

In The
Supreme Court of the United States

RICHA NARANG,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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Introduction

The government claims that this Court in *United States v. Cotton*, 535 U.S. 625 (2002) authorized deathless indictments, lingering eternally despite their final, non-appealable dismissal pursuant to government motion. Further, the government characterizes the exclusive statute enacted by Congress (18 U.S.C. § 3296) for reinstating a dismissed indictment as unnecessary and “ministerial” because *Cotton* supposedly eliminated the need for an existing indictment (or a valid waiver thereof) for a court to adjudicate a felony. Acknowledging that this Court has historically held to the contrary, the government claims *Cotton* overrules this precedent by making an existing indictment unnecessary to try federal defendants. The government contends the finality¹ of the indictment’s dismissal pursuant to government motion can be ignored notwithstanding, as the government admits, “the district court did not enter a separate, contemporaneous order reinstating the indictment...” Brief for the United States in Opposition (“Opp”) at 20. The Fourth Circuit did not disagree – finding “the indictment was not properly

¹ Under 18 U.S.C. § 3731, the government had thirty days from the dismissal of the indictment in which to appeal, and its failure to do so renders the judgment final. *United States v. Kalb*, 891 F.3d 455, 462 (3rd Cir. 2018) (section 3731’s mandatory “shall be” language, coupled with requirement that appeal “shall be diligently prosecuted,” renders section 3731 jurisdictional). *See also United States v. Foumai*, 910 F. 2d 617, 620 (9th Cir. 1990). Statutory deadlines for filing appeals are jurisdictional. *Hamer v. Neighborhood Housing Services of Chicago*, 138 S.Ct 13, 21 (2017); *Bowles v. Russell*, 551 U.S. 205, 210 (2007)

reinstated...” Panel Opinion at Appendix (“A”) 11. Consequently, this petition implicates the finality of every dismissed indictment and the Fifth Amendment’s imperative that an indictment precede a felony trial.

Review of this case is also justified to clarify that criminal prosecutions for conduct prescribed by regulation, (18 U.C. § 1546) is limited to conduct subject to an existing valid regulation, and not *post hoc* agency guidance that is itself invalidated by a court, rescinded by the government, and vacated under court order. *Caring Hearts Personal Home Services, Inc. v. Burwell*, 824 F.3d 968, 976 (10th Cir. 2016) (“the agency appears unfamiliar with its own regulations”).

Finally, the trial court shifted the *men rea* burden of proof to Petitioner by rejecting the pervasive evidence of attorney participation in all disputed visa practices under the mistaken theory that reliance upon counsel is an affirmative defense as to which Petitioner bears the burden of proof, which was unsatisfied by failure to call corporate counsel.

1. Review is Justified to Affirm the Continuing Need for Indictments

The absence of an existing indictment should be fatal to a criminal prosecution. The Fourth Circuit conceded: “We admit that the seeming lack of a valid charging document bears indicia of a jurisdictional defect. A11. Moreover, the Panel specifically found that Petitioner did not waive this issue. A11 at n.1.

The linchpin of the Panel’s affirmance, therefore, is its misguided holding that this Court’s *Cotton* decision somehow eliminated the requirement of an

indictment (or valid waiver thereof) to adjudicate a felony. In what the Government dismisses as “pre-*Cotton* decisions,” (Opp at 13), this Court has long held that a court holding defendant for trial “without indictment or presentment to a grand jury, exceeded its jurisdiction.” *Ex Parte Wilson*, 114 U.S. 417, 429 (1885). *Cotton* addressed whether, after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), an indictment’s failure to specify a drug quantity precluded sentencing upon it. 535 U.S. at 629. In ruling that it did not, neither *Cotton* nor any other decision suggests that this holding extends to a dismissed (i.e., completely nonexistent), as opposed to merely defective, indictment. The government’s arguments to the contrary are unavailing.

Cotton cabined the sentencing consequences of *Apprendi*,² but it did not bring about the end of the Fifth Amendment guarantee of an existing grand jury indictment. Only this Court can confirm this. The implications of immortal indictments for plea agreements (a large portion of which entail the dismissal of indictments in deference to pleas of guilt to successor charges) are staggering--a court’s final indictment dismissal offers no defense. The Solicitor General characterizes a court’s final judgment of dismissal as a “procedural defect concerning the indictment,” signifying nothing. Opp at 12.

To the contrary, Congress has provided the Government thirty days in which to preserve the jurisdiction of courts over a dismissed indictment, 18 U.S.C. §3731, which the Government admits it failed to do (Opp at 16), or sixty days from vacation of a

² This Court has expanded *Apprendi*’s recognition of the jury’s sentencing supervision. *United States v. Haymond*, 139 S.Ct. 2369, 2377 (2019).

plea to a successor information in which to file a “motion” for reinstatement, 18 U.S.C. §3296. The government undertook neither measure here. The Government’s claim that § 3296 compliance is unnecessary to achieve its judicial result (indictment reinstatement), impermissibly renders the statute surplusage, invites chaos, and undermines the independence of both courts and grand juries. Review by this Court is necessary to reaffirm that an existing grand jury indictment is still a jurisdictional predicate for federal criminal prosecution, and that defendants, like all litigants, can rely upon the finality of unappealed court judgments.

The government – and the Panel – incorrectly extrapolate from *Cotton’s* narrow rejection of sentencing significance for the type of indictment defects described in *Ex Parte Bain*, 121 U.S. 1 (1887), an abandonment of the Fifth Amendment’s requirement of an indictment. In truth, the label attached to the requirement of an indictment as “jurisdictional” is less important than the simple fact that the Fifth Amendment requires an independent grand jury indictment for any adjudication of a felony, a precondition independent of, but no less dispositive than, the requirement of subject matter jurisdiction within the metes of 18 U.S.C §3231. *See, e.g., United States v. Williams*, 504 U.S. 36, 48 (1992)(distinguishing between a court “whose jurisdiction is predicated upon a specific case or controversy” and the independent role of a grand jury).

Standing against this evisceration of the Fifth Amendment is this Court’s undisturbed jurisprudence of more than 135 years, *Ex Parte Wilson*, 114 U.S. 417 (1885), and the decisions of two

circuits holding that a court cannot try an accused on a dismissed indictment absent its timely reinstatement. See *United States v. Foumai*, 910 F. 2d 617, 620 (9th Cir. 1990), and *United States v. McCarthy*, 445 F. 2d. 587, 592 (7th Cir. 1981) (Stevens, J.). A judgment dismissing an indictment goes to the court’s power to hear it, and this Court should grant review to make this clear.³

The Opposition Brief unsuccessfully attempts to distinguish *Foumai* and *McCarthy* as cases preceding the enactment of §3296 in 2002. Opp at 17. The enactment of an exclusive statutory means of indictment reinstatement, however, actually undermines the Government position that courts now have authority simply to ignore the final unappealed dismissal of an indictment. The loss of jurisdiction from a government failure timely to appeal a dismissal under § 3731, *Kalb*, 891 F.3d at 462, makes compliance with § 3296 the sole congressionally-approved means of acquiring jurisdiction over a final court-dismissed indictment.

Given the uncounted thousands of criminal cases resolved by finalized plea agreements comprising indictment dismissals, the specter of dismissed indictments being subsequently resurrected at the government’s unilateral whim is incompatible with the Fifth Amendment and §3296. Cf. *United States v. Loud Hawk*, 474 U.S. 302, 311 (1986) (upon

³ Some “post-*Cotton*” circuit court opinions construe an indictment’s complete failure to state an offense as a jurisdictional defect. See e.g., *United States v. Izurieta*, 710 F.3d 1176, 1179 (11th Cir. 3013). Other circuit courts construe *Cotton* more broadly as denying jurisdictional stature to defects that “go to the merits if the case—not the court’s power to hear it.” *United States v. Muresanu*, 951 F. 3d 833, 839 (7th Cir. 2020).

dismissal, a citizen no longer the subject of public accusation). The impairment to finality from undying public accusations is only compounded when existing indictments are necessary in some circuits, but not others.

Where, as here, the government has a statutory right of appeal, an expectation of finality in a trial court judgment accrues upon expiration of the statutory appeal period. *United States v. DiFranseco*, 449 U.S. 117, 136 (1980) (until “the time to appeal has expired”); *United States v. Collins*, 859 F.3d 1207,1227 n.17 (10th Cir. 2017) (citing *United States v. Earley*, 816 F.2d 1428, 1434 (10th Cir. 1987) (en banc) (government right of appeal prevents finality “until the expiration of the time for appeal to be taken”) (citing cases); *Foumai*, 910 F.2d at 620. The government claims incorrectly that expiration of the appeal period implicates only appellate jurisdiction. Opp at 6. The expiration is equally fatal to trial court jurisdiction. *Id.* The government’s failure to appeal, not its interpretation of Petitioner’s subjective expectation, Opp at 19, created the finality. *Id.*

The Opposition Brief falsely claims that the prosecution “requested that the indictment be reinstated after the petitioner sought to undo her guilty plea to the substitute charge.” Opp at 16-17. Reinstatement was neither requested nor ordered - which is why the Fourth Circuit found that “the indictment was not properly reinstated pursuant to that statute [Sec. 3296].” A11. Nonetheless, the Fourth Circuit proceeded to find, incorrectly, that *Cotton* makes an existing indictment immaterial to the jurisdiction of a court to try a defendant. There is no reinstatement motion in the record, which is

why the Government simultaneously argues that resort to §3296 is unnecessary because reinstatement was "required" under §3296 even without statutory compliance. Opp at 15.

The government derides as "unsound," Petitioner's position that 18 U.S.C. §3731 (requiring government appeals of indictment dismissals) and §3296 (establishing requirements for the reinstatement of a dismissed indictment) are "jurisdictional." Opp. at 16. Considered conjointly, however, the two statutes are clearly jurisdictional in effect. Section 3731 divests a district court of jurisdiction over a dismissed indictment while §3296 conditions its potential reinstatement on statutory compliance.

The government filed no reinstatement motion, and the Panel held that such a failure was immaterial.⁴

⁴ The government's claim that it filed a motion seeking reinstatement refers to an opposition brief to Petitioner's Second Motion to Dismiss the Information. D. Ct. Doc. 254 at 1, 8-9. Filed as it was without the prerequisite withdrawal of Petitioner's plea as required by Sec. 3296(a)(3), the government's opposition brief could not constitute a motion under that statute. Yet the government relies on it to claim it "preemptively requested reinstatement of the dismissed counts before petitioner withdrew her guilty plea." Opp at 20. The government said or wrote absolutely nothing else on the topic of reinstatement of the dismissed indictment – most particularly after Petitioner withdrew her guilty plea. Nor, for that matter, did the trial court. The Panel had no record choice but to conclude that the indictment was never properly reinstated.

2. The Regulatory Regimen Pursuant to Which Petitioner was Prosecuted and Convicted has Since Been Judicially Invalidated and Rescinded by the Government

The government's opposition fails even to mention that the entire regulatory edifice of its prosecution of Petitioner has since been judicially invalidated and rescinded by the government.

The prosecution of Petitioner was predicated upon the prosecution's characterization of visa laws as prohibiting the practice of third party contracting pursuant to which Petitioner's employer sought H-1B visas. Count 1, ¶16. Visa fraud requires a sworn visa misrepresentation about material facts "required by the immigration laws or regulations prescribed thereunder." 18 U.S.C. §1546(a)¶4. Petitioner did not submit any sworn statements; instead, the H-1B visa applications were authored and filed by her employer's corporate counsel. The Opposition Brief fails to acknowledge that the putatively violated immigration laws did not exist. They would be first announced as a CIS Policy Memo in 2018 - months after defendant's trial⁵ - only to be rescinded by the Government in 2020 in response to a judicial rejection of them as incompatible with existing immigration laws.

The CIS Policy Memo addressed the staffing model of Petitioner's employer--"third-party contracting"--and sought to prohibit the practices attendant thereto -- which are particularized in

⁵ PM-602-1057, *Contracts and Itinerary Requirements for H-1B Petitions Involving Third-Party Worksites* (February 22, 2018). ("CIS Policy Memo").

Petitioner's dismissed indictment (Ct. 1, Para 16). The features of third party contracting that the prosecution labeled fraudulent were standard, lawful practices compliant with then existing law, until unsuccessfully prohibited under the CIS Policy Memo in 2018 forbidding visa petitions based on speculative job vacancies, the use of contractor intermediaries to place visa beneficiaries, and "benching" (the failure to pay beneficiaries not yet placed with end users).⁶

Because the H1-B visa process proceeds by an annual lottery, beneficiary employment is typically a year after application. In fact, DHS regulations prohibit visa applications, or preliminary labor certifications, being filed less than 6 months before initial employment.⁷ Thus, by regulation, the opening could not be its existence at the time of visa application. The third-party staffing industry serves the need for temporary specialized employees by pursuing visa applications which, if successful, it seeks to subcontract to other employers while retaining an employer-employee relationship. As held by the District of Columbia District Court in 2020, third-party staffing practices are legal under the existing statutes and valid regulations. *ITServ.Alliance v. Cissna*, 443 F. Supp. 3d 14, 37, 40, 42, 43 (D.D.C. 2020), *appeal withdrawn by*

⁶ Government expert Violett testified at trial that no regulations forbade these practices. JA 132, 241. The government subsequently abandoned "benching" and the use of contractor intermediaries as material to guilt. March 28, 2021 Submission of the Government to the Fourth Circuit Pursuant to Fed. R. App. P. 28(j).

⁷ 8 C.F.R. § 214.2(h)(1)(ii)(9)(i)(B) (visa); 20 C.F.R. 855.730(b) (labor certification).

government agreement with judgment, 2020 WL 3406588 (D.C. Cir. June 15, 2020).

That Court held that this was a lawful industry practice and rejected the DHS effort to make it illegal though the 2018 CIS Policy Memo. It invalidated that Memo as more onerous than longstanding regulations, lacking necessary rulemaking procedures, and arbitrary and capricious. *ITServ*, 443 F. Supp. 3d at 14, 37, 40, 42, 43. The government promptly settled the issue by withdrawing its appeal of *ITServ* and agreeing to rescind the CIS Policy Memo. *See* Appendix A.

Undeterred, however, DHS then issued an emergency Interim Final Rule on October, 8, 2020 “[i]n the absence of specific, clear, and relevant statutory or regulatory definitions,” (85 Fed. Reg. 63931), acknowledging that H-1B visa terms, including “employer,” “are not adequately defined,” and revising them “to avoid any confusion or mistaken belief.” (63929-30). This new October 2020 IFR required “non-speculative employment for the beneficiary at the time of the filing,” *id.*; 5363941, the very regulatory claim that the Opposition Brief argues was violated by Petitioner’s employer in 2014. *Opp* at 4.

But this emergency IFR was itself enjoined for failure to comply with the APA. *National Ass’n of Manufacturers v. DHS*, 491 F.Supp.3d 549 (N.D. Cal 2021), *dismissed*, 2021 WL 1652546 (9th Cir. April 8, 2021). On May 27, 2021, DHS unilaterally removed this IFR from the Code of Federal Regulations (“vacatur”) to comply with the federal court judgment, and gave notice that the “changes made by the IFR do not have any legal effect.” 86 Fed. Reg. 27027. On March 12, 2021, CIS announced

that, based upon its rescissions, visa rulings could be reopened. (<http://uscis.gov/news/alerts/uscis-may-reopen-H-1B-petitions-under-three-rescinded-policy-memos>).

Without acknowledging any of these recent misadventures, the Solicitor General instead fails to specify a single regulation to have been violated, but merely parrots the Panel that “the charges relate to fraud in the visa application process.” Opp at 3. But courts have enjoined the Government’s efforts to prohibit (much less criminalize) the subject H-1B visa practices, the government has rescinded the 2018 CIS Policy Memo and vacated the 2020 IFR, its abortive efforts to define this conduct as violative of immigration laws.

The fraud allegations at Petitioners’ trial in 2017 describe no violation of any existing regulation or statute (then or even now). It would not be until the 2018 issuance of the CIS Policy Memo that the government would act to prohibit these third-party staffing practices – until *ITServ* caused the government to rescind the prohibition, and the United States District Court for the Northern District of California caused it to abandon the IFR.

3. The Trial Court Misallocated the Burden of Proving *Mens Rea* of Fraud in a Highly Regulated Matter

All of the visa applications were filed by corporate counsel, who approved the use of fictitious (Anglicized) names for the Human Resources Manager. Furthermore, the context at issue was a highly regulated matter that has successfully confused the regulators administering these laws.

ITServ.Alliance,, 443 F. Supp. 3d at 14, 37, 40, 42, 43. *United States v. Crosby*, 294 F.2d 928, 942 (2d Cir. 1961) (employees are entitled to rely on the expertise of corporate counsel in complex regulated field).

The trial court erroneously characterized this evidence as an affirmative defense as to which Petitioner bore the burden of proof rather than the fatal impediment to *mens rea* which was the government's to prove. The trial court further ruled that Petitioner failed to meet her improperly attributed burden of proof by failing to produce testimony from the afore-referenced corporate counsel. Finally, the trial court took judicial notice that the use of a fictitious name in signing a document is fraudulent. JA at 237.

This last ruling concerned trial evidence that Petitioner's co-workers had signed filings in Anglicized versions, "Sam Bose" and "Sonia Basu," of the name of Ecomnets' HR Manager, Sanchita Bhattacharya. The uncontroverted trial evidence established that there is no prohibition of signing a fictitious name, JA 236-36, 523, and that HR Managers are specifically allowed to sign for visa petitioners and to Anglicize their names when so doing. PM-602-0134(B)(2)(5)(8) and 8 C.F.R. 102.2(a)(5), respectively. The trial court inverted a rule of evidence, Fed. R. Evid. 201, to relieve the government of its burden to prove the most contested factual question of the trial, Petitioner's *mens rea*.

Conclusion

This petition should be granted.

Respectfully submitted,

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Appendix A

SETTLEMENT AGREEMENT

This settlement agreement (hereinafter “Agreement”) is entered between Plaintiffs and Defendants (collectively, “the parties”), with reference to the facts and terms recited herein. A complete list of the Plaintiffs who are parties to this Agreement is set forth on Exhibits 1 and 2, inclusive. These exhibits are incorporated by reference in this Agreement for all purposes. The terms of this Agreement only apply to the entities specifically identified herein.

WHEREAS ITServe Alliance, Inc. commenced litigation styled as ITServe Alliance, Inc. v. United States Citizenship and Immigration Services, No. 1:18-cv-02350-RMC in the United States District of Columbia (“ITServe Litigation”) on October 11, 2018;

WHEREAS Judge Huvelle entered an order, dated March 6, 2019, consolidating certain separate lawsuits as part of the ITServe Litigation for the limited purpose of resolving three legal issues;

WHEREAS Judge Collyer entered an order, dated March 10, 2020 granting summary judgment, in part, with respect to certain issues in favor of the Plaintiffs set forth in Exhibits 1 and 2;

WHEREAS in recognition that the parties and the interests of justice are best served by settling the disputes between them, the parties, through their counsel, have engaged in settlement negotiations and have agreed to settle their disputes in connection with the petitions set forth on Exhibits 1

and 2, inclusive, without the need for further litigation;

NOW, THEREFORE, in consideration of the mutual agreements and promises entered into between the parties and intending to be legally bound, the parties agree as follows:

TERMS OF AGREEMENT

1. Effective Date of the Agreement. This Agreement will become effective upon execution of the Agreement by all parties or their authorized representatives (the “Effective Date”).

2. 2018 Policy Memorandum. USCIS will rescind the 2018 Contract and Itinerary Memorandum (PM-602-0157) in its entirety within ninety (90) days of the Effective Date of this Agreement.

3. 1991 Regulatory Establishment of Itinerary Requirement at 8 C.F.R. § 214.2(h)(2)(i)(B). USCIS will abstain from the application of the 1991 itinerary requirement, 8 C.F.R. § 214.2(h)(2)(i)(B), in the limited instance of applicable H-1B adjudications until such...

...

...

14. Counterparts. This Agreement may be executed in counterparts, each one of which constitutes an original, and all of which constitute one and the same Agreement. Facsimiles and electronic transmissions of signatures shall constitute acceptable binding signatures for the purposes of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement, and the undersigned represent that they are authorized to execute and deliver this Agreement on behalf of the respective parties.

DATED: May 16, 2020 CONSENTED AND
AGREED TO BY:

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