

18-6865

No.

Supreme Court, U.S.
FILED

NOV 08 2018

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

ADONY NINA — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ADONY NINA

(Your Name)

U.S.P. ALLENWOOD, P.O. BOX 3000

(Address)

White Deer, PA 17887

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether Title 18 U.S.C. § 2 (Aiding and Abetting) Requires the Prosecution to Prove Beyond A Reasonable Doubt The Jurisdictional Element By Establishing A Defendant Committed An Offense Against The United States.
2. Whether The Aiding And Abetting Statute Is Limited To Offenses Against The United States As Specified In The Plain And Unambiguous Language Contained In The Statute?

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APPENDIX B The Judgment of the U.S. District Court.

APPENDIX C The Order Denying Rehearing and/or Rehearing En Banc.

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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:

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002)	
Ex Parte United States, 242 U.S. 27 (1916)	
Hayle v. United States, 851 F.2d 879 (2d Cir. 1987)	
Hughes Air craft Co. v. Jacobson, 525 U.S. 432 (1999)	
In Re Bonner, 151 U.S. 242 (1894)	
King v. Burwell, 135 S. Ct. 2480 (2015)	
Lamar v. United States, 240 U.S. 60 (1916)	
Rosemond v. United States, 134 S. Ct. 1240 (2014)	
U.S. v. Aguilar, 585 F.3d 652 (2d Cir. 2009)	
U.S. v. Al Kassar, 660 F.3d 108 (2d Cir. 2011)	
U.S. v. Cotton, 535 U.S. 625 (2002)	
U.S. v. Desinor, 525 F.3d 193 (2d Cir. 2008)	
U.S. v. Doyle, 348 F.2d 715 (2d Cir. 1965)	
U.S. v. Fitzsimmons, 2003 WL 1571708 (2003)	
U.S.v. Gaudin, 515 U.S. 506 (1995)	
U.S.v. Labat, 905 F.2d 18 (2d Cir. 1990)	
U.S. v. Lasaga, 328 F.3d 61 (2d Cir. 2003)	
U.S. v. Layland, 277 F.3d 628 (2d Cir, 2002)	
U.S. v. Mann, 451 F.2d 346 (2d Cir. 1971)	

STATUTES AND RULES

- 18 U.S.C. § 2
- 18 U.S.C. § 924(j)(1)
- 21 U.S.C. § 848(e)(1)(A)

OTHER

Canons of Statutory Construction

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

[X] 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 B 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 May 17, 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: August 13, 2018, and a copy of the order denying rehearing appears at Appendix C.

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 Fifth Amendment to the United States Constitution.

Provides in relevant part, that: "No person shall be ... deprived of life, liberty, or property, without due process of law" U.S. Const. Amend. V.

Title 18 U.S.C. § 2 provides:

- (a)Whoever commits an Offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b)whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Based almost exclusively upon the testimony of Co-operating witnesses, Adony Nina hereinafter "Petitioner, was convicted of participating in a Murder in furtherance of a drug trafficking crime under a Theory of Aiding and Abetting. Petitioner Claims the Convictions are fatally flawed due to the absence of any evidence that the Offense was committed against the United States. Therefore, all Counts of Conviction require reversal because the Prosecution failed to prove beyond a reasonable doubt the required federal nexus under the federal Aiding and Abetting Statute. There is not one iota of evidence that the Offense was committed against the United States.

Preliminary Statement

The purpose of the United States Constitution is to limit the power of the Government and protect the Rights of the People. "The purpose of a written constitution is to bind up the several branches of government by certain laws, which when they transgress, their acts shall become nullities" (Thomas Jefferson).

In all case where life and are effected by the proceedings, the court must keep strickly within the limits of the law authorizing it to take jurisdiction, try the case and to render judgment. The Court may not go beyond the limits of the essential requirements regardless what stage of the proceedings, and it's authority is not to be enlarged by mere inferences from the law or doubtful construction of its terms. See In Re Bonner, 151 U.S. 242, 257 (1894).

Ariticle III of the United States Constitution enumerates the powers of the Judicial Branch. The federal courts have power to adjudicate actual "cases" and "Controversies" in which the United States is a party. Federal courts also have jurisdiction over cognizable offenses against the United States pursuant to the Judiciary Act of 1789. See also 18 U.S.C. § 3231, which vest the district courts with the power to hear "all offenses against the laws of the United States. The Second Circuit has held that: "in order to apply extra-territorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitary or fundamentally unfair. See United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011).

The Second Circuit has reiterated in United States v. Rubin, 743 F.3d 31, 38-39 (2d Cir. 2014), that the inquiry into whether an indictment charges a federal offense for the purposees of establishing subject-matter jurisdiction under § 3231 is exceedingly narrow. They ask only whether "the indictment alleges all of the statutory elements of a federal offense." See also Hayle v. United States, 815 F.2d 879, 882 (2d Cir. 1987). However, defects in an indictment short of a failure to charge all of the statuory elements do not undermind subject-matter jurisdiction, and do not implicate the power of the federal court to decide a case presented by the indictment. See United States v. Cotton, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002). The contention that in fact certain of the statutory elements are lacking go to the merits of the prosecution, not to the jurisdiction of the court to entertain the case or to punish the defendant if all of the alleged elements are proven. See Hayle, 815 F.2d at 882. Even appeals that call into question the government's authority to bring a prosecution or congressional authority to pass the statute in question are generally not jurisdictional in the sense required by Lamar v. United States, 240 U.S. 60, 36 S. Ct. 255, 60 L. Ed 526 (1916), and its progeny.

Accordingly, the Second Circuit has denied as waived post-conviction challenges to the constitutionality of a prosecution or criminal statute based on the Commerce Clause, United States v. Lasaga, 328 F.3d 61, 63 (2d Cir. 2003); the Double Jeopardy Clause, United States v. Leyland, 277 F.3d 628, 631-32 (2d Cir. 2002); and the Sixth Amendment's guarantee of a speedy trial, United States v. Mann, 451 F.2d 346, 347 (2d Cir. 1971). The Second Circuit has also held that "an indictment states an offense even though the crime alleged appears to be barred by the statute of limitations," United States v. Doyle, 348 F.2d 715, 718 (2d Cir. 1965).

The Fifth Amendment provides: "No person shall be held to answer for a Capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," and the Sixth Amendment states: " In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and 'cause' of the accusation."

This preserves the historic role of the jury as intermediaries between the State and criminal defendants. See United States v. Gaudin, 515 U.S. 506, 510-511, (1995) ("This right was designed to guard against a spirit of oppression and tyranny on the part of rulers, and was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their Civil and political liberties.").

The indictment sets forth the 'case' and controversy' establishing the court's jurisdiction over the offense against the United States. The Grand Jury Clause of the Fifth Amendment requires that an indictment contain some amount of factual particularity in order to ensure that a conviction is not secured "on the basis of facts not found by, and perhaps not even presented to the grand jury" that voted for the indictment. United States v. Russell, 369 U.S. 749, 770 (1962). This principle is enshrined in Fed. R. Crim. P. 7(c), which states: "The indictment ... shall be a plain, concise and definite written statement of the essential facts constituting the offense charged, written statement of the essential facts constituting the offense charged, It is the legislature, not the court, which is to define an offense, and ordain its punishment. Ex parte United States, 242 U.S. 27 (1916)

Title 18 U.S.C. § 2 provides: "[w]hoever, commits an offense against the United States or aids, abets, counsels, induces or procures its commission, is punishable as a principal;" and (b) provides: "[w]hoever, willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Pursuant to the plain language of 18 U.S.C. § 2, the aiding and abetting statute requires proof of an intent to commit an offense against the United States. This fact must be proven beyond a reasonable doubt. A cursory review of Title 18 U.S.C. § 2 makes clear that Congress intended 18 U.S.C. § 2 to apply to "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is just as culpable as the principal. However, there is no question that the offense against the United States is an element that the law makes necessary to constitute the offense under the federal aiding and abetting statute. Against this backdrop, it becomes clear the absence of a territorial nexus between the defendant aiding and abetting conduct and the United States effectively deprived the Prosecution of a cause of action.

This essential element was not charged in the indictment, it was specifically omitted from the jury instructions; and there is no evidence from which the Jury can conclude that Petitioner's conduct was an offense against the United States.

Therefore, Petitioner respectfully submits this Petition to:
THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND THE
ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

REASONS FOR GRANTING THE PETITION

Petitioner Adony Nina respectfully request that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit, which affirmed his convictions under an Aiding and Abetting theory of liability from the United States District Court for the Southern District of New York.

Argument

Certiorari Is Warranted Given That The Decision Affirming Nina's Convictions Does Not Address A Critical Gap In The Evidence Required To Support Nina's Guilt Under An Aiding And Abetting Theory Of Liability

The lower court's decision does not address a crucial gap in the evidence needed to sustain Nina's convictions under an aiding and abetting theory of liability. Accordingly, it is respectfully requested this Most Honorable Court grant Certiorari.

To convict someone as an aider and abettor under the federal aiding and abetting statute (18 U.S.C. § 2), the evidence must show that the defendant was aware of the underlying crime and that he had a specific intent to facilitate the commission of an offense against the United States. See 18 U.S.C. § 2. To convict a defendant on a theory of aiding and abetting, the government must prove that the underlying crime was committed by a person other than the defendant and that the defendant acted -- or failed to act in a way that the law required him to act -- with the specific purpose of bringing about [an offense against the United States]. See United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990); United States v. Wiley, 846 F.2d 150, 154 (2d Cir. 1988); United States v. Zambrano, 776 F.2d 1091, 1097 (2d Cir. 1985). See also Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014). Aiding and

abetting requires the specific intent of facilitating or advancing the principal's commission of an offense against the United States.

As is frequently set forth in jury instructions, the inquiry regarding what is required to establish guilt under a theory of aiding and abetting is that the prosecution must show the defendant joined in the underlying criminal conduct as something that he wished to bring about:

In order to aid and abet another to commit an offense against the United States, it is necessary that the defendant willfully and knowingly associate himself in some way with the offense against the United States and that he willfully and knowingly seek by some act to help make the offense against the United States succeed.

See United States v. Fitzsimmons, 2003 WL 1571708 at 4 (S.D.N.Y. Mar. 26, 2003).

In Petitioner's case, he was convicted of aiding and abetting a murder under two different statutes. On Count One of the S12 indictment, which charged a violation of 21 U.S.C. § 848(e)(1)(A), the District Court instructed the jury that: "the government must prove the killing occurred because of, and as part of the Defendant's engaging in, or working in furtherance of the [narcotic conspiracy]." The Second Circuit has held that: to convict a defendant of § 848(e)(1)(A), the government is required to prove the motive for the killing ... was related to the drug conspiracy. See United States v. Desinor, 525 F.3d 193, 202 (2d Cir. 2008).

The Second Circuit has recognized the Constitutional importance of requiring a substantive connection between a killing and a charged narcotics conspiracy, explaining that: "absent such a requirement § 848(e)(1)(A) would be subject to Constitutional challenge on the

Commerce Clause grounds." See United States v. Aguilar, 585 F.3d 652, 658 (2d Cir. 2009). This element is curcially important because it provides the nexus required to establish federal jurisdiction.

On Count Two of the S12 indictment, which charged a violation of 18 U.S.C. § 924(j)(1), the District Court charged the jury that: "to find the defendant guilty, beyond a reasonable doubt, the government has to prove that the defendant ... used or carried a firearm in relation to a drug trafficking crime or possessed a firearm in furtherance of a [drug trafficking] crime ... and that in the course of using or carrying the firearm ,,, the defendant caused the death of Aisha Morales. In addition, to sustain a conviction under 18 U.S.C. § 924(j)(1), a jury must find a meaningful connection between the killing and the charged conspiracy. United States v. Wallace, 447 F.3d 184, 187 (2d Cir. 2006).

The District Court also instruct the jury that the defendant was also charged with aiding and abetting Counts One and Two. The District Court went on to misinform the jury on the éléments of federal aiding and abetting law by instructing the jury with regards to Count One: "that it would be sufficient for you to convict if you find that the evidence proves beyond a reasonable doubt that the defendant aided and abetted another person in the intentional killing of another while engaged in a narcotics conspiracy. As to Count Two, it would be sufficient for you to convict if you find that the evidence proves beyond a reasonable doubt that the defendant aided and abetted another person in the use, carrying and possession of a firearm in furtherence of a drug trafficking conspiracy which resulted in murder. The District Court explained that "Aiding and Abetting liability is it's own theory of criminal liability." In effect, it is a theory of liability that permits

a defendant to be convicted of a specified crime if the defendant, while not himself committing the crime, assisted another person or persons in committing the crime."

No one noticed the error and the District Court continued to mis-inform the jury regarding the elements of the federal aiding and abetting statute. The District Court instructed the Jury that: "under federal law, whoever aids, abets, counsels, commands, induces or procures the commission of and offense, is punishable as a principal." The Judge deliberately omitted the jurisdictional element which requires the Government to prove that the offense was "against the United States."

The District Court went on to instruct the Jury that: "in other words, it is not necessary for the government to show that the defendant himself carried out the crime in order for you to find the defendant guilty." If you do not find beyond a reasonable doubt that (1) as to count One, the defendant himself physically killed, or counseled, commanded, induced, procured or caused the killing ... or (2), as to Count Two, the defendant physically himself used, carried, or possessed [a] firearm in furtherance of a narcotics conspiracy and killed Aisha Morales with such firearm with such fireaRM, you may, under certain circumstances, still find that the prosecution has proved the elements of these crimes by showing that the defendant was an aider and abettor.

The District Court did not once explain to the Jurors that under the aiding and abetting theory of liability, the government is required to prove that the "offense was against the United States." The Judge simply bypassed this crucial jurisdictional element which is clearly necessary to constitute a violation under 18 U.S.C. § 2.

Title 18 U.S.C. § 2 provides: (a) "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal;" and (b) provides: [w]hoever, willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." Id.

As with any case of statutory interpretation, the analysis begins with the language of the statute. Hughes Air Craft Co. v. Jacobson, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999). The first step is to determine whether the language at issue has a plain and unambiguous meaning with regards to the particular dispute in the case. See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). The Court must read the words in their context and with a view to their place in the overall statutory scheme. See King v. Burwell, 135 S. Ct. 2480, 2489 (2015). Moreover, it is a cardinal principle of statutory construction that the Court must give effect, if possible, to every clause and word of a statute. See Williams v. Taylor, 529 U.S. 362, 404, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

The text of Title 18 U.S.C. § 2, sub. Sec. (a) and (b) make clear that the statute applies to whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures an offense against the United States will be punishable as a principal.

There is no question that the statute limits liability to whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. Likewise, subsection (b), extends liability to whoever willfully causes an act to be done, which if directly performed by him or another would

be an "offense against the United States," is punishable as a principal.

Congress made clear in the statute to include not just the clause "an offense against the United States," but also willfull acts done, which if directly performed by him or another would be an "offense against the United States." The statute makes clear that the jurisdictional element necessary to confer federal jurisdiction is that the offense be committed against the United States. The plain unambiguous meaning of the clause "offense against the United States," refutes any contention that the federal aiding and abetting statute can be bootstraped to any violation of federal law.

If Congress enacted a federal aiding and abetting statute that could be attached to any federal offense, it would have simply said: whoever commits a federal offense, aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. However, Congree did not do that. Congress specifically included the clause "against the United States" for the specific purpose of conferring federal jurisdiction, and limit liability under the federal aiding and abetting statute to whoever aids and abets an "offense against the United States."

The District court made clear in its instructions that the aiding and abetting statute had its own theory of liability. It necessarily follows that the aiding and abetting statute would have its own element establishing federal jurisdiction. Any other statutory interpretation of the federal aiding and abetting statute would effectively enlarge the authority of the federal government beyond the authority granted by Congress. Federal prosecutors have been attaching the federal aiding and abetting theory of liability to almost every federal offense by simply citing the Statutory citation and paraphrasing the language

contained in the statute and omitting the jurisdictional element which the law makes necessary for federal jurisdiction. Prosecutors always allege aiding and abetting because it allows a lesser standard of proof. It allows the federal prosecutor to prove only that the defendant did and act which aided or abetting the underlying offense.

This abusive misapplication of federal law can only be prevented by the intervention of this Most Honorable Court's authority to instruct the lower courts on the proper construction, interpretation and application the federal aiding and abetting statute.

Conclusion

Petitioner comes before this Most Honorable Court defending all those persons who have been denied a fair trial in violation of the Due Process Clause by the unauthorized application of the federal aiding and abetting statute. The laws of our Country take care, or should take care, to not let the weight of the federal government fall upon anyone except as specifically authorized by Congress. A rigid adherence to the canons of Statutory Construction will ensure the greater security and safety of our citizens from the unauthorized expansion of the federal government's authority. Therefore, it is respectfully requested this Petition for Writ of Certiorari be Granted.

Respectfully submitted:

Adony Nina November 7th 2018
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