

No. 21-5185

ORIGINAL

Supreme Court, U.S.
FILED

JUL 15 2021

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Lexton Pellew — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

District of Columbia Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Lexton Pellew, No. 7555-053
(Your Name)

FCI Butner II, PO Box 1500
(Address)

Butner, NC 27509
(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

The petitioner "was not charged with aiding and abetting in counts 11-14 but the court allowed the jury to return a guilty verdict on those counts based upon admittedly erroneous jury instruction". Therefore, should the convictions in cts 13-14 also be vacated seeing that the 10 yr consecutive sentence was derived from the consecutive counts and he has already served the original portion?

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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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/B to the petition and is

reported at Pellew v. US, 16-CO-1191 (DC App); 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 is unpublished.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 C to the petition and is

reported at Pellew v. US, 2007-cf3-24268; 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 is unpublished.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[] is unpublished.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[] is unpublished.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 9/9/2020

[] 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: 5/13/21, 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

U.S. CONSTITUTION, FIFTH AMENDMENT, DUE PROCESS CLAUSE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property [WITHOUT DUE PROCESS OF LAW]; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION, SIXTH AMENDMENT, RIGHT TO EFFECTIVE COUNSEL

[In all criminal prosecutions], the accused shall enjoy the right to a speedy 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].

STATEMENT OF THE CASE

The petitioner was not charged with aiding and abetting in counts 11-14, but the District of Columbia Superior Court added the aiding and abetting instruction and then even added a conspiracy theory instruction. Mr. Pellew objected to the additional instructions & even the jury [sent a note] asking was the [aiding and abetting] to be added. The Court said..I don't know why they would ask that when he was never charged in those counts with conspiracy nor the aiding and abetting on those counts. But I will just tell them to go ahead and apply the aiding and abetting. (See App'x F Trial p. 2 lines 8-25; p. 3 lines 1-4..what I suspect is happening is that some member or members are [hung up] on the fact that maybe they're not fully convinced at this stage that it was Lex..that Lex was the shooter. And if that's the case, then I think under that theory, [aider and abettor theory] is one that would help resolve that).

The former Counsel (Glaser) objected to these add ons and then later said, I won't say anything else about it & I won't even raise it on appeal.(App'x F p. 23 lines 11-25 ..Well my answer to the Court, again, very briefly, maybe I said it wrongly, I made an objection, initially which the objection stands. I [will not argue if there is an appeal, anything in respect to the conspiracy instruction should have been given rather than this because I waived the court's offer for me to argue more and give the instruction..it might not be you doing the appeal, if there is an appeal,

STATEMENT OF THE CASE CONTINUED

Because of this jury instruction error, the jury returned guilty verdicts on all counts except counts 11-12. The Court imposed a aggregated sentence of 288 mths, in which counts 13-14 were the additional 120 months that were consecutive. Thus, deeming the error as far from harmless.

The petitioner filed a 23-110 Post conviction filing and argued that the counsel was ineffective and that the court constitutionally erred when "applying the aiding and abetting and conspiracy theory instruction to counts 13-14 in light of Wilson-Bey v US 903 A.2d 818, 839 (DC 2006)(En Banc)". The District of Columbia Superior Court denied the relief and without a hearing. Mr. Pellew filed a timely appeal (16-CO-1191), which was denied. Then Mr. Pellew filed a Petition for Panel Rehearing, Rehearing En Banc which was denied on May 13, 2021).

Therefore, the petitioner has exhausted all available remedies & the issues are ripe to be heard by this Court and to clarify when and how the aiding and abetting instruction is to be applied and what to do when a counsel "knows the instruction is wrong and forfeits and even vows to not raise the constitutional error on appeal", thus effectively abandoning the merit claim and the petitioner during the critical stages of a criminal proceeding and being the cause of the additional 10 yr sentence. Without the additional sentence, Mr. Pellew would been home today.

REASONS FOR GRANTING THE PETITION

Wilson-Bey v US 903 A.2d 818 (En Banc 2006) states:
..The instructions ..was erroneous.. and ruled that..[] whether the defendant was charged as principal or as aider or abettor, the government had to prove all elements of the offense..[] and because the instructions given "omitted" the mens rea element of the offense charged, the error was of constitutional magnitude & because the instruction did not require the prosecution to prove that the defendant acted on premediated design ..or even that she knew that the 1st defendant (or anyone else) intended to kill the decedent..

Holding: The case was remanded to the trial court with directions to Vacate [both] defendant's convictions of "assault with a dangerous weapon!"

The petitioner, Mr. Lexton Pellew, proceeded to trial in the District of Columbia Superior Court with former counsel Harold I. Glasser. Pellew was charged with Ct-1 as conspiracy, but was not charged with conspiracy nor aiding or abetting.. in counts 11-14. (See App'x D, Indictment in full)

While the jury was deliberating ,the jury returned with a note asking "if the aiding and abetting instructions applied to cts 11 thru 14?"(App'x F p. 2 lines 13-25 and *passim* thereafter..)

Specifically, the following dialogue took place:

[Court] All right. We can discuss the [note] before they come in
..the note says: Does the aiding and abetting element apply
to counts 11 thru 14?

The counsel informed the court that "only Mr. Pellew is charged
in cts 11-14 as the "principal", so the aiding and abetting does
not apply to those counts. (See App'x D Indictment vs App'x F Jury
questions and court actions)

[Gov. Lucas] p. 3 in App'x F, states: "What I suspect is happening
is that some member or members are "hung up" on the fact that
maybe they are not fully convinced at this stage that it was Lex
and--

[Court] That it was Lex that was the shooter or that he was present
[Lucas] ..if that's the case, then I think that under that theory,
aider and abetting theory is one that could help resolve that.

[Glasser, Counsel]..It wouldn't be the case, your honor, because to
the US Attorney's Office, he was indicted. These words are exactly
the charges--what he was indicted about and he is indicted as a
principal.

[Court]..[] could he be responsible as an aider and abettor, I
think Mr. Lucas (Gov.) is correct..

[Glasser p. 6] If I am charged as a principal, I cannot be an
aider or abettor..may I look at the indictment your honor..sure
you "won't see the words aiding or abetting in the indictment"
lines 17-23 (Payton v US 305 A.2d 512,513 (DC 1973)

[Glasser p. 7] I can't see under any circumstances that he can be an aider or abettor to his own act and this is what he is charged with, his own deliberate act, not aiding and abetting...

[Court p. 8] All right. You make logical points but they're totally inconsistent with the law in this jurisdiction and yes if they find him guilty, I'll never be certain, whether they were finding him as the shooter or just helping the shooter, but that's totally appropriate under DC law and I have to make a decision..and let me say, I explicitly instructed them without any objection that that the aiding and abetting instruction applied to each of the-- and I think that's correct.(See App'x F, p. 8 lines 20-23); See Tyree v US 942 A.2d 629 (DC 2008)

But this was not correct and was inconsistent with the DC law because 2 years earlier in a En Banc ruling of Wilson-Bey v US 903 A.2d 818, the En Banc panel Vacated and Remanded because of the same flawed and unconstitutional instructional error that occurred in Mr. pellew's case. In fact, even the government came back and informed the Court that the court's decision was in error and that the court should use the conspiracy theory. But even this was error too because the cts 11-14 were not conspiracy nor aiding and abetting counts. (See App'x F p. 13 lines 7-20 and lines 23-26 vs Hairston 908 A.2d 1195 (DC 2006) and Wilson-Bey, *supra*)

Also, even the co-defendant's lawyer (Baer) said .."Well I would just [add] for Mr.--, I mean it "only applies to Mr. Lucas". The court said.."That's right..the verdict form doesn't even have those charges for Mr. Lucas, its not an issue for Lucas" (App'x F p. 10 lines 19-24)

To further the jury's confusion, even the court "knew" the conspiracy & aiding and abetting errors had occurred (App'x F p. 16 lines 12-14..but the judge underestimated the jury's independent thinking and wit by admitting that.." [I] guess I didn't imagine that a jury could go off in that direction but obviously, at least one of them has.) So after all the confusion, the parties still said .." I think that there is a distinction in this case for ~~that~~ particular question, its not aiding and abetting that's applicable its a conspiracy instruction. " (App'x F p. 17 lines 1-5.."well I think that's the safer course..I don't know if its necessarily what we've done is wrong..and I think that as long as they decide the case based upon "conspiracy principles that its fine", but of course the standard for aiding and abetting is going to be higher for the government..yeah" (App'x F p. 17 lines 6-17)

But Mr. Pellew was not charged with conspiracy nor aiding and abetting in counts 11-14, they were substantive counts and stand alone and to relinquish the burden of the government purposefully violated all the due process protections afforded to a defendant and was very prejudicial to the petitioner's life and liberty. (See App'x F p 17 lines 6-17 and p. 22 lines 6-19.."All right, well

let me say, I think both theories of liability are proper, Mr. Lucas and I agree with you that its probably more accurate [to abuse] the conspiracy theory for aiding and abetting, certainly more helpful to you..[If] the one I gave is an error, its preserved..[] were "only talking about those 4 cts involving Mr. Pellew..& the issue is whether if the conspiracy theory for aiding and abetting is the more legally accurate one? (App'x F p. 23 lines 6-8)

Well in this case, and according to Wilson-Bey, *supra*, Robinson v US 100 A.3d 95 (DC App. 2014); Arrington v US 238 A.2d 218 (DC App. 2020) and a host of other rulings, it is now very clear that the instructional errors were in fact constitutionally wrong and the petitioner's counsel was wrong for abandoning the preserved claim and the court was wrong for upholding the convictions for cts 13-14 that added the addition 10 yrs to the sentence and it was consecutive. Thus showing the cause and prejudice prongs as being met and the constitutional violations.

This Court should Grant the Writ, Vacate the Decision & Reverse the conviction and sentence with instructions to release Pellew seeing that he has already served the initial 168 month concurrent sentences.

The transcripts show that the jury had "reasonable doubt as to whether to convict the petitioner on cts 11-14 and were also just confused over the instructions." No one knew the proper law and the burden of proof was clearly lowered in favor of the government. (See App'x C , 23-110 p. 3-8, emph. p. 4 lines 9-12..the

court and government [acknowledged at that time that the government tried the case on a theory that the defendant was the principal but the government now ask the court to respond to the jury that it could consider aiding and abetting with respect to those counts].)

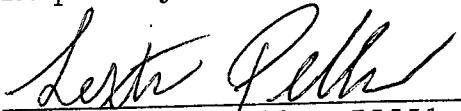
Moreover, in Wilson-Bey, the DC Court of Appeals (En Banc) held that the "Pinkerton Liability and Aiding and Abetting are distinct legal theories that require proof of different elements." As a result, concepts that are applicable in the Pinkerton context may not be transposed to the related but distinctly different context of aiding and abetting. (Arrington v US 238 A.3d 218 (DC 2020).. the aiding and abetting instruction given to the jury was unconstitutional because giving the jury the natural and probable consequences part of the aiding and abetting, thus allowed conviction without proof of the mens rea required for the principal and was constitutional error that required reversal. (See also Coleman v US 948 A.2d 534 (DC 2008) and Kitt v US 904 A.2d 348 (DC)

Therefore, because this Court has held that..Any amount of actual jail time has Sixth Amendment significance in Glover v US 531 US 198,203 (Sp. Ct 2001), this Court should Reverse the lower Court and Order the Relief to be Granted and Release Mr. Bellew.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Mr. Lexington Pellew, 75551-053

Date: JULY, 14th, 2021