No._____

In the Supreme Court of the United States

CHAKA LECHAR CASTRO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES C. THOMAS, P.C.

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QUESTIONS PRESENTED

I. Whether sufficient evidence supported Petitioner's convictions under 18 U.S.C. § 924(c) for counts three, five, seven and nine of the Second Superseding Indictment?

II. Whether targeting a particular ethnic or religious group, with the absence of evidence of any hate or animus, is enough for application of the hate crime motivation enhancement under U.S.S.G § 3A1.1?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Chaka LeChar Castro respectfully requests a writ of certiorari to review the judgment of the United States Court for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, **App. A**, is not published in the Federal Supplement but is available at *United States v. Castro*, 823 F. App'x 375 (6th Cir. 2020). The judgment of the district court, **App. B**, is unpublished but found at 2019 WL 6329222. The transcript of the district court's oral denial of Petitioner's Rule 29 motion can be found at **App. C**.

JURISDICTION

The Sixth Circuit Court of Appeals entered judgment on August 11, 2020. *See* **App. A**. On March 19, 2020, in light of the ongoing public health concerns relating to COVID-19, the U.S. Supreme Court issued an Order which extended the time to file petitions for writs of certiorari in all cases due on or after March 19, 2020 to "150 days from the date of the lower judgment, order denying discretionary review, or order denying a timely petition for rehearing." This petition is timely filed pursuant to said Order and pursuant to Supreme Court Rule 13.1. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions can be found in **App. D**.

STATEMENT OF THE CASE

Petitioner Castro was charged in a second superseding indictment with one count of RICO conspiracy in violation of 18 U.S.C. § 1962(d), four counts of assault with a dangerous weapon in aid of racketeering in violation of 18 U.S.C. § 1959(a)(3), and four counts of use and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). See **App. N.**

Petitioner Castro proceeded to trial on all charges with the undersigned court-appointed counsel. At trial, the government attempted to establish that Petitioner Castro should have foreseen the use of firearms in the charged offenses because of some perceived notion that victims need to be controlled; however, little evidence regarding Petitioner Castro's actual knowledge of the use of firearms within the charged conspiracy was produced. Additionally, the government attempted to elicit testimony from codefendants that victims were targeted due to ethnicity or national origin. Notably, the government did not attempt to produce any evidence that any of the defendants actually targeted victims as a result of animus or hate towards their perceived race or national origin. Instead, while the testimony showed that people of certain ethnic origins were targeted for economic reasons, testimony of witnesses confirmed that none of the codefendants, including Petitioner, possessed hate or animus that led to their crimes. It was an economic decision based upon the perception that people of Indian or Asian descent who were in the restaurant business were more likely to keep cash and other valuables in their homes.

At the conclusion of the government's case, Petitioner Castro, by and through undersigned counsel, made a Motion for a Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Petitioner Castro argued that the evidence elicited by the government was insufficient to sustain a conviction for the substantive counts relating to RICO, the substantive counts relating to firearms, and the aiding and abetting counts. The district court denied the motion by oral ruling on the record. **See App. C.** After deliberation, the jury entered a guilty verdict on all counts.

This petition for a writ of certiorari challenges Petitioner Castro's conviction on counts three, five, seven and nine of the second superseding indictment [18 USC § 924(c)]. Petitioner Castro raises two issues on appeal. The first is that the district court erred in denying Petitioner Castro's motion for acquittal based upon insufficiency of evidence as it relates to the 18 USC § 924(c) counts three, five, seven and nine contained in the second superseding indictment. The government attempted to prove culpability on alternative theories pursuant to *United States v. Rosemond*, 134 S. Ct. 1240 (2014), and *Pinkerton v. United States, 328 U.S. 640 (1946).* It is Petitioner Castro's position that no reasonable jury could conclude that she had either the requisite knowledge and intent required pursuant to *Rosemond*, or that it was reasonably foreseeable that firearms would be used by her codefendants.

The second issue Petitioner Castro raises on appeal is that the district court improperly applied the hate crime motivation enhancement to her sentence pursuant

to U.S.S.G. § 3A1.1. It is Petitioner Castro's position that the section is legally inapplicable, and that the application was factually unsupported.

REASONS FOR GRANTING THE PETITON

This case presents a significant question of criminal law that requires the Court's review. Specifically, district courts and circuit courts of appeal are applying the hate crime enhancement in contrast to the legislative history of the section. This case presents an opportunity for the Court to address and resolve the improper applications.

I. SUFFICIENCY OF EVIDENCE

When reviewing sufficiency of the evidence de novo, the reviewing court must ask whether, upon viewing all of the evidence in the light most favorable to the prosecution, any rational juror could have found all of the elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Counts three, five, seven and nine of the second superseding indictment charged use and carry of a firearm during and in relation to a crime of violence, contrary to 18 U.S.C § 924(c). The government sought to prove these charges on alternative theories of culpability. The first theory was that of aiding and abetting; 18 USC § 2, since there was no proof of the defendant's actual possession of a weapon. The second was the theory of *Pinkerton* liability as *Pinkerton v. United States*, 328 U.S. 640 (1946).

A person aids and abets a crime when, in addition to undertaking a requisite act in furtherance of the offense, the person intends to facilitate the commission of the offense. *United States v. Rosemond*, 134 S. Ct. 1240, 1248 (2014). A defendant must have advanced knowledge that the plan would include a firearm, *id* at 1249. The government must show that the "[d]efendant 'decided to join in the criminal venture ... with full awareness of its scope ... including its use of a firearm" for the defendant to be guilty of any count as an aider and abettor under 924(c). *United States v. Johnson*, 702 F. App'x 349, 359 (6th Cir. 2017) (quoting *Rosemond*, 134 S. Ct. at 1249).

There was no evidence that Petitioner Castro ever agreed to any conspiracy with her co-defendants using firearms. No evidence was proffered that Petitioner Castro handled a gun, brandished the weapon, or gave any coconspirator a gun. The record is void of any testimony that Petitioner Castro had the requisite knowledge and intent legally necessary for conviction. Due to the sheer lack of evidence presented, no reasonable jury could conclude that Petitioner Castro was guilty as an aider and abettor.

Alternatively, the government attempted to prove culpability based upon *Pinkerton* liability (supra). Under this theory, it must be reasonably foreseeable that Petitioner Castro's accomplices would bring a firearm to the robbery, and once there, use it in furtherance of the crime. However, when discussing how a gun would make people more cooperative on direct, Petitioner's testifying codefendant, Octavius Scott, was asked, "And why, during the course of your involvement, were you told to bring

the guns?" He replied, "It was never really talk but somewhat of a silent understanding." **App. E** at PageID.4902. Not only did Mr. Scott fail to testify that the codefendants agreed to use guns to force cooperation once they entered the homes, but he confirmed that no conversation happened regarding firearms with the defendant whatsoever. Instead, he had this belief silently, in his own mind. **App. F** at PageID. 4905 – 4906.

Based upon the testimony at trial, no reasonable jury could conclude that Petitioner Castro was guilty beyond a reasonable doubt of these counts.

II. U.S.S.G. § 3A1.1

The district court applied a three-level sentencing enhancement to Petitioner's conviction based upon the jury's verdict that she "intentionally selected any victim as the object of the offense of conviction because of the actual or perceived race, national origin, or ethnicity of the victim". The court's instructions to the jury required them to find that the Petitioner "would not have acted, but for the victim's actual or perceived race, national origin, or ethnicity." **App. G**.

The government did not attempt to prove that Petitioner Castro, or any other codefendant for that matter, committed a crime against any victim because of a motivation of hate for the victim's actual or perceived race, national origin, or ethnicity. The government took the position that absolutely no evidence whatsoever was necessary to prove that hate was a motivating factor, because it was irrelevant. Instead, they offered the following evidence:

(1) Facebook messages inquiring about cities that had "Indians and chinks" where she could "make some money"; **App. H.**

(2) Castro's "269 pages of [internet] searches" for victims such as "Patel in Shelby, North Carolina, Chen in Edison, New Jersey, Singh in Fayetteville, Georgia"; **App. I**.

(3) Testimony of cooperating witnesses, who explained that the crew used race and ethnicity as a proxy for good or easy robbery targets; **App. J**.

(4) Castro's handwritten "hit list" marked with "I"'s and "C"'s; **App. K,** and

(5) Testimony from investigators and from robbery victims whose addresses were on that list corroborating Castro's notations; **App. L**.

The instruction on this issue was argued in a preliminary conference centered on the meaning of "because of", which the district court instructed the jury to mean "This requires you to find that the defendant would not have acted but for the victim's actual or perceived race, national origin, or ethnicity. However, selection on that basis does not need to be the sole but for cause." See **App. G**.

Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, the sentencing guidelines were amended to provide sentencing enhancements for hate crimes. U.S.S.G. Section 3A1.1 provides:

Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, increase by **3** levels.

(b) (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by **2** additional levels.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from §2H1.1(b)(1) applies.

The legislative history of the Hate Crimes Sentencing Enhancement Act states that:

> [I]n order to constitute a hate crime, the selection of a victim … must result from the defendant's ***hate*** **or** ***animus*** toward any person for bearing one or more of the characteristics set forth in the definition of "hate crime." Any other result would risk the imposition of unacceptable duplicative punishments upon defendants for substantially the same offense.
>
> H.R. Rep. No. 103-244, at 5 (1993) (emphasis added).

The Report, found at **App. M**, states that motive is at the heart of punishment at criminal law, and relevant to hate crime enhancements. Furthermore, it goes so far as to give an example a case not appropriate for application of the adjustment, that "[f]ederal fraud crimes committed against one particular ethnic or religious group due solely to the defendant's belief that all members of that group are wealthy, absent any hate or animus toward that group, are not hate crimes. If such crimes were motivated by hatred toward the group, however, they might me shown to be hate crimes." Moreover:

> In order to constitute a hate crime, the selection of a victim or, in the case of a property crime, the property which is the object of
>
> the crime, must result from the defendant's hate or animus toward any person for bearing one or more of the characteristics

> set forth in the definition of "hate crime." Any other result would risk the imposition of unacceptable duplicative punishments upon defendants for substantially the same offense. H.R. 1152 directs the Sentencing Commission to avoid such duplicative punishments wherever they may arise under this bill.

On appeal, the government argued that the text of the guideline included no additional requirement relating to a defendant's motivation for that selection citing *In re Terrorist Bombings. In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 154 (2d Cir. 2008) (motivation is "utterly irrelevant to the applicability of the hate crime enhancement"). Courts in other circuits have held otherwise, true to the directive. *See United States v. Boylan*, 5 F. Supp. 2d 274 (D.N.J. 1998) (not appropriate where it did not "appear beyond a reasonable doubt that the primary motivation for the offence was hatred" of the victims); *United States v. Woodlee*, 136 F.3d 1399 (10th Cir. 1998) (adjustment properly applied in case where defendants subjected black victims to racial taunting, chased them and shot at them), none of which occurred in the instant matter.

The government proceeded on a theory in direct conflict with the purpose of the hate crime enhancement. The enhancement was both legally deficient and incorrectly applied to Petitioner Castro.

CONCLUSION AND PRAYER FOR RELIEF

For the reasons above, Petitioner, Chaka LeChar Castro respectfully requests

a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

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DATED: January 7, 2021

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PROOF OF SERVICE

I, James C. Thomas, court-appointed counsel for Petitioner, Chaka LeChar Castro, do swear that on this date, January 7, 2021, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed in Forma Pauperis, Petition for Writ of Certiorari, and attached Appendix on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by emailing the above documents *and* depositing an envelope containing the above documents in the U.S. mail properly addressed to each of them and with first-class postage prepaid, within 3 business days. The names and addresses of those served are as follows:

Bethany Lipman, US Depart. of Justice, 1301 New York Ave., NW, Ste. 700 Washington, DC 20005; Bethany.Lipman@USDOJ.gov

US Solicitor General, Department of Justice, 950 Pennsylvania Ave. NW, Room 5616, Washington, DC 20530-0001; SupremeCtBriefs@USDOJ.gov

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of January, 2021.

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