No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2020

GABRIEL ELIJAH KANE ARKINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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SUBMITTED: July 12, 2021

QUESTION PRESENTED

In response to Petitioner's third and final motion for acquittal under Rule 29(c) Fed. R. Crim. P. the district court ruled that standing alone the government's eye-witness identification testimony may well have warranted acquittal, given the witnesses' failure to consistently identify Petitioner as the male robber carrying the sawed-off shotgun during a robbery. To compensate for this failure in proof the courts below claim that the government's main witness, who those courts deemed an accomplice, testified to sufficient facts to send the case to the jury to determine whether Petitioner was indeed the shotgun toting robber. Accordingly the question presented is:

> WHETHER THE PRESUMPTIVE FORCE OF THE RULE THAT THE TESTIMONY OF AN ACCOMPLICE IS SUFFICIENT TO CONVICT IS A LAWFUL SUBSTITUTE FOR THIS COURT'S RULES GOVERNING ACQUITTAL MOTIONS ESPECIALLY WHERE, AS HERE, THE ACCOMPLICE DENIES BEING AN ACCOMPLICE BUT THE DISTRICT COURT RULES HIM AN ACCOMPLICE ANYWAY, A RULING THE NINTH CIRCUIT SUMMARILY AFFIRMS.

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Petitioner, Gabriel Elijah Kane Arkinson, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

1. The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. Arkinson*, 836 Fed. APPX. 573 (9th Cir. 2021) is unreported. A copy of the decision is attached in the Addendum to this petition at pages 1-4.

2. The district court's written decision denying Petitioner's final acquittal motion and finding the government's main witness an accomplice is set forth in the Addendum at pages 5-10.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition affirming Petitioner's convictions and 180-month prison sentence was filed on February 12, 2021. This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on July 12, 2021, within the 150 days for filing under the Rules of this Court (*see* Rule 13, ¶1) *as amended* by the Court's March 19, 2020, order.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be . . . liberty, or property, without due process of law; . . .

The Sixth Amendment to the United States Constitution provides:

> 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; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTES AND/OR RULES INVOLVED

Rule 29 Fed. R. Crim. P. provides:

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

> (1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.
>
> (2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.
>
> (3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

STATEMENT OF THE CASE AND FACTS

(A) The District Court.

In September of 2017, after being incarcerated for an unrelated escape charge, Curtis Alexander (Alexander) wrote to both the Helena Montana Police Department and the Lewis and Clark County Montana Sheriff's Office regarding crimes allegedly committed by others. Because Alexander's information involved an

alleged home invasion and the robbery of a drug dealer the matter was referred to the Federal Bureau of Investigation (FBI) for follow-up. After Alexander was debriefed by the FBI, Petitioner and two co-defendants were charged in a three-count indictment for conspiracy to rob, robbery and carrying a sawed-off shotgun during a crime of violence all in violation of federal law. Mr. Alexander was the only person who said Petitioner was involved in the crimes. Petitioner and one co-defendant (Milstein) proceeded to trial, while the remaining co-defendant (Shurtliff) pleaded guilty. Because it will be important later we emphasize here that the defendant who pled guilty (Shurtliff) was neither an eyewitness to the robbery, nor did she testify at Petitioner's trial.

According to Alexander's direct and cross-examination testimony while "hanging out" with Petitioner and his co-defendants Alexander heard all three conspire to commit a home invasion/robbery of a known drug dealer. However during the conspiracy phase that led to these crimes Alexander allegedly made it clear to the other three that he wanted nothing to with the plan; and in addition strongly discouraged Petitioner and his co-defendants from committing the robbery. Nevertheless the robbery is committed when, according to Alexander only, Petitioner and his trial co-defendant (Milstein) enter the home of victim Pat Lovett, who is present there with his girlfriend Vicky Anderson. The purpose being to rob Lovett of drugs and money.

According to Alexander only, he witnessed Petitioner wearing a mask and carrying a sawed-off shotgun into Lovett's house intending to commit the robbery that had been planned previously but which, again, Alexander self servingly said he wanted nothing to do with and in fact actively discouraged. In the end the victims (Lovett and Anderson) are able to identify co-defendant Milstein both before and during trial as one of the robbers. However before trial Lovett identifies Alexander as the robber and Ms. Anderson likewise identifies Alexander as the robber both before and during trial.

Perfecting all of his Rule 29 Fed. R. Crim. P. acquittal motions at the proper times the district court ruled as follows on Petitioner's final and renewed Rule 29(c) motion for acquittal:

> Had Ms. Anderson and Mr. Lovett been the government's only witnesses, the jury may well have acquitted Defendant Arkinson, given their failure to consistently identify him as the male robber. However, the government's key witness, Curtis Alexander, identified Defendant Arkinson as the person who agreed with Defendants Milsten and Shurtliff to rob the victim. (Doc. 147 at 28-32). Mr. Alexander also identified Mr. Arkinson as having a loaded sawed-off shotgun on the day of the robbery (Doc. 145 at 38) and as having entered the victim's trailer with Defendant Milsten and a woman identified as "Vickie." (Doc. 145 at 42).

In essence, Defendant Arkinson argues that the jury should have rejected Mr. Alexander's testimony because it was not corroborated by other admissible evidence. Mr. Alexander's testimony alone is sufficient to support the jury's guilty verdict as to Defendant Arkinson. "The uncorroborated testimony of an accomplice is enough to sustain a conviction unless the testimony is incredible or insubstantial on its face." *United States v. Lopez*, 803 F.2d 969, 973 (9th Cir. 1983). The Court applies this standard in considering Mr. Alexander's testimony, even though he denied being an accomplice to the robbery[1] and was not charged with the crime. Mr. Alexander was subjected to rigorous cross-examination by able and experienced defense counsel. The Court has reviewed his testimony and finds that it was neither incredible nor insubstantial on its face.

Mr. Alexander's testimony was also supported by other evidence submitted at trial. While there were inconsistencies in the testimony of various witnesses, "questions of witness credibility fall squarely and exclusively within the jury's purview." *United States v. Delgado*, 357 F.3d 1061, 1069 (9th Cir. 2004). It is for the jury to determine which witnesses to believe, and the Court will not substitute its judgment for that of the jurors. Accordingly,

IT IS HEREBY ORDERED that "Defendant Arkinson's Post-Trial Motion for Acquittal Under Rule 29(c)" (Doc. 148) is DENIED.

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[1] Mr. Alexander denied having agreed to participate in the robbery, (Doc. 145 at 32) and testified that he attempted to dissuade the others from going forward with their plan. (Doc. 145 at 39).

(Addendum at pages 9-10).

(B) The Ninth Circuit's decision.

The Ninth Circuit affirms Petitioner's conviction and 180-month prison sentence. The Ninth Circuit also affirms the district court's use of the accomplice rule, but goes a step further ruling in addition that the accomplice rule is merely an

extension of the principle that even a single witness can suffice to convict a defendant before the jury.

REASONS FOR GRANTING THE WRIT

There are two reasons why the Court should grant the writ, reverse Petitioner's convictions and set him free. First, because the government proved on its case-in-chief through its own victim witnesses (Lovett and Anderson) that Alexander was the robber. And second because the decisions of the courts below not to grant Petitioner's Rule 29 motion violate this Court's decisions governing acquittal motions and how they should be processed. We now address each of these reasons in reverse order.

In *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 252-256 (1986) this Court engages in an extended discussion comparing summary judgment/directed verdict motions in civil cases *with* "a motion for acquittal in a criminal case" (*Id*. at 252). Three normative criteria relevant to acquittal motions arise under this discussion:

> First, "whether a fair minded jury could return a verdict for the plaintiff on the evidence presented under the relevant burden of proof";
>
> Second, that "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff";

> Third, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge".

Anderson, *supra*, 477 U.S. at 252-255.

These principals are likewise embodied in this Court's decision in *Jackson v. Virginia*, 443 U.S. 307, 316-320 (1979) which specifically applies procedurally in federal criminal cases through Fed. R. Crim. P. Rule 29. *Also see United States v. Garcia*, 919 F.3d 489, 491 (7th Cir. 2019), which analyzes *Anderson* at length, along with the role trial judges have in guarding the requirement of proof beyond a reasonable doubt in criminal cases. Under Rule 29 a trial judge upon a defendant's motion, or even on the judge's own initiative, "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction," either after the government has rested its case or after a jury has rendered a verdict or been discharged. Fed. R. Crim. P. Rule 29(a) and (c).

However once the defendant has been found guilty "the factfinder's role as the weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution" *Jackson v. Virginia*, *supra*, 443 U.S. at 319 (1979) (emphasis original). Yet even *Jackson* recognizes that notwithstanding the obligation to construe all the evidence in a light favorable to the government there still will be cases where the evidence "so construed may still be so supportive of innocence that no rational juror

could conclude that the government proved its case beyond a reasonable doubt." *See e.g. United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010) (en banc). Or to put it in the words of *Jackson v. Virginia* itself:

> This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.
>
> *Jackson v. Virginia*, 443 U.S. at 319.

The district court deviated from these standards and the requirements of Rule 29. Under Rule 29 an acquittal motion can be made at i) the close of the government's case; ii) at the close of all the evidence; and iii) after the jury has rendered a guilty verdict or been discharged. *See* Rule 29(a)-(c). Furthermore, Rule 29 provides that a motion brought under subpart (a) can be reserved for decision later; but under that option (where the district court reserves decision) "it must decide the motion on the basis of the evidence at the time the ruling was reserved" Rule 29(b).

Petitioner made all three motions authorized under Rule 29. At the close of the government's case (ER Vol. IV, page 517). At the close of all the evidence (ER Vol. IV, page 545). And then again within 14 days after the guilty verdict (ER Vol. II, pages 107-139).

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With no explanation or reasoning on the record Petitioner's first two acquittal motions were denied. (ER Vol. IV, pages 520 and 545). However on the third acquittal motion brought under subpart (c) the district court (having not reserved ruling under subpart (b) of the rule) makes two critical evidentiary rulings. First, that the victim eyewitness testimony from Ms. Anderson and Mr. Lovett "may well have" warranted acquittal given their failure to identify Petitioner as the male robber (Addendum at page 11). And, second, that based on unidentified evidence in the form of "Mr. Alexander's testimony", Mr. Alexander was an accomplice to the robbery. (*Id*.)

In addition, although the district court did consider that Mr. Lovett was unable to identify Petitioner in court, and that Ms. Anderson identified Mr. Alexander as the robber during her direct testimony (ER Vol. I, pages 51-52), at no time did the district court acknowledge that on its case-in-chief the government put on positive proof that before trial Mr. Lovett identified Mr. Alexander as the robber (*See* Government's Exhibit 8, Addendum at page 11).

Considering that both victims identified Mr. Alexander as the robber on the government's case in chief, together with the fact that the district court belatedly ruled Mr. Alexander an accomplice, the guilty verdict is error because neither the district court nor the jury considered all the evidence as *Jackson v. Virginia* and Rule 29 require. The evidence did not change between Petitioner's second Rule 29

motion at the close of the government's case and his final acquittal motion under Rule 29(c).

What the district court did here was erroneously reserve two evidentiary rulings involving failed identification testimony and accomplice responsibility, with the result being that those crucial facts were in effect completely omitted from jury consideration under the *Jackson* presumption that credibility is for the jury. A verdict involving an individual (Alexander), who was ruled an "accomplice" by the court (and who was positively identified by both victims as the robber), neither earned nor deserves the presumption of validity that a guilty verdict acquires under *Jackson*. Indeed by ruling Alexander an accomplice so late in the proceeding the district court made a key credibility finding that was actually within the province of the jury, not the judge, as clearly explained under the decisions of this Court. *See e.g. Anderson v. Liberty Lobby, Inc.*, *supra*, "Credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict" 477 U.S. at 255.

Where, as here, the district court had all of the evidence before it at the time of Petitioner's second Rule 29 motion it was error for the district court to make crucial credibility findings at the Rule 29(c) phase, where those defense positive evidentiary points (failed identification testimony and accomplice responsibility)

were altogether cast from the acquittal equation under the heading of the *Jackson* presumption that jurors determine credibility. Indeed the *Anderson* case shows that:

> "more facts in evidence are needed for the judge to allow reasonable jurors to pass on claim when the proponent is required to establish the claim not merely a preponderance of the evidence but beyond a reasonable doubt."
>
> *Anderson*, *supra*, 477 U.S. at 253, *quotation marks and other alterations and cites omitted*.

As a final matter the Court should grant the writ because sufficiency of the evidence to support a conviction processed under Rule 29 of the Federal Rules of Criminal Procedure implicates the decisions of a judicial officer made following indictment, sworn trial testimony and the right to counsel, through whom the rights to object, cross examine and confront witnesses are realized. Review of this process reaches constitutional levels here because not only did the district court belatedly rule Alexander an accomplice, which essentially determined him to be an incredible witness; in addition both courts below refused to address that at the close of the government's case the evidence clearly showed that Alexander was the robber.

Relevant here is that before trial a defense investigator (Hopkins) visited Mr. Lovett, who was in jail on charges not relevant to this case. At that meeting, Mr. Lovett identified Alexander as the robber from a two-photo spread (pictorial) line-up, saying that he (Lovett) was 100% certain that Alexander was the robber. Both the two-person photo spread (and the recorded dialogue between Hopkins and Lovett

which accompanied this identification by Lovett) were disclosed to the government before trial. However, instead of waiting for the defense to seek admission of this pretrial identification the government elected to preempt this defense proof by marking the two-person photo spread as Government's Exhibit 8, and admitting it for its truth as evidence under Rule 801(d)(1)(C):

> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:
>
> (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> (C) identifies a person as someone the declarant perceived earlier.
>
> Rule 801(d)(1)(C).

Although it is a recognized trial tactic to minimize the sting of an opponent's impeachment by initiating the impeachment yourself, *see e.g. United States v. Ewings*, 936 F.2d 903, 909 (7th Cir. 1991). What the government did here was more than that. By admitting Government's Exhibit 8 as substantive evidence the government proved that Alexander was the robber. Granted, the government attempted to impeach Lovett's identification naming Alexander as the robber. However, impeachment evidence is almost never (except in select circumstances not relevant here) substantive evidence of guilt. *See e.g. United States v. Whitson*, 587

F.2d 948, 953 (9th Cir. 1978) ("In no case is it permissible for the jury to use impeaching evidence in deciding the defendant's guilt or innocence").

While we recognize that accomplice liability and jury instructions have long been approved by this Court. *See e.g. Cool v. United States*, 409 U.S. 100, 103 (1972). The difference here is that in holding Alexander an accomplice on Petitioner's third and final Rule 29(c) motion the district court, and then again the Ninth Circuit, make a credibility determination that serves to completely undermine the source of the government's case against Petitioner. Because, again, under *Anderson v. Liberty Lobby, Inc.*, *supra*, "Credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict" 477 U.S. at 255. The fact that both victims identified Alexander as the robber; together with the cogent point that the government only used preemptive impeachment to counter Lovett's "100% certainty" that Alexander was the man toting the shotgun caused the government's case to fail. Thus it should have never been given to the jury for decision. There was simply insufficient proof beyond a reasonable doubt for the jury to reach a guilty verdict against Petitioner.

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CONCLUSION

WHEREFORE, the Court should grant this petition and set the case down for full briefing because on this record Petitioner was not proved guilty beyond a reasonable doubt. *Cf. In re Winship*, 397 U.S. 358 (1970).

RESPECTFULLY SUBMITTED this 12th day of July, 2021.

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