurred after the murder of his mother. Again, the court of appeals disagreed, finding “no requirement in the statute that use of the mail in the facilitation of the criminal enterprise take place prior to the murder.” Pet. App. 25. Rather, the court stated, “the evidence must establish a nexus between the use of the mail and the furtherance of the murder for hire strategy.” *Ibid.* Here, the court observed, “the jury reasonably found convincing the evidence that [petitioner], with little financial means of his own, required Ms. Johnson’s life insurance checks to satisfy the \$45,000 obligation he retained with Winberry, a central obligation in the murder for hire conspiracy. The insurance proceeds arrived in the mail during the pendency of the murder for hire conspiracy.” *Id.* at 25-26.

## ARGUMENT

Petitioner renews (Pet. 10-18) his claim that the district court incorrectly instructed the jury on the interstate commerce element of 18 U.S.C. 1958(a) and that his interstate travel and use of the mails did not facilitate the physical act of murder of his mother as he contends is required by the statute. He also contends that the court of appeals' rejection of that claim conflicts with the decisions of other circuit courts. Petitioner's argument lacks merit, and there is no conflict in the courts of appeals. Further review is unwarranted.

1. As the court of appeals held, the district court correctly instructed the jury on the interstate commerce element of Section 1958(a). Section 1958(a) prohibits, among other things, traveling in interstate commerce or causing another to use the mail with the intent that a murder be committed as consideration for the receipt of anything of pecuniary value. The required connection between the use of the mail and interstate travel is sufficiently established, as the district court instructed the jury, where the mailing or interstate travel promoted, advanced, managed, carried on, or facilitated the murder for hire and petitioner traveled or used the mail with the intent to further or facilitate the commission of that murder. See pp. 7-8, *supra*.

The statute nowhere states that the travel or mailing must facilitate or further the physical act of murder. Instead, the travel or mailing must be undertaken with the intent that a murder-for-hire be committed, *i.e.*, "a murder \* \* \* as consideration for \* \* \* anything of pecuniary value," 18 U.S.C. 1958(a) (emphasis added). As the court of appeals stated, Section 1958(a) is not a murder statute, but rather a murder-for-hire statute containing a jurisdictional element. Pet. App. 24. Peti-

tioner clearly traveled to Arkansas with the intent that a murder for hire be committed: he traveled so that the murder could be committed by the individual petitioner hired at a time when petitioner had an alibi. *Ibid.* Petitioner also caused the use of the mails with the intent to facilitate the murder, as he needed the life insurance proceeds to satisfy his debt to Winberry. See Pet. App. 25-26; *United States v. Mueller*, 661 F.3d 338, 346 (8th Cir. 2011) (“Evidence of insurance transactions arising from the death of the victim, which involved the mails and interstate facilities, and payment of a portion of those insurance proceeds to a defendant are sufficient evidence to show the required nexus between using the mail or facilities in interstate commerce and the murder-for-hire scheme. Even if the insurance proceeds are collected after the murder is complete, a defendant can still be found guilty of murder-for-hire.”) (citation omitted).<sup>3</sup>

2. Petitioner asserts (Pet. 11-15) that the courts of appeals are divided on the question whether the interstate activity in Section 1958(a) must facilitate the physical act of murder itself rather than the murder-for-hire scheme. Petitioner is incorrect; no disagreement exists. Even if the circuits did disagree, the unpublished opinion below would not be an appropriate vehicle to address it.

The decisions petitioner claims are on his side of the asserted conflict affirmed convictions under Section 1958(a). He points to no court of appeals decision reversing a conviction on the reading of the statute he ad-

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<sup>3</sup> Petitioner’s position, that no mailing “*after* the murder” could ever satisfy Section 1958(a)’s jurisdictional element (Pet. App. 25), would seemingly make the statute inapplicable to a case in which a defendant mails a hit man a check as compensation after a completed murder.

vances here. Moreover, the reasoning those courts used in affirming convictions does not conflict with the reasoning the court of appeals used in this case to affirm petitioner's conviction.

In *United States v. Houlihan*, 92 F.3d 1271 (1996), cert. denied, 519 U.S. 1118 (1997), the First Circuit found the evidence sufficient to support two defendants' convictions under Section 1958(a), stating that "the jury rationally could find a facilitative nexus between the use of telephones and the criminal activities underlying the counts of conviction." *Id.* at 1292.<sup>4</sup> Consistent with the court of appeals' holding in this case, the court stated that the government had to prove that "one of the participants used the telephone or some comparable interstate facility in furtherance of the *scheme*," *ibid.* (emphasis added), and it concluded that the evidence was sufficient because "the jury reasonably could regard the various calls as an important link in the communicative chain that led to murder and attempted murder," *id.* at 1293. The court's holding that use of interstate facilities to facilitate the physical act of murder was sufficient, *ibid.*, does not mean that the First Circuit viewed such a showing as a necessary requirement.

Petitioner also cites (Pet. 14) *United States v. Richeson*, 338 F.3d 653 (7th Cir.), cert. denied, 540 U.S. 934 (2003), but, again, that case is consistent with the court of appeals' decision here. The Seventh Circuit found the evidence in that case sufficient on the question whether the letters at issue there "were mailed with the intent to execute his murder-for-hire *scheme*." *Id.* at

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<sup>4</sup> The court found the evidence insufficient as to a third defendant because "the government failed to link him to the murder in any meaningful way." *Houlihan*, 92 F.3d at 1293. Its holding was not based on the interstate commerce element of Section 1958(a).

660 (emphasis added). The court stated that Section 1958(a) “requires only that the interstate facility employed in a particular case be useful, not integral, to the commission *or planning* of the contract killing,” *id.* at 659 (emphasis added), and that the statute “does not require that the mailings themselves prove all the essential elements of the crime, only that the mailings be used with the intent that the murders be committed,” *ibid.* As with the *Houlihan* court, the *Richeson* court addressed the facts before it as part of a sufficiency-of-the-evidence analysis; it did not suggest that such facts must be present in every case under Section 1958(a) or that the interstate activity must facilitate the physical act of murder, as opposed to the overall scheme to commit murder for hire. See *id.* at 656-661.

Finally, *United States v. Robertson*, 473 F.3d 1289 (10th Cir. 2007), (see Pet. 14-15) lends no support to petitioner’s claim of a conflict. The court in that case “tend[ed] to agree” with the defendant that the jury instructions there were incomplete for lack of an intent instruction, *id.* at 1292, but it did not decide that question, instead ruling against the defendant on plain error grounds because she “failed to show that her substantial rights were affected,” *id.* at 1293 n.2. As part of that plain error analysis, the court reviewed the “district court’s instructions, as a whole” and found that they reflected “a consistent theme: the use of an interstate commerce facility with the intent that a murder be committed.” *Id.* at 1293. The court’s harmless error analysis, focused on whether the instructions as a whole conveyed that intent was an element of the offense, is not relevant to the distinct claim that petitioner presents here involving whether the interstate facility must be

used to further the physical act of murder rather than the broader murder-for-hire scheme.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2012