

No. \_\_\_\_\_

\_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_

ABDOULAYE DIALLO, — PETITIONER  
(Your Name)

vs.

UNITED STATES OF AMERICA, — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ABDOULAYE DIALLO

(Your Name)

555 GEO Dr. (MVCC, Reg. # 72011-066)

(Address)

Philisburg, PA 16866

(City, State, Zip Code)

N/A

(Phone Number)

## QUESTIONS PRESENTED

- I.- Whether the District Court failed where did not granted his motion for acquittal because the Government failed to produce sufficient evidence to support a finding that Petitioner knew the fraudulent SNAP transactions beyond a reasonable doubt.
- II.- Whether the delay to get an indictment and a superseding indictment had substantially prejudiced Petitioner, for sentencing purpose.
- III.- Whether the Government's amount of loss calculation was flawed. \*

## **LIST OF PARTIES**

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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United States v. Brodie, 403 F.3d 123403 F.3d 123; 2005 US App LEXIS 59442005.

United States v. Bozovich, 782 F.3d 814, 817 (7<sup>th</sup> Cir. 2015).

United States v. Caminos, 770 F.2d 361, 365 (3d Cir. 1985).

United States v. Cornielle, 171 F.3d 748171 F.3d 748; 1999 US App LEXIS 51461999.

United States v. Elsbery, 602 F.2d 1054, 1059 (2d Cir. 1979).

United States v. Ewell, 383 U.S. 116, 122, 15 L. Ed. 2d 627, 86 S. Ct. 773 (1966),

United States v. Hernandez, 678 Fed Appx 425678; 2017 US App LEXIS 39262017.

United States v. Hoo, 825 F.2d 667, 671 (2d Cir. 1987).

United States v. Idowu, 157 F.3d 265, 267 (3d Cir. 1998).

United States v. Lovasco, 431 U.S. 783, 795, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977).

United States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971).

United States v. Miller, 2017 US App LEXIS 100072017 U.S. App. LEXIS 10007.

United States v. Pearlstein, 576 F.2d 531, 540-41 (3d Cir. 1978).

United States v. Reed, 744 F.3d 519, 526 (7th Cir. 2014).

United States v. Scarpa, 913 F.2d 993, 1014 (2d Cir. 1990).

United States v. Scott, 437 U.S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978).

United States v. Sharma, 190 F.3d 220, 231 (3d Cir. 1999).

United States v. Stewart, 185 F.3d 112, 126 (3d Cir. 1999).

United States v. Wert-Ruiz, 228 F.3d 250, 255 (3d Cir. 2000).

United States v. Youla, 241 F.3d 296,300 (3<sup>rd</sup> Cir. 2001).

## **STATUTES**

7 U.S.C. § 2024(b).

18 U.S.C. § 2.

18 U.S.C.S. § 37.

18 U.S.C. § 371.

18 U.S.C. § 1343.

18 U.S.C. § 1344.

18 U.S.C. § 3231

28 U.S.C. § 129.

28 U.S.C. § 3742.

## **OTHER AUTHORITIES**

Eight Amendment of the United States Constitution.

Fed.R.Crim.P - Rule 29.

Fed.R.Crim.P. 52.

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**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix   A   to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 26, 2018

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No.   A  .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).



### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment of the United States Constitution. Petitioner's sentence violates the Due Process Clause of the U.S. Constitution.

## STATEMENT OF THE CASE

### A.- Procedural History

On January 15, 2015 a sealed indictment was returned by a Grand Jury from the United States District Court for Eastern District of Pennsylvania against Petitioner along with co-defendant Lassana Nianghane. The Indictment, which was labeled DPAE2:15-CR-0017-001, was unsealed on April 2, 2015.

On July 13, 2016 Petitioner's indictment was superseding and the case proceeded to jury trial before the Honorable Cynthia M. Rufe.

Following a jury trial Petitioner was convicted of Unlawful use, transfer, acquisition and possession of SNAP<sup>1</sup> benefits, in violation of 7 U.S.C. § 2024(b) -aiding and abetting,- and 18 U.S.C. §§ 2, 371 and 1344. in violation of conspiracy, conspiracy to commit wire fraud and wire fraud.

On May 8, 2017, Petitioner was sentenced by the Honorable Rufe to forty-two (42) months' imprisonment, followed by 3 years of supervised release, \$1,064,541.00 in restitution, and a special assessment of \$400.

On May 18, 2017, a Notice of Appeal was timely filed by Petitioner.

On May 19, 2017, attorney Stuart Wilder was appointed to represent Petitioner in his appeal proceeding.

On January 22, 2018, attorney Stuart Wilder filed a Brief pursuant to Anders v. California, 386 U.S. 738 (1967) on behalf of Petitioner.

On April 30, 2018 the Third Circuit granted the Mr. Wilder's motion to withdraw and affirmed the District Court's judgment of conviction and sentence.

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<sup>1</sup> SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM. Generally referred to as food stamps, is a program administrate by the United States Department of Agriculture (USDA) and the Food and Nutrition (FNS)

## STATEMENT OF THE CASE (Cont.)

### B.- Statement of Facts

Petitioner ran a store, the Brothers Food Market, in the vicinity of Germantown Avenue, Philadelphia. It was a grocery store that was certificated to accept "food stamps," which are now formally known as SNAP benefits (SNAP stands for "supplemental nutrition assistance program"). SNAP benefits are provided to recipients on Electronic Benefits Transfer ("EBT") cards known as "Link" cards. Link cards are used like debit cards to purchase eligible food. Stores certified to accept Link cards may not exchange the SNAP benefits for cash or for ineligible items such as tobacco, alcohol, pre-cooked foods, or cellular phones.

The USDA alleges that rather than complying with the terms of the SNAP program, The Brothers Food Market exchanged cash for SNAP benefits. Specifically, The Brothers Food Market exchanged cash for the Government payments at a rate of 40 cents on the dollar.

The USDA conducted several investigation into food stamp frauds, in the zone where Petitioner operated his grocery store. Basically, the investigation consisted in conducting undercover agents to approach "African-native" street vendors to catch potential SNAP defrauders, in a typical entrapment. In this order, the record reflects that, at least, six (6) investigation sessions were conducting involving Petitioner and/or Petitioner's grocery market, along with his co-defendant Lassana Nianghane.

The first investigation operation occurred on September 10, 2011, where Special Agent Charmeka Parker, from the USDA's Office of Inspector General, sent an undercover Philadelphia Police Office along with a cooperating witness (CW) into a store in the 5600 block of Germantown Avenue in Philadelphia, both provided with EBT cards that looked like

## STATEMENT OF THE CASE (Cont.)

any other SNAP card, which were controlled by S.A. Parker's office. The undercover Philadelphia Police Officer approached a street vendor<sup>2</sup> and asked him for cash. The Police Officer gave the street vendor the EBT and the PIN and the street vendor made a phone call to somebody else. Then, the street vendor took cash from his packet and gave \$150 to the Police officer, which were delivered to S.A. Parker.

Immediately after, S.A. Parker checked the electronic records of the contractor that processed the EBT transactions, finding that the transaction of the controlled EBT used by the undercover agent at the very same time of the perfect entrapment was manually processed by Brothers Food Market in the amount of \$299.99. The amount of cash which the street vendor provided the undercover officer with, was one-half of the amount of money charged to the EBT card.

A second undercover transaction was held on October 5, 2011 in the very same vicinity and by the very same manner. Once again, an undercover police officer and the CW approached the very same street vendor, to whom they provided with two similar EBT cards and PINs and received, by hand from the street vendor, two different amount of money because at this time were two different transactions, which were also manually processed by Brothers Food Market; one was for \$498 and the other one was for \$300.

Like before, immediately after such money was delivered to S.A. Parker, who received approximately half of these amount. This undercover transaction was recorded on videotape and showed to the jury.

On November 9, 2011, S.A. Parker made a third undercover operation, following the same pattern of the previous ones. Here, the undercover police agent met with the street

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<sup>2</sup> Lassana Nianghane

## STATEMENT OF THE CASE (Cont.)

vendor in a market and went with him to the vicinities of Germantown and Cheltenham Avenue, where the undercover agent asked the same street vendor, in the very same way that a month before, about cash. The street vendor used the EBT and provided the undercover agent with cash, while S.A. Parker had been checking the contractor's electronic records, which reflected that the transaction was made manually through Brothers Food Market for the amount of \$399.99. In exchange, the undercover agent did receive \$200 in cash, and delivered to S.A. Parker. This transaction was also recorded on videotape and showed to the jury at trial.

On October 15, 2012, almost a year after the last undercover operation against Petitioner and the street vendor, S.A. Parker started over again. But this time the *modus operandi* in the investigation was different. S.A. Parker, acting undercover, went personally to the Brothers Food Market while another undercover agent made surveillance over the same street vendor to whom the cooperator witness had passed already a controlled EBT card for a similar operation than before. The street vendor made a phone call to Petitioner at the Brother Operation and passed him the EBT card number and PIN, requesting Petitioner to debit \$529.99. The street vendor returned the CW the EBT card, along with \$260 in cash. Once the transaction was done, the undercover agent alerted S.A. Parker, who had been remained inside of the Brothers Food Market.

Meanwhile, in a parallel way, S.A. Parker was also conducting another transaction, with another controlled EBT card, at the Brothers Food Market, noting that Petitioner entered the card number manually. It should be pointed out that S.A. Parker, always portraying a common neighboring of this vicinity, ask to Petitioner to get cash for food stamps and Petitioner's answer was a categorical not.

## STATEMENT OF THE CASE (Cont.)

When S.A. Parker checked the contractor's electronic records, she found that her controlled EBT card and the other used by the CW with the street vendor, were on the records.

About eight months later, S.A. Parker conducted a fifth undercover operation. This time, on June 10, 2014, S.A. Parker personally met with the street vendor and asked him to get cash for SNAP benefits. Then, she passed to the street vendor two controlled EBT cards and PINs and requested to debit \$300 and \$200 respectively. S.A. Parker did receive the half of the amount of money requested, by hand from the street vendor.

When S.A. Parker checked the contractor's electronic records, these transactions were reflected. This undercover operation was video recorded and the recording was showed to the jury at trial.

Another 8 months later, on February 4, 2015, S.A. Parker went back again to approach the same street vendor for the exactly undercover operation and produced the same fraudulent SNAP transaction with two controlled EBT cards. This time, the amounts involved were \$299.99 and \$289.99, receiving a 50% by hand from the street vendor.

At the very same time, another undercover agent was inside of the Brothers Food Market, recording a video and voice of Petitioner, which were showed to the jury at trial.

## LASSANA NIANGHANE

Mr. Nianghane was the key-Government-witness. In fact, he was the only witness against Petitioner that was not a Government officer. Mr. Nianghane was a close friend of Petitioner and very close friend of some Petitioner's family members.

Mr. Nianghane was approached by the law enforcement and caught buying food

**STATEMENT OF THE CASE (Cont.)**

stamps for cash money, paying about the half of the amount involved. To make the illegal transactions, Mr. Nianghane called his friend, the Petitioner, who debited from the EBT card the agreed amount of money. Once such money was debited, Mr. Nianghane gave in cash around the 50% of the amount involved, to the beneficiary of the SNAP program.

But Mr. Nianghane was also a very good client of the Brothers Food Market, where he made the food shopping for his big family and also purchased barrel of food to ship to Africa.

When Mr. Nianghane was arrested and charged in the instant criminal case, the Government did not trust him, considering that he lied. Nevertheless, the Government used him as its key-witness against Petitioner. According to the Government, one could infer that Mr. Nianghane provided two different stories to them. One could infer that the Government found that Mr. Nianghane first story was not credible but the ultimate story, incriminating Petitioner was true. The most important point to examine the sufficiency of the evidence regarding Mr. Nianghane's testimony at trial, is that there was an inconsistent story.

## REASONS FOR GRANTING THE PETITION

### I.- Sufficiency of the Evidence

In late 2011, the Government began investigating the Brothers Food Market for violating the terms of the SNAP program. During the investigation, the Government did interview an employee of the Brothers Food Market, but not any recipients of SNAP benefits vouchers. There were not even one SNAP beneficiary testifying that the Brothers Food Market was a place for he/she to sell his/her benefits for cash or to use them to purchase ineligible items at the Brothers Food Market.

The Government did never installed video surveillance of the store to capture individuals to whom the Government could later on identify as beneficiaries of the SNAP program, making transaction to get cash money for food stamps. Instead, the Government removed and kept for several days the security camera system containing about one week of video showing what had happened inside the Brothers Food Market during the all 24 hours of this period of time, and the Government found nothing irregular and during this whole week nobody appears giving Petitioner an EBT card and receiving cash money. The Government watched and appreciated, by security video, the Brothers Food Market's commercial activity during at least one week. The Government did not identify any of the customers selling their SNAP cards to interview those individuals.

More than that, the case-agent, S.A. Parker, had been at Brothers Food Market, as an undercover agent, portraying a common customer, and tried to induce Petitioner to buy her food stamps. But Petitioner refused explaining her that it's a prohibit act.

It is very important to highlight that once Petitioner was arrested, a contingent of law enforcement agents went to the Brothers Food Market and meticulously searched the store.



## REASONS FOR GRANTING THE PETITION (Cont.)

They found nothing, but a very organized store. Also, because they saw a lot of cigarette cartons containing more than 2,000 cigarette packages, they sent another contingent of agents from ATF, who review the cigarette packages one-by-one, but also found nothing. Everything was so organized and in complete order, that the ATF agents congratulated Petitioner by a letter<sup>1</sup>.

The evidence adduced at trial in the Government's case-in-chief, under any circumstance, could be sufficient to allow a reasonable juror to conclude that defendant had actual knowledge that the transactions between the street vendor, co-defendant Lassane Nianghane, and the USDA's enforcement team, leaded by S.A. Parker, were transactions to get cash money for food stamps, defrauding the SNAP benefits program. "The knowledge element of a crime is satisfied on a theory of 'deliberate ignorance,' or 'willful blindness,' where a jury could find that the defendant deliberately closed his eyes to what otherwise would have been obvious to him concerning the fact in question. To find knowledge on this theory, the jury must be able to conclude that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." See United States v. Adesanya, 82 Fed. Appx. 759; 2003 US App LEXIS 253152003.

At trial, the pivotal issue in the case was whether Petitioner knew or should known that the SNAP transactions made between a street vendor, Mr. Nianghane, and some supposed SNAP beneficiaries were fraudulent transactions, because even though the SNAP card holders did not receive any items by hand from him, in fact, Petitioner didn't know about the

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<sup>1</sup> The Bureau of Alcohol, Tobacco, Firearms and Explosives addressed a letter to Petitioner, expressing congratulation for keeping the cigarette are tidily. This letter was delivered to the trial lawyer and never ever was submitted as evidence at trial. The letter still remains in the trial lawyer possession.

## REASONS FOR GRANTING THE PETITION (Cont.)

beneficiary but only about the EBT card and PIN and for each of those transactions Mr. Nianghane received the equivalence in authorized merchandise by the SNAP program. Petitioner did not, never ever, returned cash money nor to Mr. Nianghane neither to any EBT card holder in exchange of food stamps. And the only evidence at trial was Mr. Nianghane testimony as the key-Government-witness upon a cooperation agreement.

Petitioner defense theory was that he never exchanged cash money for food stamps. That in receiving the EBT numbers and PINs to produce SNAP transactions he did not commit any crime. He could violated the SNAP policy directing him to make every transaction face-to-face, but not a crime. Petitioner's defense rested in that he knew Mr. Nianghane and often Mr. Nianghane called him to provide him with EBT card and PIN to debit an amount of money for an order of authorized item.

The vexed question here is why those SNAP transactions were not doing *in propria persona* by the card holder, face-to-face to the SNAP program affiliated.

The Government adduces that the unique response should be because were fraudulent transactions. But those transaction were conducted by the Government; the Government induced a street vendor, Mr. Nianghane, to get food stamps for cash money earning the 50%. But those transactions, in fact, were fraudulent just right up to Mr. Nianghane, never beyond him. The cash money involved in the charged offense, was always received by the Government by hand from Mr. Nianghane. In the all six undercover operation, nobody other than Mr. Nianghane gave cash money to the Government.

In the other hand, the defense did try to explain the jury that those six times when Mr. Nianghane had called Petitioner asking him to debit some amount of money from some EBT card, the only things that Mr. Nianghane had received were authorized items by USDA's

## REASONS FOR GRANTING THE PETITION (Cont.)

SNAP program. During the Defendant's Closing Argument, the defense counsel elaborated and brandished this argument, but was not sufficient clear and vehement to impact the conscience of all the jurors.

Could be true that the undercover law enforcement agents who set Mr. Nianghane up did never hear from him requesting food or other item to the Brother Food Market, but they did neither hear Mr. Nianghane making reference to cash money.

Unfortunately, Petitioner did not take the stand to testify in his own behalf, to explain the jury the real scenario he had figured the six times when Mr. Nianghane called him for a SNAP transaction. What would have been explained by Petitioner to the jury? That his friend Mr. Nianghane was making some business with some African fellow, in order to ship some barrel of food and other items to their native Africa, or reserving the found of the SNAP to make a shopping of food for some friend/family/client (Waggy, Fama, Hassein) because often Mr. Nianghane called Petitioner to do similar transaction.

It should be pointed out that Petitioner was not an original target of the USDA's team, leaded by S.A. Parker, because during the very first entrapment operation, S.A. Parker should wait until check the electronic records of the contractor that processed the EBT transactions, to find that the EBT cars were processed by the Brothers Food Market, a grocery store that was run by Petitioner.

Petitioner challenges the sufficiency of the Government's evidence to convict him. According to the Third Circuit, "this is always a heavy lift." See United States v. Reed, 744 F.3d 519, 526 (7th Cir. 2014) ("We will overturn a verdict for insufficiency of the evidence only if, after viewing the evidence in the light most favorable to the Government, the record is devoid of evidence from which a rational trier of fact could find guilt beyond a reasonable

## REASONS FOR GRANTING THE PETITION (Cont.)

doubt.").

Petitioner main contention is that the Government presented no "state-of-mind evidence" from which the jury could conclude that he willfully became involved in fraudulent transactions with SNAP program EBT cards.

Petitioner's argument here is that without direct evidence of his mental state, the jury was left to choose between several equally plausible benign explanations for his violation to the policy as a marchant of the SNAP program. The most plausible explanation has to do with the role played by the key-Government-witness Mr. Nianghane, who often coordinated with another African people to buy provisions and food in Petitioner's store. In this order, as the record clearly reflects, several times (at least 3 times per week) persons like Fama, Waggy, Hassein and others, used Mr. Nianghane to buy food and other items in the Brothers Food Market, using EBT card, whose numbers and PINs were provided by Mr. Nianghane to Petitioner and/or the person on duty in the store. It should be taken into consideration that Mr. Nianghane had two difference size trucks; one big size and the other medium size. Both trucks were used to deliver food from the Brothers Food Market to the clients of Mr. Nianghane.

Petitioner challenges his wire fraud and unlawful acquisition of Supplemental Nutritional Assistance Program (SNAP) convictions on the theory that there was insufficient evidence supporting his intent to defraud. "Intent to defraud requires a willful act by the defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." United States v. Britton, 289 F.3d 976, 981 (7th Cir. 2002). This may be established "by circumstantial evidence and by inferences drawn from examining the scheme itself that demonstrate that the scheme was

## REASONS FOR GRANTING THE PETITION (Cont.)

reasonably calculated to deceive." *Id.*

Petitioner argues that, even though he was not an unknowing bystander who got mixed up in conspiracy scheme, in fact, he was not, not even in the slightest, a co-conspirator because he was never been aware about the type of transactions Mr. Nianghane had been doing with the undercover agents. He alleges that he had no idea that Mr. Nianghane's transactions were not aboveboard.

In any criminal conspiracy case, the Government must prove that the defendant had knowledge of the facts that constitute the offense and of the illicit purpose of the conspiracy. *See, e.g., United States v. Idowu*, 157 F.3d 265, 267 (3d Cir. 1998) (explaining, in the context of a challenge to the sufficiency of the evidence for a conspiracy conviction, that "the Government is obliged to prove beyond a reasonable doubt that the defendant had knowledge of the particular illegal objective contemplated by the conspiracy"); *United States v. Pearl stein*, 576 F.2d 531, 540-41 (3d Cir. 1978) (stating, in the context of reversing conviction for mail fraud, that "the evidence must indicate that the defendants had knowledge of the fraudulent nature of the [ ] operation and willfully participated in the scheme with the intent that its illicit objectives be achieved"); *See also Bryan v. United States*, 524 U.S. 184, 141 L. Ed. 2d 197, 118 S. Ct. 1939 (1998) ("'knowingly' merely requires proof of knowledge of the facts that constitute the offense").

The Third Circuit has held, in *United States v. Stefan E. Brodie*, 403 F3d 123403 F.3d 123; 2005 US App LEXIS 59442005 U.S. App. LEXIS 5944, that "the knowledge element of a crime such as the one charged here may be satisfied upon a showing beyond a reasonable doubt that a defendant had actual knowledge or "deliberately closed his eyes to what otherwise would have been obvious to him concerning the fact in question." *United States v.*

## REASONS FOR GRANTING THE PETITION (Cont.)

Stewart, 185 F.3d 112, 126 (3d Cir. 1999). To find knowledge premised on the latter "willful blindness" theory, the jury must be able to conclude that "the defendant himself was objectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." United States v. Caminos, 770 F.2d 361, 365 (3d Cir. 1985). Willful blindness is not to be equated with negligence or lack of due care, and does not allow a conviction simply because the defendant "should have known of facts of which he or she was unaware." United States v. Wert-Ruiz, 228 F.3d 250, 255 (3d Cir. 2000) (willful blindness is a "subjective state of mind that is deemed to satisfy the scienter requirement of knowledge"); see also United States v. Sharma, 190 F.3d 220, 231 (3d Cir. 1999) (purpose of a willful blindness instruction is to "ensure[ ] that a juror who believed that a defendant turned a blind eye towards his co-defendant's conduct would not vote to acquit the willfully blind defendant"). As noted, the Government pursued the willful blindness theory of knowledge at trial and the District Court provided a correct willful blindness instruction to the jury."

In sum and substance, the Government did never present any evidence showing that Petitioner delivered cash money to somebody else, in exchange for food stamps. Was only the testimony of Mr. Nianghane, which under any circumstance could be enough to convict Petitioner.

An appellate court should overturn a conviction for insufficiency of the evidence when, viewed in the light most favorable to the Government, the record is devoid of evidence from which a reasonable jury could find the defendant guilty beyond a reasonable doubt." See United States v. Hernandez, 678 Fed Appx 425678 Fed. Appx. 425; 2017 US App LEXIS 39262017 U.S. App. LEXIS 3926 (7<sup>th</sup> Cir. March 6, 2017).

## REASONS FOR GRANTING THE PETITION (Cont.)

There are no evidence from which it could conclude that Petitioner knew what was going on. It is obvious and the records clearly reflects that furthered the scheme's success not for his own gain, but Mr. Nianghane.

Nobody saw Petitioner delivering cash money to Mr. Nianghane; the law enforcement agents were almost four (4) years "investigating" Petitioner's commercial activities and setting up a street vendor, Mr. Nianghane, to sale food stamps. But the law enforcement agents did never caught Mr. Nianghane receiving case money by hand from Petitioner, despite the surveillance during and after the fraudulent transactions. The investigators did never ever see any EBT card holder selling his/her food stamps to the Brothers Food Market.

The Government alleges that a very high average of SNAP transactions in the Brothers Food Market could be illegal transactions; but the agents knew or should known who were the card holders involved and did not investigate.

The law enforcement agents of USDA watched at least one whole week of a recorded video-tape of the Brothers Food Market's 24 hour activities. Also, they searched the store and found nothing. And more over, the could get Petitioner's cell-phone number, because Petitioner was a businessman, and getting a wire tape warrant from the court, intercept Petitioner's phone to record his conversations. The Government's agents did it, like they normally do it in most of the wire fraud investigation?

Mr. Nianghane, a supposed co-conspirator to whom the Government threatened with a 10 year sentence if he choose not testify against Petitioner, changing his original version of the facts<sup>2</sup> and supporting the Government-case, is the only person in the world who says that Petitioner bought food stamps.

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<sup>2</sup> As the record clearly reflects, the Government did not contend that Mr. Nianghane offered a different version of the facts during his first debriefing sessions, which, obviously, contradicted the Government-case.

## REASONS FOR GRANTING THE PETITION (Cont.)

Mr. Nianghane conspired, or attempted to conspire to commit SNAP frauds. But he conspired only with the Government's agents, because all the EBT cards involved in the scheme of the charged conspiracy, were cards without beneficiary. The Government was the holder of such cards. One might ask whether Mr. Nianghane made other fraudulent transactions with real card holders? The records reflects that nobody, other than the Government's agents, was involved in the scheme.

One might ask whether the testimony of a co-defendant who had previously lied to the Government, could be sufficient to convict a man like Abdoulaye Diallo. A man who came from Senegal in his 30 years of age looking for a better living conditions for his family; to pursue the "American dream," starting as a street vendor like Mr. Nianghane. And once all his dreams became true, only on basis of a fearful person's testimony, those dreams have been blown out. The testimony of Lassana Nianghane, never ever could be sufficient to convict Abdoulaye Diallo: **Abdoulaye Diallo did never conspire.**

### II.- Pre-Indictment delay

Petitioner appeals the decision of the United States District Court for the Eastern District of Pennsylvania, which convicted him of six counts of wire fraud in violation of 18 U.S.C.S. § 1343, six counts of unlawful acquisition of Supplemental Nutritional Assistance Program (SNAP) benefits, in violation of 7 U.S.C.S. § 2024(b), and conspiracy to committed these crimes, in violation of 18 U.S.C.S. § 37. The District Court sentenced him to concurrent prison terms of 42 months' imprisonment.

In appeal, Petitioner alleged that he was prosecuted with a delayed indictment and consequently he was victim of a Government plan to gain a tactical advantage which



## REASONS FOR GRANTING THE PETITION (Cont.)

substantially prejudiced him for sentence purposes.

Petitioner still argues that his U.S. Constitutional Amendment VI rights were violated because there was a 40-month delay between the investigation's completion, because the crime was committed on September 10, 2010, and his original indictment, on January 15, 2015.

This Honorable Supreme Court should find that Petitioner has suffered substantial prejudice because the delay was a ploy by the Government to gain a tactical advantage. The Government has not manner to explain such delay, which prejudiced Petitioner regarding the amount of loss involved, for sentencing purpose. See United States v. Scott, 437 U.S. 82, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978).

Petitioner's contention is that his sentence violates the Due Process Clause of the U.S. Constitution because he was not indicted until forty months after the first over act for which he was charged was committed. Although this Honorable Supreme Court has held in United States v. Marion, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971), that the statute of limitations is "the primary guarantee against bringing overly stale criminal charges." (quoting United States v. Ewell, 383 U.S. 116, 122, 15 L. Ed. 2d 627, 86 S. Ct. 773 (1966)), an indictment brought within the time constraints of the statute may nevertheless violate due process where pre-indictment delay has been shown to cause substantial prejudice to the defendant's ability to present his defense and the delay was an intentional device to gain a tactical advantage over the accused. Where delay prejudices the presentation of a defense and is engaged in for an improper purpose its violates the due process clause because such conduct departs from fundamental notions of fair play. A defendant bears the heavy burden of proving both that he suffered actual prejudice because of the alleged pre-indictment delay

## REASONS FOR GRANTING THE PETITION (Cont.)

and that such delay was a course intentionally pursued by the Government for an improper purpose. See United States v. Cornielle, 171 F.3d 748, 171 F.3d 748; 1999 US App LEXIS 5146, 1999 U.S. App. LEXIS 5146.

This Honorable Supreme Court has explained that where delay prejudices the presentation of a defense and is engaged in for an improper purpose it violates the Due Process Clause because such conduct departs from fundamental notions of "fair play." United States v. Lovasco, 431 U.S. 783, 795, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977).

Petitioner bears the "heavy burden" of proving both that he suffered actual prejudice because of the alleged pre-indictment delay and that such delay was a course intentionally pursued by the Government for an improper purpose. See United States v. Scarpa, 913 F.2d 993, 1014 (2d Cir. 1990); United States v. Hoo, 825 F.2d 667, 671 (2d Cir. 1987). Prejudice in this context has meant that sort of deprivation that impairs a defendant's right to a fair trial. See United States v. Elsbery, 602 F.2d 1054, 1059 (2d Cir. 1979). This kind of prejudice is commonly demonstrated by the loss of documentary evidence or the unavailability of a key witness. See, e.g., Lovasco, 431 U.S. at 796 (accepting defendant's claim of prejudice based on loss of testimony of two material witnesses but finding no due process violation because delay was not improper).

Here, Petitioner seeks this Honorable Supreme Court to consider his form of proof of prejudice sufficient to show a violation of due process: prejudice due to the extraordinary harm he has suffered because the Government delayed his prosecution to charged him with an incredible amount of money loss in the charged offense, which has affected him for sentencing purposes.

## REASONS FOR GRANTING THE PETITION (Cont.)

### III.- The Loss Amount Calculation

The Government did not interview the accountant who began doing accounting work for the Brothers Food Market, to let this professional accounting described the methodology used to generate financial statements and produce a cost of goods figure and profit and loss statements for the store during the relevant time period.

The Government's loss methodology used to calculated the amount of loss, has no foundation or empirical evidence to support that any manual transaction mean that it's food stamp fraud.

The Government should used the total revenue and cost of goods sold figures calculated by the store accountant, and used industry data from any financial industry report to look at comparable grocery stores in the vicinities of Germantown and Cheltenham Avenue, to get an approximately % of the average stores' total income. Then, the Government should divided the cost of goods figure for the Brothers Food Market by the % of the average, to arrive at a projected business revenue. Finally, the Government should subtracted that figure from the actual business revenue, to arrive at a figure which reflected the amount the revenue was overstated due to food stamps exchanged for cash. But that never happened.

The Government's loss calculations rested on a major assumption that a high percent of the manual transactions executed in the Brothers Food Market, over certain amount, were fraudulent.

The Government methodology, "comparable stores," which the District Courts have approved, was not proper applied in calculating the loss amount in the instant case. In sum, the figures used by the Government to calculated the amount of loss, were not reliable.

One can make two points: First, there were no records from which to confidently arrive

REASONS FOR GRANTING THE PETITION (Cont.)

at a loss figure. Second, the Government's figures begged scrutiny.

**“A convicted defendant has a due process right to be sentenced on the basis of accurate information.”** See United States v. Bozovich, 782 F.3d 814, 817 (7<sup>th</sup> Cir. 2015).

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DIALLU ABDOU IAYE

Date: 06/26/2018