No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ABDIRAHMAN DAUD – Petitioner

vs.

UNITED STATES OF AMERICA – Respondent

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

PETITION FOR WRIT OF CERTIOARI

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QUESTION PRESENTED

Whether the Court of Appeals' application of "harmless error" analysis to an erroneous jury instruction regarding the critical, specific intent element of the offense charged, when the existence of that intent was controverted at trial and formed the basis for Abidrahman Daud's defense at trial, violated Daud's Sixth Amendment right to a trial by jury by substituting the speculation of a three judge panel of the Court of Appeals for an actual jury determination on the factual issue of Daud's specific intent?

LIST OF PARTIES

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

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IN THE

SUPRME 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

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the petition and is a published decision, United States v. Daud, 899 F.3d 608 (8th Cir. 2018).

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided the case below was August 10, 2018. A copy of that decision appears at Appendix A. On September 17, 2018, Defendant/Appellant filed a Petition for Panel Rehearing/Rehearing En Banc. The Petition for Rehearing was denied on October 12, 2018. A copy of that order appears as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "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..."

Article III, §2, cl. 3, of the United States Constitution provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury…."

STATEMENT OF THE CASE

On April 18, 2015, Abdirahman Daud was charged by criminal complaint with Conspiracy to Provide Material Support and with Attempting to Provide Material Support, both in violation of 18 USC §2339B(a)(1) and 18 USC §2. On May 18, 2015, a superseding indictment was issued, charging Daud with the same charges as set forth in the Complaint. On October 21, 2015, a Second Superseding Indictment was filed against Daud. He was charged in Count I with Conspiracy to Murder Outside the United States in violation of 18 USC §956(a) and 18 USC §2; in Count II with Conspiracy to Provide Material Support and in Count VI with Attempting to Provide Material Support, both in violation of 18 USC §2339B(a)(1); and in Count X with Perjury in violation of 18 USC §1621. The gravamen of the charges against Daud was that he conspired to travel to Syria and provide material support to the Islamic State (ISIL) and to engage in fighting on behalf of ISIL. Daud was arraigned on the Second Superseding Indictment on November 2, 2015, and entered a plea of not guilty on all counts.

On December 17, 2015, Daud filed a Motion to Dismiss Count I (ECF#347) on the basis that the Second Superseding Indictment failed to allege a specific intent to kill which was an essential element of an offense under 18 USC §956(a). This Motion was denied by the District Court by an Order dated February 10, 2016. (ECF #371). On April 11, 2016, Daud filed Defendant's Proposed Supplemental Jury Instructions (ECF #341), requesting a jury instruction on the 18 USC §956(a)

charge which would require the jury to find that Daud conspired with the specific intent to kill another human being. (Appendix C).

Jury trial of this matter commenced on May 9, 2016. At the conclusion of the Government's case on May 26, 2016, Daud moved for a Judgment of Acquittal under Fed.R.Crim.P 29, arguing that the evidence was insufficient for a properly instructed jury to find that all killing on behalf of ISIL constitutes murder or that Daud had a specific intent to take a human life without justification. (Trial Transcript ("TR") 2582). The District Court denied Daud's Motion for Judgment of Acquittal. Daud renewed this Rule 29 motion on May 27, 2016, at the conclusion of the trial. (TR 2846). The District Court denied the renewed motion.

At the May 27, 2016, final charge conference, Daud objected to Final Instruction #18[1] with respect to the 18 USC §956(a) charge on the grounds that the definition of "malice aforethought" proposed by the Government and the District Court did not require a specific intent to kill. Daud renewed his request for his proposed alternative instruction set forth in his filing ECF#341. (TR 2852-2853). Daud contended that the jury instructions given by the District Court improperly allowed for his conviction under 18 USC §956(a) based only upon proof that he agreed to "willfully act with callous disregard of the consequences to human life," whether or not the death of another human being was intended or was the result of the conspiracy. Daud contended that a proper jury instruction would set forth as an element of the offense that he agreed to, or intended to, cause the unlawful killing of another human being as the objective of the conspiracy.

[1] At the Charge Conference, Final Instruction No. 18 was numbered No. 16. (Appendix D).

On June 3, 2016, the jury returned verdicts on all counts. Daud was found not guilty on the perjury charge in Count X. He was found guilty on Count I, Conspiracy to Murder Outside the United States; on Count II, Conspiracy to Provide Material Support and on Count VI, Attempting to Provide Material Support.

Sentence was imposed on November 16, 2016. The District Court imposed a sentence of 360 months on Count I, and a concurrent sentence of 180 months on Count II and Count VI. The Court ordered a term of life of supervised release on each Count to run concurrently.

Daud filed a timely Notice of Appeal on November 18, 2016. On August 10, 2018, the Court of Appeals denied Daud's appeal. Without reaching the issue of whether the District Court's jury instructions were erroneous, the Court of Appeals applied its prior decision in United States v. Dvorak, 617 F.3d 1017, 1024 (8th Cir. 2010), to hold that any error in jury instructions was harmless because it was clear beyond a reasonable doubt that any rational jury would have convicted Daud even if the District Court had adopted an instruction that required the Government to prove a specific intent to kill.

On September 17, 2018, Daud filed a Petition for Rehearing arguing that the application of "harmless error" analysis to an erroneous jury instruction regarding the critical, specific intent element of the offense charged, when the existence of that intent was controverted at trial and formed the basis for Daud's defense, violated Daud's Sixth Amendment right to a trial by jury. The Court of Appeals

denied the Petition for Rehearing on October 12, 2018. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals in this case decides an important question of constitutional law in a manner which conflicts with the decision of this Court in Neder v. United States, 527 U.S. 1 (1999), which applied "harmless error" analysis to excuse instructional error only with respect to an element of the offense "supported by uncontroverted evidence." *Id.* at 18. By contrast, in this case, the Court of Appeals applied "harmless error" analysis to an erroneous jury instruction regarding a critical, specific intent element of the offense, which was contested at trial and which pertained to whether Mr. Daud had an intent or agreement to kill. The opinion of the Court of Appeals represents an extraordinary extension of the reach of "harmless error" analysis to what is actually structural, instructional error in the context of this trial. Petitioner contends that such an extension of "harmless error" analysis beyond the limited grounds approved in Neder effectively negates the jury trial guarantee of the Sixth Amendment and presents an important question of federal law which should be settled by this Court – whether the right to render a verdict in a criminal prosecution belongs exclusively to the jury, or whether an appellate court may substitute its own speculation and factual findings as to a defendant's guilt in the absence of a verdict by a properly instructed jury.

ARGUMENT

The Government before trial requested and obtained a jury instruction on the 18 USC §956(a) "conspiracy to murder charge" that allowed for conviction based merely on proof that Daud agreed "to willfully act with callous and wanton disregard of the consequences to human life." (Brief of United States/Appellee, p.51; Appendix D). Daud sought an instruction defining "malice aforethought" in the context of a conspiracy charge as requiring a "specific intent to kill." (ECF#431; TR 2852-2853; Appendix C). This argument was central to Mr. Daud's individual defense in a joint trial with two co-defendants: he raised it by challenging the indictment for failing to allege a specific intent to kill (ECF# 347), in pre-trial motions (ECF#431, #465), in cross-examination, in argument (TR 3000-3001), and in his proposed jury instructions (ECF#431, TR 2852-2953).

The jury instruction used at trial, however, relieved the Government of the burden of proving that the objective of the conspiracy involved the specific intent to take a human life. As a result, Daud was convicted by a jury finding of a substantially less culpable specific intent, that he conspired to engage in acts that showed a "callous and wanton disregard of the consequences to human life," whether or not death resulted or was intended to result. Thus, the erroneous jury instruction ratified the Government's theory of prosecution – that mere association with ISIL proved a callous and wanton disregard for human life -- infecting the entire trial process and rendering it fundamentally unfair.

THE APPLICATION OF HARMLESS ERROR ANALYSIS TO A DISPUTED INTENT INSTRUCTION INVOLVING AN INTENT TO KILL CONTRAVENES ESTABLISHED CONSTITUTIONAL STANDARDS FOR ASSESSING HARMLESS ERROR

Abdirahman Daud's defense to the charge of Conspiracy to Murder in violation of 18 USC §956(a) centered on his contention that he did not himself intend, or agree with another, to kill a human being. Daud first challenged the Second Superseding Indictment, containing the §956(a) charge, on the grounds that it only alleged a plan to "join, and fight with, ISIL" and not an "intent to kill." (See, Motion to Dismiss Count I, ECF #347, objecting to failure of Second Superseding Indictment to allege a specific intent to kill). Instead of requiring an agreement to kill, the indictment used the legal term of art – murder - which encompasses both killing with a specific intent to kill and acting with a callous and wanton disregard for human life resulting in the death of another human being.

Prior to trial, Daud requested a jury instruction requiring the jury to find "an agreement [to]… kill another person" which Daud joined, "knowing and intending to help accomplish its purpose of committing an unlawful killing outside the United States." (Proposed Jury Instruction No. 28, ECF #431, p. 5; Appendix C). This instruction was objected to by the Government and overruled by the District Court.

The erroneous instructions at trial prevented Daud from arguing that he lacked a specific intent to kill as the trial judge required strict adherence to his instructions. At a pretrial conference on April 26, 2016, the District Court stated, "No. I've denied that. We're not getting into that. He can't talk about that. If he does that, he knows where he's going to go, and there's a door [to the detention holding

area] over there…." (TR, 33). Later, the District Court stated to Daud's counsel, "This is not a political trial. If you try to make it, you'll find out what the Court will do." (TR, 39). On May 11, 2016, after the Government's opening argument and just prior to the defendants' opening arguments, the District Court called a bench conference and stated, "Just a reminder, my rulings, I don't know what you're going to be saying on your opening statements, but don't even get close to violating my rulings." (TR, p.98). As such, during opening argument, counsel could only argue that Daud did not have the "intent to murder" (which included the Government's theory of an agreement to willfully act with callous and wanton disregard for human life) instead of arguing that Daud did not have the specific intent to kill.

Daud renewed his request for an instruction requiring a specific intent to kill at the final charge conference on May 27, 2016. (TR 2852-2853). His request was denied. Thus, in closing argument, counsel could only argue, "It seems like a long time ago that I first stood in front of you and talked to you in opening statement and suggested that this trial would be a trial about intent. What was on Mr. Daud's mind? … What was in his mind when he took the first steps to begin that long journey, where he was going, and what he was intending to do, if he ever got to the end of that long journey?" (TR, 3000-3001); "Mr. Daud did not have murder on his mind. He did not join in conspiracy to commit murder…" (TR, 3066). Due to the flawed jury instruction however, counsel had to repeat the erroneous instruction in closing argument (allowing for conviction based on agreeing to act with a callous

and wanton disregard for human life) instead of arguing that the Government failed to prove Daud had the specific intent to kill. (TR, 3004).

The erroneous jury instruction barred Daud from preventing a defense and constitutes structural error in the trial process which defies harmless error analysis. "Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal." United States v. Escobar de Bright, 742 F.2d 1196, 1201-02 (9th Cir. 1984).

The Court of Appeals assumed that Mr. Daud's Sixth Amendment rights were violated, as an improper instruction on an element of the offense establishes a violation of the Sixth Amendment's jury trial guarantee. Neder v. United States, 527 U.S. 1, 12 (1999).[2] In Neder, this Court held that such a constitutional violation is subject to harmless error analysis when the element to which the instructional error relates "is supported by uncontroverted evidence." *Id.* at 18. In such a circumstance, when a defendant did not and apparently could not contest the element, "…answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19.[3] Neder's holding that an element which is the subject of an erroneous or omitted instruction must be supported by "uncontroverted

[2] The Panel avoided a determination of whether or not the instruction was actually erroneous.

[3] Neder involved a tax and mail fraud case where the jury instructions omitted the element of "materiality." Neder did not challenge, either at trial or on appeal, whether his failure to report five million dollars in income on his taxes was "material." Whether failure to report such income was "material" was a question of fact that could readily be determined from a written record. *Id.* at 15.

evidence" in order to justify excusing the error through "harmless error" analysis has been followed by multiple appellate decisions. United States v. Fernandez-Jorge, 894 F.3d 35, 54 (1st Cir. 2018)("When jury instructions fail to account for an element of the crime charged, that error is harmless only if we can conclude "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error."); United States v. Montoya-Gaxiola, 796 F.3d 1118, 1124-1125 (9th Cir. 2015)("The Supreme Court has noted, however, that a jury instruction error would not be harmless if a defendant contested the omitted element and raised evidence sufficient to support a contrary finding.").

By contrast, in the instant case, the erroneous jury instruction affected the framework of the entire trial – from the indictment, to the jury instructions, to the evidence presented, and to the arguments of counsel – and rendered it fundamentally unfair. See also, Tucker v. Kemp, 762 F.2d 1496, 1501 (11th Cir. 1985)(nature of defense at trial is an important factor in determining whether harmless error analysis is appropriate and applying harmless error analysis only when the defense was non-involvement in the murder while the intentional nature of the murder was not contested).

Further, substantial evidence existed to call into question whether the Government established by proof beyond a reasonable doubt that Daud acted or conspired with the specific intent to kill. No testimony was introduced to show that Daud watched the gruesome ISIL propaganda videos introduced as evidence by the

Government and Daud was described as a person "not big on technology" and a person who did not "view the videos" that others watched. (TR, 849). A Government cooperating witness testified that Daud "didn't want to be part of the group" planning to fight in Syria because he didn't approve of the person selected as the group's leader (TR, 587). This same cooperating witness testified that a motive to travel to Syria in the Fall of 2014 resulted from surveillance by law enforcement and fear of arrest. (TR, 701-702). Far from establishing that Daud intended to go to Syria to kill, as concluded by the Court of Appeals, this testimony could have allowed a jury to conclude that Daud simply wished to avoid arrest and imprisonment in seeking to travel to Syria and did not conspire with the specific intent to kill.

There was no evidence introduced at trial of Daud using, handling, seeking to obtain, or training to use, any firearm, dangerous weapon, or explosive. Testimony from cooperating witnesses that the group sought to travel to Syria to "fight and kill" was challenged on cross-examination, frequently elicited by leading questions from the Government, lacked specifics as to Daud's agreement to such a purpose, and came from witnesses seeking to please the government who had a significant reason to lie. The Government's own expert witness testified that ISIL seeks to project an image to world of itself as a governing State, building roads and funding social welfare projects. (TR, 443). This image is promulgated through a "professional, slick propaganda operation." (TR, 304-305, 436-437). The expert further testified that young men traveling to join ISIL have a variety of motives

including to "protect civilians from oppression," to "join a perceived Islamic society," or the "provide humanitarian assistance." (TR, 469). This expert testimony was consistent with the Government's own cooperating witnesses, who testified that they believe the Western media was lying about ISIL's atrocities and that they would "check the situation" out in Syria before deciding to fight on behalf of ISIL. (TR, 2379-2380; 1851). Thus, while the evidence may have been overwhelming that Daud sought to associate himself with ISIL, and thus exhibited a "wanton and callous disregard for human life," that evidence fell far short of establishing an uncontroverted "intent to kill" on the part of Daud.

Other cases in which harmless error analysis has been applied to excuse instructional error at trial similarly involve uncontroverted issues of fact. In Johnson v. United States, 520 U.S. 461 (1997), the jury instructions in a perjury case omitted a materiality element. The false testimony pertained to the source of tens of thousands of dollars used to renovate a home and which were actually proceeds of drug trafficking. The defendant did not object to or request a materiality instruction be submitted to the jury instead of it being decided by the judge. Johnson at 463. Neither at trial nor on appeal did the defendant present a "plausible argument that the false statement under oath…. was somehow not material to the grand jury investigation." *Id.* at 469.[4]

[4] Further, in Johnson, the defendant did not object to the absence of a materiality instruction. "In the context of such unobjected-to error, the mere deprivation of substantial rights "does not, without more" warrant reversal." Neder, 527 U.S. at 34 (Justice Scalia dissenting), citing United States v. Olano, 507 U.S. 725, 737 (1993).

In United States v. Inman, 558 F.3d 742 (8th Cir. 2009), the jury instructions failed to require as an element that the materials used to produce child pornography traveled in interstate or foreign commerce. The defendant did not object to the absence of the instruction and the trial record contained "undisputed evidence that Inman's hard drive and DVDs were shipped in interstate and foreign commerce." The credibility and accuracy of this testimony was not challenged by Inman. *Id*. at 750.[5]

In a case relied upon by the Court of Appeals in its opinion below, United States v. Dvorak, 617 F.3d 1017 (8th 2010), the instructions omitted the requirement in an identity theft prosecution that the defendant knew he was using the identity of a real person. However, the trial court submitted special interrogatories to the jury, in which the jury separately found that the defendant did know he was using the identity of a real person. Dvorak at 1025. As a result, the application of harmless error analysis was appropriate because "[t]he special interrogatory eliminated any possibility that the error contributed to the verdict." *Id. at* 1027.

In the instant case, the erroneous jury instruction pertained to the issue of Daud's intent and to the central element of the charged conspiracy – did he agree with others to intentionally kill another human being. It is a longstanding axiom that a "defendant's intent is obviously not usually susceptible of proof by direct evidence. In most cases it must be inferred from the facts and circumstances of the particular case." Leffler v. United States, 409 F.2d 44 (8th Cir. 1969). Because of the

[5] As noted in Justice Scalia's dissent in Neder, Johnson and Inman are distinguishable from the instant case as "[i]n the context of such unobjected-to error, the mere deprivation of substantial rights "does not, without more," warrant reversal. 527 U.S. at 34.

fact-specific and subjective nature of the inquiry into whether a defendant possessed the necessary intent to commit a crime, it is particularly an issue reserved for resolution by the jury:

> However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. …Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges.
>
> Morissette v. U.S., 342 U.S. 246, 274-276 (1952).

Daud contends that the Panel decision, by applying harmless error analysis to the central intent element of the conspiracy charged, an element which was contested at every stage of the trial process, has impermissibly extended harmless error analysis to excuse errors which "infect the entire trial process and necessarily render a trial fundamentally unfair." Neder, 527 U.S. at 1 (discussing class of errors to which harmless error analysis may not be applied). Because the issue of intent at trial was not uncontroverted, and because evidence of intent can rarely be overwhelming and conclusive, the Court of Appeals erred in applying harmless error analysis to excuse the constitutional error that violated Daud's Sixth Amendment rights and which occurred at trial over his specific and vigorous objection.

CONCLUSION

The guarantee of a trial by jury is the only constitutional right to appear in both the body of the Constitution and the Bill of Rights – it is the "spinal column of American democracy." Neder v. U.S., 527 U.S. 12 at 38-39 (1999)(Justice Scalia

dissenting, joined by Justice Souter and Justice Ginsberg). Simply put, the Constitution does not trust judges to make factual determination of criminal guilt. The Court of Appeals in its opinion in this case made a factual determination, regarding a fundamental and contested element of the offense charged, thereby substituting its own speculation and evaluation of the evidence for the constitutionally required determination of these questions of fact by a jury. Mr. Daud's constitutional and Sixth Amendment right to a trial by jury were violated. The petition for writ of certiorari should be granted.

Respectfully submitted,

Date: Jan. 10, 2019

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