21-5867

ORIGINAL

NO.

IN THE SUPREME COURT OF THE UNITED STATES

JAMES DEAN KENDRICK, PETITIONER

VS

UNITED STATES OF AMERICA, RESPONDENT

ON PETITIONER FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION(S) PRESENTED

1. Can the Government's alleged motive for the murder of a non-Indian committed by another non-Indian, which occurred on the Cattaraugus Indian Reservation, in Erie County, within the State of New York, and the Criminal Statutes (Title 21, United State Code, Section 848(e)(1)(A); and 841 (b)(1)(A), which set forth the Government's alleged motive for the murder), override 139-years of this Court's precedent as to criminal jurisdiction on Indian Reservations, giving the District Court for the Western District of New York (Rochester) criminal jurisdiction over such a murder?
2. When Congress repealed Title 21 U.S.C. Section 848 subsections (g) through (p), which includes subsection (m), did Congress intend to narrow liability for Title 21 U.S.C. Section 848(e)(1)(A) Counts, to exclude Aiding and Abetting liability from Title 21 U.S.C. Section 848(e)(1)(A) Counts?; and
3. Can a defendant be convicted for murder under Title 21 U.S.C. Section 848(e)(1)(A), based on Aiding and Abetting liability?
4. Can a defendant be sentenced to life in prison, for a conviction under Title 21 U.S.C. Section 848(a), if the Government's proof at Trial does not meet the requirements of Title 21 U.S.C. Section 848(b)(2)(A); or 848(b)(2)(B)?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties to this Petition (Petitioner James Dean Kendrick and Respondent United States). Petitioner had two co-defendants proceed to trial with Petitioner (Pablo Plaza (72) and Janine Plaza-Pierce) and two co-defendants (Angelo Ocasio and Damien Colabatistto (U.S. District Court-W.D.N.Y. 15-cr-6128, Colabatistto was charged by a separate Indictment but related case)) that proceeded to two separate trials, as well as multiple co-defendants that plead guilty, prior to trial, some cooperated with the Government and some did not. In the Court below, the appeals of the co-defendants who were found guilty, at trial, were each filed separately. Petitioner is not aware, as of this filing, whether any of the above-mentioned co-defendants who were found guilty, have filed, or will be filing their own petitions in this Court.

Co-Defendants:

Pablo Plaza aka Paul (2) (Dist. Ct. 10-cr-6096) Went to Trial. Appeal-757 Fed. Appx. 42; 2018 U.S. App. lexis 34044.

Pablo Plaza aka Plaza (3) (Dist. Ct. 10-cr-6096) Plead guilty and received a 25 year sentence.

Janine Plaza-Pierce aka Jan (4) (Dist. Ct. 10-cr-6096) Went to Trial. Appeal-940 F.3d 817; 2019 U.S. App. Lexis 30336.

Edwin Negron aka E (5) (Dist. Ct. 10-cr-6096) Plead guilty and agreed to cooperate with the Government.

Angelo Cruz aka Kubiac (6) (Dist. Ct. 10-cr-6096) Plead guilty and received a 25 year sentence.

Lance Plaza-Pierce (7) (Dist. Ct. 10-cr-6096) Plead guilty and was sentenced to 180 months in prison.

Angelo Ocasio (8) (Dist. Ct. 10-cr-6096) Went to Trial. Appeal-752 Fed. Appx. 37; 2018 U.S. App. Lexis 29616.

Jeffrey Davis (9) (Dist. Ct. 10-cr-6096) Plead guilty and agreed to cooperate, and testified for the Government.

Zavier Vasquez (10) (Dist. Ct. 10-cr-6096) Plead guilty and agreed to cooperate, and testified for the Government.

Phillip Barnes (11) (Dist. Ct. 10-cr-6096) Plead guilty and agreed to cooperate, and testified for the Government.

Matilde Delgado (12) (Dist. Ct. 10-cr-6096) Plead guilty and agreed to cooperate, and testified for the Government.

Related Case:

Damion Colabatistto (Dist. Ct. 15-cr-6128) Went to Trial. Appeal-762 Fed. Appx. 38; 2019 U.S. App. Lexis 4567.

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

James Dean Kendrick respectfully petitions this Court for a Writ of Certiorari to review the judgment, opinion(s) and sentence of the United States District Court for the Western District of New York (Rochester), which has been sanctioned by the United States Court of Appeals, Second Circuit.

OPINIONS BELOW

The United States Court of Appeals, Second Circuit issued a Summary Order (16-4286, September 14, 2020), which is included in the Appendix (Appx. 8-14) Appeal-826 Fed. Appx. 60; 202 U.S. App. Lexis 29432.

The United States District Court for the Western District of New York (Rochester) (Judge Frank P. Geraci, Jr.) Order, United States v. Kendrick, 2014 U.S. District Lexis 181703 at 3-8. (Dist. Ct. 10-cr-6096)

JURISDICTION

On September 14, 2020 the United States Court of Appeals, Second Circuit, issued a Summary Order affirming Petitioner's convictions. On March 30, 2021 the Second Circuit denied Petitioner's timely filed request for rehearing or rehearing en banc. Petitioner, by letter postmarked May 26, 2021, requested an extension of time to file for certiorari review. Per this Court's June 14, 2021 letter, Petitioner was informed that the deadline to file a petition for a writ of certiorari review has been extended to 150 days (see Appx. 16). As a result, pursuant to this Court's Rules 13.1 and 13.3, and the 150 day extension, this Petition for certiorari is timely filed within 150 days of the Second Circuit's March 30, 2021 denial of Petitioner's request for rehearing or rehearing en banc. Petitioner invokes this Court's jurisdiction under Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

On July 17, 2012 Petitioner and others were charged, by a Second Superseding Indictment. The Counts that are relevant to this petitioner are two murders (Counts 14 and 15) alleged, by the Government, to be drug related. And the sentence applied to the Continuing Criminal Enterprise Count (Count-2).

Petitioner (a non-Indian) in error was indicted, tried, convicted, and sentenced to life imprisonment, in the United States District Court for the Western District of New York, for the crime of murder of one Francisco Santos (a non-Indian), alleged to have been committed on the Cattaraugus Indian Reservation, in Erie County, in the State New York. The Indictment does not allege that either the accused or the deceased was an Indian.

The Indictment does not state the locus of the murder, however, the evidence at Trial established that the murder occurred on the Cattaraugus Indian Reservation, in Erie County, within the State of New York.

The murder of Francisco Santos (Count-14) is charged under Title 21 U.S.C. Section 848(e)(1)(A), as a murder committed while engaged in a crime punishable under Title 21 U.S.C. Section 841(b)(1)(A), that is, a conspiracy to possess with intent to distribute and to distribute a specified quantity of controlled substances.

The Statutes used, by the Government, to charge the Francisco Santos homicide (Count-14), sets forth the motive, alleged by the Government, for said homicide. However, the alleged motive for a homicide cannot establish criminal jurisdiction, for the murder of a non-Indian committed by a non-Indian, in Indian Country, to be prosecuted in Federal Court.

Both Counts 14 (Francisco Santos Homicide) and 15 (Ryan Cooper Homicide) are charged under Title 21 U.S.C. Section 848(e)(1)(A); Title 21 U.S.C. Section 841(b)(1)(A); and Title 18 U.S.C. Section 2 (commonly referred to as the Aider and Abettor Statute).

The Government improperly included Title 18 U.S.C. Section 2 Aiding and Abetting liability to the Section 848(e)(1)(A) Counts, as Congress did not intend for Aiding and Abetting liability to apply to Section 848(e)(1)(A) Counts.

Count-2 charged Petitioner with engaging in a Continuing Criminal Enterprise (CCE), in violation of Title 21 U.S.C. Section 848(a). While Subsection (b) of Section 848 allows a defendant to be sentenced to life, the District

Court improperly sentenced Petitioner to life imprisonment for Count-2 (Continuing Criminal Enterprise), in this case.

The evidence, at Trial, did not establish that Petitioner was involved in a violation involving at least 300 times the quantity of a substance described in subsection 401(b)(1)(B) of the Act (21 U.S.C.S. Section 841 (b)(1)(B)), as required by Section 848(b)(2)(A); or that Petitioner's alleged Enterprise received 10-million dollars in gross receipts during any twelve-month period of its existence for manufacture, importation, or distribution of a substance described in Section 401(b)(1)(B) of the Act (21 U.S.C.S. Section 841(b)(1)(B)), as required by Section 848(b)(2)(B). The Jury verdict found, as to quantities involved, 1-Kilogram or more of Heroin; 5-Kilograms or more of Cocaine; and 280-Grams or more of Cocaine Base. However, the Jury did not specifically find the quantities necessary to support a life sentence for said Count.

REASONS FOR GRANTING THE WRIT

The United States District Court for the Western District of New York (Rochester) has decided an important federal question in a way that conflicts with relevant decisions of this Court, as to criminal jurisdiction on Indian Lands, and said decision has been sanctioned by the United States Court of Appeals, Second Circuit. Additionally, said decision has also departed so far from the accepted and usual course of judicial proceedings on this issue, ignoring 139-years of Supreme Court precedent, which has been sanctioned by the United States Court of Appeals, Second Circuit, so as to call for an exercise of this Court's supervisory power.

FACTUAL AND PROCEDURAL HISTORY

On July 17, 2012 Petitioner was charged, in the Western District of New York (Rochester), in a Second Superseding Indictment with, inter alia, the murder of Francisco Santos (Count-14), while engaged in an offense punishable under Title 21, United States Code, Section 841(b)(1)(A), that is, a conspiracy to possess with intent to distribute, and to distribute a specified quantity of controlled substances. All in violation of Title 21, United States Code, Section 848 (e)(1)(A) and Title 18, United States Code, Section 2 (10-cr-6096, Document #268 at pg.11). The Drug Conspiracy (Count-1) charged is alleged to have spanned from 1993 to March 2, 2011 (10-cr-6096, Document #268 at pg. 1-2).

At the Detention Hearing (March 18, 2011), the Government's proffer established that the Cattaraugus Indian Reservation of the Seneca Nation of Indians was the locus of the murder of Francisco Santos.

Petitioner, through counsel, argued in a Pre-Trial Motion that under United States v. McBratney (104 U.S. 621) and its progeny, the Federal Court lacked jurisdiction as to Count-14 (Francisco Santos Homicide) because the murder charged in Count-14 was committed in Indian Country (Cattaraugus Indian Reservation) and only involved non-Indians (10-cr-6096, Document #365).

The Government took the position that Count-14 charged murder committed while engaged in a drug conspiracy in violation of 21 U.S.C. Section 848(e)(1)(A), which is a general law of the United States and applies everywhere. (10-cr-6096, Document #444).

The District Court erroneously denied Petitioner's jurisdiction argument, based on a misunderstanding of McBratney and its progeny. The District Court stated, "As did the Magistrate Judge, I agree that in McBratney, the crime involved a federal enclave law, ie., 'the charge of murder within the boundaries of the Ute Reservation,' and consequently, find unpersuasive Defendant's [Petitioner] argument that nothing in McBratney or its progeny distinguishes between federal laws of general applicability and federal laws where the situs of the crime is an element of the offense"(United States v. Kendrick, 2014 U.S. District Lexis 181703 at 3-8). In said Decision, the District Court has confused the elements of the offense of an enclaves crime, with the facts that must be considered when determining whether Federal or State Court has criminal jurisdiction, and also has mistakenly

believed that the crime charged in McBratney was an enclaves crime. The cases relied on , by the District Court, are easily distinguished from this case.

Petitioner, through counsel, filed a Supplemental Motion pertaining to the jurisdiction issue (10-cr-6096, Document #485). The Government filed a Motion to Strike (10-cr-6096, Document #486). Petitioner, through counsel, filed a Reply (10-cr-6096, Document #491). However, the District Court denied said Motion.

Petitioner proceeded to Trial, which began on June 16, 2016. The trial evidence established that Francisco Santos was killed on the Cattaraugus Indian Reservation, in Erie County, within the State of New York. Francisco Santos' cause of death was the result of multiple stab wounds. There was no evidence presented, at the trial, of any drugs being present, or any drug deals being conducted, at the time that Francisco Santos was killed. Francisco Santos was non-Indian. The Defendant (Petitioner) is non-Indian. The Jury returned a guilty verdict, as to Count-14 (Francisco Santos Homicide), on July 28, 2016.

Petitioner was sentenced, by the District Court, on December 19, 2016 to life imprisonment for Count-14 (Francisco Santos Homicide). The Judgment of Commitment was entered on December 28, 2016 (10-cr-6096, Document #935).

Petitioner proceeded, Pro Se, on Direct Appeal, again raising his jurisdiction argument in his Appeal Brief to the Second Circuit (16-4286, A.B. at pg. 53-par. 245 to pg. 54) citing United States v. McBratney, 104 U.S. 621; Draper v. United States, 164 U.S. 240; New York ex rel Ray v. Martin, 326 U.S. 496; and United States v. Ramsey, 271 U.S. 467. However, the United States Court Of Appeals, Second Circuit, did not even mention the jurisdiction issue, in its Summary Order (16-4286, dated March 30, 2021), and pertaining to all issues that were not specifically mentioned stated "We have considered all of Appellant's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the District Court." (Summary Order at pg.7)

Petitioner, proceeding Pro Se, now petitions this Court for a Writ of Certiorari because a United States District Court has decided an important federal question in a way that conflicts with relevant decisions of this Court and one-hundred and thirty-nine (139) years of Supreme Court Precedent, which decision has also been sanctioned by the United States Court of Appeals, Second Circuit. If Petitioner would have appealed in any other

United States Court of Appeals in the Country, Petitioner's conviction would have been vacated. If Petitioner would have been charged in any other District Court in the Country, the charge would not have proceeded to trial. These statements are made based on the fact that every other Court of Appeals in the Country and every other District Court in the Country, have been researched by Petitioner, and they all continue to follow McBratney and its progeny. In fact, no cases have ever been cited by or on behalf of the Government, at the District Court level or on Appeal, where a Federal Court has found criminal jurisdiction to exist, in Federal Court, for a murder in Indian Country, which applies Title 21 U.S.C. Section 848 (e)(1)(A); and Title 21 U.S.C. Section 841 (b)(1)(A) to a similar set of facts as are herein presented. Because none exist.

INDIAN-COUNTRY CRIMINAL JURISDICTION ARGUMENT

Francisco Santos Homicide COUNT-14

New York State is one of the original 13 States to enter into the Union. Congress did not make an exception to the Cattaraugus Indian Reservation, or retain sole and exclusive jurisdiction over that Reservation when New York State entered into the Union. Therefore, New York State upon entering the Union, retained criminal jurisdiction over it's own citizens and other non-Indians throughout the whole of the territory within it's limits, including the Cattaraugus Indian Reservation. Therefore, the Federal Courts do not have criminal jurisdiction over the crime of murder of a non-Indian committed by another non-Indian on the Cattaraugus Indian Reservation. Only New York State has criminal jurisdiction to prosecute said crime. Any other holding would be in conflict with United States v. McBratney (104 U.S. 621) and its progeny.

In this case, the Petitioner (a non-Indian) has been convicted, in Federal Court, of the murder of Francisco Santos (a non-Indian), which occurred in Indian Country, and has been sentenced to life imprisonment for said murder. The evidence at Trial established that the locus of the murder was the Cattaraugus Indian Reservation, in Erie County, within the State of New York. The fact that the Government has charged the murder under Title 21 U.S.C. Section 848 (e)(1)(A), as a murder while engaged in a crime punishable under Title 21 U.S.C. Section 841 (b)(1)(A), that is, a conspiracy to possess with intent to distribute, and to distribute a specified quantity of controlled substances, sets forth the Government's alleged theory of the motive for the murder as being drug

related. However, the motive for the murder is not a factor to be considered, when determining whether Federal Court or State Court has criminal jurisdiction over a murder, committed in Indian Country. The facts that determine criminal jurisdiction, in Indian Country, for a victim crime, are as follows:

1. The criminal act(s) committed.
2. The locus of the criminal act(s) committed.
3. Whether the victim is Indian or non-Indian.
4. Whether the accused is Indian or non-Indian.

In this case, the criminal act committed is murder. The locus of the criminal act committed is the Cattaraugus Indian Reservation, in Erie County, within the State of New York. The victim (Francisco Santos) is non-Indian. The accused (Petitioner) is non-Indian. Therefore, the relevant facts and standing Supreme Court precedent establish that the United States District Court, for the Western District of New York had no jurisdiction over Count-14 (Francisco Santos Homicide) of the Indictment in this case (10-cr-6096). Therefore, the conviction for Count-14 (Francisco Santos Homicide) should be vacated and the case should be remanded to the District Court, to dismiss said Count from the Indictment, with prejudice.

STANDING PRECEDENT

In the year 1882, this Court heard the case of United States v. McBratney (104 U.S. 621). In said case, the defendant was indicted and convicted, in the Circuit Court of the United States for the District of Colorado, of the murder of Thomas Casey, within the boundaries of the Ute Reservation in that District. From the evidence at trial it appeared that both were white men, and the murder was committed in the District of Colorado, within the Ute Reservation, the said Ute Reservation lying wholly within the exterior limits of the State of Colorado.

The question therein presented to this Court for consideration is as follows:

> Q: "Whether the Circuit Court of the United States sitting in and for the District of Colorado has jurisdiction of the crime of murder, committed by a white man upon a white man, within the Ute Reservation in said District, and within the geographical limits of the State of Colorado[?]" (104 U.S. at 621)

In McBratney this Court held, the Circuit Court of the United States have jurisdiction of the crime of murder committed in any "place or district of country under the exclusive jurisdiction of the United States;" and, except

where special provision is made, "The general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country." RS. sec. 629, cl.2; sec. 2145; sec. 5339, cl. 1.

But the Act of Congress of March 3, 1875, for admission of Colorado into the Union, authorized the inhabitants of the Territory "To form for themselves out of said Territory a state government with the name of the State of Colorado, which state, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever;" and the Act contains no exception of the Ute Reservation or of jurisdiction over it. 18 Stat. at L., 474. (104 U.S. at 623)

The Act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing Treaty which are clearly inconsistent therewith. Case of the Cherokee Tobacco, 11 Wall., 616 [78 U.S., XX., 227]. Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian Reservation, or the sole and exclusive jurisdiction over that Reservation, it has done so by express words. Case of the Kansas Indians, 5 Wall., 737 [72 U.S., XVIII., 667]; U.S. v. Ward [Supra]. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exceptions as had been made in the Treaty with the Ute Indians and in the Act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that Reservation is no longer within the sole and exclusive jurisdiction of the United States. The Courts of the United States have, therefore, no jurisdiction to punish crimes within that Reservation, unless so far as may be necessary to carry out such provisions of the Treaty with the Ute Indians as remain in force. But that Treaty contains no stipulation for the punishment of offenses committed by white men against white men. (104 U.S. at 623-24)

The single question that we do or can decide in this case is, that stated in the certificate of division of opinion, namely: whether the Circuit Court of the United States for the District of Colorado has jurisdiction of the crime of murder committed by a white man upon a white man within the Ute Reservation and within the limits of the State of Colorado; and for the reasons above given, that question must be answered in the negative. (104

U.S. at 624)

In the year 1896, in the case of Draper v. United States (164 U.S. 240), this Court considered a similar argument, in which, the accused and the deceased were both [African Americans]. In Draper, this Court considered the law to enable Montana and other states to be admitted into the Union on an equal footing with the original states. This Court, following it's holding in McBratney, held that jurisdiction as to crimes committed on an Indian Reservation by others than Indians or against Indians, the state courts were vested with jurisdiction to try and punish such crimes. (164 U.S. at 242-43)

The Court stated, "Our conclusion is that the Circuit Court of the United States for the District of Montana had no jurisdiction of the Indictment, ..." (164 U.S. at 247)

In the year 1926, in the case of United States v. Ramsey (271 U.S. 467), this Court stated, "The authority of the United States under Section 2145 to punish crimes occurring within the State of Oklahoma, not committed by or against Indians, was ended by the grant of statehood. [citing] United States v. McBratney, 104 U.S. 621, 624, 26 L.ed. 869, 870; Draper v. United States, 164 U.S. 240, 41 L.ed. 419, 17 Sup.Ct Rep. 107. (271 U.S. at 469)

In United States v. Ramsey, the defendants, two white men, were charged, by an indictment, with the murder of one Henry Roan, a full-blood Osage Indian and legal member of the Osage Tribe. The crime was committed in Osage County, in Indian Country and in and upon the Reservation established by law of the United States for the Osage Tribe of Indians, on and in a certain tract of land which was then and there under the exclusive jurisdiction of the United States, the title to which said allotment was held in trust by the United States and was inalienable. The court below sustained a demurrer to the indictment upon the ground that the allotment described in the indictment as the locus of the crime was not "Indian Country" within the meaning of Section 2145. Because the construction of the statute upon which the indictment is drawn was involve, this case was brought to this Court on a Writ of error under the Criminal Appeals Act of March 2, 1907, Chap. 2564, 34 Stat. at L. 1246, Comp. Stat. Section 1704, 6 Fed. Stat. Amo. 2d ed. p. 149. In Ramsey, the Court stated, "The sole question for our determination, therefore, is whether the place of the crime is Indian Country within the meaning of Section

2145. (271 U.S. at 470) The Court found that said land was Indian Country and held that the judgment sustaining the demurrer to the indictment was erroneous and must be reversed.

In the year 1943, the United States District Court for the Western District of New York considered a Writ of Habeas Corpus (Ex parte Ray, 54 F. Supp. 218), in which, the petitioner prisoner applied for a Writ of Habeas Corpus to be released from incarceration for his conviction and sentence to life imprisonment for a murder in the City of Salamanca, New York, which lies within the Allegany Indian Reservation and the land of which is leased from the Seneca Nation of Indians.

Petitioner, a white man, on December 4, 1939, in the Supreme Court, Cattaraugus County, New York, was convicted and sentenced to life imprisonment for the murder of a white man, in the City of Salamanca, Cattaraugus County, New York. The locus of the murder lies within the Allegany Indian Reservation.

The petitioner contended that Section 217, Title 25 U.S.C.A., extends the general laws of the United States to the Allegany Reservation and as a corollary thereto extends U.S.C.A., Title 18, Sec. 451, subsec.3, and sec.452, the former prescribing exclusive jurisdiction in the United States over crimes defined in the Chapter which includes the latter, or Section 452, defining murder and which includes the acts involved therein--homicide in the perpetration of a robbery.

The crux of petitioner's contention lies in the interpretation of Section 217, Title 25 U.S.C.A.. The language of the Section is as follows:

> "Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of [any] crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country."

No cases were cited by or on behalf of the petitioner which apply Section 217, Title 25, and Section 542, Title 18, to a similar set of facts as were therein presented. (54 F. Supp. at 221)

The United States Attorney*1 appearing therein presented the administrative view that New York State has

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*1.The U.S. Attorney for the W.D.N.Y. in said case, is from the same Office that prosecuted this Petitioner.

jurisdiction , citing United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869, and Draper v. United States, 164 U.S. 240, 17 S.Ct 107, 41 L.Ed. 419. (54 F. Supp. at 221)

The District Court Judge held that Congress has not proscribed exclusive federal jurisdiction over the "acts" therein for which petitioner has been convicted, and concluded that New York State law controls unless and until Congress passes legislation superseding it. (emphasis added) And further held that Title 25, sec. 217, U.S.C.A., does not extend the general criminal laws over the City of Salamanca. As a result, the State law of New York applies, and courts of that state correctly and properly assumed jurisdiction in the judgment and sentence of petitioner.

In the year 1945, this Court granted certiorari because of the federal question raised. And in the year 1946 the case of new York ex rel Ray v. Martin was decided. The Court stated that in United States v. McBratney, 104 U.S. 621, 26 L.ed. 869, this Court held that the State courts of Colorado, not the Federal Courts, had jurisdiction to prosecute a murder of one non-Indian by another committed on an Indian Reservation located within that State. The holding in that case was that the Act of Congress admitting Colorado into the Union overruled all prior inconsistent statutes and treaties and placed it "upon an equal footing with the original States...;" that this meant that Colorado had "criminal jurisdiction over it's own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation;" and that consequently, the United States no longer had "sole and exclusive jurisdiction" over the Reservation, except to the extent necessary to carry out such treaty provisions which remained in force. That case has since been followed by this Court and its holding has not been modified by any act of Congress. (326 U.S. at 497-98)

The question presented in New York ex rel. Ray v. Martin is whether New York, which is one of the original States, has jurisdiction to punish a murder of one non-Indian committed by another non-Indian upon the Allegany Reservation of the Seneca Indians located within the State of New York. This Court held that "we think the rule announced in the McBratney Case controlling and that the New York Court therefore properly exercised its jurisdiction. For that case and others which followed it all held that in the absence of a limiting treaty obligation or Congressional enactment each State had a right to exercise jurisdiction over Indian Reservations within its

boundaries. (326 U.S. at 498-99)

The petitioner argued that the laws of the United States make murder a crime "if committed in any place within the sole and exclusive jurisdiction of the United States..." 18 U.S.C.A. Section 452, 7 FCA Title 18, Section 452, that Section 2145 of the Revised Statutes, 25 U.S.C.A . Section 217, 5 FCA Title 25, Section 217, makes the murder statute applicable to "Indian Country;" and contended that the Seneca Reservation is Indian Country, and that consequently New York has no jurisdiction to punish a murder committed on that Reservation. However, this Court held that the cases following the McBratney Case adequately answer petitioner's contentions concerning Section 2145, ..., the McBratney line of decisions stands for the proposition that States, by virtue of their Statehood, have jurisdiction over such crimes notwithstanding Section 2145. (326 U.S. at 499-500) In Donnelly v. United States, Supra, 228 U.S. at p.270, 57 L.ed. 831, 33 S.Ct. 449, Ann Cas 1913E 710, this Court pointed out that the provisions contained in Section 2145 of the Revised Statutes were first enacted as Section 25 of the Indian Intercourse Act of June 30, 1834, 4 Stat 729, 733, c 161, 25 U.S.C.A. Section 217, 5 FCA Title 25, Section 217. This means that the Statute was in effect at the time of the McBratney decision. Yet, significantly, the Court did not even find it necessary to mention it. (326 U.S. at FN6)

In the year 2016, in United States v. Bryant, 136 S.Ct 1954, this Court acknowledged the "complex patchwork of federal, state, and tribal law" governing Indian Country, citing Duro v. Reina, 495 U.S. 676, 690, n1, 110 S.Ct. 2053, 109 L.ed.2d 693 (1990), in which, the Court stated in relevant part, in Footnote 1 [3b] "For Indian Country crimes involving only non-Indians, longstanding precedents of this Court hold that State Courts have exclusive jurisdiction despite the terms of Section 1152. see New York ex rel Ray v. Martin, 326 U.S. 496, 90 L.ed. 261, 66 S.Ct. 307 (1946); United States v. McBratney, 104 U.S. 621, 26 L.ed. 869 (1882)... ."

More recently, in the year 2020, this Court, in McGirt v. Oklahoma, 140 S.Ct 2452 this Court stated, "nothing we might say today could unsettle Oklahoma's authority to try non-Indians for crimes against non-Indians on the lands in question." citing United States v. McBratney, 104 U.S. 621, 624, 26 L.ed. 869 (1882). (140 S.Ct at 2460)

SPILLOVER PREJUDICE

The introduction of the evidence, in Petitioner's Trial, of the Francisco Santos homicide (Count-14), which the District Court lacked jurisdiction over, prejudiced Petitioner as to the other homicide (Count-15 Ryan Cooper Homicide) that Petitioner was being tried for.

Count-15 of the Second Superseding Indictment charged Petitioner with the murder of Ryan Cooper, while engaged in an offense punishable under Title 21, United States Code, Section 841(b)(1)(A), that is, a conspiracy to possess with intent to distribute, and to distribute a specified quantity of controlled substances. All in violation of Title 21, United States Code, Section 2. (10-cr-6096, Document #268 at 12)

At Trial, the Government presented the theory that Ryan Cooper was killed because of what he may have known about the killing of Francisco Santos, that Ryan Cooper was beat to death with a hammer and dismembered, at the home of co-defendant Plaza (76)*2, and that his body-parts were discarded around the City of Rochester. However, there was no physical evidence presented at Trial, by the Government, to support the Government's theory. In fact, the Government did not have a body, or any of the alleged dismembered body-parts of Ryan Cooper, or any evidence to prove that Ryan Cooper is even dead. The Government's evidence, as to the Ryan Cooper homicide (Count-15) was the hearsay testimony of Daniel Young, who the Government alleged was an un-indicted co-conspirator of the Count-1 Drug Conspiracy. Daniel Young's credibility is more than questionable, he is a convicted felon who was on parole when he caught his 3rd or 4th D.W.I. *3, for which he miraculously received a conditional discharge with no jail time; an unprecedented sentence, in the State of New York, for a 3rd or 4th Felony D.W.I., a plea deal for which the Federal Government claims to have had no involvement in arraigning. Daniel Young received money from the Government, and had multiple violations of a Court Order of Protection with his wife, all while he was waiting to testify in Petitioner's case.

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*2. There are three individuals involved with this case with the name Pablo Plaza, a father and his two sons. Therefore, when mentioned in this case, their name was followed by the year that they were born, in parenthesis.

*3. Daniel Young was not sure if it was his 3rd or 4th D.W.I., when he testified in this case. His record showed that it was the 4th time being pulled over for driving under the influence of alcohol, however, his first one was reduced to a misdemeanor.

Because of the spill-over prejudice to Petitioner, resulting from the introduction at Trial of the Francisco Santos homicide (Count-14), a count for which the District Court lacked criminal jurisdiction , Petitioner was denied the right to a fair trial as to Count-15 (Ryan Cooper Homicide). Therefore, Petitioner is entitled to a new trial as to Count-15 (Ryan Cooper Homicide).

The complete lack of any physical evidence to support the Government's theory and the government's witnesses, as to the Ryan Cooper homicide (Count-15), combined with the fact that the Government has not even proven that Ryan Cooper is dead, supports Petitioner's argument that without the improper inclusion of the Francisco Santos homicide (Count-14) in Petitioner's Trial, a count for which the District Court lacked criminal jurisdiction, the result of the proceeding probably would have been different. Therefore, Petitioner has established "a reliable inference of prejudice" by the improper inclusion of the Francisco Santos homicide (Count-14) and evidence relevant thereto, in Petitioner's Trial, which would not have been admissible otherwise.

Based on the above-mentioned prejudice, this Court should vacate Petitioner's conviction for Count-15 (Ryan Cooper Homicide), and remand the matter to the District Court for the Western District of New York, with an Order to provide Petitioner with a new trial, for Count-15 (Ryan Cooper Homicide), within 60-days, or dismiss said Count from the Indictment with prejudice.

AIDING AND ABETTING LIABILITY-848(e)(1)(A) COUNTS

FACTUAL AND PROCEDURAL HISTORY

The Government included Title 18, United States Code, Section 2 (commonly known as the Aiding and Abetting Statute) in the Indictment for both Counts-14 (Francisco Santos Homicide) and 15 (Ryan Cooper Homicide), both of which are charged under Title 21, United States Code, Section 848(e)(1)(A), as a murder while engaged in a crime punishable under Title 21, United States Code, Section 841(b)(1)(A), that is a conspiracy to possess with intent to distribute, and to distribute a specified quantity of controlled substances. (10-cr-6096, Document #268 at 11-12)

Petitioner, through counsel, challenged the Government's use of aiding and abetting liability for the Section 848(e)(1)(A) Murder Counts (Counts 14 and 15), and the Government's including Title 18, United States Code,

Section 2, in the Indictment for Counts-14 (Francisco Santos Homicide) and 15 (Ryan Cooper Homicide), in a Pre-Trial Motion, seeking dismissal of said Counts. (10-cr-6096, Document #365 at pg.30-44)

The Government filed a Motion in opposition to Petitioner's arguments on aider and abettor liability. (10-cr-6096, Document #444 at pg.15)The Government, as explained below, was incorrect in relying on the Second Circuit's ruling in United States v. Walker (142 F.3d 103 (1998)).

On or about June 27, 2013 (10-cr-6096, Document #473), during oral argument of Petitioner's Pre-Trial Motions, Judge Feldman invited counsel to submit, in writing, additional arguments pertaining to aider and abettor liability and how it does not apply to Title 21, United States Code, Section 848(e)(1)(A) Counts. In response, two letters (July 11, 2013; and July 17, 2013) were submitted on behalf of the Defendant(s) (Petitioner). (10-cr-6096, Document #488; and 489)

On or about February 5, 2015 the District Court entered its Decision and Order, denying Petitioner's Pre-Trial Motions. (10-cr-6096, Document #646)

At the close of Trial, during the District Court Jury Charge*4, the Court charged the Jury that "they could find the Defendant(s) [Petitioner] guilty of Counts 14 (Francisco Santos Homicide) and 15 (Ryan Cooper Homicide), if they find that the Defendant(s) [Petitioner] aided and abetted others for said homicide counts."

On or about July 28, 2016 the Jury returned a guilty verdict for both Counts 14 (Francisco Santos Homicide) and 15 (Ryan Cooper Homicide). (10-cr-6096, Document #871) The Jury returned a general verdict, there are no special findings as to the criminal liability that the Jury based their guilty verdict on. On December 19, 2016 Petitioner was sentenced to life imprisonment for both Counts 14 and 15. (see Judgment of Commitment 10-cr-6096, Document 935)

Petitioner, again raised the issue of aider and abettor liability and that it does not apply to Title 21, United States Code, Section 848(e)(1)(A) Counts, in his Appeal to the United States Court of Appeals, Second Circuit.

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*4. The Jury was instructed as to principal and accomplice liability; Aider and Abettor liability; and Pinkerton liability for Counts 14 and 15.

(16-4286, A.B. at pg.41, par. 187 through pg.43, par. 196)

The Government filed a Response opposing Petitioner's argument, again relying on United States v. Walker, 142 F.3d 103 (1998).

The United States Court of Appeals, Second Circuit, declined the invitation to revisit Walker (142 F.3d 103 (1998)), stating " Walker, we held that liability under the Statute attached to aiders and abettors of murder because, unlike in other subsections, subsection (e) expressly provided for such liability. 142 F.3d at 113-14." (16-4286, Summary Order at pg.7) However, the Second Circuit has overlooked that fact that it's prior ruling in Walker, which held that subsection(e) expressly provided for aider and abettor liability, was based on subsection (m), which Congress repealed after Walker was decided.

848(e)(1)(A) COUNTS-AIDING AND ABETTING LIABILITY ARGUMENT

The Government improperly included Title 18, United States Code, Section 2 (commonly known as the Aiding and Abetting Statute) in the Indictment for both Counts 14 (Francisco Santos Homicide) and 15 (Ryan Cooper Homicide), both of which are charged under Title 21, United States Code, Section 848(e)(1)(A), as a murder while engaged in a crime punishable under Title 21, United States Code, Section 841(b)(1)(A), that is a conspiracy to possess with intent to distribute, and to distribute a specified quantity of controlled substances. (10-cr-6096, Document #268 at 11-12) The general accomplice liability provisions of Title 18, United States Code, Section 2 does not apply to 848(e) Counts.

In United States v. Walker (142 F.3d 103 (1998)), which was relied on by the Government and the Second Circuit, the Second Circuit held, "Therefore by the plain language of the Statute, Section 848(e)(1)(A) demonstrates clear intent to include liability for aiding and abetting. United States v. Walker, 142 F.3d at 113-14. The relevant portion of the Second Circuit's reasoning for the ruling in Walker is as follows:

> "... Section 848 [subsection] (m) provides mitigating factors applicable only to Section 848(e). One of the factors to be considered is the fact that 'the defendant is punishable as a principal in the offense which was committed by another, but the defendant's participation was relatively minor.' Therefore, by the plain language of the Statute, Section 848(e)(1)(A) demonstrates clear intent to include liability for aiding and abetting." Walker, 142 F.3d at 113-114.

United States v. Walker (142 F.3d 103) was decided in 1998. Congress repealed Section 848 Subsections (g) through (p) (which includes Subsection (m)) on March 9, 2006, approximately 8-years after the Second Circuit's holding in Walker, and approximately 4-years prior to the original Indictment in Petitioner's case. (10-cr-6096, Document #1, dated March 18, 2010) the fact that Congress repealed Subsection (m), which provided the mitigating factor that applied aider and abettor liability to Section 848(e), and which the Second Circuit relied on in Walker, bolsters Petitioner's argument that Congress's intent was to narrow liability for Section 848(e)(1)(A) Counts, to apply only to the person that commits the murder and the person that counsels, commands, induces, procures, or causes the intentional killing.

Given Congress's verbatim adoption of Title 18, United States Code, Section 2 language (counsels, commands, induces, procures, or causes) when creating Title 21, United States Code, Section 848(e)(1)(A), and the exclusion of the words aids and abets is particularly significant. Comparing the two (2) Statutes, particularly their differences, virtually compels the conclusion that Congress intended to exclude aiding and abetting liability from the Title 21, United States Code, Section 848(e)(1)(A) Statute. The Government's argument in Walker, that Section 848(m) applied aider and abettor liability and was only applicable to Section 848(e), supported the Government's argument, at that time, as to congress's intent. However, that argument became moot when Congress repealed Subsection (m) of Section 848.

Additionally, if there were some ambiguity as to Congress's intent over the language and liability applicable to Title 21, United States Code, Section 848(e)(1)(A), the rule of lenity impels the Court to reverse. As this Court has noted, "long standing principles of lenity, which demand resolution of [an] ambiguities in criminal statutes in favor of [defendants] preclude our resolution of an ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." See United States v. Hong-Liang Lin, 962 F.2d 251, at 258; quoting Hughey, 495 U.S. at 422, 110 S.Ct. at 1985 (citation omitted).

Because the Jury returned a general verdict, in Petitioner's case, there is no way to discern the criminal liability that the Jury relied on to reach their verdict, as to Counts 14 (Francisco Santos Homicide) and 15 (Ryan Cooper Homicide). Therefore, Petitioner may have been convicted, based on criminal liability that does not apply

to the Statute of which Petitioner has been indicted. Therefore, this Court should vacate said convictions (Counts 14 and 15) and remand the case to the District Court with an Order to provide Petitioner with a new trial, within 60-days, or dismiss said Counts, with prejudice.

TITLE 21, UNITED STATES CODE, SECTION 848(a) (CCE) AND IMPROPER SENTENCE OF LIFE

Count-2 of the Second Superseding Indictment charged Petitioner with engaging in a Continuing Criminal Enterprise, in violation of Title 21, United States Code, Section 848(a) (Title 21, U.S.C. Sections 841; 846; and 856). (10-cr-6096, Document #268 at pg. 2-3)

The Government's proof, at Trial, did not establish that Petitioner was involved in a violation involving at 300 time the quantity of a substance described in subsection 401(b)(1)(B) of the Act (21 U.S.C. Section 841 (b)(1)(B)), which is required under Section 848(b)(2)(A); or that Petitioner's alleged Enterprise received 10-million dollars in gross receipts during any 12-month period of its existence for the manufacture, importation, or distribution of a substance described in Section 401(b)(1)(B) of the Act (21 U.S.C. Section 841(b)(1)(B)), as required by Section 848(b)(2)(B). Therefore, the Government's evidence was insufficient to support the District Court's sentence of life for the Continuing Criminal Enterprise Count (Count-2). Additionally, the Jury made Special Findings as to the drug quantities involved, finding 5-Kilograms or more of Cocaine; 1-Kilogram or more of Heroin; and 280-Grams or more of Cocaine Base. The Jury did not specify amounts high enough, for and drug type, to reach the amounts necessary to support a life sentence. Therefore, the Jury's verdict does not support a life sentence for Count-2 (CCE). This Court should remand this matter, to the District Court, with an Order to properly re-sentence Petitioner for Count-2 (CCE).

CONCLUSION

For all of the foregoing reasons, this Court should Grant all of the relief requested in this Petition, and should Grant any other and further relief that this Court deems just and proper.

Dated: August 23, 2021

Print: James Dean Kendrick

Sign: James Dean Kendrick, Pro Se